



Hon Margaret Keech MP
Member for Albert



**Minister for
Tourism, Fair Trading,
Wine Industry Development
and Women**

30 MAY 2007

Mr Gary Banks
Chair
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Mr Banks

On behalf of the Minister for Tourism, Fair Trading, Wine Industry Development and Women, and the Queensland Government, please find attached a submission in response to the *Productivity Commission Issues Paper* regarding its inquiry into the consumer policy framework.

Yours sincerely

David Smith
Senior Policy Advisor

Enclosure

RESPONSE TO PRODUCTIVITY COMMISSION ISSUES PAPER: CONSUMER POLICY FRAMEWORK

Queensland Government Submission May 2007

Contact Agency
Department of Tourism, Fair Trading and Wine
Industry Development

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1. Executive summary

1.1 Summary: Overall framework and approach

Overall the Australian consumer policy framework, with its division of regulatory, policy and administrative responsibilities between the Commonwealth, States and Territories provides a functional structure as well as significant and workable levels of national consistency. The core general legislation in Queensland mirrors a predominately uniform national law. The *Fair Trading Act 1989* objectives are to support an equitable, competitive, informed and safe marketplace. These objectives are consistent with the *Trade Practices Act 1974* objectives of consumer protection, fair trading and competition, with no one objective of primary importance. However, the current national consumer policy framework needs updating to meet the demands of new and evolving markets, to reflect changing community values about what is fair and equitable, and to ensure all objectives are supported by infrastructure that enables the objectives to be met equally well.

The Queensland Government believes it is in the interests of commercial certainty and effective consumer protection that there is a high degree of national consistency in laws and that there are some areas of law where consistency could be improved. In some cases, national consumer policy could be enhanced by placing greater reliance on the general law and by harmonising laws across jurisdictions. Because States and Territories have a broader regulatory footprint than the Commonwealth, the States and Territories face a greater task in developing a uniform framework. An optimal consumer policy framework should provide an enhanced national uniform general law and flexibility for States and Territories to respond to local market issues. Such a framework should preserve current arrangements which recognise the responsiveness and efficiency in State and Territory service delivery.

Throughout this submission, there is an argument for a consistent overarching national consumer policy framework, despite the divergent responses and responsibilities. A progressive framework will have the dual goals of equity and efficiency and recognise that while equitable concerns can sometimes be difficult to measure, addressing these concerns is not inconsistent with efficiency. A national framework for consumer policy will avoid the notion that these goals are mutually exclusive and recognise that the objectives of consumer policy are equally about consumer protection and fair trading as well as competition. The

framework will recognise, as competition policy does, that there are circumstances where equity concerns will override efficiency arguments.

It is crucial government remains an active player in consumer policy. Consumers rely on fair and equitable markets and need a consumer policy framework that provides sufficient protection to participate confidently in markets. While our consumer policy requires a down payment to establish and maintain such a framework, these costs are small relative to the social and economic benefits. When market complexity, market dysfunction or product/service risks are beyond even the well-informed consumer, there is a role for consumer policy to provide protections. This role is particularly important for vulnerable consumers and markets where risks are high and detriment may be proportionately severe. The Queensland community expects there to be a truly fair market for goods and services and that governments play an active role in achieving this.

Consumer policy has traditionally been viewed as attempting to achieve a balance between social costs and social benefits of policy and regulation. However, in a progressive framework, consumer protection together with fair trading play a key role in improving marketplace efficiency and driving economic activity. Consumer protection and fair trading objectives complement and expand on competition policy in this respect. Consumer protection, fair trading and competition policy share an interest in consumer welfare but provide different but equally legitimate pathways to achieve it. New national institutional arrangements are needed to enable consumer protection and fair trading policy to become more effective drivers alongside competition policy in the national arena.

The present institutional arrangements supporting the national consumer policy framework could be enhanced by the following strategies:

- **Development of a consumer advocacy sector including an independent National Consumer Council**

For a national consumer policy framework to be effective, new national institutions enabling consumer advocacy and research are needed. The development of broad and specific fair trading and consumer protection policy relies on both business and consumers having an effective voice in the policy making process. This is currently hampered by the lack of a fully functioning and resourced national consumer advocacy sector as well as the current paucity of data and research in consumer policy. There is a need to build capacity by providing resources and infrastructure for adequate consumer representation, research and advocacy. While some State and Territory infrastructure exists, sector capacity varies. The

establishment of an independent National Consumer Council (funded by the Commonwealth) would ensure consumers have a voice and effort is coordinated.

In addition, a properly resourced national research program is needed to provide a more complete assessment of the marketplace to regulators, governments, business and the consumer advocacy sector. This program could be either incorporated into a National Consumer Council or as a separate initiative under a currently funded national program such as the Australian Research Council.

- Investigate the merits of creating a national consumer policy body

The merits of creating an independent national body to provide rigorous policy analysis, advice and development on issues relevant to a national consumer policy framework should be investigated. To support the development of consumer policy at a national level a body such as a National Consumer Commission may be considered and should include representation from the States, Territories and the Commonwealth. Such a body could perform a national policy role, which is not undertaken by the Australian Competition and Consumer Commission (ACCC). and could be focussed on facilitating better and more consistent national policy development.

- Examine alternative mechanisms for overcoming significant delays or impasses in national reviews

Complex national review processes can cause significant delays in achieving regulatory reforms and enhanced uniformity. The Office of Best Practice Regulation (OBPR) plays an important advisory role in the regulatory review process but Ministerial Councils are sometimes unable to consider regulatory proposals because the level of detail required about costs and benefits (and the availability of such information) to properly assess proposals can be subject to diverse views. A review of relevant mechanisms within the gate keeping and decision making processes should be undertaken to enable proposals to be progressed while identifying the elements of the assessment the subject of disagreement.

- Enhancement of the current capacity to analyse the net benefit of regulatory proposals on the community.

Queensland supports the need to adopt regulatory options that have the greatest net benefit to the community and supports enhancements to the present review mechanisms to readily assess that outcome. Additional policy tools could be utilised as part of the regulatory impact process to examine both economic and social justice analyses of market dysfunction and identify policy solutions arising out of both analyses. This policy process would include the requirement to undertake a social impact analysis, identify consumer costs and benefits,

including for example the impact on household budgets and a requirement to articulate the basis on which consumer choices are made and a recognition of the longer term cost to the community that arises out of socio-economic inequity.

1.2 Department of Tourism, Fair Trading and Wine Industry Development (Qld)

In Queensland the activities of the Department of Tourism, Fair Trading and Wine Industry Development (DTFTWID) contribute to the whole-of-government objective of building Queensland's economy by achieving a strong diversified economy. In delivering fair trading services the Department works closely with peak industry bodies, business, consumers and other government and community organisations.

DTFTWID administers a range of fair trading and consumer protection legislation in Queensland, including:

- *Fair Trading Act 1989* including *Fitness Industry Code of Practice*;
- *Property Agents and Motor Dealers Act 2000*;
- *Trade Measurement Act 1990*;
- *Consumer Credit (Queensland) Act 1994*;
- *Residential Services (Accreditation) Act 2002*;
- *Second-hand Dealers and Pawnbrokers Act 2003*;
- *Security Providers Act 1993*;
- *Tourism Services Act 2003*;
- *Introduction Agents Act 2001*;
- *Motor Vehicles and Boats Securities Act 1986*;
- *Business Names Act 1962*;
- *Sale of Goods Act 1896*; and
- *Travel Agents Act 1988*.

DTFTWID also administers legislation relating to the classification of films, publications and computer games; the establishment and operation of manufactured / mobile home parks, and retirement villages; adult entertainment and the liquor industry.

The primary objective of the fair trading legislation is to create and maintain a safe, fair and ethical marketplace. A fair marketplace is seen as one where the consumer and trader operate with balanced rights, where ethical traders and consumers are not disadvantaged by traders who do not observe the law or a standard of ethics in their dealings. This is done by:

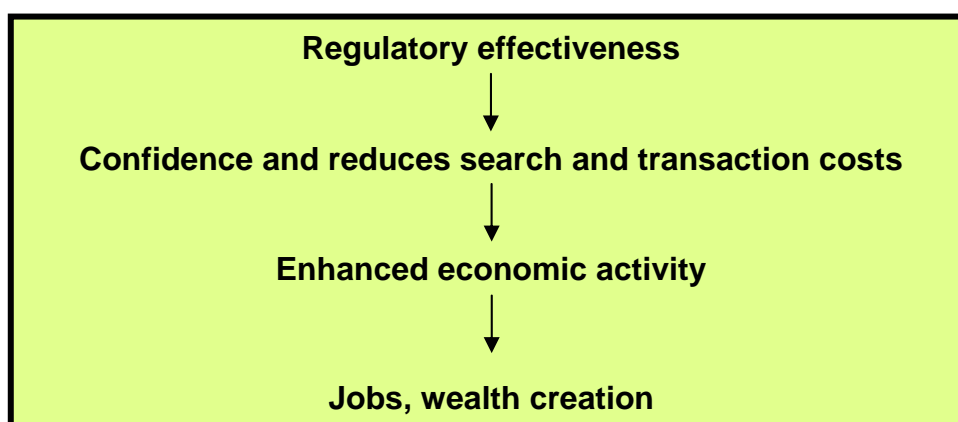
- maintaining a contemporary regulatory framework which identifies marketplace issues, trends and changes and seeks to improve the integrity of trading practices in Queensland;
- informing businesses and consumers of their rights, responsibilities and enforcement activities to promote compliance, fair dealing and confidence in the marketplace;
- delivering effective licensing, registration and accreditation services;
- conducting a highly visible targeted compliance program to detect and deter non-compliance through spot checks; in-field education; conciliation of consumer disputes; investigation of complaints and taking appropriate enforcement action; and
- maintaining effective dispute resolution processes including the ability for consumers to enforce individual rights.

DTFTWID has regional offices in Brisbane, Southport, Toowoomba, Maroochydore, Wide Bay, Rockhampton, Mackay, Townsville and Cairns. The Department receives and processes over 10,000 written complaints a year and provides information and advice to more than 2.7 million consumers. Nearly 470,000 fair trading enquiries are year are dealt with by Smart Service Queensland.

Regulatory effectiveness, marketplace integrity and business and consumer confidence

Research undertaken on behalf of the Office of Fair Trading (OFT),¹ assessing the links between consumer and business confidence, shows that regulatory effectiveness is essential for market efficiency. A Network Economics Consulting Group Report (NECG Report) supported the link between the quality of the regulator and economic performance (shown in Figure 1). The research highlighted that businesses that comply with regulation outperform non complaint businesses.

Figure 1: The relationship between regulatory effectiveness and economic performance



¹ Networks Economics Consulting Group (NECG) (2003) Measuring the links between consumer and business confidence, regulatory effectiveness and economic performance, Report for the Office of Fair Trading, September. (NECG Report)

The Queensland fair trading framework recognises that effective regulation leads to competitive, efficient and fair markets. A fair marketplace delivers consumer and business confidence, necessary precursors to business success, strong economies and strong communities.

Queensland's fair trading framework recognises that behaviour change in the marketplace is best achieved by the combined influence of effective regulation, a visible targeted compliance and enforcement presence, information and education for both consumers and traders about rights, fair trading and customer service standards.

To gauge the awareness and effectiveness of Queensland's fair trading framework and use of fair trading services, OFT undertakes a regular schedule of survey research. Surveys commissioned by OFT also demonstrate institutional quality and regulatory efficiency. Research undertaken on OFT's activities indicates continued positive marketplace impacts:

- 74% of Queensland consumers believe that if Queensland traders do not behave fairly or ethically, there are laws that will protect consumer rights;
- 88% of Queensland traders believe that if Queensland traders do not behave fairly or ethically, there are laws that will protect consumer rights; and
- an estimated 69% of Queensland's adult population were reached through OFT awareness and education activities. ²

1.3 Outline of submission

The first part of this submission (section 2) provides an overview of the role of consumer policy and the role of government. Section 3 addresses issues in relation to market trends and developments. Section 4 identifies how well the current framework and suite of measures is working by addressing the following issues:

- jurisdictional responsibilities (4.1);
- policy tools (4.2);
- gate keeping and review arrangements (4.3);
- regulatory and oversighting bodies (4.4);
- self and non-regulatory approaches (4.5);
- generic and industry specific regulation (4.6);
- enforcement and redress issues (4.7); and
- disadvantaged and vulnerable consumers (4.8).

² Trader and Consumer Confidence Survey May 2006; Queensland Household Survey May 2006

2. Rationale for consumer policy

2.1 The role of consumer policy

The current parameters

There are four significant differences in the parameters of consumer policy between the Commonwealth and the States/Territories and between the various States and Territories.

Firstly, the States' regulatory footprint is broader than that of the Commonwealth primarily because of constitutional limitations on the Commonwealth and its distance from constituents. In accordance with Ministerial agreement, Queensland and other State jurisdictions mirror the consumer protection provisions in the *Trade Practices Act 1974* (TPA), Queensland through its *Fair Trading Act 1989* (FTA), and establish a statutory fair trading regulator. Because there are limitations in the general law, Queensland has enacted other marketplace specific legislation. Marketplace specific legislation can be efficient if it is targeted because it does not create a burden of unnecessary regulation on other industries. This larger regulatory footprint means there is a task for States and Territories to ensure appropriate uniformity.

Secondly, there is variation in the regulation administered by fair trading agencies. This difference can impede the effectiveness of the current institutional arrangements in harmonising cross-jurisdictional legislation. Specific examples of this include building, tenancy, liquor and electrical safety regulation.

Thirdly, specific marketplaces are regulated by non-fair trading agencies, such as the delivery of health care services, energy and residential services that tend to fall outside of the national consumer policy framework. The application of the general fair trading and consumer protection laws can be less effective in these areas with the interaction of the following factors:

- (i) the Commonwealth only taking action on certain national issues;
- (ii) state fair trading agencies leaving action to specific regulators;
- (iii) specific regulators not possessing expertise in, or prioritising, fair trading law administration; and
- (iv) no understanding of the principles underpinning consumer policy.

An important corollary of this for individual jurisdictions is the need for a whole-of-government based consumer policy framework which gives primacy to the general law, but

under which the development of all consumer protection related regulations occurs. This approach may reduce duplication of regulation and address matters of importance falling through gaps in service delivery.

Fourthly, it is presently necessary for the States to regulate because of constitutional limitations on the Commonwealth. An agreement by the States to uniform legislation mirroring the TPA and other general consumer policy laws deemed necessary may alleviate the need for Commonwealth legislation and achieve significant savings to the community.

The need for a consistent framework

Despite the jurisdictional divergence in the regulatory parameters of consumer policy, there should be a consistent underlying consumer policy framework that forms the basis of the State, Territory and Commonwealth approach. This framework should have the dual objectives of fair trading and consumer protection. Its goals should include equitable and efficient markets taking into account marketplace ethics. The framework ought to clearly articulate that regulation is justifiable, and regulatory proposals be reviewed accordingly, where pure economic efficiency conflicts with important social objectives.

In April 1995, all Australian Governments endorsed a package of legislative and administrative arrangements that underpin National Competition Policy (NCP). The key objective of NCP was to develop a more open and integrated Australian market that limits anti-competitive conduct and removes the special advantages previously enjoyed by government business activities, where it is in the public interest to do so. Competition however is one of three primary objectives in the TPA.

The principal objective of the FTA is to provide for an equitable, competitive, informed and safe marketplace. The object of the TPA is to enhance the welfare of Australians through promotion of competition, fair trading and the provision for consumer protection. To achieve the stated objectives in the TPA and Fair Trading Acts, both equity and efficiency need to be considered. However in practice, strong tensions can arise in balancing efficiency goals against equity goals in policy assessment at the national level. This is because consumer and community costs, including social impacts, are sometimes difficult to quantify and weigh against more immediately quantifiable costs. In order to provide balance to regulation the creation of new national institutions may be important for the next phase of fair trading and consumer policy development. This is dealt with at 4.3 “Gate keeping and review arrangements”, 4.4 “Regulatory and oversighting bodies” and 4.5 “Self and non-regulatory approaches”.

While NCP is designed to result in better use of resources and substantial and ongoing benefits to the community, the introduction of increased levels of competition alone will not ensure delivery of the best overall result for the community. Accordingly, governments have a responsibility to ensure NCP reforms are only implemented where it is demonstrated that such reforms are clearly in the public interest, that is, there is a clear demonstration that competitive reform will yield a net benefit, and no significant detriment, to the community. Government also has a role in ensuring a fair allocation of costs and benefits. While the Queensland Government is well aware of the potential benefits competition can bring to the community, this government will continue to ensure competition is not pursued in isolation from equity goals and that a considered and pragmatic approach is taken to NCP.³

The goals of social equity and market efficiency are not mutually exclusive and both need to be considered in order to achieve fair and competitive marketplaces. Where market efficiency goals are given a priority over broader social goals an unbalanced policy outcome can result. The Hilmer Report notes "... competition policy is not about the pursuit of competition for its own sake. Rather it seeks to facilitate effective competition in the interests of economic efficiency while accommodating situations where competition does not achieve economic efficiency or conflicts with other social objectives."⁴ Presently the current national approach to consumer policy does not clearly articulate distributional costs and benefits, making government decision making about allocation more difficult.

The social objective of achieving fair outcomes for market participants, while considering efficiency, is also concerned with issues of equity. Equity is concerned with fairness and considers the distribution of resources, wealth, benefits and losses as well as mechanisms of justice to correct unfair outcomes. Equity seeks to promote business and consumer confidence in the marketplace, before, during and after transactions. In this way it attracts continued investment and consumption, stimulating market activity. Equity is proactive through the implementation of measures that seek to prevent or minimise the likelihood of unfair outcomes, for example through consumer education, licensing of occupations and defining rules of conduct in markets. Equity is also reactive through mechanisms to correct for losses resulting from failed market transactions.

