



**A submission from the
Victorian Government to the
Productivity Commission on the Draft
Report *Review of Australia's Consumer
Policy Framework***

March 2008

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1 Overview

The Victorian Government welcomes constructive proposals to advance the consumer policy framework in Australia.

The Victorian Government has been proactive in improving the effectiveness of both non-regulatory and regulatory consumer initiatives and advocating a national reform agenda in many areas. The Victorian Government welcomes the Productivity Commission's Draft Report on the Australian consumer policy framework.

Both the Victorian and Australian consumer policy frameworks must constantly adapt to changing market conditions and changes to legal and government institutions. In that context, the Victorian Government welcomes constructive proposals to advance the consumer policy framework in Australia.

The Victorian Government recognises that this framework must be cognisant of the increasingly national markets in Australia and has to adopt a national perspective.

But it also has to recognise the shared cooperative approach that has been the hallmark of consumer protection in Australia; the central role that the States and Territories play (shouldering most of the compliance effort rather than the Commonwealth); and the need to ensure responsiveness to local issues.

Victoria values a cooperative approach to consumer protection in Australia and Victoria is committed to building a shared commitment with the Commonwealth and other States and Territories to achieving collaborative reform in consumer protection policy and enforcement.

The Victorian Government is willing to actively participate in this review process to achieve the best outcome for Australian and Victorian consumers.

The Victorian Government is keen to participate in the reform process that this Draft Report puts forward, and welcomes this opportunity to work closely with the Commonwealth and other State and Territory Governments to develop an agreed outcome flowing from the Draft Report and then the Productivity Commission's Final Report.

In its Draft Report, the Productivity Commission concluded that the current legislative framework is substantially complete and there is little need for reform or experimentation. The Productivity Commission concluded that the current policy framework is "sound" with "relatively modest prospects of producing significant gains for Australian consumers".

The Victorian Government acknowledges that Australia has a fundamentally solid consumer protection regime. However, the core components, such as implied warranties, are quite old, and evolving and emerging markets often highlight the need for continual maintenance and updating of legislative schemes.

Australia's consumer policy framework is no longer best practice. Australia has fallen behind overseas jurisdictions, in particular the European Union and the United Kingdom.

The Victorian Government has continued to innovate in this area, for example, with its introduction of unfair contract terms legislation. There are areas where further

innovation could occur, although the Productivity Commission shies away from this, preferring to focus on already existing reforms.

The Productivity Commission's recommendations appear to reflect a tendency to accept Commonwealth legislation and institutional structures with limited critical analysis, while suggesting substantive changes to State and Territory functions.

The focus of the Productivity Commission's Draft Report is on the legislative framework, and on enforcement (and enforcement being seen primarily as court based enforcement). This matches the operation of the Australian Competition and Consumer Commission, which focuses on court actions against large national firms, but has limited other functions.

This is in contrast to State and Territory operations. The focus of the Australian Competition and Consumer Commission is on the "supply side" particularly with respect to competition policy, while State and Territory consumer affairs agencies have a focus on the "demand side". The Victorian Government, through Consumer Affairs Victoria, undertakes a very broad range of consumer protection activity. This includes advice to consumers and business through publications, a call centre and website, conciliation, outreach services to disadvantaged and vulnerable groups, school education and various other activities. Recognising this broader activity is important in considering the implications of the Productivity Commission's proposed overhaul of the consumer framework.

While the Productivity Commission proposes substantive changes to the States and Territories consumer protection functions, it proposes little change, and undertakes little analysis of, Commonwealth consumer protection functions. The Trade Practices Act is proposed as the template legislation — with limited analytical basis for this decision — and very little change is proposed to Commonwealth institutional frameworks. This is despite the Productivity Commission identifying overlap and "consumer confusion" as a driving factor behind its recommendations (a lot of which occurs at the Commonwealth level).

The Productivity Commission needs to consider the implications of its recommendations on Commonwealth institutional arrangements. The Victorian Government would like to see reform considered as widely in the Commonwealth sphere as in the States and Territories.

As outlined in its initial submissions, the Victorian Government supports harmonisation where differences impose a cost and it meets the principle of subsidiarity.

The Victorian Government supports the subsidiarity principle. The principle of subsidiarity stems from the idea that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.

In the Victorian Government's view further analysis is warranted for some of the Productivity Commission's recommendations. This submission provides more information and analysis on these issues.

As the Productivity Commission points out, decision making on regulation should be based on rigorous analysis. The Victorian Government agrees that there is a compelling case to provide for uniform consumer protection legislation. However, the

arguments put forward for a referral of enforcement powers to the Commonwealth are far less compelling.

The Productivity Commission's argument is based on "unwarranted" inconsistency in enforcement and overlap, for which little evidence is provided. In practice, a cooperative approach to compliance means that there is little "unwarranted" inconsistency.

As the Productivity Commission also noted, there are substantial constitutional factors which shape the roles of the Commonwealth and States. In particular, the Commonwealth has no constitutional power to legislate for sole operators and unincorporated businesses, nor does it have the power to provide non-court alternative dispute resolution services. One result of this has been the specialisation of agencies at the Commonwealth and Territory levels, with the Australian Competition and Consumer Commission specialising in national enforcement issues, and the States and Territory consumer agencies specialising in services to individual consumers.

This specialisation also results in the States and Territories undertaking the bulk of the consumer protection activity — relating to assisting consumers — although they also play a role in national issues.

Given the cooperative approach to enforcement that now occurs, with the States and Territories playing the dominant role, the most obvious option is to continue cooperative enforcement based on uniform national legislation. This approach is also the one advocated by the Australian Competition and Consumer Commission in its submission to the Productivity Commission: "The ACCC considers that a single law, multiple regulator model would provide a framework which best meets the needs of both consumers and businesses." (ACCC 2007, p. 123)

In particular, the Victorian Government is concerned to ensure that the Commonwealth will place as high a priority on consumer protection as the Victorian Government does.

In recent times, consumer protection has been of low priority at the Commonwealth level.

State and Territory officials have been frustrated in their attempts in recent years to move towards world's best practice in consumer policy by the opposition of the Commonwealth Government and its agencies. For example, the introduction of national unfair contract terms legislation and the regulation of Property Investment Advice. Earlier this year, the Commonwealth formally rejected a reform proposal that the Ministerial Council on Consumer Affairs move to a two-thirds majority voting arrangement. This would have built on reforms to the Ministerial Council's processes that were put into place in recent years but not acknowledged by the Productivity Commission.

The Victorian Government is keen for the Commonwealth to adopt a leadership role on consumer protection.

With Commonwealth leadership in consumer policy, the Victorian Government would be keen to develop a national harmonised consumer protection legislative regime based on 'best-of-breed' State and Territory and Commonwealth legislation. 'Best-of-breed' legislation would draw on not only the Trade Practices Act, but also the best parts of all State and Territory Fair Trading Acts to create national legislation.

The Victorian Government supports the future transfer of credit regulation to the Commonwealth to ensure integration with other aspects of financial services regulation. However, this would need to be done with appropriate transitional arrangements to ensure the current focus on credit is not lost. In the first instance, the Commonwealth could join the States and Territories as a signatory to Uniform Consumer Credit Code and assist in planning for a transfer of credit regulation to the Commonwealth.

The Victorian Government recognises the need for greater national harmonisation in product safety. The Victorian Government agrees to the transfer of product safety to the Commonwealth if there is a commitment by the Commonwealth to signalling the priority it places on product safety issues (such as appointing a product safety Commissioner at the Australian Competition and Consumer Commission) and assurances on the general compliance resources. As that commitment is currently lacking, the Victorian Government supports the national harmonised model currently being progressed by the Ministerial Council. Should the forthcoming Ministerial Council meeting be unable to achieve support for the national harmonisation model, Victoria will seek support for a two-step transfer of responsibility, keeping in spirit with the Productivity Commission's recommendation.

The Productivity Commission identified institutional arrangements between the Commonwealth and the States and Territories as a significant issue in consumer policy. However, the Productivity Commission did not consider the institutional arrangements at the Commonwealth level. Given the broader reform agenda that the Productivity Commission has put forward, it may be beneficial to do so.

Consumer Affairs Victoria's experience is that overlap issues can be exacerbated by the separation of consumer protection at the Commonwealth level between the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and the Australian Communications and Media Authority.

The Victorian Government welcomes the Productivity Commission's proposals for improving the consumer policy framework for Australia and the Victorian Government has initiated many reforms aligned with the recommendations in the Draft Report.

1.1 The Victorian Government's vision

The Victorian Government has a strong commitment to reducing regulatory burden and supports harmonisation of consumer protection legislation in order to reduce costs to Australian businesses.

The Victorian Government's vision for consumer protection involves the development of consistent, harmonised, consumer protection legislation supported by an inter-governmental agreement. This should be based on 'best-of-breed' legislation from what is available in Commonwealth, State, Territory and New Zealand legislation. This could be created by a national working party under the Ministerial Council on Consumer Affairs, reporting to the Council of Australian Governments. The national legislation would include:

- national unfair contract terms legislation modelled on the Victorian legislation

- a harmonised Act taking the best approach where the Trade Practices Act and State and Territory Fair Trading Acts take divergent approaches, and
- the adoption of the best protections available in the Act, this would include contact, telemarketing and non-contact sales protections, and the range of enforcement provisions available in the Victorian Fair Trading Act.

In the agreement to adopt a national generic consumer law there should be scope for jurisdictions to collectively (and individually in approved circumstances) experiment with new policy developments.

To address weaknesses in consumer protection at the Commonwealth level, there should be reform of the Commonwealth consumer protection regime to enhance Commonwealth consumer regulation and signal the Commonwealth's renewed commitment to this area. This could include:

- maintaining existing synergies of competition policy and consumer policy within the Treasury portfolio
- considering institutional arrangements at the Commonwealth level, and
- establishing a national consumer council.

The Commonwealth and the States and Territories should join together to work cooperatively on the operation and enforcement of the consumer protection regime across Australia. There would be a number of aspects to this:

1. The establishment of a senior enforcement committee to replace the Fair Trading Operations Advisory Committee and the Consumer Products Advisory Committee, with its own independent resourced secretariat to push national enforcement programs.
2. Development of national priorities: refining and maximising effectiveness of AUZSHARE; developing national protocols and standards on enforcement; and developing national competency standards for inspectors.
3. Improve the operation of the Ministerial Council on Consumer Affairs by:
 - a. introducing majority voting (with no veto powers), and
 - b. providing for a well resourced secretariat to the Ministerial Council with organic policy capability to enable priority progress on strategic issues.

The States and Territories should agree to the transfer of credit regulation and product safety to the Commonwealth with appropriate transition arrangements and Commonwealth commitment.

1.2 Summary of the Victorian Government's response to recommendations

In addition to agreeing to the broad thrust of the Productivity Commission's main recommendations, the Victorian Government also comments on each of the draft recommendations.

1.2.1 Objectives for a national consumer policy framework

The Victorian Government supports a set of national agreed objectives for consumer policy, which could form the basis for national legislation. The Productivity Commission's recommended overarching and operational objectives for the consumer policy framework generally align with the Victorian Government's Vision and Goals for Consumer Affairs Victoria.

A national objective should be focussed on maximising consumer welfare — consistent with the public interest. This provides a link to the ultimate outcome being sought, rather than just the means of doing so.

The national objectives need to recognise that consumer empowerment alone is not sufficient. It needs to be accompanied by regulatory measures to protect consumers where necessary.

1.2.2 A nationally coherent consumer policy framework

A national generic consumer law

With Australia's consumer markets becoming more national, variations in the generic consumer law across jurisdictions can impose costs on businesses, which may be passed on to consumers. The Victorian Government supports in principle a national generic consumer law. This should be the most effective law possible.

The Victorian Government supports universal coverage for generic consumer protection legislation. Consequently, the Victorian Government recommends that the Productivity Commission undertake further analysis on the exemption for disclosure under the corporations law.

The Victorian Government does not agree that the gains from experimentation in the future are unlikely to be large. Consequently, in the agreement to adopt a national generic consumer law there should be scope for jurisdictions to collectively (and individually in approved circumstances) experiment with new policy developments.

The Victorian Government supports enacting the new generic law through applied ("template") law arrangements. However, the Victorian Government considers that it should be backed by an inter-governmental agreement outlining the institutional procedures for reviewing and amending the legislation and conducting experimentation.

Model for the national generic consumer law

The Victorian Government supports the development of consistent, harmonised, consumer protection legislation supported by an inter-governmental agreement. The Productivity Commission proposed that the Trade Practices Act be used as the basis for this legislation. The Victorian Government does not support this view as there are many significant provisions in State and Territory Fair Trading Acts that are not in the Trade Practices Act.

The Victorian Government believes that any new harmonised laws should be 'best-of-breed' legislation, drawing on developments across the Commonwealth, States and Territories.

The Victorian Government would support extending the coverage of the product liability provisions to include non-corporate entities that fall outside of the coverage of the Trade Practices Act.

Enforcement of the national generic consumer law

The Productivity Commission has not put forward a strong case for a national regulator. A national regulator would not address some of the problems that the Productivity Commission has used to support its case for a national regulator. Further, where introduction of a national regulator may address the problem, the Productivity Commission has not considered alternatives to a national regulator that may be a more cost effective way of addressing the problem (given the significant costs in setting up a national regulator).

Without a significant commitment by the Commonwealth to focus on delivering consumer protection, the referral of enforcement powers to the Commonwealth is likely to result in a watering down of consumer protection in Victoria.

Constitutional issues do place a constraint on the potential arrangement of activity between the Commonwealth and States and Territories. The lack of appropriate alternative dispute resolution processes at the Commonwealth level points towards a cooperative enforcement model as the most appropriate enforcement model for Australia.

The Victorian Government considers the Productivity Commission needs to conduct a rigorous assessment of the costs and benefits of shifting enforcement responsibilities to a national regulator. There would be significant costs in shutting down State and Territory operations only to reopen facilities as Australian Competition and Consumer Commission offices. However, it is not clear what the benefits would be if the Australian Competition and Consumer Commission offices performed exactly the same functions as the States and Territories.

The Victorian Government supports the continued operation of a cooperative model of enforcement. The Productivity Commission was unable to identify any significant issues arising from shared enforcement. The States and Territories continue to shoulder the vast majority of consumer protection compliance activity in Australia and the Productivity Commission has failed to outline how this would be successfully transferred to the Commonwealth.

Policy decision making

As the Productivity Commission stated in its Draft Report, lower level governments have advantages over higher level ones in tailoring policies to local needs. In addition to large-scale demographic and geographic differences, States and Territories differ on economic and political factors as separate political units of the broader Australian federation. These are all legitimate reasons for differing policies at a jurisdictional level. For this reason, the Victorian Government advocated the principle of subsidiarity in its initial submissions.

The Ministerial Council on Consumer Affairs deals with a wide range of diverse issues. The Productivity Commission stated in its Draft Report that nearly half of the Ministerial Council's issues are currently "unresolved", and claims that there is a widely held view it is largely ineffectual. However, these "unresolved" issues are

predominantly newly added issues, watching briefs etc, and in the majority of its work, the Ministerial Council has been effective.

There are certain areas where the Ministerial Council has been less than effective, and this can be attributed to a range of reasons. In some areas where delays have occurred, it has been the Commonwealth that has been at the core of the delay.

Further, policy issues that the Commonwealth is solely responsible for taking forward have also been delayed. It is not clear that shifting consumer policy responsibility from the States and Territories to the Commonwealth will expedite policy decision making or implementation of decisions. For those areas within its control, the Ministerial Council has been introducing reforms to improve arrangements.

The Victorian Government recommends retaining policy decision making as a shared responsibility of the Commonwealth, States and Territories within the Ministerial Council framework. Nonetheless, there are enhancements that can be made to the operation of the Ministerial Council, many of which have already been initiated.

The Victorian Government recommends retaining policy decision making responsibility cooperatively amongst the Commonwealth, States and Territories, within the Ministerial Council on Consumer Affairs framework. The Victorian Government has participated in the Ministerial Council's actions to reform its strategic agenda to improve its effectiveness and efficiency.

The Victorian Government would support further reforms to the Ministerial Council to facilitate speedier decision making, including: governments making a formal commitment to resolve issues at the Ministerial Council; implementing a two-thirds voting arrangement with no veto power for any jurisdiction; and resourcing the Ministerial Council with policy staff to drive strategic agenda items.

Commonwealth institutional arrangements

The Victorian Government proposes that in developing a new national harmonised legislation model, it is appropriate to consider institutional arrangements. It is the view of the Victorian Government that the Productivity Commission has not given the alternatives to Commonwealth institutional arrangements sufficient consideration.

While the Victorian Government supports the Productivity Commission's recommendation for greater recognition of consumer policy at the national level, more concrete proposals are needed.

The Productivity Commission should consider consumer protection at the Commonwealth level. Regardless of whether consumer policy and enforcement responsibilities are transferred to the Commonwealth, the Victorian Government would encourage the Productivity Commission to consider institutional issues for the Commonwealth..

Product safety

The Victorian Government supports a harmonised product safety regime. The Victorian Government has worked with the other jurisdictions to produce a harmonised model based on one national law with one national set of bans and standards and cooperative enforcement. This will address the issue of inconsistency for business and provide for a robust national system. All States and Territories have agreed to this model; however, progress to implement this has been delayed by

Commonwealth insistence to continue to review alternative models. Should the forthcoming Ministerial Council meeting be unable to achieve support for the national harmonisation model, Victoria will seek support for a two-step transfer of responsibility, keeping in spirit with the Productivity Commission's recommendation.

The Productivity Commission used the example of "well publicised recent problems" as a reason for moving to a one-law one-regulator model in the product safety area. Presuming that the Productivity Commission is referring to the issue of "Bindeez Beads", this case demonstrated how quickly a cooperative scheme can operate with Bindeez Beads banned across Australia within a two to three day period. However, it also demonstrated the vulnerability of jurisdictions to delays if information on product safety risks are not communicated amongst jurisdictions as quickly as possible.

1.2.3 Harmonisation of industry-specific consumer regulation

Council of Australian Governments review

The Victorian Government supports in principle conducting a review of industry specific consumer protection schemes. The Victorian Government has already initiated a review of Consumer Affairs occupation licensing scheme under the aegis of Victoria's Reducing the Regulatory Burden program. The Victorian Government has also initiated a modernisation program for its consumer laws. From a practical point of view, it would be worthwhile identifying a specific set of schemes for review under the auspices of the Council of Australian Governments. Such a review should be conducted within the framework of the National Reform Agenda. Any consideration of schemes for review by the Council of Australian Governments should include Commonwealth schemes such as financial services regulation, telecommunications and therapeutic goods.

Credit regulation

As the Commonwealth already regulates most of the banking and financial services industry, the Victorian Government supports in principle the transfer of credit regulation to the Commonwealth to allow for consistent regulation across the financial services industry. However, there are a range of significant transitional issues that need to be considered to ensure effective regulation continues. In the first instance, the Commonwealth could join the existing scheme.

Energy regulation

The Retail Policy Working Group of the Ministerial Council on Energy is currently developing the national framework. The Victorian Government recognises that a number of consumer protection functions are best placed under a national framework. However, there may be some protections in the energy sector which may be more appropriately addressed at a state level and the Victorian Government considers that it is important for jurisdictions to be able exercise some discretion over consumer protections in their state in order that optimal consumer outcomes can be achieved.

The Victorian Government supports the Productivity Commission's recommendation to remove any price caps still applying in contestable retail energy markets where markets are sufficiently competitive. This is consistent with the Australian Energy Market Agreement, which the Victorian Government has committed to. Under the Agreement, the Australian Energy Market Commission has assessed the effectiveness of competition in Victoria's retail energy market and has found that competition in

electricity and gas retail markets in Victoria is effective. Draft advice to the Victorian Government from the Australian Energy Market Commission is that price regulation for residential customers should be phased out (or removed) beginning 1 January 2009.

Building regulation

The Victorian Government is committed to effective protection of domestic building consumers. To this end, the Victorian Government supports the principles reflected in the recommendations about the home building sector to provide: guaranteed access for consumers to alternative dispute resolution; appropriate performance standards among building professionals; and mandatory home builders warranty insurance that delivers genuine value to consumers. The Victorian Government is currently working with the insurance industry on ways to improve home builders warranty insurance and expand the grounds on which home builders warranty insurance claims can be made.

1.2.4 Unfair contracts and practices

The Victorian Government continues to support the adoption of unfair contract terms legislation throughout Australia. The Victorian Government considers, however, that the Productivity Commission's recommendation in this area will water down unfair contract terms legislation such that it is impractical to enforce in any meaningful way. Given the significant consumer and market benefits of this legislation and the Productivity Commission's conclusion that unfair contract terms legislation has a low impact on business, this watering down is difficult to justify and the Victorian Government continues to support national adoption of Victoria's unfair contract terms model.

The Victorian Government considers that unfair practices legislation should be considered more closely in the development of national consumer protection legislation.

1.2.5 Defective products

Implied warranties regime

The Victorian Government supports the Productivity Commission's recommendation on awareness raising and appropriate enforcement of the implied warranties regime. In recent years, the Victorian Government has undertaken extensive work in this area in education and compliance. Most recently, aspects of the law have again been tested in a Supreme Court case in Victoria brought by the Director of Consumer Affairs Victoria (*Cousins v Merringtons Pty Ltd & Anor* [2007] VSC 542).

However, these laws have been in place for many years. There are some core issues with the regime that the Productivity Commission needs to further consider. This includes the systemic non-compliance by retailers and manufacturers with the scheme; the need for a comprehensive review of the scheme; and the impact on the economy of the inability of consumers to achieve redress. The Productivity Commission may wish to consider the New Zealand Consumer Guarantees Act 1993. Improvements to implied warranties legislation could be considered as part of the development of a best practice national consumer protection act as discussed previously.

Product safety

The Victorian Government considers that the assessment undertaken by the Productivity Commission concerning a General Safety Provision was limited. There are advantages of this proactive system and the Victorian Government is of the view that the Productivity Commission should consider a General Service Provision in the context of broader consumer policy and not just civil liability reforms. Nonetheless, The Victorian Government supports the Productivity Commission's recommendation on monitoring any possible impact of the recent civil liability reforms on the incentives to supply safe products.

The Commonwealth, States and Territories have implemented the Productivity Commission's recommendation for research to be conducted on product safety. The Ministerial Council on Consumer Affairs commissioned a one-off baseline study of consumer product-related accidents in September 2006. A consultant was engaged to undertake the study. The Final Report was submitted in October 2007.

The Victorian Government supports the mandatory reporting of product recalls and mandatory reporting of products associated with serious injury or death.

The Victorian Government has taken the lead on introducing harmonisation of product safety bans and standards and is managing a project to deliver harmonisation of all existing bans and standards in parallel to the development by the Ministerial Council on Consumer Affairs of a national regulatory model.

1.2.6 Access to remedies

Complaint referral

The Victorian Government is of the opinion that the creation of a virtual single telephone referral centre would not reduce consumer confusion. In fact, it would add another layer of referral to the already existing system. The more appropriate approach would be to improve systems within currently existing State and Territory consumer affairs agencies.

The vast bulk of general consumer complaints are handled by the State and Territory consumer affairs agencies. In this context, enhancing the Australian Competition and Consumer Commission's web-based information on complaint handling is unlikely in itself to have a great impact.

The Victorian Government supports the continued use and enhancement of AUZSHARE, which is a successful collaboration tool.

Improvements to consistency in alternative dispute resolution

The carve up of telecommunications regulation may make legislative sense. However, it does not make sense to consumers and is a significant source of consumer confusion. Consequently, the Victorian Government supports extending the functions of the Telecommunications Industry Ombudsman as recommended by the Productivity Commission.

Under the Australian Energy Market Agreement, which the Victorian Government has committed to, an obligation for energy distributors and retailers is to have an internal dispute resolution scheme and participate in independent dispute resolution

(Ombudsman) schemes. This is to be retained under the current state and territory functions.

The Victorian Government supports a mandatory requirement for credit providers to belong to an approved alternative dispute resolution scheme and supports the consolidation of the existing alternative dispute resolution schemes. The Victorian Government considers there would be merit in further investigation of the idea of a single statutory financial ombudsman scheme, as operates in the United Kingdom.

The Victorian Government considers there is scope to increase the number of industry-based schemes given the significant number of licensed industries within which an ombudsman scheme could be established as part of the licensing arrangements. However, the Victorian Government acknowledges that there will remain a large number of areas where such schemes are not feasible for a range of reasons. In this respect, the Victorian Government supports the Productivity Commission's recommendation to have an effective and properly resourced alternative dispute resolution mechanism to deal with these disputes. This might be achieved through establishing an industry ombudsman scheme using a structure of an ombudsman supported by deputy ombudsmen and advisory boards, which focus on particular types of disputes and/or particular industries.

Small claims courts and tribunals

The Victorian Government does not consider that differences in the ceilings for small claims across jurisdictions are a major issue. Rather, the Victorian Government sees the primary issue with small claims ceilings being that consumers commonly purchase consumer goods that exceed the ceilings. The Victorian Government would welcome the Productivity Commission's consideration of what an appropriate small claims ceiling would be.

The Victorian Government supports in principle the Productivity Commission's recommendation to allow small claims courts and tribunals to make judgments about civil disputes based on written submissions. The Victorian Government recognises, however, that there are advantages and disadvantages of both approaches and a considered approach is required. The Victorian Civil and Administrative Tribunal is to trial "on the papers" determinations.

Consumer representation

The Victorian Government supports the Productivity Commission's recommendation that the Commonwealth Government should assess whether further clarification or amendment to the Federal legislation to facilitate appropriate private class actions is required.

The Victorian Government supports representative actions by regulators and the power of regulators to take independent actions.

The Victorian Government considers that a super-complaints mechanism may improve intelligence gathering and prioritisation and should be further considered by the Productivity Commission.

The Victorian Government supports the funding of legal aid and financial counselling services. In 2006-07, the Victorian Government provided over \$5 million for financial counselling services and \$41 million for legal aid services to be delivered to the Victorian community.

1.2.7 Compliance and enforcement

The Victorian Government welcomes the detailed discussion of compliance activities by the Productivity Commission. However, the Productivity Commission has taken a somewhat narrow view of compliance and enforcement activities focusing on legal proceedings. State and Territory consumer affairs agencies, which undertake most of the consumer protection compliance and enforcement activity in Australia, use a wide range of tools to achieve compliance with the law by businesses.

The Victorian Government supports the introduction of civil penalties in the consumer protection legislative regime.

The Victorian Government supports substantiation notices, which are already available in Victoria as part of the Fair Trading Act.

The Victorian Government supports the use of infringement notices as part of its compliance toolkit. The Victorian Government already uses infringement notices across government as an effective addition to other enforcement tools. Infringement notices are used to enforce consumer protection legislation.

The Victorian Government supports naming and shaming powers, which are already part of the Victorian Fair Trading Act and utilised by Consumer Affairs Victoria in compliance and information and awareness activity. Under Consumer Affairs Victoria powers, there is a public interest test and no immunity provided to the Crown. Thus, in practice, these powers have been demonstrated not to pose the reputation risks identified by the Productivity Commission. They fill an important compliance gap and are not similar to injunction powers that the Productivity Commission suggested as a substitute.

The Productivity Commission recommended making regulators more visibly accountable for their performance through requiring them to report on the nature of specific enforcement problems and steps taken to address them. The Victorian Government, through Consumer Affairs Victoria, already undertakes much of the Productivity Commission's recommended activity. For example, Consumer Affairs Victoria undertakes market scans for consumer detriment and emerging risks, and undertakes market research on compliance. The Annual Report of the Director of Consumer Affairs Victoria contains substantial amounts of information on activities of the agency.

1.2.8 Empowering consumers

The Victorian Government supports information disclosure requirements that are comprehensible and facilitate consumer decision making. The Victorian Government supports the reform of mandatory disclosure in financial services.

The Victorian Government reiterates the view made in its initial submission that behavioural change strategies, such as social marketing techniques, should be considered in the policy development process alongside more traditional responses such as information campaigns and regulation. The Victorian Government considers that given the more sophisticated understanding governments now have of what drives consumer behaviour, policies need to more effectively address both economic efficiency and social policy concerns in consumer markets. The Productivity

Commission could give the issue of behavioural change, and strategies to effect behavioural change, more consideration in its final report.

