Consumer Affairs Victoria

Choosing between general and industry specific regulation

Research Paper No. 8 November 2006

Victoria
The Place To Be

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Published by Consumer Affairs Victoria,
121 Exhibition Street, Melbourne, Victoria, 3000.

Authorised by the Victorian Government,
121 Exhibition Street, Melbourne, Victoria, 3000.

Printed by Midway Press Print Management, 9 Third Avenue, Sunshine, 3020.

Preface

Governments use a complex combination of general and industry-specific regulation to protect consumers. The paper discusses the strengths and weaknesses of general and industry-specific approaches and why there are strong incentives to use industry-specific approaches, even when increased enforcement effort or amendments to general regulation could deal with the problem.

Given that general regulation is already in place and will continue, industry-specific regulation is most suited to issues that are beyond the scope of general regulation. In all cases, it is important to consider the costs and benefits of regulatory and non-regulatory alternatives, to ensure that the proposed responses protect consumers effectively with minimum administration and business compliance costs.

The research paper is one in a series designed to stimulate debate on consumer policy issues. The subsequent research paper *Using licensing to protect consumer interests* discusses in more detail one type of industry-specific regulation—licensing schemes.

Consumer Affairs Victoria would like to thank Deborah Cope from PIRAC Economics for her assistance in preparing this paper.

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"Choosing between general and industry-specific consumer regulation"

Governments use a complex combination of general and industry-specific regulation to implement consumer policy objectives. The Victorian legislative framework is extensive, with 25 Consumer Acts[1] (listed in the *Fair Trading Act 1999* (Vic)), 19 of which have associated regulations. They cover issues as diverse as registering business names, prostitution control, trade measurement standards, building contracts, credit regulation, regulation of cooperatives and pre-paid funerals. Against this complex regulatory framework, involving multiple legislative instruments and diverse areas of regulation, the Victorian Government has stated its objective of relying more on the Fair Trading Act.

> *The most important of these Acts is the Fair Trading Act. By emphasising the Fair Trading Act as our key enforcement tool it is considered that there will be greater consistency in conduct regulation across industries and lower compliance costs for business, especially if some industry-specific legislation can be avoided.*
> (CAV 2004a, p. 6)

Since 2002, Victoria's Fair Trading Act has been amended to strengthen consumer protection, reducing the need for industry-specific legislation. These amendments included new powers for the director of Consumer Affairs Victoria to require traders to substantiate product claims, deal with rogue traders and obtain information (Campbell 2002, p. 1128). The amendments expanded civil injunction powers and amended the provisions for making adverse publicity orders, making the Act easier to enforce (Hulls 2004, p. 1509).

The Victorian Government's approach has been followed by others, including the Queensland Government:

> *The Office of Fair Trading will continue its program of significant legislative review, including a comprehensive review of current legislation to reduce the future need for lengthy and complex industry-specific legislation.*
> (Minister for Tourism, Fair Trading and Wine Industry Development 2004, p. 1–2)

It is also consistent with the Victorian guide to regulation, which stated:

> *Regulation of specific activities, industries or professional groups is a last-resort option. Preference will be given to:*
>
> - *promoting industry self-regulation and best practice, including codes of conduct*
> - *assessing whether existing broader legislation (State or Commonwealth) applies to particular cases*
> - *using other non-legislative methods (e.g. government provision of information) to address concerns.*
>
> (DTF 2005, p. 1–7)

The approach is also consistent with the Victorian Government's focus on improving Victoria's regulatory framework and reducing the cost that regulation imposes on business (Brumby 2006). This is particularly true in the case of small business (DTF 2005, p. i).

[1] Consumer Affairs Victoria is involved in the administration of other Acts, not listed as Consumer Acts, and other agencies administer legislation that also has consumer protection objectives.

Despite this recognition of the benefits of using general regulation to deal with problems that require government intervention, in practice there is often pressure to implement industry-specific approaches. The agencies responsible for regulating specific industries sometimes push for industry-specific consumer regulation in addition to the Fair Trading Act. These agencies may also advocate relying on industry-specific regulation alone and exempting those industries from the Fair Trading Act. Agencies have proposed this in electricity, gambling and health services.

Consumer markets are changing, such that new consumer challenges regularly emerge. There is always a choice of policy responses. Questions about whether general or industry-specific approaches are most appropriate will therefore continually arise.

This paper discusses the issues that should be considered when choosing between industry-specific and general consumer regulation. To make well informed choices, it is important to understand four issues:

1. The distinction between industry-specific and general legislation is not straightforward, but there are broad differences in the approach to regulation.
2. There are incentives that encourage the use of industry-specific legislation, even for issues that might be dealt with under the existing provisions in general legislation.
3. Industry-specific and general legislation have different strengths and weaknesses that make them suited to dealing with different types of problems.
4. Given the existence of the Fair Trading Act, policy makers should ensure that any new industry-specific regulation is necessary and effective.

The paper recognises that licensing is an important area of industry-specific regulation but it focuses on other forms of industry regulation. Licensing is discussed in a separate Consumer Affairs Victoria research paper *Using licensing to protect consumers' interests*.

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“General and industry-specific regulation” 1

Regulation comprises ‘the instruments by which governments place requirements on enterprises, citizens and government itself, including laws, orders and other rules issued by all levels of government and by bodies to which governments have delegated regulatory powers’ (OECD 1997, p. 6). It includes primary legislation (Acts) and subordinate legislation (Regulations) and other regulatory instruments such as mandatory codes of practice, ministerial directions or binding guidelines. Consumer regulation establishes rights for consumers or constrains the activities of traders to protect and promote the interests of consumers and ensure that markets work in the interests of consumers and the broad community.