A properly balanced consumer policy framework recognises:

- (1) fair trading and consumer protection policy are beneficial;

³ Queensland Treasury, *Public Benefit Test Guidelines*

⁴ Hilmer Report (1993), Chapter 1, part 5, p.6.

- (2) consumer policy helps to develop an understanding of market participants to inform and enhance the effectiveness of marketplace regulation (including competition policy) by completing the understanding of the supply and demand side of markets;
- (3) consumer policy has a broader interest than, for example, information asymmetry and honest dealing, by considering failures attendant on unequal bargaining power, unethical conduct, community values concerning unfair conduct and externalities; and
- (4) the importance that principles of equity have alongside market efficiency.

See **Appendix B** for a diagrammatic portrayal of the relationship between competition and consumer policy.

A synthesis

Internationally, economic policy makers are realising this important connection between competition policy and consumer policy.^{5,6} In the European Union, the former European Commissioner responsible for competition policy, Mario Monti, repeatedly exclaimed that “consumer interest [is] the central goal of competition policy”.⁷ In line with this sentiment the European Community set up a working group comprised of experts from national consumer organisations to study ways in which the Community’s competition policy can best safeguard consumer interests. This is recognition that acceptable market outcomes result from ensuring consumer interests are accounted for in considering competition. Competition advocates usually describe the outcomes for consumers to be cheaper, value for money goods that the community wants.

To achieve acceptable market outcomes both the supply and demand side must be analysed and addressed. While the supply side (i.e. that of competition and market structure) is in competition regulator’s calculations, it is crucial that that demand side issues are recognised and taken into account. Effective and well-functioning markets cannot exist without informed consumers who are willing to participate in markets and able to make their beneficial consumption choices.⁸ Even where there are competitive markets there is potential for transaction failures and consumption issues arising on the demand side: it cannot be taken for granted that competition will automatically deliver benefits to consumers. Importantly, while competition policy may have the consumer interest at heart and has recognised an informed marketplace is a pre-requisite for competition, fair trading and consumer protection policy has a broader ambit.

⁵ Parnes, L.B. (2006). Competition and Consumer Protection, *Competition Policy Review*, 16(5), 189-192.

⁶ Buttigieg, E. (2005). Consumer and Competition Policies: synergy needed, *Consumer Policy Review*, 15(5), 192-197.

⁷ Buttigieg, E. (2005). Consumer and Competition Policies: synergy needed, *Consumer Policy Review*, 15(5), 192-197.

⁸ Khuddoos, A. (2006). Competition and the Consumer, *Consumer Policy Review*, 16(5), 170.

The link between consumer empowerment and economic growth

The focus internationally is turning towards the consumer as a key driver in economic growth. There is a growing recognition that traditional routes to higher productivity (such as lower taxes, less regulation, a smaller role for government) are no longer sufficient.⁹ This is where consumer policy plays a central role in addressing demand conditions which are increasingly important to the competitiveness agenda. It is now often stated that consumers not only benefit from competition, they activate it.¹⁰ Economic growth in modern markets requires understanding and unlocking the demand-driven potential in markets.¹¹ There is clearly a need to further explore the connection between the empowerment of consumers and productivity and economic growth. The empowerment of consumers does not occur through information and education provision in relation to product/service choice alone. Consumers are empowered by having a clear set of rights, clear fair trading standards for business, and accessibility to independent mechanisms to achieve redress, including the enforcement of individual legal rights. In that sense, while industry specific ombudsman and other dispute resolution services have proliferated in recent times, this does not relieve government of its responsibility to provide enforceable fair trading standards to ensure confidence is maintained in the marketplace.

2.2 The role of government

Within the environment of competing regulatory demands it is crucial that government continue to play an active role in setting policy to shape economic direction. The challenge for the consumer policy framework is establishing its role in facilitating beneficial outcomes for businesses and consumers. Most importantly, government needs to avoid 'regulatory capture' by ensuring that evidence of the impacts of regulation take adequate account of factors across markets and community. The following discussion provides a general overview of issues relating to the role of government in addressing consumer policy matters.

Regulators need to reduce unnecessary regulatory burdens and increase harmonisation to achieve greater efficiency in, and across, marketplaces. If perfect competition could be established, some consumer issues would be addressed without government intervention and regulation would to a large degree be unnecessary. Consumers would have access to numerous markets populated with a great number of very small suppliers producing

⁹ Professor Porter of Havard Business School, argues that to achieve higher prosperity UK companies, for example, will need to upgrade their productivity by competing on more unique and more innovative products and services.

¹⁰ Sylvan, L. (2004). Activating competition: the consumer-competition interface, *Competition and Consumer Law Journal*, 12(2), 191-206.

¹¹ Wolthuizen, C. (2006). Turning up the volume: The importance of a strong consumer voice, Speech to the 3rd National Consumer Congress, hosted by Consumer Affairs Victoria, 17 March 2006.

homogenous products and services. Consumers would be able to realise their preferences by making efficient rational decisions based on perfect information. Suppliers could also easily enter and exit markets without barriers to meeting the demands of consumers. Unfortunately, competition is unable to produce these perfect conditions.

As fair trading agencies are in a central position as public agents to influence economic systems, a fundamental requirement is that they act as information and knowledge brokers, coordinating and facilitating market processes and bridging the gap between the supply side and demand side.¹² This marks fair trading agencies, not as referees of markets, intervening in a limited way by reactively remedying market failures, but as active participants promoting innovation, good business practice and strategic experimentation on the supply side.

A progressive consumer policy framework should develop responsible action on the supply and demand side by emphasising elements such as self-regulation, participation of consumers and suppliers in policy making and implementation, and using information as a regulatory tool in itself.¹³ Consumer affairs agencies as active players across the supply and demand side of markets, working within a network of regulators in consumer policy, are able to address many market and consumer concerns while also achieving best regulatory practice.¹⁴ This entails regulators acting as market catalysts, creating conditions to enable markets to reach socially preferable states and actively engage in regulatory activity in markets on an ongoing basis in consultation with market players. However regulators must also ensure consumer's interests are constantly factored into their calculations.

Calculating risk

Issues of risk management, its distribution across markets and the community and how governments should respond to risk are part of the general discussion on more responsible regulation. There are different perspectives on the role consumer policy and government should play in dealing with the distribution of risk in markets. In particular, questions surround the level of acceptable risk and to what extent 'beneficial risk' is appropriate in markets.¹⁵ One of the assertions that has been made is that today's consumers are more risk averse than ever before, and that consumers appear to be over-protected through

¹² Ibid.

¹³ Ramsay, I. (2006). Consumer law, regulatory capitalism and the 'new learning' in regulation, *Sydney Law Review*, 28, 9-35.

¹⁴ Moreau, F. (2004). The role of the state in evolutionary economics, *Cambridge Journal of Economics*, 28, 847-874.

¹⁵ Better Regulation Commission (2006) *Risk, Responsibility and Regulation: Whose risk is it anyway?*; Banergee, Subho and Ewing, Robert. *Risk, wellbeing and public policy*

regulation. The removal of regulation is seen as a way of empowering consumers to take responsibility for their own actions.

In modern markets society and consumers face a range of different risks. For example, in the Australian financial services sector as a result of changes in government policy in the 1980s, consumers are not only more exposed to risk but also have an appetite to take on increased levels of risk based on an expectation of higher returns. Also, the taking on of larger debt in a less affordable housing market has increased markedly in the past decade. Theoretically, this is not problematic as under ideal conditions, where transaction costs are negligible, individuals involved in a transaction will have achieved the optimal allocation of resources through the process of trading risks between parties.¹⁶

However, in many cases transaction costs are far from negligible and as a result the failure to appropriately allocate risks has consequences for welfare and efficiency.¹⁷ For example, consumers may be over-exposed to risk where they cannot efficiently distribute risk through bargaining. Information problems, perhaps in the form of search costs, may prevent the exercise of choice in markets and erode the consumers' ability to bargain or make appropriate choices¹⁸. Additionally, in highly competitive environments, there is the potential for increased pressure on business to find competitive advantage by shifting risk to consumers in unfair ways or perhaps raising transaction costs. For some consumers unfair practices and even small transactions costs limit their ability to realise the benefit of competitive markets. This results in suboptimal allocation of risk and due to differing degrees of disadvantage results in risk being unevenly felt across society.

The management of risk with respect to consumer policy requires an understanding of how consumers are able to avoid risk, prevent risk, shift risk and distribute risk.¹⁹ In contrast to blaming consumers for their level of risk aversion, European Community consumer laws view the success of the internal marketplace as being contingent on the consumer who is confident in consistent and adequate national consumer laws. The well-protected "confident consumer" is seen as integral to constructing a successful single market and is an activator of markets. A key element of promoting confident consumers is for consumer policy and government to actively participate in the issue of risk and play a role in its distribution across markets and the community.

¹⁶ ACCC Submission to the Principles Based Review of the Law of Negligence, August 2002, Submission #47
1st.

¹⁷ *ibid.*

¹⁸ Westpoint, Finscorp and Westwater, company collapses are recent examples with combined consumer detriment of more than \$500M.

¹⁹ Moss, D.A. (2002). *When all else fails: Government as the Ultimate Risk Manager*. Harvard University Press.

When equity outweighs efficiency

In some cases, particularly in areas where public safety are paramount, governments must be prepared to impose restrictive regulation. Public safety may outweigh concerns about restrictions of market entry and tough regulatory requirements. However there is also a need for government to identify principal risks and undertake risk analysis prior to responding reactively to each perceived risk or detriment. Risks that can be clearly defined as 'principal risks' include:

- those which incur the highest cost (administrative or policy costs) to manage;
- risks with serious political, social, environmental or health consequences; or
- risks that attract high levels of public interest.²⁰

Queensland Transport regulatory initiatives

The overriding consideration for a range of transport specific regulation is the safety of the general community when using the transport systems (whether road, rail or marine). The Queensland Government strongly advocates the need for regulation that ensures a high level of safety even if this means market entry restrictions for example and other restrictive regulatory initiatives. The community expects transport systems to operate safely as demonstrated through community consultation in forums such as the Road Safety Summit held in February 2006.

Residential services

Aged services are regulated by both the Commonwealth and the States. The Queensland Government has introduced the *Residential Services (Accommodation) Act 2002* and the *Residential Services (Accreditation) Act 2002* to regulate budget hostels and boarding houses. The legislation requires service providers to ensure living standards, safety and rights for residents. At the time the legislation was introduced, about 10,000 vulnerable people were living in more than 500 supported accommodation, boarding houses and rental complexes across the state.

Market based responses, soft touch regulation or general law could not resolve the problems in this area. The increased costs imposed by this legislation may impact on the financial viability of some service providers and their establishments and potentially, on the availability and choice of accommodation in this market. The regulatory requirements however seek to strike a balance between maintaining industry viability and accommodation options and ensuring living standards, rights and quality of life for disempowered and vulnerable people in the community.

Disability services

Disability services are regulated by both the Commonwealth and the States. While the Commonwealth covers issues of accreditation of certification bodies, disability employment schemes and rehabilitation, the States cover government funding of services, service standards and operation. People with a disability are more likely to be subject to abuse, neglect or exploitation in the context of the provision of services. A regulatory approach by Queensland Government to ensuring appropriate standards of services are provided to people with disabilities is thought to be appropriate given the significant risk to a particularly vulnerable group of consumers and the likely serious consequences of service standards not being adequate.

²⁰ Better Regulation Commission (2006) *Risk, Responsibility, and Regulation: Whose risk is it anyway?*

Regulation and organisational strategy

Regulation, to varying degrees, establishes control over competitive dimensions in markets.²¹ For example, preventing organisations from acting in certain ways or placing requirements on entry into markets in an attempt to prevent negative outcomes to consumers. While this may limit choices in certain areas, organisations are still able to achieve sustainable competitive advantage based on the deployment of resources under their strategic control. Regulation therefore does not prevent competition in markets *per se* but changes the nature of competition. Regulation is sometimes also seen to be beneficial by organisations as it may remove some of the complexity and environment turbulence in markets. Given the complexity of markets and the multiple configurations of organisations there are many ways in which firms can compete within the boundaries laid out by regulation. Regulation therefore can be used in a positive way to establish the kind of competition desired by regulators to achieve certain social goals or outcomes.

In some cases, regulation necessarily interferes with achieving the ideals of efficiency and places some burdens on markets. However, regulation has the overriding priority of achieving social objectives which sometimes comes at an immediate cost, with the overall aim of achieving acceptable market and community outcomes that produce longer term savings and other benefits.

The cost of regulation

The traditional view of regulation is that it inevitably imposes costs and burdens upon business. There is little doubt that poor and ill-considered regulation may well have this impact. What is emphasised to a lesser extent is how regulation contributes to economic growth by minimising transaction costs and providing a stable and certain environment for businesses and consumers.²² The Harvard economist, Robert Barro, found in a study of over 100 countries from 1965 to 1990, that effective maintenance of the rule of law could increase the average annual growth rate by as much as 0.5%.²³ Many other global studies employed various qualitative measures of the characteristics of the regulator framework. For example the *Global Competitiveness Report* for 2002 (produced annually by the World Economic Forum) found a strong positive correlation between measures of regulatory stringency and

²¹ Ramaswamy, K., Thomas, A.S. & Litschert, R.J. (1994). Organizational performance in a regulated environment: The role of strategic orientation, *Strategic Management Journal*, 15, 63-74.

²² National Economics Consulting Group, (2003) *Measuring the links between consumer and business confidence, regulatory effectiveness and economic performance*, Report for the Office of Fair Trading.

²³ Barro, R (1997), *Determinants of Economic Growth: A Cross-Country Empirical Study*, MIT Press.

GDP per capita.²⁴ The 2006-07 report also stressed the importance of the institutional environment, including the protection of property rights.²⁵

The role institutional and regulatory structures play in enhancing economic outcomes has often been argued without accompanying empirical support. To this end, as noted above, the Queensland OFT commissioned research into the links between consumer and business confidence, regulatory effectiveness and economic performance.²⁶ The main findings of the meta-analysis included:

- Regulation and regulatory systems that free up the information flows and remove information asymmetries can improve individual market efficiency by up to 10%;
- Institutional quality, as measured by the quality of the regulator and the level of compliance rates, was capable of explaining up to one fifth of the differences between the economic performance of comparable industries in terms of industrial growth and the rate of investment;
- The impacts of regulation on industry employment vary and are affected by the stage of the regulatory cycle. Industrial employment is most likely to fall in the initial or adoption stage of the development and where overzealous or uneven enforcement takes place;
- Firms with a high level of compliance are likely to outperform other firms in the industry;
- The effects of regulation are not consistent across industries or within industries. Strong transfer and re-distributive effects exist and need to be taken into consideration in the overall evaluation; and
- There appears to be strong links between good governance, institutional quality and macro economic performance.

Considering the results of their analysis generally, NECG extrapolated on the contribution of a regulatory agency such as OFT to market efficiency and competitiveness and concluded that:

- Institutional quality and regulatory efficiency are important drivers of growth both independently and in combination with other variables such as investment and innovation;
- Regulatory efficiency is becoming an important means by which national and sub national economies can improve their relative competitiveness;
- Industry effects of specific pieces of regulation will vary and need to be considered on a case-specific basis; and

²⁴ Porter, M. 'Building the microeconomic foundations of prosperity: Findings from the Microeconomic Competitiveness Index'

²⁵ available at www.weforum.org/pdf/global_competitiveness_reports/

²⁶ Network Economics Consulting Group (2003) *Measuring the links between consumer and business confidence, regulatory effectiveness and economic performance*, Report for the Office of Fair Trading .

- The effects of regulation exhibit a distinct time path and have differing effects on individual firms and industries.

At an individual business and industry level, feedback provided to the OFT has been that responsible regulation is not particularly burdensome and it does three things for business:

- It provides a 'level playing field';
- It can remove rogue and irresponsible traders from the market; and
- It promotes confidence in markets.

Summary

There is a continuing role for government through consumer policy to provide protections when market complexity, market dysfunction or product/service risks require more interventionist strategies than consumer education and information. The role of government is to utilise the consumer policy objectives of fair trading and consumer protection to complement competition policy. The Queensland Government is responsible for decisions around the allocation of risk and any proposed regulation requires good assessment and evaluation prior to implementation.

A consumer policy framework that truly joins equity and efficiency considerations is best placed to undertake this assessment and ultimately achieve good market outcomes. Consumer policy is about both efficiency and equity in the marketplace. While competition policy recognises that public interest is an important part of analysing costs and benefits, an overemphasis on efficiency over equity should be avoided. Consumer policy can account for the impact of markets on the community through inclusion of both supply and demand side issues.

One of the biggest challenges facing consumer policy is the integration of supply and demand side issues to address the balance between efficiency and equity. Policy and policy tools aimed at addressing this challenge are discussed later in the submission (section 4.2)

Conclusion

The national consumer framework may benefit from investigating the merits of:

1. An enhanced approach to national consumer policy that provides practical solutions to balancing equity and efficiency.
2. Ensuring the national consumer policy framework is central to the process of assessing the impact on markets, the calculation of risk and the reasonableness of regulation.

3. Clarifying the role of the national consumer policy framework with regard to both the supply and demand side of markets.
4. Further researching and investigating the benefits to the economy and business of consumer protection and fair trading at a national level.

