

**PRODUCTIVITY COMMISSION REVIEW OF
AUSTRALIA'S CONSUMER POLICY
FRAMEWORK: DRAFT REPORT**

NSW GOVERNMENT RESPONSE

April 2008

The Productivity Commission's draft report has made 28 separate recommendations and raised a number of issues for further comment. This submission covers key issues of interest to NSW and does not include responses to every recommendation.

The body of the submission refers to key Productivity Commission recommendations in relation to a national generic consumer law (chapter 4 of the Productivity Commission report) and industry specific consumer regulation (chapter 5 of the Productivity Commission report). Additional information and commentary are set out in attachments.

A new national generic consumer law

(Productivity Commission Recommendations 4.1, 4.3, 4.4)

On 26 March 2008, the Council of Australian Governments (COAG) endorsed enhanced national approaches to improve the consumer policy framework. COAG also agreed to the Commonwealth assuming greater responsibility for regulating product safety.

NSW supports the COAG decision and agrees with the Productivity Commission that a more nationally coherent consumer policy framework is justified, because in national markets, variations in consumer law can result in higher compliance costs and inequitable consumer protection.

NSW also agrees that there should be a new national generic consumer law and that this national generic consumer law should be based on the consumer protection provisions of the *Trade Practices Act 1974*, incorporating best practice provisions in other existing fair trading laws.

NSW agrees with the Productivity Commission's finding that a transfer of enforcement responsibilities to the Commonwealth would be problematic at this time, and that further investigation of these obstacles and risks is required. In fact, given the problems, NSW could not support a transfer of enforcement responsibilities to the Commonwealth at this time.

The main problems that NSW considers would need to be overcome before considering any transfer of enforcement responsibilities to the Commonwealth include:

- **Service delivery:** The NSW Office of Fair Trading has a service delivery focus and strong local presence and has 24 Fair Trading Centres as well as 68 other service outlets in regional and remote NSW (*see attachment A for further information on OFT's service delivery role*). Any change in enforcement mechanisms would have to maintain service delivery at a local level and should not result in any reduction in services provided to individual consumers.
- **Transfer costs:** The transfer of enforcement responsibilities and resources to the Commonwealth regulator would be a complex exercise. It is not yet clear whether the benefits of a single enforcement regime outweigh these transfer costs.
- **Transferring staff:** A transfer of enforcement responsibilities to the Commonwealth regulator may also involve a transfer of Fair Trading staff. However, there could be

difficulties in ‘splitting’ these staff between Commonwealth and State enforcement activities. The Fair Trading Act gives the Commissioner power to advise and educate consumers; take action for remedying infringements of , or for securing compliance with, all legislation administered by the Minister for Fair Trading; receive, investigate and refer complaints; and examine and research laws and matters affecting consumers. Staff carry out these functions with respect to both generic consumer protection laws and industry specific laws. This includes staff in the Fair Trading Information Centre who deal with consumer and trader enquiries; staff in metropolitan and regional Fair Trading Centres who deal with enquiries, complaints, registration and licensing procedures; inspectors, investigators, legal officers, policy officers, education and information officers. There are linkages between service delivery staff and enforcement staff which would be adversely affected by transfer of functions to the Commonwealth. For example, market intelligence gained through complaint handling and inspection services plays an integral role in informing compliance activity.

- Linkages between the generic law and industry specific laws: Existing linkages between different pieces of NSW legislation provide the regulator with a range of enforcement options and enhance the substantive outcomes of compliance activity. For example, section 66 of the NSW Fair Trading Act empowers the regulator to seek an injunction restraining conduct which is in contravention of industry specific legislation administered by the Minister for Fair Trading, section 64A of the Fair Trading Act allows the regulator to suspend a licence under any legislation administered by the Minister and section 191 of the *Property, Stock and Business Agents Act 2002* allows contravention of other legislation administered by the Minister to be grounds for disciplinary action under that Act. In addition, business misconduct often involves a series of offences, and the ability to take action under the generic law as well as other relevant State statutes means the regulator can tailor prosecution action to achieve the best result. Such linkages would have to be maintained or replicated in any new arrangements to ensure that effective enforcement options are maintained. (*Case studies at [attachment B](#)*).
- Access to consumer tribunals and small claims courts: NSW supports the Productivity Commission’s finding that consumers and small firms should maintain access to State and Territory consumer tribunals and small claims courts (see attachments A and E for further information), acknowledging that the cost of pursuing legal action through the Federal Court under the Trade Practices Act is expensive and time-consuming and therefore not a realistic option for most small firms.