General regulation establishes rights or obligations that apply across industries. It is triggered by the general characteristics of the behaviour, product or service, or trader, not by the industry it is related to. In Victoria, the primary piece of general consumer legislation is the Fair Trading Act. Other general legislation includes the *Goods Act 1958*, the *Co-operatives Act 1996*, the *Associations Incorporation Act 1981* and the *Trade Measurement Act 1995*. Under general legislation, similar issues across industries are dealt with in a similar way, giving consumers equal levels of protection and imposing the same obligations on traders.

Industry-specific regulation sets up rights and obligations in a specific industry. Victoria’s industry-specific consumer Acts include the *Travel Agents Act 1986*, the *Second-Hand Dealers and Pawnbrokers Act 1989*, the *Motor Car Traders Act 1986* and the F*unerals (Pre-Paid Money) Act 1993*. The tools these Acts use to regulate traders’ behaviour are diverse, including obligations to provide information, prohibitions or standards on the trader’s activities or products, and powers that assist the regulator to identify and investigate breaches of the Act.

The distinction between general regulation and industry-specific regulation, however, is not clear cut. The Fair Trading Act, for example, includes provisions for prescribing industry-specific codes of practice (part 6), although no codes are prescribed under the Act. Industry-specific legislation can include provisions that apply to more than one industry because similar clauses are duplicated in several industry-specific Acts. The Motor Car Traders Act (s. 82I), the Travel Agents Act (part 3A), the Second-Hand Dealers and Pawnbrokers Act (part 5, division 2) and the *Estate Agents Act 1980* (s. 93A), all provide similar powers for inspectors.

1.1 The difference in regulatory approaches

Both industry-specific and general regulation use a variety of tools to achieve their objectives. While there is considerable overlap, there are also broad differences in the character of each approach. It is useful to recognise these differences when analysing why industry-specific regulation has developed, and the strengths and weaknesses of different approaches to regulation.

General regulation usually has broader coverage because it is defined by the type of conduct, behaviour or activity, not by an industry. It regularly deals with issues across heterogeneous industries and thus often uses standards to guide what is acceptable behaviour, rather than defining rules that impose specific conditions on traders. The Associations Incorporation Act, for example, regulates for the integrity of committee members by prohibiting them from knowingly or recklessly misusing information or their position in the association. The *Co-operatives Act 1996* requires officers of cooperatives to act honestly, with a reasonable standard of care and diligence, and not improperly use information or their position. Neither Act sets minimum training or qualifications for officers. These Acts are triggered if people commit certain offences, rather than preventing people from becoming officers if they do not meet preconditions. Similarly, the Fair Trading Act tends to regulate conduct rather than setting rules for traders, products or services. The Act specifies that 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive' (s. 9(1)) rather than specifying what traders must do in order to avoid misleading or deceiving consumers. There are, however, some sections of the Act where more prescriptive rules are used.

Industry-specific regulation is generally more narrowly focused because it is constrained to a defined industry sector. It tends to focus more on the trader. For example, industry-specific regulation covers sectors like estate agents, introduction agents, motor car traders, prostitution service providers, second hand dealers and pawnbrokers, liquor outlets and travel agents. Because it applies to more homogeneous problems, industry-specific regulation often sets more prescriptive rules than general regulation does. The Motor Car Traders Act and Estate Agents Act put conditions on the people that traders can employ rather than holding the traders accountable for the performance of their staff.

The Organisation for Economic Cooperation and Development made the following observations—which appear to be valid for consumer regulation—when comparing industry-specific and general competition regulation:

> *Sector-specific regulation in contrast is generally adopted in situations where direct government intervention is deemed to be required because markets are either inherently imperfect or will not produce a desirable distribution of benefits. It follows that regulation usually seeks not so much to change or finetune market incentives, as to replace them with direct control.* (OECD 1999, p. 25)

Reliance on industry-specific regulation

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Despite the Victorian Government's efforts to increase reliance on the Fair Trading Act and general legislative instruments, the Victorian regulatory framework is still characterised by a significant amount of industry-specific regulation. Nearly half of the Acts under the consumer affairs portfolio have an industry focus. In addition, a substantial amount of consumer protection regulation is contained in industry specific Acts administered by other portfolios.

There is also evidence that industry-specific regulation may be used in Victoria when issues could be dealt with using general regulation. This paper does not analyse the costs and benefits of each case in which industry-specific regulation is used, but there is at least the open question of whether Victoria relies excessively on industry-specific approaches. The *Veterans Act 2005*, for example, regulates the collection of money for patriotic funds, in connection with past or present officers or members of the defence forces. General fund raising is covered by the *Fundraising Appeals Act 1998*. It is not clear whether there would be benefits in incorporating patriotic funds into the general regulation.

A lot of industry-specific regulation addresses practices such as misleading advertising, misleading or unconscionable conduct, implied warranties and unfair contracts. These are all covered in the Fair Trading Act but industry-specific regulation often deals with this conduct through more prescriptive requirements. Tampering with odometers, for example, which is prohibited by s. 38 of the Motor Car Traders Act, would also be an example of deceptive conduct under the Fair Trading Act. The *Introduction Agents Act 1997* prohibits staff from pretending they are clients (s. 16) and false advertising (s. 17), which would also breach the Fair Trading Act.

There is evidence from the application of similar laws in New Zealand that vendor bidding, an issue that is addressed in the Estate Agents Act in Victoria, can be prosecuted under general fair trading legislation (box 1).

Box 1: Vendor bidding in New Zealand

In December 2002, the New Zealand Commerce Commission brought proceedings against Grenadier Real Estate Limited that it had engaged in misleading and deceptive conduct and breached s. 9 of New Zealand's *Fair Trading Act 1986*.

> *The allegation was that people present at the auction were induced to believe bids were being received by genuine prospective purchasers and that the auctioneer gave no indication whether a bid was a vendor's bid.*

The case was lost in the first instance because the plaintiff failed to establish that the auctioneer had given no indication that a bid emanated from the vendor. The Commerce Commission appealed the case. The Court of Appeal upheld the first judge's decision but made several comments about the application of the misleading and deceptive conduct provisions in New Zealand's Fair Trading Act to vendor bids in real estate auctions.