The Victorian Minister for Consumer Affairs recently initiated the establishment of a National Education and Information Advisory Taskforce to provide expert advice to the Ministerial Council on Consumer Affairs and the Standing Committee of Officials of Consumer Affairs on consumer education issues that require a national and coordinated approach. The Victorian Government supports undertaking a cross-jurisdictional evaluation of the effectiveness of consumer information and education measures and considers this work is within the scope of the National Education and Information Advisory Taskforce.

The Victorian Government supports funding at the Commonwealth level for consumer advocacy (Victoria already provides significant funding for consumer advocacy at the state level). However, the recommendations put forward by the Productivity Commission are not a substitute for a National Consumer Council style organisation, as the Productivity Commission suggests.

The recommendations of the Productivity Commission, to support a national consumer body, to commission research and to support networking are worthwhile, but fall short of the ability of a National Consumer Council style organisation to provide a national consumer voice and a countervailing voice to industry in regulatory debates.

1.2.9 Vulnerable and disadvantaged consumers

The Victorian Government supports consumer protection services focussed on vulnerable and disadvantaged consumers. The recommendations put forward by the Productivity Commission, however, will do little to assist vulnerable and disadvantaged consumers. If they were implemented in Victoria, they would weaken the protections that now apply.

1.2.10 Other considerations of the future framework

The Victorian Government supports trans-Tasman harmonisation.

The Victorian Government acknowledges the Productivity Commission's consideration of e-commerce issues. However, the Productivity Commission did not make any recommendations. Victoria has been active in considering the implications of e- and m-commerce issues for consumers having led a national working party of consumer agencies on these issues for several years. The Victorian Government considers that the current national approach of relying on OECD e-commerce guidelines is not adequate and the law needs to specify minimum requirements for trading.

The Victorian Government supports the Productivity Commission's intention to harmonise legislation to reduce compliance costs for businesses. However, it is imperative that enforcement measures remain effective under the proposed new national generic law.

1.2.11 Quantifying the net benefits

The Victorian Government recognises the Productivity Commission's attempt to quantify the potential benefits from reform of the consumer policy framework, based

on the consumer detriment survey undertaken by Consumer Affairs Victoria. While the modelling work is commendable, the results are largely driven by the initial assumption of a 5 per cent decrease in the incidence of consumer detriment. The Victorian Government does not agree that the proposed model will have such an effect on the incidence of consumer detriment. An alternative model of stronger joint cooperative administration of an improved national generic law would have a greater impact on reducing consumer detriment and yield larger net benefits.

2 Objectives for a National Consumer Policy Framework

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 3: OBJECTIVES FOR A FUTURE CONSUMER POLICY FRAMEWORK

Draft Recommendation 3.1

Australian Governments should adopt a common overarching objective for consumer policy:

‘to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith’.

To provide more specific guidance to those developing and implementing consumer policy, this overarching objective should be supported by six operational objectives.

The consumer policy framework should efficiently and effectively aim to:

- *ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition;*
- *ensure that goods and services are safe and fit for the purposes for which they were sold;*
- *prevent practices that are unfair or contrary to good faith;*
- *meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;*
- *provide accessible and timely redress where consumer detriment has occurred; and*
- *promote proportionate, risk-based enforcement.*

The Victorian Government supports a set of national agreed objectives for consumer policy, which could form the basis for national legislation. The Productivity Commission’s recommended overarching and operational objectives for the consumer policy framework generally align with the Victorian Government’s Vision and Goals for Consumer Affairs Victoria.

A national objective should be focussed on maximising consumer welfare — consistent with the public interest. This provides a link to the ultimate outcome being sought, rather than just the means of doing so.

The national objectives need to recognise that consumer empowerment alone is not sufficient. It needs to be accompanied by regulatory measures to protect consumers where necessary.

The Productivity Commission outlined that the “Introduction of a set of objectives for the consumer policy framework will provide greater guidance to policymakers, regulators, consumers and suppliers. It will also facilitate evaluation of the effectiveness of the framework.” (PC 2007, p. 27)

The overarching objective aligns with Consumer Affairs Victoria’s Vision of “informed and responsible consumers and traders in Victoria”. In pursuing its Vision, Consumer Affairs Victoria has articulated four main goals in its Corporate Plan for 2007-08:

- empowered consumers
- an efficient, fair and safe trading environment
- protected vulnerable and disadvantaged consumers, and
- optimised organisational capability.

These goals are mostly reflected in the Productivity Commission’s recommended operational objectives.

The Victorian Government notes that the objective of the Trade Practices Act 1974 is “...to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.” The Productivity Commission may wish to consider this type of direct link to consumer welfare as part of the proposed national objectives. The national objectives as they currently stand tend to focus on the means of achieving the public benefit rather than the public benefit itself.

3 A Nationally Coherent Consumer Policy Framework

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 4: GENERIC CONSUMER REGULATION

Draft Recommendation 4.1

Australian Governments should establish a new national generic consumer law to apply in all jurisdictions, enacted through applied (“template”) law arrangements. Unless otherwise appropriate, the new law should be based on the consumer protection provisions of the Trade Practices Act, as amended by other recommendations in this report, or as necessary to ensure that the new law covers non-corporate entities and accommodates jurisdictional differences in court and tribunal arrangements.

Draft recommendation 4.2

The new national generic consumer law should apply to all consumer transactions, including financial services. However:

- *the Australian Securities and Investments Commission should remain the primary regulator for financial services; and*
- *financial disclosures currently only subject to “due diligence” requirements should be exempted from the misleading or deceptive conduct provisions of the new law.*

Draft Recommendation 4.3

Responsibility for enforcing the consumer product safety provisions of the new national generic consumer law in all jurisdictions should be transferred to the Australian Government and undertaken by the Australian Competition and Consumer Commission.

Draft Recommendation 4.4

Beyond the enforcement of consumer product safety, Australian Governments should jointly consider the scope and means to overcome any obstacles to the introduction of a single national regulator for the new national generic consumer law, including through:

- *arrangements to ensure that the Australian Competition and Consumer Commission (ACCC) is sufficiently resourced to assume the enforcement functions currently performed by State and Territory Fair Trading Offices in regard to their generic laws;*
- *the introduction of a mechanism to enable State and Territory Governments to formally convey their priorities and concerns in the consumer policy area to the ACCC;*
- *enhancements to the ACCC’s reporting requirements to provide assurance that consumer policy issues, including those arising at the local level, receive appropriate attention; and*
- *legislative changes to ensure that consumers maintain access to State and Territory consumer tribunals and small claims courts.*

Draft Recommendation 4.5

Pending any across-the-board adoption of a single national regulator model for the new national generic consumer law, individual States and Territories should have the option to refer their enforcement powers for all of this law to the Australian Competition and Consumer Commission.

CHAPTER 6: SUPPORTING INSTITUTIONAL CHANGES

Draft Recommendation 6.1

As part of the transfer of greater responsibility for the consumer policy framework to the national level, the Australian Government should:

- *ensure that portfolio responsibility for consumer policy is readily visible, effective and influential;*
- *put in place arrangements to promote effective coordination across other areas of government with responsibilities in the consumer policy area; and*
- *maintain the current portfolio linkage between consumer and competition policy.*

Draft Recommendation 6.2

The arrangements within the Ministerial Council on Consumer Affairs for voting on changes to consumer policy should be altered to reflect the greater proposed role for the Australian Government in the development and application of both the generic consumer law and industry-specific consumer regulation (see draft recommendations 4.1, 4.3 and 5.1-5.3). Specifically, future policy changes should only require the agreement of the Australian Government and three other jurisdictions.

3.1 A national generic consumer law

With Australia's consumer markets becoming more national, variations in the generic consumer law across jurisdictions can impose costs on businesses, which may be passed on to consumers. The Victorian Government supports in principle a national generic consumer law. This should be the most effective law possible.

As discussed by the Productivity Commission in its Draft Report, Australia's consumer markets are becoming more national. In this context, jurisdictional variations in the generic consumer law can impose costs on businesses, which may be passed on to consumers. Certainly, needless variation in the generic laws across jurisdictions does not benefit anyone. For these reasons, the Victorian Government supports the introduction of a national generic consumer law.

3.1.1 Universal coverage

The Victorian Government supports universal coverage for generic consumer protection legislation. Consequently, the Victorian Government recommends that the Productivity Commission undertake further analysis on the exemption for disclosure under the corporations law.

The Victorian Government agrees that the coverage of the generic consumer protection law should be universal. As outlined in the Victorian Government's initial submission, universal coverage and consistency avoids boundary problems, can provide tools for addressing small issues, and promotes fairness, efficiency and efficacy, with potentially lower administration and compliance costs (Victorian Government submission sub x, p 61-66).

The Victorian Government supports extending the coverage of the Trade Practices Act to include financial services regulation and telecommunications regulation. As the Productivity Commission pointed out there is a strong underlying rationale for any new national generic law to apply to all sectors, thus avoiding the uncertainty and regulatory 'cracks' that carve-outs create.

The Victorian Government does not have a fixed position on the exclusion of Corporations Act disclosures from any national generic law, but would appreciate more analysis of the issue before any final conclusion is reached. The Productivity Commission (p69) discussed the issue in brief, and argued that the strict liability nature of misleading and deceptive conduct provisions would have a chilling effect on disclosure under the Corporations Act and/or lead to even longer and more confusing disclosure documents. However, the only source quoted is the Wallis inquiry, which occurred a decade ago. Since then there have been many regulatory changes in both corporations law and financial services regulation which have changed the environment. In addition, there are moves to reduce prescribed disclosure rules which have led to excessive and ineffective disclosure. In this context, the application of the Trade Practices Act provisions on misleading and deceptive conduct seem highly relevant.

On a first principles basis the generic law should apply to all industries. The case for an exemption in this area does not appear to have been fully made. It may warrant further consideration, including some analysis of the types of disclosure that the Productivity Commission expect would be captured under such an arrangement.

3.1.2 Experimentation

The Victorian Government does not agree that the gains from experimentation in the future are unlikely to be large. Consequently, in the agreement to adopt a national generic consumer law there should be scope for jurisdictions to collectively (and individually in approved circumstances) experiment with new policy developments.

One of the reasons the Productivity Commission argued that a national generic consumer law is warranted is because the gains from jurisdictional experimentation are “now unlikely to be large in the consumer area” (PC 2007, p. 50). The Victorian Government does not agree that the gains from experimentation are unlikely to be large and provides recent examples to illustrate this.

In 2003, the Victorian Government adapted UK legislation and introduced unfair contract terms provisions in the Victorian Fair Trading Act. The Productivity Commission acknowledged that “there are sound economic and ethical rationales for proscribing unfair contract terms that cause consumer detriment” (PC 2007, p. 109) and consequently, recommended that a provision be incorporated into the new national generic consumer law that voids unfair contract terms.

A further example of recent experimentation that provided useful learning for other jurisdictions is the introduction of more stringent requirements for increases in credit card limits in the Australian Capital Territory. The Productivity Commission classified this as an example of the failure of experimentation, because little appears to have come of it. The Victorian Government understands that a full evaluation of this legislation is yet to be undertaken. However, it may be noted, success and failure are both useful outcomes of experimentation.

The Productivity Commission made two specific claims regarding the effect of the Australian Capital Territory experiment. Regarding the impact of the reforms, it is claimed that the default rate has not changed due to the introduction of the reform, which would appear to be true from the data presented. This is a beneficial lesson from the experiment.

The other claimed impact from the experiment – delays in provision of credit after the Australian Capital Territory bushfires – is based on an assertion by the Australian Bankers Association and not on any data. A first principles consideration of the situation is that it would not result in any non-trivial delay in accessing credit. If the customer was within their existing credit limits, there would not be any issues. If a client required the extension of a credit limit then the banks would simply need to assess capacity to pay, as they do for many other credit products. This should not introduce a significant delay.

A fuller evaluation of the reform is warranted and this would be useful in determining the effectiveness of the intervention.

The New South Wales cap on credit interest rates and fees is another recent example of experimentation. It is too early for this to be evaluated as loopholes in the Uniform Consumer Credit Code allow avoidance of the Code to occur.

One of the arguments put forward by the Productivity Commission to explain why the gains for experimentation are unlikely to be large was that “there is perhaps greater consensus on the contours of consumer policy than in the past (and hence less need for ‘experiments’ to help choose between competing models).” (PC 2007, p. 50) The

Victorian Government's view is that there is little evidence that policy development in consumer policy has come to a halt, or that there is consensus on future developments in the consumer policy area. For example, the Victorian Government believes there is a case for considering as part of a national scheme a broader unfairness test for business conduct. The Productivity Commission discussed the proposal in its Draft Report and concluded "that it would be prudent for Australian policymakers to see how the European model develops, and only to consider the option of pursuing a general unfair practices provision at a later time if warranted by strong evidence in its favour." (PC 2007, p. 111) There may be benefits from experimentation in this area. Indeed this experimentation is already occurring, for example, there is a fairness principle embedded in financial services legislation.

The Victorian Government acknowledges that there are costs of experimentation. However, in some cases they may be outweighed by the benefits of a particular experiment.

While the Victorian Government believes there are still significant gains to be made from jurisdictional experimentation, the Victorian Government does not believe that this issue should hinder the push for a new national generic law. Rather, the Victorian Government believes that it is an important issue to be considered in drawing up the agreement to adopt a national generic consumer law. There should be scope for jurisdictions collectively, and individually in approved circumstances, to experiment with new policy developments under the new law.

3.1.3 Enacting the national generic consumer law

The Victorian Government supports enacting the new generic law through applied ("template") law arrangements. However, the Victorian Government considers that it should be backed by an inter-governmental agreement outlining the institutional procedures for reviewing and amending the legislation and conducting experimentation.

The Productivity Commission recommended in its Draft Report that the new national generic consumer law be enacted through applied ("template") law arrangements. As outlined in the Victorian Government's second submission, a move to increase harmonisation through the introduction of template legislation may require jurisdictions to relinquish some, or all, regulatory control. For example, where template legislation is adopted, amendments may be determined by a majority of jurisdictions (if these were the agreed voting arrangements), in which case a jurisdiction may have to adopt legislation did not support. Consequently, the template law arrangements would need to be backed by an inter-governmental agreement outlining the institutional procedures for reviewing and amending the legislation, and for conducting experimentation with new regulatory forms or processes, which will undoubtedly arise over time.

3.2 Model for the national generic consumer law

3.2.1 Shortcomings of the Trade Practices Act as a model

The Victorian Government supports the development of consistent, harmonised, consumer protection legislation supported by an inter-governmental agreement. The Productivity Commission proposed that the Trade Practices Act be used as the basis for this legislation. The Victorian Government does not support this view as there are

many significant provisions in State and Territory Fair Trading Acts that are not in the Trade Practices Act.

In its Draft Report, the Productivity Commission argued that the new national generic law should be based around the Trade Practices Act (modified to reflect other recommendations made in its report) as it “is already applied to corporations across the country, and is well respected and tested.” (PC 2007, p. 60)

How well known a piece of legislation is should not be the test for determining if it should be the basis for the new national generic consumer law. The Trade Practices Act is a broader act than the State and Territory Fair Trading Acts in that it includes competition provisions, which are of significant public interest. Further, the Trade Practices Act’s consumer protection provisions are supplemented by the State and Territory Fair Trading Acts, which have broader consumer protection provisions than the Trade Practices Act. As far as consumer law goes, the State and Territory Fair Trading Acts are also applied to corporations across the country and are respected and tested.

The test of which legislation should be the basis for the new national generic consumer law should be how effective the specific provisions of the legislation are in protecting consumers. In this regard, the Productivity Commission has overlooked two important issues in determining that the Trade Practices Act should be adopted as the basis for the new national consumer law.

First, where State and Territory Fair Trading Acts have similar provisions to the Trade Practices Act it should not be assumed that the drafting of the Trade Practices Act provision is the most effective and relevant. For example, the pyramid selling provisions in the Victorian Fair Trading Act are considered to be more effective than those in the Trade Practices Act.

Corones and Christensen (2007) completed a comparison of generic consumer protection legislation in Australia to assist the Productivity Commission in undertaking its inquiry into Australia’s consumer policy framework. The study compared the Trade Practices Act with the equivalent provisions of the State and Territory Fair Trading Acts. It found a number of material differences. However, the study was limited. It only identified where material differences existed. No analysis of the effectiveness of different provisions was undertaken and the authors did not recommend one jurisdiction’s provision over another’s. Where material differences were identified, Corones and Christensen simply recommended that the discrepancies be reviewed.

For example, in reviewing the implied terms regimes, the authors noted that “...the different circumstances in which goods must be fit for their purpose and the different meanings of merchantable quality provide significant potential to detrimentally impact on consumers.” (Corones & Christensen 2007, p. 94) Therefore, one of the recommended review issues was that the “meaning of merchantable quality should be reviewed and harmonised” (Corones & Christensen 2007, p. 95). However, the authors did not recommend adoption of a particular meaning of merchantable quality.

Second, there are some consumer protection provisions in the State and Territory Fair Trading Acts that are not in the Trade Practices Act. While Victoria’s unfair terms in consumer contracts provisions have been picked up by the Productivity Commission in the draft recommendations, there are other provisions that have not been picked up.

For example, Victoria's Fair Trading Act covers telephone marketing sales, regulating permitted call times, disclosure requirements and cooling-off periods. If the Trade Practices Act was adopted as the template legislation, then these consumer protection measures would no longer exist.

3.2.2 Best-of-breed model for national generic consumer law

The Victorian Government believes that any new harmonised laws should be 'best-of-breed' legislation, drawing on developments across the Commonwealth, States and Territories.

For the reasons outlined above, the Victorian Government believes that the new national generic consumer law should not be modelled on the consumer protection provisions in the Trade Practices Act. Rather, the national generic consumer law should be 'best-of-breed' legislation, bringing together the best parts of consumer protection law in Australia and drawing on developments across the Commonwealth, States and Territories. The process of introducing a national generic consumer law would also provide an opportunity to review the effectiveness of particular provisions which have been identified as problematic. For example, as discussed later in this submission, the implied terms regime could be reviewed. Indeed, no jurisdictions' current provisions may be completely effective and entirely new provisions may need to be drafted.

3.2.3 Inclusion of product liability provisions

The Victorian Government would support extending the coverage of the product liability provisions to include non-corporate entities that fall outside of the coverage of the Trade Practices Act.

In looking at provisions in the Trade Practices Act that are not replicated in the State and Territory Fair Trading Acts, the Productivity Commission raised the issue of the product liability provisions and how they should be handled in a national generic law. (PC 2007, p. 71)

Placing these provisions in a national generic law would extend coverage of the product liability provisions to include non-corporate entities that fall outside of the coverage of the Trade Practices Act. These provisions provide a right for persons who suffer injury or loss as the result of a defective product to take legal action for compensation against the supplier of that product. This is a reasonable consumer protection that would meet community standards and expectations. In the development of a national generic law, there would not appear to be any reason why this should be excluded. The Victorian Government would support this extension of coverage.

3.3 Enforcement of national generic consumer law

3.3.1 Weak case to support introduction of national regulator

The Productivity Commission has not put forward a strong case for a national regulator. A national regulator would not address some of the problems that the Productivity Commission has used to support its case for a national regulator. Further, where introduction of a national regulator may address the problem, the Productivity Commission has not considered alternatives to a national regulator that

may be a more cost effective way of addressing the problem (given the significant costs in setting up a national regulator).

The Productivity Commission recommended the introduction of a national regulator to enforce the new national generic consumer law on the basis that it would address the following problems that exist under the current system:

- differences in the enforcement priorities of jurisdictional regulators raise the costs for businesses and could undermine the intent of a single law in promoting consistency
- differences in interpretation of the law by jurisdictional regulators also raise the costs for businesses and could undermine the intent of a single law in promoting consistency
- inadequate resourcing for enforcement of the generic law by some governments
- the risk of duplication of regulatory effort
- the incomplete mechanisms to coordinate enforcement actions of national significance, and
- consumer confusion about who to contact with a complaint.

The analysis used by the Productivity Commission in reaching the conclusion that a national regulator would address the above problems is insufficient. In summary:

- it does not appear that in practice a national regulator would address some of the problems the Productivity Commission has used to support its case for a national regulator
- where there is an issue, the Productivity Commission has not addressed the scale and a preliminary assessment would conclude that they are small scale problems, and
- where a national regulator may address the problem, the Productivity Commission has not considered any alternatives to a national regulator that may be more cost effective.

These issues are discussed in detail below.

Differences in enforcement priorities

It is not clear how differences in enforcement priorities undermine the intent of the single law in promoting consistency. The tailored application of the law and allowing for jurisdictional differences in enforcement priorities is an important part of the consumer protection framework in Australia.

There are benefits from allowing different jurisdictional enforcement priorities. First, it ensures that jurisdictional specific concerns that do not exist elsewhere in Australia are addressed. For example, Queensland tends to have unique issues relating to vacation tower apartments, particularly on the Gold Coast, whereas natural gas heating products are concentrated in the southern states, mainly in Victoria. Second, there are benefits to other State and Territory regulators and consumers where enforcement action is taken by one jurisdiction on a business that operates nationally. For example, Consumer Affairs Victoria's work on unfair contract terms that "has

assessed and effected amendments to many contracts that are used by companies that operate nationally or are replicated by companies operating in other jurisdictions.” (Victorian Government 2007b, p. 59)

Further, it is not clear how a national generic consumer law enforced by State and Territory regulators with different enforcement priorities would raise the costs for businesses. Enforcement actions are undertaken where businesses have breached the law. The costs associated with this result from the business being non-compliant. The costs do not arise from jurisdictions having different enforcement priorities, i.e. from a non-compliant operator being pursued in one jurisdiction but not another.

Differences in the interpretation of the law

The Productivity Commission argued that where the substance of the generic law is common across jurisdictions, differences in the interpretation of those laws by regulators has cost raising effects for businesses (PC 2007, p. 55). Further, unwarranted variations in enforcement at the jurisdictional level would risk undermining the intent of a single law in promoting consistent treatment for consumers and businesses across the country. The Productivity Commission contended that a national regulator would largely obviate this risk.

While it is not clear what the Productivity Commission means by “unwarranted” variations in enforcement (as no examples are provided), it is acknowledged that in theory differences in the interpretation of the law across jurisdictions could undermine the intent of the single law and raise costs for businesses.

However, in practice this is not the case. The only example provided by the Productivity Commission is in the energy sector where until recently there was not national regulation and thus, you would expect variation.

The only recent example of varying approaches to enforcement that can be identified is with respect to the “definition of meat” in the national trade measurement legislation. Some States interpreted meat as including white meat and some did not. This was resolved by the Standing Committee of Officials of Consumer Affairs and national consistent enforcement guidelines were issued.

Inadequate enforcement resources

The Productivity Commission also argued that a national regulator would address concerns about the adequacy of the resources provided by some governments for enforcement of generic requirements (PC 2007, p. 61). However, the Productivity Commission made no comment on how a national regulator would be better resourced to undertake enforcement activities.

Risk of duplication of regulatory effort

The Productivity Commission contends that a one-law, one-regulator model would have the “significant advantage of removing the possibility of needless duplication of regulatory effort.”(PC 2007, p. 61) In theory, a national regulator should address this problem. However, in practice it is not evident that this would be the case. To carry out the enforcement functions currently undertaken by the States and Territories, a national regulator would need to be a very large organisation with regional operations. Within this context, it would be foreseeable for a regional office to pursue an

enforcement action without communicating that to another regional office or the national office. There is no evidence to suggest that a national regulator of significant size with regional offices would be better able to deal with this issue than the arrangements that currently exist under the Fair Trading Operations Advisory Committee of the Standing Committee of Officials of Consumer Affairs. Further, it is not clear that “needless duplication of regulatory effort” is a large problem. The Productivity Commission has only provided one anecdotal example.

Incomplete mechanisms to coordinate enforcement

The Productivity Commission identified that the mechanisms to coordinate the enforcement of consumer law are currently incomplete and argued that the fact that not all jurisdictions have signed up to the AUZSHARE arrangement limits the ability of consumer regulators to identify priority areas for enforcement action (PC 2007, p. 55). On the basis that a national regulator would have more consolidated intelligence on complaints data, the Productivity Commission concluded that a national consumer regulator would be in a better position to assess and prioritise actions taken on behalf of consumers (PC 2007, p. 61).

AUZSHARE is an initiative of the Standing Committee of Officials of Consumer Affairs which demonstrates the effectiveness of the cooperative arrangements that exist. There are further enhancements that could be made to AUZSHARE as is to be expected. The Victorian Government would support recommendations to improve the system as a cost effective way of sharing complaint information and having a national recording system.

In addition to AUZSHARE, there are other mechanisms for coordinating enforcement actions across the Commonwealth, States and Territories that have not been considered by the Productivity Commission. One of the functions of the Fair Trading Operations Advisory Committee of the Standing Committee of Officials of Consumer Affairs is to initiate and/or co-ordinate appropriate operational responses to emerging issues of national significance. The membership of Fair Trading Operations Advisory Committee includes officers responsible for compliance and/or enforcement of fair trading issues from all Commonwealth, State, Territory and New Zealand Consumer Affairs Agencies. It has been an effective tool for coordinating national enforcement actions. For example, Victoria took the lead agency role in the case of Michael Knight (Sheridan Sheets) as agreed by the Fair Trading Operations Advisory Committee. Further, Consumer Affairs Victoria worked with the New Zealand Commerce Commission when Michael Knight moved to New Zealand. The exchange and monitoring of information allowed for a further enforcement action in New Zealand.

In addition, head of consumer agencies have in recent years had a number of meetings to discuss compliance and enforcement issues under the banner of the Australian Consumer Protection Enforcement Network.

Consumer confusion about who to contact with a complaint

The Productivity Commission argued in its Draft Report that the introduction of a national consumer regulator “would address concerns that under the existing multiple enforcement agency regime, some consumers are confused by the diversity of options in making complaints and that referral processes are of varying helpfulness” (PC 2007, p. 61).

Replacement of State and Territory regulators with a national body would only address a minor element of this problem. It would ensure that complaints that consumers mistakenly lodged with the Australian Competition and Consumer Commission, when the State and Territory consumer protection agencies were the more appropriate agency to deal with the complaint, were lodged with the correct agency in the first instance. From 2005-06 enquiries data, the Victorian Government estimates that only 0.42 per cent (9,791) of the total number of consumer enquiries made to the Australian Competition and Consumer Commission and State and Territory regulators (2,355,200) would fit this category.¹

In contrast, it would appear that much of the confusion experienced by consumers in determining who is the appropriate agency to deal with their complaint relates to dispute resolution and complaint bodies operating outside of the State and Territory consumer protection agencies. As outlined by the Productivity Commission in its Draft Report there are "...over 20 consumer ombudsman's offices, multiple private dispute resolution and complaint bodies, and a variety of legal aid offices, tribunals, and small claims courts across jurisdictions" (PC 2007, p. 150) that can assist consumers in receiving redress.

The Productivity Commission's proposal to introduce a national consumer regulator will not address the problem of complaints being lodged with State and Territory regulators where they would be more appropriately dealt with by an ombudsman or a private dispute resolution body. For example, the Productivity Commission outlined in its Draft Report that "three times as many consumers with a complaint about essential services (initially) go to Consumer Affairs Victoria than to the specialised ombudsman services that were set up to deal with most of these concerns" (PC 2007, p. 152). If a national consumer regulator were to replace Consumer Affairs Victoria there is no evidence to indicate that consumers would know to approach the Energy and Water Ombudsman with their complaint in the first instance rather than the national regulator.

Further, it will not address the consumer confusion problem in some of the largest markets in Australia – financial services and telecommunications. The Commonwealth Government has created separate consumer protection regimes in these areas and separate institutions to enforce these regimes. In the experience of Consumer Affairs Victoria, telecommunications is one of the most confusing areas for consumers. As highlighted by the Productivity Commission in its section on alternative dispute resolution, "In the telecommunications area, the main concern is that some functions that consumers expect from the TIO [Telecommunications Industry Ombudsman] are fulfilled by other bodies" (PC 2007, p. 156) and "...consumer confusion...arises from multiple and overlapping [financial services ADR] schemes..." (PC 2007, p. 158). A national consumer regulator will not address these problems.

