



**A preliminary submission from the
Victorian Government to the
Productivity Commission's Inquiry into
Australia's consumer policy framework**

The existing consumer policy framework in Victoria

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1 Introduction

This paper is the Victorian Government's preliminary submission to the Productivity Commission inquiry into Australia's consumer policy framework. It provides factual information on Victoria's consumer policy framework, including an overview of the key Victorian institutions involved in consumer policy and regulation, existing regulatory and non-regulatory interventions that aim to achieve consumer policy objectives, and dispute resolution and compliance and enforcement mechanisms that support the regulatory framework. The submission provides the contextual background to a further submission from the Victorian Government on policy issues, which will be made later.

Victoria's consumer policy framework has developed within Australia's legal framework, recognising the constitutional role of the Commonwealth and the role of the states. It has adapted over time to changing consumer markets, responding to the complexity and diversity of issues that need to be addressed if consumers are to be empowered to make informed choices that protect their interests, deliver the goods and services that best meet their needs and stimulate effective competition between suppliers.

The Victorian Government has been proactive in improving the effectiveness of both non-regulatory and regulatory consumer initiatives. Its approach reflects its broader focus on improving market performance and, hence, on productivity and growth, ensuring people are treated fairly and have access to justice and reducing regulatory burdens on business.

1.1 National and state responsibilities

The Victorian Government's role will always, to some extent, be defined by the Commonwealth's areas of constitutional responsibility. The majority of the Commonwealth powers relevant to consumer regulation are contained in section 51 of the Constitution. They include powers relating to: corporations; trade and commerce with other countries and among the States; postal, telegraphic and telephonic services; banking; weights and measures; bills of exchange and promissory notes; bankruptcy and insolvency; external affairs; and the government of the Territories (in section 122).

State regulation can cover the above areas to the extent that it is not inconsistent with, or precluded by, Commonwealth legislation. The states also need to cover other areas where the Commonwealth does not have the power to legislate. The most obvious area is unincorporated businesses that operate wholly within one state, where constitutional responsibility clearly rests with the states. While a range of mechanisms are available to co-ordinate and improve national co-operation, development of consumer policy by States and Territories encourages responsiveness and policy innovation, as demonstrated by Victoria's approach in this area. Given these benefits, alternatives to state-based regulation should only be considered if they would clearly deliver more efficient and effective policy outcomes.

1.2 A complex and changing consumer environment

Effective consumer policy can never be simplistic or one-dimensional. It is by nature complex, because it has to recognise the realities in managing the potential problems that can arise in consumer markets.

First, consumer agencies must be capable of dealing directly with individual consumers because individual assistance and dispute resolution is an integral part of

their role. These processes address a considerable amount of consumer detriment and encourage consumers to pursue their rights. This in itself helps maintain confidence in the system because people can see that individuals are treated fairly and justly. In addition, as their private negotiations are backed by an effective redress mechanism, traders are encouraged to comply with the law. From an agency perspective, dispute resolution processes provide invaluable intelligence on the real problems consumers face, in real time. However, achieving these benefits requires agencies to have a sufficiently large local footprint to make them visible and accessible to consumers.

Second, policy responses need to be tailored to meet the problems and characteristics of individual markets. The nature and causes of consumer problems vary considerably across industries. While many of these problems can be addressed by strong general laws, general law cannot be relied on to address all problems in all markets. There will always be a need for tailored specific laws or non-regulatory strategies in some industries to address particular problems. Without the ability to target approaches, there is a risk that either problems that need addressing will be ignored, or some sectors will be overregulated because general strategies will be made more prescriptive to deal with acute problems in a limited number of markets. While tailoring can make regulation and non-regulatory responses more diverse and complex, this complexity is often the trade-off for regulation that is less extensive and more effective.

Third, the regulatory framework has to be co-ordinated across industries. For example, there are significant differences in the way consumers transact in pawn broking and small amount lending, yet both are examples of short-term finance. The regulation that applies to one sector would not be appropriate for the other and recognising and managing such interactions again adds to the complexity of the regulatory framework.

Fourth, efficient and effective consumer policy needs to address problems at a range of levels, incorporating non-regulatory responses with the general or specific laws that apply. Informing and educating businesses and consumers about their rights and responsibilities, providing dispute resolution and redress, and prosecuting businesses that deliberately flout the law are all valid activities that contribute to the consumer protection framework. Effective policies are those that provide a suite of options that can be customised to specific problems, and achieve the most desirable outcomes within the constraints of the market and consumer protection framework.

Finally, consumer regulation has simultaneous economic and social objectives. Often these objectives work together, but in some cases they involve trade-offs. For example, market regulation that improves the outcomes for many consumers cannot necessarily guarantee that those who are vulnerable or disadvantaged do not confront severe problems. In practice, a balance is needed which can add to the complexity of the regulatory framework. Individual approaches may be needed to meet the needs of specific groups of consumers, such as Indigenous people, those from Non-English speaking backgrounds, people with disabilities or those in financial difficulty. Effective policies often must be multi-faceted, tailored to the needs of these specific groups and developed and implemented in co-operation with other government and non-government agencies.

Complexity in the consumer policy framework is further increased by the need to respond to changes in the economy, as the characteristics and expectations of consumers change and new goods and services, accompanied by new problems, emerge.

Over the past decade, Australia has experienced strong economic growth with falling unemployment, solid income growth for much of the population and sustained growth in the value of the family home. At the same time, technological change has diffused rapidly. Services markets (utilities, financial and telecommunications particularly) have been deregulated providing more options and choices to consumers. Marketplace dynamism has brought challenges with the changes — particularly how to adapt to new, often complex, products and transactions and how to discern the validity of marketing claims and the potential costs and benefits of the greater choices on offer. These changes mean that knowing how to access and process large volumes of information and understand the implications of complex product and service offerings are more than ever important skills for consumers. Similarly, the complexity of problems consumers face is increasing in many markets.

At the same time the population is aging, the number of self-funded retirees is increasing, household composition is moving away from traditional families and household indebtedness is increasing, largely off the back of historically high house prices. This has the potential to increase the number of potentially vulnerable or disadvantaged consumers.

1.3 Victorian government priorities

Recognising the challenges that affect consumer policy, and government policy more generally, the Victorian Government has been a reform leader, focusing simultaneously on achieving economic efficiency, social policy objectives, sustainability and reductions in regulatory costs. These priorities are reflected in four key policy statements.

- In 2001, *Growing Victoria Together* outlined the Government's vision for making Victoria a stronger, more caring and innovative State. This statement provided the framework for later strategies.
- *Victoria: Leading the Way* was a blue print released in 2004, with strategies to continue Victoria's growth and economic prosperity. It recognised the role of best practice regulation in:

reducing the time and costs of doing business in Victoria—and the prices faced by Victorian consumers—by ensuring that Government regulation does not unduly impact on business productivity and growth.¹

- *A Fairer Victoria — The Victorian Government's Social Policy Action Plan*, outlined strategies 'to improve access to vital services, reduce barriers to opportunity, strengthen assistance for disadvantaged groups and places and ensure that people get the help they need at critical times in their lives.'²
- *Our Environment, Our Future — Sustainability Action Statement*, which provides a comprehensive road map for the Government, other agencies and the wider community towards achieving real and measurable outcomes in the

¹ Victorian Government 2004, *Victoria: Leading the Way*, p. 25

² Victorian Government 2005, *A Fairer Victoria — The Victorian Government's Social Policy Action Plan*, p. 1

areas of climate change, protection of natural assets, resource efficiency and waste reduction.³

- *Reducing the Regulatory Burden — The Victorian Government's Plan to Reduce Red Tape* released in 2006, which included specific targets to reduce the administrative burden state regulation imposes on business, and commitments to review the scope for simplifying and streamlining regulation.

Consistent with these statements, a number of changes have been made to improve the consumer policy framework in Victoria. For example, in 2003 and 2004 the *Fair Trading Act 1999* was strengthened by introducing unfair contract term provisions and increasing the range of available penalties and deterrents thereby improving the capacity of Consumer Affairs Victoria to respond to breaches of consumer regulation and limiting the extent of ongoing consumer detriment.

The Reducing the Regulatory Burden initiative is the first of its kind in Australia and adopts leading policy tools developed in Europe, in particular the Standard Cost Model, to achieve policy reforms that reduce the administrative burden of regulation on business. The consumer regulatory framework is being reviewed in accordance with this initiative to ensure existing and proposed regulations are effective and appropriate and to achieve the Government's targets for regulatory reduction.

Consumer Affairs Victoria is also increasing the effectiveness of non-regulatory consumer strategies. Information and education programs, for example, are shifting away from simply distributing information towards a greater focus on behavioural change. The research used to design these strategies, and their evaluation programs, focus more on techniques that not only increase the penetration of information but also its influence on consumer action and choices.

Community engagement is increasing in priority and strategies are being individualised to target key groups. Different strategies are often needed for different groups in the community because they do not seek information from the same places, and respond differently to the way the information is delivered. Consumer Affairs Victoria has established units to target Indigenous and multicultural consumers, and opened 'shop fronts' in regional locations. These units improve awareness and accessibility of Consumer Affairs Victoria's services for Indigenous, multicultural and regional communities. In addition, Consumer Affairs Victoria has developed relationships with a wide range of stakeholders to identify projects and outcomes based on the demographics of the particular region and needs of the community.

Consistent with the Government's commitment arising from *Growing Victoria Together*, to joined up government services, Consumer Affairs Victoria has partnered with other government service providers to improve service delivery. The co-location of Consumer Affairs Victoria's service centre with the Office of Small Business in the new Victorian Consumer and Business Centre is one example of this renewed approach to service delivery and consumer and trader engagement.

1.4 The consumer policy framework

Combined, the above influences have resulted in a consumer policy framework in Victoria that encompasses a broad range of regulatory and non-regulatory activities. The primary consumer regulation in Victoria is the *Fair Trading Act 1999* (the FTA),

³ Victorian Government 2006, *Our Environment, Our Future — Sustainability Action Statement*, <http://www.dse.vic.gov.au/ourenvironment-ourfuture> (accessed 16 April 2007).

which regulates conduct across all industries. In addition, there are many industry-specific Acts that impact on entry to or conduct in industries such as retirement villages, real estate, residential tenancies, building, credit, motor car traders, pawnbrokers, prostitution service providers, travel agents, health professionals, utility services and taxis.

Overall, however, the majority of consumer policy interventions in Victoria are non-regulatory. They include handling complaints and enquiries, providing information and education to consumers and business, dispute resolution and community engagement.

In Victoria, much of this regulation is administered by bodies within the Consumer Affairs portfolio. However, there are many other laws administered by agencies outside the portfolio that regulate market conduct to achieve consumer policy goals — for example, the regulation of utility services, health and legal professionals, and providers of transport and education services. Local governments also have a role in areas such as food regulation.

In addition to state-based regulation, Victorian consumers and businesses have rights and obligations under Commonwealth regulation. At this level there are also a mix of general regulations, such as the *Trade Practices Act 1974* (Cth), and industry-specific regulation, for example the *Telecommunications Act 1997* (Cth).

The diversity of government involvement in consumer issues is reflected in a diversity of organisations involved in implementing consumer policy. Some, like Consumer Affairs Victoria, undertake regulatory and non-regulatory activities across a range of industries, while others, such as the various ombudsmen schemes, are focused on one aspect (like dispute resolution), within a particular industry.

This framework is discussed in more detail below.

2 The institutions

Government and non-government bodies fulfil functions within the consumer policy framework, including developing, implementing and reviewing policy and regulation, monitoring and enforcing compliance with regulation, and providing dispute resolution services and advice to consumers and traders.

Within the Victorian Government, the Minister for Consumer Affairs and the agencies within this portfolio have principal responsibility for the development and administration of consumer policy.

The main bodies are Consumer Affairs Victoria, which has policy development, regulatory and non-regulatory functions across a wide range of industries, and the Business Licensing Authority, which administers legislation relating to business licensing/registration schemes across a number of industries.

In addition to these two agencies, many other agencies separately pursue consumer protection objectives or have consumer protection in part as a rationale for some of their activities. These can be grouped into several categories:

- policy and regulatory bodies — involved in the development, review or implementation of consumer regulation

- advisory and advocacy bodies — provide advice or advocate to the government regarding consumer issues
- tribunals and dispute resolution bodies — provide mechanisms to assist with the resolution of consumer and trader disputes

The various institutions are discussed further under the headings below.

2.1 Consumer Affairs Victoria

Consumer Affairs Victoria is a Business Unit within the Victorian Department of Justice.⁴

The Director of Consumer Affairs Victoria is a statutory officer employed by the Secretary of the Department of Justice under Part 3 of the *Public Administration Act 2004*, pursuant to s. 98 of the FTA. The Director's statutory functions and powers are specified in s. 100 of the FTA. The Director must submit an annual report to the Minister for Consumer Affairs who must in turn table this report in the Parliament (s. 102 FTA). The Director also performs the functions of Registrar of Co-operatives and Incorporated Associations, Residential Tenancies Bond Authority and Director of Trade Measurement. The Director may delegate any of his powers or functions (except the power under s. 106I to obtain information, documents and evidence) in accordance with s. 101 of the FTA.

Consumer Affairs Victoria undertakes a broad range of activities that fulfil the Director's statutory functions. These include:

- providing information and advice;
- receiving, conciliating and investigating complaints;
- providing policy advice to the Minister for Consumer Affairs;
- educating consumers and traders on their rights and responsibilities;
- encouraging, promoting and monitoring compliance with consumer laws;
- prosecuting breaches of consumer laws;
- regulating the consumer environment through licensing and business registration; and
- reviewing and developing the regulatory framework.

These activities are discussed in further detail below.

Consumer Affairs Victoria's activities in relation to the administration of general regulation, such as the FTA, cover all consumer markets (and some business transactions). It also undertakes many industry-specific activities that relate to a broad range of industries and markets including real estate and residential tenancies, building, credit, motor car traders, second-hand dealers and pawnbrokers, prostitution service providers and travel agents. Included in these activities are services related to the Business Licensing Authority's administration of numerous licensing and registration schemes (discussed below).

⁴ For further information see Consumer Affairs Victoria's website (www.consumer.vic.gov.au) and Consumer Affairs Victoria's Annual Reports, published annually and available on its website.

Consumer Affairs Victoria's operations also include a call centre to provide advice to consumers, tenants and traders, a service centre co-located in Melbourne's CBD with the Office of Small Business and a further seven 'shop-fronts' across Victoria to provide advice and assistance to regional communities. Mobile services visit every non-metropolitan local government area in the state on a regular basis. Consumers can also obtain information and advice through Consumer Affairs Victoria's website⁵ which receives nearly 100 000 visits each month.

As at 30 June 2006, Consumer Affairs Victoria had 412.8 full-time equivalent staff⁶ and, in 2005-06, it had a total operating expenditure of \$64.4 million⁷. However, this figure may overstate Consumer Affairs Victoria's actual expenses as it includes around \$15 million of grants and funding provided to external organisations and contractors under service provider agreements (for example provision of financial counselling services).

2.2 Business Licensing Authority (Vic)

The Business Licensing Authority is an independent statutory body governed by the *Business Licensing Authority Act 1998*.⁸ It licenses and registers:

- credit providers and finance brokers
- estate agents and agents' representatives
- introduction agents
- motor car traders
- prostitution service providers
- second-hand dealers and pawnbrokers
- travel agents

The Business Licensing Authority is comprised of a Chair, a Deputy Chair and two members, one of whom is the Director of Liquor Licensing. It was established in 1998, following the amalgamation of multiple separate industry licensing and registration bodies. Although there are variations between the schemes it administers, it can take advantage of the synergies of scope in administering multiple schemes.

The Director of Liquor Licensing is a statutory appointee responsible for granting or refusing applications for the grant, variation, transfer or relocation of a liquor licence or BYO permit, and for conducting investigations and providing advice to the Minister for Consumer Affairs on the operation of the *Liquor Control Reform Act 1998*.

Through the establishment of the Business Licensing Authority, the responsibility for licensing and registration is separated from policy development, compliance monitoring, investigations and enforcement (which is the responsibility of Consumer

⁵ www.consumer.vic.gov.au.

⁶ Versus a budget of 423 FTE. In addition, some corporate functions are provided by central Department of Justice staff.

⁷ Included in the \$64.4m are grants paid to outside organisations (\$4.5m), Departmental Governance and Support costs (\$3.7m), Consumer Utilities Advocacy Centre funding (\$0.5m) and outsourced service provider contracts (\$9.4m).

⁸ For further information see the Business Licensing Authority's website (www.bla.vic.gov.au) and the Business Licensing Authority's Annual Overview, which is available on its website.

Affairs Victoria and Victoria Police) and disciplinary proceedings and appeals (which are done through the Victorian Civil and Administrative Tribunal (VCAT)).

Disciplinary proceedings before VCAT are initiated by Consumer Affairs Victoria and in instances where Victoria Police maintain a monitoring/enforcement role, disciplinary proceedings can be initiated by the Victoria Police, eg second-hand dealers and prostitution service providers.