Industry specific consumer regulation

(Recommendation 5.1)

COAG is already overseeing a significant regulation review and reform program through the COAG Business Regulation and Competition Working Group. The Working Group is working to identify priority reform areas and assessing the regulatory burden in each jurisdiction on an ongoing basis. Unnecessary and redundant regulations will be addressed through specific actions agreed by COAG, as well as strengthened gate-keeping and regulation assessment processes and coordinated reform actions across jurisdictions.

COAG has now identified trade licenses as a regulatory hotspot and will review industry specific consumer regulation as part of its examination of possible national systems for trade licensing.

In addition, occupational licensing has been through various regulatory reform processes over the last 15 years, including a review of partially registered occupations and National Competition Policy legislative reviews. Regulation in NSW has also recently been the subject of statewide review processes such as inquiries by the Independent Pricing and Regulatory Tribunal and the Small Business Regulation Review Taskforce. In addition, NSW legislation is subject to regular statutory review via inbuilt review provisions and the requirements of the NSW Subordinate Legislation Act.

These existing initiatives are expected to identify and resolve the issues raised in the Productivity Commission report.

NSW notes that recommendation 5.1 is based on the assumption that regulation is more likely to be unnecessary if it occurs in only one or two jurisdictions and the Commission's statement (on page 84 of Volume 2) that unless such regulations are evidently needed to meet region-specific circumstances, there should be a starting presumption that they could be repealed without adversely affecting consumers.

NSW does not accept the Commission's assumption or presumption. Given the significant difference in population between the jurisdictions, it is possible that problems may manifest themselves first in a larger jurisdiction given the size and characteristics of the population. The nature and size of the problem in that jurisdiction may require a regulatory response which may not be warranted in a smaller jurisdiction.

For example, in relation to the regulation of strata managers in NSW, the population density of NSW, particularly in urban areas, sets it apart from other jurisdictions. There are currently around 59,275 strata schemes in NSW. Accordingly, it is likely that problems may more readily arise with strata managers in NSW than other states.

It is also possible that some jurisdictions with more limited enforcement activities would not enact particular regulation because of their lack of resources to enforce it.

With regard to the specific findings set out in the Commission's draft report, it should be noted that Table 5.1 (p.87 of Volume 2) is inconsistent with information obtained by COAG in its Skills Shortage Project. COAG requested Senior Officials to implement full and effective mutual recognition of occupational licences for six priority trades (electricians, plumbers, carpenters and joiners, bricklayers, refrigeration and air-conditioning mechanics and motor mechanics) by 30 June 2007 and for all other vocationally trained licensed occupations by 31 December 2008.

The Skills Shortage Project has identified the current "state of play" in relation to the regulation of the trades. The following table corrects the information in Table 5.1 of the draft report by listing those occupations that are regulated in more than 1 or 2

jurisdictions. (Motor vehicle repairers are not included on this list, but are licensed in NSW and WA and regulated in terms of certain transaction requirements in ACT)

OCCUPATION	NO. OF JURISDICTIONS	RELEVANT JURISDICTIONS
Concreting	3	NSW,QLD,SA
Metal Fabrication	3	NSW,QLD,SA
Stonemasonry	3	NSW,QLD,SA
Fencer	4	NSW,VIC,QLD,SA
Roof Tiler/Slaters	4	NSW,VIC,QLD,SA
Kitchens, Bathrooms & Laundries	4	NSW,VIC,QLD,SA
Plasterers (wet, dry and solid)	4	NSW,VIC,QLD,SA
Glazing	4	NSW,VIC,QLD,SA
Wall and Floor Tiling	4	NSW,VIC,QLD,SA
Waterproofing	4	NSW,VIC,QLD,SA
Pools and Spas	5	NSW,VIC,QLD,SA,ACT
Refrigeration and Air-conditioning mechanic	8	NSW,VIC,QLDWA,SA,TAS,ACT,NT

Finance Broking and Consumer Credit

(Recommendation 5.2)

On 26 March 2008, COAG agreed in principle to the Commonwealth assuming responsibility for regulating mortgage credit and advice, margin lending and non-deposit taking institutions. NSW supports this decision.

COAG also agreed that States will retain interim responsibility to regulate mortgage credit and advice and mortgage broker activities. This decision will allow NSW and other states to continue with the existing process to implement finance broking legislation in the interim.

An exposure draft Finance Broking Bill was released in 2007 for public consultation. The draft Bill encompasses a licensing scheme which includes a requirement for mandatory membership of an ASIC approved alternative dispute resolution scheme, as recommended in the draft Productivity Commission report. The consumer protection regime in the Bill has been developed specifically for broking, in consultation with the broking industry, and NSW hopes that the work already done to develop this scheme will assist the Commonwealth in developing its regulation of this area.