3. Market trends and developments

Globalisation has been identified as one of the dominant developments in the nature of markets over recent decades. Australia, as with other countries, has increased the level of openness to global trade. Due to its geographic isolation and relatively small economy internationally, Australia has generally been open to the process of globalisation. Imported goods have increased their share of nominal domestic demand from around 11 per cent in the 1960s to about 17 per cent in 2004.²⁷ Also, over the past decade the volume of imported goods grew by an average rate of 9 per cent a year accounting for 17 per cent of nominal domestic demand in 2004.²⁸

Despite the increase in Australia's international trade, globalisation has yet to reach its full maturity. Besides overall growth in global trade one of the most significant impacts on consumer policy is the changing nature and mix of traded goods and services. Technological progress and innovation have significantly reduced costs of transportation and communication, making it possible for more Australian consumers to directly access goods and services outside of the local and national economy. While the expenditure on consumer durables declined as a proportion of disposable income²⁹, the purchasing power of consumers combined with a relative decrease in costs of some consumer durables and a marked increase in the range of products available to consumers has created a more complex environment.³⁰ Additionally pure services, and bundled services and products, which now make up a larger proportion of the expenditure of households, adds to the complexity of markets for consumers.

Access to markets outside the local economy allowing access to a broader, more complex range of products and services, has been made easier through advances in information and communication technologies. The internet, web services offering online shopping, escrow

²⁷ Dark, D. & Dawkins, J. (2005). Why have Australia's imports of goods increased so much? *Economic Roundup Summer 2004/05*, Treasury, Canberra.

²⁸ *ibid*

²⁹ *Economic Roundup*, Treasury, Canberra, Spring 1999.

³⁰ New products have also entered into the market. For example, over the past 15 years there has been a notable increase in Australian consumers and firms buying more information and communication equipment.

services, online banking and secure transactions are some key areas that have facilitated the growth of e-commerce. For a majority of consumers and businesses, transacting through the means of e-commerce provides a number of benefits such as greater convenience, increased choices and lower prices. Consumers are able to participate in global markets from their own home with the ability to execute the transaction over a relatively short period of time. Also by avoiding intermediaries in the supply chain there are potential benefits to the consumer through reduced prices.

Overall, consumers are able to participate in more dynamic, fast paced markets with a broader range of complex products and services than their predecessors. However, these newer methods of transacting expose consumers to risks that were less prevalent in the consumption of goods and services in the traditional 'old-economy'. In particular, when using modern information and communications technologies consumers are less able to identify market failures such as information and contract issues and potential externalities which can expose them to potential risks.

To understand how modern transaction methods can impact on consumers (and the relevance of consumer policy) it is important to consider the central role played by information in allowing consumers to assess the potential risks of a transaction. Pre-purchase information delivered through modern information and communications technologies is a key risk element for consumers whether it is gathered as part of the information search phase initiated by the consumer or when presented to a person as part of telemarketing. Modern information and communications technologies makes it easier for individuals to stretch the truth in making claims about products and services, assure customers with post-purchase support that may not exist, or at the extreme end attempt to commit fraud. Due to the nature of electronic transactions consumers are not able to verify the existence or quality of these products or the identity of their supplier. The increased level of anonymity in the marketplace heightens risks for both suppliers and consumers. With consumers being substantially more susceptible to improper trade practices in online markets, some form of government intervention may be appropriate to reduce the level of risk. However, it is recognised that improving confidence in online markets and minimising any impacts on business, competition and market efficiency can not be achieved without a consistent and collaborative approach across jurisdictions to consumer protection.

International cooperation with participation by government, business and consumer organisations and input by Australia, on e-commerce and consumer protection is being progressed through OECD forums. Queensland continues to support a nationally consistent approach to regulation in this area.

The consumer at the end of a long chain of risk

A small, but growing percentage of consumers are currently involved in purchasing products directly from outside of their local market. A far larger percentage of consumers are exposed to retail outlets that have themselves sourced a range of goods from outside the local market. As with consumers, retailers have also benefited from technological advances and innovation resulting in lower costs and faster speed of communication and shorter delivery times. In general, retailers can operate with decreased inventories and can search more broadly for products to deliver to consumers. As a result the consumer of today is placed at the end of a longer and more complex chain of risk than was previously the case. Additionally, disputes between consumers and retailers increasingly involve reference to manufacturers or other intermediaries outside Australia. In a significant number of cases, particularly with information and communication equipment, bricks and mortar retailers refer consumers to manufacturers thereby avoiding the reasonable expectation from consumers that issues be dealt with directly by the local retail outlet.

The chain of liability becomes confused. The simple case of achieving redress between the consumer and the local retailer creates a challenge for consumer policy that seeks to achieve redress for consumers in the local market. Fair trading regulators need to develop more effective remedies for consumers including the development of the general law to reflect existing common law obligations on retailers (that may not be well known or understood) in these circumstances.

Where information and communication technologies are able to improve the competitiveness of markets, it is critical that consumer policy is in place to act as a facilitator of consumer confidence. While generally the benefits are left to the markets to dispense through greater choice or lower costs which may be passed onto the consumer, there is a role for government in allocating the risk. This is no better illustrated than the pressure currently being applied by financial institutions which reap enormous efficiencies through electronic transactions, to shift the risk of those transactions entirely onto the consumer by amendment to the Electronic Funds Transfer Code of Conduct.

Conclusion

The national consumer framework may benefit from investigating the merits of:

5. Supporting the continuing importance of a national consumer policy framework in providing protection for consumers in the context of the growing complexity and globalisation of the market.
6. Enhancing remedies for consumers in the local market where the chain of liability can make the seeking of redress difficult.

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

As discussed previously (1.2 “Department of Tourism, Fair Trading and Wine Industry Development”) there are indications that the current Queensland policy framework is providing good outcomes for consumers and business in this State. These outcomes, which can be attributed to regulatory efficiency, are reflected in a strong Queensland economy.

While there is evidence that the overall national approach is working and that the jurisdictional divisions are appropriate, potential enhancements can be identified at the national level. Both achievements as well as areas requiring refinement are outlined throughout the remainder of the submission.

4.1 Jurisdictional responsibilities

As stated previously, there is a division of regulatory, policy and administrative roles and responsibilities for consumer policy between the States and Territories and the Commonwealth. The TPA at the Commonwealth level and the Fair Trading Acts in each of the States and Territories contain the key provisions. The State and Territory Fair Trading Acts, not subject to Constitutional limitations, apply to all persons, encompassing individuals, partnerships and corporations. There may, as a result, be some overlaps between the TPA and State and Territory Acts and jurisdiction of those bodies that administer the legislation. In the event of any inconsistency the TPA will prevail. Each State and Territory has a Memorandum of Understanding with the ACCC to avoid duplication of enforcement. Generally, the ACCC has an interest in selective cases of national significance while the States ensure remedies for individual consumers as well as achieving systemic marketplace outcomes including national outcomes.

The consumer protection provisions in Part V of the TPA mirrored in the States and Territories Fair Trading Acts is at the core and continues to be a functional division. Part V sets out certain conduct that is prohibited including misleading and deceptive conduct; unconscionable conduct; false or misleading representations; and conduct around unsolicited goods and services. It is important that State and Territories administration of these provisions are retained. (A further discussion of the general law is at section 4.6 “Generic and industry-specific regulation”)

The States and Territories ‘regulatory footprint’ is wider than the Commonwealth’s through the regulation of a diverse range of industries. (See Appendix A) In addition to the general law in the Fair Trading Acts there is the need for industry specific regulation where the Commonwealth cannot legislate.

Evidence of uniformity

It is reasonable to assume a lack of uniformity will have cost implications for businesses and consumers in certain markets. Despite a lack of evidence of the actual costs, significant work has been done to achieve greater harmonisation. One of the key mechanisms promoting enhanced harmonisation is the Ministerial Council on Consumer Affairs (MCCA). The role of MCCA is to consider consumer affairs and fair trading matters of national significance and where possible develop a consistent approach to these issues.³¹

Queensland is willing to and is capable of working in a collaborative and cooperative fashion to achieve national uniformity where needed. The composition of Queensland’s economy and growth drivers mean that Queensland will continue to experience specific marketplace problems ahead of other jurisdictions and will also continue to lead the development of appropriate regulatory responses to issues as they emerge.

While some inconsistencies have developed across jurisdictions in fair trading legislation, overall the national framework works well and there is perhaps less divergence and more harmonisation than is sometimes suggested. The States and Territories have worked hard to ensure as much consistency as is necessary and desirable in the circumstances. This makes sense in markets that can be considered to have a single national marketplace and to eliminate the migration of marketplace issues to less regulated jurisdictions.

³¹ “About MCCA” www.consumer.gov.au/html/protection.htm

Travel agents - The Queensland *Travel Agents Act 1988* requires travel agents to be licensed. The legislation is part of a state-based national scheme for licensing travel agents which is underpinned by a requirement that licensees join the Travel Compensation Fund which is regulated by the Commissioners of fair trading agencies. The scheme engenders confidence in the travel market by protecting consumer against losses and disruption of travel arrangements and it indirectly protects other businesses in the tourism supply chain.

Under the national Participation Agreement, participating States and Territories agree to enact uniform provisions. All States and Territories are party to the Participation Agreement. However, Northern Territory has not required travel agents to join the Travel Compensation Fund.

Amendment of the uniform provisions is subject to approval by MCCA. In 2004-2005, the participating jurisdictions completed a number of amendments to the scheme following a NCP review, which reduced the burden on business.

There are a variety of processes that are effectively utilised including:

- *Uniform legislation* – Uniform legislation has been used in Australia's *Uniform Trade Measurement Legislation*. Uniformity is not guaranteed because uniform legislation continues to require the cooperation of jurisdictions to ensure any amendments to the legislation remain consistent, are adopted by all jurisdictions and are enacted without time lags. The uniformity of this legislation has been high however time lags have been an issue. The main contributing factors to this have been the previous reluctance of the Commonwealth to take responsibility for legislation and administration despite a constitutional head of power and the relative priority it received in different jurisdictions.
- *Template legislation* – Template legislation attempts to overcome problems with the uniform legislation model by designating one jurisdiction to enact the template legislation while the other jurisdictions enact legislation which applies the template as the law in each jurisdiction. Any amendments made to the legislation in the designated jurisdiction immediately apply elsewhere. In theory, this guarantees that any future changes that are made to template legislation are adopted in all jurisdictions. Accordingly, they provide the greatest degree of consistency between jurisdictions over time. The uniform *Consumer Credit Code* has been a successful example of this model.
- *Core consistent provisions* – At times, flexibility may be necessary to support legitimate and important differences between jurisdictions. In this instance, core consistent provisions may be preferred as this model only seeks consistency and agreement on key parts of the legislation. Additionally, the core consistent provisions model can be used where numerous confined local issues do not need to be addressed nationally or it is difficult to do so. Such an approach can be found in the MCCA agreement that jurisdictions would 'mirror' the provisions in Division 1 of Part V of the TPA. This approach, while providing a high level of uniformity, provides maximum flexibility to jurisdictions (and to those responsible for the drafting of legislation) to make any changes

which are considered appropriate to ensure that amending legislation meets a jurisdiction's particular needs. The degree of uniformity achieved depends on the subject matter and degree of specificity. The weighing of the benefit of this flexibility against costs to sectors of the community must remain a matter for government decision making.

- *Mutual recognition* – The Mutual Recognition Agreement (MRA) provides that businesses can sell any good, which meets the regulatory requirements of the jurisdiction in which it is manufactured, or into which it is imported from overseas, in any Australian State or Territory (and to New Zealand under the Trans-Tasman Mutual Recognition Arrangement). Under the MRA, governments can implement a temporary exemption from their obligations for a period of 12 months. However, these exemptions are rarely sought by governments, because they can already effectively restrict products without having to resort to the temporary exemption process.

Template legislation tends to provide the greatest degree of consistency between jurisdictions over time. This default position could apply unless there were factors identified that made this mechanism inappropriate.

Harmonisation

In the European Community (EC), a move away from a minimal harmonisation approach (characterised by a floor of rights upon which member States could build) towards maximum harmonisation (where there is a ceiling of rules and any more protective national rules are prohibited) has been reflected in the dominant philosophical approach to consumer policy.³² The impetus behind this harmonisation has been the objective to improve the functioning of the market and remove barriers to trade. In some circumstances differential consumer rules can be barriers to trade. Until evidence emerges of the impact of this approach, caution must be exercised. Axiomatically, the maximum approach may not improve uniformity and will reduce flexibility to intervene in specific marketplace problems.

International commentary is also developing on the need for a cautious approach to harmonisation. Any move towards uniformity must be careful not to create a national system of harmonised laws that removes the flexibility and responsiveness of States/Territories and reduces innovative pressures and incubative creativity arising out of competitive federalism. There is already a significant degree of uniformity in consumer policy across Australia. In the move towards greater harmonisation it is important not to remove the States' flexibility to respond to regional issues or to fragment the system further.

³² Howells, Geraint G, (2006) "The Rise of European Consumer Law – Whither National Consumer Law"? 28 Sydney Law Review 63

Most importantly the current framework provides the flexibility for Queensland to respond to regional, industry or marketplace specific issues where necessary. There is also a culture of competitive regulation allowing States and Territories the ability to adopt regulatory innovations from other jurisdictions where necessary and tailor regulation to suit local conditions.

In reviewing components of the framework it is important that the overall framework is not fragmented. The current approach of separately reviewing component parts of the framework poses that risk. Such an approach is inconsistent with the integrated service model the Queensland community is demanding. Confusion and uncertainty arise when different laws, each with its own constitutional limitations deal with the same issue differently. Given the breadth of the States' mandate, the constitutional limitations of the Commonwealth and the high level of uniformity in laws, consideration should be given to greater clarification and coordination of these shared responsibilities.

In April 2007, COAG agreed the States and Territories would have responsibility for developing a uniform approach to regulating product safety. A harmonised approach to product safety shares responsibility for policy leadership across multiple jurisdictions and their agencies, minimising the risk of significant issues being missed and increasing the opportunity for innovative response and national coverage. State-based agencies as service delivery experts have been the prime movers of products safety innovation in terms of education, industry liaison and policy development.

Harmonisation means the States and Territories can maintain and improve on existing levels of service and respond more effectively to local issues requiring urgent attention. For example, individual Ministers may introduce interim bans to provide immediate protection against serious product hazards surfacing in local markets.

The current wider regulatory framework includes a coordinated approach to consumer redress and enforcement with the Commonwealth generally assuming responsibility for selected national, multi-state and international issues and the States primarily responsible for consumer complaints. Service delivery integration at a state and regional level is currently being developed in response to consumer demand. Fragmentation of the service delivery arrangements is not consistent with consumer demand or modern trends in the development of public services. States and Territories are currently successfully developing and providing integrated administrations covering diverse areas with substantial contacts with individual consumers and businesses at the local level. Economies of scale and scope are achieved through this integration. Service provision in relation to functions such as information and

education, dispute resolution and much compliance and enforcement action generally seems better placed at the local level not only for scale and scope but also for accessibility and responsiveness.

A wholly Commonwealth administered framework could be time consuming, rigid, costly and cumbersome. The States are better placed to undertake the oversight of the wide scope of consumer law they currently administer. The broad administrative networks associated with the wider regulatory footprint enable local State and Territory officials to quickly detect and respond to emerging problems such as a dangerous product entering the market.

Services such as product safety systems are most effective when they are provided as close to the people as possible. Existing regionally based systems provided by the States and Territories ensure a wider and more accessible spread of services and therefore, more effective delivery and protection. A centralised approach is often less accessible and less responsive as it is limited to issues of national significance rather than the needs of local markets and communities.

As a matter of course, State and Territory agencies provide proactive compliance checks and audits in various high risk areas including infant's products and toys available at retail stores, shows and community markets.

Product Safety – During the pre-Christmas 2006 period, the Queensland product safety proactive compliance program included more than 5,000 toys inspected at 249 premises across the State and resulted in the removal of 20 unsafe toys from the market to protect Queensland children. A number of national product safety recalls have been initiated through this process and at least 3 suppliers will be subject to court proceedings. This ensures regional consumers receive the same level of protection as those in the major cities. High risk products such as toys, bunk beds, cots and baby walkers are subject to more frequent checks for compliance with mandatory safety standards. A recent compliance check at a Brisbane importer led to a supplier of a potentially deadly range of toys being fined \$4,000. The range of toys including cars, trains, animals and a puzzle, failed to comply with mandatory safety standards and were a potential choking hazard for children under three years of age.

The States and Territories as a group were quick to regulate the safety of mini motorbikes, blind cords (potentially causing strangulation) and moveable soccer goal posts to ensure that injuries and deaths were kept to an absolute minimum. None of these products have been regulated by the Commonwealth. Marketplace intelligence on products sold at shows is regularly exchanged between state-based regulators as the transient nature of suppliers in these environments calls for a swift and coordinated response to ensure that unsafe products are removed across the country.

Commonwealth administration of investigative and enforcement processes, staffing structures, and running matters through the Federal Court system as opposed to state-based tribunals and courts, is likely to be more costly. There is also a danger that by the time a national issue is identified and a policy response developed, intervention may be more difficult and costly. The opportunity to stop unfair business practices becoming an accepted part of doing business at an early point would be lost. Any change implemented could already be outdated.³³ A related risk in a wholly Commonwealth framework is the lack of responsiveness to regional issues and decreased service levels.

The optimal model for addressing consumer policy across the nation would be one that allowed for a large degree of harmonisation (where the need for it is based on empirical investigation and a public benefit test), as well as flexibility for States and Territories to respond to local market issues. In this model there would be the potential for development of uniformity, without centralisation.