Under a service agreement, Consumer Affairs Victoria provides administrative support and resources to the Business Licensing Authority, including administering the licence application process and investigating applications on the Authority's behalf. The administration of liquor licensing is also undertaken by Consumer Affairs Victoria, under delegation from the Director of Liquor Licensing.

2.3 Policy and Regulatory bodies

As noted above, in addition to Consumer Affairs Victoria and the Business Licensing Authority, there are other areas within the Victorian Government responsible for developing policies that promote consumer interests. These policy areas, such as health, transport, utilities, food, education and housing are all part of the consumer policy framework.

There are different approaches employed to regulate each of these areas. Box 1 provides examples of the different approaches adopted and the institutions involved.

Box 1. Industry-specific approaches to regulating consumer issues in Victoria⁹

Utility service providers

Responsibility for the development and review of policy is separated from the implementation and enforcement of the regulation. The Essential Services Commission (ESC) (an independent statutory authority within the Treasury portfolio) is responsible for the regulation of Victoria's water, gas and electricity services. However, policy and legislative development functions relating to these services are situated within various government departments – the Department of Primary Industries (electricity and gas) and the Department of Sustainability and the Environment (water). The ESC's regulation of electricity and gas distribution and retail services is scheduled to transfer in 2008 to a national framework being developed by the COAG Ministerial Council on Energy.

The taxi industry

The Department of Infrastructure conducts policy work as well as administers legislation through the Victorian Taxi Directorate (VTD). The VTD are responsible for licensing and the implementation of service improvement initiatives.

The Essential Services Commission has an advisory and recommendatory role to the Minister for Planning in relation to taxi fares.

Health professionals

⁹ Consumer Affairs Victoria also has a role in regulating each of the industries listed in so far as the *Fair Trading Act 1999* and other laws administered by Consumer Affairs Victoria apply. The Victorian Competition and Efficiency Commission also has a role in relation to each of these industries through its regulatory review and oversight activities.

The Department of Human Services is responsible for maintaining the regulatory framework, and considering general policy matters in relation to health practitioner registration boards.

From July 2007, the health practitioner registration boards will come under the umbrella of a single Act, the *Health Professions Registration Act 2005* rather than separate Acts.

Each registration board keeps a register of suitably qualified practitioners and conducts professional disciplinary hearings. Some examples are the Chiropractors Registration Board of Victoria, Dental Practice Board of Victoria and Nurses Board of Victoria.

While some health professions are regulated through this registration scheme, others (such as occupational therapists and speech therapists) are self-regulated by an industry association that sets practice standards, codes of ethics and complaints procedures.

Public transport

The Department of Infrastructure is responsible for public transport policy and coordinating and monitoring public transport services in Victoria.

The Victorian Government also partners with private operators in the provision of a number of public transport services. These partnership agreements contain incentives to ensure service quality such as stipulating fines for below-par performance.

Education providers

The Department of Education is responsible for government policy and the provision of primary and secondary education. Five statutory authorities also operate to ensure that targets are met for education and training, and the delivery of government-funded education and training outputs.

Vocational Education and Training, and Higher Education is regulated and provided by the Office of Training and Tertiary Education which falls under the Victorian Department of Innovation, Industry and Regional Development.

However, day-to-day operational policies are generally the responsibility of each educational institution who develop their own operational processes.

Builders

The regulation and administration of the building control system in Victoria is overseen by the Building Commission, which is a statutory authority. The Building Commission works with four other statutory bodies (the Building Advisory Council, Building Appeals Board, Building Practitioners Board and the Building Regulations Advisory Committee) to regulate the Victorian building industry and operates within a national legislative framework administered by the Australian Building Codes Board.

Much of the non-technical consumer focussed building regulation is managed by Consumer Affairs Victoria, which is responsible for administering the part of the legislation that relates to domestic building contracts, and, through Building Advice and Conciliation Victoria, answering consumer inquiries and conciliating complaints.

To the extent that small business policy and regulatory bodies seek to promote and protect the interests of small business as consumers, they also form part of the consumer policy framework.

In many market situations, such as retail leasing, there are strong parallels between the problems faced by small business and those faced by individual consumers. In these instances, the strategies that are implemented to ameliorate these problems are the same, and require a cooperative approach between bodies such as the Office of Small Business and Consumer Affairs Victoria.

2.3.1 National bodies

In addition to an array of Victorian government agencies, there are also numerous agencies within the Australian Government that contribute to the consumer policy framework in Victoria. The main agencies are:

- the Australian Competition and Consumer Commission (ACCC) — responsible for administering the regulation of competition and consumer protection matters at the Commonwealth level;
- the Australian Securities and Investments Commission (ASIC) — responsible for the regulation of financial markets, securities, futures, corporations, insurance and credit;
- the Australian Communications and Media Authority (ACMA) — responsible for regulating broadcasting, the internet, radiocommunications and telecommunications; and
- Food Standards Australia New Zealand (FSANZ) — responsible for developing standards in relation to food composition, labelling and contaminants that apply to all foods produced or imported for sale in Australia and New Zealand.

In addition, the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) will be the institutions responsible for administering and enforcing the national Law and Rules being developed by the Ministerial Council on Energy to regulate electricity and gas distribution and retail services under a single national framework from 2008.

As in Victoria, there is diversity and complexity in coverage of consumer issues at the Commonwealth level, with many other agencies also playing a role in policy development and/or regulation.

2.3.2 National processes

Recognising the roles of the states, territories and commonwealth, national processes have been established to facilitate consistent policy development, implementation and enforcement across Australia through cooperation among the jurisdictions.

The Victorian Government is involved in developing policy at a national level through representation on the Ministerial Council on Consumer Affairs (MCCA), the Standing

Committee of Officials of Consumer Affairs (SCOCA) and associated sub-committees and working groups.¹⁰

MCCA, comprises all the Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading, consumer protection, trade measurement and credit laws. As indicated in its mission statement (Box 2), the role of MCCA is to advance fair trading and consumer issues of national significance. It also provides a formal mechanism for consultation and cooperation between Australia and New Zealand and among government, industry and consumers.

MCCA works within the framework of an agreed Strategic National Consumer Affairs Agenda¹¹, which is reviewed annually with input and comments from the consumer movement, business, government bodies and other interested agencies and parties.

Box 2. Mission Statement of the Ministerial Council on Consumer Affairs

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

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

Source: www.consumer.gov.au (accessed 9 February 2007)

MCCA is supported by SCOCA, which consists of the heads of Commonwealth, State and Territory government agencies responsible for consumer affairs and fair trading policy and the Head of New Zealand's consumer affairs policy-making agency.

The chairs of MCCA and SCOCA are filled by the different jurisdictions on a rotational basis. Currently, Victoria is the chair of both bodies.

Supporting the work of SCOCA are four permanent advisory committees:

¹⁰ For further information on MCCA and SCOCA see www.consumer.gov.au, the Official site of the Ministerial Council on Consumer Affairs.

¹¹ See for example the *Ministerial Council on Consumer Affairs Strategic Agenda*, September 2005, http://www.consumer.gov.au/html/mcca_projects.htm (accessed on 19 April 2007).

- the Fair Trading Operations Advisory Committee — is made up of consumer protection agency compliance officers and advises on the enforcement of consumer laws and fair trading operational issues.
- the Consumer Product Advisory Committee — consists of consumer product safety officers and provides policy advice on product safety standards, bans and recalls.
- the Trade Measurement Advisory Committee — is made up of consumer trade measurement officers and advises on technical and enforcement issues associated with trade measurement.
- the Uniform Consumer Credit Code Management Committee —consists of credit and policy officers from consumer agencies and deals with the management of the Uniform Consumer Credit Code, the nationally-consistent law which regulates consumer credit.

The functions and membership of these committees is outlined in Box 3. SCOCA may refer matters of strategic national importance to the advisory committees for consideration and/or action. The advisory committees may only work on policy issues, in respect of operational matters concerning current legislation that are referred to them by, or through, the Chair of SCOCA. The advisory committees may, with the approval of at least one member of SCOCA, identify issues for placement on the national work-plan. Victoria, through Consumer Affairs Victoria, is represented on each of the advisory committees and currently chairs UCCCMC.

In addition to these permanent committees, MCCA and SCOCA may establish other permanent or ad hoc working parties to address particular issues.

Box 3. Functions and membership of the SCOCA advisory committees

Consumer Products Advisory Committee	Fair Trading Operations Advisory Committee	Trade Measurement Advisory Committee	Uniform Consumer Credit Code Management Committee
<p>To advise SCOCA on current and emerging consumer product safety issues and recommend strategies to address these.</p> <p>To facilitate a co-ordinated Trans-tasman approach to consumer product safety issues.</p> <p>To maintain and promote a tripartite approach (industry, Government and consumers) to consumer product safety.</p> <p>To enhance the effectiveness of Product Safety Compliance and law Enforcement activities by exchanging information between member agencies and facilitating joint investigation/inspection programs.</p>	<p>To action issues referred to it by SCOCA, in particular, those listed on the Strategic National Consumer Affairs Agenda.</p> <p>To identify and report to SCOCA legislative or policy options for emerging matters causing consumer detriment.</p> <p>To maintain an effective mechanism (Auzshare) to ensure early reporting of emerging issues of national significance.</p> <p>To initiate and/or co-ordinate appropriate operational responses to emerging issues of national significance.</p> <p>To build links with other enforcement agencies, co-regulatory bodies and industry groups to foster information sharing.</p> <p>To provide mechanisms for effective communication between industry, government and consumers on fair trading matters.</p>	<p>To facilitate the implementation of the policy decisions of SCOCA and MCCA in relation to trade measurement.</p> <p>To examine and resolve, where possible, technical and operational trade measurement issues.</p> <p>To facilitate the development, maintenance and evaluation of an effective and consistent trade measurement system.</p> <p>To provide mechanisms for effective communication between industry, Government and consumers on trade measurement matters.</p> <p>To assist the National Measurement Institute with its trade measurement responsibility both nationally and internationally.</p> <p>To enhance co-operation and collaboration between member agencies in relation to compliance, law enforcement and other operational activities.</p>	<p>To deal with matters relating to the consistent administration and enforcement of the Consumer Credit Code and to undertake policy development and provide policy advice to MCCA.</p> <p>To provide advice on requests for exemptions.</p> <p>To promote and encourage nationally consistent education and information programs and undertake ongoing stakeholder consultation.</p>
<p style="text-align: center;">—————</p> <p style="text-align: center;">Membership</p> <p>Officers responsible for product safety, product investigation and recall, product policy and standards. Members are from all Commonwealth, State, Territory and New Zealand Consumer Affairs agencies including a representative from Standards Australia.</p>	<p style="text-align: center;">—————</p> <p style="text-align: center;">Membership</p> <p>Officers responsible for compliance and/or enforcement of fair trading issues from all Commonwealth, State, Territory and New Zealand Consumer Affairs agencies.</p>	<p style="text-align: center;">—————</p> <p style="text-align: center;">Membership</p> <p>Officers responsible for trade measurement issues from all member jurisdictions, including a representative from the National Measurement Institute.</p>	<p style="text-align: center;">—————</p> <p style="text-align: center;">Membership</p> <p>Credit Officer or Officer responsible for monitoring the implementation of the Uniform Credit Code from all member jurisdictions.</p>

2.4 Advisory and advocacy bodies

There are a number of statutory bodies within the consumer affairs portfolio that have as their primary function providing advice to the Minister for Consumer Affairs. Each of these bodies is responsible for the provision of advice relevant to the regulation of a specific industry. For example, the Estate Agents Council provides advice relevant to the *Estate Agents Act 1980*, the Prostitution Control Act Ministerial Advisory Committee provides advice relevant to the *Prostitution Control Act 1994*, and the

Liquor Control Advisory Council provides advice relevant to the *Liquor Control Reform Act 1998*.

These advisory bodies receive Terms of Reference from the Minister for Consumer Affairs and advise the Minister on the general operation of the relevant Act, and specific issues within their industry. The constitution of these bodies varies, but generally includes both industry and consumer representatives.

In addition to bodies that provide policy advice to the Minister, other bodies advise on the distribution of specific industry funds. For example, the Consumer Credit Fund Advisory Committee was established to assess grant applications and make recommendations to the Minister regarding the Consumer Credit Fund. This fund is a statutory trust fund, established to channel civil penalty monies awarded under the Consumer Credit Code to credit-related research, developing advice and assistance programs and materials, and educational services. The Estate Agents Council also makes recommendations to the Minister on applications for grants from the Victorian Property Fund.

A number of statutory authorities within the consumer affairs portfolio are tasked with representing or promoting the interests of certain consumers or groups within the community. For example, the Consumer Utilities Advocacy Centre was established to ensure that the interests of Victorian electricity, gas and water consumers are effectively represented in policy and regulatory decisions. The Centre, which is funded by the Victorian Government through Consumer Affairs Victoria, has both industry and consumer representation.¹²

The above government bodies are in addition to the many non-government organisations that represent the interests of consumers, or groups of consumers. Consumer Affairs Victoria supports the funding of a number of non-government bodies that research consumer issues and contribute to policy discussions.¹³ Two such organisations are:

- the Consumer Action Law Centre – formed in November 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service. It provides legal advice and representation to consumers, particularly vulnerable and disadvantaged consumers, and undertakes policy and research work to advance the interests of consumers generally.¹⁴
- the Financial and Consumer Rights Council – the peak body for community based organisations and individuals concerned with the rights of low income and vulnerable consumers in Victoria. Among other things, it aims to develop policy and undertake consumer advocacy and law reform activities in the public and private sector that enhance the financial well-being of all people, particularly low income and vulnerable consumers.¹⁵

¹² For further information see the Consumer Utilities Advocacy Centre's website (www.cuac.org.au).

¹³ For a detailed discussion of consumer advocacy, see the Consumer Affairs Victoria Research Paper *Consumer Advocacy in Victoria*, Research Paper 7, March 2006.

¹⁴ For further information see the Consumer Action Law Centre's website (www.consumeraction.org.au).

¹⁵ For further information see the Financial and Consumer Rights Council's website (www.fcrc.org.au).

2.5 Tribunals and complaint handling and dispute resolution bodies

The final category of institutions that comprise the consumer policy framework in Victoria is tribunals and complaint handling and dispute resolution bodies, which assist with the resolution of consumer and trader disputes.

A range of bodies that provide mediation, conciliation and arbitration services in Victoria. Some, including Consumer Affairs Victoria, the Dispute Settlement Centre of Victoria and the Victorian Civil and Administrative Tribunal assist in resolving a range of disputes across most, if not all, industries, while others, including many ombudsman schemes, provide assistance in resolving disputes within specific industries.

The Dispute Settlement Centre of Victoria is a program of the Victorian Department of Justice.¹⁶ The program commenced in the late 1980s as a pilot project to provide mediation as an alternative to resolving disputes through the court system. It offers tailored services to Indigenous and Culturally and Linguistically Diverse clients to increase accessibility of mediation services to the community.

The Victorian Civil and Administrative Tribunal (VCAT) was established pursuant to the *VCAT Act 1998* through the amalgamation of a number of separate administrative tribunals, including the Small Claims Tribunal and the Administrative Appeals Tribunal. It was set up to provide Victorians with access to a modern, accessible, efficient and cost effective civil justice system. It offers consumers and traders a forum for dealing with disputes on a range of issues including purchases of goods and services, domestic building works, residential and retail tenancies and consumer credit.¹⁷

Small business consumers can also obtain the assistance of the Victorian Small Business Commissioner in resolving disputes relating to retail tenancies or general unfair market or government practices.¹⁸ The position of the Victorian Small Business Commissioner was established under its own legislation, the *Small Business Commissioner Act 2003*, which commenced operation on 1 May 2003. It was established expressly to promote greater fairness in business through its four main functions: information and education, review of government practices, investigation of small business complaints and dispute resolution.

The Office of the Victorian Small Business Commissioner delivers on the Victorian Government's objective to provide a central point where retail tenancy disputes and small business concerns regarding unfair market or government practices can be addressed. The Victorian Small Business Commissioner's functions are defined in the Small Business Commissioner Act (s. 5) and include the following:

- to facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace;
- to promote informed decision-making by small businesses in order to minimise disputes with other businesses;

¹⁶ See www.justice.vic.gov.au/disputes.

¹⁷ For further information see VCAT's website (www.vcat.vic.gov.au) and VCAT's Annual Reports, published annually and available on its website.

¹⁸ For further information see the website of the Office of the Small Business Commissioner (www.sbc.vic.gov.au).

- to receive and investigate complaints by small businesses regarding unfair market practices and mediate between the parties involved in the complaint;
- to make representations to an appropriate person or body on behalf of a small business that has made a complaint;
- to monitor and report to the Minister on any emerging trends in market practices that have an adverse effect on small businesses;
- to investigate compliance with industry codes.