Energy

Attachment C sets out the NSW response to recommendations 5.3, 5.4 and 9.2.

Home Building

Attachment D sets out the NSW response to recommendation 5.5 and provides details of the NSW consumer protection system for home building.

Small claims courts and tribunals

Attachment E sets out the NSW response to recommendation 9.3 and provides additional information on the NSW Consumer, Trader and Tenancy Tribunal.

Additional comments

Attachment F provides additional NSW comments on the draft report.

Attachment A – Consumer protection service delivery in NSW

The Office of Fair Trading has a staff of 1,076 and delivers its services through 24 Fair Trading Centres and 68 other service outlets in regional and remote NSW. During 2006/07 there was a total of over 6.5 million requests for service from consumers and traders, including over 2.5 million website sessions, 1.25 million phone calls, nearly 240,000 counter enquiries, 900 public seminars and information sessions delivered to 27,000 people, and 34,052 formal disputes. In the same period there were 41,000 compliance activities, including 28,620 inspections, 3,280 investigations and 440 prosecutions conducted.

Fair Trading's local relationships, rapid local response and marketplace education all result in Fair Trading being considered a community representative rather than a "government" agency.

The services offered through the Office of Fair Trading's decentralised environment are not single contact transactions. For example, where consumers and traders have not been able to resolve a dispute, a complaint may be lodged with Fair Trading and officers then attempt to informally negotiate between the two parties to find a resolution that is mutually acceptable to both parties. The following case study illustrates the service provided by Fair Trading:

Case study – The cancelled cruise

The consumers booked a Pacific Islands cruise through a travel agent, departing Sydney on 19 February 2008. They had paid in full by the specified deadline. On 15 February the agent notified them that the cruise company had cancelled their booking with no explanation.

The matter was brought to Fair Trading's attention on 18 February. An officer immediately contacted all parties and established that a former employee of the travel agency had taken the bookings and paid the initial deposit to the cruise company, but not the balance of monies owed. The booking had been cancelled and when the agent tried to re-book in early January the cruise was fully booked. It was not until the consumers approached the travel agency about the delay in receiving their tickets that they were informed that the cruise company had cancelled their booking. They were not informed that the agency had failed to make the final payment.

The consumers had made all necessary preparations for their departure, being quite unaware of the events that had taken place. Once their complaint was lodged, Fair Trading contacted a senior official within the cruise company who identified a last minute cancellation. The consumers were allotted this booking. After Fair Trading spoke with the franchisee of the travel agency, the consumers were offered \$500 onboard credit.

This outcome could not be achieved under a less responsive and more formal complaint handling or alternative dispute resolution process. For this reason, NSW considers, in relation to recommendation 9.2, that the complaints handling functions provided by the Office of Fair Trading and other State/Territory agencies provide the most cost-effective means of alternative dispute resolution for general, non-specialised consumer transactions.

During 2006-2007 Fair Trading received over 34,000 complaints. Of these 96% were finalised within 30 days of receipt, and despite the fact that there is no compulsion involved, over 85% were successfully resolved.

If either party is reluctant to negotiate, the consumer has the option of making a claim to the Consumer, Trader and Tenancy Tribunal. Although the Tribunal is a determinative body, the legislation provides for alternative dispute resolution whereby the Tribunal is required to use its best endeavours to bring the parties to a settlement prior to making orders.

Once a consumer has reached this stage, the Tribunal supplies them with a valuable service by providing an accessible, efficient, effective, informal, expeditious and affordable avenue to resolve disputes about the supply of goods and services and issues about residential tenancy. Parties are generally not legally represented in the Tribunal.

The Tribunal receives over 64,000 applications annually, in eight divisions, being Tenancy, General (consumer), Home Building, Residential Parks, Strata & Community Schemes, Motor Vehicles, Commercial and Retirement Villages. Currently 44% of applications are lodged online via the Tribunal's website.

Of the 64,000 applications, in the reporting period 2006-2007, 68% were finalised within 35 days of lodging the application and without the cost of legal representation. The Tribunal finalised 78% of all applications either before or at the first hearing. The Tribunal is providing an inexpensive and expeditious outcome for NSW consumers and traders.

The Tribunal delivers its services across the entire State. In the 2006-2007 financial year close to 80,000 hearings were held in over 95 locations in metropolitan and regional NSW, with an average wait of only 24 days between lodging an application and the first hearing being listed.