¹ In the 2005-06 financial year, Consumer Affairs Victoria received 588,800 written and telephonic requests for information and advice. (CAV 2006b, p. 19) Given approximately one quarter of Australia's population live in Victoria, it is assumed that 2,355,200 enquiries were received by State and Territory fair trading agencies in 2005-06. Over the same period, the ACCC received 75,319 enquiries, of which approximately 13 per cent (9,791) were referred to a State and Territory fair trading agency. (ACCC 2007, p. 40-41)

In addition, transferring the enforcement of generic regulation to the Commonwealth has the potential to create new boundary issues in the real estate and motor car markets (the largest purchases for most consumers). Currently, generic consumer protection legislation and specific licensing regimes are enforced by State and Territory consumer protection agencies. If enforcement of the generic law was transferred to the Commonwealth, this has the potential to create confusion for consumers who might contact two different agencies to have similar issues resolved.

3.3.2 Shortcomings of a national regulator

Extent of the States and Territories enforcement activity

Without a significant commitment by the Commonwealth to focus on delivering consumer protection, the referral of enforcement powers to the Commonwealth is likely to result in a watering down of consumer protection in Victoria.

The Productivity Commission outlined that:

Lower level governments can at times have advantages over higher level governments in tailoring policies to specific jurisdictional needs. ... Because State and Territory regulators are closer to where these issues arise, they can potentially employ local knowledge to develop more effective and more timely policies than might a national regulator. (PC 2007, p. 48)

The Productivity Commission then proceeded to dismiss this idea on the basis that “A nationally-based, appropriately resourced and focused, policy regime can still provide for tailored enforcement and the capacity to respond quickly to local issues.”(PC 2007, p. 51) However, there is no discussion from the Productivity Commission about what it considers would be an appropriate level of resources or how you would appropriately focus a national regulator on delivering national and regional priorities. An assumption is made that because you could *theoretically* create such a national regulator that is all that is needed to *practically* create one.

In its analysis, the Productivity Commission has not given sufficient consideration to the extent of compliance and enforcement activities the States and Territories undertake. The States and Territories play a dominant role in enforcement of consumer laws, significantly outweighing the Commonwealth’s activity (refer to the Compliance and Enforcement chapter for further discussion). Further, a significant proportion of Consumer Affairs Victoria compliance and enforcement activity is undertaken at the regional level.

The Productivity Commission concluded that the Australian Competition and Consumer Commission (the recommended body to become the national regulator), with its network of regional offices, could undertake the localised enforcement functions currently performed by the State and Territory consumer affairs agencies (PC 2007, p. 63). The funding issue aside, the Australian Competition and Consumer Commission’s current network of regional offices would not be sufficient to replicate the localised enforcement functions performed by the State and Territory offices. The Australian Competition and Consumer Commission’s “regional” offices are located in the metropolitan areas of the States and Territories. In contrast, many of the State and Territory consumer affairs agencies have offices in the regional areas of their jurisdiction. Consumer Affairs Victoria has regional offices in Warrnambool, Geelong, Ballarat, Mildura, Bendigo, Wangaratta and Morwell with mobile services to 49 other towns across Victoria.

In terms of funding, for the Australian Competition and Consumer Commission to maintain the level of activity in consumer law compliance and enforcement now undertaken by all jurisdictions combined, it would require a substantial lift in resources. This would significantly alter the focus of the organisation. Therefore, the competition and regulation work of the Australian Competition and Consumer Commission would have to diminish in relative importance. This would be an unintended consequence of ensuring the Australian Competition and Consumer Commission would be “appropriately focused”. Further, the organisation would become much more difficult to manage efficiently and effectively.

The Productivity Commission argued that the Australian Competition and Consumer Commission does not underplay consumer issues, highlighting that the majority of the Australian Competition and Consumer Commission’s enforcement actions relate to consumer protection. However a cooperative approach to enforcement is most likely to maintain appropriate enforcement. The Australian Competition and Consumer Commission itself advocates a continuation of a shared, cooperative approach to enforcement.

Constitutional issues

Constitutional issues do place a constraint on the potential arrangement of activity between the Commonwealth and States and Territories. The lack of appropriate alternative dispute resolution processes at the Commonwealth level points towards a cooperative enforcement model as the most appropriate enforcement model for Australia.

The present split of consumer affairs responsibilities between States and the Commonwealth reflects a constitutional position that the Commonwealth can only regulate the activities of corporations.

The Commonwealth can also regulate the activities of unincorporated privately-owned enterprises (such as partnerships or sole traders) in those industries, such as telecommunications, insurance and banking, that the Constitution reserves exclusively to the Commonwealth, but in practice these industries are virtually entirely undertaken by corporations.

This split partially gives rise to current split in functions between the Commonwealth and the States and Territories. Due to the impact of the Constitution State and Territory consumer protection law extends to aspects of transactions between consumers and corporations where the Trade Practices Act is silent, i.e. the Trade Practices Act does not cover the entire field of transactions between consumers and corporations.

These inconsistencies can only be addressed by either:

- transfer to the Commonwealth of State power to regulate transactions between consumers and unincorporated enterprises; or
- an intergovernmental agreement and model legislation.

Full transfer of all State and Territory consumer affairs responsibilities to the Commonwealth would mean that the Commonwealth would have to establish complaint-handling, investigative and dispute resolution procedures, etc, for small consumer claims.

As the Productivity Commission noted, aspects of the Constitutional requirements for Commonwealth Courts mean that the tribunals and small claims courts available at a State and Territory level cannot be replicated at a Commonwealth level (PC 2007, p. 61-62). The recommendation the Productivity Commission made is that the State and Territory tribunals and small claims courts should continue to adjudicate the national generic law.

However, having separate tribunals and small claims courts raises issues for regulators. It is more difficult to transition cases, both for regulators, and for consumers and businesses. Data collection and monitoring is also more difficult. The Productivity Commission raised this issue elsewhere in its analysis of reporting on compliance activity.

For these reasons, State based regulators have continued to place effort into ensuring appropriate integration/monitoring with tribunal systems. By separating out all aspects of consumer protection to a separate level of Government, this would make interaction more difficult. The Productivity Commission recognised that the implication of this is that a cooperative style approach to national regulation would be more suitable.

Transfer Costs

The Victorian Government considers the Productivity Commission needs to conduct a rigorous assessment of the costs and benefits of shifting enforcement responsibilities to a national regulator. There would be significant costs in shutting down State and Territory operations only to reopen facilities as Australian Competition and Consumer Commission offices. However, it is not clear what the benefits would be if the Australian Competition and Consumer Commission offices performed exactly the same functions as the States and Territories.

The Productivity Commission did not discuss the costs of setting up the national regulator. Its discussion was limited to outlining how the transaction costs of a shift of enforcement responsibilities to a national regulator could be avoided (PC 2007, p. 62-63).

The Productivity Commission assumed that the Australian Competition and Consumer Commission's network of regional offices would be sufficient to replicate the localised enforcement functions performed by the States and Territories. However, as discussed above, for the Australian Competition and Consumer Commission to replicate the States and Territories regional operations, it would need to open offices in the regional areas of each State and Territory. The Australian Competition and Consumer Commission's metropolitan offices would not be sufficient.

The costs of transferring enforcement responsibilities to a national regulator need to be considered more thoroughly. There would be significant costs in shutting down State and Territory operations only to reopen facilities as Australian Competition and Consumer Commission offices and it is not clear what the benefits would be. If, as the Productivity Commission assumes, the Australian Competition and Consumer Commission offices were to perform exactly the same functions as the States and Territories there would be no additional benefit to consumers in setting up the national regulator.

3.3.3 A cooperative model of enforcement

The Victorian Government supports the continued operation of a cooperative model of enforcement. The Productivity Commission was unable to identify any significant issues arising from shared enforcement. The States and Territories continue to shoulder the vast majority of consumer protection compliance activity in Australia and the Productivity Commission has failed to outline how this would be successfully transferred to the Commonwealth.

The Victorian Government supports the continued operation of a cooperative model of enforcement. This is a common institutional arrangement and is generally effective. For example, in the food safety area, policy is set at a national level through Food Safety Australia and New Zealand, while enforcement occurs at the State and Territory level (in Victoria, this is through the Department of Human Services and local government).

In the Victorian Government's view, this is also an effective model for consumer protection. The Productivity Commission has been unable to identify significant problems arising from the cooperative model of enforcement. Nonetheless, if governments wish to improve consistency and coherence in enforcement of a national law there are a number of actions that could be taken within a cooperative model. For example, the development of national compliance guidelines (as with the definition of 'meat' under trade measurement law), a national training scheme for compliance officers, better coordination through more frequent meetings of the Fair Trading Operations Advisory Committee and further development of the Australian Consumer Protection Enforcement Network.

The Australian Competition and Consumer Commission supported a cooperative approach to enforcement in its submission to the Productivity Commission:

The ACCC considers that a single law, multiple regulator model would provide a framework which best meets the needs of both consumers and businesses. It would provide both with a higher degree of certainty regarding the standard of conduct required, reduce compliance costs, and enable regulators to better coordinate and focus their combined resources on enforcing the law. (ACCC 2007, p. 123)

The Productivity Commission's recommendation, which involves transfer of all enforcement resources to the Commonwealth, will raise significant transition issues, including transition costs, and also significant constitutional issues. The Victorian Government believes the Productivity Commission has not given these considerations sufficient weight in their analysis. Given the choice between these two options, a cooperative model is obviously the most cost effective.

There is an issue for small States and Territories, which confront economies of scale in public administration. The Victorian Government supports the Productivity Commission's recommendation to allow States and Territories to refer their enforcement powers to the Commonwealth. However, the Victorian Government believes there is also a broader opportunity here for arrangements to be made between individual States and Territories to undertake specific functions on behalf of each other.

3.4 Policy decision making

3.4.1 Tailoring policies to local issues

As the Productivity Commission stated in its Draft Report, lower level governments have advantages over higher level ones in tailoring policies to local needs. In addition to large-scale demographic and geographic differences, States and Territories differ on economic and political factors as separate political units of the broader Australian federation. These are all legitimate reasons for differing policies at a jurisdictional level. For this reason, the Victorian Government advocated the principle of subsidiarity in its initial submissions.

The Productivity Commission stated that lower level governments have advantages over higher level governments in tailoring policies to specific jurisdictional needs (PC 2007, p. 48). The Productivity Commission recognised some jurisdictional differences where this may be the case – the need of the Indigenous populations in Queensland, Western Australia and the Northern Territory or the need for different building standards in cyclone prone Darwin. However, the Productivity Commission should recognise that there are a broader range of factors than large-scale demographic differences and physical geographic differences that may require differing policies at the jurisdictional level.

States and Territories differ on economic factors, which can lead to differences in consumer protection needs. For example, real estate sales are conducted in different ways in New South Wales and Victoria — Victoria has a predominance of auctions over private sales — and Victoria has access to domestic natural gas for heating and uses it more intensively than in most other jurisdictions. Particular individuals and groups of importers or businesses may focus in specific States or Territories, so problems with certain products may be confined to individual States or Territories or manifest themselves more significantly in certain States or Territories.

Further, it should be recognised that the Australian States and Territories are established political units of the broader Australian federation. There may be legitimate reasons for different cultural/political responses to issues. Certain issues may be considered more serious in some States or Territories than in others, or their ranking, compared to other issues within a State or Territory, may differ.

3.4.2 Productivity Commission criticisms of Ministerial Council

The Ministerial Council on Consumer Affairs deals with a wide range of diverse issues. The Productivity Commission stated in its Draft Report that nearly half of the Ministerial Council's issues are currently "unresolved", and claims that there is a widely held view it is largely ineffectual. However, these "unresolved" issues are predominantly newly added issues, watching briefs etc, and in the majority of its work, the Ministerial Council has been effective.

There are certain areas where the Ministerial Council has been less than effective, and this can be attributed to a range of reasons. In some areas where delays have occurred, it has been the Commonwealth that has been at the core of the delay.

Further, policy issues that the Commonwealth is solely responsible for taking forward have also been delayed. It is not clear that shifting consumer policy responsibility from the States and Territories to the Commonwealth will expedite policy decision making or implementation of decisions. For those areas within its control, the Ministerial Council has been introducing reforms to improve arrangements.

The Victorian Government recommends retaining policy decision making as a shared responsibility of the Commonwealth, States and Territories within the Ministerial Council framework. Nonetheless, there are enhancements that can be made to the operation of the Ministerial Council, many of which have already been initiated.

The Productivity Commission criticised the Ministerial Council on Consumer Affairs for a lack of policy responsiveness going as far as describing the Ministerial Council as largely ineffective, albeit attributing this as a “widely held view” (PC 2007, p. 53-54).

The Productivity Commission’s analysis of the Ministerial Council’s operations is superficial and pays no regard to steps taken over recent years to enhance its effectiveness. The Productivity Commission may wish to review its analysis of the Ministerial Council.

One key claim of the Productivity Commission is that “In fact, nearly half of the issues that have been raised in the MCCA meetings over the last decade remain unresolved” (PC 2007, p. 53). This is outlined in Table 4.1 in the Productivity Commission’s Draft Report, which is reproduced in Box 1.

Box 1. Productivity Commission Table on Ministerial Council on Consumer Affairs' Progress on Consumer Issues

Table 4.1 MCCA's progress on consumer issues

Meeting	Jul 2000	Jul 2001	Aug 2002	Aug 2003	Aug 2004	Apr 2005	Sep 2005	May 2006	Sep 2006	May 2007
Antique cots	⊙									
Auzshare						⊙				
Baby walker standard			⊙							
Banking issues	→									
Car rental	→									
Commonwealth Games						⊙				
Comparison rates	→		→							
Consumer policy review								→	→	→
Consumer research						→	→	⊙		
Cooperatives legislation							→	⊙		
Credit cards	→	→						→	→	→
Credit providers and EDR								→		
Cross jurisdictional issues		⊙						⊙		
Education and information										⊙
Electronic equipment review									⊙	
Electronic/mobile commerce	→		→							
Enforcement consistency					⊙					
Ethanol in fuel				⊙						
Event ticketing		→								
Finance brokers				→	→				→	→
Frequent flyer points	⊙									
Fundraising									⊙	
Future directions								→		
GST	⊙									
Home building insurance		→	→							
Inbound tourism operators							→			
Indigenous consumers			→	→	→	→	⊙			
Infomercials			⊙							
Mobile phone contracts		→								
Mobile phone radiation	⊙									
National trade measurement					→			→	→	⊙
Overseas mail soams		→	⊙							
Pay day/Fringe credit	→	→	→							
Personal property securities										⊙
Petrol		⊙								
Prams and strollers										→
Premium rate telephone services						→	⊙			
Product safety policy				→	→	→	→	→	→	→
Property investment advice				→	→	→	→	→		
Residential tenancy databases				→					→	
Reverse mortgages										→
Smash repairs							⊙			
Telemarketing								⊙		
Temp. compensation for petrol		→	⊙							
Travel agents	→									
Travel compensation fund			⊙					⊙	→	⊙
Two-part pricing						⊙				
Unfair contract terms			→	→	→	→	→	→		
Victorian credit review								⊙		
Weighting instruments	⊙									
Wine labelling						→				
Youth education					→	→	⊙			

Key: → Matter raised and future consideration proposed
⊙ Decision made/No future action required

Source: PC 2007, p. 54

Consumer Affairs Victoria reviewed the list of “unresolved” issues. While the Productivity Commission identified many issues as “unresolved”, many of these issues have, in fact, come to some conclusion, although this may have not been reported in a communiqué. Other issues are better described as “open”, as they may have only recently been added to the agenda, or may be more in the nature of a watching brief. Table 1 presents the projects that the Productivity Commission noted were “unresolved” (i.e. not marked “⊖” in the table above) together with Consumer Affairs Victoria’s assessment of their current status.

Table 1. Status of “Unresolved” Ministerial Council on Consumer Affairs Issues

Issue	Status
Banking issues	Issues dealt with. Item closed.
Car rental	Research completed. No further national action, jurisdictions to adopt their own approaches.
Comparison rates	Currently being reviewed.
Consumer policy review	This project was established to participate in the Productivity Commission’s review of the consumer policy framework, which is ongoing.
Credit cards	Responsible lending is an ongoing issue.
Credit providers and external dispute resolution	Resolved. Legislation to be drafted.
Electronic/mobile commerce	Research completed. No further national action.
Event ticketing	New South Wales Code completed. Concluded no need for further action.
Finance brokers	Draft legislation about to be released.
Future directions	Ongoing task being progressed by a Working Party.
Home building insurance	Research completed. No agreement on alternative building warranty insurance model.
Inbound tourism operators	Concluded national regulatory framework not warranted.
Mobile phone contracts	Extensive work undertaken, ongoing cooperative approach being taken.
Pay day/Fringe credit	New legislation agreed and developed.
Product safety policy	Significant outcomes achieved. Extensive debate on national regulatory framework in progress.
Property investment advice	Working Party report completed. No agreement on a need for national regulation.
Residential tenancy databases	This issue has been finalised and the Ministerial Council has agreed to a position. Legislative drafting is currently the responsibility of Queensland.
Reverse mortgages	Working Party progressing response to issue.
Travel agents	Working Party progressing; significant outcomes achieved; ongoing review of matters.
Unfair contract terms	Unable to progress this issue through the Commonwealth’s Office of Best Practice Regulation, despite many attempts at completing a Regulatory Impact Statement. The Draft Report notes unfair contract terms legislation does not impose a substantive cost on business, however the substantiation of this has been a sticking point with the Office of Best Practice Regulation.

The Ministerial Council maintains a “strategic agenda” of priority projects (many council agenda items may be for noting or of relatively minor nature). The Ministerial Council’s strategic agenda was outlined in the Ministerial Council on Consumer Affairs Working Party on Consumer Policy Information Paper on Consumer Policy Issues.

Nonetheless, there are issues where the Ministerial Council has not achieved agreement. This can occur for a range of reasons. There are also delays in achieving agreement. For example, there have been difficulties in developing Regulatory Impact Statements that pass the scrutiny of the Commonwealth’s Office of Best Practice Regulation. Others relate to difficulty in achieving Commonwealth Government agreement to policy proposals.

The varying nature of these delays means that transfer of the responsibility to the Commonwealth is unlikely to significantly impact on this.

Property investment advice

The example the Productivity Commission almost exclusively relied on in its Draft Report is the case of the regulation of property investment advice. The experience with this policy area is that the States and Territories have been supportive of action and while they have different positions on the nature of the regulation, they have been willing to compromise to achieve agreement. This has not been the case with the Commonwealth, which has not supported the States and Territories position.

If the Ministerial Council no longer existed and the Commonwealth was solely responsible for progressing this project, as the Productivity Commission has recommended, then this issue would be no closer to being satisfactorily resolved than is currently the case.

Box 2. Property investment advice

In 2003, the former Queensland Minister for Tourism, Racing and Fair Trading raised the issue of property investment seminars and the possibility of national legislation to regulate property investment advice, with the Ministerial Council on Consumer Affairs. As a result, the Ministerial Council set up a Working Party in August 2003 to consider property investment advice in Australia.

A draft discussion paper was circulated by the Standing Committee of Officials of Consumer Affairs agencies on the 10 March 2003. The Commonwealth Treasury refused to endorse the paper or agree to its public release. Australian Securities and Investments Commission was then invited to work on redrafting the discussion paper taking into account the views of all agencies.

The Hon Ross Cameron, MP, the Parliamentary Secretary to the Treasurer had written to the Hon John Lenders MLC, Minister for Consumer Affairs in March 2004, saying that the Commonwealth was of the view that this matter is the responsibility of the States and Territories, that direct regulation of the real estate industry is a traditional role of the State and Territory Governments and the matter should be addressed through improvements to existing State and Territory regulatory structures.

The Working Party released a public discussion paper in August 2004 on the industry, including the scope and level of possible regulation to encourage an efficient property investment advice market, within an appropriate framework of consumer protection.

The Working Party was of the view that there were significant problems associated with the provision of property investment advice and wealth creation training services in Australia. However, unanimous agreement on the level of regulation required to address the problems was not achieved. Nonetheless, States and Territories were willing to compromise on a position in order to advance the project.

The Commonwealth in February 2005 would not support integrating the matter into the financial services regime. The Commonwealth would also not support any regime other than no-regulation or co-regulation.

Given the Commonwealth Government's position, the Ministerial Council has been unable to complete this project.

AUZSHARE

The Productivity Commission also used AUZSHARE as an example of the Ministerial Council on Consumer Affairs' failure. This is surprising as AUZSHARE was an initiative of the Ministerial Council that has not long been operating.

All States and Territories are members of AUZSHARE and participate in the system. A number of States have begun to contribute complaints data into AUZSHARE. Consumer Affairs Victoria contributes complaints data. Consumer Affairs Victoria has recently upgraded its case management system and is temporarily unable to export data from this system to AUZSHARE. However, Consumer Affairs Victoria is working on developing methods to export data and expects to be uploading again soon.

Nonetheless, the Productivity Commission should not over-estimate the benefits of up-loading data into AUZSHARE. Nationally produced data is unlikely to be "much more revealing" (PC 2007, p. 55). If an issue arises at the national level, then in most cases it will also manifest itself in one or more States or Territories and be identified at that level.

A range of mechanisms exist for the exchange of information among States and Territories and with the Commonwealth, not the least of which is the informal contact between agencies, and the monthly phone-conferences between agencies progressed under the auspices of the Fair Trading Operations Advisory Committee.

While a national data set would be useful and is being progressed, it is unlikely to reveal problems that would have been otherwise overlooked.

Jurisdictions will continue to work on and improve AUZSHARE as one of a number of vehicles for improving coordination of enforcement activity. Additional data will be provided into AUZSHARE, and further work should be undertaken on data definitions and consistency issues.

These types of issues are common with any IT project, and are not a reflection of the institutional arrangements or the organisation of the Ministerial Council.

Delays in implementing Commonwealth policy decisions

One of the reasons put forward for the Productivity Commission's recommendation that the Commonwealth take over the States and Territories role in the consumer policy area has been delays in implementing policy decisions of the Ministerial Council on Consumer Affairs. Any consideration must be in comparison to alternatives, and the Productivity Commission has neglected to consider how long it has taken the Commonwealth to implement policy.

For a range of reasons, governments can take time to progress policy issues. Even when it is the responsibility of a single government, where there is no need to reach consensus with other jurisdictions, there can be delays. For example, the Commonwealth has been working on implementing "all inclusive" pricing, a relatively straightforward amendment to the Trade Practices Act which States and Territories have also agreed to implement (refer Box 3).

Box 3. Commonwealth delay on "all inclusive" pricing

On 21 April 2005, the Australian Government announced that it would be making an amendment to the Trade Practices Act to respond to the use of component pricing in the market.

At the Ministerial Council on Consumer Affairs meeting held 22 April 2005, in response to a paper presented by Victoria, Ministers endorsed the need for Federal legislation to close off opportunities to mislead consumers by way of component pricing. It also endorsed a model which would ensure that the total price is always prominently displayed.

States and Territories agreed to explore any necessary legislative implications arising from this decision. On 10 March 2006, the Commonwealth publicly released a draft bill. It received responses from five Consumer Affairs Ministers and proceeded to redraft the Bill in response to issues raised.

In late December 2006, the redrafted Bill was circulated to stakeholders and the Ministerial Council Ministers. At the Standing Committee of Officials of Consumer Affairs meeting held on 11 April 2007, the Commonwealth presented a paper in which it explained that it was seeking legal advice on issues arising from consultation on the redrafted Bill. In response to Victoria's concern that the Bill does not require the total price to be always displayed as prominently than any component price, the Commonwealth stated that it would inform the Minister of Victoria's concerns.

To date, there has not been any further information from the Commonwealth about the results of its legal advice request or the status of the Bill. The Ministerial Council endorsed the need for legislative amendment to the Trade Practices Act at the Ministerial Council meeting on 22 April 2005. Nearly three years later the Bill has not been finalised.

3.4.3 Improvements to the Ministerial Council

The Victorian Government recommends retaining policy decision making responsibility cooperatively amongst the Commonwealth, States and Territories, within the Ministerial Council on Consumer Affairs framework. The Victorian

Government has participated in the Ministerial Council's actions to reform its strategic agenda to improve its effectiveness and efficiency.

The Victorian Government would support further reforms to the Ministerial Council to facilitate speedier decision making, including: governments making a formal commitment to resolve issues at the Ministerial Council; implementing a two-thirds voting arrangement with no veto power for any jurisdiction; and resourcing the Ministerial Council with policy staff to drive strategic agenda items.

The Ministerial Council on Consumer Affairs and its advisory body — the Standing Committee of Officials of Consumer Affairs — have gone through a review and development process.

Ministerial Council reforms

In May 2006, the Ministerial Council on Consumer Affairs agreed to review its operating protocols and its Strategic Agenda in order to expedite decision making and achieve beneficial outcomes for consumers nation-wide.

As lead jurisdiction for the review, Victoria recommended to Ministers that they agree:

- to place items on the National Strategic Agenda on the basis of majority vote
- remove items from the National Strategic Agenda on the basis of majority vote
- where Ministers propose an item for inclusion on the Strategic Agenda, they are to provide evidence demonstrating the national impact of the issue and include Terms of Reference for taking the issue further. In addition, project management procedures including milestones and timelines are to be provided, and
- to expedite issues, the Ministerial Council may also ask jurisdictions to advance a project to the point of final report to the Standing Committee of Officials and the Ministerial Council.

While the Ministerial Council agreed to specific jurisdictions advancing projects to the point of decision and providing supporting evidence when a matter is to be added to the Strategic Agenda, it did not agree to adopt majority voting in regard to the addition or removal of items on the Strategic Agenda. The Commonwealth was one of two jurisdictions which did not support this limited move to consensus voting.

The Victorian Government has recently adopted the single jurisdiction approach in relation to a project to harmonise existing product safety bans and standards across Australia. Instead of establishing a working party to undertake the work, it has established an advisory reference group but recommendations will go direct to the Standing Committee of Officials rather than be discussed within a working party. Experience has shown that working groups can delay matters as members seek to obtain consensus. In addition, many options for action are withdrawn or watered down as working parties seek to second guess the possible positions of the Standing Committee of Officials or the Ministerial Council.

In the above case, the Commonwealth has objected to the use of a reference group rather than the use of a working party.

Commitment

It has not been the States and Territories that have held up Ministerial Council decisions as they are willing to compromise. Recent major policy decisions have been delayed by the Commonwealth. For example:

- The Office of Best Practice Regulation would not agree to the Regulatory Impact Statement for unfair contract terms despite the Productivity Commission's finding that it is a low impact policy proposal. Despite significant effort the Standing Committee of Officials of Consumer Affairs was unable to develop a version of the Regulatory Impact Statement which would satisfy the Office.
- On the issue of component pricing, it was the Commonwealth that delayed the process (refer Box 3).
- Similarly, in relation to the property investment advice, it was the Commonwealth that stymied a proposal to address this issue.
- Further, with regard to implementing a national product safety regime, all the States and Territories have agreed to a model, however, the Commonwealth was not willing to compromise and has now delayed the process for over a year.

The Victorian Government would like to see a formal commitment by all governments to resolving issues at the Ministerial Council and a willingness to take a cooperative approach.

Majority decision making

In its Draft Report, the Productivity Commission recommended changing the Ministerial Council on Consumer Affairs' voting arrangements so that future policy changes would only require the agreement of the Commonwealth and three other jurisdictions.

The Victorian Government recognises the merit in changing the voting arrangements of the Ministerial Council in an attempt to expedite reform proposals. In fact, as discussed above, the Ministerial Council recently considered a proposal to change the voting arrangements at the Ministerial Council to a two-thirds majority for that reason. However, this proposal was formally rejected by the Commonwealth.

As highlighted above, it is primarily the Commonwealth that has delayed or blocked policy proposals. On this basis, the Victorian Government does not support giving the Commonwealth veto power in the Ministerial Council. The Victorian Government would encourage the Productivity Commission to consider the merits of a two-thirds majority voting arrangement with no veto power for any jurisdiction.