In addition to its general dispute resolution service, Consumer Affairs Victoria provides two specialist dispute resolution services:

1. the Estate Agents Resolution Service — a free service dedicated to the provision of advice, information and resolution of disputes on real estate matters;¹⁹ and
2. Building Advice and Conciliation Victoria — a joint service provided by Consumer Affairs Victoria and the Building Commission, which provides practical, expert advice on preventing and resolving building disputes.²⁰

A number of industry ombudsmen also protect consumers' interests in their dealings with service providers in specific industries. Ombudsmen schemes are particularly common in sectors that have been privatised or contracted out, such as utilities and public transport.

One example of a Victorian ombudsman scheme is the Energy and Water Ombudsman (Victoria) (EWOV). EWOV is the result of the legislated requirement that all electricity, gas, LPG and water companies must provide a dispute resolution scheme approved by the Essential Services Commission for persons to whom they provide certain services or works. Consumers can access the Ombudsman's services free of charge.

The EWOV has the power to investigate and resolve disputes between Victorian electricity, gas and water customers and their providers. It is a company limited by guarantee, which is funded by member companies according to the number of complaints made about them. The Board of Directors comprises both industry and consumer representatives, with an independent chairperson.²¹

Other ombudsmen schemes protecting the interests of consumers in Victoria include the Public Transport Industry Ombudsman, the Telecommunications Industry Ombudsman, the Postal Industry Ombudsman and the Banking and Financial Service Ombudsman (the later three operating at a national level).

Another example of an industry dispute resolution scheme in Victoria is the Legal Services Commissioner, whose role was created in December 2005 to assist Victorians resolve disputes about lawyers. The Commissioner receives, investigates and resolves complaints about lawyers and mediates disputes between lawyers and their clients. If a complaint raises issues about a lawyer's professional conduct, the

¹⁹ Consumer Affairs Victoria *Estate Agents Resolution Service (EARS)*, Real Estate Factsheet, October 2006.

²⁰ Consumer Affairs Victoria *Building Advice and Conciliation Victoria*, Information Brochure.

²¹ For further information about the Energy and Water Ombudsman (Victoria) see www.ewov.com.au.

Commissioner investigates the complaint and, in the most serious cases, initiates disciplinary proceedings. The Commissioner may also refer the investigation of a complaint or attempted settlement of a dispute to the Law Institute of Victoria or the Victorian Bar. If this happens, these bodies report back to the Commissioner, who considers their findings and recommendations before deciding what action, if any, to take on the complaint.²²

In addition to industry ombudsmen, other bodies established under industry regulatory schemes handle complaints relating to specific types of conduct and determine compensation claims without the need for formal tribunal or court proceedings. These bodies include the Motor Car Traders Guarantee Fund Claims Committee (MCTGFCC) and the Travel Compensation Fund.

The MCTGFCC is an independent statutory authority established by the *Motor Car Traders Act 1986* to determine compensation claims made under that Act. The Committee is comprised of members representing the interests of consumers, members with motor car trading industry knowledge and a lawyer, who acts as the Chairperson. The Committee decides claims against the Motor Car Traders Guarantee Fund, which essentially indemnifies consumers against certain categories of loss incurred in dealings with motor car traders.

The Travel Compensation Fund (TCF) operates under a Deed of Trust subscribed to by all States and Territories (except the Northern Territory) as part of the Co-operative Scheme for the Uniform Regulation of Travel Agents. Under the scheme, all licensed travel agents (except in the Northern Territory) are required to participate in the TCF as a condition of their licence. Consumers who have paid a licensed travel agent for their travel arrangements may lodge a claim with the TCF for financial loss suffered if the agent has ceased trading or suffered a financial collapse and failed to pass on their money to the travel principal (such as airlines and hotels). The Fund has a Board of Trustees appointed by MCCA and day to day management is the responsibility of a Chief Executive Officer, overseen by a Management Committee of Trustees.²³

3 The regulatory framework

The consumer regulatory framework in Victoria comprises a range of Commonwealth and Victorian regulation. The main pieces of general legislation are the *Fair Trading Act 1999* (Vic) and the *Trade Practices Act 1974* (Cth). In addition, many other Acts establish various interventions that apply to specific industries. These are discussed further under the headings below.

The Victorian Government recognises that regulation is not without cost to business (which is then passed on to consumers) and the government. Therefore, rigorous gate-keeping processes such as Business Impact Assessments and Regulatory Impact Statements have been implemented to ensure that any regulation introduced provides the best balance between consumer protection and business efficiency, leading to the optimal policy outcome.

In many instances, non-regulatory approaches are more appropriate and this is reflected in the mix of regulatory and non-regulatory activities that comprise the consumer policy framework. Non-regulatory responses, which support and complement the regulatory framework, can include the provision of education,

²² For further information about the Legal Services Commissioner see www.lsc.vic.gov.au.

²³ For further information about the Travel Compensation Fund see www.tcf.org.au.

information, advice and dispute resolution services, and the development of codes of practice and service agreements with organisations. These activities are discussed in sections 4 and 5 below.

The Victorian Government is committed to reducing costs on business and not-for-profits, and thereby the end consumer, and achieving consumer policy objectives at minimal cost to the community.

The *Reducing the Regulatory Burden* initiative was announced by the Treasurer in the 2006-07 Budget. The initiative includes a commitment to reduce the administrative (or reporting) burden of regulation on businesses and not-for-profits by 15 per cent over the next three years and 25 per cent over five years. It includes funding to undertake reviews of regulation in priority areas and requires departments to offset any new administrative (or reporting) burden of regulation with a simplification to an existing burden. The implementation of programs across Government to reduce the administrative burden may provide opportunities to streamline and rationalise consumer-related regulation.

As part of this initiative, the Victorian Competition and Efficiency Commission are conducting an inquiry into food regulation in Victoria. The terms of reference for the inquiry include to inquire and report on the nature and magnitude of the compliance and administrative burdens of food regulation and opportunities for reducing or streamlining this regulation. A final report is scheduled for release by 14 September 2007. As part of this review, VCEC will review and consider the misleading and deceptive conduct provisions in Victoria's Food Act.

The Treasurer and Premier have also requested the State Services Authority to review the impact of regulation and reporting requirements on the not-for-profit sector. A final report, including practical recommendations for streamlining or reducing any burden, is due by 30 September 2007.

3.1 The Fair Trading Act 1999

The Victorian FTA applies to all persons, which encompasses individuals, partnerships and corporations. As outlined in s. 1, the main purposes of the FTA are:

- (a) to promote and encourage fair trading practices and a competitive and fair market;
- (aa) to protect consumers;
- (b) to regulate trade practices;
- (ba) to provide for statutory conditions and warranties in consumer contracts;
- (bb) to provide for unfair terms in consumer contracts to be void;
- (c) to provide for the safety of goods or services supplied in trade or commerce and for the information which must be provided with goods or services supplied in trade or commerce;
- (d) to regulate off-business-premises sales and lay-by sales;
- (e) to provide for codes of practice;
- (f) to provide for the powers and functions of the Director of Consumer Affairs Victoria including powers to conciliate disputes under this Act and powers to carry out investigations into alleged breaches of this Act.

The territorial reach of the FTA is governed by section 6, which provides that it applies within Victoria, and outside Victoria to the full extent of the extra-territorial power of the Parliament. The current state of the law on the extra-territorial reach of State legislation is that legislation that purports to extend to people and matters

outside the State is valid if there is a sufficient nexus between the legislation and the person or matter outside the State. The FTA operates principally on forms of conduct and on supplies of goods or services and so it would appear that there will be sufficient nexus if:

- conduct occurs in Victoria, even if the subject or object of the conduct is outside Victoria;
- the subject or object of the conduct is in Victoria, even if the conduct occurs outside Victoria;
- a party to a supply is in Victoria, even if all other parties are outside Victoria;
- the contract for the supply was made in Victoria, even if all parties are outside Victoria; and
- the goods or services are supplied in Victoria, even if all parties are outside Victoria.

The FTA has general application, establishing rights and obligations that apply across all industries, unless they are specifically exempt²⁴. Breaches of the FTA are triggered by certain characteristics of the product or service or behaviour of the trader, not the industry they operate in. For example, the FTA can cover everything from take away food, to selling musical instruments, alternative health care and car repair services.

Because of the diverse range of industries covered by the FTA, the framework it establishes uses standards to guide acceptable behaviour, rather than defining rules that impose specific conditions on traders.²⁵ For example, the Act specifies that 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive' (s. 9(1)), rather than specifying what traders must do to avoid misleading or deceiving consumers.

Some of the types of conduct covered by the FTA include:

- unconscionable conduct;
- misleading and deceptive conduct;
- false or misleading representations;
- bait advertising and referral selling; and
- harassment and coercion.

The FTA also contains provisions relating to implied conditions and warranties in consumer transactions. These include implied conditions that:

²⁴ There are only a limited number of exemptions. For example credit contracts are excluded from the unfair contract terms provisions in Part 2B of the Act and electricity retailers are exempt from some of the provisions relating to off-business premises sales.

²⁵ However, the FTA (s. 100(1)(bb)) does enable the Director to prepare and publish industry guidelines in relation to the operation and enforcement of the FTA in a particular sector. For example, Consumer Affairs Victoria has issued guidelines on debt collection in Victoria. There is also provision for the promotion of mandatory and voluntary codes of conduct.

- the goods are of merchantable quality (s. 32I);
- the goods are reasonably fit for a particular purpose, where the purchaser expressly or by implication has made it known to the supplier (or an agent), the particular purpose for which the goods were required (s. 32IA);
- in a contract for the supply of services, the services will be rendered with due care and skill (s. 32J);
- the goods will correspond with the sample in quality (where the contract contains a term, express or implied, to the effect that the supply is a supply of goods by sample) (s. 32HA); and
- in a contract of supply of goods by description, the goods will correspond with the description (s. 32 H).

In 2003, the FTA was strengthened by the addition of Part 2B containing provisions relating to unfair terms in consumer contracts. The unfair contract terms provisions and their effect are outlined in Box 4. Consumer Affairs Victoria's approach to enforcing these provisions is discussed below under section 6.2.

Box 4. Part 2B of the FTA — Unfair Contract Terms

Part 2B of the FTA deals with unfair terms in consumer contracts. The provisions are largely based on the United Kingdom's Unfair Terms in Consumer Contracts Regulations 1999, which in turn give effect to the European Union's Directive on Unfair Terms in Consumer Contracts²⁶. The provisions have the following effects:

- an unfair term in a consumer contract is void;
- certain terms in standard form consumer contracts may be prescribed by Regulation as being unfair and it is an offence to use any such prescribed term;
- the Director of Consumer Affairs can apply to VCAT for a declaration that a term is unfair, and for injunctions to prevent the continued use of unfair terms; and
- if a term in a consumer contract is assessed as unfair, or as being a prescribed unfair term, it will result in that term being void. However, the contract will continue to bind the parties, but only as far as the contract is able to exist without the unfair term or the prescribed unfair term.

Section 32W defines an unfair term as:

“A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the rights and obligations arising under the contract to the detriment of the consumer.”

Section 32X of the FTA provides that, in determining whether a term is unfair, a court (or VCAT) may take into account whether the term has one of a list of objects or effects. These listed objects or effects are typically found in terms that fall within the following categories:

²⁶ Council Directive 93/13/EEC of 5 April 1993.

- *lock-in-terms (unilateral change terms)*, which allow the supplier to vary important terms of the contract, or to perform his or her obligations under the contract in a different way than was agreed with, or is expected by, the consumer. These terms enable the supplier to make these changes without providing fair and reasonable adjustments, or without the consumer being allowed to terminate the contract without penalty.
- *punitive dispute resolution terms*, which prevent or restrict the consumer's options regarding dispute resolution, with the effect of putting pressure on the consumer to pursue a dispute or to settle a dispute on terms that are favourable to the supplier;
- *terms restricting liability* of the supplier, its servants or agents for breach of the contract; and
- *penalty clauses*, which unfairly inhibit consumers from exercising their rights, for example by requiring the consumer to pay an amount on termination which goes beyond compensating the supplier.

The legibility and clarity of terms in consumer contracts are also regulated, pursuant to s. 163 of the FTA.

3.2 The Fair Trading Act 1999 and the Trade Practices Act 1974

The Victorian FTA was developed in parallel with the consumer regulation of the Commonwealth and the other states and territories. The development of Victoria's FTA is outlined briefly in Box 5. The coverage of the Commonwealth TPA is limited by the Constitution. Therefore, the application of the state and territory FTAs to 'all persons' is relied on to ensure comprehensive coverage of consumer protection law in Australia.

The FTA in each state and territory has been modelled on the TPA following reviews in the 1970s and 80s, which recommended consistency and uniformity among the jurisdictions. The first such recommendation was made in the Swanson Report published by the Trade Practices Act Review Committee. The report noted, "sensible administration arrangements between Commonwealth and State enforcement agencies... would seem to overcome many problems"²⁷ and, "the Committee is not in favour of continuing a system whereby prohibitions of unfair practices are framed in different terms in the law of each of the States and the Commonwealth."²⁸

In June 1982, the Victorian Consumer Affairs Council, chaired by Dr Maureen Brunt, launched its Inquiry into Deceptive Trade Practices Law. It was this inquiry that first recommended the adoption by States of Part V of the Trade Practices Act. The Inquiry stated:

The Commonwealth Act has proved itself in almost a decade of existence and enforcement. There is a useful body of case law in being. There is widespread public knowledge and acceptance of the requirements of the law. A strategy of uniformity as between Commonwealth and State laws eliminates conflicting obligations for the one enterprise and discriminatory obligations as

²⁷ Trade Practices Act Review Committee 'Report to The Minister for Business and Consumer Affairs', Published by Australian Government Publishing Service, Canberra, 1976 p. 59.

²⁸ Ibid.

*between different enterprises. It makes for economy in business compliance and in public administration and enforcement. It offers opportunities for consultation between governments of different perspectives and experience in the common law – an exercise in co-operative Federalism.*²⁹

In response to both the Swanson Report and the Victorian inquiry, Victoria enacted the Fair Trading Act 1985, and the other states followed suit passing their own Fair Trading Act or equivalent between 1985 and 1992. Each Act borrowed from the TPA the consumer protection provisions in Divisions 1 and 1A of Part V (and associated remedies under Part VI) and applied them to 'persons' rather than 'corporations'.

Box 5. Major milestones in the history of the Victorian Fair Trading Act

Pre 1893 — Some protection under the common law. Although the common law primarily reflected the philosophy that *caveat emptor* (buyer beware) and freedom of contract should apply equally to commercial and consumer sales.

1893 — The Sale of Goods Act 1893 (UK) was introduced.

1896 — The first *Goods Act 1896* (Vic) was enacted, which was “almost entirely a reproduction of the common law”³⁰. The limited consumer protection measures included implied terms such as ‘fitness for particular purpose’ [s19(a)] and ‘merchantable quality’ (s20), which applied, respectively, where a seller’s skill and judgement were relied upon in the purchase, and where the sale of goods was by sample. These terms could be, and usually were, excluded by the contract.

1970 — The *Consumer Protection Act 1970* (Vic) was enacted.

1982 — The Victorian Consumer Affairs Council chaired by Dr Maureen Brunt commenced an Inquiry into Deceptive Trade Practices Law. The report of this inquiry recommended the adoption by the states and territories of Part V of the Trade Practices Act. Non-excludable implied terms for consumer contracts were inserted into the *Goods Act 1958* (Part 4) modelled on those in the Trade Practices Act.

1985 — The *Fair Trading Act 1985*, largely mirroring the consumer protection provisions in the *Trade Practices Act 1974* (Cth), was introduced.

1999 — Following an extensive review of consumer protection in Victoria over four years, the *Fair Trading Act 1999* was enacted. The new FTA consolidated the *Consumer Affairs Act 1972*, the *Ministry of Consumer Affairs Act 1973* and the *Fair Trading Act 1985* and removed the *Market Court Act 1978*. Among the new provisions included in the 1999 Act were provisions relating to lay-by and non-contact sales, and provisions enabling prescription of codes of practice, and recall of dangerous goods.³¹

2003 — Following a review of the FTA, provisions dealing with implied conditions and warranties were transferred from the Goods Act to a new Part 2A of the FTA. In addition, provisions regulating telemarketing and unfair terms in consumer contracts were added, with substantial amendments also made to the pyramid selling, door-to-

²⁹ Victorian Consumer Affairs Council, ‘Inquiry Into Deceptive Trade Practices Law’ Report to the Minister of Consumer Affairs, March 1983, p. 48.

³⁰ Victoria, *Parliamentary Debates*, Explanatory Memorandum of the Sale of Goods Bill 1894, 19 December 1894, at 350.

³¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 1999, 187 (Mrs Wade, Minister for Fair Trading).

door and lay-by sales provisions. New powers were also introduced relating to substantiation and show cause notices, public warnings and cease trading injunctions.

2004 — Civil injunction powers were expanded, adverse publicity orders were introduced, and courts were given powers to make mandatory (positive) injunctions. The amendments also expanded the list of consumer acts to which these and other enforcement and compliance provisions of the FTA extend to.