The Tribunal's legislative obligation requires it to use its best endeavours to bring parties to a settlement before it finalises the matter by making orders. Between January and August 2007 almost 80% of all matters with both applicants and respondents attending and that were referred to the Tribunal's Deputy Registrar Conciliators were settled by way of a mutually agreed settlement without the need for a hearing before a Tribunal member. Where a full settlement could not be reached the Deputy Registrar Conciliators were successful in partially settling the matters through the conciliation process, significantly reducing the time spent hearing the matter. This result is of great benefit to the Tribunal's clients as they both have ownership of the outcome and it again demonstrates the Tribunal's efficiency and commitment to assisting legally unrepresented people to resolve their disputes at a low cost.

There is no conflict of interest in the Consumer, Trader and Tenancy Tribunal resolving disputes and its administrative arm being the Office of Fair Trading. The Tribunal is established under separate legislation and decisions are made by independent statutory officers. Additionally, the early intervention model of resolving disputes

adopted by Fair Trading ensures that only appropriate disputes are referred to the Tribunal. Accordingly, the principles of proportionality are embedded at every level of Fair Trading's continuum of dispute resolution services.

NSW notes the Commission's interest in the question of whether a regulator should also be the dispute resolution body. The following case study illustrates the approach taken in NSW.

Case study – Home Building

Under the Home Building Act 1989, complaint resolution and disciplinary action are two distinctly different but related processes.

The complaint resolution process is consumer focused and is designed to provide complainants with an effective and inexpensive way of resolving disputes with licensed contractors. Most building complaints are lodged with or dealt with in the first instance by Fair Trading Centre staff. Those matters not resolved through this process are forwarded to either the Home Building Service (a business unit of the Office of Fair Trading) or referred to the Consumer, Trader and Tenancy Tribunal.

The disciplinary process is contractor focussed and often commences following the completion of the dispute resolution process. It involves the use of a range of compliance sanctions of sufficient magnitude to effectively regulate the residential building industry and to control the performance of licence holders.

The disciplinary process plays no part in the dispute resolution process and has no impact on the quantum of redress achieved by consumers. The consumer has no role in the disciplinary process. Disciplinary action is to maintain minimum standards in the residential construction industry and to modify the behaviour of contractors who fail to meet and maintain those standards.

The Home Building Service carries out the disciplinary process and the Commissioner for Fair Trading takes disciplinary action. The Commissioner's decisions are subject to review by the Administrative Decisions Tribunal.

Attachment B – Litigation Case Studies

Case studies where only the Fair Trading Act could provide an effective enforcement outcome:

- 1. The owner of a caravan park engaged in conduct that was in breach of his obligations under the Residential Parks Act 1998. His tenants took action in the Consumer, Trader and Tenancy Tribunal and the Office of Fair Trading prosecuted him for offences under the Act. The owner continued the misconduct. The only option was to seek an injunction under section 66 of the Fair Trading Act and orders that the owner comply with the Residential Parks Act.*
- 2. Unlicensed motor dealers were prosecuted under the Motor Dealers Act 1974. They continued the unlicensed trading. The only option was to seek an injunction under section 66 of the Fair Trading Act and orders that the conduct in breach of the Motor Dealers Act cease.*

Case studies where prosecution action has been taken under both an industry specific statute and the Fair Trading Act. The Fair Trading Act offences are used when elements of the misconduct may not be in contravention of the industry specific legislation but are in breach of the generic law.

- 1. A licensed swimming pool builder was convicted of breaches of the Home Building Act for receiving an excessive deposit (10% instead of the statutory 5%) and carrying out residential building work without a contract of insurance. The builder was also convicted under the Fair Trading Act for making a false and misleading representation. He had told the consumers that the local council would not approve a concrete pool and convinced them, against their wishes, to build a fibreglass pool. The local council had made no such decision.*
- 2. An unlicensed motor dealer was convicted under the Motor Dealers Act of several counts of unlicensed dealing and odometer interference. The dealer had falsely advertised cars as if they were for private sale, had only one owner, were registered, had a low odometer reading etc, and was also convicted under the Fair Trading Act for making false representations that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or particular previous use.*
- 3. A licensed motor dealer who displayed second-hand cars for sale with notices that falsely stated no statutory warranty applied (thus misleading potential purchasers into thinking the dealer was not obliged to repair or make good any defect which may exist or occur in the car) was convicted under the Fair Trading Act for making a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. He was also found guilty of breaches of the Motor Dealers Act as he had not made the required entries in his register or used the correct forms.*
- 4. A finance broker advertised personal loans and other finance, took details from prospective borrowers over the phone, subsequently advised them that the loan had been approved and demanded a loan fee of \$300-\$500. The loans were not advanced and he refused to refund the fees. He was convicted of multiple breaches of the Consumer Credit Administration Act for not entering into a finance broking contract and for accepting a commission without securing the credit. The court ordered refunds as provided by the Act. The finance broker was also convicted under the Fair Trading Act for falsely representing that services have approval or benefits they do not have and for accepting payment without intending to supply services.*

5. *An electrical goods wholesaler sold non-genuine branded miniature circuit breakers marked with the regulatory compliance mark to a retailer. As the wholesaler is not authorised to use the regulatory compliance mark he was found guilty of a breach of the Electricity Safety Act. He was also convicted of breaches of the Fair Trading Act for falsely representing that the goods were a particular brand and were approved by Standards Australia.*

Attachment C - Energy services

(Recommendations 5.3, 5.4, 9.2)

The NSW government supports national energy reform and is working with other jurisdictions to develop a single national regime for consumer protection in energy under the Ministerial Council on Energy.