Federalism

Harmonisation is consistent with the federal structure of the Australian nation and resists further attempts towards centralisation. A recent report prepared for Council for the Australian Federation,³⁴ highlights the benefits of federalism and decentralisation. The report argues that federalism is regarded as one of the best governmental systems for dealing with the twin pressures produced by globalisation – the upward pressure to deal with some matters at the supra-national level and the downwards pressure to bring government closer to the people. Governments around the world are recognising the benefits of a federal model. This has been most evident in Europe, where the abiding principle of the European Union is subsidiarity – that responsibility for a particular function should where practicable, reside with the lowest level of government. The need for regional flexibility to respond to issues is well illustrated by States' responses to social welfare and health issues and the need to be responsive to local communities.

The Queensland *Liquor Act 1992* has provision for regulating the carriage or sale of liquor in a regional area. Locally targeted regulation may support a community driven strategy to reduce individual harm caused by alcohol abuse and to address alcohol related disturbances and public disorder. Restrictions may include limits on the amount and type of alcohol that can be brought into an area, or conditions for licensed premises. This initiative, known as Alcohol Management Plans, was in response to issues identified by the community and in

³³ Bush, Janet (2007) "Uniformity or diversity? The future of European consumer policy" National Consumer Council

³⁴ Twomey, A and Withers, G (2007) Federalist Paper 1 Australia's Federal Future: A Report for the Council for the Australian Federation.

the Cape York Justice Study. It involves the Queensland Government and Indigenous communities working together to address issues affecting Aboriginal and Torres Strait Islander people.

On 30 December 2002, the government commenced the introduction of restrictions on the type and quantity of liquor that can be brought into various remote Indigenous communities. Alcohol management plans, which are developed and implemented in partnership between indigenous communities and government, form the basis for the restrictions.

Protecting health consumers

The current framework of consumer protection is an appropriate mix of generic and industry-specific legislation at both a state and national level. It is also a multi-pronged approach which encompasses regulatory, educative and advocacy strategies. The special characteristics of the industry, needs of industry participants and relationship between the industry and consumers means that industry and sometimes state specific measures are necessary.

Conclusion

The national consumer framework may benefit from:

7. Maintaining the current model of jurisdictional division of responsibilities for regulation, policy and administration that allows flexibility and state/ regional responses to market issues.
8. Ensuring that the coherency of national consumer policy framework is maintained by applying this approach to all of the component parts of the consumer policy framework.

4.2 Policy tools

There are a range of policy tools that can be used to ensure consumer empowerment and protection. Policy tools should vary according to the issue, the market and the nature and extent of the detriment to the consumer. Once the policy stages of identification and analysis of the problem are conducted, there is also typically a calculation about the costs and benefits of the various policy options that are selected to address the issue. This costs / benefits analysis is particularly comprehensive when it is regulation that is being considered or when the possible impacts are wide.

Queensland has a rigorous Public Benefit Test (PBT) and Regulatory Impact Statement (RIS) process incorporating cost-benefit analysis as a key tool for government decisions on market intervention. The cost-benefit analysis (CBA) seeks to avoid unnecessary or excessive costs of regulation. It utilises a process of identifying different options for regulation to deal with specific market problems. While it may identify social objectives, it is

particularly useful to gatekeepers in considering economic impacts by quantifying all of the potential costs imposed on business, consumers and government. It is the way that cost-benefit analysis is relied upon and utilised at the national level which forms the focus of the initial part of this discussion. Importantly, the application of cost-benefit analysis to policy assessment can vary. At the national level there appears to be some difficulties with the application of CBA to the assessment of consumer policy.

Cost-benefit analysis (CBA)

If used appropriately CBA can assist with efficient allocation of resources and provide a relatively objective and transparent decision making process where assumptions and justifications for regulatory action are explicit.³⁵ However, a limited application of CBA in the assessment of consumer policy at a national level can deliver inconsistent outcomes. In general, value judgements are required to balance both efficiency (i.e. the creation of wealth) and distribution of wealth (i.e. equity) concerns.³⁶ The actual calculation of costs and benefits involves an array of approximations, simplifications and counterfactual hypotheses, the use of which involves countless judgement calls. These types of calculations will involve the exercise of discretion and this discretion can be exercised in a number of different ways.³⁷

Refinement of CBA at the national level, should address some practical and conceptual issues, namely:

1. the perception that CBA offers an objective and unbiased methodology with which to assess regulation;
2. the importance placed on economic efficiency as the more easily quantified value; and
3. that economic analysis in CBA cannot adequately quantify risk or issues of social justice, either conceptually or practically.

CBA can be difficult to apply to some benefits of proposed action, such as assessing the monetary value of life, health and well-being. These harder to quantify benefits are important to balancing the cost benefit equation but can be neglected in the national CBA process. In examining the assessment of costs and benefits in policy, the Commonwealth Treasury's wellbeing framework recognises that analyses of economic development which only take in income, and which neglect other important determinants of wellbeing.³⁸

³⁵ Heinzerling, L. & Ackerman, F. (2004). Pricing the priceless: Cost-benefit analysis of environmental protection, Georgetown Environment Law and Policy Institute, Georgetown University Law Center.

³⁶ Lemieux, p. (2006). Social welfare, state intervention, and value judgements, *The Independent Review*, 11(1), 19 – 36.

³⁷ Heinzerling, L. & Ackerman, F. (2004). Pricing the priceless: Cost-benefit analysis of environmental protection, Georgetown Environment Law and Policy Institute, Georgetown University Law Center.

³⁸ Australian Treasury (2004), Policy Advice and Treasury's Wellbeing Framework, *Economic Roundup*, Winter.

The national CBA process is mostly silent on the questions of equity and distribution of resources because of the difficulties in calculating these things, especially when compared to more readily identifiable and immediate short term costs impacting on competition. However issues of equity and the distribution of risk should be key concerns for government policy making and a key criterion for evaluation of public policy.

Alternatives to CBA

CBA is one of many policy tools to help in assessing regulation. There is also a need to seek alternatives and to use a multi disciplinary approach at each stage of the policy development cycle.

In recent years behavioural economists, have contributed to the discourse on policy development and consumer policy by challenging the traditional neo-classical economic approaches. The neo-classical approach, relying on classical choice theory, focuses on the individual consumer and assumes that when faced with a choice or a problem, the consumer will exercise a well defined set of preferences. In contrast, behavioural economics indicates that in certain circumstances consumers do not behave consistently with standard economic assumptions about rational behaviour. Rather, many other contextual influences may influence their choices. They may, for example be motivated by perceptions of fairness and concern about consequences for others or they may have a limited tolerance or capacity to engage in complex cognitive exercises and instead apply 'rules of thumb'.

The behavioural economics approach treats key aspects of consumer decision making as endogenous, originating from within the individual. While the classical economics approach treats key aspects of consumer behaviour as exogenous, that is influenced by their external environment. This means the behavioural approach can offer more insights into consumer decision making, where neo-classical economics alone is unable to explain critical issues for consumer protection.³⁹ Behavioural analysis implies many things that were assumed irrelevant to decision making in traditional economics, such as beliefs, the actual information people possess, culture, peers, learning and other factors relevant in psychological and sociological disciplines, are important. The import of behavioural economics for consumer policy can be readily dismissed by criticism that it is still in its infancy and does not offer a complete and cogent theory of consumer behaviour that can be used either to complement or modify traditional theories of consumer choice or that the studies are restricted to particular areas such as financial services and cannot be generalised. The challenge to

³⁹ Smith, R and King, S (2006) *Insights into Consumer Risk: Building Blocks for Consumer Protection Policy, Roundtable on Demand-Side Economics for Consumer Policy: Summary Report*, OECD, Paris.

policy makers is to recognise that the traditional theories equally do not offer a complete and cogent explanation and there is a critical mass of primary research findings which now need to be routinely considered with other competition and consumer policy analysis and processes.

There is also room for the development of new and innovative ways of ensuring consumers voices and interests are taken into consideration. In the UK work is being done in relation to the development of tools to ensure consumers' interests are taken into consideration in regulation. For example a consumer interest toolkit has been developed by the consumer body with Pricewaterhousecoopers for the telecommunications sector.⁴⁰

There are also well established policy development tools that should be utilised at the national level to give effect to the series of public interest tests identified in clause 1, subclause (3) (d)–(j) of the Competition Principles Agreement such as social welfare and equity consideration including community service obligations; government legislation and policy relating to ecologically sustainable development; economic and regional development; government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity; and the interests of consumers generally, or a class of consumers and the efficient allocation of resources.

Both the International Monetary Fund and the World Bank utilise social impact analysis to assess the impact of economic policies on social outcomes, to determine if a policy or program will meet its social objectives and to recommend strategies to ensure these objectives are met.⁴¹ There is a particular emphasis in assessing the impacts on the vulnerable and the poor. The overall aims are equitable and sustainable development which entails measures that strengthen social development outcomes and sustain the gains of economic development.

However, these alternative approaches suffer from the paucity of methodologies, data and research in national consumer policy. While the need for a national research agenda will be discussed further (in sections 4.3 and 4.5), the paucity of methodology and data is reflective of the priority afforded to national consumer policy within a primarily economic framework. To create a progressive national consumer policy framework there appears to be a need for national agencies which predominately use an economic paradigm to adopt a more

⁴⁰ Bowe, Collette (2006) "Putting Consumers at the Heart of Regulation" Consumer Policy Review 16(2)

⁴¹ International Monetary Fund (2001) *Social Impact Analysis of Economic Policies*. Factsheet; The World Bank, (2003) *Social Analysis Sourcebook: Incorporating Social Dimensions into Bank-Supported Projects*. Social Development Department.

integrated approach with other disciplines to obtain the best policy outcomes for the community. The underdevelopment of this area points to the need for new national institutions (as discussed further in sections 4.3 and 4.5) to progress the integration of new empirical knowledge into both competition and consumer policy.

Conclusion

The national consumer framework may benefit from investigating the merits of:

9. Reviewing national consumer policy development guidelines to include an expanded range of methodologies fully addressing social and economic objectives of consumer policy
10. Developing a national consumer policy toolkit (that has a range of methodologies from multidisciplinary perspectives) that is accessible to Commonwealth and State/Territory policy makers.
11. Developing shared training programs for policy makers and regulators that utilise both economic and social justice analytical frameworks.
12. Commissioning research into alternative policy tools and methodologies to enhance the current national policy toolkit.

4.3 Gate keeping and review arrangements

Queensland's review mechanisms

Queensland has rigorous review mechanisms in place for proposed regulation and reviews business regulation with a view to reducing legislative burdens. Assessment of the need for regulation is undertaken within government guidelines for developing public policy. In accordance with the Competition Principles Agreement the Queensland Government examines all new legislation proposals potentially restricting competition and provides evidence that it is consistent with National Competition Policy requirements. Regulatory proposals which have the potential to restrict competition must be reviewed through a Public Benefit Test (PBT) in accordance with guidelines published by Queensland Treasury.

Assessment of the need for regulation is undertaken within government guidelines for developing public policy including compliance with the Queensland Policy Handbook. This includes consideration of issues within a policy cycle such as:

- the nature and level of detriment impacting on the economy or the community;
- effectiveness of existing policy or regulation;
- government policy objectives;
- policy instruments and costs and benefits of policy options;

- stakeholder and community consultation;
- consistency with whole-of-government strategies, priorities and objectives;
- implementation strategies; and
- policy evaluation.

While Cabinet has ultimate responsibility for policy decisions, central government agencies play a key role in determining processes for analysis and decision-making on regulatory proposals.

Queensland Treasury has a role in ensuring the efficiency of regulatory frameworks by providing advice to government on impacts of regulation and regulatory design. In accordance with the *Competition Principles Agreement*, the Queensland Government examines all new legislation proposals potentially restricting competition and provides evidence that it is consistent with NCP requirements.

The Queensland *Statutory Instruments Act 1992* requires a Regulatory Impact Statement (RIS) to be prepared about proposed subordinate legislation if it is likely to impose appreciable costs on the community or a part of the community.

Queensland's approach to the process is characterised by its flexibility. In each review, the process will be determined on a case-by-case basis taking into account the significance of restrictions on competition under consideration; the size of the likely impacts of retaining or removing the restrictions; the complexity of the issues involved in the review and the level of community concern associated with the review.

Consultation with stakeholders and interested parties is an integral part of the process. The extent of consultation may differ if it is a major or minor review. In a major review, a full assessment of costs and benefits, including a detailed quantitative and qualitative analysis, is required. A reduced review may be conducted in certain cases such as where legislation may restrict competition but was developed for social reasons rather than economic objectives (eg legislation governing health and safety standards).

Once the analysis has been completed, the Queensland Government will determine whether a particular restriction on competition is in the public interest, taking into account the magnitude and distribution of all impacts.

The Department of State Development produces a number of guidelines to assist Queensland Government in effective and appropriate regulatory responses. For example the

Guidelines on Alternatives to Prescriptive Regulation has been developed to provide information on alternatives to prescriptive regulation.

As noted above, the government is committed to review of all business regulation, with a view to reducing the legislative burden on business. The objective is economic and regulatory efficiency rather than deregulation. The Queensland Office for Regulatory Efficiency assists public and private sector agencies in the review process including by provision of advice and assistance on the RIS process and managing the reduction of the unnecessary regulatory burden for business through support for the Red Tape Reduction Task Force.

Queensland's agenda for regulatory reform

The Queensland Regulatory Reform Agenda, comprising activities at federal and state levels in line with Council of Australian Governments (COAG)-endorsed initiatives, is largely being driven by the recommendations set out in the Service Delivery and Performance Commission's (SDPC) report – *Review of Legislative/Regulatory Reform Initiatives in the Queensland Government - Phase 1*. The SDPC Report made recommendations focused on improving institutional arrangements across the Queensland Government and contains 12 recommendations which are consistent with, and support, the COAG reforms and provides overarching governance arrangements. A key recommendation of the report is the formation of a Cabinet Committee to direct and drive the national and State regulatory reform agenda. The Cabinet Regulatory Reform Committee (CRRRC), announced by the Premier on 12 October 2006, will oversee all major legislative reviews in government and direct and drive the national and State regulatory reform agenda at a whole-of-government level.

The Queensland Office for Regulatory Efficiency with the Department of State Development is a key component of Queensland's approach to regulatory efficiency and reform. It undertakes the following functions:

- Federal and State Reform Initiatives: progressing endorsed initiatives under the federal and state regulatory reform agendas;
- Regulatory Impact Assessment: strengthening regulatory impact assessments including possible extension of impact statements to primary legislation; and
- Investigation and Advocacy: conducting investigations that target systemic regulatory issues of concern to business.

Commonwealth review arrangements

COAG guidelines require any regulatory proposal imposing appreciable costs on business to be subject to a national RIS. The OBPR within the Productivity Commission (PC) administers the COAG guidelines, procedures and approvals for the RIS process.

Queensland agrees governments have a responsibility to ensure that ultimately the option adopted must *generate the greatest net benefit for the community*. However, present COAG guidelines do not ensure that the allocative and distributive effects are articulated sufficiently to enable informed decision making about shifting the cost of risk. There is also an emphasis on quantifying and monetising benefits and burdens on business. This however, is only one of the steps in calculating *the net benefit to the community*.

To better balance the process, both qualitative and quantitative analysis should be conducted so that all relevant economic and social costs, benefits and impacts can be calculated. In addition to risk analysis, cost-benefit analysis, measuring compliance costs for business and assessing impacts on competition, there should also be:

- A social impact analysis;
- A consideration of the effects on vulnerable groups of consumers; and
- The need to address the goals of equity and sustainable economic development.

Guidance on measuring and attributing value to wider economic *benefits* of regulatory options such as those flowing from remedying information failure, improving competition and better allocation of resources would be useful. The current guidelines as implemented at the national level lead to a discounting of indirect costs and benefits.

An additional principle could be included in the COAG guidelines to ensure that all matters included in clause 1, sub-clause (3) (d)–(j) of the *Competition Principles Agreement* are specifically attended to, in particular:

- Government legislation and policies relating to ecologically sustainable development;
- Social welfare and equity considerations, including community service obligations;
- Government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- Economic and regional development, including employment and investment growth;
- The interests of consumers generally or a class of consumers;
- The competitiveness of Australian businesses; and
- The efficient allocation of resources.

Views of community representatives are absent from the industry views on the RIS process in the Productivity Commission's annual report. Whilst the RIS process is certainly supported, as discussed in the previous section, there should be a policy toolkit with alternative methodologies that form part of the structure and guidelines of the OBPR to deliver a balance in consumer policy.

Proposed recent amendments to COAG RIS guidelines place further emphasis on quantifying and monetising risk including assessing net present values of costs. There is no requirement to identify and quantify distributive impacts nor to provide the rationale for determining who will bear the cost. The quantitative emphasis represents a significant raising of the threshold in circumstances where there is a paucity of information and which will delay and thwart policy development without a significant input of resources to match the raised threshold. The PC has itself noted that as Commonwealth RIS thresholds have been rising, the level of Commonwealth agency compliance with the requirements has decreased. As COAG RIS thresholds have been rising, delays in MCCA policy development have been increasing.

Concerns about consistency in OBPR's application of COAG guidelines are evidenced in the development of the various options for a national personal properties registration system. Personal property security (PPS) relates to a security such as a mortgage, which can be taken over the various forms of personal property for example, motor vehicles, ships, shares, insurance and patents. The current system for registering personal property securities is important to both lenders and borrowers but is complex and fragmented and presents particular difficulties for lenders. The current laws regulating securities over personal property are currently contained in more than 70 pieces of legislation across Australia's nine jurisdictions.