> *That Act's prohibition on misleading or deceptive conduct applies generally to sales made in the course of trade. Naturally that includes sales by licensed auctioneers… the bidding process which may culminate in a sale either at or in the immediate aftermath of an auction must not mislead or be deceptive for those who become purchasers…*
>
> *In particular, unless their [persons who attend the auction] attention has been directed to the conditions about a reserve and about vendor bidding, they should not be taken to be familiar with the manner in which those vendor rights may be exercised… But even if something along these lines is done before bids are sought, it seems to us that where it is the auctioneer who is to make any bids for the vendor, it is likely to mislead or deceive intending purchasers if that is not done in a manner which makes it clear whether a particular bid is being received from a bidder on the floor of the auction room or is being made by the auctioneer on the vendor's behalf…*

The appeal judges concluded that an auctioneer would breach the New Zealand Fair Trading Act if a bid was made on behalf of the vendor and it was not made clear that it was a vendor bid.

Source: *Commerce Commission v Grenadier Real Estate Ltd* [2004] 2 NZLR 186 [42-44] (Blanchard J)

Until recently, there has been no formal requirement to consider alternative policy approaches as part of developing new legislative proposals (Victorian Government 2004, p. 25). As a result, it is unclear whether, in developing industry-specific Acts, policy makers fully considered whether the problems could be dealt with through a more concerted enforcement effort under existing general legislation or by amending that legislation.

2.1 Pressure to use industry-specific regulation

There appear to be incentives that reinforce the use of industry-specific regulation to address consumer policy issues. The pressure to undertake reform to redress problems often occurs when there is an acute problem or crisis in the industry (Cranston 1984, p. 313) or when people perceive that the problem cannot be addressed under the general law. In the case of introduction agents in Victoria:

> *A small but significant number of introduction agents have engaged in widespread and ongoing unfair conduct resulting in both economic loss and emotional disturbance for many, and in particular, vulnerable consumers in this state…*
>
> *These included failure to provide any service; the provision of service materially different from that sought; high-pressure sales techniques; misleading representations; unauthorised credit card deductions; excessive prepayments; inadequate disclosure and an evasive approach to consumer complaints, including in many cases failure to comply with orders of the Small Claims Tribunals. At that time I put the industry on notice that if standards did not improve government intervention would be considered.* (Wade 1997, p. 1631)

Similarly, public concern about vendor bids and over- and under-quoting of real estate prices had an impact on amendments to the Estate Agents Act, and concerns about different fuel prices in Melbourne and regional Victoria influenced the *Petroleum Products (Terminal Gate Pricing) Act 2000*. While it is legitimate for governments to address important community issues, there is a risk that the community profile of the issues encourages policy makers and politicians to adopt high profile responses when greater enforcement under existing legislation or improving enforcement powers within the general law might be more appropriate.

The perception that general regulation cannot deal with the problem may arise because the Fair Trading Act already exists, yet the problem has arisen, hence it is concluded that the Fair Trading Act must be unable to deal with the problem. There are several reasons for problems arising even if there is existing legislation.

First, existing agencies do not have unlimited resources. The existing agencies might be able to reduce unfair or exploitative practices if they had more resources to promote compliance and, if necessary, prosecute offenders. These agencies would also need to educate the industry about the consequences of continuing undesirable practices. Effective media reporting of enforcement action can be an important way of informing industry. Enforcement is also necessary to prevent inappropriate practices under industry-specific regulation. Passing legislation does not eliminate the problem. It simply provides additional tools to redress the problem. It is important to consider whether the comparative effectiveness of industry-specific versus general regulation is a result of the strengths of the two regulatory approaches or the resources devoted to compliance and enforcement.

Second, a related issue is the priority the regulator gives to pursuing breaches of the Act. If the regulator does not prioritise its activities appropriately, it could fail to address the most significant issues.

Third, the coverage or enforcement provisions of general legislation may make it impossible or more difficult or expensive to address problems; for example the Fair Trading Act applies to conduct in trade and commerce. Consumer issues in areas like fundraising would fall outside this definition.

In the case of enforcement, the powers to collect evidence to identify breaches of the regulation may be stronger under industry-specific regulation than they are under general regulation. Also, the prescriptiveness of industry regulation makes it easier to prove a breach of the Act. It is easier to prove that a building contract includes banned clauses than to prove that the builder intended to take advantage of the consumer. Similarly, the regulator may have more extensive powers under some industry-specific regulation, which can compel traders to report regularly and empower the regulator to require the provision of information. An example is in the *Petroleum Products (Terminal Gate Pricing) Act 2000*:

> *10. Declared suppliers to produce documents and answer questions*
>
> *For the purpose of monitoring compliance with this Act or the regulations, the Director may require a declared supplier at a time and place specified by the Director—*
>
> *(a) to answer orally or in writing any questions put by the Director relating to the declared supplier's business as a declared supplier*
>
> *(b) to supply orally or in writing information required by the Director relating to that business*
>
> *(c) to produce to the Director specified documents or documents of a specified class relating to that business.*

Reporting and mandatory information provisions make it easier for the regulator to identify where problems are occurring and collect evidence to prosecute offenders.

Finally, there are cases in which the problems or the characteristics of the industry are unusual, and general regulation is ineffective. In these cases, industry-specific regulation may improve the outcomes for consumers.

Overall, stakeholders may argue for new problems to be addressed through industry-specific regulation for several reasons. From a public sector agency perspective, advocating new legislation potentially avoids the criticism that the problem resulted from the agency's failure to act. Industry-specific approaches may be favoured by some industry-based agencies to maintain their control over the solution to the problem, or because they are unaware of the potential to use general legislation. There are many provisions in Acts covering sectors such as health, which are similar to those in the Fair Trading Act. A number of Acts, for example, contain restrictions on false, misleading or deceptive advertising, which is also prohibited under s.12 of the Fair Trading Act (box 2). The penalty provisions in the Fair Trading Act are substantially higher than for all other Acts except the Food Act. Penalties for misleading or deceptive advertising under other Acts are typically about A$5000 for an individual and A$10 000 for a body corporate, compared with A$60 000 for an individual and A$125 000 for a body corporate under the Fair Trading Act.