Ministerial Council policy resources

The Ministerial Council on Consumer Affairs is not resourced with policy staff to drive strategic agenda items. Consequently, the implementation of Ministerial Council policy decisions relies on individual jurisdictions reallocating their existing resources to progress decisions. This can contribute to delays in the implementation of decisions. Where resources are devoted specifically to Ministerial Council projects timely delivery can be achieved. For example, Consumer Affairs Victoria provided dedicated resources to support the Ministerial Council and its Working Party on

Consumer Policy allowing the development of the Ministerial Council information papers in a timely manner.

The Victorian Government considers that consideration could be given to enhancing the level of resources available to work on Ministerial Council projects.

3.5 Commonwealth institutional arrangements

3.5.1 Alternative institutional arrangements

The Victorian Government proposes that in developing a new national harmonised legislation model, it is appropriate to consider institutional arrangements. It is the view of the Victorian Government that the Productivity Commission has not given the alternatives to Commonwealth institutional arrangements sufficient consideration.

The Productivity Commission briefly considered the institutional arrangements at the Commonwealth level and concluded that the Australian Competition and Consumer Commission is the appropriate regulator at the Commonwealth level (PC 2007, p. 63-65).

However, the Productivity Commission merely accepts the Commonwealth arrangements as representing best practice, without analysis. No consideration was given to the institutional arrangements in the States and Territories or models from other countries (except in an information only appendix).

3.5.2 Greater recognition of consumer policy at the national level

While the Victorian Government supports the Productivity Commission's recommendation for greater recognition of consumer policy at the national level, more concrete proposals are needed.

The Productivity Commission's recommendation for greater recognition of consumer policy at the national level is welcomed. However, the Productivity Commission does not put forward a specific way as to how this is to be achieved. It does not, for example, recommend increased funding and staffing for the relevant policy area of the Commonwealth Treasury. Without specific proposals it is submitted that this general recommendation has little meaning.

3.5.3 Overlap and boundary issues with the current Commonwealth model

The Productivity Commission should consider consumer protection at the Commonwealth level. Regardless of whether consumer policy and enforcement responsibilities are transferred to the Commonwealth, the Victorian Government would encourage the Productivity Commission to consider institutional issues for the Commonwealth..

The Productivity Commission identified institutional arrangements between the Commonwealth and the States and Territories as a significant issue in consumer policy. However, the Productivity Commission did not consider the institutional arrangements at the Commonwealth level. Given the broader reform agenda that the Productivity Commission has put forward, it may be beneficial to do so.

Consumer Affairs Victoria's experience is that overlap issues can be exacerbated by the separation of consumer protection at the Commonwealth level between Australian

Competition and Consumer Commission, Australian Securities and Investments Commission and Australian Communications and Media Authority.

Where there are a number of regulators, as exists at the Commonwealth level, there can be trades that “fall between the cracks” in an enforcement sense. Consumers can be confused and individuals, particularly those with complex needs, can be passed back and forth between agencies.

These issues do not just arise at the State level, or between Commonwealth and State and Territory agencies, but also between Commonwealth agencies.

There are a number of key consumer purchases that have industry specific regulation — homes, cars, credit and financial services, and telecommunications. Some of these are regulated by the States and Territories (real estate, domestic building, credit, motor car traders) and are generally regulated by consumer affairs agencies. Telecommunications and financial services are regulated by the Commonwealth. However, they are administered by separate agencies — the Australian Competition and Consumer Commission, the Australian Communications and Media Authority and the Australian Securities and Investments Commission.

This separation at the Commonwealth level can cause boundary issues, both at the policy level and at the enforcement level. It is also confusing for consumers, and creates problems for national coordination, since so many parts of consumer policy at the Commonwealth level are outside of the Consumer Affairs portfolio and thus not represented on the Ministerial Council on Consumer Affairs.

The Australian Communications and Media Authority has a limited role in relation to consumer protection. Its responsibilities are defined in the Telecommunications Act and the Telecommunications (Consumer Protection and Service Standards) Act. The Australian Communications and Media Authority registers codes of practice developed by the industry self-regulator, the Communications Alliance. The industry self-regulator has been slow to develop codes of practices relating to consumer protection due to industry inertia.

Because of the existence of an industry-specific regulator, the State and Territory consumer affairs agencies and the Australian Competition and Consumer Commission have not given a priority to telecommunications consumer protection.

This may have resulted in gaps in the level of protection afforded to telecommunications consumers because of the Australian Communications and Media Authority's limited role and, arguably, the ineffectiveness of industry-based self-regulation. These gaps have had to be addressed on an issue-by-issue basis by agencies such as Consumer Affairs Victoria.

It has certainly resulted in confusion among complaints handling agencies about jurisdiction and also which agency is best placed to handle a policy issue that arises. For example, the industry operates an ombudsman scheme but certain complaints from consumers have been unable to be handled by the Ombudsman due to restrictions on his or her jurisdiction. It was not clear who should handle those complaints.

It has also resulted in a lack of awareness amongst industry about their obligations under general fair trading legislation.

3.6 Product safety

3.6.1 National harmonisation of product safety

The Victorian Government supports a harmonised product safety regime. The Victorian Government has worked with the other jurisdictions to produce a harmonised model based on one national law with one national set of bans and standards and cooperative enforcement. This will address the issue of inconsistency for business and provide for a robust national system. All States and Territories have agreed to this model; however, progress to implement this has been delayed by Commonwealth insistence to continue to review alternative models. Should the forthcoming Ministerial Council meeting be unable to achieve support for the national harmonisation model, Victoria will seek support for a two-step transfer of responsibility, keeping in spirit with the Productivity Commission's recommendation.

The Council of Australian Governments, in response to the Productivity Commission's report on product safety, has:

...requested the Ministerial Council on Consumer Affairs to develop options for a national system for product safety regulations and a recommended approach by the end of 2006. Subsequently, CoAG (2007) announced the States and Territories had agreed to develop a uniform approach to product safety within 12 months. (PC 2007, p. 142)

The Victorian Government, at the request of the Ministerial Council on Consumer Affairs and in response to the earlier report of the Productivity Commission on product safety, developed a harmonised model for product safety which was presented to the Ministerial Council in September 2006.

The key features of the harmonised model were:

- Adoption of a uniform law across the country with one national set of permanent bans and standards.
- Establishment of an expert assessment body — the National Product Safety Assessment Committee — which would replace state-based product safety committees. The Committee would be sufficiently resourced to lead a national products safety assessment process and would be established within an appropriately resourced support organisation, such as the Australian Competition and Consumer Commission.

The benefits of the harmonised model were seen to be:

- the law would be uniform across jurisdictions
- Ministers retained the ability to act locally on temporary bans
- it provided a simple national process for implementing national permanent bans, standards and product recalls
- permanent bans, mandatory standards and compulsory product recalls would be nationally consistent, providing the certainty that businesses have been seeking from the Australian product safety system, and

- the enforcement role of the State and Territory agencies would be retained, which would maintain integration with fair trading agency inspectorates and ensure responsiveness to the needs of local communities.

State and Territory Consumer Affairs Ministers determined that the harmonised system, as developed by the Victorian Government, would substantially reduce the level of regulation and ensure that one set of standards and bans applies across Australia. This would benefit both consumers and business. It would also meet the Council of Australian Governments requirement that the Ministerial Council "...develop options for a national system for product safety regulations without increasing the regulatory burden...".

The States and Territories agreed to the harmonised model. However, the Commonwealth has continued to insist on the consideration of a one-law one-regulator model with the result that progress has not been able to be achieved.

The Victorian Government has had a consistent position on the proposal to move to a one-law one-regulator model. The Victorian Government has been prepared to accept this provided the Commonwealth:

- gave assurances about provision of appropriate budget and regional presence
- guaranteed on-going priority for product safety
- evidenced this commitment by the appointment of a Commissioner responsible for consumer product safety at the Australian Competition and Consumer Commission, and
- provided a willingness to seriously consider the introduction of a General Safety Provision.

While the Victorian Government is willing to support a one-law one-regulator model for product safety, without a commitment by the Commonwealth to the conditions outlined above, the Victorian Government continues to support the implementation of the harmonised model. Currently, there is no evidence that the Australian Competition and Consumer Commission would perform better than the States and Territories in enforcing product safety legislation and there are significant concerns that local service delivery would deteriorate. Similar to the Productivity Commission's consideration of enforcement of a national generic consumer law, the Productivity Commission has overlooked considering how a cooperative enforcement approach may be effective in the product safety area.

Nonetheless, it is important to continue to progress harmonisation of product safety and delays in implementing an agreed model are not beneficial. Should the forthcoming Ministerial Council meeting be unable to achieve support for the national harmonisation model, Victoria will seek support for a two-step transfer of responsibility, keeping in spirit with the Productivity Commission's recommendation.

As a first step the Victorian Government would develop a memorandum of understanding with the Commonwealth committing Victoria to mirror in Victoria any new ban or standard introduced by the Commonwealth and thus ensuring consistency between the two jurisdictions and reducing any possible delay in introducing new bans and standards.

3.6.2 Well publicised recent problems

The Productivity Commission used the example of “well publicised recent problems” as a reason for moving to a one-law one-regulator model in the product safety area. Presuming that the Productivity Commission is referring to the issue of “Bindeez Beads”, this case demonstrated how quickly a cooperative scheme can operate with Bindeez Beads banned across Australia within a two to three day period. However, it also demonstrated the vulnerability of jurisdictions to delays if information on product safety risks are not communicated amongst jurisdictions as quickly as possible.

In its Draft Report, the Productivity Commission referred to “well publicised recent problems” in product safety:

As some well publicised recent problems have illustrated, product safety issues are generally national in nature, and with potentially severe consequences for some consumers if not promptly addressed. Hence, the risks to consumer well-being under a system that requires nine jurisdictions to take quick and effective action are likely to be higher than for other parts of the generic law. (PC 2007, p. 67)

While the Productivity Commission does not explicitly state which well publicised recent event they are referring to, presumably they are referring to the issue of “Bindeez Beads”. This is a useful example as it illustrates the success of the cooperative approach but also some of the vulnerabilities relating to communication between jurisdictions.

Table 2. Timing of “Bindeez Beads” banning across jurisdictions

Jurisdiction	Type of Ban and Effective Date
Victoria	Interim Ban: Effective from 7 November 2007 for 3 months.
Queensland	Interim Ban: Effective from 6 November 2007 for 42 days.
New South Wales	Temporary Ban: Effective from 6 November 2007. (It was effective in that New South Wales could initiate action from the signed ban prior to it being gazetted if they needed to by entering individual premises. However, for it to become effective across the State it needed to be gazetted, which occurred on 9 November 2007 in a routine gazette.)
Tasmania	Temporary Ban: Prepared on 6 November 2007 and effective from 7 November 2007 (gazetted). It is an open-ended ban.
South Australia	Permanent Ban: Effective from 6 November 2007 (gazetted). (An Interim Ban is not an option in the South Australian legislation.)
Western Australia	Interim Ban: Prepared on 6 November 2007 and effective from 7 November 2007 (gazetted).
Australian Capital Territory	Interim Order: Signed on 7 November 2007 and effective from 8 November 2007 (gazetted).
Northern Territory	Temporary Prohibition Order: Signed on 6 November and effective from 12 November 2007 (gazetted) for 28 days.
Commonwealth (ACCC)	On 6 November 2007, Moose Enterprises Pty Ltd contacted the Australian Competition and Consumer Commission and initiated a voluntary recall. In line with the States and Territories, on 5 February 2008 the Australian Competition and Consumer Commission introduced a temporary ban for 18 months.

Table 2 outlines the timing and mechanisms implemented by the States and Territories for banning Bindeez Beads. Despite the timing of the bannings being

complicated by a public holiday occurring in the period, Bindeez Beads were still banned across Australia within a two to three day period.

The success of such an approach depends on effective communication of information between jurisdictions and there is a risk if information is not passed between the Commonwealth, States and Territories as quickly as possible.

It is also important to highlight that the success of any ban relies on ensuring that traders comply with the ban.

In Victoria, as of the morning of 7 November 2007 and over the following two day period, 190 stores were visited across the State. Only two stores were found to have Bindeez Beads available for sale – one in Bairnsdale just as the interim ban had been gazetted on 7 November 2007 and one in Ballarat on 8 November 2007. Neither retailer was aware at that time of the ban and immediately withdrew the product. Approximately 33 per cent of the visits were in the metropolitan area and 66 per cent in regional stores. Consumer Affairs Victoria compliance inspectors were of the view that the voluntary recall by Moose Enterprises had been effective in Victoria.

This is an example of the proactive compliance activity of Consumer Affairs Victoria and the use of its regional office network to achieve compliance in regional Victoria.

In comparison, the Australian Competition and Consumer Commission appeared to take a less proactive approach. Moose Enterprises Pty Ltd initiated a voluntary recall with the Australian Competition and Consumer Commission. The Victorian Government understand that there was no compliance activity undertaken by the Australian Competition and Consumer Commission and a ban order was not introduced until 5 February 2008.

4 Harmonisation of Industry-Specific Consumer Regulation

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 5: INDUSTRY-SPECIFIC CONSUMER REGULATION

Draft Recommendation 5.1

CoAG should instigate and oversee a review and reform program for industry-specific consumer regulation that would:

- *identify and repeal unnecessary regulation, with a particular focus on requirements that only apply in one or two jurisdictions;*
- *drawing on previous reviews and consultations with consumers and businesses, identify other areas of specific consumer regulation that apply in all or most jurisdictions, but where unnecessary divergences in requirements or lack of policy responsiveness impose significant costs on consumers and/or businesses; and*
- *determine how these costs would be best reduced, with explicit consideration of the case for transferring policy and regulatory enforcement responsibilities to the Australian Government and how this transfer might be best pursued.*

Draft Recommendation 5.2

Responsibility for regulating finance brokers and other credit providers should be transferred to the Australian Government, with the regulatory requirements encompassed within the regime for financial services administered by the Australian Securities and Investments Commission (ASIC).

As part of this transfer:

- *the Uniform Consumer Credit Code and related credit regulation, appropriately modified, should be retained. The Australian and State and Territory Governments should give priority to determining the precise requirements, and how they would be best incorporated within the broader regime, having regard to initiatives recently canvassed by the Ministerial Council on Consumer Affairs and the recent House of Representatives inquiry on home lending;*
- *a licensing system should be introduced for finance brokers that, amongst other things, requires them to participate in an ASIC-approved alternative dispute resolution (ADR) scheme; and*
- *a registration system should be introduced for other credit providers, not already covered by the broader licensing arrangements for financial service providers, with a condition of registration being participation in an ASIC-approved ADR scheme.*

Draft Recommendation 5.3

A single consumer protection regime for energy services should be developed and implemented under the auspices of the Ministerial Council on Energy. It should apply to all jurisdictions participating in the national energy market and be enforced by the Australian Energy Regulator.

Draft Recommendation 5.4

The Australian Government should remove any retail price caps applying to telecommunication products and services. Also, following the establishment of national consumer protection arrangements for energy services (see draft recommendation 5.3), participating jurisdictions should remove any price caps still applying in contestable retail energy markets.

Ensuring that disadvantaged consumers continue to have sufficient access to utility services at affordable prices should be pursued through transparent community service obligations, supplier-provided hardship programs, or other targeted mechanisms that are monitored regularly for effectiveness.

Draft Recommendation 5.5

Australian Governments should take early action to provide better and uniform protection for those having a home built or renovated. Specifically, this should entail:

- *guaranteed access for consumers to alternative dispute resolution mechanisms;*
- *provision of greater scope to de-register builders who do not meet appropriate performance standards; and*
- *a revamping of compulsory builders' warranty insurance to ensure that it is of genuine value to consumers and that consumers understand the product.*

4.1 Council of Australian Governments review

The Victorian Government supports in principle conducting a review of industry specific consumer protection schemes. The Victorian Government has already

initiated a review of Consumer Affairs occupation licensing scheme under the aegis of Victoria's Reducing the Regulatory Burden program. The Victorian Government has also initiated a modernisation program for its consumer laws. From a practical point of view, it would be worthwhile identifying a specific set of schemes for review under the auspices of the Council of Australian Governments. Such a review should be conducted within the framework of the National Reform Agenda. Any consideration of schemes for review by the Council of Australian Governments should include Commonwealth schemes such as financial services regulation, telecommunications and therapeutic goods.

The Productivity Commission recommended that a review of industry specific consumer regulation be undertaken by the Council of Australian Governments. The Victoria Government supports in principle reviewing industry specific regulation; this has been an ongoing focus of the Victorian Government (refer Box 4).

Box 4. Consumer Affairs portfolio legislation reviewed since 2002

Since 2002, the following Victorian consumer affairs portfolio legislation has been reviewed:

- Domestic building
- Associated Incorporations
- Residential tenancies
- Credit
- Motor car traders
- Residential accommodation
- Retirement villages
- Subdivision (Bodies Corporate) regulations
- Fundraising
- Conveyancing, and
- Patriotic funds.

The Victorian Government recognises that there is a need to review industry specific schemes and in particular occupation licensing schemes. As stated in the previous Victorian Government submission:

The Victorian Government recognises that existing licensing schemes, which have often been in place for decades, need to be assessed as to the administrative and compliance burden they impose on business. It also recognises that not all schemes are fully aligned in terms of the objectives and interventions as per the framework described above.

Under the Victorian Government's Reducing Regulatory Burden initiative, a comprehensive review of all existing licensing schemes administered by Consumer Affairs Victoria has commenced to ensure the consumer problems, regulation objectives and government interventions are consistent and appropriate. Based on this review, the goal is to develop reforms that would streamline the interaction between business and the regulator. (Victorian Government 2007b, p. 74).

The Victorian Government supports a review of occupational licensing schemes and is already undertaking its own reviews as well as leading national reviews, such as the review of harmonisation of real estate licensing currently being undertaken by the Standing Committee of Officials of Consumer Affairs.

However, it should be noted that the scope of the review as proposed by the Productivity Commission is unclear. The scope as described by the Productivity Commission includes:

- Identification and repeal of unnecessary specific consumer protection regulation, particularly where they apply in only one or two jurisdictions.

- Other areas of industry specific consumer regulation “...that apply in all or most jurisdictions, but where needlessly divergent requirements or a lack of policy responsiveness impose significant costs on consumers and/or businesses. This listing process would variously draw on previous reviews and consultations with consumers and businesses.” (PC 2007, p. 84)

An initial consideration of this recommendation is that it is potentially quite broad and significant. As already identified by the Productivity Commission it may be similar in size and scope to the legislation reviews conducted as part of National Competition Policy in the 1990s. This is in the context of implementing the significant changes to generic consumer protection laws already recommended by the Productivity Commission, and other processes and reviews undertaken under the auspices of the Council of Australian Governments’ National Reform Agenda, and Victoria’s Reducing the Regulatory Burden program.

Given this context it may be useful to have a narrower rather than wider scope. The Productivity Commission may wish to outline the scope of the schemes that it intends to capture. A more narrowly focussed program of reviews may be more manageable and effective.

In addition, the Productivity Commission should also explicitly consider what Commonwealth schemes should be included in a review of industry specific consumer legislation. This could include key Commonwealth schemes, such as financial services regulation, communications regulation and/or therapeutic goods regulation.

4.2 Credit regulation

As the Commonwealth already regulates most of the banking and financial services industry, the Victorian Government supports in principle the transfer of credit regulation to the Commonwealth to allow for consistent regulation across the financial services industry. However, there are a range of significant transitional issues that need to be considered to ensure effective regulation continues. In the first instance, the Commonwealth could join the existing scheme.

In principle, transferring responsibility for credit (including finance broking) at an appropriate time to the Commonwealth is considered to be desirable given the national character of credit markets and the Commonwealth primacy in financial markets regulation. However, whether it would work in practice depends on: what the regulatory scheme is to look like; how future policy settings would be determined; whether there would be a single regulator; and what level of funding and resources would be committed.

The effectiveness of the transfer would also depend on the goals of a transfer. The Productivity Commission Draft Report described the goals as including better regulation, less overlap, less confusion, more responsive policy capability, more consistency of treatment of financial products and services (including more consistency of consumer redress) and more opportunity to incorporate wider financial services policy considerations into the credit mix. The Victorian Government considers these to be appropriate goals.

While a transfer to the Commonwealth is one way to eradicate legislative overlap, streamline processes and make further progress on implementing credit policy already agreed by the Ministerial Council on Consumer Affairs, it is not the only way to

proceed. In any case, to do so in the short term would be premature and counterproductive.

In terms of efficiencies, the Ministerial Council and the Standing Committee of Officials of Consumer Affairs have recognised that responses to major market changes in credit (and broking) have not emerged quickly enough in the past. There are several reasons for this, not all of which are within the control of the States and Territories.

First, credit policy issues are invariably complex and industry stakeholders have considerable influence. This means that the most appropriate policy solutions will usually take some time to work through, especially if industry – but also consumer groups – oppose them. Second, the requirements imposed on policy development under the Council of Australian Governments Guidelines mean that almost all initiatives need to go through two regulatory impact statements (and associated consultation) before they can proceed and the statements require approval by the Office of Best Practice Regulation. Third, the arrangements between the States and Territories under the Uniform Credit Laws Agreement mean that all amendments to the Uniform Consumer Credit Code need to go through the Queensland Parliament. There are occasions where due to an election or a Ministerial reshuffle or re-allocation of Ministerial responsibilities or through ‘local’ issues taking priority, a credit initiative requiring legislative change has been delayed. Fourth, resources have previously been lacking to ensure sufficient policy, compliance, enforcement and administration capacity collectively across the States and Territories.

The Standing Committee of Officials of Consumer Affairs has moved to remedy some of these issues. In terms of resources, apart from State by State allocations, the Uniform Consumer Credit Code Management Committee has had the services of a project officer for more than three years, and more recently, the services of a part time legislation officer in Queensland. Since 2003, the Victorian Government has dedicated significant resources to credit and broking. Victoria has chaired the Management Committee, run two major credit conferences, taken several substantial credit-related test cases to the courts and taken the lead on various credit policy developments, including implementing recommendations from its own significant review of credit markets and their regulation. The renewed efforts of the Victorian Government and the Standing Committee of Officials of Consumer Affairs members generally to move more responsively on credit have started to pay dividends.

In summary, the Victorian Government supports in principle the Productivity Commission’s recommendation to transfer credit regulation to the Commonwealth. However, the efficiency and effectiveness of a transfer to the Commonwealth of responsibility for credit providers and finance brokers is subject to a range of considerations, including the content of the regulation, resources, timing and licensing.

4.2.1 Content

The Victorian Government recognises that the current scheme needs improvement, but emphasises the need for continuing industry-specific consumer protection. The Victorian Government therefore welcomes the Productivity Commission’s recognition that the Uniform Consumer Credit Code and related credit regulation – appropriately modified – should be retained.

The importance of well functioning credit markets to the economy and to the lives of consumers is recognised. It is acknowledged that while credit markets and the finance broking industry have undergone major transformation over the last decade, the Code itself was written over 13 years ago². For these reasons, in 2005, the then Victorian Minister for Consumer Affairs commissioned an extensive review of consumer credit regulation and consumer credit markets. It was conducted during 2005 and 2006 by Consumer Affairs Victoria. The resultant Report of the Consumer Credit Review (March 2006) contained almost 40 recommendations of both a regulatory and a non-regulatory nature, covering everything from sub-prime lending, finance broking and responsible lending to credit reporting, external dispute resolution and consumer education. Many of the recommendations require national action through the Ministerial Council on Consumer Affairs, a number involve matters requiring legislative change and modernisation of the Victorian statute book, while others mandate education, research and collaboration and co-operation with industry.

In September 2006, the Victorian Government Response to the Report of the Consumer Credit Review was released. All but one of the recommendations was supported (or supported in part or in principle). Implementation of the recommendations is proceeding across a number of fronts at both State and national levels. For example, an exposure draft of national legislation to regulate finance and mortgage broking was released for public and stakeholder consultation in November 2007. A Bill to effect Victorian legislative improvements and refinements was introduced in December 2007. The Ministerial Council has endorsed those recommendations in the Victorian Government Response that require national concerted action, such as tackling over-indebtedness, modernising the remedies and penalties in the Code and responding to the new consumer protection challenges posed by equity release lending.

As recognised by the Productivity Commission, the Ministerial Council has an active program relating to credit, debt and broking. Aside from the areas aforementioned, the following substantial projects are also in train:

- universal external dispute resolution for consumers of credit
- comprehensive consumer testing of pre-contractual disclosure settings
- exploration of responsible lending, starting with credit cards, and
- better protection against abuses and avoidance of regulation.

On top of this, there are other major policy issues that come to the fore in considering a transfer of responsibility to the Commonwealth. Prominent among these is the extent to which small and medium enterprises and consumer investors should share the protections currently afforded to consumers under the Code. The proposed finance broker law covers these areas borrowing from Chapter 7 of the Corporations Act. This development may pave the way for similar treatment in connection with small and medium enterprises and consumer investors who source their credit needs directly from credit providers rather than through brokers.

² The Code came into force in late 1996. However, it was actually finalised in 1994, following the execution in 1993 of the inter-governmental Uniform Credit Laws Agreement.

The Productivity Commission's recommendation refers to the need for the Australian Government and the States and Territories to give priority to determining the precise requirements of the Code and related regulation. The initiatives to reform the Code referred to above must progress and if anything, be expedited. However, this could be jeopardised by the substantial diversion of time and resources that would be required to effect a seamless transfer of responsibility to the Commonwealth.

The Productivity Commission also recommended that credit and related regulation be incorporated into the broader regime of Commonwealth financial services regulation. This would not be a straightforward exercise. The Productivity Commission does not analyse the extent to which the many and varied requirements imposed on financial services licensees could realistically apply to credit providers without modification (or apply at all). The Victorian Government is not aware of any independent analysis covering this. Incorporation into the broader financial services regime raises a number of issues not addressed by the Productivity Commission. These include:

- incorporating current arrangements into the broader financial services regime would deliver as many as three disclosure systems – the specific settings (current or proposed) under the Code, the proposed national broking law and the generic disclosure requirements under the Commonwealth law
- training and competency requirements would be required for credit providers who already hold a financial services licence, given that at present, licensees hold their licence in connection with non-credit financial products, and
- they would hold two licences, or if combined, one licence for two areas.

4.2.2 Resources

Credit regulation is an important consumer protection scheme run by the States and Territories. If the Commonwealth were to assume responsibility for credit and related regulation, the Victorian Government – and no doubt other States and Territories – would need to be satisfied that commensurate resources would be made available for the task.

This means resources devoted to policy, resources devoted to the licensing function, resources devoted to compliance issues, resources devoted to enforcement activity and resources for consumer education and 'trader' assistance. Presumably, the Commonwealth Treasury would handle policy and the Australian Securities and Investments Commission would be responsible for the rest. Present indications from the Commonwealth Government are that the budget for the Australian Securities and Investments Commission will contract.

The Australian Securities and Investments Commission would need to be ready, willing and able to take compliance and enforcement action not just in relation to conduct with clear national import, but also, in relation to localised activity. In Victoria, for example, this could mean taking action against a single payday lender in Geelong, or exploring compliance issues with a finance broker operating on the Murray River at Albury-Wodonga. While the Australian Securities and Investments Commission has from time to time focused enforcement attention on a non-national business (like a finance broker operating in the Australian Capital Territory), this would need to become routine rather than sporadic.

4.2.3 Timing of the transfer

This is a critical issue.

As at January 2008 there are no fewer than eight existing projects on credit regulation improvement – several well advanced and all significant:

- credit card over-commitment and responsible lending
- national finance and mortgage broking regulation
- abuse and avoidance practices, and ‘fringe lending’
- best practice disclosure, including consumer testing
- instalment lending such a vendor terms
- equity release protections
- comparison rate overhaul, and
- external dispute resolution.

The orderly progression of these policy initiatives is vital if credit and related regulation is to be efficient and effective.