Despite the breadth and wide ranging impacts of this reform on consumers, industry and governments, OBPR has decided in this instance a RIS is not required. However, States and Territories are concerned that a RIS should be undertaken to properly analyse the social and economic costs and benefits to consumers, business and the government of the reform options. About 70 pieces of legislation may need to be repealed to achieve a national register. However, the absence of a thorough analysis may mean a lack of clarity in resolving important issues such as maintaining present levels of consumer protection and adequate PPS services in regional communities.

Delays in the review process

The COAG guidelines reiterate the advisory role of the OBPR and that it does not have any power over Ministerial Council decisions. In practice the OBPR review role can mean that

Ministerial Councils do not have the opportunity to consider certain regulatory proposals where agreement cannot be reached with the OBPR about the information required to justify regulatory intervention. There are circumstances where there is substantive policy agreement amongst States but OBPR continues to seek alterations to a RIS. There is currently no mechanism to resolve situations where impasses are reached with OBPR and the impasse can continue on for lengthy periods of time. While the Commonwealth Government in managing its own legislative agenda can address OBPR impasses, no such mechanism is available in the COAG RIS processes for Ministerial Councils. This is a significant contributor to delays in the work of the MCCA.

Conclusion

The national consumer framework may benefit from investigating the merits of:

13. Reviewing the gate keeping mechanisms to ensure a range of methodologies are used including a social impact assessment.
14. Examining alternative mechanisms for overcoming significant delays or impasses in national reviews.

4.4 Regulatory and oversighting bodies

Ministerial Council on Consumer Affairs

Currently, national consumer policy proposals are considered by MCCA. The MCCA is comprised of Commonwealth, State, Territory and New Zealand ministers responsible for fair trading, consumer protection laws with an aim of consistency in policy decisions and legislation.

The MCCA has numerous achievements including the maintenance of consistent fair trading laws, the development of the uniform consumer credit code laws, the development of a consistent national regime for travel agents, the decision to radically reform the trade measurement system, the comprehensive review of the product safety system and the decision for national uniform regulation of finance brokers. A more streamlined approach to decision making at this national level may be of assistance.

There are a number of refinements that could be considered.

First, national projects need to be fully funded and resourced without delaying intra-jurisdictional work. The timely availability of research would better inform a strategic agenda and allow MCCA to identify emerging issues of national significance. Good quality research would also lead to a more efficient regulatory framework, particularly if more was known

about the impact of various regulatory approaches. The COAG RIS guidelines together with the paucity of available data mean that original research is needed to support policy development. This suggests the need for a new national institution to carry out this work such as a National Consumer Council or alternatively a national consumer research fund under the auspice of MCCA. The National Consumer Council could be both tasked by MCCA to identify a strategic research agenda so that the research community can focus its work on contributing to the area as a whole and to undertake research in relation to the MCCA's strategic agenda and inform the MCCA of emerging trends.

Secondly, the work of MCCA could be greatly enhanced by the existence of a body such as a National Consumer Commission that would have responsibility for consumer policy development. (This will be discussed further below).

Thirdly, a change to the COAG guidelines could significantly improve time frames. Current COAG Guidelines require that where two or more state jurisdictions acting in consort to develop harmonised approaches must refer any RIS to OBPR for review. An amendment which allows those States to progress reviews without reference to OBPR would assist in removing those matters from the agenda of a Ministerial Council where consensus cannot be achieved. For example, at their discretion, the State or Territory jurisdictions acting in consort may refer to OBPR or agree to refer to another jurisdiction's gate keeping process.

Notwithstanding, these refinements, MCCA decision making should continue to be consensus-based in order to preserve the autonomy of individual jurisdictions.

A National Consumer Policy Body

Currently, Commonwealth, State and Territory fair trading and consumer protection agencies and MCCA do not have access to a body dedicated to advice on consumer policy for national issues. For example, the ACCC does not have a role in policy development. In the absence of a stand alone Commonwealth consumer portfolio, the Treasurer is responsible for the development of consumer policy as well as maintaining gate keeping on national regulatory proposals.

To support the development of consumer policy at a national level that adequately addresses fair trading and consumer protection objectives it is suggested that the merits of a body, such as a National Consumer Commission be investigated. This body may include representation from the States, Territories and the Commonwealth and may facilitate better and more consistent policy development processes on a national basis as well as ensuring the fair

trading and consumer protection objectives are preserved and further developed alongside competition policy.

Such a body may need to be resourced with administrative and secretariat functions. Its role would be to advise governments on issues of consumer policy and coordinate the implementation of agreed policy for enforcement by existing Commonwealth, State and Territory fair trading and consumer protection agencies. Such a body may enable a number of important goals to be achieved, including:

- Recognition of the importance and benefits of uniform national general law;
- Recognition of the importance of maintaining regional service delivery arrangements throughout Australia;
- Enable the Australian consumer policy framework to avoid duplication;
- Provide the potential for consumer to drive improvements in both consumer policy and economic reform; and
- Better articulation and development of a national consumer policy framework that is broadly representative and has credence nationally.

Each Australian jurisdiction could have representation and with a Ministerial Governing Body determining the work program. This Ministerial Governing Body may also need to have administrative and secretariat support and therefore may require an administrator (who is a statutory office holder) assisted by administrative staff who could undertake research and policy functions. Decision making by the Ministerial Governing Body could be achieved by two-thirds majority.

Conclusion

The national consumer framework may benefit from investigating the merits of:

15. Ensuring individual MCCA projects are fully funded and resourced.
16. Developing a national consumer policy research capacity either through the establishment of a fund administered by MCCA or the establishment of a National Consumer Council.
17. Establishing a national body with responsibility for developing consumer policy.
18. Reviewing COAG guidelines to allow State and Territory jurisdictions to move towards greater harmonisation in a timely manner.
19. Making a default agreement utilising template legislation as the agreed mechanism for uniform legislation.

4.5 Self and non-regulatory approaches

Shared responsibility

The concept of 'shared responsibility' is reflected in the OFT framework where government, industry and consumers have clear roles to play in maintaining a fair and ethical marketplace. Shared responsibility means more than reliance on consumer education and self-regulation by industry. While these non-interventionist strategies are important, government also needs to play a facilitative role in encouraging greater consumer involvement in policy development and regulatory responses, the development of a consumer advocacy sector and true stakeholder partnerships. The current national framework does not provide an adequate infrastructure for consumers and business to play an integral and equal role in ensuring an environment of sustainable economic efficiency, a strong competitive market and fair outcomes for consumers. In addition, consumers must have access to sources of advice, representation and redress. These issues will be discussed first, followed by a discussion on self-regulation by industry.

Consumer advocacy and representation

As discussed previously, without adequate consumer input, consumer affairs agencies risk being captured by the supply side on issues of regulatory burden, competitiveness and efficiency. This perspective is only one side of the story.

It has long been recognised that there can be complementarity between competition policy and consumer protection policy. But this policy interface cannot be explored without an adequately resourced consumer advocacy sector. Consumer involvement in policy development can take many forms and can include gathering information on consumer views and consultation with consumers through to participation and representation.⁴² Consumer involvement should be at the heart of good public policy making processes. Apart from being ethically sound and ensuring open and accountable processes that will increase consumer confidence and the legitimacy of the policy process, it can also help to improve the quality of the policy response.

As a disparate and under resourced group, consumers and small community consumer advocate organisations do not have the capacity or the time to play an effective role in contributing to policy development, lobbying, research and other forms of advocacy. This means they cannot currently compete with the voice of industry and industry bodies. This also has implications for the efficacy of bodies such as the Uniform Consumer Credit Code

⁴² National Consumer Council (2002) *Involving Consumers: Everyone Benefits*,

Management Committee for example, which depend on the capacity of consumer engagement in the process.

National consumer advocacy body

One promising model for enhancement of consumer capacity is that of the UK's National Consumer Council. This organisation, funded by government, but independent from it, has a prominent place in debate on consumer policy and economic competition.

A national consumer advocacy body in Australia (based on the model of the UK National Consumer Council) could:

- carry out research in consumer policy;
- provide a voice for consumers in the regulatory and political/ policy process in relation to consumer protection regulation, fair outcomes for consumers, consumer redress, sustainable economic efficiency and a strong competitive market;
- have a Board comprised of representatives with expertise in the formulation and development of consumer issues;
- have an advisory committee comprised of senior representatives from the public and private sectors, including consumers; and
- have regional networks and links.

Research

There is also a need for a more complete picture to be available to regulators and government in relation to the costs and benefits of fair trading and consumer protection policy and regulation. A properly resourced national research program for consumer policy could achieve this goal and ensure more effective and efficient regulation. The consumer advocacy sector also needs to be supported by an adequate body of research from consumer perspectives that can then be considered by regulators and policy makers as part of an 'evidence-base'. Much policy analysis of consumer policy is based on the assumptions of the neoclassical economic model. This should be supplemented by other research that challenges some of the assumptions inherent in the neoclassical approach. There is a need for a rigorous and independent body of research to complement what is currently available to enhance the likelihood of more positive and fairer outcomes for consumers.

The Commonwealth can play an important role in this regard. It has the existing infrastructure and mechanisms to operate a national research grants scheme dedicated to consumer policy. It also has a role (either through a consumer council) in utilising this research to provide the consumer policy sector with a body of research that can be distilled and utilised for best practice in policy development and regulation. The funding of research

and the meta analyses of existing research will be valuable starting points for the development of a broader policy development toolkit and an evidence base for policy makers and regulators.

Consumer advice and legal representation

Consumers need access to affordable sources of advice and redress, including legal representation where it is necessary and alternative dispute resolution. Notwithstanding the existence of legal protections and 'consumer friendly' dispute resolution process, consumers, particularly vulnerable consumers, often need assistance with enforcing their rights and sometimes legal action through the courts is the only available recourse. Consumers' ability to access appropriate redress is central to sustainable economic efficiency and a strong competitive market.

A nationwide network of consumer legal centres could:

- provide advice and representation to consumers; and
- be authorised to undertake legal actions on behalf of individual or groups of consumers;
- be authorised to undertake 'super complaints' in relation to certain features of the market that are currently negatively impacting on consumers (see s11 Enterprise Act UK);
- participate in advocacy for consumers and links with the national body; and
- participate in developing local communities' capacity to provide fair outcomes for consumers through education, awareness raising, and skills development.

Corporate social responsibility (CSR)

Government has a role in encouraging and facilitating corporate social responsibility (CSR). Combined with greater expectations from consumers that companies will conduct themselves in an ethical manner and public concerns about corporate governance and the growing influence of major corporations, is the commercial benefits to business of engaging in CSR. Closer links with consumers can lead to greater awareness of their needs which may result in their businesses being more competitive. It is also in the commercial interest of business in terms of long term value creation and risk reduction to take into account the social and environmental context in which they operate.

The UK Government has promoted and facilitated the engagement of business in CSR through strategies such as encouraging business to be actively involved in consumer education programs (such as road shows and seminars) and establishing an alliance of stakeholders to facilitate the planning and coordination of activities across the public and private sectors.

Governments should encourage and facilitate business to engage in CSR by:

- conducting research to establish the business case for CSR and how it contributes to a company's competitive advantage;
- developing guidelines, principles and reporting frameworks for CSR;
- setting an example through their own procurement policies and by undertaking sustainability reporting; and
- consider making some aspects of CSR mandatory particularly for specific concerns or market failures.

Self-regulation

In Queensland, alternatives to prescriptive legislation are considered as part of the policy development process. The *Guidelines on Alternatives to Prescriptive Regulation*, produced by the Department of State Development, aim to outline best practice approaches in designing alternatives to regulation with business involvement in order to:

- maximise the flexibility of regulations while still meeting the desired outcomes;
- increase the level of business involvement to ensure that regulatory systems are designed effectively; and
- highlight alternatives to prescriptive regulation which can provide benefits to all stakeholders –government, industry and the community.⁴³

Self and non-regulatory approaches are supported by the Queensland Government where they can be effective. The Queensland Government has a clear framework when considering regulation that all variations of a regulatory response be considered. That means that self regulation, co-regulation, codes of practice, negative licensing, positive licensing, for example, are all considered and that the lightest form of regulation be tried in the first instance. DTFTWID also adopts an approach of monitoring industry and working with industry to stop unfair practices or for industry to put in place processes and structures that better protect consumers. This includes industry approaches to complaint resolution, accreditation and industry disciplinary processes such as the Real Estate Institute of Queensland's own disciplinary tribunal.

There is a large spectrum of self-regulatory tools and strategies. Despite the many different approaches to self-regulation, the UK National Consumer Council has identified three elements common to most forms of regulation, both statutory and self-regulatory that are needed if it is to be effective:

- rules which set out how business conduct is to be judged;

⁴³ Guidelines on Alternatives to Prescriptive Regulation. Department of State Development.

- monitoring and enforcement of the rules; and
- a redress system for consumers who have suffered loss, through breach of the rules.⁴⁴

The benefits of self-regulation can include:

- a flexible and cost effective way to address problem areas;
- benchmarking best practice at a level beyond minimum standards; and
- the initiative or strategy is more likely to be 'owned' by the industry if it is developed by them and best suited to the needs and realities of their sector.

There are also limitations including:

- it does not apply to those who are not part of the scheme;
- 'rogue traders' who are often the source of problems will always absent themselves from the scheme;
- there may be a limited range of sanctions and opportunities for redress;
- it may not last the test of time;
- lack of perception of independence and confidence in outcomes from industry sponsored processes;
- lack of commitment from industry if rolled up into a general scheme rather than industry specific; and
- consumers may not be aware of other processes nor be made aware of their rights including time limitations on legal action.

There has been extensive investigation into self-regulation as a policy alternative in consumer protection and fairly consistent findings. The *Taskforce on Industry Self-Regulation Report* summarised the factors common to industries and the market that are most likely to benefit from self-regulation.⁴⁵ They included the following findings:

Australian Treasury (2000) *The Report of the Taskforce on Industry Self-Regulation*

Nature and extent of market failure

Self-regulation is likely to be most effective where there are clearly defined problems but no high risk of serious or widespread harm to consumers.

Market structure

An industry environment with an active industry association and/or industry cohesiveness is most likely to administer effective self-regulation as industry participants are more likely to commit financial resources, consult with stakeholders and monitor the effectiveness of self-regulation.

⁴⁴ National Consumer Council (UK) (2000) *Models of Self Regulation*

⁴⁵ Australian Treasury (2000) *The Report of the Taskforce on Industry Self-Regulation*

Self-regulation is less effective where there is a broad spread of smaller businesses that do not communicate with each other.

Self-regulation is most likely to be effective in a competitive market as industry participants are more likely to be 'compliant conscious' to differentiate their products, or in fear of losing market share.

A more mature industry may be able to administer more effective self-regulation, as industry participants are more likely to have sufficient resources and be more committed while any 'shakeout' of rogue traders will already have occurred.

Industry and consumer interests

Self-regulation is likely to be most effective where firms recognise that their future viability depends not only on their relationship with their current customers and shareholders, but also on the wider community.

The more incentives there are for industry participants to initiate and comply with self-regulation, then the more chance a scheme can remedy specific industry problems.

The extent to which industry participants are prepared to sign up to a self-regulatory scheme will affect the ability of that scheme to provide effective self-regulation. Where a scheme has a high level of consumer recognition, to the point where consumers will favour scheme participants when making purchasing decisions, then the scheme is most likely to be effective. This will create incentives for non-members to join the scheme.

Where there are cost advantages and/or increased flexibility in self-regulatory initiatives to address specific industry problems compared with government regulation or the court system, then there is a greater chance of improving market outcomes for both business and consumers, and minimising compliance costs for businesses.

These attributes are only present in a small number of markets. These tend to be in the province of the Commonwealth's regulatory regime and include for example financial services and banking, telecommunications and advertising. While smaller, more diverse and less cohesive industries, which tend to form part of the States and Territories purview are less conducive to self-regulatory strategies.

Howell argues that from a consumer perspective, self- and co-regulatory initiatives have had very mixed success.⁴⁶ Self-regulation is clearly not preferable where there are high risks of serious or widespread harm to consumers. The UK National Consumer Council has warned about the dangers of UK's current competition policy and that the emphasis on mitigating regulatory risks by fostering self-regulation can be ineffective.⁴⁷ They argue if self-regulation is to produce a desirable outcome, it needs to meet stringent criteria.

⁴⁶ Howell, Nicola (2005) "Searching for a national consumer policy reform program" *Competition and Consumer Law Journal* (12) 294

⁴⁷ Johnstone, Jill and Kozadova, A *Imperfect Markets* National Consumer Council UK

There is a need to utilise the extensive findings already in existence about where self-regulatory responses are appropriate. They could be incorporated into the COAG guidelines on best practice regulation.

Conclusion

20. The national consumer framework may benefit from investigating the merits of:
21. Establishing a National Consumer Council
22. Encouraging industry / business to engage in corporate social responsibility
23. Establishing a consumer policy research fund that is either administered by the proposed National Consumer Council or is a separate initiative under a current government funded process such as the Australian Research Council.
24. Utilising existing findings to develop clear guidelines on when self-regulation is appropriate

4.6 Generic v industry-specific regulation

Governments, both Commonwealth and States and Territories, use a combination of general and industry specific regulation to implement consumer policy objectives. Where possible, reliance should be placed on general law, or the general law developed to be more responsive to a wider range of industries. Where necessary, consumer policy could be enhanced by placing greater reliance on the general law, and by harmonising the law across all jurisdictions. To be effective the general law needs to be supported by well resourced compliance and enforcement programs together with information and education policies.