Box 2: Acts that prohibit misleading or deceptive advertising

The following Acts are examples of legislation outside the consumer affairs portfolio which have consumer protection objectives and prohibit false, misleading or deceptive advertising:

- *Chinese Medicine Registration Act 2000*
- *Chiropractors Registration Act 1996*
- *Dental Practice Act 1999*
- *Food Act 1984*
- *Legal Profession Act 2004*
- *Medical Practice Act 1994*
- *Nurses Act 1993*
- *Optometrists Registration Act 1996*
- *Osteopaths Registration Act 1996*
- *Pharmacy Practice Act 2004*
- *Physiotherapists Registration Act 1998*
- *Podiatrists Registration Act 1997*
- *Private Agents Act 1966 (s. 28 prohibits misleading representations)*
- *Psychologists Registration Act 2000*
- *Veterinary Practice Act 1997*

Industry groups often support industry-specific legislation because they find it easier to understand the regulation's impact on their businesses, and they have more influence over the legislative process because their views are not competing with the priorities of other industries. The second reading speech for the Motor Car Traders Bill (1973), for example, noted that a licensing scheme was introduced in response to the request of the Victorian Automobile Chamber of Commerce.

> *The Victorian Automobile Chamber of Commerce has advised the government that the retail motor industry in general and the Used Car Traders Division of the chamber, in particular, have for some considerable time been concerned over certain practices in the motor car industry which are considered not to be in the best interests of the majority of traders and the general public…*
>
> *In addition the chamber has advocated the introduction of legislation to control dealers in motor vehicles through a licensing system, to establish positive protections for members of the community on the buying selling and exchange of motor vehicles, and to establish a fund to provide compensation for persons who suffer loss by reason of the actions of motor car traders.* (Wilcox 1972, pp1430–1431)

The government may see industry-specific regulation as more proactive and, therefore, more likely to demonstrate to the community that the government is addressing the problem and reducing the risk that it will reoccur. It allows ministers to demonstrate that they are personally involved in finding a solution.

In addition, there is an increasing focus on negotiating nationally consistent solutions to specific problems. However, jurisdictions are likely to agree more readily to policies and legislation that focus on a clearly defined problem in a particular industry, rather than changes to general regulation that would potentially affect industries outside the area of immediate concern.

Combined, these factors create incentives to increase the reliance on industry-specific regulation. If industry-specific approaches are not analysed objectively, the regulatory framework may become progressively more ad hoc and complex, and provisions in the various Acts could overlap or be inconsistent. There should be a careful assessment of the most appropriate response to any problem and regular reviews of approaches to ensure that the cumulative costs of regulation are not excessive.

“The strengths and weaknesses of general and industry-specific regulation” 3

Both general and industry-specific regulation have strengths and weaknesses, and each is likely to be preferred under different circumstances. This section compares these strengths and weaknesses.

The strengths and weaknesses of industry-specific compared with general regulation have been considered in a range of policy contexts, including consumer policy. Two examples are provided in appendix 1. In most policy contexts, similar issues have been identified.

3.1 General regulation

As noted previously, general consumer regulation applies a consistent regulatory framework across a range of industries. The relevance of the regulation in any one industry depends on the prevalence of the problem that the regulation targets.

General regulation has three broad advantages:

1. universal and consistent coverage
2. lower business administration and compliance costs
3. reduced risk of regulatory capture.

Universal coverage and consistency

The benefits of universal coverage and consistency were recognised in Victoria’s 1983 inquiry into deceptive trade practices law:

> *We believe it to be extremely important that the Trade Practices Act should start from a position of universal application to all business activity, whether public sector or private sector, corporate or otherwise. Only in this way will the law be fair, and be seen to be fair, and avoid giving a privileged position to those not bound to adhere to its standards.* (Victorian Consumer Affairs Council 1983, p. 66)

The Fair Trading Act applies broadly to conduct in trade and commerce. Because general regulation is triggered by generic behaviours or problems it can accommodate changing industry circumstances and emerging problems more easily. Provisions that prohibit misleading conduct, for example, would automatically cover misleading claims about products in a new industry. The legislation would not need to be extended to recognise new products, industries or ways of doing business. Consumers are automatically protected. This is especially important as the rate of technological development and innovation increases. Australia is among the top ten countries for Internet use and has one of the highest incidences of online consumer purchase. Eighty-seven per cent of Australian Internet users have made an online purchase (AC Neilson 2005a) and 30 per cent regularly use online shopping (AC Neilson 2005b. p. 111). Rogue traders often take advantage of new technologies as quickly as legitimate businesses do.

> *But in some cases, the tremendous benefits of new technology also have created risks for consumers. In the FTC's [United States Federal Trade Commission] experience, fraudulent operators are always among the first to appreciate the potential of technologies and then to use that potential to exploit and deceive consumers.* (Majoras 2005, p. 2)

Consumer protection that automatically covers all types of trade and commerce is important. Because general regulation applies consistently across all industries, it addresses similar behaviour in similar industries in the same way. This has fairness, efficacy and efficiency benefits (box 3).

Box 3: Benefits of consistent regulation

From a fairness perspective, consistent regulation means that consumers who face the same risks receive the same protection, and traders that engage in the same types of behaviour suffer the same consequences.

The efficacy of the regulation is improved because there is less risk of gaps and overlap. Gaps allow behaviours that the legislation is trying to redress to continue in some sectors. Consumers in these sectors are disadvantaged. Overlap occurs when one industry is covered by two or more types of regulation that address similar issues. This can increase compliance costs, add complexity and cause confusion. It increases the risk of conflict among the various regulatory requirements.