If responsibility for credit and related legislation were to transfer in the short term, the Commonwealth would need the ability and the capacity to be able to assume responsibility for all of the above initiatives without causing substantial delay. This is unlikely to be possible. Even with the resources and the will, the complexity of these initiatives and their context and history suggest that seeing them through under State and Territory guidance is a better option.

If all of the initiatives were at the beginning or early stages, then an early transfer would not cause the same continuity problems, but this is not the case. The following are some examples:

- The consultation regulatory impact statement on credit card responsible lending is near completion but there will be considerable work involved in digesting the results of consultation (once that occurs) and then finalising the policy recommendations to be submitted to the Ministerial Council on Consumer Affairs.
- Almost 12 months has been spent refining and revising a substantial research agreement addressing the sort of disclosures and information that best suits consumers needing to understand and to shop around for credit. This will be groundbreaking Australian research and should underpin the ‘renovation’ of credit disclosure, which aligns with the Productivity Commission’s recommendation on information disclosure.
- The Uniform Consumer Credit Code Management Committee is in the process of proposing compromises to resolve some of the reservations that peak bodies and consumer advocates have about the ‘fringe’ lending initiatives. This project has a complex multi-layered history and raises significant policy issues such as systemic abuse and avoidance practices (concentrated in, but not exclusive to, sub-prime and fringe), excessive fees and transparency.

It would be inefficient to ‘offload’ these projects on the Commonwealth. Indeed to do so would create unnecessary uncertainty in the market. Overall, it is more important for reducing consumer detriment and maximising welfare to finalise the projects being advanced by the States and Territories then to rapidly transfer credit to the Commonwealth.

4.2.4 Licensing versus registration for credit providers

The Productivity Commission’s recommendation states that where credit providers are not presently “covered by the broader licensing arrangements for financial service providers”, they would need to be covered by a “registration system” (PC 2007, p. 93).

It is not clear why a distinction should be drawn in this way, especially since there are many substantial credit providers who do not hold financial services licences because they do not offer financial services covered by the Commonwealth regime. Since credit is not a financial product within the meaning of Chapter 7 of the Corporations Act, by definition, no credit provider holds a relevant financial services licence.

From a consumer perspective, it is precisely those credit providers who have not been through the financial services licensing process at all that are most likely to cause consumer detriment. These providers have not had to undergo the discipline required to obtain a licence and often will not even have had exposure to an external dispute resolution scheme. While suggesting that subscription to an external dispute resolution scheme would be a component of registration, this means the standard for *registered* credit providers will fall well short of that applicable to many of the mainstream bank and credit union credit providers who have submitted to the comprehensive financial services reforms.

This is not to say that the full rigour of a ‘credit-facing’ financial services licence would be appropriate for a small scale localised credit provider. On the other hand, it is premature to peremptorily determine that a multitude of credit providers around the nation will not have to match the professionalism imposed by the financial services licensing system.

4.2.5 Brokers and licensing

The Productivity Commission’s recommendation suggests that the extent of finance and mortgage broker regulation would be some form of licensing, with compulsory external dispute resolution as a licence condition. The Productivity Commission’s recommendation does not appear to acknowledge the extensive work that has been done to develop a comprehensive regulatory scheme to address finance and mortgage broking. The Victorian Government considers that the logic used by the Productivity Commission in its Draft Report in relation to the Uniform Consumer Credit Code should apply equally to the emerging national finance broker regulation. That is, there is a need for industry specific regulation. In any case, the links between the activities of brokers and the provision of credit mean that it would be difficult to satisfactorily disentangle them: they should logically travel together.

4.3 Energy regulation

4.3.1 A single consumer protection regime

The Retail Policy Working Group of the Ministerial Council on Energy is currently developing the national framework. The Victorian Government recognises that a number of consumer protection functions are best placed under a national framework. However, there may be some protections in the energy sector which may be more appropriately addressed at a state level and the Victorian Government considers that it is important for jurisdictions to be able exercise some discretion over consumer protections in their state in order that optimal consumer outcomes can be achieved.

The Productivity Commission recommended that a single consumer protection regime for energy services should be developed and implemented under the auspices of the Ministerial Council on Energy. Further, the Productivity Commission recommended that it should apply to all jurisdictions participating in the national energy market and be enforced by the Australian Energy Regulator.

In 2003, the Ministerial Council on Energy agreed to a package of reforms to Australia's energy market covering governance and institutions, economic regulation, electricity transmission, user participation and gas market development.

As part of these reforms, a Retail Policy Working Group was established to develop a program to identify distribution and retail regulation functions to be transferred to the national framework. At present, the Working Group is considering a number of consumer protections including the retailer obligation to supply small customers, small customer market contracts and small customer marketing. In addition, a number of distributor functions affecting consumers are being considered such as: a contractual model for distribution services; distributor obligation to provide connection services; distributor interface with customers; retailer failure arrangements; customer registration and transfer among others.

The Victorian Government recognises that a number of consumer protection functions in the energy sector are best placed under a national framework. However, there may be some protections, which may be more appropriately addressed at a state level given differing market conditions affecting consumers and historical arrangements in each state justifying state-specific measures. The Victorian Government considers that it is important for jurisdictions to be able exercise some discretion over consumer protections in the energy sector in their state in order that optimal consumer outcomes can be achieved.

4.3.2 Removal of retail energy price caps

The Victorian Government supports the Productivity Commission's recommendation to remove any price caps still applying in contestable retail energy markets where markets are sufficiently competitive. This is consistent with the Australian Energy Market Agreement, which the Victorian Government has committed to. Under the Agreement, the Australian Energy Market Commission has assessed the effectiveness of competition in Victoria's retail energy market and has found that competition in electricity and gas retail markets in Victoria is effective. Draft advice to the Victorian Government from the Australian Energy Market Commission is that price regulation for residential customers should be phased out (or removed) beginning 1 January 2009.

The Productivity Commission recommended in its Draft Report that "...following the establishment of national consumer protection arrangements for energy services (see draft recommendation 5.3), participating jurisdictions should remove any price caps still applying in contestable retail energy markets." (PC 2007, p. 98) Further, the Productivity Commission considered that continued access to utility services at affordable prices for disadvantaged consumers "...should be pursued through transparent community service obligations, supplier provided hardship programs, or other targeted mechanisms that are monitored regularly for effectiveness." (PC 2007, p. 98)

The Victorian Government supports these recommendations. It is consistent with the Australian Energy Market Agreement, which the Victorian Government has committed to. The Agreement provides for the phase-out of retail price regulation where effective competition can be established. The Agreement also supports the achievement of social welfare and equity objectives through the operation of transparently funded State or Territory community service obligations that do not materially impede competition. The Ministerial Council on Energy Retail Policy Working Group is also evaluating the hardship programs and other measures in order that these be considered within a national framework as appropriate. This work is currently underway.

Under the Agreement, the Australian Energy Market Commission is charged with undertaking an assessment of the effectiveness of competition in electricity and gas retail markets in each State. Victoria is the first jurisdiction to be assessed.

The Australian Energy Market Commission has found that competition in electricity and gas retail markets in Victoria is effective and it has provided draft advice to the Victorian Government that price regulation for residential customers should be phased out (or removed) beginning 1 January 2009. A final report from the Australian Energy Market Commission is expected in February 2008. The Victorian Government will be considering the recommendations in this report in its deliberations on the future of standard retail pricing oversight in Victoria.

4.4 Building regulation

The Victorian Government is committed to effective protection of domestic building consumers. To this end, the Victorian Government supports the principles reflected in the recommendations about the home building sector to provide: guaranteed access for consumers to alternative dispute resolution; appropriate performance standards among building professionals; and mandatory home builders warranty insurance that delivers genuine value to consumers. The Victorian Government is currently working with the insurance industry on ways to improve home builders warranty insurance and expand the grounds on which home builders warranty insurance claims can be made.

In making comparisons between the various home building regulatory models in each state, it is important to note the policy approaches underpinning each one. Victoria has sought to maintain high levels of consumer protection while avoiding unnecessary regulatory burden. The Victorian model therefore features a somewhat leaner regulatory framework than may exist in other jurisdictions, complemented by various non-legislative means of maintaining high standards of practice among builders.

4.4.1 Guaranteed access for consumers to alternative dispute resolution

This submission assumes that ‘guaranteed access’ means that a consumer may have unfettered access to alternative dispute resolution services, as the need may arise.

The Victorian Government is committed to guaranteed access to alternative dispute resolution so as to minimise unnecessary litigation and the associated imposts on both consumers and builders. Building Advice and Conciliation Victoria was established as a service jointly operated by Consumer Affairs Victoria and the Building Commission. Building Advice and Conciliation Victoria services are provided to consumers and builders free of charge so as to maximise accessibility for people throughout every socio-economic stratum. Building Advice and Conciliation Victoria services may include a free, independent expert assessment and written report to assist in the resolution of disputes of a technical nature. 80 per cent of disputes conciliated by Building Advice and Conciliation Victoria are successfully resolved.

Consumers and builders have the further option of dispute resolution through the Victorian Civil and Administrative Tribunal, which provides an informal, accessible and effective quasi-judicial dispute resolution option which is faster and less expensive than litigation via the court system.

Once a building complaint has been lodged with Victorian Civil and Administrative Tribunal or a court of law, alternative dispute resolution is no longer provided through Building Advice and Conciliation Victoria.

As outlined in the Victorian Government’s previous submission to the Productivity Commission Victorian has reviewed its Alternative Dispute Resolution services and identified a diversity of mechanisms. The Victorian Government’s initial submission discussed the work being undertaken in Victoria to review alternative dispute resolution schemes, partly to address this diversity. The Productivity Commission may wish to consider the variances in alternative dispute resolution services.

The Victorian Government is closely monitoring its domestic building alternative dispute resolution services to identify opportunities for improvement and conducting a broader review of alternative dispute resolution services to identify opportunities for improvement.

4.4.2 Enhanced scope to de-register builders

The Victorian Government is committed to the maintenance of appropriate performance standards among building professionals. To this end, the Victorian regulatory system employs a variety of measures to deter poor practices and reward excellence. This includes a robust registration scheme accompanied by the capacity to discipline and/or de-register problem builders. These measures are supported by incentives to participate in voluntary Continuing Professional Development programs and appropriate recognition and reward for builders who exceed the minimum standards of quality and workmanship.

The Victorian Government is currently reviewing its builder registration and disciplinary framework with a view to better protecting consumers against problem builders.

4.4.3 Revamping compulsory builders' warranty insurance

The Victorian Government acknowledges criticism of the current mandatory 'last resort' insurance product and supports the principle of ensuring consumers are receiving value for money. Caution should be exercised, nevertheless, in seeking to revamp an insurance product which has apparent benefits to some consumers although accurate quantification of the costs and benefits is difficult.

Home builders warranty insurance constitutes an important part of the consumer protection framework by guarding against the risk of significant detriment arising from the death, disappearance or insolvency of a builder. Such risks may have been low during the recent high levels of building activity but can be more pronounced during times of economic downturn. The Victorian Government is currently considering an expansion of the existing grounds on which home builders warranty insurance claims can be made.

The Productivity Commission should also consider that it may be premature to assess the current home builders warranty insurance arrangements, which have only been in place since 2002 (home builders warranty insurance is a 'long tail' insurance product, the exact value of which may only be accurately assessed when the product matures in the next 3-5 years).

5 Unfair Contracts and Practices

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 7: UNFAIR PRACTICES AND CONDUCT

Draft Recommendation 7.1

A new provision should be incorporated in the new national generic consumer law that voids unfair terms in standard form contracts, where:

- *the term is established as 'unfair': that is, it is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract;*
- *there is evidence of material detriment to consumers;*
- *it does not relate to the upfront price of the good or service;*
- *all of the circumstances of the contract have been considered; and*
- *there is an overall public benefit from remedial action.*

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers subject to detriment, with suppliers also potentially liable to damages for that detriment.

There should also be a capacity for an industry or business to secure regulatory approval for 'safe harbour' contract terms that would be immune from any action under this provision.

The operation and effects of the new provision should be reviewed within five years of its introduction.

5.1 Unfair contract terms legislation

The Victorian Government continues to support the adoption of unfair contract terms legislation throughout Australia. The Victorian Government considers, however, that the Productivity Commission's recommendation in this area will water down unfair contract terms legislation such that it is impractical to enforce in any meaningful way. Given the significant consumer and market benefits of this legislation and the Productivity Commission's conclusion that unfair contract terms legislation has a low impact on business, this watering down is difficult to justify and the Victorian Government continues to support national adoption of Victoria's unfair contract terms model.

A relatively recent development in consumer protection law has been the prohibition of unfair contract terms. The Victorian Government notes that the Productivity Commission recommended in its Draft Report a prohibition against unfair contract terms in certain circumstances. The Victorian Government believes the recommended provision is unnecessarily narrow.

5.1.1 Is unfair contract terms legislation warranted?

The Productivity Commission suggested that the cost-benefit of unfair contract terms legislation is "finely balanced" and "hard to assess". While it might be difficult to quantify the public benefit of an unfair contract terms provision, the Victorian Government maintains that the benefit is real. This is not too dissimilar to the difficulty in quantifying the benefit of the prohibitions against false, misleading, deceptive and unconscionable conduct. It is now accepted that the prohibitions against these behaviours are justified as being in the public interest. The Australian Competition and Consumer Commission submission similarly endorses such a view in its submission:

The fact that actual consumer detriment is difficult to quantify does not necessarily mean that UCTL cannot be justified. Consumer detriment is not necessarily bound to concepts of actual financial loss. Detriment can be exhibited in a number of ways, including intangible detriments such as dissatisfaction at apparent 'unfairness' in traders' dealings with consumers.

For example, although misleading and deceptive conduct laws are well accepted as a fundamental aspect of consumer policy, they are not solely based on the concept of consumer detriment. Just as it is uncertain whether consumers who purchased products where misleading claims were made acted because of the false information, it is also uncertain whether consumers acted under conditions of misinformation or misunderstanding of information in entering contracts with unfair contract terms. (ACCC 2007, p. 78)

In any event, the Victorian Government's view is that unfair contract terms legislation is inherently desirable as a conduct norm, in the same way as are prohibitions against false, misleading, deceptive and unconscionable conduct.

In its Draft Report, the Productivity Commission approached the issue of unfair contract terms from the perspective that "the rationale for action principally rests on the detrimental *use* of unfair terms, not their *existence*. This is because...dormant unfair terms do not actually cause detriment to consumers."

The Victorian unfair contract terms definition makes a term unfair "if it causes a significant imbalance in the parties' rights and obligations...to the detriment of the consumer". The fact that a term has not been *used* by a supplier to the consumer's detriment does not necessarily mean that it has not caused a detrimental impact. Terms that limit consumers' rights to sue, or that deem certain facts as existing thereby limiting the evidence that a consumer can lead, or that prevent a consumer from terminating a contract, can act as a deterrent to consumers exercising their lawful rights and in some cases, actually remove consumers' rights without the term being invoked. The Consumer Affairs Victoria 2007 Research into Unfair Contract Terms indicates that 46 per cent of respondents believed that terms and conditions prevented them from taking further action or were unsure if they could take action.

The inherent detriment and unfairness could exist even if the term was negotiated or brought to the consumer's attention. Thus, there are strong policy reasons for a consumer or regulator to be able to declare such terms void irrespective of whether it is *used* by the supplier or not.

5.1.2 Evidence of material detriment

The Victorian unfair contract terms legislation regards a term as "unfair" if:

contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

Thus, it is sufficient for a term to be considered unfair if there is a significant imbalance that is to the detriment of the consumer. The provision is silent on whether that detriment must be material or potential. Introducing an evidential requirement to demonstrate 'material detriment' would introduce unnecessary complexity. The Trade Practices Act and State and Territory Fair Trading Acts already allow for action to be taken where there is a possibility of detriment. For example, by prohibiting conduct that is misleading or deceptive *or likely to* mislead or deceive and in the case of the Trade Practices Act, prohibiting conduct that has the purpose, or has *or is likely to* have the effect, of substantially lessening competition.

In most cases where there is a significant imbalance in the parties' rights and obligations, the detriment will be self evident. In practice, consumers will only be motivated to take action where there is actual detriment. Regulators will only be inclined to act where there is a real possibility of detriment to consumers.

In its Draft Report, the Productivity Commission proposed that a court could only void an unfair term in the contracts of consumers who had suffered ‘material detriment’ or ‘evident detriment’ or ‘demonstrated detriment’. Such an approach is misconceived. It defeats the purpose of enforcement action and potentially leads to duplicated enforcement actions. This is because the United Kingdom and Victorian unfair contract terms regimes (as is the case with the other consumer protections in the Fair Trading Acts and Trade Practices Act) gives consumers the right to take a private action to void a term as it applies to them, and gives the regulator the power to take public actions to enjoin suppliers from using or enforcing unfair terms generally. What the Productivity Commission effectively proposes is that enforcement action should only be allowed if it is brought by a consumer, or by the regulator on the consumer’s behalf, to void a particular term in a particular contract and only if it has caused ‘material’ or ‘evident’ or ‘demonstrated’ detriment to that consumer.

The Victorian Government’s experience with unfair contract terms legislation is that suppliers typically assert that whilst a term *prima facie* appears, by definition, unfair, that it is not its intent and the term is never enforced or is only utilised in very rare circumstances where the consumer’s behaviour warrants it. For example, where the consumer has acted opportunistically or in bad faith.

Consumer Affairs Victoria’s approach in these circumstances has been to assess the term on its likely interpretation and where this differs from the supplier’s stated intent or application, request the supplier to redraft the term to better accord with its actual use. This is particularly important where leaving the term unamended would mislead consumers about their rights and legal obligations, would be likely to act as a deterrent to consumers taking action against supplier or would result in the consumer paying a penalty rather than reasonable damages for a breach of contract.

5.1.3 Standard form versus negotiated contracts

The Productivity Commission proposed to limit the application of unfair contract terms legislation to “standard form contracts”. As a matter of enforcement policy and agency priorities, it is highly likely that the focus would be on standard form contracts. In such cases, maximum public benefit is achieved for minimal effort. However, enshrining such a requirement in the legislation unnecessarily introduces an evidentiary burden (and cost) on the consumer or regulator attempting to enforce the law. Further, it is not clear what degree of negotiation would be required to convert what is ostensibly a standard form contract into a negotiated contract, or if only the revised term(s) would be excluded from unfair contract terms provisions, or if one negotiated term would mean that the entire contract could no longer be classified as a standard form contract.

The Victorian unfair contract terms legislation allows a Court or Tribunal to take into account whether a disputed term was individually negotiated (refer start of section 32X of the Victorian Fair Trading Act). A similar approach has also been taken with respect to unconscionable conduct in the Trade Practices Act and State and Territory Fair Trading Acts. The Victorian Government supports this approach rather than the proposed blanket exclusion.

When introducing the Trade Practices Act in 1973 the late Lionel Murphy observed:

In consumer transactions unfair practices are widespread. The existing law is still founded on the principal known as *caveat emptor* – meaning ‘let the buyer beware’. That principal may have

been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule... The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor.

Although it might be said that in the intervening years consumers have become more sophisticated, the Victorian Government can envisage situations where, although a term is negotiated, a consumer may be subject to unfair (by definition) contract terms.

In theory, free contracting should result in an equal bargain for buyer and seller. However, in many situations there will be an inequality of information that colours the worth of the bargain struck. Vickers (2003) puts forward an example where contract terms deal with unlikely but possible contingencies:

(consider) the possibility that I will be late with a loan or hire purchase payment, or forced to cancel my package holiday booking. Imagine that small print in the contract required me effectively to pay a high price, disproportionate to any cost involved, if such contingencies arose and that the supplier would reap a correspondingly high profit. For example, suppose that the late payment allowed the lender to invoke a higher interest rate henceforth, or to damages as if I had repudiated the whole contract, or in the cancellation example to no refund even though the holiday that I had booked was easily resellable.

Even the most far-sighted of consumers might reasonably not have thought through the implications of such contract terms, still less factored them into their purchase choices. But for the suppliers the contingencies concerned could be a considerable source of (anticipated) profit. In this context there is a limit to the protection afforded to consumers by the law on breach of contract, which few consumers might be willing or able to pursue in any event. (Vickers 2003, p. 15)

Vickers also cites competition and market efficiency concerns where consumers are effectively 'locked-in' to a contract. The supplier is in effect a monopoly supplier making that consumer vulnerable to exploitation of market power in the form of poorer quality goods or services, in comparison to the higher quality anticipated pre-contractually. Or the consumer might be fairly compensated in part for this through lower prices or other means. But, the supplier being in a monopoly position is guaranteed the customer will stay and so does not need to continue to innovate or operate efficiently. In effect, there is motivation for the supplier to optimise efficiency and value pre-contractually but not post-contractually resulting in a 'bargains-then-ripoffs' pattern. (Farrell and Klemperer 2003)

Nevertheless, if a negotiated term is to be excluded, by definition, from the operation of unfair contract terms legislation, it should be because at the very minimum:

- the consumer read and understood the meaning and effect of the term
- the consumer was not faced with any impediment compromising their ability to choose whether to contract or not
- the term was not put on a 'take it or leave it' basis, and
- the consumer and seller engaged in meaningful discussion about the intent, operation and wording of the term.

5.1.4 There is an overall public benefit

The Productivity Commission cited various reasons for why the mere existence of unfair contract terms should not be prohibited and suggested that the inclusion of a public benefit test would ensure that the regulator took into account all of the circumstances of the contract.

It is submitted that the requirement to take account of ‘all the circumstances’, as in the Victorian legislation, in deciding if a term is unfair, encompasses the concept of ‘public benefit’. An ‘all the circumstances’ test would require a decision-maker to give due consideration and weight to situations where there are sound reasons for an apparently one-sided clause or where the term is not a ‘key’ unfair contract term.

A ‘public benefit’ test would introduce an unduly high burden on a party seeking to declare a term ‘unfair’.

5.1.5 Excluding upfront price

The Productivity Commission expressed concern that there was a risk of regulatory overreach by regulators declaring upfront pricing as ‘unfair’. The United Kingdom approach has been to carve out upfront pricing from unfair contract terms legislation.

However, the Victorian Government submits that such an approach is not necessary. Careful drafting of the definition of unfair contract terms can ensure that upfront pricing alone is not caught by the prohibition. The Victorian definition stipulates that to be unfair, a term must *cause* a significant imbalance in the parties’ rights and obligations.

5.1.6 ‘Safe harbour’ immunity for contract terms

Quarantining certain terms from legal action under unfair contract terms legislation poses several problems. On its face, an exemption from legal action would be a motivator for business and industry groups to develop industry standard contract terms, particularly in those industries where the risk of unfair contract terms is high. There is also an incentive for individual businesses to differentiate themselves and avoid the perception of collusion by developing their own variants.

Granting ‘safe harbour’ immunity from any unfair contract terms action for specific contract terms has advantages and disadvantages. Where a term is *prima facie* fair, there is no need for an immunity process. Where a term appears to be unfair, granting immunity creates certainty for businesses using those terms. However, a regulator cannot be certain that an apparently fair term, or one that in ‘all the circumstances’ is not unfair, will in fact be unfair in some unrecognised context. The granting of immunity will preclude those consumers adversely affected from bringing their own private action.

Further, circumstances change. It is impractical to expect regulators to monitor the use of ‘authorised terms’ and be aware whenever ‘circumstances’ may change. The regulator’s ability to act swiftly where an authorised term is being used unfairly will be effectively stymied until a consumer has suffered actual detriment. Further, there is a risk that a supplier will misrepresent a situation where immunity from action against certain terms has been granted as an endorsement by the regulator of the term, the contract as a whole or even the business itself.

Consumer Affairs Victoria’s existing practice (and that of the United Kingdom’s Office of Fair Trading) of reviewing industry contracts on a ‘without prejudice’ basis and issuing general and industry-specific guidelines has been seen to operate without creating uncertainty or detriment to business. The Victorian Government believes this should be the Productivity Commission’s recommended approach.

5.1.7 Should the regulator's powers be *ex ante* or *ex post*?

The Victorian Government does not support the Productivity Commission's view that regulators should, initially at least, only be permitted to act *ex post* with the option at some later stage to act *ex ante*. It is not clear why the Productivity Commission has framed these options as mutually exclusive. The United Kingdom and Victorian regimes contain both options allowing the regulator to act proactively in those areas where there is a prevalence of unfair terms and reactively where there has been actual detriment to consumers. In addition, under the Victorian regime, the Victorian Parliament may proscribe terms as unfair. This two-pronged, proactive-reactive approach allows maximum flexibility for the regulator to deal systematically with particular types of unfair contract terms and particular industries through the use of prosecutions, injunctions or declarations or a combination of all three.

Confining a regulator to only taking action where there has been identified instances of consumer detriment undermines the potential for a systemic preventive approach. While the regulator is able to publicly raise particular unfair contract terms issues in specific industries, the ability to reinforce its views with strategic litigation is severely hampered. The regulator would be reduced to, in effect, tout for complaints about particular industries in order to be able to take legal action. It is a reality that consumers generally are loathe to become involved in litigation, particularly where they would be required to give evidence. This would further hamper the regulator's ability to achieve the best possible outcome. Being able to litigate pre-emptively obviates those problems.

The Productivity Commission suggested that a reactive approach once finalised will act as a deterrent in the case of other consumers. If an action by a single consumer was likely to have a domino effect for other customers, it is conceivable that the business would seek to arrange a settlement with the consumer in order to avoid alerting other consumers. And if the regulator was unaware of the conduct – because its ability to assist would be restricted to situations where there has been demonstrable detriment which would act as a disincentive for consumers to proactively raise the issue with the regulator – there is a likelihood that other consumers will be negatively impacted before the regulator would be able to take action.

A further complication with the 'demonstration' approach suggested by the Productivity Commission is that an action involving only one consumer with a specific fact situation is unlikely to deter other businesses from using similarly suspect terms. There will remain a stronger incentive to retain a profitable contract on the basis that 'it is not the same for me'. Moreover, a deterrent effect from litigation only arises from a successful judicial determination. Court cases can easily become lengthy and protracted, involving detailed argument and appeals, all of which delays the deterrent effect. A proactive approach acts as a disincentive for many businesses to unduly delay an outcome so that they may have some modicum of contractual certainty. Where the litigation is reactive, the customer is captured and the profit realised so there is not the same incentive to 'give it up'.

The notion that a proactive (*ex ante*) approach should be avoided because it poses a higher risk of regulatory error is misconceived. Any action taken by a regulator, be it judicial or administrative, is always open to independent review if the subject business disagrees with the regulator. Legal proceedings are decided by a court or tribunal. Administrative actions can be appealed to a court/tribunal or to the Government

Ombudsman. The proscription of unfair terms must be passed by Parliament. Each of these processes results in an independent review and it is in the regulator's own interests not to be criticised of making regulatory errors.

5.1.8 Conclusion

Consumer Affairs Victoria's experience to date has been overwhelmingly that businesses that have been involved in revising their contract terms to comply with the unfair contract terms legislation have found the experience to be positive rather than negative. The result is a consumer contract that is clearer in objectives without compromising businesses concerns. In particular, terms that were originally included to provide a contingency for the business where a consumer acted capriciously or opportunistically are refined to better reflect their intent and thus provide greater certainty for consumers. Unfair contract terms legislation should permit both proactive and reactive strategies.

5.2 Unfair practices legislation

The Victorian Government considers that unfair practices legislation should be considered more closely in the development of national consumer protection legislation.

In its Draft Report, the Productivity Commission did not recommend the development of a general provision against unfair practices. The Productivity Commission stated that while such a provision might be conceptually neat it was not of practical use to consumers. The Productivity Commission supported this position saying that specific false and misleading conduct provisions in both the Trade Practices Act and State and Territory Fair Trading Acts provided consumers with more effective protection.

However, the absence of a general prohibition on unfairness leaves regulatory gaps over both pre-contractual and post-contractual behaviour. For example, some marketing and promotional practices, which are not necessarily misleading or deceptive or unconscionable, may nevertheless be considered unfair.

The Victorian Government supports further consideration being given to the inclusion of a general provision against unfair practices in the development of national generic consumer protection legislation. There are general fairness provisions in numerous specific statutes, such as those covering financial services. It is difficult to argue that similar provisions should not exist in general law.