Queensland recognises the importance and centrality of its FTA, and the Queensland Government will continue its program of regulatory review to reduce industry specific regulation where it is not required. However industry specific regulation is sometimes needed. Flexibility to respond to industry specific issues is a particularly important need for the States and Territories with their broader and more diverse regulatory responsibilities.

General law versus industry specific regulation

General regulation deals with issues across a diverse range of industries. It usually uses standards rather than defining rules that impose specific conditions on traders. The benefits of generic regulation include universal coverage and consistency, lower costs of administration and compliance at the state level and reduced risk of regulatory capture.

The lack of development in the general law at the national level has been an unrecognised driver of the development of industry specific regulation. Examples include the regulation of finance brokers, responsible lending, property investment advice, credit advice and unfair contracts. Finance brokers are intermediaries carrying out functions previously undertaken by nationally regulated financial institutions. As intermediaries, finance brokers fall outside prudential and regulatory requirements with no requirement to be approved deposit holders. Also, as they provide credit advice, as opposed to investment advice, they fall outside the requirement to be licensed by the Australian Securities and Investments Commission (ASIC).

The potential level of consumer detriment arising from the practices of finance brokers is high. As a result MCCA found a need for regulation of this industry. The most efficient form of regulation would appear to be around the advice activity itself rather than the industry as a whole. This requires action by the Commonwealth. As a result, other industry specific regulation addressing credit advice may become necessary producing a less efficient regulatory scheme.

Property investment advice is investment advice given by individuals or by any of six identified occupational/professional groups. Given the range of occupations, profession by profession regulation is inefficient. A Senate Inquiry recommended the Commonwealth Government fully license investment advice because of its significance to the national economy and the level of potential consumer detriment. However the Commonwealth has not acted nationally. In the absence of a general law consumers will continue to be exposed to risk and a less efficient regulatory response will occur.

In other instances, industry specific regulation can provide targeted solutions, can be easier to enforce and can address problems before they arise. Such regulation tends to work best for industries that can be clearly defined and are relatively static, where there are specific or technical problems that cannot be dealt with through general regulation and where there are significant consequences for consumers if problems do arise. In some areas, such as in the regulation of food safety, industry specific legislation allows regulators to proceed as co-regulatory partners with business based on the adoption of National standards.

Industry specific regulation tends to focus more on the traders and has a narrower focus than general law. Because it applies to a single industry or sector, industry-specific regulation often imposes more prescriptive rules or conditions of participation in a market, such as relating to competency and standards of conduct. Such provisions can be more effective than general law in preventing or reducing the risk of serious harm. Potential problems may be addressed when a trader enters such a market as through a licensing process, rather

than depending on the effectiveness of action taken by the regulator after the fact under general law.

Targeted regulation can greatly improve confidence in a market, particularly when there are significant risks of participation. It provides consumers and traders with certainty about their rights and obligations and better equips the parties to resolve disputes when they do arise.

Industry specific regulation is usually easier to enforce than general regulation because it is easier to demonstrate when specific rules have been broken. Unlike actions under general law, prosecution is less dependent on proving that the intention of the action would damage consumers.

Industry specific models may also provide regulators with a more effective means of monitoring business behaviour against compliance requirements. Monitoring of compliance, through means such as record keeping or audit requirements can prevent problems arising in identified priority or high risk areas. A range of other industry specific provisions, including up-front obligations, may be used to target any significant risks which are characteristic to a particular market. A mix of provisions may be utilised to address:

- information failure through disclosure requirements such as relating to service description, terms of transaction, personal identification of traders, conflicts of interest and commissions;
- probity through checks against possible criminal history and adherence to a code of conduct;
- fiduciary responsibilities such as trust account, record-keeping and auditing requirements;
- business solvency through bankruptcy restrictions and insurance requirements;
- quality of services through accreditation, competency or qualification requirements; and
- access to redress through requirements for participation in dispute resolution schemes and compensation funds.

Security Providers Act 1993 provides a licensing regime covering occupations in the security industry including crowd controllers, security officers, private investigators, security equipment installers, electronic surveillers, dog handlers, in-house security guards, and security advisors.

The private security industry makes a significant contribution to crime prevention and one of the Queensland Government's priorities is to protect and enhance community safety. General principle law is an unsuitable mechanism for regulation when there is a need for industry specific requirements such as standards of conduct, qualifications and training.

Further, it is unable to provide a regulatory structure, which may ensure the integrity of participants in a particular market or to provide a means of excluding unsuitable persons such as, in this case, people convicted of serious crimes including assault and possession of dangerous drugs.

The Queensland *Property Agents and Motor Dealers Act 2000* (PAMDA), which includes licensing requirements for real estate agents, was amended in 2001 to include marketeering provisions (s573A-E). This legislation now provides the regulator with flexibility to deal with a regional specific problem, which did not emerge to a significant extent until later in other Australian jurisdictions and when it did so, it occurred in only a limited number of other locations.

Marketeering is the term for sales practices which emerged in the late 1990s, mostly at the Gold Coast, where a number of people and companies act in concert to sell real estate to 'mum and dad' investors at grossly inflated market values.

This PAMDA amendments were designed to broadly define a 'marketeer' to capture any person directly or indirectly involved in the sale or promotion of the sale or provision of a service in connection with the sale of residential property. This includes those providing advisory, management, legal, accounting, administrative or other services. Amendments included: a cooling off period on residential property contracts; licensing of property developers; disclosure requirements for property developers including their level of interest in the property; offences of misleading conduct, unconscionable conduct and false representations extending beyond licensees to capture anyone involved in a sale; new mandatory warning statements with all contracts urging buyers to obtain independent legal advice and independent valuation advice; a requirement that real estate agents and property developers disclose to prospective purchasers their relationship with anyone else in relation to the sale and the commissions earned by all parties involved in the sale; marketeer proceedings providing for civil penalties of up to \$15,000 for individuals and \$75,000 for corporations, and for banning persons from this area of the market for up to 5 years, for offences relating to misleading conduct, unconscionable conduct and false representations and other misleading conduct in relation to residential property; the ability of the Commercial and Consumer Tribunal to impose conditions on real estate agent and property developers licences, cancel or disqualify licensees for up to five years and order payment of compensation to victims.

Enhancement of the general law

Queensland Government supports the maintenance of Part V of the TPA, and mirror provisions in State Fair Trading Acts and movements towards ensuring consistency in these provisions. The current elements of the consumer protection provisions include prohibitions on misleading and deceptive conduct, unconscionable conduct and harassment and coercion.

What could be considered, and what is currently lacking in the general law, is a general standard of fairness. A broader fairness test is part of the general consumer law of the United States of America. Section 5 of the Federal Trade Commission Act provides that unfair or deceptive acts or practices in or affecting commerce are declared unlawful. Unfair

practices are defined as those that “cause or (are) likely to cause substantial injury to consumers, which are not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”. The United Kingdom will also be introducing a general duty on all businesses not to trade unfairly with consumers, as a result of the Unfair Commercial Practices Directive adopted by the European Commission.⁴⁸

The absence of this kind of provision in the general law is another little recognised contributory pressure to the development of industry specific laws to safeguard consumer rights, particularly for vulnerable consumers. Further enhancement of the general law in this regard, may be a step towards increasing harmonisation of consumer laws. A significant amount of industry specific law addresses itself to the unequal bargaining power between consumers and suppliers and information asymmetry by intervening in the contractual relationships between the parties. Specific examples of legislation which interfere with the contractual rights between parties include the *Property Agents and Motor Dealers Act 2000*, the *Manufactured Homes (Residential Parks) Act 2003*, the *Retirement Villages Act 1999* and the *Body Corporate and Community Management Act 1997*.

Manufactured Homes (Residential Parks) Act 2003

In a backdrop of increasing migration of people into Queensland, amenable weather and an aging population, relocatable or manufactured homes in residential parks have become a popular long-term housing alternative, particularly for retirees.

General laws have been unable to adequately address the unique problems arising when people own their own relocatable or manufactured homes in a residential park but individually rent the land on which their homes are situated. In particular, such law is unable to provide a legal framework to address major issues arising in the relationship between home owners and park owners such as security of tenure.

Home owners in residential parks are often retirees who are generally on low or fixed incomes. They have invested substantial amounts of money, possibly their life savings, to purchase their own homes rather than seek public housing. On the other hand park owners have made significant investments in purchasing residential parks requiring economic returns and both parties need some certainty.

Generally, these homes are pre-fabricated or built on site and, while some may be relocatable, they are relatively permanent self-contained structures securely affixed to rented or leased land in a private residential park. When problems arise, house removal is usually not an option because of the large expense or logistical difficulties. Therefore, certainty in issues such as security of tenure in leasing the land on which the residents home is sited, agreed rent levels commensurate with their capacity to pay and access to dispute resolution systems are crucial to entering an agreement.

⁴⁸ Cousins, D (2007) “Consumer affairs; past, present and future” Consumer Affairs Victoria Lecture

The Queensland *Manufactured Homes (Residential Parks) Act 2003* (the Act) has been developed to strike a balance between the interests of both parties. The key objectives of the Act promote fair trading and consumer protection in this area by establishing rights and obligations of the parties such as requiring disclosure of information to prospective residents; providing a cooling-off period on contracts; regulating site agreements including variation of site rent; facilitating input into park affairs; and providing effective dispute resolution processes.

Retirement Villages Act 1999

According to researchers at the University of Queensland, our ageing population will produce a boom in demand for retirement village living over the next 20 years. ¹ Retirement village schemes provide for the accommodation, social and recreational needs of people who are fifty-five years or older. However, a typical retiree relocating to a retirement village will be aged between 71 to 73 years.

Occupancy arrangements in these schemes may take several forms, the most common being where the resident owns the freehold title to the unit or is granted a lease or licence over the unit. In return for paying an ingoing contribution and entering into a residence contract, participants obtain a right to reside in the village with access to services such as 24-hour emergency call service, bowls or croquet lawn, swimming pool and community centre.

Residents pay an ongoing contribution which is used by the operator to maintain capital items and cover recurrent expenses at the village. The acquisition and replacement of these capital items is funded by the operator. Upon leaving the village, the unit is reinstated to facilitate its re-sale, and the proceeds of this sale fund the payment of an exit entitlement to the resident and an exit fee to the operator.

The *Retirement Villages Act 1999* addresses the complexity of contractual occupancy arrangements in retirement village schemes and facilitates a balance between fair trading and industry viability. It provides certainty and transparency of the rights and obligations of residents and operators. Requirements include making key disclosures to prospective residents, a cooling-off period on residence contracts, transparent and accountable village budgeting decisions by operators, input by residents to village budgeting and expenditure and access for residents to effective dispute resolution processes.

Information disclosure requirements include information about facilities, fees and charges, maintenance reserve fund and capital replacement fund, residents rights and obligations and the resale process.

Important initiatives in the provisions were the creation of the maintenance reserve fund and the capital replacement fund. These funds, which are funded by residents and the village operator respectively, provide an accountable means of addressing maintenance and capital item-related expenditure. The legislation also requires that retirement villages must be registered which includes checking the background of operators.

¹<http://www.uq.edu.au/news/?article=3775>

Conclusion

The national consumer framework may benefit from investigating the merits of recognising that:

25. there are circumstances where the general law does not apply in considering policy solutions
26. the application and enforcement of the general law be considered first
27. the general law not be repeated in industry specific legislation
28. the role of industry specific legislation, particularly where there is a public interest in applying quality assurance processes on entry to an occupation
29. that the same requirements for evidence based policy decision making be applied to recommendations to de-regulate as they are to regulate.

The national consumer framework may benefit from investigating the merits of:

30. Increasing the uniformity of the general law across jurisdictions.
31. Enhancing the general law by the addition of a standard of fairness.

4.7 Enforcement and redress issues

Without compliance monitoring or enforcement activity, some industry players may choose not to comply with existing consumer protection law. Therefore consumer access to remedies for consumer disputes and breaches of legal rights where informal, fair and inexpensive processes lead to fair enforceable outcomes are key contributors to a fair and ethical marketplace. Responsibility for Australia's consumer policy framework is shared between the Commonwealth, States and Territories including compliance and enforcement. The relevant bodies are the ACCC, ASIC at the Commonwealth level, and the OFT, or equivalent in each State and Territory.

The Office of Fair Trading (Qld) Enforcement Framework

The OFT seeks to achieve a fair, safe and competitive marketplace with responsible industries, businesses and consumers. To achieve this goal OFT focuses on delivering high quality proactive activities with respect to the "Three C's". The "Three C's" is a model designed to help OFT work more effectively to improve behaviour by consumers and business in the marketplace. The "Three C's" stand for:

- getting the marketplace CONTEXT right through ensuring the rules and regulations are appropriate and adjusted to the marketplace;

- ensuring those being regulated and those benefiting receive COMMUNICATION at the right time and place so they're aware of their responsibilities and obligations, the consequences of not acting responsibly, and the avenues for assistance and advice; and
- ensuring effective COMPLIANCE programs address problems and bring appropriate accountability to bear where traders break the law.

Contraventions of OFT legislation may cause serious detriment to consumers and business, and can also damage a fair, safe and competitive marketplace that is crucial to a healthy and vibrant Queensland economy. OFT seeks to achieve voluntary compliance with legislation by communicating with business regarding its obligations to comply, monitoring the effectiveness of the legislative framework, and by taking action to detect contraventions and enforce the law.

OFT is committed to deterring, detecting and remedying improper or unlawful practices that have the potential to cause serious detriment or inconvenience to consumers and the marketplace generally. OFT recognises the need to deliver effective consumer protection initiatives together with targeted and focussed compliance activities that encourage compliance, and enhance awareness of the rights and obligations of consumers and businesses alike.

While the trend is for governments to use market sensitive means to achieve compliance (*such as*, alternative dispute resolution mechanisms, codes of conduct and consumer charters), these do not negate the need for continued enforcement of consumer protection laws.⁴⁹

Enforcement focus

OFT aims to protect and uphold the welfare of consumer transactions. It is imperative that OFT's compliance and enforcement activities are supportive of both the consumer and the marketplace in which they operate. Constant demographic change, particularly in areas experiencing above average expansion and population growth, requires the application of effective, dynamic and resourceful compliance and enforcement strategies. OFT reassesses compliance efforts to respond to new technologies and a constantly changing marketplace; both in a pro-active and reactive capacity.

By maintaining a visible marketplace presence, and from undertaking regular compliance activities, such as industry focussed compliance checks (spot-checks) and complaint

⁴⁹ Fels, Professor A. Australian Competition and Consumer Commission.

investigations, OFT ensures high risk industry sectors/operators receive focussed compliance attention. OFT's annual compliance program delivers both a responsive compliance effort responsive to consumer complaints and issues; as well as targeted compliance visits designed to monitor trader compliance during its scheduled and intelligence driven proactive compliance program. Its strategic approach to the compliance program is working with a higher proportion of non-complying businesses being targeted each year.

DTFTWID receives over 11,000 complaints annually on behalf of OFT. Approximately 3,500 of these are assessed as involving possible legislative breaches which may lead to further investigation. The remaining complaints are assessed as disputes between consumers and businesses. Mediation is used to address these complaints with a view to securing redress for complainants and/or helping businesses to improve their level of compliance, their customer service obligations and complaint handling procedures.

Each year OFT sets a clear focus on high risk products, practices and industries warranting closer monitoring to ensure compliance with the legislation. About 9,000 pro-active compliance checks are undertaken on the operations of Queensland businesses. These pro-active compliance checks are undertaken on industries and businesses that meet one or more of the following criteria:

- size of industry and transactions;
- numbers of consumer complaints received;
- significant enforcement history;
- intelligence gathered;
- new type of businesses or new legislation covering existing businesses;
- consumer confidence in industry; and
- significant events.

Historical data indicates that OFT's pro-active compliance program results in approximately 30% yield; that is, the percentage of enforcement actions initiated from the annual proactive compliance program is around 30% of spot-checks conducted. In stark contrast, however, the rate of enforcement actions initiated from OFT's reactive or responsive effort [e.g. Investigation of complaints, conciliation etc] is much less; approximately 4%. OFT's proactive compliance program identifies and monitors identified non-compliant traders in targeted industry sectors. The checks undertaken can also provide an important early warning of potentially serious issues of non-compliance.

Delivery of an effective, balanced compliance program that delivers both pro-active and reactive [responsive] compliance activities requires constant and focussed managing. OFT places an emphasis on the use of intelligence and market based research to drive pro-active compliance activities on a state-wide basis. OFT resources have been dedicated to the analysis of state-wide complaint, non-compliance, enforcement and intelligence data to ensure the effective and efficient use of compliance resources.

Key principles

OFT's compliance and enforcement philosophy is founded upon the embrace of certain key principles. Whilst maintaining a visible marketplace presence, OFT aggressively promotes ethical trader and consumer practices and enforces a myriad of marketplace protection legislation. Our compliance and enforcement effort is underpinned by:

- Risk management;
- Proportionality;
- Consistency;
- Transparency;
- Shared responsibility;
- Professionalism; and
- Promotion.

These principles are applied in the context of:

- identifying, investigating, addressing and deterring unacceptable and/or unlawful trader behaviour; and
- contributing to the creation and maintenance of an equitable, informed and safe marketplace.