2006 — A fair trading monitoring power was introduced to allow inspectors to enter business premises to monitor compliance and enable the early detection of trader conduct that is potentially harmful to consumers or is anticompetitive.

Although the state and territory laws were modeled on the TPA and generally mirror its provisions with regard to consumer protection, there has never been uniformity among the various laws. For example, in the second reading speech for the Victorian FTA (in 1999), it was stated that, “in pursuit of uniform fair trading legislation across Australia, drafting of provisions in the Fair Trading Bill [have] been modelled where possible on the relevant provisions of the Trade Practices Act.”³² However, even at the time of its introduction, as alluded to in the second reading speech, the provisions were not uniform.

Over time, the differences among the fair trading acts and between the TPA and the fair trading acts have grown. One difference is the inclusion in the Victorian FTA of provisions relating to unfair terms in consumer contracts.

3.3 Other general legislation

In addition to the FTA and TPA there are other Acts administered by Consumer Affairs Victoria that have general application across a range of industries in Victoria. These include:

- the *Co-operatives Act 1996* (Vic) – which established a legislative framework for the formation, registration and management of cooperatives, regardless of the industry they operate in;
- the *Associations Incorporation Act 1981* (Vic) – which provides a means of incorporation for any association, society, club, institution or body formed or carried on for any lawful purpose that has at least 5 members. Through the Act, incorporated associations benefit from limited liability of members, perpetual succession, ability to enter into contracts, and power to acquire, hold and dispose of property;
- the *Trade Measurement Act 1995* (Vic) – which establishes a legislative framework under which all goods sold by measurement in Victoria whether by weight, length, volume, area or count must be accurately measured, labelled and have the correct price calculated. This Act is part of a uniform national trade measurement scheme that covers the use of measuring instruments for trade, testing and certification of measuring instruments in use for trade, transactions by measurement, pre-packed articles, public weighbridges, and instrument certifying businesses (servicing licensees).

³² Ibid.

In addition to these Acts administered by Consumer Affairs Victoria, the *Small Business Commissioner Act 2003*, has general application to assist in the creation of a fair and competitive environment for small businesses to buy goods or services from other businesses and dispute resolution processes that help maintain a productive relationship between the parties.

Further, the *Equal Opportunity Act 1995* (Vic) provides that it is unlawful to discriminate against another person in the provision of goods and services (s. 42(1)), on the grounds of one of the attributes set out in the Act. These include race, gender, age, impairment and religious belief. There are a small number of exceptions but in general, the Equal Opportunity Act is an important guarantor of the rights of all consumers to have equal access to goods and services without discrimination and promotes the operation of a free and fair market in a diverse community. The Equal Opportunity and Human Rights Commission is empowered to conciliate any disputes arising out of that Act and disputes that are not settled at conciliation can proceed to VCAT for determination.

At the Commonwealth level, general regulation in addition to the TPA includes the *Corporations Act 2001*, which establishes a regulatory framework for company registration, including the powers and duties of directors, issuance of shares, financial reporting and auditing, which ensures that companies are managed in a way that consumers, among others, do not suffer as a result of those involved in the company behaving inappropriately or not exercising due care. This framework applies to all companies irrespective of the industry in which they operate.

3.4 Industry-specific regulation

The industry-specific laws that also contain consumer protection provisions are administered both at a Commonwealth and state level. Commonwealth industry-specific regulations that have some consumer protection objectives include those governing financial services (*Australian Securities and Investments Commission Act 2001*), food standards, the telecommunications industry (*Telecommunications Act 1997*), and the pharmaceutical industry (*Therapeutic Goods Act 1989*).

Victorian industry-specific consumer regulations govern industries as diverse as motor car traders, travel agents and pawnbrokers. As noted above, there are also many Victorian industry-specific regulations that are administered by agencies other than Consumer Affairs Victoria. These include regulations governing occupations such as architects, health professions and lawyers, as well as regulation governing industries such as utility service providers, public transport and taxis. Further examples include industry regulation with the objective of product safety (for example the regulation of radiation sources and cooling towers) and industry regulation associated with quality service provision to consumers (for example, the regulation of Supported Residential Services, children's services, private hospitals and water businesses). Government also directly influences the quality of services it funds including community, health, disability and social housing services through service agreements as well as industry-specific regulation.

In comparison to general regulation like the FTA and TPA, industry-specific regulation is generally more narrowly focused and tends to focus more on the trader.³³ Industry-specific regulation often sets rules on trader behaviour, for example, the *Motor Car Traders Act 1986* (Vic) and the *Estate Agents Act 1980* (Vic),

³³ For a detailed discussion of the differences between, and the strengths and weaknesses of general and industry-specific regulatory approaches, see Consumer Affairs Victoria's Research Paper *Choosing between general and industry specific regulation*, Research Paper No. 8, November 2006.

put conditions on the people who can hold a licence to operate in those industries. Licence conditions include having sufficient financial resources to carry on business in the case of motor car traders (s. 13(4)) and holding minimum qualifications for estate agents (s. 14(1)).

However, there are many instances where industry-specific regulation includes general conduct standards similar to those contained in the FTA. For example, the *Food Act 1984* and the *Veterinary Practice Act 1997* both contain provisions prohibiting false, misleading or deceptive advertising, similar to sections 9–12 of the FTA. Other industry-specific Acts contain more prescriptive requirements relating to the types of conduct prohibited by the FTA, such as misleading advertising, misleading or unconscionable conduct, implied warranties and unfair contracts. For example, the *Motor Car Traders Act 1986* (s. 38) specifically prohibits odometer tampering, which is an example of deceptive conduct and specifically provides for a 3-month or 5000km statutory warranty, which overlaps to some extent with the merchantable quality provision of the FTA. The *Introduction Agents Act 1997* prohibits false advertising (s. 17) and staff from pretending they are clients (s. 16) which would also breach the FTA.

The types of industry-specific regulation within the consumer regulatory framework are quite varied. Regulatory tools that set rights and obligations in specific industries include:

- licensing schemes — generally restrict entry to an industry and/or impose restrictions on conduct within an industry;
- negative licensing schemes — ban traders from operating in an industry if certain standards are breached or not met;
- registration schemes — require traders to notify the regulator before operating in an industry, but may also require the trader to meet certain qualifications or conditions before they can be registered;
- conduct standards — legislative provisions that require traders within a particular industry to do certain things or meet certain standards;
- codes of conduct — either mandatory (which set out the rules under which traders in an industry must operate) or developed and administered by the industry as part of a co-regulatory scheme with legislative backing provided by the government; and
- accreditation schemes — require traders to satisfy specified criteria to obtain accreditation in a particular industry (which may be either mandatory or voluntary).

The various regulatory tools that operate in Victoria are discussed further under the headings below.

3.4.1 Licensing schemes

As noted previously, within the Consumer Affairs portfolio, the Business Licensing Authority is responsible for licensing determinations for estate agents, introduction agents, motor car traders, prostitution service providers, credit providers, second hand dealers and pawnbrokers, and travel agents. Liquor licensing is the responsibility of the Director of Liquor Licensing. The number of applications received

and licences granted by the Business Licensing Authority in each industry in 2005-06 are shown in table 1.

Table 1. Licence applications received and granted in 2005-06			
<i>Licence type</i>	<i>Applications received in 2005-06</i>	<i>Licences Granted/Noted in 2005-06</i>	<i>Total number of licences in 2005-06</i>
Credit providers	176	165	931
Estate agents	608	573	7480
Introduction agents	11	11	50
Motor car traders	159	129	2198
Prostitution service providers	24	10	151
Second-hand dealers and pawnbrokers	594	506	6270
Travel agents	55	47	925
Total	1627	1441	18005

Outside the Consumer Affairs portfolio, there are licensing schemes for a broad range of industries including health care, legal services, finance and superannuation, building, security providers, cadastral surveyors, driving instructors and taxis.

The various licensing schemes differ greatly in the level of regulation applied to the industry.³⁴ However, as identified by the Bureau of Industry Economics, licensing schemes typically have the following broad components:

- notification — the business is required to register with, and supply information to, a specified agency;
- prior approval — the business must obtain the approval of a specified agency before it can commence operating in the area covered by the licence;
- standards — the business is required to comply with licence conditions; and
- enforcement — it is unlawful to supply the products or services covered by the licence without holding a valid licence. A business that does not comply with the licence conditions could have additional conditions imposed on its licence, or have its licence revoked and lose its right to carry on that business.³⁵

³⁴ For a detailed discussion of licensing schemes, see Consumer Affairs Victoria's Research Paper *Using Licensing to protect consumers' interests*, Research Paper No. 9, November 2006.

³⁵ BIE (Bureau of Industry Economics) 1996, *Business Licences and regulation reform*, Report 96/10, pp. 5-6.

Box 6 outlines the key features of four Victorian business licensing schemes as an indication of how the various elements fit together under different schemes.

Box 6. Key features of three licensing schemes in Victoria

Estate agents

Anyone who buys, sells, leases or manages real estate or a business on behalf of a vendor, landlord, purchaser or tenant must hold an estate agent's licence or be employed by a licensed estate agent as an agent's representative. There are age, qualification and other restrictions on who can be licensed as an estate agent or employed as an agent's representative.

Once licensed, estate agents must meet specified conduct requirements. For example, they must:

- maintain separate accounts for moneys held in trust on behalf of clients;
- supervise any estate agency business for which they are responsible and the staff working in the business; and
- meet prescribed minimum requirements relating to client documentation.

Motor car traders

It is an offence to carry on the business of trading in motor cars without holding a motor car trader's licence. Individuals, partnerships and bodies corporate may apply for a motor car trader's licence, provided they do not fall within specified categories (for example they are disqualified, they have insufficient financial resources, expertise or knowledge to carry on business as a motor car trader, or have been convicted or found guilty of a serious offence).

Motor car traders must comply with a range of conduct requirements outlined in the *Motor Car Traders Act 1986* including requirements relating to odometer readings, roadworthy certificates, consignment selling, advertising, cooling-off periods and statutory warranties. They must also comply with other conditions, such as providing information to consumers on the previous owner, distance travelled, price, age and model of second hand vehicles.

Motor car traders must also contribute (through their annual licence fee) to the Motor Car Traders Guarantee Fund, which provides a compensation scheme for customers who have suffered a loss as a result of a licensed motor car trader's failure to comply with certain provisions of the Act.

Second hand dealers and pawnbrokers

Anyone who trades in second hand goods (a second hand dealer) or advances money on the security of pledged goods (a pawnbroker) must be licensed. While licences are ongoing, the licence holder must report annually to the Business Licensing Authority, and the licence is automatically cancelled if the licensee or an associate:

- has been convicted or found guilty within the previous five years of an offence involving fraud, dishonesty, violence or drug trafficking that attracts a sentence of at least three months imprisonment; or

- has their licence or registration cancelled or suspended, or is disqualified from any occupation or business under Australian law.

Second hand dealers and pawnbrokers must also meet conditions on how they conduct their business, including identifying their customers, recording information on their transactions, informing customers of their rights in pawning goods, and reporting suspected stolen goods to the police.

Credit providers

The regulatory framework applying to credit providers is referred to as a registration scheme. Unlike the schemes above, prior approval is not required before a person can operate in the industry. However, the other components of a licensing scheme, as outlined by the Bureau of Industry Economics, are present.

The credit provider registration scheme was established by the *Consumer Credit (Victoria) Act 1995*. Under the scheme, it is unlawful to provide consumer credit in Victoria without being registered.³⁶ Registration is a simple process with no upfront fee or continuing annual fee. Applicants supply some basic details to the Registrar of the Business Licensing Authority and then update the register annually if these details change. However, once a credit provider is registered, the Director of Consumer Affairs has extensive investigation powers. He may take disciplinary action if a credit provider does not comply with Victoria's credit laws or fails to carry on business 'efficiently, honestly and fairly'. The register of credit providers is publicly available.

A number of licensing schemes also establish statutory mechanisms for consumers to obtain redress if certain conduct standards or requirements are breached.

One such statutory redress facility is the Motor Car Traders Guarantee Fund, which was established by the *Motor Car Traders Act 1986*. One of the purposes of this fund is to compensate people who suffer loss because of certain actions of licensed motor car traders. The fund is an avenue of last resort allowing people (other than a motor car trader, financier, manufacturer or related company) to claim against the fund for losses incurred because a motor car trader failed to:

- comply with specific provisions of the Act;
- transfer good title to a car;
- comply with an agreement to pay the purchase price to a person who sold a car to the trader or to remit all, or part, of the purchase price to another person;
- pay transfer fees, registration fees or stamp duty on a new or unregistered car or to provide a roadworthy certificate or other document required to enable the car to be registered;
- remit money paid to the trader as a premium or purchase price for an insurance policy or warranty to the person who was to provide the insurance or warranty; or

³⁶ Note that authorised deposit taking institutions, such as banks, are not required to be registered under the scheme. These institutions are regulated under the Commonwealth's financial services legislation.

- satisfy a court order, order of VCAT, or order made by the Authority for a licensee to pay compensation to persons losing money arising from the licensee's trading in motor cars.

A similar compensation scheme available to Victorian consumers is the Travel Compensation Fund (TCF). The TCF operates under a Deed of Trust subscribed to by all States and Territories except the Northern Territory. It is a condition on travel agents in all jurisdictions that licensees are members of the TCF. Consumers can apply to the TCF for compensation where they have suffered financial loss (up to \$25,000) where the agent has ceased trading or collapsed; or where the agent has failed to pass on monies to service providers (such as airlines).

Another statutory compensation scheme, administered by Consumer Affairs Victoria, relates to estate agents. The *Estate Agents Act 1980* provides that payment may be made from the Victorian Property Fund to compensate any person who suffers financial loss through the defalcation of a licensed estate agent or their employee. The Victorian Property Fund is sourced from estate agent licence fees and interest earned on deposits in estate agent's trust accounts.

3.4.2 Negative licensing schemes

A number of negative licensing schemes operate in Victoria. Unlike other licensing or registration schemes, which allowing people to trade only once they have demonstrated specified qualifications or registered with a regulator, negative licensing schemes simply exclude people from operating in the industry based on certain criteria.

In the finance broker industry, the *Consumer Credit (Victoria) Act 1995* establishes a form of negative licensing by prohibiting certain people from engaging in finance broking (s. 37C) yet allowing people to enter the industry without the need to first obtain clearance from a regulator that they do not fall within one of the prohibited categories.

Similar restrictions apply for people wishing to work as estate agent representatives or employees of motor car traders. In Victoria, the licensing schemes that cover both the motor car trader and estate agent industries prohibit motor car traders or estate agents from employing someone as an agent's representative (in the case of estate agents) or sales representative (in the case of motor car traders) if that person falls within specified categories that disqualify them, thereby creating a form of negative licensing for employees in these industries.

3.4.3 Registration schemes

Consumer Affairs Victoria and the Business Licensing Authority administer several registration schemes in Victoria, which require traders in particular industries to register before they can trade. As noted above, notification (or registration) is also one of the components of a licensing scheme and the distinction between the two types of regulation may be blurred.

The largest of these registration schemes is the business names registration scheme administered by Consumer Affairs Victoria. This scheme involves minimal regulation and simply requires traders operating under a name other than a company or personal name to register the name of the business under which they trade in Victoria and, once registered, to display the business name at the registered address and business address and on documents issued. Business name registrations must be kept up to date and renewed every 3 years. The registration scheme provides a means of identifying and locating traders operating behind businesses and facilitates

the provision of information to traders on legislation and compliance obligations. Applications for business name registrations are received in-person, online and by fax or mail. In 2005-06, Consumer Affairs Victoria processed 64,136 new applications for business names and renewed 90,220 business name registrations.

Consumer Affairs Victoria also administers registration schemes relating to incorporated associations, co-operatives and limited partnerships, patriotic funds, fundraisers and processes certain retirement village applications. Services related to these schemes are offered face-to-face, via mail and fax and, increasingly, online. In addition to processing applications, Consumer Affairs Victoria maintains public registers of these organisations, and monitors their compliance with legislative requirements. A summary of Consumer Affairs Victoria's activities in relation to these registration schemes is shown in table 2.

<i>Name of scheme</i>	<i>Number of new applications processed during 2005-06</i>	<i>Total number on register as at 30 June 2006</i>
Business names	64,136	365,469
Associations	1,507	32,552
Co-operatives	10	748
Limited partnerships	21	94
Retirement villages	323	323
Fundraisers	250	851

In November 2007, Consumer Affairs Victoria will commence registering funeral providers in accordance with a funeral industry registration scheme established under the *Funerals Act 2006*.

3.4.4 Conduct standards

Some industry-specific legislation operating in Victoria seeks to regulate conduct within a particular industry.³⁷ This is achieved either through prescriptive requirements that require traders to do certain things or through general conduct requirements that specify standards of conduct but do not prescribe how these standards are to be met.