However some of the recommendations of the Draft Report are inconsistent with the direction of the current reform process and are not supported by NSW. In particular, the Draft Report is critical of attempts to maintain jurisdictional controls over retail price regulation, alternative dispute resolution and service performance standards.

As part of the national energy reform process all jurisdictions have agreed that retail price controls for energy will remain a matter for decision by each jurisdiction. In addition, jurisdictions have agreed that the ongoing role for price caps as a protection for consumers will be considered by each jurisdiction once the Australian Energy Market Commission (AEMC) has reviewed the effectiveness of competition in each market. In response to the Owen Inquiry, the NSW Government announced in December 2007 that it will retain retail price caps as an important consumer protection measure until at least 2013 or until AEMC's review demonstrates effective competition.

In noting the proposal to remove retail energy price caps, the report argues that customers who stay on the regulated price are failing to capture savings available to them. Research in the UK has found that some customers are paying as much as 30% higher for energy and that many customers find it difficult to choose the most appropriate energy product in the competitive market.

The Draft Report also argues energy price caps deny benefits to consumers by preventing 'the flexibility needed to facilitate interval metering or other demand management initiatives'. However, the Review does not take into account the sophisticated price regulation frameworks that have been developed. For instance, EnergyAustralia has installed over 300,000 interval meters and is charging 90,000 customers under a regulated time-of-use tariff.

Energy and Water Ombudsman

The NSW Government and the other jurisdictions on the Ministerial Council on Energy have not proposed establishing a single energy Ombudsman at this stage. Instead the focus has been on ensuring the regulatory framework moves to the national level in an ordered manner. It should be noted that the Energy and Water Ombudsman of NSW also provides services to customers of Sydney Water and Hunter Water but there is no existing process to move to national regulation of metropolitan water utilities.

Attachment D - Home building sector

(Recommendation 5.5 – better consumer protection for those having a home built or renovated)

Alternative dispute resolution

The draft report notes at page 100 that NSW is one of the jurisdictions where sector specific ADR bodies exist for the home building sector. An early intervention dispute resolution service has been provided by the Office of Fair Trading since February 2003 following the establishment of the Home Building Service.

The operation of the dispute resolution service initially involves an attempt to resolve the dispute by Fair Trading Centre staff. In 2006/07 of the 6,112 complaints received by Fair Trading around 2,251 or 36% of disputes were resolved at this stage. Of the 2,517 complaints referred to the Home Building Service, 1,784 were subject to site inspections, of which 1,533 or 86% were resolved. The remaining complaints were referred to the Consumer, Trader and Tenancy Tribunal or other agencies, or were dealt with as disciplinary matters against licence holders.

The early intervention dispute resolution service has reduced the volume of building complaints going to the Consumer, Trader and Tenancy Tribunal by approximately 30%.

Disciplining builders

The NSW *Home Building Act 1989* provides ample scope for the de-registration of builders who do not meet appropriate performance standards. The Act provides that where the Commissioner for Fair Trading is satisfied that any ground on which disciplinary action may be taken against a builder has been established the Commissioner may suspend a licence or cancel a licence and disqualify the builder, either temporarily or permanently, from being the holder of a licence or a member of a partnership, or an officer of a corporation that is the holder of a licence.

The grounds for taking disciplinary action against a builder include that the builder is not entitled to hold a licence or is not a fit and proper person to hold a licence and is guilty of improper conduct. Improper conduct by a builder includes a breach of a statutory warranty. The statutory warranties contained in the Act are implied in every contract to do residential building work and include that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract; and that all materials supplied by the builder will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new; and that the work will be done in accordance with, and will comply with, the Home Building Act or any other law; and that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time.

In addition, the legislation requires that before renewing a licence the Commissioner must be satisfied (among other matters) that the builder is not subject to any order of the Consumer, Trader and Tenancy Tribunal that has not been satisfied within the period required by the Tribunal; and is not the subject of what the Commissioner

considers to be an unreasonable number of complaints or formal cautions or penalty notices or insurance claims.