In 2005-06 OFT:

- finalised 10,513 consumer complaints;
- achieved almost \$2.9 M in redress for consumers, including more than \$1.4 M in redress conciliated with traders on behalf of consumers;
- maintained licensing and registration services to 395,259 businesses and community organisation and 1.04 million searches of its public registers;
- conducted 6849 proactive compliance checks;
- the breaches identified resulted in 676 infringement notices being issued;
- finalised 3125 enforcement actions against traders resulting in fines, costs and compensation orders exceeding \$0.76 M;

- monitored 37,727 businesses, community groups and individual licensees for compliance with legislative requirements;
- verified almost 5500 measurement standards for business and government;
- provided information and advice to more than 2.7 million consumers; and
- answered 496 671 enquiries.⁵⁰

Access by consumers to redress

The role for fair trading agencies and the regulators is to ensure there are necessary enforcement powers and a culture that recognises the importance of consumer protection law, and of ensuring compliance.

Preventative strategies, such as information provision, are an important part of the enforcement regime. OFT has a heavy emphasis on information provision and there is evidence that this strategy has merits.⁵¹ However OFT is also aware of the limitations of these strategies for consumers who may have low levels of literacy or certain disabilities that make written material unsuitable for information transmission.

There is a wide spectrum of avenues for redress for consumers from informal mechanisms of direct negotiation and alternative dispute resolution through to semi-formal tribunal forums and finally litigation through the courts. The Tribunal forum is designed to be informal, consumer friendly, cost effective and thus easy to access. The Queensland Commercial and Consumer Tribunal (CCT) uses an innovative approach by providing:

- a high level of assistance and information to parties without providing legal advice;
- dispute resolution services to other Departments pursuant to memorandum of understanding; and
- active case management of files and lateral approach to listing.

The CCT deals with matters referred from the following empowering Acts:

- *Architects Act 2002*;
- *Building Act 1975*;
- *Building and Construction Industry Payments Act 2004*;
- *Domestic Building Contracts Act 2000*;
- *Disability Services Act 2006*;
- *Liquor Act 1992*;

⁵⁰ Department of Tourism, Fair Trading and Wine Industry Development, Annual Report 2005-06

⁵¹ The Queensland Household Survey shows that an estimated 81% of Queensland's adult population had heard or read advice in the previous 6 months from the Office of Fair Trading over 10 key message areas delivered through awareness and education activities

- *Manufactured Homes (Residential Parks) Act 2003;*
- *Pest Management Act 2001;*
- *Plumbing and Drainage Act 2002;*
- *Professional Engineers Act 2002 ;*
- *Property Agents and Motor Dealers Act 2000;*
- *Queensland Building Services Authority Act 1991;*
- *Residential Services (Accreditation) Act 2002;*
- *Retirement Villages Act 1999;*
- *Tourism Services Act 2003; and*
- *Wine Industry Act 1994.*

Generally, for other matters, consumers with disputes against traders may seek redress through the Queensland Small Claims Tribunal. This is a low cost dispute resolution service attached to the courts system for claims up to \$7,500 which excludes the use of a solicitor. Small claim courts are utilised in a number of other Australian jurisdictions. Government agencies commonly refer consumers with unresolved conciliations when there is no evidence that a trader has breached fair trading or other law.

In the year 2005-06 1,303 applications were received and of those 1,273 were resolved at tribunal level - 78% of those were finalised within 7 months. Despite the informality, such avenues for redress can still be difficult for vulnerable consumers to access. These consumers are also unlikely to feel confident directly negotiating with the business and would find the idea of appearing before even the CCT daunting. This may include, for example, some older people, Indigenous people, people with English as a second language and people with low levels of literacy. Some older people for example may be extremely reluctant to seek any form of redress on their own behalf. If they are in a retirement village they may be fearful of the owners and operators finding some reason to evict them from their home. Also many consumer disputes are relatively small in the scheme of things (although often significant to the consumer), with the result that court litigation is simply not feasible. Legal Aid funds are limited for consumer protection matters; and community legal centres have limited capacity to take on large numbers of consumer cases. This need is an emerging issue and has been captured by other more generalist services working with vulnerable groups. Therefore there is a need to develop a national system of services to assist vulnerable consumers to access redress.⁵²

⁵² This is discussed further in the sections on self and non-regulatory approaches and vulnerable consumers

New and emerging avenues for redress

The development of industry based consumer dispute resolution schemes is a relatively new initiative. Examples of schemes in Australia include:

- The Banking and Financial Ombudsman Service;
- The Financial Industry Complaints Services Ltd;
- The Insurance Ombudsman Services;
- The Credit Union Complaints Resolution Centre;
- The Financial Co-operatives Dispute Resolution Service;
- Insurance Brokers Disputes Ltd; and
- Credit Ombudsman Service.

These schemes have approval from ASIC under its Policy Statement 139 to be External Dispute Resolution schemes.

Like other self-regulatory responses, the effective development of these schemes tends to be dependent upon the relative power and strength of an industry, industry maturity and development of the relevant industry peak bodies.⁵³ Failure by business to comply with the schemes leads to industry based sanctions such as disqualification from the relevant industry association. These schemes tend not to be helpful to individual consumers with comparatively 'small complaints'.

There has been criticism of these industry based schemes by a number of commentators. Primrose, for example in her study of the Telecommunications Industry Ombudsman scheme argued that in practice the scheme diverted complaints from the ACCC and the courts jurisdiction, successfully shielding its offending members from substantial penalties and negative publicity. She argued that it was not independent and seemed to act more in the interests of its members than consumers.⁵⁴ Significantly, the number and disparate nature of these schemes means that marketplace intelligence gathered by authorities which can meaningfully act when necessary is fractured, making any intervention by government agencies necessarily less effective and less likely.

What this points to is the importance of the continuing role of fair trading agencies in proactive enforcement and redress and a need for regulators to be able to access complaint

⁵³ O'Shea, P and Rickett, C (2006) "In defence of consumer law: the resolution of consumer disputes" (28) *Sydney Law Review* 139

⁵⁴ Primrose, K (2001) "The telecommunications industry ombudsman scheme: consumer safeguard or clever scam" *Competition and Consumer Law Journal*

information from a range of bodies. Policy makers can consider a range of ways to ensure consumers gain redress including:

- facilitating consumer legal education to help prevent disputes arising;
- ensuring there are consumer friendly, informal and independent mechanisms available (such as tribunals and alternative dispute resolution);
- ensuring there is adequate legal advice and representation available, particularly to vulnerable consumers; and
- undertaking public enforcement mechanisms where necessary.

What is clear is that natural justice demands fair and independent avenues for redress for consumers be available. Industry funded schemes do not pass this test.

Other strategies: negative licensing

Negative licensing is usually introduced through stand alone and industry specific legislation. The essential difference to full licensing is that a business would not need to apply for a licence and satisfy market entry criteria. Negative licensing legislation may include provisions addressing specific conduct and duties with a range of penalties. Depending on the seriousness of a breach, a business person could be banned from the market by injunction.

Negative licensing has limited application in that it does not provide for screening of market entrants though licensing criteria such as for criminal history clearance, minimum qualifications and solvency, or for the identification of and communication with businesses being regulated. The latter can be helpful to regulators for educating sector participants on regulatory requirements and for monitoring compliance.

Other strategies: reputation and regulation

A great deal of the market value of businesses comes from their positive reputation.⁵⁵ As a guide reputational costs – the potential punishment faced by businesses which have acted unethically or broken the law – often outweigh the costs of penalties imposed by market regulators.⁵⁶ It is estimated that one third of a firms drop in common stock market value following alleged or actual corporate fraud announcements is a result of lost reputation.⁵⁷ Due to the importance of reputation to businesses, fair trading agencies tend to use “naming

⁵⁵ Basdeo, D.K., Smith, K.G., Grimm, C., Rindova, V. & Derfus, P. (2006). The impact of market actions on firm reputation, *Strategic Management Journal*, 27(12), 1205

⁵⁶ Robyn Eifertsen interview with Jonathan Karpoff - Reputation outweighs regulation in preventing future Enron-style scandals, <http://uwnews.washington.edu/ni/article.asp?articleID=2337>, viewed 15 March 2007.

⁵⁷ Karpoff, J.M. & Lott, J.R. Jr (1993). The reputational penalty firms bear from committing criminal fraud, 36(2), 757-

powers” cautiously, as a result of *Kioa v West (1985)*⁵⁸, procedural fairness may be required before use.

There is debate about the reliance that should be placed on direct reputational action through consumer policy. Jurisdictions across Australia vary in the application of naming of businesses with some more willing to take action than others. In part this may be due to the varying degrees of perceived risk across jurisdictions in relation to the potential negative outcomes for agencies and businesses where there is a small chance of a false positive (i.e. when naming occurred but was unjustified) or backlash from business even when the naming is a correct call. The action of naming a business also carries the risk of potential legal action against fair trading agencies and is often associated with a marked increase in the level of media activity. The willingness to use naming powers may also depend on such things as the relationship of the agency with the media, the audience penetration media has with the effected consumer group. Direct reputational impact is never the motivation for OFT using its naming powers. The only circumstance OFT considers using the naming power is where there is a high likelihood of ongoing and significant consumer detriment and the purpose of using the naming power is to warn consumers of the detriment. Consideration of the media’s likelihood in reaching the necessary audience to an effective extent is a relevant consideration. This is particularly relevant in a highly decentralised state with numerous regional media outlets.

While naming is contentious from the viewpoint of business and consumer agencies, the question arises whether it has a place in a progressive consumer policy framework. The UK National Consumer Council emphasises the importance of consumers engaging in the regulatory process particularly in respect to reputation. They contend that providing reputational information to consumers increases the transparency of the regulatory process and is consistent with good principles of regulation. As noted above reputation is a key signalling factor in markets and is an important component of the decision making process of consumers. To cater for this need an informal market of trade in reputational information has occurred through the establishment of internet forums, discussion boards, social networking and review sites on the internet aimed to a considerable degree on clarifying the reputation of business and their products/services. Governments have yet to determine their degree of active involvement in dealing with reputational information and how best to address market failures where business reputation is not aligned with business practice.

⁵⁸ *Kioa v West* (1985) 159 CLR 550

Naming of businesses works best against bricks and mortar establishments who are unlikely to set up shop again once they are named or fix problems identified and rebuild their business. Rather than reputational action of consumer agencies being in the traditional mode of one off naming of businesses or publicising of enforcement actions, a broader reputation signalling role could be established by consumer agencies publishing trader complaint statistics and histories. For example, the Better Business Bureau, located throughout the USA and Canada, allows access to business reliability reports providing consumers with information on complaints against both member and non-member businesses. Business reliability reports indicate the number of complaints, the nature of complaints and their resolution, and a summary rating of the business.

Complete consumer protection comes from naming in circumstances where a trader ceases to trade as a result of it. Of lesser effect is where trading becomes more difficult if the trader's suppliers become aware of the circumstances. Beyond these benefits, naming is not an effective way of providing consumer protection. The idea of attracting consumer attention to possible detriment in dealing with a particular trader can be a cost effective way of being seen to act, but in reality provides patchy, short term, business specific consumer protection. It relies on media reaching every person in a consumer target group in a timely way including those who may not read, see or hear.

However, disciplinary hearings in relation to most registered professions are held in camera and no publicity is given to all but the most serious substantiated matters. Consumers are therefore prevented from making choices about the service provider aware of information about disciplinary breaches. There appears to be no good policy reason as to why some service providers should be afforded a higher level of protection against reputational damage, with marketplace traders subjected to reputational damage in circumstances where they have not had the opportunity to provide a response and to be heard by an independent umpire.

Civil penalties

The consumer protection law allows actions by individual consumers, businesses and the appropriate consumer protection enforcement agency. There are a variety of enforcement mechanisms available to enforcement agencies, businesses and consumers to ensure the existing consumer protection law is effectively enforced. These enforcement mechanisms can be divided into civil remedies and criminal penalties.

MCCA has recently released a discussion paper on civil penalties for Australia's consumer protection provisions. It raises the question whether the costs to business of the civil

remedies may not outweigh the benefits of breaching the law and whether pecuniary penalties and banning orders could be introduced to supplement the current consumer protection provisions.

Conclusion

The national consumer framework may benefit from investigating the merits of:

32. Reinforcing the importance of the continuing role of consumer affairs agencies in pro-active enforcement and redress activities.
33. Specific and targeted strategies for vulnerable consumers to access redress at a national level.
34. Civil penalties in achieving consumer protection.

4.8 Disadvantaged and vulnerable consumers

A vulnerable consumer can be defined as one who is capable of readily or quickly suffering detriment in the process of consumption. The susceptibility to detriment may arise from either the characteristics of the particular market or the individual's attributes or circumstances. While a disadvantaged consumer is a person in persistent circumstances (such as poverty) which will adversely affect consumption, causing a continuing susceptibility to detriment in consumption.⁵⁹ Some consumers may be disadvantaged or vulnerable in some marketplace situations if they:

- have a low income;
- are from a non-English speaking background;
- have a disability—intellectual, psychiatric, physical, sensory, neurological or a learning disability;
- have a serious or chronic illness;
- have poor reading, writing and numerical skills;
- are homeless;
- are very young;
- are old;
- come from a remote area; and
- have an Indigenous background.⁶⁰

A major study of social disadvantage, *Dropping off the edge*, found that disadvantage is a pattern, not just for individuals, but for whole communities in particular locations in Australia possibly leading to lifelong disadvantage and intergenerational effects. There are a substantial number of areas in Australia suffering cumulative disadvantage. Indicators of social disadvantage, including low income and education, unemployment and limited

⁵⁹ Consumer Affairs Victoria, (2004) *What do we mean by disadvantaged and vulnerable consumers?* Discussion Paper

⁶⁰ ACCC (2005) *Don't take advantage of Disadvantage*

computer use and internet access, are recurring and interrelated features that are also marked in research on consumer protection as indicators of consumer vulnerability.⁶¹

It is important that a progressive consumer protection framework defines areas of disadvantage and identifies vulnerable consumers. There is a need for more rigorous research at a national level in relation to quantification of vulnerable consumers, analysis of causes of vulnerability, identification of market characteristics that exacerbate vulnerability and strategies to address their vulnerability. A thorough conceptualisation of this area also requires an understanding of the different but related concepts of consumer vulnerability (and vulnerable consumers), consumer detriment and consumer disadvantage (and disadvantaged consumers).⁶² Whilst disadvantage implies a consistent and continuous state of circumstances, vulnerability may be transient or related to a particular market. This is where a national research agenda would be invaluable.⁶³

Research involving vulnerable and disadvantaged consumers and establishing cases for regulatory intervention is typically based on quantifying levels of consumer detriment. This is usually in net loss or benefit in dollar terms. While it may be possible (in some circumstances) to quantify the nature of the detriment a consumer may suffer, this is only part of the equation.⁶⁴ A net loss once quantified, will mean different things to different consumers. For example, the regulatory decisions made would be quite different with an understanding based on research commissioned by OFT in the UK that for each £1 loss by a consumer with half the national average income may be as significant as detriment of £2.50 to a consumer with an average income. Consumers who are disadvantaged (usually indicating a range of factors of disadvantage occurring at the same time) experience greater detriment than other consumers. Consumer detriment also needs to have qualitative measures that can look at the detriment consumers may face as a whole, given their individual circumstances.

In summary, what is needed is further exploration of these issues which is where a fully resourced national consumer advocacy sector and research program would be invaluable. Tenant argues: “*To properly understand the needs of consumers who struggle the most to*

⁶¹ Vinson, T. (2007). *Dropping off the edge: the distribution of disadvantage in Australia*, Jesuit Social Services and Catholic Social Services Australia

⁶² Consumer Affairs Victoria, (2004) *What do we mean by disadvantaged and vulnerable consumers?* Discussion Paper

⁶³ See previous section.

⁶⁴ For example, consumer detriment can be defined as the loss in consumer surplus that consumers experience due to the presence of imperfect information. That is, the consumer detriment is taken as the difference in consumer surplus between a situation where consumers are fully informed and a situation where consumers' information is imperfect. Hunter, J et.al.(2001) *Measuring Consumer Detriment under conditions of imperfect information*. Office of Fair Trading (UK)

*share in the benefits of competitive markets evenly, or at all, proper investigation and planning of responses invites more than economic analysis. There are social considerations, health impacts, educational implications and so on. Investigating the causes and effects of exclusion and disadvantage are often poorly recognised as economic good sense. Clearly getting the balance right has the potential to save enormous downstream costs to the community in a range of services, usually the responsibility of the state to provide for obvious reasons.”*⁶⁵

Responses to vulnerable consumers

A key point is that disadvantaged and vulnerable consumers should be of central concern for consumer policy. It is linked to goals of equity and sustainable development. Consumer affairs agencies must look after the interests of those least able to represent themselves. However, the exact role for regulators in relation to vulnerable consumers is a contested issue.

Khaldoun says that there is a radical rethink of the role of government and its social welfare institutions where increasingly governments in Australia and elsewhere in the industrialised world are promoting the notion of total individual responsibility. Governments merely see their role as facilitating the free operation of markets. Vulnerable communities and individuals are expected to fend for themselves.⁶⁶ However numerous commentators are also advocating utilising a framework around concepts such as social exclusion that may be more useful for policy makers. The concept of social exclusion is broader than traditional notions of resource poverty in that it gives emphasis to the idea that social exclusion is:

- not just a characteristic of individuals;
- is multi-dimensional and reflects a combination of inter-related factors; and
- focuses on causes (eg low skills), outcomes (eg high crime) and processes (family breakdown), as opposed to just available resources at a point in time.

This takes the emphasis away from the simplistic notion that the disadvantaged or vulnerable should simply ‘help themselves’ and emphasises the complexity of their position and the importance of a holistic and multifaceted response.

The concept of ‘social exclusion’ has been applied to consumers in the financial services sector for example. There have been major studies undertaken in the United Kingdom on the scale and impact of financial exclusion, and some smaller studies undertaken in Australia, the United States, Canada and New Zealand.