An example of a prescriptive conduct requirement is a requirement for traders to provide specified information to their customers or the general public. For example, in the finance and superannuation sectors, superannuation trustees must inform consumers about the Superannuation Complaints Tribunal. Similarly, before entering a credit contract, a credit provider must give the debtor a pre-contractual statement and an information statement in a form prescribed by the Consumer Credit Regulation 1995 pursuant to section 14 of the Consumer Credit Code. The first page of the pre-contractual statement must disclose:

³⁷ Although many examples of conduct requirements are found within licensing schemes, not all regulation of conduct is part of a licensing scheme.

- the amount of credit to be provided or, if the amount is not ascertainable, then the maximum amount of credit to be provided;
- the annual percentage interest rate or rates;
- details of any interest free period;
- the total amount of interest if the contract is to be;
- paid out within seven years;
- the number, amount and frequency of repayments;
- any credit fees and charges. (s. 14 Consumer Credit Code)

The rest of the pre-contractual statement must state to whom the credit is to be paid, any variations in the contract, the frequency of the account statement and details on default rates and other charges. The information statement must explain the debtor's rights and obligations under the Consumer Credit Code.

In relation to petrol and diesel regulation, a range of obligations are imposed on wholesale suppliers to set and publish daily on their websites wholesale prices at the terminal gate³⁸ and to disclose certain pricing information on invoices to customers at the time of delivery.

In relation to pre-paid funerals, prior to a consumer signing a contract, funeral organisers or directors must disclose in writing:

- where and how the funeral money is to be invested
- any terms or conditions that apply to the investment, and
- any other prescribed information.

Under the *Funerals (Pre-paid Money) Act 1993*, the pre-paid funeral contract must also specify:

- the type of funeral service to be supplied
- any goods, services and facilities to be supplied in connection with the funeral service, and
- the total cost of the funeral service.

To protect business consumers when renting retail premises, the *Retail Leases Act 2003* protects retail tenants by imposing certain requirements on landlords. These include disclosure requirements relating to the tenancy agreement, a requirement to compensate the tenant for interference with the tenancy in certain circumstances, and a requirement not to engage in unconscionable conduct in connection with a lease or proposed lease.

Another example of a general legislative conduct standard can be found in the *Owners Corporation Act 2006*, to come into force in late 2007. Under a registration scheme for managers of owners corporations established by the Act, registered managers will be required to act honestly and in good faith, exercise due care and diligence and not make improper use of the manager's position to gain an advantage personally or for any other person (s. 122).

³⁸ The legislation provides a flexible formula for suppliers to determine terminal gate prices.

3.4.5 Codes of conduct

A number of industry codes of conduct apply in Victoria. Some are national, while others are specific to certain industries or regions. Industry codes of conduct can be mandatory, voluntary or part of a co-regulatory scheme.

The FTA (Part 6) provides for the preparation of voluntary codes and the prescription of mandatory codes for different industries. Consumer Affairs Victoria is working with Tourism Victoria and the Tourism Alliance (an industry association representing tourism operators) on the development of a voluntary code of practice for short-term accommodation booking agents, which are exempt from the more stringent requirements of the *Estate Agents Act 1980*. To date, no mandatory codes have been prescribed under the FTA.

Under sections 51AD and 51AE of the Trade Practices Act, the Australian Government may also prescribe mandatory or voluntary industry codes of conduct. A number of mandatory codes have been prescribed under these provisions, although these relate more to the competition provisions of the TPA than the consumer protection provisions, and have an indirect effect on consumers. One example is the petroleum industry Oilcode, which promotes the interests of fuel resellers by setting minimum standards for petrol re-selling arrangements, establishing an independent downstream petroleum dispute resolution scheme and introducing transparent wholesale pricing.

Other industry codes of conduct operating in Victoria have been developed as part of broader industry specific regulatory schemes. For example, compliance with the Energy Marketing Code of Conduct is a licence requirement for energy and gas retailers who sell or intend to sell to consumers of less than 160MWh electricity and 10,000 gigajoules gas per year. The Essential Services Commission is responsible for the implementation and administration of the Code, using expert advice from industry and consumer representatives.

Other general legislation designed to protect consumers includes professional standards legislation, which has been enacted by all

Each of the Australian jurisdictions has enacted professional standards legislation to support the self-regulation of the professions and other occupations. The Victorian *Professional Standards Act 2003* provides that members of professional and occupational associations seeking the benefit of a cap on their liability in damages claims arising from negligence are required to prepare self regulatory professional standards schemes to increase the levels of professional standards and minimise the likelihood of negligence in providing professional services to consumers. The Act has established a Professional Standards Council which has the statutory power to approve, monitor and review such schemes including undertaking compliance audits of such schemes. The legislation also sets out a *Model Code for Complaints and Disciplinary Matters* which associations³⁹ may adopt as part of their schemes.

Many codes of conduct are developed by industry in consultation with government agencies, although they are not part of industry regulatory schemes. For example, Consumer Affairs Victoria had an active role in the development of many industry codes including:

- the Electronic Funds Transfer Code;

³⁹ Further information on the Professional Standards Council is available at www.professionalstandardscouncil.gov.au.

- the Code of Banking Practice;
- the Supermarket Scanning Code; and
- the Weight Management Industry Code of Practice

Three examples of industry-specific codes that have been developed voluntarily by industry associations are outlined in Box 7.

Box 7. Examples of voluntary industry codes of conduct

The AANA Food & Beverages Advertising & Marketing Communications Code⁴⁰

The Australian Association of National Advertisers' (AANA) Food & Beverages Advertising & Marketing Communications Code is administered nationally by the Advertising Standards Bureau. The Code sets standards for the content of advertising and marketing material promoting food and beverage products. Among other standards, the Code specifies the following.

- Advertising and/or Marketing Communications for Food and/or Beverage Products shall be truthful and honest, shall not be or be designed to be misleading or deceptive or otherwise contravene Prevailing Community Standards, and shall be communicated in a manner appropriate to the level of understanding of the target audience of the Advertising and/or Marketing Communication with an accurate presentation of all information including any references to nutritional values and/or health benefits.
- Advertising and/or Marketing Communications for Food and/or Beverage Products which include nutritional or health-related comparisons shall be presented in a non-misleading and non-deceptive manner clearly understandable by an Average Consumer.
- Advertising and/or Marketing Communications directed towards Children for Food and/or Beverage Products shall be particularly designed and delivered in a manner to be understood by those Children, and shall not be misleading or deceptive or seek to mislead or deceive in relation to any nutritional or health claims, nor employ ambiguity or a misleading or deceptive sense of urgency, nor feature practices such as price minimisation inappropriate to the age of the intended audience.

The Weight Management Industry Code of Practice⁴¹

The Weight Management Industry Code of Practice is administered by the Weight Management Council Australia Limited, which manages its members' compliance with the Code.

The Code was developed by representatives of the weight management industry, consumer organisations, health and nutrition professionals and state and federal government consumer affairs departments. The Code covers all aspects of conducting a weight loss business including advertisements, disclosure, contractual agreements, cooling-off periods, refunds, complaint resolution and sanctions for breach, staff training and qualifications and sales practices.

⁴⁰ See www.advertisingstandardsbureau.com.au (accessed 5 April 2007).

⁴¹ See www.weightcouncil.org.au (accessed 5 April 2007).

*The General Insurance Code of Practice*⁴²

Among other things, the Code requires general insurers to:

- meet agreed timeframes for handling claims or responding to complaints;
- fast-track claims or make advance payments when customers show they are in financial hardship as a result of the damage or loss leading to their claim;
- give reasons for their decision if they are unable to provide cover and refer customers to another insurer, the Insurance Ombudsman Service or the National Insurance Brokers Association (NIBA) for further information about insurance options; and
- handle disputes and rectify mistakes in a transparent and efficient manner and in a specified time.

Compliance with the Code is monitored by the independent Insurance Ombudsman Service.

3.4.6 Accreditation schemes

Accreditation schemes signal to purchasers that a service provider within a particular industry has satisfied specified criteria. Some accreditation schemes affecting Victorian consumers are voluntary, often operated through an industry body that self regulates. For example, retirement villages can seek accreditation through the Retirement Villages Association (RVA), which accredits operators that meet the Association's management, service and amenity standards. The standards set by the scheme are in addition to those required under the *Retirement Villages Act 1986* (Vic). Consumer Affairs Victoria supported the development of RVA's Accreditation Scheme as a self-regulatory approach to promoting continuous improvement in retirement village service delivery.

Other mandatory accreditation schemes also operate in Victoria to ensure traders in certain industries or providing certain services meet specific regulatory criteria. For example, to ensure that liquor licensees receive a high standard of training on the responsible serving of alcohol, they are required to undertake an approved course conducted by an accredited Registered Training Organisation (RTO). To obtain accreditation, a RTO must apply to Consumer Affairs Victoria and provide details of the organisation and evidence of individual trainer's qualifications and experience.

4 Non-regulatory interventions

A wide variety of non-regulatory responses to consumer problems are used in Victoria to empower and protect consumers in the marketplace and to educate and inform traders regarding good business practices and their legal obligations. The types of non-regulatory responses include:

- providing advice and responding to enquiries;
- information campaigns; and
- community engagement and education programs.

⁴² See www.insurancecouncil.com.au (accessed 5 April 2007).

4.1 Providing advice and responding to enquiries

Consumer Affairs Victoria has offices across the state where Victorians can access face-to-face advice and assistance on consumer and tenancy issues. The metropolitan office is the newly opened Victorian Consumer & Business Centre, which is co-located with the Office of Small Business in Melbourne's central business district.

This is a 'one-stop-shop' for consumers and traders, enabling the provision of face-to-face information, advice and transactions for licensing, businesses and associations, consumers and tenants. Consumer Affairs Victoria receives an average of 200 visits a day to the Centre and in February 2007 celebrated its 30,000th customer since it opened in June 2006.

Consumers, tenants and traders also have access to face-to-face information and advice through regional offices in Ballarat, Bendigo, Geelong, Mildura, Morwell, Wangaratta and Warrnambool. A mobile outreach service operates from each of the offices, ensuring that Consumer Affairs Victoria regularly visits each regional Local Government Area. From July 2005 to February 2007, the regional offices responded to 23,650 enquiries and complaints, many of which were discussed face-to-face.

In addition, Consumer Affairs Victoria responds to consumer enquiries through a statewide telephone service (the 1300 55 81 81 'Consumer Helpline'), and via email and post. In 2005-06, Consumer Affairs Victoria received 571,184 calls to the Consumer Helpline, 21,098 enquiries by email and 1382 enquiries by mail.

There is also a dedicated phone line for indigenous consumers as well as language-specific enquiry lines for Arabic, Russian, Vietnamese, Cantonese and Mandarin speakers. In addition to the enquiries received through the general Consumer Helpline and the Indigenous and multi-lingual services, Consumer Affairs Victoria also receives around 80,000 enquiries per year relating to specific areas of its operations including liquor licensing, licensed occupations and trade measurement.

Due to the very broad scope of consumer transactions, the enquiries received by Consumer Affairs Victoria cover an array of topics. In 2006, the top 10 telephone enquiries to the Consumer Helpline regarding goods and services were:

1. Personal Goods and Services — clothing, hair products and jewellery, in relation to defective goods, misleading advertising and undisclosed or unreasonable charges;
2. Computers, Electronic and Telecommunications — mobile phones and personal computers, including computer software and hardware, warranty and product quality;
3. Automotive and Transport — vehicle purchases, the quality of service by motor car traders, help with panel beaters and warranty repairers;
4. Building and Renovating — non-completion of work, misleading omissions and non-issue of required documentation by the tradesperson;
5. Lifestyle and Leisure — gym contracts, event ticketing, travel and accommodation, on issues such as unsatisfactory service and misleading advertising;

6. Furniture and Furnishings — product quality and warranty enquiries, refunds, trader conduct and misleading advertising;
7. Credit and Finance — over-commitment or repayment difficulties, repossessions, trader conduct, consumer leases and debt collection procedures (including court judgements);
8. Household and Domestic Goods and Services — pricing and charges, damage to property and unsatisfactory or substandard service related to dry cleaning, home maintenance, catering services and utility providers;
9. Domestic Appliances — small electrical appliances, major kitchen appliances and whitegoods, including the quality of these products, warranty issues, pricing concerns and trader conduct and
10. Scams — scams victims and people wanting to dob-in-a-scam relating to dubious phone calls, email messages, chain letters, door-to-door sales, print advertisements or phoney investment and employment opportunities.

While some enquiries result in conciliation or enforcement action or the complaint being referred to another body, they nearly always involve initially providing the inquirer with information. Dealing with telephone, face-to-face and written enquiries is an increasing part of Consumer Affairs Victoria's work. For example, from 2001–02 to 2005–06, the number of enquiries received by Consumer Affairs Victoria increased almost 27 per cent.

Consumer Affairs Victoria also funds a range of community organisations to provide advice and advocacy services to consumers. In 2005-06, Consumer Affairs Victoria funded not-for-profit agencies to provide:

- financial counselling services to low income families and individuals facing financial difficulty;
- advocacy services to vulnerable and disadvantaged consumers and tenants;
- specialist support services to Consumer Affairs Victoria and advocates in the areas of consumer credit, aged tenants, rooming house and caravan park residents, and general tenancy issues;
- funding not-for-profit agencies for policy research and advocacy;
- grants from the consumer credit fund for specified purposes; and
- grants from the Victorian Property Fund for specified purposes.

An example of a project being funded in 2007, is a series of *Civil Claims Workshops* being run by the Peninsula Community Legal Centre. The aim of the workshops is to help consumers better prepare for civil claims by teaching them how to complete a civil claims application, prepare for a hearing at the Victorian Civil and Administrative Tribunal (VCAT) and understand how VCAT decisions and enforcement orders procedures work.

4.2 Provision of information

As well as responding reactively to requests for information and advice, Consumer Affairs Victoria has a range of proactive strategies to make information more useful

and accessible to consumers. These strategies use a variety of media including websites, publications, direct advertising campaigns, direct mail, publicity and advertorials in the media, and exhibitions, to deliver information to consumers. Consumer Affairs Victoria distributes information via intermediaries such as finance lenders, estate agents, hardware stores, libraries and community centres, to reach consumers at key points in their purchasing lifecycle and help them make better informed purchase decisions.

During the 2006 calendar year, the Consumer Affairs Victoria website received 1,121,874 visits (sessions), making it one of the most highly frequented Victorian Government websites. The Consumer Affairs Victoria website provides a range of information and tips for consumers and business. Consumers benefit from information and tips on their rights and responsibilities, scam alerts and guides to help them protect their interests when buying products and services that are known to generate a high incidence of consumer problems. Newsletters, press releases and updates provide an important mechanism to alert the business community and industry participants to important information regarding compliance. Consumer Affairs Victoria publishes a number of newsletters that are targeted to business such as:

- a quarterly newsletter distributed by direct mail to all motor car traders;⁴³
- a quarterly newsletter for estate agents;⁴⁴
- Grapevine: an electronic newsletter distributed to all liquor licence holders;⁴⁵ and
- *CAV Link*: a generic Consumer Affairs Victoria newsletter that is mailed to all subscribers and key stakeholders.⁴⁶

The website also allows consumers and business to access a range of services on-line, such as, enquiry and complaint lodgement, business name searches and registrations, temporary limited liquor licence applications, and annual return submissions for real estate agents. Consumer Affairs Victoria also operates an online subscription service for convenient email updates, as well as targeted newsletters for business, consumers and stakeholders.

As at April 2007, Consumer Affairs Victoria had close to 150 information products (DL and A5 brochures, factsheets, guides and magazines) available in hard copy and on its website, which provided consumers with an array of information on a variety of topics. Topics include renting, building and renovating, buying and selling a home, product safety, credit and debt, and information for businesses, retirement village operators and owners corporations. A number of these publications are available in multiple languages to assist consumers from non-English speaking backgrounds.

One of the most popular types of publication is the series of consumer guides, which are available online and in hard copy to guide consumers on how to choose the best product or service, or provide information on their rights if they are not satisfied with

⁴³ Consumer Affairs Victoria *Driving a Better Industry - A Newsletter for Motor Car Traders*.

⁴⁴ Consumer Affairs Victoria *Real Estate News*.

⁴⁵ Consumer Affairs Victoria *The Grapevine*.

⁴⁶ Consumer Affairs Victoria *CAV Link*,

<http://www.consumer.vic.gov.au/CA256F2B00224F55/page/CAVLink+Newsletter?OpenDocument&1=90-CAVLink+Newsletter~&2=~&3=~>.

the product or service they receive. These guides are also published in multiple languages. Two of these guides — buying a car and renting a home — are summarised in Box 8.

Box 8. Consumer guides for buying a car and renting a home

Better Car Deals

Consumer Affairs Victoria's *Better Car Deals* publication is a guide for buyers of new or used cars.⁴⁷ The guide covers:

- compulsory and standard fees and charges;
- obtaining a loan and insurance;
- consumers' rights and obligations in buying a new or used car from a licensed dealer, including warranties and trade-ins;
- consumers' rights and obligations in buying a used car through private sale or auction;
- a checklist for assessing the quality of the vehicle;
- tips on ongoing maintenance and upkeep;
- identifying the right repairer and the obligations on the repairer and the owner; and
- what to do in the case of an accident.