The following statistics indicate the extent to which the NSW regulator has exercised the disciplinary powers provided by the Home Building Act. During the financial years 2004/05, 2005/06 and 2006/07, the Office of Fair Trading undertook the following:

- 158 disciplinary hearings which resulted in:
 - 32 licence disqualifications
 - 2 licence suspensions
 - 62 monetary fines totalling \$363,000;
- the cancellation of 814 licences due to Licensing Branch compliance actions, such as licensees becoming insolvent, failing to comply with a Consumer Trader, and Tenancy Tribunal Order, or lodging a fraudulent application;
- 105 licences were cancelled following 'Operation Ambrosia', the Independent Commission Against Corruption's investigation into the use of fraudulent documentation to obtain building licences; and

In addition to the above, licence holders are also subject to compliance action as part of Fair Trading's yearly compliance operations. As a result of field visits and site inspections by HBS building investigators during the period 1 July 2004 to 31 December 2007, 767 penalty infringement notices were issued for breaches of the Home Building Act 1989, resulting in fines totalling \$495,500.

Home warranty insurance

The home warranty insurance scheme is an integral component of the NSW Government's consumer protection package for homeowners having building work undertaken in this State. Most insurers withdrew from the home warranty insurance market after the collapse of HIH insurance in 2001 and the 11 September 2001 attacks on the United States.

The current home warranty insurance scheme was put in place in 2002 and is designed as a last-resort rescue mechanism where a builder has become insolvent, died or disappeared and is unable to honour a responsibility for ensuring that residential building work is properly and adequately performed or to commence or complete a building contract or return and rectify defective work.

The Government has introduced a range of measures to protect homeowners' interests including mandatory critical-stage inspections for all classes of buildings; early intervention dispute resolution by the Office of Fair Trading, enhanced mandatory contract provisions requiring compliance with the Building Code of Australia, the provision of a consumer guide to homeowners, and the inclusion of a check list and cooling-off period.

A public register of builders and trade contractors has been set up providing on-line information about builders and other licensees so homeowners can assess the background of those with whom they intend dealing.

Where dispute resolution cannot take place because of the death, disappearance or insolvency of the builder, the home warranty insurance scheme provides additional protection such as a minimum cover of \$300,000 for a period of six years for structural defects and two years for non-structural defects. Cover is also provided for loss of deposit and completion costs.

As of 30 September 2007 some 1,100 claims had been lodged under the scheme with over \$12 million having been paid to claimants and a further \$7 million set aside for open claims.

In 2002, policies were offered by only two insurers. There are now five insurers providing home warranty insurance and another providing specialist cover for owner-builders, thereby addressing difficulties previously faced by builders in obtaining insurance and reducing waiting times. The increased competition has also resulted in reduced premiums.

The New South Wales Government through the establishment of the Home Warranty Insurance Scheme Board has also implemented an effective governance regime for home warranty insurers. The Scheme Board has overseen the development of an industry deed and amended conditions of approval for insurers requiring compliance with market practice and claims handling guidelines as well as a complaint management and dispute resolution system and procedures for the collection of data and the publication of information on the scheme.

The Market Practice Guidelines require insurers to have in place agreements with all intermediaries (including industry associations, such as the Master Builders Association and the Housing Industry Association, where they act as intermediaries for insurers) requiring the intermediaries to comply with the Guidelines.

In addition the Guidelines require intermediaries to disclose to the builder all remuneration received by the intermediary, including:

- the dollar amount of commission the insurer pays the intermediary including all fees and allowances. Where the dollar amount level of commission is not calculable a description of the nature of the commission and how it is calculated is to be provided; and
- any additional fees or brokerage the intermediary charges the builder in addition to the insurer's premium.

Industry associations are not treated any differently to other brokers/agents of insurers.

During 2007 enhancements were made to the scheme with the minimum level of cover raised from \$200,000 to \$300,000 and the introduction of new rules more clearly defining when a builder has disappeared as well as the commencement of the regular publication on the website of the Office of Fair Trading of information on the operation of the scheme.

The Government is currently considering further changes that have the potential to significantly improve consumer access to making a claim under the scheme that will further ensure that it delivers on the Government's consumer protection objectives.

The 2003 *NSW Home Warranty Insurance Inquiry* undertaken by Richard Grellman examined the merits of a voluntary home warranty insurance scheme in NSW. The inquiry considered a voluntary scheme fraught with risk and does not satisfy the interests of builders or consumers. In short, it found the scheme's compulsory nature reflects the importance of providing consumers with a minimum level of protection.

The inquiry concluded that if the scheme was optional, it was likely that price sensitive consumers, perhaps the most vulnerable group, would elect to run the risk and not insure. In the interests of consumer protection, the inquiry reaffirmed the need to maintain a minimum level of compulsory cover. A mandatory scheme not only protects the initial home owner, but also successors in title.