⁶⁵ Tenant,D “Australia’s desperate need for a National Consumer Council”.

⁶⁶ Khaldoun, H “Illiteracy, Financial Services and Social Exclusion” Financial Services Consumer Policy Centre

The main United Kingdom reports have considered the scale and impact of financial exclusion, its possible link to education and options to improve financial inclusion both at the national and local level. Research has looked at:

- redlining practices in mortgage lending;
- redlining practices in insurance;
- closure of bank branches in low income areas;
- the rise of money lenders resulting from financial exclusion in urban areas; and
- fringe credit providers, including the rise of pay day lenders resulting from financial exclusion in urban areas.

Regulatory and policy responses to the problem of financial exclusion have only recently been developed in those jurisdictions, and the Australian debate can benefit from a study of these international developments.⁶⁷

What commentators emphasise is the importance of law reform in these areas to protect vulnerable consumers. Unfair or poorly designed laws and practices can also perpetuate or contribute to increasing poverty.⁶⁸

Disadvantage is particularly related to issues of unconscionability and the core prohibition on unconscionable conduct in the TPA and Fair Trading Acts. The equitable doctrine of unconscionable conduct is an important aspect of consumer protection. The doctrine has long been recognised in Australia and was reinvigorated by the High Court in *Blomely v Ryan*.⁶⁹ The first review into the TPA (the Swanson Committee 1976) recognised the need to have statutory provisions dealing with unconscionability. The recommendations of this report were not immediately effected, but there was eventually a gradual incorporation of the prohibition on unconscionable conduct into the TPA.⁷⁰ The *Amadio* case saw the extension of the principles of unconscionability into commercial dealings.⁷¹

Unconscionable conduct is not so concerned with the 'unfairness of the contract' but the circumstances in which the contract is procured. While adequate consideration and relative bargaining power of parties will be important there must also be conduct that fits the

⁶⁷ Khaldoun, H "Illiteracy, Financial Services and Social Exclusion" Financial Services Consumer Policy Centre

⁶⁸ Howell, N (2004) "Poverty, credit law and social justice: examining the links". Australian Lawyers and Social Change Conference. Canberra 23 September 2004.

⁶⁹ (1956) 99 CLR 362

⁷⁰ see a description of this in Griggs, L "The unconscionability provisions of the Trades Practices Act 1974: Contrasting Judicial Developments"

⁷¹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

description of unconscionable. Therefore the elements of unconscionable conduct are both a special disadvantage and an exploitation of the special disadvantage.

In *Commercial Bank of Australia Ltd v Amadio* an elderly Italian couple, with limited written English, signed a guarantee for their son. They believed their son's business was going well and that they had limited liability. This was not the case. Known to the financial institution who arranged the guarantee, but not the Amadios was that the son was in a terrible financial situation and their liability extended to the full value of their home. The High Court set aside the mortgage unconditionally on the grounds that the Amadios were in a position of special disability in relation to the bank. They had limited knowledge and understanding of the transaction and had a lack of assistance and advice where it was necessary. This disability was sufficient that it was unconscionable for the bank to rely on their guarantee. There was a particular focus on the actions of the bank's representative who knew of the circumstances of the Amadios and the son's financial situation.

Clearly, vulnerable consumers are 'everybody's business' including industry. Amadio illustrates that consumers vulnerability due to a variety of factors cannot be taken advantage of by business.

Howell asks whether the current law does enough to ensure that in the future couples like the Amadios do not risk the family home (and thus their financial and emotional security) in a contract of guarantee without fully appreciating, and consciously agreeing to the risks that such a contract entails? Maybe not, if the fact that allegations of unconscionability are still frequently raised in guarantee cases.⁷²

Issues for older people

While there are potentially a number of vulnerable consumer groups in society we have chosen to focus on older people for this submission as it is a rapidly growing area of concern, particular in relation to a variety of equity release financial products now on the market. There is clear evidence that Australia's population is aging and that older people (65 years and over) are no longer a minority. In 1870, 42 per cent of Australia's population was aged less than 15 years and 2 per cent was aged 65 years and over. In 1998, 21 per cent was aged less than 15 years and 12 per cent was aged 65 years and over.⁷³ While clearly not all older people are vulnerable, there are significant issues of vulnerability arising for some older people in our society. Consumer vulnerability may also be linked to vulnerability in other

⁷² Howell, N (2004) "Poverty, credit law and social justice: examining the links". Australian Lawyers and Social Change Conference. Canberra 23 September 2004.

⁷³ Productivity Commission, "Policy Implications of the aging of Australia's Population" Conference Proceedings, Melbourne 18-19 March 1998

areas of their lives such as limited resources, limited literacy or English skills and abuse and exploitation.

The Seniors Advocacy Information and Legal Service

This service, auspiced by a Community Legal Service was funded to assist older people experiencing or at risk of experiencing domestic and family violence. It runs as a multi-disciplinary model providing social work support and legal advice and in some cases representation. It has been a very successful service and has been inundated with requests for assistance from around Queensland.

Many of the older people attending this service were also experiencing consumer issues. The service has now been expanded on a pilot basis for twelve months to operate from five locations throughout the State. While the new service model has been expanded to include responses to some consumer issues, the primary focus of the service is older people suffering abuse and exploitation.

This service illustrates the unmet need of many vulnerable consumers in the community and the continuity between various aspects of vulnerability in people's lives.

Older people can be particularly vulnerable to abuse by family members and friends and subject to pressure to engage in unfair and unconscionable lending practices with financial institutions. The Elder Abuse Prevention Unit (Lifeline, Brisbane) has revealed that 32% of callers to its Helpline have identified financial abuse as the primary reason for their call. They estimate that there were losses in excess of \$8 million due to the financial abuse of older people in Queensland between 1st November 2002 and 30th June 2005. This figure, they argue, significantly underestimates the magnitude of the problem as only 8.6% of the financial abuse callers disclosed a dollar amount⁷⁴

As older people tend to be asset rich, but cash poor, one of the most attractive targets for perpetrators is the older person's family home. However, even the loss of small sums of money can be overwhelming for a senior who is reliant on a small fixed income.

Of particular concern has been the rise of equity release products that are particularly aimed at older people. These loans allow older people to remain in their homes and get a lump sum or regular payment to supplement their income. The two main types are:

- Reverse mortgages that allow a loan to be secured against a property. Working in the opposite way to a home loan, interest is applied to the loan but no repayments are required so the loan sum increases. As a result the lender may end up owning a large part of the property; and

⁷⁴ Elder Abuse Prevention Unit, Annual Report 2005

- In a home reversion scheme, part or all of the property is sold to the company at a discounted price (usually between 35% and 60% of its value). The person has the right to live in the home until they die or want to move.

These schemes are being rapidly taken up, with new products emerging. Recently for example, the Adelaide Bank has teamed up with Rismark International to launch Australia's first shared equity mortgage. The loans will allow home owners to avoid paying interest and principal repayments on part of their homes. In return, funds managed by Rismark will share in the capital appreciation of the home (by up to 40% for example for contributing 20% of a home loan). It is expected that this scheme will be attractive to retirees who want to refinance their home loans and reduce monthly repayments.⁷⁵

Given the previous discussion on elder abuse it is obvious there is much potential for older people to be taken advantage of and subject to unconscientious exploitation. There is a need for a national approach to this issue, investigation into the extent of the problem and increased resources to assist and advise older people in relation to financial abuse. While cases such as *Amadio* require financial institutions offering these products to be aware of whether the older person is suffering from any type of special disability (as the *Amadios* were in relation to their lack of understanding) or duress or exploitation, the vulnerability of aged persons because of their age, relationships and possible financial status, together with the complex product offering make this a case for urgent attention by regulators and suggest that the unconscionability provisions of themselves are insufficient.

Conclusion

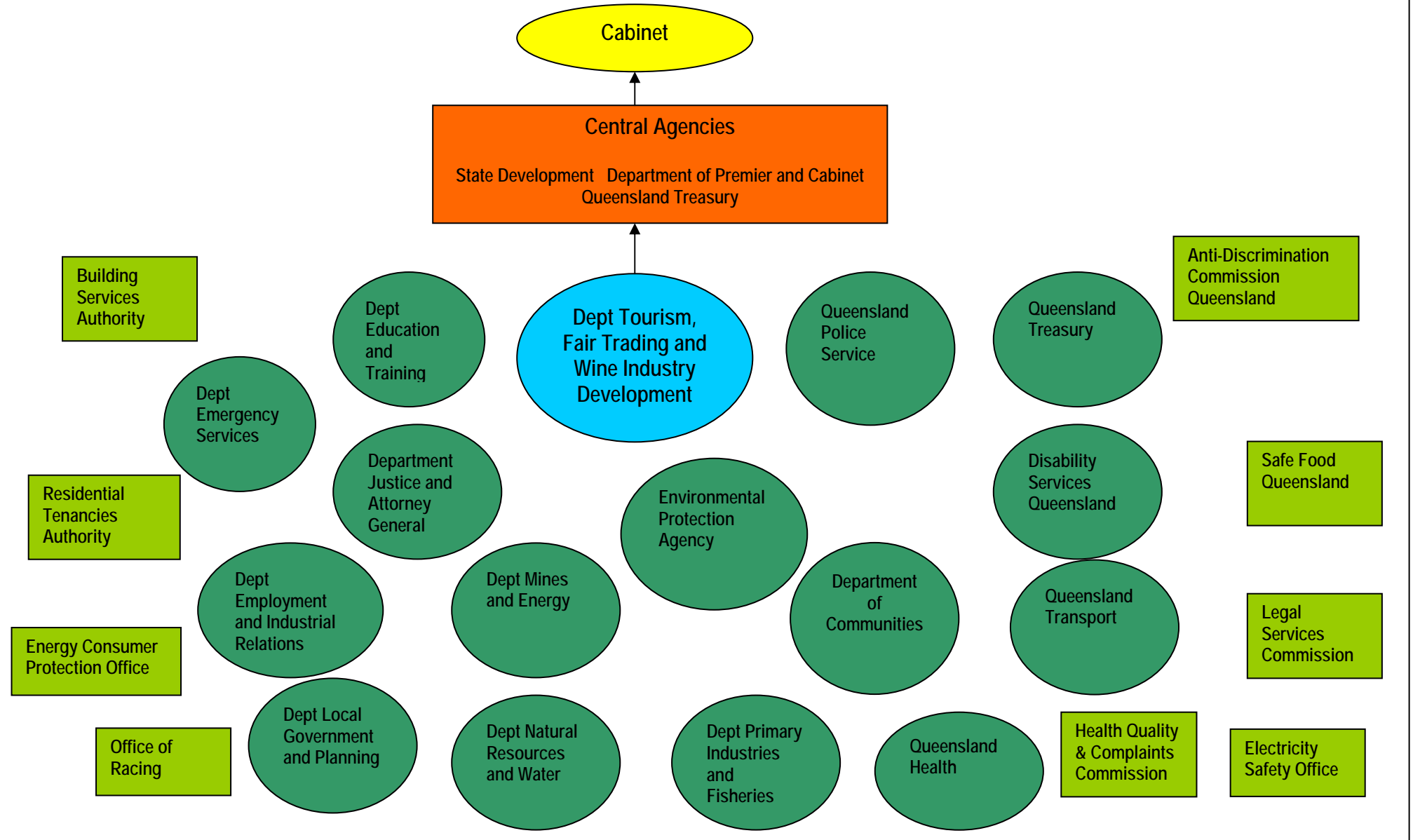
The national consumer framework may benefit from investigating the merits of:

35. Undertaking national research into quantifying and investigating issues for vulnerable consumers.
36. Reinforcing the role for government in protecting vulnerable consumers.
37. Raising industry awareness of its roles and responsibilities in conducting transactions with vulnerable consumers.
38. Undertaking a national investigation into the rise of equity release products, particularly in relation to older people.
39. Ensuring adequate resources are available for a national network providing legal advice and representation for vulnerable consumers.

⁷⁵ Wilmot, B (2007) "Partnership launches shared equity mortgages" Australian Financial Review 14 March 2007

APPENDIX A: QUEENSLAND AND CONSUMER POLICY

DIAGRAM: Old Govt agencies responsibilities for consumer policy related to trade and commerce



Key: Queensland Government authorities - other than the Department of Tourism, Fair Trading and Wine Industry Development - with responsibility for consumer protection and fair trading

Building Services Authority regulates the building industry including licensing of contractors and statutory insurance for consumers

Department of Communities has responsibility for childcare licensing.

Dept of Education and Training regulates education services including accreditation of private schools and universities and provision of international student programs

Dept of Emergency Services regulates:

- Ambulance services
- Fire safety

Dept of Employment and Industrial Relations regulates to reduce risk to employees, business clients and the general public through a number of workplace health and safety codes of practice for example, about:

- Asbestos removal
- Compressed air recreational diving and recreational snorkelling
- Recreational technical diving
- Horse riding schools, trail riding establishments and horse hiring establishments
- Storage and use of rural chemicals at a rural workplace

Dept of Justice and Attorney-General regulates:

- Competency, standards and conduct of the legal profession
- Operation of trust accounts

Dept of Local Government and Planning through Building Codes Queensland regulate acceptable levels of public health, safety and well-being as well as energy and water efficiency of buildings through building and plumbing codes.

Dept of Mines and Energy regulates:

- Reliability and standard of electricity supply
- Licensing of energy retailers including marketing rules
- Provision of mediation and dispute resolution services for energy consumers

Dept of Natural Resources and Water regulates land titles and valuation including:

- competency and registration of surveyors and valuers
- sustainable management and efficient use of water

Dept of Primary Industry and Fisheries regulates:

- Safe use of chemicals in agriculture
- Veterinary practitioners
- Recreational fishing

Disability Services Queensland regulates disability service standards and service operation including mandatory employment screening

Electricity Safety Office regulates electrical equipment, electrical installation and electrical repair.

Environmental Protection Agency/Queensland Parks and Wildlife Service regulates:

- Some recreational activities through the issue of permits
- Water efficiency labelling

And provides guidance on standards for:

- Energy efficient home design
- Energy efficient appliances
- Home Insulation
- Landscaping for energy efficiency

Legal Services Commission (an independent statutory body) investigates complaints about the conduct of solicitors, barristers and law practice employees.

Office of Racing regulates probity in the Queensland racing industry.

Queensland Anti-Discrimination Commission regulates discrimination, sexual harassment and public vilification, including in the provision of goods and services

Queensland Health regulates:

- Private hospitals
- Health practitioners
- Food standards
- Pest controllers through licensing

Queensland Police Service regulate:

- fraud
- the possession and use of weapons through licensing

Queensland Transport regulates:

- Taxi, bus and limousine industries
- Marine training and marine safety environments
- Road safety matters, including approvals for traffic controllers, motorcycle and driver trainers, approved examiners and pilot and escort drivers
- Tow truck industry, including approval to operate as a tow truck operator
- Vehicle standards and safety
- Mass, dimension and load bearing capacities for vehicles
- Transportation of dangerous goods
- Rail safety
- Trucking industry

Queensland Treasury regulates:

- Government owned corporations
- gaming

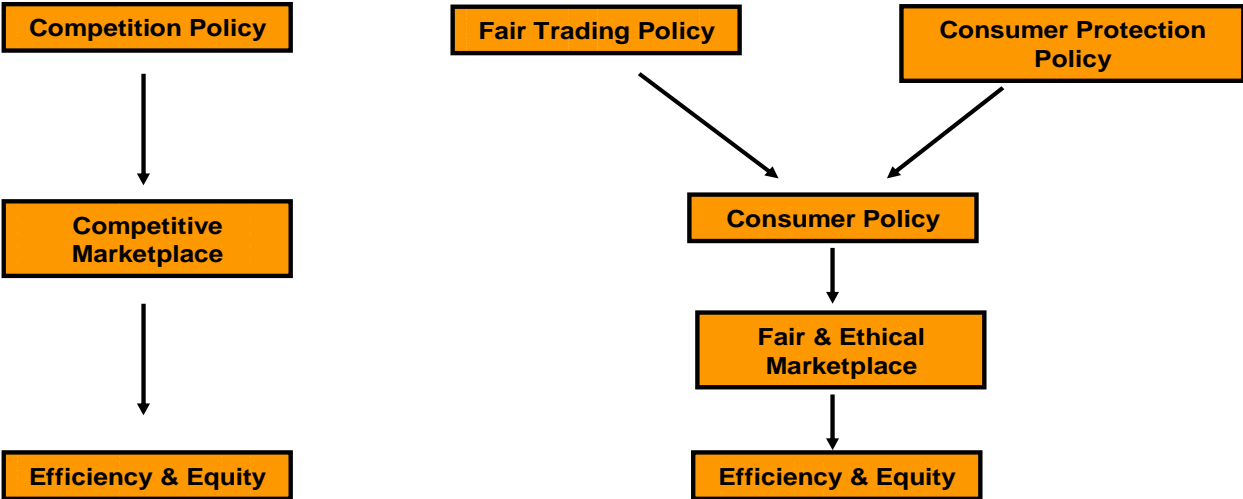
Residential Tenancies Authority regulates residential tenancy to protect the rights of consumers renting most forms of residential accommodation

Safe Food Queensland regulates to manage any risks to the safety of primary produce throughout the supply chain

<http://www.qld.gov.au/departments/index.html>

APPENDIX B: COMPETITION AND CONSUMER POLICY

Competition and Consumer Policy



APPENDIX C: Decision Tree incorporating demand and supply side considerations (adapted from Michael Jenkin and Louise Sylvan, presentation at the National Consumer Congress 2007)