6 Defective Products

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 8: DEFECTIVE PRODUCTS

Draft Recommendation 8.1

Australia's consumer regulators should:

- raise awareness among consumers and suppliers about the statutory rights and responsibilities conferred by the implied warranties and conditions in the generic consumer law; and
- where appropriate, take specific enforcement action against misleading marketing and sale of extended warranties.

Draft Recommendation 8.2

Consistent with the recommendations in the Productivity Commission's recent consumer product safety report, Australian Governments should, as soon as practicable:

- commission a study to assess product-related injuries;
- develop a hazard identification system for consumer product incidents;
- introduce mandatory reporting requirements for product recalls; and
- require suppliers to report products associated with serious injury or death or products which have been the subject of a successful product liability claim or multiple out-of-court settlements.

Draft Recommendation 8.3

Drawing on the mechanisms proposed in draft recommendation 8.2, Australian Governments should monitor any possible impact of the recent civil liability reforms on the incentives to supply safe products.

6.1 Implied warranties regime

The Victorian Government supports the Productivity Commission's recommendation on awareness raising and appropriate enforcement of the implied warranties regime. In recent years, the Victorian Government has undertaken extensive work in this area in education and compliance. Most recently, aspects of the law have again been tested in a Supreme Court case in Victoria brought by the Director of Consumer Affairs Victoria (*Cousins v Merringtons Pty Ltd & Anor* [2007] VSC 542).

However, these laws have been in place for many years. There are some core issues with the regime that the Productivity Commission needs to further consider. This includes the systemic non-compliance by retailers and manufacturers with the scheme; the need for a comprehensive review of the scheme; and the impact on the economy of the inability of consumers to achieve redress. The Productivity Commission may wish to consider the New Zealand Consumer Guarantees Act 1993. Improvements to implied warranties legislation could be considered as part of the development of a best practice national consumer protection act as discussed previously.

6.1.1 Systemic non-compliance with the implied warranty scheme

Consumer Affairs Victoria notes systemic non-compliance with the scheme across a range of sectors where goods purchased are not of either merchantable quality or not fit for purpose, or services purchased are not provided with due care and skill. At the same time, Consumer Affairs Victoria observes there is an almost rigorous adherence by retailers with manufacturers' (voluntary) expressed warranties regarding refunds, returns and repairs.

Consumer complaints received by Consumer Affairs Victoria involve retailers requiring consumers to return defective goods within a specified grace period (two weeks to a month) in order to receive a refund. If consumers fail to return the product

within the grace period, retailers require consumers to take up their concerns with the manufacturers directly.

In 2007, Consumer Affairs Victoria completed two internal market-monitoring reports of the consumer electronic and mobile phone sectors. These reports note manufacturer returns policies restrict statutory warranties through:

- insistence on repairing goods (in some cases repeatedly) rather than issuing replacements or refunds on goods found to be defective immediately after purchase
- insistence that repairs are carried out through specific authorised service centres, and
- only providing repairs; replacement or credit notes for defective goods rather than refunds. (CAV 2007b, p. 7 and CAV 2007c, p. 4)

It may be that consumers and certain retailers are unaware of the legislative provisions. However, the implied warranty provisions are a core element of all Australian consumer legislation, so it is not clear that manufacturers and large retailers can plead ignorance.

It is noted that other State and Territory consumer affairs agencies receive similar complaints. These *contractual* disputes are referred by the Australian Competition and Consumer Commission to State and Territory consumer affairs agencies.

6.1.2 Comprehensive review of the statutory warranty scheme

Raising awareness of implied warranties, as recommended by the Productivity Commission, is not likely to be adequate.

The Victorian Government would support a more extensive review of the use of implied warranties as well as express warranties. It should be noted a similar review was carried out in the United Kingdom. (UK OFT 2002) Such a review could include:

- examining complaints received by Australian and overseas enforcement agencies
- market research of the incentive structures for retailers and manufacturers, and
- providing options to amend the current scheme to deliver appropriate outcomes.

6.1.3 Impact on the economy of failure to resolve consumer redress

Consumer Affairs Victoria's study on consumer detriment noted 26 per cent of all consumer complaints resulted in the consumers choosing not to pursue redress. This is because the direct and indirect cost to consumers of pursuing redress for many purchases (except house purchases) is prohibitive. Consumer Affairs Victoria notes that in many instances where the consumer has sought regulator assistance suppliers will immediately provide refunds. However, consumers only seek regulator assistance in four per cent of all cases (CAV 2006a, p. 9). In all cases, the onus is on the consumer to show that the retailer or manufacturer has failed to meet the implied warranty.

Failure of market mechanisms to resolve this consumer redress issue has significant financial impacts. Consumers either retire from the market or pay higher search costs.

Any review of implied warranties should consider providing options for more efficient dispute resolution mechanisms (market or government) to improve consumer redress. Currently, some State and Territory Fair Trading Acts have differing sets of remedies for breaches of the implied warranty. Additionally, some States and Territories have recourse to cheaper alternative dispute resolution mechanisms than the courts.

6.2 Product Safety

6.2.1 A general safety provision

The Victorian Government considers that the assessment undertaken by the Productivity Commission concerning a General Safety Provision was limited. There are advantages of this proactive system and the Victorian Government is of the view that the Productivity Commission should consider a General Service Provision in the context of broader consumer policy and not just civil liability reforms. Nonetheless, The Victorian Government supports the Productivity Commission's recommendation on monitoring any possible impact of the recent civil liability reforms on the incentives to supply safe products.

The Productivity Commission reiterated the recommendations made in its consumer product safety report, including that Australian Government's should:

- commission a study to assess product-related injuries
- develop a hazard identification system for consumer product incidents
- introduce mandatory reporting requirements for product recalls, and
- require suppliers to report products associated with serious injury or death or products which have been the subject of a successful product liability claim or multiple out-of-court settlements.

However, more could be done in the product safety area.

The idea of a General Service Provision has been revisited in the Productivity Commission's Draft Report and the Productivity Commission reiterated its view that "...the introduction of a General Safety Provision would not provide a net benefit to the community." (PC 2007, p. 144) Further, the Productivity Commission did not consider that there was sufficient reliable evidence on the impact of the civil liability reforms to alter this conclusion.

The Victorian Government considers that the case for a General Safety Provision does not fall or succeed on the impact of civil liability reforms, as seems to be argued by the Productivity Commission. Amendments to legislation in 2004 following the Review of the Law of Negligence have arguably weakened supplier incentives to supply safe products. The absolute legal liability under civil law is only one aspect of the argument for a General Safety Provision. Also important are the certainty for business and consumers about rights and responsibilities, how clearly the law states those rights and responsibilities, how easy it is to communicate those to the public and how easy it is to enforce them. The civil liability reforms do not address these issues.

A General Safety Provision implies a more proactive approach to product safety.

A General Service Provision would be more consistent with, and able to replace, some industry specific regulation, such as electrical goods safety and some aspects of therapeutic goods regulation.

The Victorian Government considers that the Productivity Commission should review the operation of the General Safety Provision in Europe and the United Kingdom before rejecting the idea.

The Victorian Government supports the Productivity Commission's recommendation on monitoring any possible impact of the recent civil liability reforms on the incentives to supply safe products. In the longer term, it may be necessary to further amend civil liability legislation as the market circumstances giving rise to the 2004 reforms have substantially changed since then.

6.2.2 Study of product safety related injuries

The Commonwealth, States and Territories have implemented the Productivity Commission's recommendation for research to be conducted on product safety. The Ministerial Council on Consumer Affairs commissioned a one-off baseline study of consumer product-related accidents in September 2006. A consultant was engaged to undertake the study. The Final Report was submitted in October 2007.

In September 2006, the Ministerial Council on Consumer Affairs directed the Standing Committee of Officials of Consumer Affairs to commission a one-off baseline study of consumer product-related accidents. This study was jointly funded by all jurisdictions and managed on behalf of the Standing Committee of Officials by the Commonwealth Treasury. A consultant – Access Economics – was engaged to undertake the study. The Final Report was submitted to the Standing Committee of Officials in October 2007.

6.2.3 Introduce mandatory reporting for product recalls and reporting of products associated with serious injury or death

The Victorian Government supports the mandatory reporting of product recalls and mandatory reporting of products associated with serious injury or death.

A product recall system is managed by the Commonwealth on behalf of all jurisdictions. The Victorian Government considers that mandatory reporting for product recalls should be developed as part of a 'best-of-breed' national consumer protection legislative scheme.

The Victorian Government supports mandatory reporting of products associated with serious injury or death. This is one of a number of issues relating to the legislative scheme for product safety that is being held up due to delays in agreement on the future regulatory framework for product safety. All States and Territories have agreed on a harmonised regulatory model. However, the Commonwealth continues to maintain its support for a one-law one-regulator model, thus preventing progress on this issue.

6.2.4 Harmonisation of product safety bans and standards

The Victorian Government has taken the lead on introducing harmonisation of product safety bans and standards and is managing a project to deliver harmonisation of all existing bans and standards in parallel to the development by the Ministerial Council on Consumer Affairs of a national regulatory model.

In May 2007, the Ministerial Council on Consumer Affairs agreed to harmonise product safety bans and standards. The project, being managed by Consumer Affairs Victoria, aims to reach agreement on a uniform suite of national product safety bans and standards. Harmonised regulations will make it easier for business and consumers to know which products are regulated across Australia.

Currently, there are some 178 different product safety bans and standards throughout Australia, 65 per cent of which relate to one jurisdiction only. Given the nature of the Australian market the disparity between jurisdictions may add unnecessary confusion.

Recently, Victoria proposed that all Commonwealth mandatory safety standards be adopted by all States and Territories. This recommendation is currently being considered by Ministers.

7 Access to Remedies

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 9: ACCESS TO REMEMDIES

Draft Recommendation 9.1

To facilitate more effective referral of complaints to the right body and sharing of information on complaints:

- all consumer regulators should participate in the shared national database of serious complaints and cases, AUZSHARE; and
- the Australian Competition and Consumer Commission should provide an enhanced national web-based information tool for guiding consumers to the appropriate dispute resolution body, as well as providing other consumer information. It should be subject to consumer testing to ensure that it is easy to use and has the appropriate content.

Draft Recommendation 9.2

Australian Governments should improve the effectiveness of alternative dispute resolution (ADR) arrangements for consumers by:

- extending the functions of the Telecommunications Industry Ombudsman to all telecommunications premium content services, pay TV and other associated services and hardware;
- establishing a national energy and water ombudsman that incorporates relevant existing State and Territory ADR bodies;
- encouraging further integration of financial ADR services, which would involve:
 - consolidating the existing financial ADR services into a single umbrella dispute resolution scheme for consumers, but with the option for those services of retaining their independence as arms within it;
 - adopting a common monetary limit on consumer disputes they can consider;
 - requiring that any new industry ADR services, including for credit, should be part of this scheme; and
- ensuring there is an effective and properly resourced ADR mechanism to deal consistently with all consumer complaints not covered by industry-based ombudsmen.

Draft Recommendation 9.3

Australian Governments should improve small claims court and tribunal processes by introducing greater consistency in key aspects of those processes across jurisdictions, including:

- common higher ceilings for claims;
- uniform subsidy rates for consumers seeking redress for small claims;
- equal availability of fee waivers for disadvantaged consumers; and
- allowing small claims courts and tribunals to make judgments about civil disputes based on written submissions, unless either of the disputing parties requests otherwise.

Draft Recommendation 9.4

In the light of the Victorian Law Reform Commission's current inquiry and recent decisions by the Federal Court of Australia regarding third-party financing of private class actions, the Australian Government should assess whether further clarification or amendment of the legislation to facilitate appropriate private class actions is required, taking into account any risks of excessive litigation or other unintended effects.

Draft Recommendation 9.5

A provision should be incorporated in the new national generic consumer law that allows consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.

Draft Recommendation 9.6

Australian Governments should provide enhanced support for individual consumer advocacy through increased resourcing of legal aid and financial counselling services, especially for vulnerable and disadvantaged consumers.

7.1 Complaint referral

7.1.1 A virtual single telephone referral centre

The Victorian Government is of the opinion that the creation of a virtual single telephone referral centre would not reduce consumer confusion. In fact, it would add another layer of referral to the already existing system. The more appropriate

approach would be to improve systems within currently existing State and Territory consumer affairs agencies.

The Productivity Commission identified consumer confusion about where to make complaints as a barrier to consumers receiving redress. “If confusion arises, consumers may choose the wrong complaint option with the risk that, as they are passed to other bodies, they will no longer seek to make a complaint – ‘referral loss’. Some consumers will be deterred in the first place by the many complaint and information options.” (PC 2007, p. 151)

The Productivity Commission suggested that one way of addressing this problem would be to create an integrated national system that provides information to consumers about their rights and directs all consumer complaints to the correct body. In the opinion of the Productivity Commission, a *virtual* single telephone referral centre would provide the greatest benefits of the options discussed. However, it may involve significant establishment costs and consequently the Productivity Commission invited feedback on whether it would be a sound investment.

As explained previously, the State and Territory consumer affairs agencies take the vast majority of consumer enquiries. These agencies have pre-existing and well-known brands. As the Productivity Commission has pointed out, there would be significant costs in promoting the new entity’s brand. It is not clear that creating a new brand, in addition to and competing with already existing State and Territory consumer affairs agency brands will reduce consumer confusion. Furthermore, as the majority of consumer issues are dealt with by State and Territory consumer affairs agencies creating a new national referral centre referring calls back to State and Territory agencies is not likely to be an improvement on the current arrangement.

7.1.2 Web based information tool

The vast bulk of general consumer complaints are handled by the State and Territory consumer affairs agencies. In this context, enhancing the Australian Competition and Consumer Commission’s web-based information on complaint handling is unlikely in itself to have a great impact.

The Productivity Commission recommended enhancing the Australian Competition and Consumer Commission’s web-based information tool – *Consumers online* – as a way of addressing the issue of consumer confusion about where to make a complaint.

The Victorian Government supports efforts to promote greater consumer awareness of where to go to get assistance when disputes cannot be resolved directly with traders. However, in relation to general complaints the vast bulk of these are handled by the State and Territory consumer affairs agencies. Consumer Affairs Victoria alone deals with nearly ten times the number of complaints and inquiries in Victoria than the Australian Competition and Consumer Commission does over Australia as a whole. In this context, enhancing the Australian Competition and Consumer Commission’s web-based information on complaint handling is unlikely in itself to have a great impact.

7.1.3 AUZSHARE

The Victorian Government supports the continued use and enhancement of AUZSHARE, which is a successful collaboration tool.

The Productivity Commission recommended that all consumer regulators should participate in the shared national database of serious complaints and cases, AUZSHARE.

The Victorian Government supports the continued use of AUZSHARE. Establishment of the database was initiated by the States and Territories. Initially, Queensland administered the scheme. This has recently been taken on by the Australian Competition and Consumer Commission. The Victorian Government, through Consumer Affairs Victoria, fully participates in the scheme and all other jurisdictions have also agreed to do so.

AUZSHARE is still in its infancy as a shared complaints database and it could be expected that enhancements to the scheme will continue to be made over time.

7.2 Improvements to consistency in alternative dispute resolution

7.2.1 Telecommunications ombudsman

The carve up of telecommunications regulation may make legislative sense. However, it does not make sense to consumers and is a significant source of consumer confusion. Consequently, the Victorian Government supports extending the functions of the Telecommunications Industry Ombudsman as recommended by the Productivity Commission.

Consumer Affairs Victoria's experience is that telecommunications is one of the most confusing areas for consumers. The Commonwealth Government has created a separate consumer protection regime in this area and a separate institution enforces the regime — the Australian Communications and Media Authority — although the Australian Competition and Consumer Commission also has a role. Further, as discussed by the Productivity Commission, some of the functions that consumers expect from the Telecommunications Industry Ombudsman are performed by other bodies. Consequently, the Victorian Government supports extending the functions of the Telecommunications Industry Ombudsman as recommended by the Productivity Commission.

7.2.2 Energy and water ombudsman

Under the Australian Energy Market Agreement, which the Victorian Government has committed to, an obligation for energy distributors and retailers is to have an internal dispute resolution scheme and participate in independent dispute resolution (Ombudsman) schemes. This is to be retained under the current state and territory functions.

The Productivity Commission recommended that a national energy and water ombudsman that incorporates relevant existing State and Territory alternative dispute resolution bodies should be established on cost efficiency grounds.

The Victorian Government acknowledges that there may be a case to establish a national energy ombudsman on cost efficiency grounds, particularly with the move to national markets and national regulation. However, further consideration would need to be given to the proposal.

The objective of the Australian Energy Market Agreement, which the Victorian Government has committed to, is to promote the long term interests of consumers with regard to the price, quality and reliability of electricity and gas services and the establishment of a framework for further reform to deliver a number of energy market benefits.

The Agreement sets out the State and Territory functions that are to be retained and those functions that will form part of the national distribution and retail regulatory framework. Under the Agreement, the obligation for distributors and retailers to have an internal dispute resolution scheme and participate in independent dispute resolution (Ombudsman) schemes is to be retained. At this point in time, there is no proposal to remove these from State and Territory responsibility.

Further, it should be noted that governance arrangements vary among jurisdictional ombudsman and alternative dispute resolution schemes – some are statutory bodies, some chartered companies and others industry established schemes. This would need to be provided for under any national ombudsman arrangement.

The Productivity Commission argued that:

There are strong grounds for including water utilities in such a consolidated body because water and energy are already dealt with by the same ombudsman in the two biggest jurisdictions, complaints often centre around similar matters to energy utilities (such as billing complaints), and in some cases, water is bundled with energy in its supply. There are, in any case comparatively few consumer complaints about water, so that separate ombudsmen would probably not be cost-effective. (PC 2007, p. 158)

The Victorian Government considers the case for a national water ombudsman is not strong. The Victorian Government acknowledges that a separate (from energy) State-based water ombudsmen may be less cost-efficient. However, the Victorian Government does not consider that this is sufficient justification for creating a national water ombudsman given the continuing dominance of States and Territories in the provision and regulation of water.

7.2.3 Financial services ombudsmen

The Victorian Government supports a mandatory requirement for credit providers to belong to an approved alternative dispute resolution scheme and supports the consolidation of the existing alternative dispute resolution schemes. The Victorian Government considers there would be merit in further investigation of the idea of a single statutory financial ombudsman scheme, as operates in the United Kingdom.

The Productivity Commission recommended that credit providers be required to belong to an approved alternative dispute resolution scheme. It also recommended that the current alternative dispute resolution schemes be consolidated into a single umbrella alternative dispute resolution scheme, with the option for current alternative dispute resolution schemes to retain their independence within the single umbrella scheme.

The Victorian Government supports a mandatory requirement for credit providers to belong to an approved alternative dispute resolution scheme. The Victorian Government also supports the integration of the existing alternative dispute resolution schemes in the financial sector. These schemes fail to provide full industry coverage at this time and they differ in the details of their operation. They have developed as self-regulatory alternatives to government regulation and are not necessarily fully

reflective of the public interest in their design and operation. The Victorian Government considers that a single national statutory scheme, as operates now in the United Kingdom, should be considered for Australia.

7.2.4 General alternative dispute resolution

The Victorian Government considers there is scope to increase the number of industry-based schemes given the significant number of licensed industries within which an ombudsman scheme could be established as part of the licensing arrangements. However, the Victorian Government acknowledges that there will remain a large number of areas where such schemes are not feasible for a range of reasons. In this respect, the Victorian Government supports the Productivity Commission's recommendation to have an effective and properly resourced alternative dispute resolution mechanism to deal with these disputes. This might be achieved through establishing an industry ombudsman scheme using a structure of an ombudsman supported by deputy ombudsmen and advisory boards, which focus on particular types of disputes and/or particular industries.

Research by Consumer Affairs Victoria for the Victorian Department of Justice showed that the majority of consumer disputes are taken up with the relevant business in the first instance and do not normally involve a third party such as a consumer agency or tribunal. It also showed that across industries, consumer dispute outcomes were poorer for industries without an ombudsman scheme. A tentative conclusion drawn from this is that industry ombudsman schemes can result in improved dispute resolution.

The Victorian Government notes that the industry ombudsman schemes in operation in Victoria have been carved out of the general dispute resolution processes operated by the general consumer protection agency, Consumer Affairs Victoria. This seemed a sensible approach where industry-based schemes could operate viably.

There is scope to increase the number of industry-based schemes in Victoria. Ombudsman schemes could be established as part of the licensing arrangements operating in a number of industries, for example, motor car traders.

While there may be scope to increase the number of industry-based schemes, there will remain a large number of areas where such schemes are not feasible for a range of reasons. In this respect, the Victorian Government agrees that it is desirable to have an effective and properly resourced alternative dispute resolution mechanism to deal consistently with all consumer complaints not covered by industry-based ombudsman.

The concept of a general consumer ombudsman for consumer disputes that are not currently covered by an industry ombudsman scheme could be established using a structure of an ombudsman supported by deputy ombudsmen and advisory boards, which focus on particular types of disputes and/or particular industries.

7.3 Small Claims Courts and Tribunals

7.3.1 Claim ceilings

The Victorian Government does not consider that differences in the ceilings for small claims across jurisdictions are a major issue. Rather, the Victorian Government sees the primary issue with small claims ceilings being that consumers commonly purchase consumer goods that exceed the ceilings. The Victorian Government would

welcome the Productivity Commission's consideration of what an appropriate small claims ceiling would be.

In its consideration of small claims ceilings, the Productivity Commission focused its discussion on the jurisdictional variations in the ceilings. However, it is not clear that jurisdictional variations in the ceilings create significant problems. Consumers do not seek redress in multiple jurisdictions. Even for businesses that operate across jurisdictions, there does not appear to be any costs from jurisdictional variations due to the individual nature of consumer claims.

But there are costs to consumers from inadequate ceilings levels. As discussed by the Productivity Commission, "...the values of some commonly purchased consumer goods now exceed even the higher ceilings." (PC 2007, p. 163) This results in consumers having to access more formal and costly proceedings to obtain redress for problems with commonly purchased goods. This also increases the costs for businesses. The Victorian Government would welcome the Productivity Commission's consideration of what an appropriate small claims ceiling would be.

7.3.2 On the papers decisions

The Victorian Government supports in principle the Productivity Commission's recommendation to allow small claims courts and tribunals to make judgments about civil disputes based on written submissions. The Victorian Government recognises, however, that there are advantages and disadvantages of both approaches and a considered approach is required. The Victorian Civil and Administrative Tribunal is to trial "on the papers" determinations.

The Productivity Commission considered that allowing small claims courts and tribunals to make judgments about civil disputes based on written submissions would have a number of benefits:

This could lower the transaction and other less direct costs to disputing parties, especially when they are some distance from the court (as in remote cases or Internet-based disputes) or are running a small business. Allowing written submissions may be less intimidating for consumers and facilitate speedier resolution of disputes. And it would considerably lower the costs for legal aid agencies of effectively representing disadvantaged consumers, since the only requirement would be preparation of written material on behalf of their clients. (PC 2007, p. 164-165)

The Victorian Government acknowledges the benefits of 'on the papers' decisions.

In Victoria, the Victorian Civil and Administrative Tribunal already has this power. Under section 100(2) of the *Victorian Civil and Administrative Tribunal Act 1998*, if the parties consent, the Victorian Civil and Administrative Tribunal may conduct all or part of the proceeding entirely on the basis of documents, without any physical appearance by the parties or their representatives. The Victorian Civil and Administrative Tribunal intends to trial the use of 'on the papers' determinations in small claims cases.

However, it is important to also acknowledge that oral testimony can also have advantages. Relying on oral testimony at hearings allows tribunal members to hear and gather relevant facts and evidence during the hearing to help resolve the dispute. Such facts and evidence may not otherwise be provided by parties in sufficient detail whilst relying on documentary evidence.

The Victorian Government would also encourage the Productivity Commission to consider the option of conducting hearings by electronic means. This may provide

some of the same benefits as allowing decisions to be based on written submissions. Under section 100(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, VCAT, if it thinks it is appropriate, can conduct all or part of a proceeding by means of a conference conducted using telephones, video links or any other system of telecommunication.

7.4 Consumer representation

7.4.1 Third-party financing of private class actions

The Victorian Government supports the Productivity Commission's recommendation that the Commonwealth Government should assess whether further clarification or amendment to the Federal legislation to facilitate appropriate private class actions is required.

7.4.2 Representative actions by regulators

The Victorian Government supports representative actions by regulators and the power of regulators to take independent actions.

The Victorian Fair Trading Act provides a power for the Director of Consumer Affairs to take representative actions or to take actions in his/her own name. This power should be retained in any future national law.

7.4.3 Super-complaints mechanism

The Victorian Government considers that a super-complaints mechanism may improve intelligence gathering and prioritisation and should be further considered by the Productivity Commission.

The Victorian Government, in its submission, suggested that the Productivity Commission consider a super-complaints mechanism. (Victorian Government 2007b)

The Productivity Commission argued that on balance a super-complaints mechanism is unnecessary based on three main arguments. First, Australian regulators already receive thousands of complaints and systematic issues identified by alternative dispute resolution schemes. Second, regulators already prioritise their investigation resources and super-complaints would draw resources from more appropriate areas. Third, Australia's small size would not support larger consumer groups with capacity to make sophisticated complaints.

There is no perfect method of allocating resources to investigations. Agencies have to rely on a range of sources to determine their priorities. One very important input into prioritisation is from key stakeholders. To argue that a super-complaints mechanism would distract agencies from the correct prioritisation is perhaps to misconstrue how the appropriate prioritisation is in fact reached. A super-complaints mechanism may improve the prioritisation process. Further, a well-designed super-complaints system could ensure useful additional intelligence is provided. Thus, it is not a repetition of agencies' intelligence collection but is in fact a supplement to it.

7.4.4 Funding for legal aid and financial counselling

The Victorian Government supports the funding of legal aid and financial counselling services. In 2006-07, the Victorian Government provided over \$5 million for financial

counselling services and \$41 million for legal aid services to be delivered to the Victorian community.

The Productivity Commission discussed enhanced support for individual consumer advocacy through additional resourcing for legal aid and financial counselling. It recommended that Australian Governments should increase funding for legal aid and financial counselling services, especially for vulnerable and disadvantaged consumers. (PC 2007, p. 175) However, in the Productivity Commission's Draft Report there was no significant discussion of funding arrangements under the Productivity Commission's preferred model.

The Victorian Government provides significant funding in these areas. Consumer Affairs Victoria funds 44 community-based, not-for-profit organisations to provide financial counselling services free of charge and also funds the peak organisation, the Financial and Consumer Rights Council Inc. Approved funding for providing financial counselling in 2006-07 was over \$5 million. (CAV 2007a, p. 204) The Victorian Government provided Victoria Legal Aid, an independent statutory body, \$41 million to provide legal aid services to the Victorian community in 2006-07. (DOJ 2007a, p. 38)

It is also important that there is promotion of available financial counselling services, particularly through networks of services that are accessed by vulnerable and disadvantaged consumers. (DOJ 2007b)

Enhanced funding from the Commonwealth for financial counselling and legal aid services for consumer disputes would be welcomed.

8 Compliance and Enforcement

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 10: ENFORCEMENT

Draft recommendation 10.1

The new national generic consumer law should give consumer regulators the capacity to:

- *seek the imposition of civil pecuniary penalties, including the recovery of profits from illegal conduct, for all relevant provisions;*
- *apply to a court to ban an individual from engaging in specific activities after the court has found that a breach of consumer law has occurred;*
- *issue notices to traders requiring them to substantiate the basis on which claims or representations are made; and*
- *issue infringement notices for minor contraventions of the law.*

Draft recommendation 10.2

The Australian Government should commission a review by an appropriate legal authority of the merits of giving consumer regulators the power to gather evidence after an initial application for injunctive relief has been granted, but prior to substantive proceedings commencing.

Draft recommendation 10.3

Australia's consumer regulators should be required to report on the nature of specific enforcement problems, their consequences, steps taken to address them and the impact of such initiatives. Such commentary should be informed by surveys of targeted stakeholder groups.