In addition, businesses are more likely to be aware of the general law because its broad application makes it more visible. This visibility makes strategies that promote understanding and compliance among business easier to implement and more effective.

From an economic efficiency perspective, significant benefits can result from consistent regulation. Good economic outcomes require that traders and industries are able to compete based on their underlying strengths. Regulation that is more lenient in one industry will give that industry an unfair advantage. The favoured industry may be more attractive because of the differences in regulation, not because it can provide its customers better products more cheaply[2]. Inconsistencies in regulation can also create incentives for people to change the way they operate simply to avoid regulation; for example, if the regulation of trained professionals, such as health professionals, building trades, advisors or agents, is unnecessarily restrictive, it can increase the incentives for people to work in those industries without training and for employers to reduce the percentage of their staff that has qualifications.

General regulation also avoids boundary problems, further reducing the risks of gaps, overlap or inconsistencies. These risks are greatest under industry-specific regulation that exempts an industry from general regulation. The Organisation for Economic Cooperation and Development noted that:

> Sector-specific regulation by definition creates a need to define jurisdictional boundaries, and that in turn could produce three important problems:
>
> 1. uncertainty concerning which regulations will apply for firms operating in several district markets, and even a risk that they will be subject to inconsistent regulatory demands such as conflicting accounting requirements
>
> 2. competitive distortions and consequent misallocation of resources caused by competing firms being subjected to different regulatory regimes
>
> 3. further competitive distortions due to regulators trying to preserve their jurisdiction over firms by restricting the businesses that regulated entities can engage in. (OECD 1999, p. 31)

This was also recognised by the Centre for Credit and Consumer Law in the context of carve-outs from the *Trade Practices Act 1974* (Cwth). The centre argued that carving out industries from the consumer protection provisions in general law had the potential to lead to 'gaps, inconsistencies and/or confusion for consumers' (Centre for Credit and Consumer Law 2004, p. 4).

Finally, general regulation can deal with issues in industries in which the number of problems is too small to warrant a separate regulatory regime but significant enough to justify low cost government intervention. The New South Wales review of the *Employment Agents Act 1996* (NSW), for example, concluded that regulation in that industry would be less costly and still protect consumers if the Employment Agents Act was repealed and replaced by new standards and enhanced enforcement under the *Fair Trading Act 1987* (NSW).

[2] This is not an argument for no regulation because regulation has a legitimate role to address problems the market cannot. It does mean, however, that similar problems should be treated in a similar way.

On balance of evidence the greatest net public benefit arises from an enhanced enforcement model. There is no consistent reason for continuing to licence employment agents that justifies the albeit limited competitive restrictions imposed by licensing. The option involves the repeal of the Employment Agents Act, resulting in the removal of the current licensing regime. It provides mechanisms to ensure that fees to jobseekers continue to be banned and that information is provided to jobseekers regarding their rights and available mechanisms for redress. This would all be achieved through the Fair Trading Act in a manner which is simpler, more efficient and effective than a licensing regime to administer. (Department of Fair Trading, p. 5)

Lower costs of administration and compliance

Regulation can impose costs on government, compliance costs on industry and costs on consumers through higher prices and reduced choice. Consistency, reduced risk of gaps and overlap, and the ability to cover new industries automatically reduce the cost to government of administering regulation. Under general regulation, there is no need to develop and manage multiple regulatory regimes. The New South Wales review of the Employment Agents Act concluded that one of the benefits of replacing that Act with amendments to the New South Wales Fair Trading Act would be 'a reduction in overall government administration costs' (Department of Fair Trading, p. 50).

If multiple regulatory regimes result in multiple regulators, then the cost advantages of relying more on general regulation could be even greater. While transferring functions to a general regulator would increase its resource needs (to allow for compliance strategies and enforcement), this increase is likely to be less than the costs of maintaining stand-alone institutions. The issue of multiple regulatory institutions is significant for Victoria. There are 69 Victorian regulators (VCEC 2005a, p. 9).

From an industry perspective, reduced complexity and overlap can reduce compliance costs because traders do not need to understand and comply with multiple Acts. Addressing consumer issues using a more coordinated approach also encourages a more holistic assessment of regulatory costs. The Victorian Competition and Efficiency Commission concluded that the application of Victorian processes for assessing the costs and benefits of new and amended regulation have rarely considered the cumulative effects of regulation (VCEC 2005b, pp. 389–390). If the number of Acts is reduced, the risk that their combined impact would have unanticipated costs is also reduced.

In addition, general regulation is often less prescriptive than industry-specific regulation. It is more difficult to design prescriptive requirements that apply to all industries. Prescriptive regulation sets rules that require traders to achieve the governments' objectives in a certain way. Even within an industry, it can be difficult and costly to design rules that generate the desired outcomes. Rules also reduce traders' ability to use the methods that best suit their operations. This can increase the costs of compliance and reduce flexibility and innovation (VCEC 2005b, pp. 377–378). Prescriptive rules can also lead traders to focus on meeting specific requirements in preference to behaving in a manner that does not disadvantage consumers.

Finally, the compliance costs of both general and industry-specific regulation can flow to consumers as higher prices. To the extent that industry-specific regulation is more prescriptive, and hence has higher compliance costs, it may result in larger price increases.

General regulation is also less likely to restrict consumer choice. As noted previously, general regulation is less likely to constrain which traders can enter an industry and which products they can sell. It is thus less likely to restrict the range of service providers, products and services available to consumers.

Regulatory capture

When a group of stakeholders gain undue influence over the development of the regulations or the activities of the regulator it is called regulatory capture. While it is essential to consult all stakeholders in the regulatory process, the views of interest groups should be balanced with the public interest when making decisions.

With industry-specific regulation, it can be harder to maintain this balance. Because of its industry-specific focus, industry-based interest groups may be able to influence those developing the regulation. This risk is more acute if the industry-specific regulation is administered by an industry-specific regulator. Again there is a greater chance that ongoing contact with the industry might have an undue influence on the regulator. General regulation administered by a general regulator reduces the risk of regulatory capture.