While the primary responsibility for ensuring that residential building work is properly and adequately performed lies with the builder engaged to undertake the work, the home warranty insurance scheme is there as a last-resort rescue mechanism for homeowners where a builder does not honour this responsibility in the most fundamental of ways. That is, they are unable to commence or complete a building contract or return and rectify defective work because they are insolvent, have died or disappeared.

Attachment E – Small claims courts and tribunals

(Recommendation 9.3)

The Productivity Commission has recommended higher ceilings for claims which can be heard in small claims courts and tribunals, but has not nominated a figure. In NSW the ceiling for general consumer claims heard by the Consumer, Trader and Tenancy Tribunal was recently raised to \$30,000. This decision was taken following a statutory review of the *Consumer Claims Act 1998* and a review of the Consumer Claims Regulation in accordance with the *Subordinate Legislation Act 1989*.

However, in some divisions the Tribunal can determine matters where the amount in dispute is over \$30,000, specifically in the Home Building (up to \$500,000), Motor Vehicles (unlimited where the dispute is over the purchase of a new vehicle for private purposes) and Commercial (varies) divisions. The Tribunal's experience with applications where the amount in dispute is over \$30,000 has shown that these matters are likely to take longer to resolve and to be more resource intensive.

Within the Home Building division around 67% of claimants are consumers. Where the value of the dispute is high, a number of matters are only determined after a process of procedural directions and interim orders. In an effort to address the length of time take to resolution in this division, in 2003 the Tribunal Chairperson introduced specialist directions setting out the procedures to be followed in home building disputes where the amount claimed was over \$25,000. The aim was to identify a range of alternative dispute resolution mechanisms and attempt to limit undue delay in proceedings.

Where most matters before the Tribunal proceed without legal representatives appearing, legal representation is far more likely in Home Building matters due to the large sums of money involved and the more complex legal issues that often arise in these disputes.

In comparison to other jurisdictions the Tribunal fees are at the lower end of the scale as shown in the Productivity Commission report at Figure 9.1. Most applications to the Tribunal cost \$32. Additionally, pensioners and students who show their pension or student card pay only \$5. This small fee is requested to prevent frivolous claims. In any case the fact a fee was unpaid would not necessarily result in the application for a determination being dismissed.

The Tribunal also has a provision for waiver of fees. A checklist is used in the residential parks division, for example, to ensure consistency in decisions about waiver of fees. In the six months July to December 2007 close to 1000 applicants (who met the criteria) either had their application fee waived or paid the reduced \$5 fee.

The Commission's recommendation that small claims courts and tribunals make judgements about civil disputes based on written submissions puts the onus on parties to make a choice to request an oral hearing.

NSW agrees that this approach could result in a less costly and more time-efficient mechanism in relation to smaller claims. In cases where the parties are geographically distant and are able to communicate effectively in writing this proposal could result in low cost and accessible justice to parties.

At the present time, the Consumer Trader and Tenancy Tribunal is able to deliver a speedy, face-to-face service to consumers and traders as it maintains eight registries, four in regional areas, and conducts hearings all over NSW with sittings in 95 locations. Further, 40% of Tribunal members are located in regional areas. The Tribunal also conducts hearings by telephone, takes evidence from witnesses by telephone and has recently developed a business case and project specifications for the piloting of hearings using video conferencing technology. This allows the Tribunal to resolve disputes quickly.

The Tribunal has an ongoing process of reviewing and refining its publications that explain the Tribunal's processes and requirements. In January 2007 a Communications Strategy 2008-2010 was launched, and this provides a framework for a comprehensive suite of information and educational tools to increase access and understanding of the Tribunal's operations. New publications targeting the Indigenous and CALD communities are also planned and this will expand the existing resources for these audiences.

The *Consumer Trader and Tenancy Tribunal Act* is structured around parties being able to present their own case orally. Decisions on the papers are an exception to the general rule and, under section 34 of the *Consumer, Trader and Tenancy Tribunal Act 2001*, can only be determined in this manner where consent has been obtained from both parties. One important factor against using a written submission process is that it does not facilitate resolution of matters by alternative dispute resolution. Section 54 of the Act requires the Tribunal to use its best endeavours to bring the parties to a settlement prior to making orders. It would be difficult to effectively use any alternative dispute resolution mechanisms in a paper based process.

As noted earlier, the Tribunal has been highly successful with its conciliation program. Use of conciliation reduces the number of matters requiring costly and time consuming hearings.

The real risk with decisions on the papers is for those in the community who face barriers to effective written communication. Decisions on the papers could potentially reduce access to justice to those parties most in need of assistance including those with limited education or with language difficulties.