8.1 The importance of non-enforcement action compliance activities

The Victorian Government welcomes the detailed discussion of compliance activities by the Productivity Commission. However, the Productivity Commission has taken a somewhat narrow view of compliance and enforcement activities focusing on legal proceedings. State and Territory consumer affairs agencies, which undertake most of the consumer protection compliance and enforcement activity in Australia, use a wide range of tools to achieve compliance with the law by businesses.

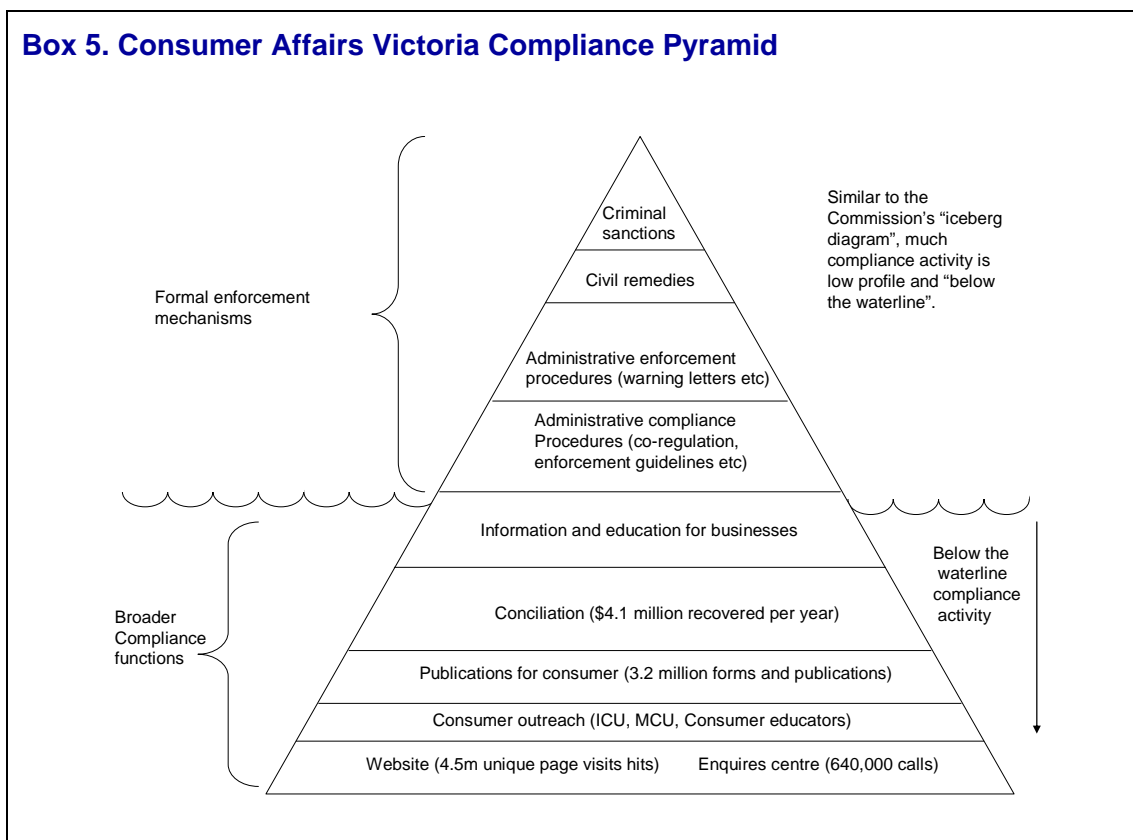
In its Draft Report, the Productivity Commission focussed the discussion on the legal proceedings available to regulators (and consumers) to achieve business compliance. While acknowledging that legal proceedings are a core and important aspect of compliance, the Productivity Commission has taken a somewhat narrow view in this area.

A focus on legal proceedings as the primary form of compliance activity may be a successful approach for a national regulator, such as the Australian Competition and Consumer Commission, which focuses on large national businesses with their own compliance departments and internal legal resources. However, for State and Territory consumer affairs agencies, which undertake most of the compliance activity in Australia, a broader compliance tool kit is required as State and Territory regulators deal with a significantly larger number of businesses that are typically much smaller (although it should be noted that State and Territory regulators also deal with national firms).

Generally, State and Territory consumer affairs agencies focus on encouraging business compliance rather than enforcement per se — although effective enforcement is necessary to ensure credibility as a regulator — and State and Territory consumer affairs agencies tend to undertake more consumer education, information and advice than does the Australian Competition and Consumer

Commission. A wide range of tools are used by regulators, working with businesses and consumers, to achieve compliance with the law.

Box 5. Consumer Affairs Victoria Compliance Pyramid



In all these areas, the additional activities undertaken by Consumer Affairs Victoria assists in ensuring businesses and consumers are aware of their rights and legal obligations and that they comply with the obligations. The form of activity that Consumer Affairs Victoria undertakes includes:

- Information and education for business (such as presentations to business, articles for trade publications, specific publications for business on compliance with the law).
- Conciliation services, which not only assist consumers but also communicate to businesses what their legal obligations are and assist those businesses with complying with the law.
- Publications to consumers which inform them of their rights and obligations (which also provides an indirect channel to businesses, through consumers exercising their rights).
- Consumer outreach services to specific groups, through the Indigenous Consumers Unit and the Multicultural Consumers Unit, as well as the Consumer Education in Schools program.
- Information provided to consumers and businesses on their legal rights and responsibilities through the Consumer Affairs Victoria call centre and website.

More detail on these specific services is available in the Victorian Government’s preliminary submission to the Productivity Commission (Victorian Government 2007a).

An analysis of the extent of activity undertaken by consumer regulators highlights the difference between State and Territory regulators and the Australian Competition and Consumer Commission.

Table 3. Comparison of Consumer Affairs Victoria and Australian Competition and Consumer Commission compliance and enforcement activity

Compliance Activity	Consumer Affairs Victoria	Australian Competition and Consumer Commission
Conciliation cases	11,177	The Australian Competition and Consumer Commission does not seek to resolve individual complaints.
Forms and publications distributed to consumers and traders	More than 3.2 million	Over 1 million
Website visits	Over 4.5 million unique visits ^a	Over 1.4 million visits
Person-to-person counter services	47,000	–
Requests for information and advice	More than 640,000 (written and telephone)	57,601 calls and 17,718 emails

Notes:

^a This figure has been used as it appears to be more comparable with the figure reported by the Australian Competition and Consumer Commission in its 2005-2006 Annual Report. The 4.5 million unique visits, equates to over 1.6 million “visitor sessions” as reported in Consumer Affairs Victoria’s Annual Report 2006-2007.

Source: CAV 2007a, Internal Consumer Affairs Victoria website statistics report and ACCC 2006.

The Australian Competition and Consumer Commission recognises this more limited role that it undertakes in its 2005-06 Annual Report, discussing “what we don’t do”:

The ACCC deals with competition and consumer protection matters of national and international significance and therefore does not:

- Pursue issues such as pricing of particular goods or services, warranties and refunds that are more effectively dealt with at a local or state level
- Mediate disputes between individuals and the suppliers of goods and services. (ACCC 2006, p. 16)

8.2 Key role of states in compliance activity and national regulation

Currently in Australia, compliance and enforcement for consumer protection is a shared responsibility between the Commonwealth and the States and Territories.

The focus of the Australian Competition and Consumer Commission is on issues of national importance, while the State and Territories focus on issues of regional or State importance (not the least because, as the Productivity Commission has identified, the State and Territory consumer affairs agencies are the only ones with constitutional powers to enforce laws against sole traders and unincorporated businesses).

Nonetheless, the State and Territory consumer affairs agencies also undertake compliance actions on issues of national significance as well as the Australian Competition and Consumer Commission. Which agency undertakes an action depends on a range of factors including where the business is located, which agency has undertaken investigations into the business and what the legislative basis for action is. For example, Consumer Affairs Victoria has dealt with many national organisations under its unfair contract terms law.

This compliance activity is coordinated between the various agencies through both informal contact and through the formal processes of the Fair Trading Operations Advisory Committee.

Throughout Australia the preponderance of enforcement activity is undertaken by State and Territory consumer affairs agencies. For example, the Director of Consumer Affairs' reported in his Annual Report for 2006-07 that Consumer Affairs Victoria had in that year:

- finalised 44 criminal prosecutions
- finalised 78 civil proceedings
- accepted 121 enforceable undertaking
- issued 188 infringement notices
- issued 643 warning letters, and
- executed 20 warrants.

Other State and Territory consumer affairs agencies also undertake significant amounts of enforcement activity, more in quantitative terms than is undertaken by the Australian Competition and Consumer Commission as shown in Table 4.

It should also be noted that the complexity of the cases is not necessarily higher in the Australian Competition and Consumer Commission. The mix in both Commonwealth and State and Territory consumer affairs agencies is of the profound and the prosaic. Most Australian Competition and Consumer Commission issues are misleading and deceptive conduct cases. Consumer Affairs Victoria also takes cases to the Supreme Court of Victoria and the High Court of Australia.

Table 4. Compliance and enforcement activity across jurisdictions in 2005-06

Enforcement actions	Victoria: Consumer Affairs Victoria	New South Wales: Office of Fair Trading	Queensland: Office of Fair Trading	Australian Competition and Consumer Commission ^a
Criminal prosecutions finalised	47	373	94 ^b	15 ^c
Civil proceedings finalised	88	138	0	
Enforceable undertakings accepted	43	Not applicable	35 ^d	50
Infringement notices served.	386	822 ^e	968	–

Notes:

^a On fair trading and consumer protection issues – Part IVA, Part IVB, Part V and Part VC of the Trade Practices Act.

^b This figure includes prosecutions that were withdrawn and dismissed.

^c This figure represents all litigation (includes both civil proceedings and criminal prosecutions).

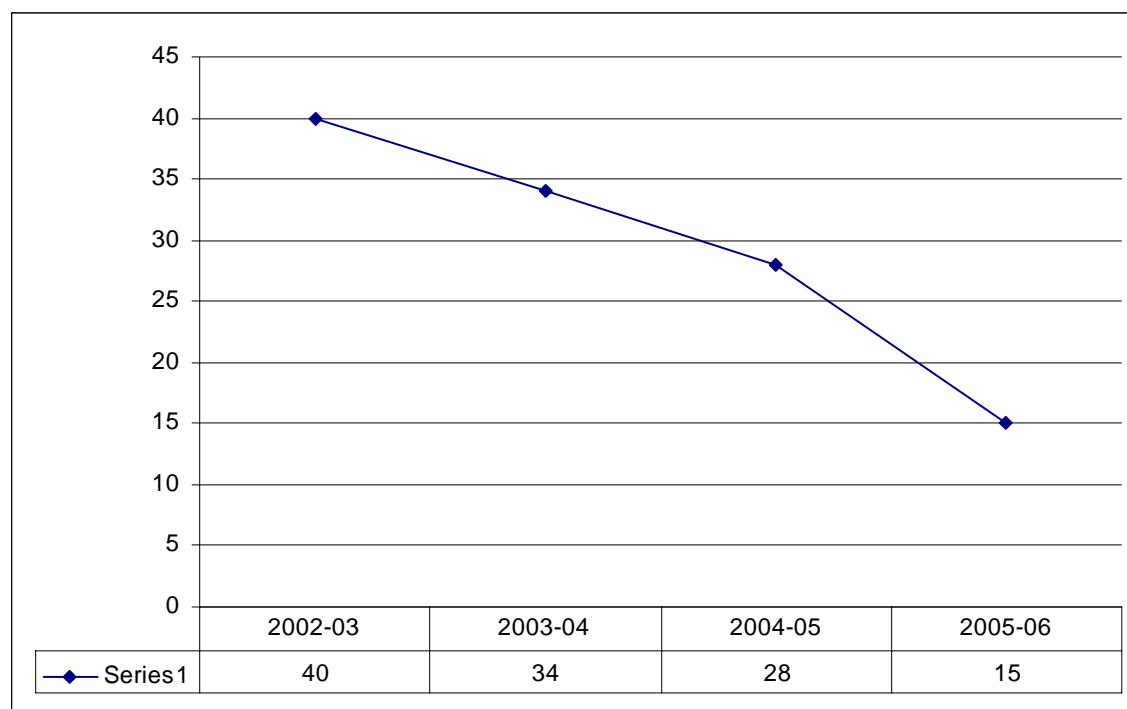
^d 246 were accepted in the previous year.

^e “Penalty notices”.

Source: MCCA Working Party 2007, p. 17-29 and ACCC 2006, p. 45.

The current levels of consumer protection enforcement activity by the Australian Competition and Consumer Commission may be explained by a policy of using enforceable outcomes as a preferred compliance tool.

Chart 1: Australian Competition and Consumer Commission litigation on consumer protection matters, completed cases



Source: ACCC 2003, p. 30, ACCC 2004, p. 31, ACCC 2005, p. 41 and ACCC 2006, p. 45.

Overall, it needs to be recognised that the State and Territory consumer affairs agencies are the powerhouses of consumer law enforcement activity throughout Australia.

8.3 Other important legislative powers in the Fair Trading Act

The Productivity Commission recommended that the basis for national legislation should be the Trade Practices Act and in its discussion of enforcement, the Productivity Commission examined a number of amendments to the law that could be made to the ‘model’ Trade Practices Act.

However, the Trade Practices Act does not represent best practice in consumer protection in Australia. There are many differences between the State and Territory Fair Trading Acts and the Trade Practices Act. One of the preferences of the Victorian Government, if a new national harmonised legislative model was to be adopted, is that a ‘best-of-breed’ approach be undertaken rather than relying on the Trade Practices Act. While analysis of all the Fair Trading Acts is beyond the scope of this submission Table 5 provides a summary of the key differences between the Trade Practices Act and the Victorian Fair Trading Act.

Some key additions in the Fair Trading Act are:

- contact sales, protection for consumers in door-to-door sales
- telemarketing and non-contact sales, protection for consumers in long-distance sales
- lay-by provisions, protection for consumers in store lay-bys which are a combination of a sale process and a money management process, and
- unfair contract terms (discussed elsewhere in this submission).

These represent important parts of the consumer protection regime in Victoria.

Table 5. Comparison between Trade Practices Act and Victorian Fair Trading Act

Similar Provisions	
<i>Trade Practices Act Provision</i>	<i>Equivalent Victorian Fair Trading Act Provision</i>
Unconscionable conduct – unwritten law (s.51AA)	s.7
Unconscionable conduct - consumer transactions (s.51AB)	s.8
Unconscionable conduct – business transactions (s.51AC)	s.8A
Codes of conduct (Part IVB)	Part 6. Inserted in 1999 Fair Trading Act: different process adopted but substantially similar effect.
Misleading or deceptive conduct (s.52)	s.9
False or misleading representations (s.53)	s.12. Has 3 extra false representations: (l)&(m) were inserted in the 1999 Fair Trading Act to respond to issues at that time and (n) was drawn from the 1985 Fair Trading Act.
Misleading conduct – employment	s.13

(s.53B)	
Cash price to be stated (s.53C)	s.15
False offers of gifts/prizes (s.54)	s.16
Misleading public re nature etc of goods (s.55)	s.10
Misleading public re nature etc of services (s.55A)	s.11
Bait advertising (s.56)	s.17. Different drafting technique, but same effect. Substantive difference is that the defence was deleted from Trade Practices Act in 2001 but not in Fair Trading Act.
Referral selling (s.57)	s.18. Minor difference: a broader definition of “consumer” contract inserted in 1999 Fair Trading Act for wider coverage than under Trade Practices Act.
Falsely accepting payment (s.58)	s.19. Substantially different drafting adopted in 1999 Fair Trading Act to make the offence strict liability and thus easier to prosecute.
Misleading reps – business opportunities (s.59)	s.20. Different drafting technique, as between Commonwealth and Victorian Parliamentary Counsel, but same effect.
Harassment/coercion (s.60)	s.21. “Person” rather than “consumer” inserted in 1999 Fair Trading Act so can be used in business to business situations; 12 deemed acts of harassment/coercion inserted in 1999 Fair Trading Act to strengthen Trade Practices Act-based provision and so make prosecution easier.
Unsolicited credit/debit cards (s.63A)	s.23 (includes references to funds-transfer cards and stored-value cards added in 1999 Fair Trading Act)
Falsely asserting right to payment for goods/services(s.64)	ss.24 & 28
Falsely asserting right to payment for directory entry(s.64)	ss.27&28. Substantially different approach to “blowing” taken in 1999 Fair Trading Act because of problems in prosecuting under previous equivalent to s.64 Trade Practices Act.
No liability for unsolicited goods (s.65)	s.25
Pyramid selling (Div 1AAA Part V)	s.22. When the 1999 Fair Trading Act was enacted, it did not re-enact the pyramid provisions of the 1985 Fair Trading Act, which were based on the old form of the Trade Practices Act provisions, but replaced them with provisions that tackled the problem of excluding legitimate multi-level marketing schemes in a new way. In addition, the old Trade Practices Act provisions were difficult to read. When the process of revising the old Trade Practices Act provisions was underway, Victoria’s view was that while the new plain English version was substantially better than the old version it still regarded its provisions as better at, or at least as good as the new Trade Practices Act provisions in dealing with legitimate multi-level marketing schemes.
Implied terms in consumer contracts (Div 2 Part V)	Part 2A. Has some extra protections over the Trade Practices Act regarding services. For example, conditions, not warranties; conditions re fit for common purpose, correspondence with demonstration, which go back to when the provisions were originally inserted in the <i>Goods Act</i> in 1982. Trade Practices Act has a statutory right to rescind for a breach of an implied condition whereas Fair Trading Act relies on common law regarding

	rescission; however, there is probably little practical difference. Different approach taken to ability to exclude implied terms for recreational services.
Non-similar provisions in the Victorian Fair Trading Act	
Section	Non equivalent Fair Trading Act provisions
False testimonials (s.14)	Inserted in 1999 Fair Trading Act to make the offence specific rather than relying on the general false rep provisions.
False invoices (s.24A and s.28)	Inserted in 2004 because of deficiency in s.24 Fair Trading Act and s.64 Trade Practices Act revealed by Federal Court case.
No liability for unsolicited services (s.26)	Included to complement the goods provision (s.24).
Names/addresses in advertisements etc (s.29)	Drawn from Consumer Affairs Act 1972.
Mock Auctions (s.30)	Mock auctions drawn from <i>Consumer Affairs Act 1972</i> .
Unfair terms in consumer contracts (Part 2B)	Unfair terms in consumer contracts (Part 2B) inserted in 2003 as result of Stensholt review of the Fair Trading Act.
Contact sales (door-to-door selling) (Part 4, Division 2)	Formal contract requirements, cooling-off right, cancellation procedure, restricted calling hours and visit duration rules.
Telemarketing (Part 4, Division 2A)	Obtaining explicit informed consent, formal contract requirements, cooling-off right; cancellation procedure, restricted calling hours and no-call-back rule.
Non-contact sales (Part 4, Division 3)	Provision of basic contract information, cooling-off periods.
Lay by provisions (Part 5)	Detailed requirements for lay-by contract and cancellation rights of both parties.
Enforcement Provisions	Product-claim substantiation notice; show cause notice (why should be allowed to continue trading); cease trading injunctions; and business licence suspension.

8.4 Recommended changes to legislation

The Productivity Commission recommended that the basis for national legislation be the Trade Practices Act, amended by a number of new provisions – civil pecuniary penalties, banning orders, substantiation notices and infringement notices (although the Productivity Commission reviewed a longer list of amendments).

8.4.1 Civil pecuniary penalties

The Victorian Government supports the introduction of civil penalties in the consumer protection legislative regime.

The Productivity Commission recommended a civil penalties regime similar to that set out in a Ministerial Council on Consumer Affairs Working Party paper and that it be expanded to include civil penalties for misleading and deceptive conduct.

The Ministerial Council has been working on the development of a civil penalties regime for some time. The work has been progressed by the Standing Committee of Officials of Consumer Affairs including the development of an issues paper and public consultations. The proposal has now been approved by the Standing Committee of Officials for presentation to the Ministerial Council.

The Victorian Minister for Consumer Affairs has advised other jurisdictions that civil pecuniary penalties should be introduced for contraventions of Australia's consumer protection laws and that civil penalties should apply to those contraventions currently covered by the criminal regime (including banning orders). The current criminal enforcement regime for Australia's consumer protection laws should be retained. Regulatory agencies should publish guidelines for businesses setting out the factors relevant to the exercise of their respective discretions in determining whether a matter should be pursued under the civil or criminal regime.

8.4.2 Substantiation notices

The Victorian Government supports substantiation notices, which are already available in Victoria as part of the Fair Trading Act.

The Victorian Government supports the use of substantiation notices. Provisions relating to the issuing of substantiation notices currently exist in the Victorian Fair Trading Act and these have been used successfully by Consumer Affairs Victoria.

8.4.3 Infringement notices

The Victorian Government supports the use of infringement notices as part of its compliance toolkit. The Victorian Government already uses infringement notices across government as an effective addition to other enforcement tools. Infringement notices are used to enforce consumer protection legislation.

The Productivity Commission, in its Draft Report, supported the use of infringement notices. Victoria's new infringement system came into operation on 1 July 2006 with the commencement of the *Infringements Act 2006*. This new system was developed in consultation with major infringement system stakeholders including local government, advocacy groups and most state government departments. The goals of the new system are to:

- consolidate infringement laws and procedures and create common principles to guide infringement policy into the future
- better protect individuals, particularly those in special circumstances (mental or intellectual disability, homelessness or serious addictions) and those experiencing genuine financial difficulty, and
- increase the rate of compliance and deter repeat offending.

Consumer Affairs Victoria issued 188 infringement notices during 2006-07. (CAV 2007a) For more information, see the Attorney General's Annual Report 2006-07 on the Infringement System (available for the Department of Justice website) and the Consumer Affairs Victoria Annual Report.

8.4.4 Non-recommended changes: naming and shaming powers

The Victorian Government supports naming and shaming powers, which are already part of the Victorian Fair Trading Act and utilised by Consumer Affairs Victoria in compliance and information and awareness activity. Under Consumer Affairs Victoria powers, there is a public interest test and no immunity provided to the Crown. Thus, in practice, these powers have been demonstrated not to pose the reputation risks identified by the Productivity Commission. They fill an important compliance gap and

are not similar to injunction powers that the Productivity Commission suggested as a substitute.

The Productivity Commission also considered other potential amendments to the enforcement provisions, including the provision of naming and shaming powers, however it did not recommend any changes.

The Productivity Commission does not support inclusion of naming and shaming powers in national consumer legislation:

Given the potentially significant personal and financial consequences for suppliers from adverse public exposure, the objectives these notices seek to achieve need to be balanced against the rights of legitimate traders. Even if further investigation or an appeal reveals that the conduct was not in breach of the law, the stigma associated with the original decision is unlikely to be entirely extinguished. This in turn highlights the need for procedural fairness in exercising such powers. (PC 2007, p. 196).

Further, the Productivity Commission noted that the current consumer protection legislation offers court orders of corrective advertising and the media reporting of successful court actions as an alternative, supplemented by court-ordered injunctions.

However, these options are not a substitute for the naming and shaming powers, which are part of the Victorian Fair Trading Act and utilised by Consumer Affairs Victoria in compliance and information and awareness activity. These powers are used in the public interest and are not reliant on court action having been taken. They can be used to provide an early warning to consumers of unfair practices and traders.

Traders can operate under assumed names and be difficult to identify for legal proceeding, or the timing of legal proceeding may leave consumers open to further detriment. For example, John Stewart (refer Box 6) exploited consumers while using an alias, working in cash, using an unregistered business name and multiple phone accounts. A public notice is often the only timely and effective approach to attempt to reduce further detriment.

This enforcement tool is a useful adjunct to other compliance tools. It is not going to be as effective as prosecuting someone and publicising the prosecution; however, it offers a useful addition to the compliance toolkit.

Businesses are protected from the misuse of this provision. First, there is a public interest test — the power can only be used when it is the public interest to do so. Second, there is no immunity for the crown, and thus the business or individual in question has all the normal legal rights they would have regarding public statements made about them.

In practice, given the above points, it is a fairly narrowly targeted tool and is not extensively used. In 2005-06, Consumer Affairs Victoria issued five such notices.

The Victorian Government supports naming and shaming powers as utilised by Consumer Affairs Victoria in compliance and information and awareness activity. If the Productivity Commission is concerned about the impact of the provision on business, then it may wish to consider how a public interest test could be more formally incorporated into the power.

Box 6. Public Warning on John Stewart

The Director of Consumer Affairs Victoria, Dr David Cousins, has issued a warning to consumers about the activities of an itinerant trader, John Stewart, who carries on the business of supplying and laying bitumen in the State of Victoria, under the unregistered business name "Bitumen Driveways".

Consumer Affairs Victoria has received complaints from individuals who claim that the bitumen supplied and laid to their property by John Stewart was defective.

The complainants describe John Stewart as being approximately 170cm tall and in his late 30's. He is also described as having blonde hair and speaking with a Scottish accent.

John Stewart travels throughout regional Victoria in a large black truck, which carries a trailer with the bright orange words "Hot Bitumen" on the side.

He goes door-to-door approaching individuals at both their residential and business addresses. John Stewart claims to have bitumen left over from a previous job and entices consumers by telling them he has a "good deal" valid for one day only.

The alleged "good deal" offered by John Stewart to unsuspecting consumers is the supplying and laying of bitumen at a price that sounds attractive but had been shown to be above the industry standard price.

In one instance, in addition to overcharging the consumer for the bitumen used, John Stewart also over calculated the area to which he supplied and laid bitumen. John Stewart's calculation exceeded the area by up to 50 square metres.

Once the work is fully or partially completed, John Stewart demands payment in the form of cash or a cash cheque. John Stewart claims that he will return to the consumer's property to complete any unfinished work after he has received payment. Consumer Affairs Victoria has no reports of John Stewart returning to a consumer's property after payment has been made.

Where consumers do not have the full amount in cash, John Stewart has been reported to use pressure tactics including following consumers to their bank and obtaining payment immediately after the funds are withdrawn.

The work completed by John Stewart is often of substandard quality. Consumers are left, at their own expense, to hire another tradesperson and complete the work, which often amounts to more than the sum paid to John Stewart in the first instance.

John Stewart's use of aliases, payment made in cash and unregistered business name make it difficult, if at all possible, for consumers to recover their losses. The only form of contact consumers are offered by John Stewart is a mobile telephone number which is disconnected shortly after the work is completed.

Consumer Affairs Victoria advises consumers to beware of the activities of John Stewart and request that you call us on 1300 55 81 81 should you be contacted by John Stewart, or any person conducting business in a similar manner.

Source: www.consumer.vic.gov.au

8.5 Regulatory Accountability

The Productivity Commission recommended making regulators more visibly accountable for their performance through requiring them to report on the nature of specific enforcement problems and steps taken to address them. The Victorian Government, through Consumer Affairs Victoria, already undertakes much of the Productivity Commission's recommended activity. For example, Consumer Affairs Victoria undertakes market scans for consumer detriment and emerging risks, and undertakes market research on compliance. The Annual Report of the Director of Consumer Affairs Victoria contains substantial amounts of information on activities of the agency.

In its Draft Report, the Productivity Commission reported the lack of information on enforcement issues and problems. This flows from the Productivity Commission's view that it is difficult to assess whether consumer agencies have appropriate funding for compliance activity because there is not more information on enforcement performance:

Specifically, the current focus of regulatory performance reporting is primarily on the collection and presentation of activity-based statistics on indicators such as complaint handling, litigation, judgements, undertakings and levels of consumer redress.

To the Commission's knowledge, there is little effort devoted to gathering, analysing and publicly reporting on areas where enforcement problems (including coordination problems) arise, what steps are taken to address them and how successful previous initiatives of this kind have been. (PC 2007, p. 199-200)

While Victoria cannot speak for other jurisdictions, the Productivity Commission is referred to the Annual Reports of the Director of Consumer Affairs Victoria for a detailed report of the activities conducted each year to deal with identified problems. Many research studies and reports on market place problems underpin the identification of an appropriate response:

- Consumer Affairs Victoria has undertaken a general consumer detriment survey. Consumer detriment is a high level measure of outcomes for consumers and should be impacted on by consumer protection compliance and enforcement.
- A study of the consumer detriment in the unfair contract terms area has also been completed (applying the broad concept to a specific area).
- Surveys of various industries have been undertaken to review the consumer experience and industry compliance. A practical example of this approach involves the Domestic Building Program. Exploratory research included market research to confirm the type and extent of issues identified by consumers and traders, an audit of compliance with the Domestic Building Contracts Act and trends in related complaints and disputes. It was confirmed that many disputes arise from a lack of clarity in building contracts. As a result the program strategy includes development of a Consumer Affairs Victoria model contract which can be used by traders and consumers. This includes consumer seminars a revised guide to Building and Renovation, improvements to dispute resolution and improved interface with the Victorian Civil and Administrative Tribunal. The results will be evaluated after a period of bedding down.