Industry-specific regulation is not necessary to accommodate industry interests. Consultation or guidance from the regulator can address industry-specific issues.

3.2 Industry-specific regulation

In industry-specific regulation, the scope of the regulatory regime is defined by the industry a trader is in. The advantages of industry-specific regulation are that it:

- provides targeted solutions
- is easier to enforce
- addresses problems before they occur.

Targeted solutions

Industry-specific regulation's main advantage is that it applies solutions that target particular problems in particular industries. There is less risk that the regulation unintentionally applies to industries in which it is not needed. It may, therefore, reduce the risk of overregulation. In some cases, for example, it may be desirable to extend consumer protection to activities that do not involve trade and commerce (as covered under the Fair Trading Act), such as the collection of donations for charities. Specific regulation can address such issues without risking extending general regulation to areas it is not intended to cover.

Clearly defining the scope of the regulation and the conditions for regulatory compliance can increase certainty for traders, reducing ambiguity in the regulatory requirements. Traders may find it more difficult to apply the general provisions in the Fair Trading Act to the circumstances of their business. It is, however, possible under the Fair Trading Act to develop guidelines for traders on the application of the Act in their sector. See, for example, Consumer Affairs Victoria's guidelines on debt collection (CAV 2004b).

Industry-specific regulation can effectively address highly technical issues. In some cases, it is necessary to define technical standards precisely; for example, the risk to health and safety if the electrical work in people's homes does not meet a minimum standard is very high, justifying more detailed industry-specific regulation. The Review of the Australian Financial System, chaired by Stan Wallis, argued in favour of industry-specific regulation in that sector because of the unique characteristics of the industry and the potential impact on consumers of making poor financial decisions (Wallis et al. 1997, p. 188; see also appendix 1).

In some industries, there is limited scope for adopting a flexible approach to achieving the government's policy objectives. In these cases, little flexibility is lost by using an industry-specific approach.

Easier enforcement

Some commentators argue that industry-based regulation is easier to enforce than general regulation, particularly when it is more specific, or sets technical rules or preconditions for entering an industry. In an analysis of the options for regulating food standards Cranston argued:

> *The existence of compositional standards, either statutory or voluntary, makes the task of implementing food law much easier. A food manufacturer knows what is expected and can be sure that products complying with the detailed requirements will not be subject to official action.* (Cranston 1984, p. 327)

This certainty makes it easier for the regulator to prove a breach of the regulation. Cranston also argued that law enforcement under general regulation is more complex. He noted that, under general regulation, proving that a food product falls below an acceptable standard involves obtaining the expert opinion of a qualified analyst. Preparing such an opinion is time consuming and costly. The outcome is uncertain because manufacturers are likely to present alternative expert views (Cranston 1984, pp. 327–328). Under industry-specific regulation, expert evaluations are needed initially to set the rules. The level of analysis to test performance against those rules, however, is usually less.

It is also easier for regulators to detect and prove that a business has breached a rule if the industry is subject to ongoing monitoring or testing—particularly if traders are required to report regularly against compliance. Introduction agents, for example, are required under their Act to report annually on the identity of those involved in the agency and whether they have been charged or convicted of an offence.

Objective rules, which are more common in industry-specific regulation, make it easier to gauge the extent of the breach and make prosecution less dependent on proving that the intention or the outcome of the breach would damage consumers. In addition, the regulator is more likely to be able to use its own testing to obtain the evidence necessary to prosecute an offender. It is less reliant on the participation of consumers.

Addresses problems before they occur

In some cases, industry-specific regulation can proactively address problems before they arise. Product standards set minimum requirements, prohibiting the sale of products that are likely to increase the risk to consumers. There are also restrictions on domestic builders entering into cost-plus contracts or contracts that include cost escalation clauses regardless of whether the contract would have resulted in a specific homeowner being charged an excessive amount for the work.

Where the consequences of substandard products or services have high costs, such as risk of severe injury or death, eliminating these risks can be important. Eliminating such risks may also be important in industries in which it is difficult to detect poor quality after it has occurred; for example, when there are long time lags between the use of the product and its detrimental impact.

“Choosing between a general and industry-specific approach” 4

In assessing the costs and benefits of general and industry-specific regulation, it is important to recognise that general regulation is needed to provide overall consumer protection, regardless of the approach taken in any specific industry. Industry-specific regulation does not remove the need for a Fair Trading Act or agencies to implement and enforce that Act. The broad policy options usually include relying on:

1. existing, or modified, general regulation
2. industry-specific regulation operating in conjunction with general regulation
3. industry-specific regulation, which replaces general regulation by exempting that industry from the application of the general law.

4.1 The costs and benefits of key policy options

As discussed above, the main benefits of option 1—relying on general regulation—are consistency across industries and reduced risk of regulatory duplication and complexity. It can be less costly for industry, consumers and the government (s. 3.1). Although additional enforcement expenditure may be necessary, it automatically addresses problems from new industries, products or types of behaviour as they arise, and reduces the risk of regulatory capture.

The way regulation is implemented and the mechanisms used to encourage compliance affect whether its potential benefits are realised. To encourage compliance, and reduce the risk of consumer detriment, general regulation relies on traders choosing not to engage in behaviour that could breach the regulation. This is more likely when traders are aware of their responsibilities and there is an expectation that those that engage in inappropriate behaviour will get caught.

Where general regulation can address a problem, option 2—enacting industry-specific regulation to operate in conjunction with general regulation—would create unnecessary regulation. This would result in duplication, increased complexity and higher regulatory costs.

The Victorian Government recognised these costs when it reviewed and repealed redundant legislation (SARC 1997). There are also examples of specific legislation being incorporated into more general regulatory instruments; for example, the protection of consumers involved in hire purchase agreements was moved from the *Hire-Purchase Act 1959* to the *Goods Act 1958* and the *Consumer Credit (Victoria) Act 1995* (SARC 1997).