Renting a home: a guide for Tenants and Landlords

Consumer Affairs Victoria's publication *Renting a home: a guide for Tenants and Landlords* is a guide on what tenants, landlords and agents must do under Victoria's residential tenancy laws. Landlords and agents that do not give residents a copy of the guide before they move in are liable for a \$500 fine. The guide covers:

- tips for tenants, landlords and agents to protect their rights;
- the tenancy agreement;
- charges such as deposits, utilities, the bond and rent;
- condition reports, and rights and responsibilities in regard to the condition, cleanliness, maintenance and repair of the premises;
- conditions on landlords or agents entering the premises;
- rights and responsibilities in ending the tenancy; and
- dispute resolution processes.

Often, the consumer guides are used in broader information campaigns aimed at informing consumers and traders of their rights and responsibilities when buying and selling in a particular industry. Consumer Affairs Victoria frequently uses targeted direct marketing campaigns to increase the penetration and effectiveness of its

⁴⁷ This publication is supported by the Victorian Automobile Chamber of Commerce (VACC) and the Royal Automobile Club of Victoria (RACV)

messages. One example is the strategy used to inform domestic building consumers of their rights and responsibilities, the common pitfalls and tactics to ensure a hassle-free building project.

The building and renovating campaign, which commenced on 4 June 2006, was designed to educate consumers on their legal rights and responsibilities, particularly under the *Domestic Building Contracts Act 1995*. Direct marketing was used to generate orders for a consumer Guidebook titled *Building and Renovating: a Guide for consumers*⁴⁸. A direct marketing model was selected because of its ability to track and interpret activity and, allow a greater degree of targeting.

The campaign focused on reaching consumers at key points in their building and renovating decisions, particularly early in the process when consumers have not been locked into decisions and are more able to protect themselves. Channels used have been: Bunnings hardware stores, homemaker magazines, internet keyword search engines, newspaper advertisements, seminars and home shows.

Consumer Affairs Victoria continually evaluates its campaigns. Using these evaluations to monitor the campaign's success and improve the delivery of future campaigns. For example, multi-channel marketing is being used to analyse and drive the building and renovating campaign. Testing different variables has allowed the campaign to learn continually from itself, and change any time to reflect the information needs of consumers.

Consumer Affairs Victoria has an extensive and developed communications program which aims to educate and provide information to industry about their rights and obligations under both general and specific consumer protection laws. For example, Consumer Affairs Victoria has a generic fair trading brochure that provides an overview of key provisions of the *Fair Trading Act*.⁴⁹ This overview is given to all new businesses as part of the business names registration process, together with fact sheets or brochures on issues such as unfair contract terms, refunds and complaint handling.

In relation to general obligations contained in the FTA, Consumer Affairs Victoria has produced guidelines on the key provisions on unconscionable conduct⁵⁰ (ss. 7, 8 and 8A), misleading and deceptive conduct⁵¹ (Part 2) and unfair contract terms⁵² (Part 2B). These guides are designed to help businesses understand their responsibilities and, to the extent necessary, voluntarily change their behaviour to minimise the risk of contravening or offending the relevant provisions. The guides are not intended as legal advice, but they do contain information on how the provisions have been applied by the courts.

⁴⁸ Consumer Affairs Victoria *Building and Renovating: a Guide for consumers*, Melbourne.

⁴⁹ Consumer Affairs Victoria *A fair trading guide for business*, Melbourne.

⁵⁰ Consumer Affairs Victoria *Fair Trading: preventing unconscionable conduct in trade or commerce against consumers or small businesses: Guidelines on the unconscionable conduct provisions of the Fair Trading Act 1999*, May 2005.

⁵¹ Consumer Affairs Victoria *Preventing misleading and deceptive conduct in trade or commerce – an Australian standard on commercial behaviour: Guidelines on the false, misleading and deceptive provisions of the Fair Trading Act 1999*, May 2005.

⁵² Consumer Affairs Victoria *Preventing unfair terms in consumer contracts - Preliminary guidelines for suppliers*, November 2003.

4.3 Community engagement and education programs

Consumer Affairs Victoria has a number of programs aimed at engaging with the community to improve awareness of Consumer Affairs Victoria's services and consumer issues more generally.

The regional offices engage with local communities and organisations to develop and deliver projects based on community needs, particularly in relation to the vulnerable and disadvantaged.

During 2007, all regional offices will implement a training program for landlords and tenants, to improve the knowledge and understanding of rights and responsibilities under the *Residential Tenancies Act 1997*. Many of the complaints Consumer Affairs Victoria receives in regional areas relate to tenancy, with a lack of knowledge of processes one of the primary causes.

Other initiatives planned include the roll-out of Fair Trading Act training for businesses across regional Victoria. This project is being piloted in the Gippsland region, under the banner of 'Better Business in Latrobe'. Training sessions have been delivered in Moe, Morwell and Traralgon with further sessions planned. The project will be evaluated by the end of the financial year with a view of state-wide delivery from January 2008.

The Community Education Unit within Consumer Affairs Victoria also proactively engages with the metropolitan community to further Consumer Affairs Victoria's goals and assist vulnerable and disadvantaged consumers who would otherwise not access Consumer Affairs Victoria's services. The unit assists workers in referral agencies — such as community legal centres, community health centres, citizen advice bureaus, council based family and youth services, and Centrelink — to understand Consumer Affairs Victoria's services. These agencies are often the first point of call for disadvantaged consumers in difficulty.

The Unit also has a community speaker program, which involves talks and workshops for vulnerable and disadvantaged consumers and tenants about their consumer rights and responsibilities, and where to obtain help if they have a dispute with a trader or landlord. These talks are available to groups such as senior citizens clubs, retirement village residents, and youth and school groups.

4.3.1 Indigenous and multicultural consumers

Consumer Affairs Victoria also has two more-targeted programs — the Indigenous Consumers Unit (ICU) and the Multicultural Consumers Unit (MCU) — that work directly with Indigenous and multicultural consumers to improve their understanding of their rights and responsibilities.

The ICU was established in May 2003 to reduce cultural barriers in Consumer Affairs Victoria service delivery, and increase awareness and use of the specialised services Consumer Affairs Victoria makes available to Victoria's Indigenous communities. The ICU delivers services directly via a dedicated 1300 helpline number, and consumer awareness and educational activities. It works closely with Victorian Indigenous communities and government and non-government organisations, to ensure consumer and tenancy programs are directly relevant to the lives of Indigenous Victorians and to improve awareness of consumer rights and complaints handling processes. For example, the ICU is significantly involved with governance training targeting Indigenous associations and co-operatives, and has formed a partnership

with Aboriginal Affairs and the Commonwealth Office of the Registrar of Aboriginal Co-operatives.

The ICU is involved in partnerships with other state government agencies (including the Dispute Settlement Centre, Energy and Water Ombudsman, Equal Opportunity and Human Rights Commission, Essential Services Commission, Office of the Health Services Commissioner, Office of the Public Advocate, Sheriff's Office, and the Victorian Aboriginal Legal Service) to promote awareness of government services and how to access these services. The 'Communities Together Program' is a whole of government program initiated by Consumer Affairs Victoria. It will, for example, deliver four workshops in the Loddon Mallee and Gippsland regions by June 2007.

Consumer Affairs Victoria's MCU works with non-English speaking background communities, community service providers and other government agencies to identify and develop programs that target the needs of consumers and tenants from non-English speaking backgrounds. The MCU focuses primarily on newly arrived migrants and refugees, who are some of the most vulnerable people within the multicultural sector. Consumer Affairs Victoria has developed a partnership with the Springvale Community Aid and Advice Bureau (SCAAB) and delivers an outreach service from the SCAAB premises one day per week. This service is well-utilised by local residents. Another element of the partnership is the development of a tenancy education program targeting African refugees. Consumer Affairs Victoria and SCAAB are working closely with the Sudanese community and local property managers to develop and deliver training. The aim of the project is to improve the outcomes for both tenants and landlords.

A similar tenancy project has recently been funded for delivery in the Footscray area, with Consumer Affairs Victoria working in partnership with a consortium led by Melbourne City Mission. A weekly mobile outreach service commenced in April 2007, to provide face-to-face service advice, information and complaint handling services in the area.

Consumer Affairs Victoria works actively with the Adult Migrant Education Service to promote awareness of consumer issues through the provision of education materials, such as the 'Mind your money' campaign.

4.3.2 Consumer education in schools

In addition to the above community engagement programs, Consumer Affairs Victoria has a range of community education programs to improve consumer and trader awareness of their rights and responsibilities and to develop consumers' skills to effectively participate in consumer markets.

One of the most significant initiatives is Consumer Affairs Victoria's Consumer Education In Schools (CEIS) program to provide young Victorians with the essential skills and knowledge to be well-informed and confident consumers. The multi-faceted program is supported by the *Consumer Stuff* series of teacher resource books. The teacher resource books are titled *Commerce*, *English*, *Maths*, *Health and Wellbeing* and *Consuming Planet Earth*.⁵³ These materials target students in Year 9 to 11 and are closely linked to the Victorian curriculum.

⁵³ See Consumer Affairs Victoria *Commerce Resource Book for Teachers*; *Consuming Planet Earth Resource Book for Teachers*; *English Resource Book for Teachers*; *Health & Wellbeing Resource Book for Teachers*; and *Maths Resource Book for Teachers*.

An independent evaluation of the first three teacher resource books revealed strong support amongst teachers with 62 per cent of co-ordinators strongly agreeing the resources were useful for improving students' consumer and financial literacy. Furthermore, 79 per cent of teachers regarded the books as valuable resources while co-ordinators at 81 per cent of schools indicated they intended to use the resources again in 2006 (96 per cent for Commerce teachers).

The program is supported by a range of other tools. Young consumers can participate in the *Consumer Stuff Challenge* competition that is offered free to all Victorian secondary schools. The competition encourages students to research important consumer and financial issues and design a consumer information product that educates their peers. This year the competition has been broadened to cater for the specific needs of students studying the Victorian Certificate of Applied Learning (VCAL). This cohort of students are in a school-work transition phase and regarded as particularly vulnerable consumers. The teacher resources are linked to the VCAL curriculum.

The CEIS program included the production of a 16 page supplement published in The Age newspaper titled *Consuming Stuff! A guide for young consumers* on 15 March 2007 to coincide with World Consumer Rights Day. The supplement was inserted in all 220,000 copies of the newspaper with 41,000 copies distributed directly to 126 schools across the state. Teachers were supported to use the supplement in the classroom with an accompanying *Consuming Stuff Teacher Kit*, which contained activities relating directly to the articles in the supplement. The kit also directed teachers to use Consumer Affairs Victoria's suite of five teacher resource books.

Consumer Affairs Victoria delivers teacher professional development to increase the quality and range of consumer education. Specifically teachers need support to integrate consumer education into their existing "crowded curriculum". Teacher workshops during 2006 produced an additional CEIS teacher resource book titled *Applied Learning Handbook*. This resource is a collection of exemplary units of work which draws on Consumer Affairs Victoria's five existing resources.

The CEIS resources are expanding in 2007 to address the needs of primary education. A new consumer education primary school resource will target students in Years 5 and 6. This will consist of a teacher resource and a student/parent booklet that will stimulate valuable parent/child discussion on a range of consumer issues. The resource will complement the Victorian primary school curriculum to maximise take-up and usage.

4.3.3 Trader education

Consumer Affairs Victoria also actively engages with traders to educate them about good business practice and their rights and obligations under the laws and regulations it administers. The approach typically varies between industries.

The most comprehensive example of Consumer Affairs Victoria's approach to ongoing liaison with industry groups and individual traders is in relation to liquor licensing. As a proactive mechanism to work with industry in promoting compliance and assisting the industry in promoting a culture of responsible serving of alcohol, liquor licensing, in partnership with local councils and Victoria Police, has developed a comprehensive program of opportunities for licensees to liaise with Consumer Affairs Victoria staff and discuss operational issues. These include:

- regional liquor licensee seminars to provide local licensees with updated information on licensing issues;
- liquor licensee forum meetings;
- a Street Talk program where staff visit different areas and meet licensees at their premises to provide information and answer questions; and
- club seminars, which inform club committee members of their responsibilities under the Act.

The Liquor Licensee Forums bring together licensees, police, local government, regulatory authorities and interested businesses and community members at a local level to discuss issues related to the operation of licensed businesses and their impact on the community. Often this cooperative approach leads to the development of Accords (codes of practice which apply specific terms, conditions and strategies to individual local government areas, or the development and adoption by members of general guidelines or sets of principles).

5 Dispute resolution

As noted above, a range of Victorian institutions provide dispute resolution services to consumers. Although some are general schemes offering assistance with many disputes types, the majority are industry-specific. Consumer Affairs Victoria provides a conciliation service for general fair trading issues, as well as specific services in relation to estate agents and building.

In recognition that the alternative dispute resolution sector is developing rapidly, and is currently broad and diverse, the Department of Justice within the Victorian Government is currently undertaking a strategic review of alternative dispute resolution services available in Victoria.

5.1 Consumer Affairs Victoria's dispute resolution services

Consumer Affairs Victoria provides conciliation and mediation services to Victorian consumers, with the objective of empowering those involved to resolve the disputes themselves. Where dispute resolution is inappropriate or unsuccessful, consumers may receive advice about alternative options. Consumer Affairs Victoria also considers whether enforcement action against traders would be appropriate within its *Compliance and Enforcement Policy*⁵⁴ and proceedings may be instituted or defended on behalf of members of the public in specific circumstances.

Section 104 of the FTA provides the legislative authority⁵⁵ for the Director of Consumer Affairs to conciliate complaints where there is a reasonable likelihood of settlement. However, if the whole or any part of a dispute falls within the jurisdiction of another (prescribed) body, the Director must refer the dispute, or that part of the dispute, to that body (s. 104(2)).

Consumer Affairs Victoria's *Conciliation Policy*⁵⁶ sets out the principles Consumer Affairs Victoria follows in conciliating consumer and tenancy complaints, its dispute resolution model, and the criteria it considers in determining whether it will undertake

⁵⁴ Consumer Affairs Victoria *Compliance and Enforcement Policy*, September 2004.

⁵⁵ Section 43C of the Domestic Building Contracts Act 1995 also provides a legislative authority for the Director of Consumer Affairs Victoria to conciliate disputes.

⁵⁶ Consumer Affairs Victoria *Conciliation Policy*, September 2004.

conciliation. The policy explains Consumer Affairs Victoria will invite enquirers to make a written complaint in circumstances where:

1. the subject matter of the complaint falls within the jurisdiction of Consumer Affairs Victoria and is not appropriate for referral to another body;
2. the circumstances give rise to an allegation that the conduct appears to be a breach of implied contractual rights or consumer legislation;
3. the conduct complained of relates to areas Consumer Affairs Victoria believes warrants its involvement in the interests of consumer protection or the promotion of a confident and informed marketplace, including targeted industries or targeted traders;
4. the consumer has made a reasonable attempt to resolve the dispute with the trader;
5. the complaint does not relate to a breach of contract by the consumer;
6. the complaint appears reasonably likely to be settled; and
7. VCAT or the Courts have not already determined the matter, or there is no case pending.

If the matter is conciliated, it will be in accordance with the principles of accessibility, efficiency and effectiveness, independence, fairness and accountability.

Consumer Affairs Victoria's conciliation services are usually provided over the telephone, involving guided conciliation where the conciliator provides advice on rights and responsibilities and can suggest a reasonable outcome to a dispute. Conciliation services are provided by Consumer Affairs Victoria staff and there is no formal decision maker. Where there is no voluntary agreement between the parties and there is no breach of legislation, Consumer Affairs Victoria cannot compel the trader to provide the outcome desired by the consumer, and is unable to make a binding determination of a matter. However, Consumer Affairs Victoria can litigate on behalf of consumers in appropriate cases pursuant (s. 105 FTA).

This general dispute resolution service assists parties to resolve disputes involving a wide range of industry and business types. The complaints handled by Consumer Affairs Victoria's general dispute resolution service can be grouped into the following categories: household goods (encompassing subjects as varied as white goods, contact or door-to-door sales, clothing and footwear, and travel), automotive, estate agents and credit. In 2005-06, the general conciliation team finalised 4,763 complaints about goods and services with over 70 per cent of these resolved through conciliation.

In addition to the general dispute resolution service, Consumer Affairs Victoria provides two industry-specific services. These are the Estate Agents Resolution Service (EARS) (which offers advice, information, mediation and dispute resolution on all types of estate agency matters) and Building Advice and Conciliation Victoria (BACV), an information, advice and dispute resolution service offered jointly by Consumer Affairs Victoria and the Building Commission. In 2005-06, EARS and BACV finalised 1890 and 927 written complaints respectively.

As indicated in table 3, there has been a steady increase in demand for all of Consumer Affairs Victoria's dispute resolution services.