The Tribunal's experience with the Strata and Community Schemes division is the best reflection of handling matters on the papers. In this division most disputes, 73%, are determined by an adjudicator on the basis of written submissions. All parties in the scheme, or those parties that may be affected by the order sought by the applicant, are invited to make written submissions and the adjudicator then determines the matter based on those written submissions. The evidentiary standard can only be satisfied by the documentation provided in those submissions. Matters may be dismissed if

insufficient information is provided that can satisfy the adjudicator that the order or orders sought should be made.

Rather than place the onus on parties to request a hearing, a better solution may be to offer parties the option of written submissions instead of a hearing at the application stage, particularly in small consumer claims with limited monetary, legal and factual issues. Both parties would have to agree. Additionally, in appropriate matters the Tribunal or the legislation may require a determination on the papers.

Attachment F – Additional Comments

Recommendation 3.1 – Objectives for consumer policy

NSW agrees that clear specification of objectives is fundamental to good regulation and agrees in principle that the concept of common overarching objectives for consumer policy has merit.

NSW considers that the recommended objectives provide a sound basis for the development of objectives that are acceptable to all jurisdictions.

Recommendation 4.5 – Optional referral of enforcement powers

NSW does not object to jurisdictions being given the option to refer powers to the Commonwealth prior to the development of a national model.

Recommendation 6.2 – Voting arrangements on the Ministerial Council

NSW acknowledges that requiring the Ministerial Council to reach decisions by consensus can result in a stalemate that hinders change. In those circumstances where a vote is necessary, NSW supports a two-thirds majority voting arrangement.

Chapter 7 - Unfair practices

The Productivity Commission discusses what are called ‘mock property auctions’, otherwise known as ‘dummy bidding’, at p112 of Volume 2. The draft report states that these auctions are ‘barred in most states through provisions in FTAs, or in Western Australia as part of a specific statute governing auctions’. In fact, in New South Wales dummy bidding is prohibited under the *Property, Stock and Business Agents Act 2002*. Section 51A of the Fair Trading Act prohibits mock auctions, but these are auctions of goods, not property.

Recommendation 8.2 – Defective products

The Ministerial Council, through its advisory committees, is taking action on these recommendations.

Access Economics, in association with the Intelligent Outcomes Group, was commissioned by the Commonwealth Treasury, on behalf of the Ministerial Council on Consumer Affairs, to produce a baseline study of consumer product related accidents. The resulting report was posted on the Ministerial Council website on 18 February 2008.

The New South Wales Fair Trading Act already provides for mandatory reporting of product recalls.

Recommendation 9.2 – Access to remedies

See attachment A in relation to a broad consumer ADR function and attachment C in relation to an Energy and Water Ombudsman.

Recommendation 10.1 – Enforcement

NSW would be willing to consider the imposition of civil pecuniary penalties as part of a national generic law. In relation to this issue, NSW notes that under the Uniform Consumer Credit Code, the consumer regulator may apply to the Court or Tribunal for

an order requiring a credit provider who has contravened a 'key requirement' of the Code to pay an amount as a civil penalty.

NSW supports the recommendations concerning banning orders, substantiation notices and infringement notices. The NSW Fair Trading Act has similar provisions.

NSW notes the Commission's concerns with public warning notices, but in NSW, such provisions allowing the issue of public warning notices operate effectively. Under 86A of the NSW Fair Trading Act, the Minister or Commissioner is able to make or issue a public statement identifying or giving warnings about any of the following:

- unsatisfactory or dangerous goods and their suppliers;
- unsatisfactory services and their suppliers;
- unfair business practices and persons who engage in them;
- any other matter that adversely affects the interests of consumers.

Section 86A has been in operation since 1991 and is an important part of the Office of Fair Trading's enforcement options. The Minister of the day was mindful of the risks and stated in Parliament that 'The decision to make such a statement is not taken lightly. It is made only after investigation and assessment of all the factors involved, including the likely public detriment if a warning is not issued, and possible unfair effects on the business concerned which may result from the statement.' The Minister also pointed out that statements may be directed at the business community, which may need to be warned about certain scams or practices which may adversely affect them.

Public warning statements and warning notices are issued in accordance with Fair Trading's internal Public Warning Statements Procedures and Guidelines. The Guidelines are used to ensure that decisions about issuing warnings are made with consistency and fairness, in accordance with the public interest and the principles of natural justice.

Under industry specific legislation the Commissioner may also authorise publication of a 'warning notice' warning of particular risks involved in dealing with specified licensed or unlicensed conveyancers, building contractors or property agents or registered or unregistered valuers.