Industry-specific regulation works best for industries that can be clearly defined and are relatively static, where there are specific or technical problems that cannot be dealt with through general regulation and the consequences for consumers if problems occur are large. In these cases, industry-specific regulation may be a proactive way to reduce the risk of significant consumer detriment. Product standards in industries such as pharmaceuticals, for example, can reduce the risk of consumers purchasing products that might be detrimental to their health, or of dangerous drugs being misused or abused.

Option 3—industry-specific regulation that replaces general regulation—avoids the problem of duplication in regulation; that is, it removes the industry compliance costs, government costs and confusion created by having two sets of regulation covering similar issues in the same industry. However, it does create other problems. First, there is often uncertainty about the boundaries between the different areas of regulation, increasing the risk of regulatory gaps. Regulatory gaps create incentives for traders to avoid regulation and can leave some consumers unprotected. Second, it silos responsibility for industry regulation, increasing the risk of regulatory inconsistency, which can be inefficient and unfair. Siloing responsibility also discourages cooperation between agencies, which is at odds with the Victorian Government's approach to encouraging 'joined up government'.

> *A subsidiary challenge is the need for collaboration between departments, both at the planning stage and in administering policies and programs… Nevertheless, the achievement of policy outcomes desired by citizens requires public servants to work more and more across the boundaries of departments and other agencies.*
> (DPC 2005, p. 1)

It also fragments compliance and enforcement activity, reducing government agencies' ability to develop centres of excellence in understanding and interpreting the regulatory provisions and pass that expertise onto businesses trying to comply with the law.

4.2 The role of industry-specific regulation

When consumer issues arise, the first question for policy makers should be whether there are general regulatory tools already available that could address the problem effectively. Given that general regulation avoids establishing new regulatory regimes and has the benefits discussed previously, there would need to be significant benefits from moving to an industry-specific solution before these benefits would outweigh the costs of additional regulation.

Section 2 discusses four reasons why existing general regulation may not deal with consumer problems effectively:

1. the regulatory agency has insufficient resources to encourage compliance and pursue enforcement

2. the regulatory agency has not given sufficient priority to problems in that industry

3. there are deficiencies in the general regulation that reduce its ability to deal with the problem

4. the problem is unusual and cannot be dealt with effectively under general regulation.

The first three reasons could be redressed by removing the deficiencies in the general regulatory framework. The fourth is where there are potential benefits from industry-specific regulation.

Deficiencies in enforcement and regulation

Whether deficiencies in enforcement result from insufficient resources or misdirected priorities, they can undermine the legislation's effectiveness. Effective enforcement requires the right regulatory tools, sufficient resources to pursue priority issues and good information flows. This ensures that the regulator is aware of breaches in the Act and traders and consumers are aware of the activities of the regulator; for example, in the regulation of advertising:

> *It is not suggested that the presence of these techniques on the statute book guarantees that advertisements will be any more legal, decent, honest and truthful than they are at present. There still needs to be an efficient enforcement procedure for detecting breaches of the standards established, including systemic monitoring and concentrating on known sources of wrongdoing and publicity to induce consumer complaints. A good deal also depends on the spirit in which any controls are operated.* (Cranston 1984, p. 55)

One useful tool for achieving awareness, and creating the perception that enforcement is taken seriously, is the promotion of the outcomes of successful prosecutions. Lack of enforcement is not a good reason for adding to the regulatory burden by introducing additional industry-specific regulation. As noted by the Commonwealth Office of Regulation Review, unless additional resources are available to enforce the industry-specific regulation, it is unlikely to improve the outcomes for consumers.

> *It is clear, however, that lack of enforcement of the general provision is not a reason in itself to enact specific regulation. Without an increase in the resources for enforcement, a specific regulation is unlikely to be more effective than general provisions.* (ORR 1994, p. 9)

Enforcing general regulation has a further flow-on benefit to future enforcement activities. It expands the body of information and legal precedent surrounding the general regulation, which improves its certainty and clarity across all industries, and makes it easier to enforce in the future.

Deficiencies in the regulation's coverage or powers may also undermine its effectiveness. Again, this is not a good reason for introducing additional industry-specific regulation. Improving the general regulation would have the combined benefits of addressing the problem that has been identified, and improving the legislation's ability to redress other problems. It may also eliminate the need to establish new regulatory institutions, which are often associated with industry-specific regulation. Overall, if the reason that the existing general regulation does not deal adequately with the problems is because of deficiencies in enforcement or the regulation itself, the best approach is to improve the operation of general regulation, rather than introducing more regulation.

"In conclusion" 5

If a problem is difficult to resolve under general regulation, it does not necessarily follow that introducing industry-specific regulation would automatically benefit consumers. In some cases, even industry-specific regulation would not ameliorate the problem. Non-regulatory solutions may be more effective, or the problem may not be able to be solved through government intervention. Similarly, the structure of the industry would have to be conducive to industry-specific approaches. It is hard to develop robust long term industry-specific solutions if the industry is difficult to define or is constantly changing. Industry-specific regulation is most appropriate when:

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

Given that general regulation is already in place and will continue, industry-specific regulation is most suited to addressing issues that are beyond the scope of general regulation. In addition, proposals to exempt specific industries from the application of general regulation should be treated with caution. By attempting to duplicate existing regulatory requirements they risk creating inconsistencies and gaps. In all cases, it is important to consider the costs and benefits of regulatory and non-regulatory alternatives, to ensure that intervention is justified and the option chosen generates the greatest benefits over its costs.

“Appendix 1:Arguments for and against general and industry-specific regulation in financial services and access regulation”

The debate about using general and industry-specific regulation occurs regularly. Two examples are financial services and access regulation. This appendix presents some of the views expressed in those debates to illustrate the real issues that have arisen in past policy discussions.