Table 3. Increase in complaints received by Consumer Affairs Victoria, 2001-02 to 2005-06					
	2001-02	2002-03	2003-04	2004-05	2005-06
Residential tenancy & accommodation	4,610	4,754	6,877	7,039	6,986
Household goods	2,979	3,083	4,450	4,875	6,241
Building and construction	899	1,423	1,992	2,010	1,890
Motor vehicles and other transport equipment	956	986	1,462	1,637	1,829
Real estate	Included in RT & accomm	537	1,060	1,106	927
Credit, finance and investment	337	374	225	389	554
Other complaints	1,462	1,323	-	-	40
Total complaints	11,243	12,480	16,066	17,056	18,467

A further service provided by Consumer Affairs Victoria to assist in the resolution of tenancy disputes is the residential tenancies inspection service, which offers free property inspections for tenants disputing rent increases and repairs, and assists landlords where tenants have left goods behind. In 2005-06, Consumer Affairs Victoria inspectors responded to 6,201 requests for inspections from tenants, landlords and estate agents, the majority (4055 being for goods left behind).

During 2005-06 Consumer Affairs Victoria's dispute resolution services facilitated full or partial refunds and repairs or restoration of unsatisfactory goods and services. Almost \$3 million was recovered for consumers, a 40 per cent increase over the year, again building on a consistent increase over the past three years.

In addition to the dispute resolution services it provides directly, Consumer Affairs Victoria funds seven community- agencies to provide state-wide advocacy services for vulnerable and disadvantaged consumers, including assistance in resolving disputes. Advocates can assist by:

- appearing and supporting consumers at VCAT hearings;
- preparing materials for VCAT hearings;
- providing consumers with support and guidance in disputes with traders or landlords, including document preparation and negotiation;
- reviewing documents and explaining these to consumers; and

- providing information and advice on rights, responsibilities and processes.

Consumers calling Consumer Affairs Victoria's Consumer Helpline may be transferred directly to a consumer advocate, if their particular circumstances indicate the consumer requires the assistance of an advocate.

Consumer Affairs Victoria also has a financial counselling program, which funds community-based not-for-profit agencies to provide financial counselling to low-income families and individuals facing financial difficulty. Counsellors can assist with:

- explaining financial options and the potential consequences of not paying bills, fines, or other debts;
- working out budget and payment strategies;
- helping to negotiate with creditors;
- providing advice about government services or benefits, like bond assistance, rent or mortgage relief, or concessions for household bills;
- indicating possible ways to recover fines and costs, or overcome legal action to seize assets;
- providing information about other legal rights and options, such as bankruptcy; and
- providing referrals to other organisations that can help.

5.2 Other general dispute resolution services

There are a number of services available to assist in the resolution of general disputes. These include the Victorian Civil and Administrative Tribunal (VCAT), the Dispute Settlement Centre of Victoria and the Office of the Victorian Small Business Commissioner.

The VCAT deals with a variety of dispute types including disputes relating to:

- purchase and supply of goods;
- credit;
- domestic building works;
- legal profession services; and
- residential tenancies.

It also hears appeals regarding decisions of the Business Licensing Authority in relation to licensing decisions.

VCAT operates by dividing disputes between 'lists'. There is a civil disputes and small claims list for general disputes, and separate lists for credit, domestic building and residential tenancy disputes. The number of applications received in 2005-06 in relation to each of these lists is shown in table 4.

Table 4. Applications received by VCAT in 2005-06	
List	Applications received in 2005-06
Residential Tenancies List	66,302
Domestic Building List	831
Civil Claims List	6,855
Occupational and Business Regulation List	109
Credit List	215
Other ^a	14,540
Total	88,852

^a Other lists are the Planning and Environment List; Guardianship List; General List and Taxation List; Anti-Discrimination List; Real Property List; Retail Tenancies List; Land Valuation List. Source: VCAT Annual Report 2005-06.

To help settle a dispute, a mediation, directions hearing or compulsory conference may take place, depending on the case; however, many cases proceed to a hearing. Hearings give parties the opportunity to call or give evidence, ask questions of witnesses and make submissions. At the end of the hearing, a member of VCAT either gives a decision on-the-spot, or writes a decision after the hearing and delivers the decision as soon as possible.

The parties to a dispute may at any time agree to resolve their differences without the need for a mediation, directions hearing, compulsory conference or hearing. If the case does proceed to a hearing, there is still an opportunity to settle prior to delivery of the decision.⁵⁷

The Dispute Settlement Centre of Victoria (DSCV) also assists parties resolve disputes of a general nature by providing mediation services and education programs. In 2005-06, it provided almost 14,000 instances of dispute resolution advice and conflict coaching, with 1398 disputes received for resolution.⁵⁸

The DSCV provides a free service and offers advice and tips for resolving disputes through a number of programs including,

- the Dispute Resolution Advisory Service, which offers advice over the phone about options for resolving disputes, and ways to prevent them from occurring and
- the Rural Dispute Settlement Centre, which provides mediation and dispute advisory services to people living in rural and regional areas.

⁵⁷ www.vcat.vic.gov.au 'About VCAT' (accessed 5 April 2007).

⁵⁸ Department of Justice *Annual Report 2005-06*, p. 87.

The DSCV has formed a partnership with the newly established Neighbourhood Justice Centre – making mediation services available to residents, government departments, agencies and community organisations within the Yarra municipality.

The DSCV caters to the needs of Victoria's culturally and linguistically diverse community with mediators from a range of cultural backgrounds and the Koori community.

The Office of the Victorian Small Business Commissioner (VSBC) assists small business consumers by receiving and mediating complaints of unfair market practices in business-to-business disputes and business-to-government disputes. Further, under the *Retail Leases Act 2003*, landlords and tenants can be assisted through mediation or other forms of alternative dispute resolution through the VSBC.

The Equal Opportunity and Human Rights Commission is empowered to conciliate any disputes arising out of the *Equal Opportunity Act 1995* and disputes that are not settled at conciliation can proceed to VCAT for determination.

5.3 Industry-specific dispute resolution services

There are numerous industry-specific dispute resolution services available to consumers in Victoria. Where there is an industry specific dispute resolution body that has jurisdiction over a matter, Consumer Affairs Victoria generally refers consumers to the relevant body and has arrangements in place to ensure consumers do not 'fall through the cracks' in jurisdiction.

Many of the industry-specific dispute resolution schemes are Ombudsmen schemes funded by the relevant industry. These include the Insurance Ombudsmen service, the Banking and Financial Services Ombudsman, the Telecommunications Industry Ombudsman, the Postal Industry Ombudsman, the Public Transport Industry Ombudsman, the Energy and Water Ombudsman Victoria and the Victorian Ombudsman (government services). Other bodies include the Office of the Health Services Commissioner, which has among its functions the provision of complaint resolution services for patients or users of health services.

In some circumstances, membership of an Ombudsmen scheme or dispute resolution service is a condition of a licence or trading in a particular industry, while other schemes have been established voluntarily by the relevant industry. For example, the Energy and Water Ombudsmen Victoria was established because electricity, gas, LPG, and water companies are required by legislation to provide a dispute resolution scheme approved by the Essential Services Commission for persons to whom they provide certain services or works.

The examples in Box 9 illustrate that, even within the consumer policy area, there is considerable diversity in the approaches to dispute resolution. Consumer ADR processes can vary in that:

- Some, but not all, dispute resolution schemes are industry funded. Consumer Affairs Victoria's conciliation service, for example, is funded through Consumer Affairs Victoria's budget allocation,
- Some use a single decision maker. Others, like the Insurance Ombudsman Service, have a panel to decide disputes above a minimum value,

- The processes of dispute resolution vary. Some relying on telephone based conciliation, others base their decisions primarily on the documents provided by participants and others make greater use of face to face meetings,
- Most require complainants to try to resolve their dispute with the service provider before making a complaint, but this is not always mandatory,
- Some have the capacity to make binding decisions, while others facilitate agreement between the parties or make recommendations, and
- Many require written complaints, though some will accept non-written complaints, particularly under special circumstances.

Box 9. Examples of industry-specific dispute resolution schemes

Credit Union Dispute Resolution Service

Scope: Complaints can be made by members (individuals and small businesses) of the 135 participating credit unions.

Structure and funding: The centre has a board with an independent chair, two consumer and two industry directors. It operates from the offices of the banking and financial services ombudsman and is financed by participating credit unions through an annual participation fee, a fee per complaint and additional fees to further investigate unresolved disputes.

Preconditions on complaints: Members are required to try and resolve their dispute with the credit union prior to lodging a complaint.

Complaints: Complaints are made in writing.

Process: The centre tries to resolve the dispute through discussion with the complainant and the credit union. If the dispute is unresolved it is investigated by a case manager. This could involve a negotiated settlement or a conciliation conference. Case managers send their findings to both parties. If the findings are rejected by either party, the Dispute Manager makes a determination. For disputes over \$100,000 the Dispute Manager can make a recommendation.

Status of decisions: Determinations are binding on the credit union but the member can withdraw from the process at any time and can still take legal action if they don't accept the determination. Recommendations are non-binding.

Insurance Ombudsman Service

Scope: Complaints can be lodged by customers of the 129 general insurance companies and underwriting agents that are members of the service. The service 'also assists in resolving disputes between uninsured drivers and another person's insurance company in relation to motor vehicle property damage'.⁵⁹

Structure and funding: The service's board has an independent chair and three industry and three consumer representatives. It is funded by industry members.

⁵⁹ Insurance Ombudsman Service 2006 *Home Page*, www.iecltd.com.au/home.asp, (accessed 14 January 2006).

Preconditions on complaints: Complainants are required to try to resolve their dispute with the insurance provider prior to lodging a complaint.

Complaints: Complaints are made in writing.

Process: Complaints are investigated by a case manager who collects information and tries to resolve the dispute. The information is given to an independent decision maker who gives written reasons for their decision.

*An Adjudicator decides disputes of \$5000 or less, a Referee decides disputes where fraud is alleged and the Panel determines all other disputes.*⁶⁰

Disputes are usually dealt with based on the documents provided by parties, though the referee may meet with parties directly. Determinations are made on disputes under \$150,000 and recommendations on disputes between \$150,000 and \$290,000.

Status of decisions: A determination is binding on the member. The complainant may accept or reject the determination. If they reject the determination they can take legal action to resolve the dispute. If the complainant accepts the determination the member may ask them to sign an agreement that they will not take any further action. Recommendations on disputes between \$150,000 and \$290,000 are not binding.

Energy and Water Ombudsman (Victoria)

Scope: The Energy and Water Ombudsman investigates and resolves disputes between Victorian electricity gas and water providers and their customers. Twenty five electricity providers, 15 gas providers and 24 water providers participate in the scheme.

Structure and funding: The scheme is governed by a board with an independent chair and four industry and four community/consumer representatives. Members fund the scheme through a fixed annual fee and a variable fee based on each member's share of cases handled.

Preconditions on complaints: Complainants are required to try to resolve their dispute with the service provider prior to lodging a complaint.

Complaints: Complaints can be lodged by phone, fax, letter, email or on-line.

Process: A conciliator confirms the details of the complaint, contacts the service provider, investigates the complaint and attempts to facilitate an agreed solution between the complainant and the service provider. If agreement cannot be reached the Ombudsman can make a decision on disputes up to \$20,000.⁶¹

Status of decisions: Decisions less than \$20,000 are binding on the service provider, unless the customer rejects the decision. Parties can reach non-binding agreements up to \$50,000.

⁶⁰ Insurance Ombudsman Service 2006 *What we do*, www.iecltd.com.au/About/pn1.htm, (accessed 14 January 2006).

⁶¹ Energy and Water Ombudsman Victoria 2006 *What happens next?*, Fact sheet 1, http://www.ewov.com.au/pdfs/EWOV_FDL_print2_020304_FINAL.pdf, (accessed 7 April 2006).

6 Compliance and enforcement

Consumer Affairs Victoria seeks to deliver timely and effective outcomes for the protection of consumers in Victoria by undertaking compliance monitoring and enforcement activities alone and, where appropriate, through cooperative arrangements with other agencies.

6.1 Compliance monitoring

As noted above (section 3), Consumer Affairs Victoria has a number of strategies designed to increase compliance with the law by educating traders and increasing their awareness of their responsibilities.

Consumer Affairs Victoria's compliance monitoring activities also seek to encourage and assist traders to comply with their obligations. Consumer Affairs Victoria regularly undertakes compliance exercises in specific areas and industries to monitor traders' activities in the marketplace. During these exercises, Consumer Affairs Victoria officers distribute education packs and provide information and support to aid voluntary compliance. Inspectors conduct audits and assess business practices in the supply of goods and services, as well as assessing licensed traders. Based on information gathered during these exercises, Consumer Affairs Victoria may investigate particular traders' conduct further, and where appropriate will consider taking action to enforce legal requirements.

6.2 Enforcement

Contraventions of the FTA and the "consumer Acts" identified in Schedule 1 of the FTA attract a wide variety of sanctions and remedies ranging from:

Administrative remedies, including:

- Warning letters;
- Infringement notices;
- Court enforceable undertakings; and
- Disciplinary proceedings in the Victorian Civil and Administrative Tribunal (VCAT)

Civil remedies, such as

- Declarations;
- Positive mandatory and negative injunctions (both interim and final);
- Cease trading injunctions;
- Corrective advertising/adverse publicity orders;
- Asset freezing orders;
- Compensation orders; and
- Orders for damages –

All of which remedies are available in the County and Supreme Courts and most of which are available in the Magistrates' court.

Criminal sanctions, available in the Magistrates Court, attract sanctions ranging from modest pecuniary penalties to imprisonment for a maximum of ten years.

To support and facilitate access to the sanctions and remedies, Consumer Affairs Victoria Inspectors have access to an equally varied selection of investigation powers. These powers are increasingly being centralised in the FTA but have application throughout most of the consumer Acts. These powers include:

- The power to enter premises, not being residential premises, at all times they are open to the public and to request assistance. Consumer Affairs Victoria Inspectors may not, under this power question persons or take documents without the consent of the occupiers, (for example section 120 of the Fair FTA and section 70I of the *Estate Agents Act 1980*);
- The power to enter business premises and to search for and seize documents and things constituting evidence of the contravention of a provision of the FTA and/or a consumer Act. These powers are exercisable by Consumer Affairs Victoria Inspectors without the consent of the occupiers of the premises entered (for example section 121 & 121A of the FTA, section 70j of the Estate Agents Act and section 82AH of the *Motor Car Traders Act 1986*);
- The power to enter premises, including residential premises pursuant to a warrant to search issued by the Magistrates' Court and to search for and seize documents and things constituting evidence of the contravention of a provision of the FTA and/or a consumer Act (for example section 122 of the FTA, section 70K of the Estate Agents Act and section 82AI of the Motor Car Traders Act);
- The power to compel persons to answer questions and to produce information and documents concerning alleged contraventions of the FTA and/or consumer Acts in circumstances where, because of the protection against subsequent criminal prosecution, such persons may not refuse to do so (for example sections 106I and 117 of the FTA, section 82AF of the Motor Car Traders Act and section 70H of the Estate Agents Act);
- The power to require persons to "substantiate" in writing any statement promoting the supply of goods or services by providing the Director of Consumer Affairs Victoria with proof of any claim or representation made in such statements, in circumstances where to fail to do so constitutes an offence (for example section 106A of the FTA; and
- The power to require persons supplying goods and services to "show cause" why the supplier should be allowed to continue to carry on business in circumstances where a failure to respond crystallises a prohibition on the person from further involvement in that business (for example section 106B of the FTA).

Consumer Affairs Victoria Inspectors employ any one or a combination of these investigation powers in support of administrative action, civil and/ or criminal proceedings designed to:

- investigate promptly and thoroughly all alleged non compliant conduct without unduly disrupting, or causing unnecessary compliance costs to, traders or consumers;
- stop the contravening conduct;
- pursue compensation or other redress for those affected by the conduct;
- ensure future compliance with the law;
- raise awareness of legislative requirements through publication of enforcement outcomes and use of other compliance tools; and
- deter and punish wrong doers.

To ensure that the investigation powers used in support of enforcement options are appropriately and effectively employed:

- any use of Consumer Affairs Victoria's investigation powers and enforcement action taken is proportionate to the consumer detriment suffered and the significance and seriousness of the contravention of administered legislation;
- Consumer Affairs Victoria will adopt a consistent approach in its compliance & enforcement activities in common circumstances in the pursuit of consistent outcomes;
- transparent, accessible policies and operating procedures will be maintained so that traders and consumers know what to expect from Consumer Affairs Victoria, what is expected of them and what they can expect in their dealings with the enforcement staff of Consumer Affairs Victoria;
- targeting of issues and traders ensures Consumer Affairs Victoria's resources are effectively applied and employed to address its strategic enforcement priorities; and
- enforcement staff will be accountable to Consumer Affairs Victoria's Enforcement Committee for their use of all investigation powers and enforcement outcomes they pursue and they will comply with all legislative reporting requirements and the operating procedures endorsed by that Committee.