A further example is Consumer Affairs Victoria's survey of "\$2 shop" operators and suppliers regarding product safety. This identified a general willingness

amongst businesses to comply with the law, but a lack of knowledge amongst businesses of the specifics of the law. This is exacerbated by the diverse cultural backgrounds of these operators. The conclusion of the review was that wholesalers would be a good focus for compliance as they are a smaller group, and generally larger and more professional, and also provide a conduit for information to store operators. In addition, information should be supplied in more relevant languages for store owners and suppliers.

- Consumer Affairs Victoria's Market Monitoring Branch routinely monitors the operation of markets for consumer detriment. For example, the Branch is currently undertaking a research project which aims to gather information about the practices of real estate agents when marketing and selling residential properties in Victoria, as well as conduct an evaluation of these market practices. The key objective of this project is to provide Consumer Affairs Victoria with market based research into industry conduct and practice over two years when residential properties are marketed and sold by real estate agents. In particular, the research will aim to establish whether or not real estate agents are systematically inaccurate when advertising the price of properties compared to the eventual selling price. It will also establish whether particular selling methods are more likely to result in inaccuracy when real estate agents quote a price in advertising.
- Program coordination groups and program managers routinely monitor the operation of specific programs and activity.

9 Empowering Consumers

PRODUCTIVITY COMMISSION DRAFT RECOMMENDATIONS

CHAPTER 11: EMPOWERING CONSUMERS

Draft Recommendation 11.1

When imposing information disclosure requirements on firms, Australian Governments should require that:

- *information is comprehensible, with the content, clarity and form of disclosure consumer tested, and amended as required, so that it facilitates good consumer decision-making; and*
- *complex information is layered, with businesses required to initially provide only agreed key information necessary for consumers to plan or make a purchase, with other more detailed information available by right on request or otherwise referenced.*

Consistent with these principles, reform of mandatory disclosure requirements in financial services should be progressed as a matter of urgency.

Draft Recommendation 11.2

Australian Governments should commission a cross-jurisdictional evaluation of the effectiveness of a sample of consumer information and education measures, and the prospects for improving them. The evaluation should be targeted at high cost measures and/or those that deal with high risk issues for consumers.

Draft Recommendation 11.3

The Australian Government should provide modest additional funding to support:

- *specified research on consumer policy issues, distributed on a contestable basis;*
- *the basic operating costs of a representative national peak consumer body; and*
- *the networking and policy functions of consumer groups.*

Such additional funding should be subject to appropriate guidelines and governance arrangements to help ensure that it is used effectively.

9.1 Mandatory information disclosure requirements

The Victorian Government supports information disclosure requirements that are comprehensible and facilitate consumer decision making. The Victorian Government supports the reform of mandatory disclosure in financial services.

The Productivity Commission recommended two methods for improving mandatory information disclosure requirements to ensure that they facilitate consumer decision making. First, it was recommended that the content, clarity and form of disclosure is consumer tested. Second, that complex information is layered with businesses initially only providing key information necessary for consumers to make a purchase and more detailed information available on request or a later stage.

It is common practice for Consumer Affairs Victoria to conduct pilot testing of information requirements and evaluation reviews of the effectiveness of information disclosures.

An initiative is being progressed for the Uniform Consumer Credit Code Management Committee to address concerns about disclosure requirements in the credit area.

There are concerns to test the current pre-contractual information in the Uniform Consumer Credit Code to ensure that it is providing consumers with a useful tool for making informed decisions when comparing credit products and providers. Investigation of how pre-contractual disclosure in the Code can be improved to assist consumers in making informed decisions about credit is being undertaken.

The research will test the effectiveness of a range of disclosure models for different consumer credit products. The effectiveness of the disclosure models will be tested by conducting comprehension testing, cognitive testing and focus groups discussions

with representative samples of consumers. The effect timing has on the effectiveness of the pre-contractual disclosure information will also be examined. The results of these tests will inform the development of one or more revised disclosure models. It is envisaged the revised disclosure model or models will be simple, easily understood, timely, concise, and cost effective to both the consumer and credit providers.

The Victorian Government is supportive of this initiative and consequently, welcomes the Productivity Commission's recommendations on improvements to information disclosure requirements in the financial services area and more broadly.

9.2 Behavioural change

The Victorian Government reiterates the view made in its initial submission that behavioural change strategies, such as social marketing techniques, should be considered in the policy development process alongside more traditional responses such as information campaigns and regulation. The Victorian Government considers that given the more sophisticated understanding governments now have of what drives consumer behaviour, policies need to more effectively address both economic efficiency and social policy concerns in consumer markets. The Productivity Commission could give the issue of behavioural change, and strategies to effect behavioural change, more consideration in its final report.

The Productivity Commission sees the role of governments in empowering consumers as primarily providing "...information and access to advice about the characteristics of the various products on offer in the market place, as well as about the legal rights and responsibilities of consumers and suppliers" (PC 2007, p. 202).

Given the more sophisticated understanding governments now have of what drives consumer behaviour this seems too narrow a view.

For many years, consumer affairs agencies have relied on the assumption that the more knowledgeable consumers are the more empowered and motivated they are to exercise informed choices. However, with the advent of behavioural economics and a greater understanding of social marketing (used extensively by health promotion and environmental professionals), consumer affairs agencies now understand that merely providing information to consumers and traders will not necessarily change their behaviour. While some consumers will benefit from an information guide on their rights and responsibilities, often alternative and multi-dimensional information or marketing approaches are required.

Consumer Affairs Victoria has recognised the need to focus more on achieving behavioural change rather than just on information provision. This focus involves improving its approach to marketing, information and education programs. Consumer Affairs Victoria also recognises that the saturation of the collective consciousness with marketing messages makes positive behavioural change difficult to achieve. In particular, for even the most dynamic and successful of communications/education programs, the target audience may be aware of the messages being delivered yet still not undertake a real change in behaviour. In the area of credit, for example, many jurisdictions run Christmas debt campaigns to limit over-expenditure during a typically expensive time of year. Despite these education and information campaigns, consumers continue to use debt in escalating amounts almost every Christmas.

Conventional economics assumes that well-informed consumers behave rationally and out of self-interest in market transactions. (McAuley 2007, p. 13) Behavioural economics theories on the other hand, suggest that decision-making is more complicated as it provides an insight into what consumers actually do in markets, rather than what economists believe they should do. In reality, consumers are often irrational, and there are complex motivations behind their actions and behaviours.

The Productivity Commission in its consideration of the insights from behavioural economics thought “The greatest benefit of recent behavioural economics work could be to improve policy in specific areas (such as by improving information disclosure).” (PC 2007, p. 309) From the Victorian perspective, the key message seems to be that merely providing information or a publication will not change consumers’ behaviour.

It is useful to consider whether alternative approaches to those used in the past could achieve more effective behavioural change. Social marketing is one such approach. Social marketing aims to change individuals’ behaviour to achieve a socially desirable goal. It does this primarily through understanding the behaviours that an organisation wants to change, and striking at the barriers that prevent people from changing those behaviours. It commonly relies on a multifaceted approach that simultaneously informs, persuades, and uses incentives and deterrents. Extensive research is used to guide the development of the campaign or policy, which is subject to ongoing monitoring and evaluation.

The Productivity Commission considered the use of social marketing techniques in its Draft Report and outlined some potential drawbacks:

Policymakers’ views about consumers’ underlying preferences may be incorrect and, from a pragmatic viewpoint, they may not work as intended (appendix B) and can be costly (Western Australian Government, sub 99, p 52). (PC 2007, p. 215)

Advocates of social marketing stress the need to base strategies on a sound understanding of the problems, behaviours that exacerbate those problems, and the benefits and barriers to changing those behaviours. The process is “strongly oriented around evidence based decision-making of which research and evaluation are a key part.” (Health Canada 2003, p. 1)

A social marketing approach has the potential to deliver much better outcomes for consumers, since it is based on rigorous research and ongoing evaluation. It can also reduce consumer detriment as a result of voluntary changes among consumers or traders, reducing the need for more explicit regulation.

However, social marketing can be costly. For that reason, social marketing is best suited to problems where:

- it is necessary to change behaviour or improve business practices to reduce consumer detriment
- the consumer detriment is considerable
- behaviours and people’s motivations can be identified and analysed
- it is possible to focus resources on changing a very limited number of behaviours where change will deliver the greatest benefit
- it is possible to identify and target traders, individuals or communities of individuals and convince them of the desirability of change, and

- it is possible to identify and remove the key barriers to change.

9.3 Evaluating education and information campaigns

The Victorian Minister for Consumer Affairs recently initiated the establishment of a National Education and Information Advisory Taskforce to provide expert advice to the Ministerial Council on Consumer Affairs and the Standing Committee of Officials of Consumer Affairs on consumer education issues that require a national and coordinated approach. The Victorian Government supports undertaking a cross-jurisdictional evaluation of the effectiveness of consumer information and education measures and considers this work is within the scope of the National Education and Information Advisory Taskforce.

The Productivity Commission concluded that there was insufficient evaluation of information and education programs used across Australia to be sure about what works best in particular circumstances and thought that there were “...grounds for a more coordinated approach to consumer information and education initiatives...” (PC 2007, p. 216) as suggested by the Australian Competition and Consumer Commission in its submission to the Productivity Commission.

The Victorian Minister for Consumer Affairs recently initiated the establishment of a National Education and Information Advisory Taskforce. The Taskforce provides expert advice to the Ministerial Council on Consumer Affairs and the Standing Committee of Officials of Consumer Affairs on consumer education issues that require a national and coordinated approach. It comprises senior education and information staff from all jurisdictions, including the Commonwealth. One of the Taskforce’s terms of reference is to establish and maintain an accessible bank of research, evaluations, strategies, campaign creative concepts, publications and other information that can assist other states in the development and implementation of their own education and information activities.

The Productivity Commission recommended that a cross-jurisdictional evaluation of the effectiveness of a sample of education and information measures should be commissioned. The Victorian Government supports this recommendation and considers that this work is within the scope of the Taskforce.

9.4 Consumer advocacy

The Victorian Government supports funding at the Commonwealth level for consumer advocacy (Victoria already provides significant funding for consumer advocacy at the state level). However, the recommendations put forward by the Productivity Commission are not a substitute for a National Consumer Council style organisation, as the Productivity Commission suggests.

The recommendations of the Productivity Commission, to support a national consumer body, to commission research and to support networking are worthwhile, but fall short of the ability of a National Consumer Council style organisation to provide a national consumer voice and a countervailing voice to industry in regulatory debates.

In its analysis of consumer advocacy arrangements, the Productivity Commission highlighted the main issue with consumer advocacy as being:

As well as having *opportunities* to contribute to policy making, consumers or their representatives also need to have the *means* – time, money and know-how if they are to make input that is effective. (PC 2007, p. 221)

The Productivity Commission identified a range of existing consumer organisations and highlighted that resourcing can be a major barrier to participation. Many organisations the Productivity Commission identified in the consumer field are small, volunteer-based organisations with limited capability to provide consumer input and are often limited to small areas of activity.

The problem in this area is similar to that which occurred during the debates over tariff reforms in the 1970s and 1980s: the beneficiaries of tariffs were concentrated, while the costs were borne across the economy by individual consumers. This meant that the collective voice for tariff reform was limited.

In many cases, a similar situation arises with consumer issues. For example, licensing schemes can produce benefits for industry groups in the form of limitations on competition. Thus, there is an incentive for industry organisations to advocate for such schemes, while the cost of these schemes is generally borne by consumers across the economy. Presently, there is a limited voice for these consumers on the national stage.

This imbalance can be seen in a number of industries, for example the building sector, where industry associations representing the interests of builders have annual income of many millions of dollars, whereas there are no significant groups like this representing consumer interests. The Builders Collective which claims to speak for consumers is a part time voluntary organisation.

This imbalance can cause problems when governments attempt to seek stakeholder feedback. This is evidenced in the responses to a recent consultation undertaken by the Victorian Government on the development of a motor vehicle lemon law. The submissions (available on Consumer Affairs Victoria's website) are predominantly from producer representatives. There are four submissions from individual consumers who have had significant issues with motor vehicle purchases, a submission from Choice (self funded organisation as the Productivity Commission noted) and from the Consumer Action Legal Centre, which is funded by the Victorian Government to provide advocacy and policy services.

For these reasons, the Victorian Government provides funding support to consumer organisations (for both individual consumer advocacy and for policy work), including:

- Consumer Action Legal Centre
- Tenants Union of Victoria
- Peninsula Community Legal Centre
- Consumer Utilities Advocacy Centre Ltd
- 44 community-based, not-for-profit financial counselling agencies and the peak body, the Financial and Consumer Rights Council Inc
- Housing Action for the Aged Group, and
- many other smaller organisations under community grants program.

The three recommendations of the Productivity Commission in this area are for:

- specified research on consumer policy issues, distributed on a contestable basis;
- the basic operating costs of a representative national peak consumer body; and
- the networking and policy functions of consumer groups. (PC 2007, p. 231)

It would appear that these proposals are put forward as a way of replicating some of the benefits of a National Consumer Council style organisation without actually creating such an organisation. As the Productivity Commission states:

...the mooted benefits of this model [NCC] are not exclusive to it...it should not require the creation of a central bureaucracy to coordinate, and limit duplication of, research efforts. (PC 2007, p. 228-229)

However, it is unlikely that these proposals would produce the benefits that a National Consumer Council style organisation could produce.

9.4.1 Contestable research

The Productivity Commission proposed that rather than funding an organisation such as a National Consumer Council style consumer advocacy body, the benefits could be achieved through the designation of a limited pool of funds to be available in the form of tied grants allocated on a contestable basis.

However, research in general is something that a government consumer agency already undertakes. For example, Consumer Affairs Victoria undertakes research of various types:

- market research on consumer and business understanding of consumer protection legislation
- evaluations of programs and projects, and
- research reports.

The issue with National Consumer Council style advocacy, is not about the quantum of research, but who does it and why. A National Consumer Council style organisation creates an *independent* source of research, information and advocacy on behalf of consumers. Contestable tied grants would essentially be government research and would not provide benefit over and above other forms of government research undertaken either internally or externally contracted.

9.4.2 National advocacy body

The Victorian Government supports the Productivity Commission's recommendation to fund the secretariat of the Consumer Federation of Australia. This will provide a welcome additional voice at the national level.

9.4.3 Networking

The Productivity Commission recommended funding for networking style arrangements to assist in the dissemination of information to organisations. The Victorian Government agrees that this would assist organisations in sharing information and improve developments for advocacy organisations.

9.4.4 A National Consumer Council

The Productivity Commission made a number of statements highlighting “partisanship” as a reason to not fund a National Consumer Council style organisation:

However, it is also important that (publicly funded) consumer advocacy groups focus on the interests of consumers as *consumers*. People have views on numerous matters, including jobs, material living standards, equity, welfare, the environment, and national security, and what balance to strike between these areas where they conflict. Many interest groups seek to represent people’s perspectives on these issues. Generally these issues are not consumer issues per se, even though, at the margin, some bear on people as consumers. (PC 2007, p. 226)

There is also a risk that such a body might become diverted from strict consumer issues. In this context, in addition to its considerable research and advocacy on core consumer issues, the NCC itself has recently ventured into some areas, such as a ‘green bill of rights’ and industry measures to address carbon emissions, that reflect concerns extending beyond consumer policy as such. (PC 2007, p. 229)

While it may be possible to reduce such policy ‘excursions’ through the careful design of governance arrangements and operating guidelines, the difficulties of preventing capture by particular interests or agendas could still be considerable. (PC 2007, p. 229)

In a civil society organisations will comment on all sorts of issues across policy areas. The Productivity Commission — Australia’s premier economic advisory body — will comment on, and even undertake enquiries into, fundamentally social policy issues. Social policy organisations, such as Australian Council of Social Service, will comment on economic issues. Environmental bodies will comment on economic issues. The Commonwealth Treasury will take a lead role in water policy and climate change. All these policy areas interact and interchange with one another.

As stated in the Information Paper provided by Ministerial Council on Consumer Affairs to the Productivity Commission, consumer policy often feeds into other policy areas.

While the Productivity Commission outlined the “risk” of this occurring, it does not explain why it thinks this is a considered a problem, other than to label this as “partisanship”. It is not clear why having a consumer advocacy organisation also advocating in broader areas affecting consumers is “partisan”. Furthermore, different organisations will have different views of the definition of “consumer policy”. Some may take a narrow definition and some may take a broad definition, this diversity of views is one of the benefits from having a broad range of stakeholders.

The Productivity Commission also argued it will be inefficient and costly to establish a National Consumer Council style organisation:

Further, establishing such a body would represent a major change that, as well as being costly, could entail some risks. In particular, there would be a loss of variety of perspectives were the body to crowd out existing consumer groups in policy processes. Indeed, an NCC-style body could find it very difficult to balance and adequately represent the diverse, and at times conflicting, interests of different sub groups of consumers. (PC 2007, p. 229)

The United Kingdom’s experience does not suggest a National Consumer Council style body would “crowd out” other consumer agencies. Rather, it is likely to be able to better represent the broader spectrum of consumer interests, particularly the interests of vulnerable and disadvantaged consumers.

10 Vulnerable and Disadvantaged Consumers

The Victorian Government supports consumer protection services focussed on vulnerable and disadvantaged consumers. The recommendations put forward by the Productivity Commission, however, will do little to assist vulnerable and disadvantaged consumers. If they were implemented in Victoria, they would weaken the protections that now apply.

The Productivity Commission outlined that some recommendations of its report "...should be of particular benefit to vulnerable and disadvantaged consumers (such as those relating to credit market reform, unfair contract terms, improved access to redress, more user-friendly disclosure statements and enhanced resources for legal aid, financial counselling and advocacy)." (PC 2007, p. 233)

The Victorian Government agrees that some of the Productivity Commission's draft recommendations could provide benefits for vulnerable and disadvantaged consumers in Victoria. In particular, those relating to improved access to redress, more user-friendly disclosure statements and enhanced resources for legal aid, financial counselling and advocacy (although the Victorian Government does not believe that the Productivity Commission has gone far enough in its recommendations related to consumer advocacy).

It should be noted that the Productivity Commission's recommendation to strengthen credit market regulation through requiring all finance brokers and other credit providers to be members of an approved alternative dispute resolution scheme has already been adopted in Victoria. Consequently, there are no additional benefits to Victorian vulnerable and disadvantaged consumers from this recommendation.

However, the Victorian Government considers that some of the significant recommendations in the Draft Report will lower consumer protection in Victoria, actually making vulnerable and disadvantaged consumers in Victoria worse off.

The Productivity Commission recommended that the new national generic consumer law should be based around the consumer protection provisions of the Trade Practices Act. As discussed previously, there are a number of provisions in the Victorian Fair Trading Act that are not in the Trade Practices Act. One of the missing protections – door-to-door selling – the Productivity Commission highlights as an example of the role played by the generic consumer law in protecting vulnerable and disadvantaged consumers.

The adoption of the existing Trade Practices Act as the model for the new national law will lower consumer protection in Victoria. Consequently, vulnerable and disadvantaged consumers would be worse off if this recommendation is implemented. The Victorian Government encourages the Productivity Commission to recommend adopting a 'best-of-breed' law, as discussed earlier in this submission.

It is acknowledged that the Productivity Commission's unfair contract terms recommendation may provide benefits for vulnerable and disadvantaged consumers in the States and Territories that are currently not covered by unfair contract terms legislation. However, the version of unfair contract terms legislation recommended by the Productivity Commission will lower consumer protection in Victoria, actually making vulnerable and disadvantaged consumers in Victoria worse off.

Further, there are recommendations that the Productivity Commission has not made that while they would improve outcomes for consumers generally, they would be of particular benefit to vulnerable and disadvantaged consumers. For example, the Productivity Commission did not recommend the development of a general provision against unfair practices.

11 Other Considerations for the Future Framework

11.1 *Trans-Tasman harmonisation*

The Victorian Government supports trans-Tasman harmonisation.

If there is to be trans-Tasman harmonisation it should be on the basis of best practice legislation. There are lessons that can be learnt from New Zealand. For example, consideration could be given to the New Zealand Consumer Guarantees Act 1993.

11.2 *E-commerce and m-commerce*

The Victorian Government acknowledges the Productivity Commission's consideration of e-commerce issues. However, the Productivity Commission did not make any recommendations. Victoria has been active in considering the implications of e- and m-commerce issues for consumers having led a national working party of consumer agencies on these issues for several years. The Victorian Government considers that the current national approach of relying on OECD e-commerce guidelines is not adequate and the law needs to specify minimum requirements for trading.

The Productivity Commission in its Draft Report examined the development of new markets in e-and m-commerce and considered that the markets are adapting appropriately to new issues arising. Nonetheless, the rise of these forms of commerce do raise issues for existing consumer protections. The Victorian Government's initial submission highlighted a number of these issues (refer Victorian Government 2007b). For example, the rise of online auction sites has made it difficult for consumers to distinguish what is "in trade or commerce". In an offline market it is relatively easy to distinguish between a professional business operating in trade or commerce and a private sale outside of remit of the Fair Trading Act.

These issues require continual monitoring and adaptation of laws to address issues as required. The Victorian Government considers e- and m-commerce issues to be an important consideration in the drafting of the new national consumer protection law.

11.3 *Small business*

The Victorian Government supports the Productivity Commission's intention to harmonise legislation to reduce compliance costs for businesses. However, it is imperative that enforcement measures remain effective under the proposed new national generic law.

The Victorian Government welcomes the Productivity Commission's recognition of the role that small business has as a consumer of goods and services, in addition to being a supplier to consumers.

In its Draft Report, the Productivity Commission has not made any recommendations specific to small business other than to include all businesses as consumers in the coverage of its proposed protections for consumers.

The Victorian Government supports the Productivity Commission's intention to increase harmonisation and consistent legislation between jurisdictions to reduce compliance costs for business. However, the Victorian Government is concerned that

its current enforcement measures should remain effective under the proposed wider coverage of a national generic law.

12 Quantifying the Net Benefits

The Victorian Government recognises the Productivity Commission's attempt to quantify the potential benefits from reform of the consumer policy framework, based on the consumer detriment survey undertaken by Consumer Affairs Victoria. While the modelling work is commendable, the results are largely driven by the initial assumption of a 5 per cent decrease in the incidence of consumer detriment. The Victorian Government does not agree that the proposed model will have such an effect on the incidence of consumer detriment. An alternative model of stronger joint cooperative administration of an improved national generic law would have a greater impact on reducing consumer detriment and yield larger net benefits.

The Productivity Commission has undertaken extensive modelling of the recommendations put forward in its Draft Report. This modelling is summarised in a chapter of the Draft Report, and is supported by a technical appendix, as well as a copy of the model published online with some further documentation. This work is welcomed, however, as with all such modelling the outcomes are dependent on the assumptions fed into the model.

The Productivity Commission estimated that its proposed reform package would provide a net gain to the community in the range of \$1.5-4.5 billion a year in today's dollars.

The driving assumption for the model is that the recommendations put forward in the Draft Report will result in a five percent reduction in the incidence of consumer detriment resulting from the reform package. The Victorian Government notes, however, that:

- the modelling makes no connection between specific elements of the reform package and assumed impact of the package
- the proposed enforcement regime is not likely to improve enforcement effort and is thus unlikely to produce the benefits assumed to be produced, alternative models, such as cooperative enforcement of 'best-of-breed' uniform national law are likely to produce greater benefits, and
- the modelling proposed modest benefits from harmonisation per se.

The Productivity Commission does not model alternative proposed regulatory regimes. In particular, a one-law (based on 'best-of-breed'), multiple-regulator regime, which is considered likely to generate greater detriment reductions.

12.1 No causal relationship between package elements and benefits

The Productivity Commission stated that it does not apportion benefits to specific reform elements. Similarly, it does not provide international evidence of the results of similar reform programs conducted elsewhere. There is no evidence presented of what aspects of the package deliver the assumed future percent reduction in the incidence of consumer detriment.

It is not clear how the package of reforms proposed by the Productivity Commission translate to improved consumer outcomes. The main thrust of the Productivity Commission's Draft Report is on reducing unwarranted variation between

jurisdictions. While this may produce some limited benefits for business, it would not produce substantive changes to consumer detriment.

The proposed legislative framework suggested by the Productivity Commission would in many cases reduce consumer protections.

On enforcement, given the nature of the current enforcement system, with a national focus at the Commonwealth level and States and Territories undertaking most of the day-to-day consumer protection work, it is not obvious that centralisation of this enforcement activity would produce net benefits.

12.2 Enforcement

Development of a single consumer protection regime for all Australian jurisdictions would impact on compliance costs for both business and government.

While a single system may reduce compliance costs for business, the particulars of how it is done will impact on how effective it is and whether it produces net benefits or costs. There is no particular theoretical basis to show how *qualitatively* such a system delivers *better* policy. Australia has traditionally opted for a model of *competitive federalism* – where States and Territories have the opportunity to use different measures to address universal consumer affairs problems. States and Territories can compare the effectiveness of policy enforcement regimes and modify their programs accordingly. Many of the competitive aspects of this process would be lost in moving to a single system of enforcement.

The benefits derived from moving to a single enforcement regime will be dependent on the nature of a national law, the institutional arrangements and the enforcement powers and processes accorded to the new regime.

Minimum standards of enforcement will be critically dependent on funding. Current (State and Territory) enforcement regimes are a balance between responding to *localised* cases of consumer detriment (for example, redressing the actions of a single local business in a regional area) and more *systemic* problems (for example, product safety problems caused by a nationwide business). Were funding for a single nationwide entity to be *insufficient*, it is likely that this might result in a reduction in local investigations relative to nationwide investigations.

12.3 Transition costs

The Productivity Commission noted that transition costs will be incurred moving to a national system. In the modelling, this is assumed as legal and administration costs that are estimated at a cost of \$25 million.

As with consumer detriment, there are tangible and intangible aspects to transition costs:

- tangible costs – cost of staff employed in policy making and enforcement, and
- intangible costs – uncertainty relating to how legislation will be drafted, how the courts will interpret new legislation and how the national regulator enforces the new regime.

In the Productivity Commission's modelling, it appears that only the *tangible costs* are reflected. The shift from nine jurisdictions with separate generic laws and many

industry based acts and regulations to a single generic law would give rise to many issues. These include:

- a significant degree of uncertainty for business
- a large short-term compliance burden for business and government;
- increases in consumer detriment due to the diverted focus of agencies involved in transition, and
- long timelines for implementation.

It would be appropriate for the Productivity Commission to better reflect these intangible costs in its modelling.

12.4 Alternatives

One of the key assumptions underpinning the one-law, one-regulator model is that the package of reforms would deliver a five per cent reduction in the incidence of consumer detriment. In its modelling, the Productivity Commission cited a similar assumption made in an English model. However, this was based on a narrower set of reforms and in the context of a very different regulatory and political regime. No evidence supports this assumption or links it to the elements of the package.

The Productivity Commission has modelled the impact of its proposed reforms. It has not modelled alternative regimes which are considered likely to be associated with larger reductions in detriment and hence, likely to produce greater net benefit to the community.

The work presented by the Productivity Commission highlights that a greater net benefit for the community is likely to come from enhancing the generic law and compliance by business with it. This will result in lower detriment. The gains from institutional change (interpreted narrowly by the Productivity Commission as transferring functions to the Commonwealth) appear to be quite modest. For example, the Productivity Commission estimates that reduction in business compliance costs of only \$58-168 million would be achieved as a result of its reforms.

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