A1.1 Financial services regulation

The inquiry into the regulation of the Australian Financial System chaired by Stan Wallis considered whether financial services should be regulated by general or industry-specific regulation. The final report for that inquiry made the following comments:

> *Specialist consumer protection in the financial system is justified on two grounds.*
>
> *First, the complexity of financial products increases the probability that financially unsophisticated consumers can misunderstand or be misled about the nature of financial promises, particularly their obligations and risks. This combined with the potential consequences of dishonour, has led most countries to establish a disclosure regime for financial products that is considerably more intensive than disclosure rules for most non-financial products.*
>
> *Secondly, financial complexity also increases the incidence of misunderstanding and dispute. Given this, and the high cost of litigation, a number of countries have imposed specific regulation of financial sales and advice and established low-cost industry complaints schemes or tribunals for resolving disputes.* (Wallis, et al. 1997, p. 188)

In its submission to that inquiry, the Insurance and Superannuation Commission commented:

> *The advantages of generic regulation under the TPA [Trade Practices Act] would include:*
>
> - *consistency and competitive neutrality across a broad range of functions*
> - *simplicity (and less consumer confusion) in that the regulatory framework could be limited to broad objectives and principles*
> - *automatic coverage could be widespread over a number of different markets*
> - *less risk of regulatory ‘capture’ (ie, regulation in the interests of the industry rather than the public)*
> - *greater certainty and lower compliance costs to industry from a uniform regime.*

Some disadvantages of generic regulation include:

- *uncertainty for both companies and consumers about the precise application of provisions to particular circumstances if the regulatory framework is too broad*
- *lack of appropriate, targeted coverage in that regulation cannot be tailored to individual financial markets and products and their particular characteristics and weaknesses (in extreme cases, this could compromise prudential security)*
- *the regulator's resources being thinly spread, so that it cannot take a systematic approach in supervising an industry from a long term perspective, but randomly targets problem areas for concentrated short term scrutiny and intervention*
- *an essentially court-based, adversarial and ad hoc approach to enforcement with little reliance on industry co-operation and voluntary compliance in response to accountability measures and moral suasion*
- *fines and the costs of redress can be expected to be met by remaining investors to their detriment*
- *loss of financial industry-specific regulatory expertise and knowledge (institutional memory).* (Insurance and Superannuation Commission 1996, p. 76)

A1.2 Regulation of the use of infrastructure by third parties (access regulation)

The Productivity Commission inquiry into the regulation of third party access to infrastructure services considered the relative merits of industry-specific and general regulation. The Commission's final report made the following comments:

> *In common with other areas of regulation, a generic approach to access regulation has a number of advantages. Among other things, it can:*
>
> - *facilitate a consistent approach across infrastructure sectors*
> - *readily accommodate changes in 'surprise' candidates for access regulation*
> - *facilitate the dissemination of regulatory lessons across sectors without dispersing limited regulatory expertise*
> - *reduce the prospect of some forms of 'regulatory capture'.*

The industry-specific approach provides scope for explicit recognition of differences between infrastructure sectors in access arrangements. If differences impinging on access matters are substantial, then tailored regimes are likely to provide greater certainty to access providers and seekers than a generic regime which relies more on interpretation in any particular circumstance. (Productivity Commission 2001, pp. 116–117)

In submissions to that inquiry, several participants also discussed these issues. The National Competition Council argued:

> *The framework for access regulation that emerged from the microeconomic reform process was intended to be economy-wide. The advantages of such an economy-wide orientation include:*
>
> - *an economy-wide approach maximises the chances that progress will be made on a broad front, without particular jurisdictions or industries falling behind*
> - *such an approach also makes for consistency as between industries and as between jurisdictions, enhancing predictability and reducing the risk that resource allocation will be distorted by the differing treatment of like cases*
> - *an economy-wide approach is likely to be less vulnerable to capture or manipulation by well-organised interest groups within particular industries or jurisdictions.*
>
> *Inevitably, however, an economy-wide orientation does impose some trade-offs. Legislation capable of accommodating a wide range of circumstances cannot be as specific and detailed as that designed say, to regulate a particular industry. Tailoring this broader framework to specific situations will therefore occur more largely at the administrative level, rather than being directly determined in and by the legislature.* (NCC 2001, p. 35)

The Australian Competition and Consumer Commission commented:

> *Industry based regimes have the advantage that they can be tailored to the particular needs of the industry. For instance, a particular technological requirement in the telecommunications industry is the need for any-to-any connectivity which is specifically catered for in Part XIC but is not a consideration directly relevant to Part IIIA.*
>
> *At the same time the generic provisions of Part IIIA have a number of advantages.*
>
> *One is that Part IIIA can act as a catalyst for the development of industry-specific regimes…*
>
> *Another advantage is flexibility. It is impossible to predict what changes in technology the future will hold or the effect these changes will have on industry. A generic access regime is adaptable and may capture new or emerging technologies more effectively than would stand alone legislation. Similarly a generic regime provides flexibility for deregulation as technical and other conditions change over time…*
>
> *A final advantage of a generic regime is that it can operate as a benchmark. Part IIIA and the Competition Principles Agreement offer consistent criteria against which the standard and quality of the access regime must be measured. This helps to ensure the integrity of the access provisions.*
>
> *For these reasons the Commission supports the retention of both industry-specific and generic access regimes.* (ACCC 2000, p. 9)

The Law Council remarked:

> *… Part IIIA has been augmented to a large extent by industry-specific regimes such as those developed for telecommunications, gas and electricity. Industry-specific regimes address industry-specific issues more comprehensively than a generic access regime can ever do.*
>
> *The Law Council is of the view that industry-specific regimes should be encouraged to the extent that they are truly required to deal with industry-specific issues. To the extent that issues are generic across industries, these must be addressed by the common principles in a revised Part IIIA.* (Law Council of Australia 2001, p. 2)

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November 2006
C-48-01-966

Confident Consumers, Protected Communities.