In 2004, Consumer Affairs Victoria published its *Compliance and Enforcement Policy*, which outlines Consumer Affairs Victoria's approach to compliance and enforcement action. Among other things, the policy sets out the criteria used to determine whether a matter is appropriate for further investigation with a view to enforcement action. These criteria include the seriousness of the offence, the culpability of the alleged offender, the sufficiency and quality of the evidence, the history of complaints against the alleged offender (if any) and whether the matter falls within Consumer Affairs Victoria's jurisdiction⁶². The policy notes that the merits and circumstances of each

⁶² To fall within Consumer Affairs Victoria's jurisdiction, the alleged conduct must breach legislation it administers. In determining jurisdiction, Consumer Affairs Victoria assesses whether it is the most appropriate agency to handle the matter, having regard to the nature of the conduct and the potential breaches. If a more appropriate agency exists in Victoria or in another jurisdiction, it may be able to cooperate or conduct a joint investigation with the other agency.

case will determine the enforcement option pursued. This policy is under review to ensure it reflects the recent extensions of Consumer Affairs Victoria Inspectors powers and the increased variety of civil remedies accessible under the FTA.

In addition to its general Compliance and Enforcement Policy, Consumer Affairs Victoria has published guides on the key provisions of the FTA — unconscionable conduct, misleading and deceptive conduct and unfair contract terms — and on other provisions. These guides outline how these provisions might be applied by the Courts and articulate Consumer Affairs Victoria’s enforcement priorities in these areas. Box 10 outlines Consumer Affairs Victoria’s enforcement priorities in relation to unconscionable conduct, as detailed in its guide *Fair Trading: Preventing unconscionable conduct in trade or commerce against consumers or small businesses*, published in 2005.

Box 10. Consumer Affairs Victoria’s unconscionable conduct enforcement priorities

Consumer Affairs Victoria will investigate serious allegations of unconscionable conduct in breach of the Fair Trading Act in any sector or industry. From the information in its complaints database and general experience in fair trading matters, Consumer Affairs Victoria has identified the following sectors where it will be particularly vigilant regarding allegations of unconscionable conduct:

- the credit and finance sector;
- the telecommunications sector — particularly mobile phones and internet services;
- the fitness industry — particularly gym membership issues;
- introduction agencies;
- the retailing industry (particularly, electrical items, white goods, furniture, computers and related goods or services); and
- the building industry.

In particular, priority will be given where the allegations would, if true, adversely affect consumers, especially vulnerable or disadvantaged consumers.

Where possible, a cooperative approach to compliance is favoured over enforcement action. One example of how Consumer Affairs Victoria is working with traders to achieve good compliance is in relation to unfair contract terms. This approach is outlined in Box 11.

Box 11. Unfair Contract Terms enforcement approach

Consumer Affairs Victoria’s strategy for encouraging compliance with unfair contract terms provisions is based, in the first instance, on industry education and consultation, whereby individual companies’ co-operation is sought in modifying or removing terms Consumer Affairs Victoria considers are unfair.

Consumer Affairs Victoria’s Unfair Contract Terms Taskforce works primarily on an industry basis as this is the most effective means to facilitate change in the market place with the scarce resources available to the Taskforce. The Taskforce identifies

for examination industries that have a solid complaints history and generate, or have the potential to generate, significant consumer detriment. In some situations, Consumer Affairs Victoria has also examined contracts for major (and high profile) events or individual companies.

Consumer Affairs Victoria has reviewed contracts in industries including mobile phones, health and fitness, car hire, domestic building, online auctions and curtain and carpet suppliers. Individual contracts have also been examined in relation to Foxtel subscriptions, the Qantas Frequent Flyer program, the Formula 1 Foster's Australian Grand Prix and the 2006 Commonwealth Games.

Once an industry is chosen, Consumer Affairs Victoria identifies a number of traders within the industry — generally the major market participants and top traders — for examination. Selected industry participants are then requested to provide copies of their consumer contracts for analysis. If contracts are not provided following this request, and are not readily obtained from websites or an existing consumer complaint file, section 32ZB of the FTA gives the Director of Consumer Affairs power to require production.

The Taskforce analyses the contract against the unfair contract term provisions in Part 2B and the other consumer protection provisions in Parts 2 and 2A of the FTA. Contracts are also reviewed for legibility. Following this analysis reports are sent to the relevant companies and meetings are held to discuss the removal or modification of unfair terms. In most cases, such dialogue results in amended contracts being implemented by the companies.

Since the introduction of Part 2B, Consumer Affairs Victoria has only initiated proceedings in VCAT against one company (AAPT Pty Ltd in 2004). In May 2005, prior to a final decision being handed down, AAPT changed its contracts and made the changes retrospective so all consumers benefited. When the final decision was handed down on 2 August 2006, the Tribunal found that although several of AAPT's original contract terms were unfair, it did not need to make orders on the basis that changes had already been made. The case was important in clarifying the interpretation of the law in line with Consumer Affairs Victoria's administrative practices.

Consumer Affairs Victoria's analysis of selected contracts within an industry has flow on effects to the rest of the industry because, in many industries, the contracts of smaller traders are based on (or even copied from) the contracts of the larger traders that have been reviewed by Consumer Affairs Victoria. Further, Consumer Affairs Victoria has also been able to draw on knowledge obtained from its analysis of selected contracts to develop guidelines on the application of the unfair contract term provisions to particular industries, which are then distributed to all identifiable industry participants.⁶³

Compliance and enforcement activity undertaken in Victoria also benefits consumers in other jurisdictions as many of the contracts examined to date are used by companies across Australia.

The investigation powers and the extensive and sophisticated array of administrative, civil and criminal sanction and remedies enables Consumer Affairs Victoria staff to take a flexible, targeted and proportionate approach to addressing non-compliance.

⁶³ For example, see *Unfair terms in vehicle rental agreements for cars, 4WDs, motor homes and vans*, Consumer Affairs Victoria, 2005.

Recent amendments to the FTA and the majority of the consumer Acts permits Consumer Affairs Victoria staff to reduce their reliance on summary criminal sanctions. These can be costly and time-consuming to pursue, do not necessarily benefit the affected consumers or the community as a whole or have the desired impact on markets as a whole. Now Consumer Affairs Victoria staff can pursue a more sophisticated approach to enforcement, often involving a combination of administrative, civil and criminal actions. However, criminal prosecutions continue to be available in cases of serious non-compliance. Full details of Consumer Affairs Victoria's compliance and enforcement activities are outlined in its Annual Report each year.

Box 12 briefly outlines four actions taken in 2005-06 to demonstrate the breadth of issues dealt with.

Box 12. Examples of recent enforcement actions taken by Consumer Affairs Victoria

*Houghton v Arms*⁶⁴

In October 2006, the Director of Consumer Affairs Victoria intervened, as *amicus curiae*, in an appeal before the High Court of Australia in support of s. 9 of the FTA.

At issue was whether, under s. 9, company employees could be liable for their misleading and deceptive conduct, in trade or commerce, engaged in within the scope of their normal duties as employees.

It was particularly significant that the High Court permitted the Director to be heard as a 'friend of the court' — in a proceeding in which he had not previously been a party given the High Court's reluctance to permit a party to be heard in relation to a matter in which it is not a party.

The Director made the decision to intervene because the Full Court of the High Court is the ultimate Court in Australia; there is no appeal. Decisions of the Full High Court are therefore the definitive interpretations of legislation in Australia.

The Appellants before the High Court supported an interpretation of s. 9 that would have seen the employees escape personal liability for their misleading or deceptive conduct, such conduct being attributed solely to their employer, a company, which was under external administration.

The Director had relied successfully upon the earlier Full Federal Court decision, *Arms v Houghton*⁶⁵, in proceedings in the Supreme Court of Victoria⁶⁶. In these proceedings, the Director argued, consistent with the Full Federal Court's findings, that a company employee, in trade or commerce, acting within the scope of actual authority, was personally liable for his misleading and deceptive conduct.

Ultimately, the High Court held that the employees were personally liable, under s. 9 of the Act, for their misleading and deceptive conduct engaged in trade or commerce.

⁶⁴ (2006) 231 ALR 534; (2006) ALJR 466; [2006] HCA 59.

⁶⁵ (2006) 151 FCR 438; [2006] FCAFC 46

⁶⁶ *Astvilla Pty Ltd v Director of Consumer Affairs Victoria* [2006] VSC 289

The Director's current proceedings, before the Victorian Court of Appeal, which were adjourned pending the outcome of the High Court's decision in *Houghton v Arms*, are listed to resume in mid May 2007.

VIP Executive Car Rentals Pty Ltd and Andreas Triantafyllos

Consumer Affairs Victoria received 17 complaints from consumers located in Australia and overseas (including South Korea, India, UK and Singapore) about VIP Executive Car Rentals Pty Ltd and its director Andreas Triantafyllos (VIP). VIP took security deposits via consumer credit cards when they hired prestige motor cars in Melbourne, and termed those deposits as 'pre-authorisations' or 'security deposits' against the possibility of damage to the cars. Representations were made that these security deposits would not be debited to consumers' credit cards unless the cars were damaged. However, VIP debited these amounts immediately and failed to refund them upon the return on the cars in an undamaged state, or when asked by consumers to do so. The amounts were usually \$3000, \$4000, or \$5000.

Consumer Affairs Victoria made a successful application in the Magistrate's Court for declarations that VIP had engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive. Injunctions were also granted, imposing a compliance regime on how VIP may operate its credit card facility to take security deposits. Through the combined efforts of Consumer Affairs Victoria and Victoria Police, consumers also obtained refunds totalling \$279,900.

Thomas Michael Kelly

Consumer Affairs Victoria successfully took action against Thomas Michael Kelly, an unregistered building practitioner, in the Magistrate's Court in late 2005. He was convicted of breaching the *Domestic Building Contracts Acts 1995* and the FTA and fined a total of \$75,000 for his infringing conduct.

Mr Kelly had entered into a major domestic building contract to carry out building works totalling \$34,000. In addition to being unregistered and engaging in misleading and deceptive conduct, Mr Kelly demanded an excessive deposit from his clients, failed to use the correct building contract, failed to complete the contracted works and provided a building service that was materially different from that which he had been engaged to perform.

Wesley Bond

A large number of motor vehicles (totalling more than \$1.9m in advertised sale price) were advertised for sale by the same trader in the Benalla Ensign. The licensed motor car dealer number given belonged to a trader in NSW. On investigation, it transpired that Wesley Bond was using this number to trade in Victoria, without authorisation.

Consumer Affairs Victoria took action against Mr Bond under the FTA and in May 2006 the Magistrate's Court granted an injunction restraining Mr Bond from trading as a motor car trader while unlicensed. The Court also ordered that Mr Bond publish a notice to the effect that in Court proceedings taken by Consumer Affairs Victoria, the Court had found that he had acted in contravention of the Act and that he is not permitted to carry on the business of a motor car trader while not licensed to do so under the Motor Car Traders Act 1986.

This matter was on appeal to the Supreme Court at the end of the financial year. Mr Bond has not sought to pursue his appeal and Consumer Affairs Victoria staff are seeking the appeal be struck out.

Gino Carmignani

In 2004, Consumer Affairs Victoria received a number of complaints regarding Gino Carmignani and/or Gino Memorials (an unregistered business name) operated by Mr Carmignani.

Mr Carmignani generated business by touting work at the Williamstown, Keilor, Fawkner and Footscray cemeteries, generally targeting recently bereaved aged pensioners from non-English speaking backgrounds.

Typically, Mr Carmignani entered into an agreement to supply a memorial stone to the consumer, stating that the memorial would be in place within eight weeks, Mr Carmignani then accepted full or part payment for the memorial stone. He would then fail to supply the memorial stone.

In August 2005, the Magistrate's Court granted orders sought by Consumer Affairs Victoria restraining Mr Carmignani from engaging in misleading and deceptive conduct, making false representations, using the unregistered business name Gino Memorials, and accepting payment from consumers before he had delivered or installed the goods. The Court also ordered Mr Carmignani to make compensation payments totalling \$61,480 to 11 consumers. Consumer Affairs Victoria have taken steps to enforce the compensation orders on behalf of the affected consumer to secure payment. Further proceedings in the Magistrates' Court of Victoria are being pursued.

Since the expansion of the range of civil and administrative measures in 2003 and 2004, the number of civil actions conducted by Consumer Affairs Victoria has increased substantially, as indicated in table 5.

Any enforcement action undertaken by Consumer Affairs Victoria is subject to review by the Courts and Ombudsman. In addition, an internal review process applies in relation to infringement notices.

	2001-02	2002-03	2003-04	2004-05	2005-06
Number of criminal proceedings completed	79	76	47	72	47
Value of fines issued	\$669,905	\$387,500	\$503,600	\$371,550	\$287,550
Value of Court Fund and Tribunal penalties imposed	\$12,900	\$4,150	\$30,469	\$5,150	\$10,500
Number of civil actions completed	11	95	74	72	88
Number of parties signing enforceable undertakings	106	102	34	60	43

⁶⁷ For full details, see Consumer Affairs Victoria's Annual Reports.

Number of infringement notices served	378	463	189	347	386
Value of costs orders obtained	\$69,285	\$52,731	\$48,284	\$33,434	\$43,840
Compensation for consumers obtained through court action	\$133,176	NA	\$5,175	\$35,742	\$143,589

6.3 Cooperative arrangements with other agencies

Consumer Affairs Victoria has cooperative arrangements with several agencies to ensure that matters are dealt with by the most appropriate body and that systemic issues and matters of national significance such as scams and rogue traders are identified and addressed quickly.

As noted above, there are overlaps between the FTA and the TPA and therefore the enforcement jurisdictions of the ACCC and Consumer Affairs Victoria. To avoid duplication in enforcement activity, Consumer Affairs Victoria has an Operating Agreement with the ACCC. The Agreement serves “as a guideline as to how the ACCC and Consumer Affairs Victoria can best serve the interest of consumers and businesses, and promote fair trading in Victoria through the efficient use of the collective resources of both agencies”. Pursuant to the agreement, staff within the agencies consult prior to referring a complaint to the other agency to determine which agency could more effectively handle the complaint.

Typically, Consumer Affairs Victoria will handle complaints where the relevant issues primarily affect Victorian consumers only. Alternatively, if matters occurring in Victoria involve a multi-state or national issue they should be raised with SCOCA or its advisory committees, where appropriate. Further, the Agreement notes that “where [a] complaint follows an alleged breach of Victorian fair trading laws and:

- is part of a national advertising campaign or involves a national firm; or
- may have national implications; and
- is indicative of an Australia wide practice,

then the issue may be more appropriately dealt with by the ACCC.”

There are occasions when the ACCC and Consumer Affairs Victoria jointly pursue an enforcement outcome.

There are also mechanisms established through the Ministerial Council on Consumer Affairs (MCCA) and the Standing Committee of Officials of Consumer Affairs (SCOCA) for the ACCC and the fair trading agencies in each of the states and territories to share information on enforcement activities and potential breaches of consumer laws. As outlined in section 2.3.1, one of the advisory committees supporting SCOCA is the Fair Trading Operations Advisory Committee, which provides advice on operational and enforcement matters relating to consumer laws. Through this committee, agencies initiate and coordinate appropriate operational responses to emerging issues of national significance.

Consumer Affairs Victoria also participates in AUZSHARE, an initiative of the Ministerial Council maintained by the advisory committee, which facilitates the

sharing among agencies of consumer complaints and information about scams of national significance.

Through AUZSHARE, consumer protection agencies monitor consumer issues emerging in other jurisdictions, and investigate the potential impact in their jurisdictions. Posted alerts on AUZSHARE facilitate fast, widespread action against scammers and rogue traders. This helps to address the limitations that state and territory consumer protection offices sometimes face in dealing with consumer roorts operating nationally, or traders who evade local consumer protection machinery by moving their operations interstate.

Another cooperative arrangement that Consumer Affairs Victoria participates in is the Australasian Consumer Fraud Taskforce, which comprises 18 government regulatory agencies and departments with responsibility for consumer protection regarding frauds and scams. The Taskforce:

- enhances the Australian and New Zealand governments' enforcement activity against frauds and scams;
- runs an annual coordinated information campaign for consumers: the 'Scams Awareness Month' in February or March (timed to coincide with Global Consumer Fraud Prevention Month);
- involves the private sector in the information campaign and encourage them to share information they may have on scams and fraud; and
- generates greater interest in research on consumer frauds and scams.

The Taskforce also partners with non-government and private sector organisations to increase community awareness of scams.

The Australasian Consumer Protection and Enforcement Network (ACPEN) is an informal group comprising representatives of Commonwealth agencies, heads of State/Territory agencies and senior compliance and enforcement staff of those agencies. The aim of the group is to achieve more strategic, speedy and effective enforcement responses. This is consistent with the objectives of MCCA, which wants to see a more coordinated and nationally focussed enforcement effort.

ACPEN has met on a number of occasions and discussed new approaches to compliance and enforcement and major lessons emanating from significant cases taken by individual agencies. The future role for ACPEN is still evolving.

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