

Consumer Affairs Victoria

Consumer Advocacy in Victoria

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“ Preface ”

This Research Paper was commissioned by Consumer Affairs Victoria (CAV) and has been prepared by Mr Chris Field. The views expressed in the paper are those of the author and are not necessarily all fully shared by CAV.

The paper draws together in a single document – possibly for the first time – an analysis of the theory, current practice and possible future directions of consumer advocacy in Victoria.

Consumer Advocacy in Victoria provides a practical and contemporary resource – it documents the current consumer advocacy framework in Victoria and makes an assessment of the effectiveness of consumer advocacy in practice. In doing so, the paper importantly highlights ‘gaps’ in the framework – areas where greater attention must be given to maximising consumers’ interests. Key to the maximisation of consumers’ long term interests is the consumer advocate’s role in providing a representative voice for consumers in the development of policy and regulation.

CAV is actively engaged in the emerging debate over the future direction of consumer policy in Australia. It is my hope that this paper will contribute to the debate by stimulating a dialogue on the objectives of consumer advocacy and the means for achieving them. This is a dialogue that goes to the heart of facilitating a consumer market that functions both effectively and justly and as such, is of equal interest to government, consumer advocates, community agencies and business.

CAV welcomes your comments on the paper. These may be directed to:

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Important preliminary note

This Research Paper has been prepared by Chris Field as Principal of Chris Field Consulting Pty Ltd. The views in the Research Paper represent those of the author alone (unless attributed to another person) and do not purport to represent the views of any other organisation with which the author has been, or is, involved.

“ Foreword ”

It has regularly been argued that consumer advocacy has an important role in the creation of competitive, efficient consumer markets and effective consumer protection frameworks, and, even more broadly, in achieving social justice.¹ But what do we mean by the term “consumer advocacy”? What is its value and role? Who undertakes consumer advocacy in Victoria and how do we assess its effectiveness? What should consumer advocacy in Victoria look like in the future? It is my intention, through the Research Paper, to provide an analysis of the theory, current practice and possible future of consumer advocacy in Victoria. To my knowledge this is the first time that such an analysis has been presented in a single document.

An important note about the limitations of the Research Paper

It is typical for an analytical exercise of the type undertaken in this Research Paper to note the limitations of the analysis undertaken. The Research Paper is no exception to this common practice. There are two major limitations that I have identified in preparing the Research Paper that I believe I need to make clear to readers:

Time constraints

The Research Paper has been prepared on request from the Director of Consumer Affairs Victoria. The budget for the Research Paper has allowed for a total of 15 days' work to be undertaken – inclusive of every aspect of the Research Paper. Given the complexity and scope of the topic, 15 days of work is, in fact, a very limited amount of time. Accordingly, this Paper does not purport to be a definitive, nor even exhaustive, analysis of all the issues relevant to an account of consumer advocacy in Victoria.

In preparing the Research Paper, I have applied a general rule that it is preferable to identify (and justify) what I consider to be the core issues for discussion and then examine these as comprehensively as possible within the obvious time constraints, rather than attempt to simply cast a less attentive eye to every conceivable aspect of the topic. Throughout the Paper certain issues have arisen that, in my view, might benefit from further analysis at some stage in the future. Where this is the case, I have indicated accordingly in the Research Paper.

A lack of source literature

The scope of source literature on the theory and (particularly) practice of consumer advocacy is limited. Another way of describing this limitation is that there is a lack of source literature, although by suggesting there is a lack of literature, there is an implication of comparison to other areas of analysis where there may be more literature (for example, literature on competition policy). In part, of course, the scope (or lack thereof) of consumer advocacy literature could itself be an indicator that consumer advocacy is an area that attracts less resources than other important aspects of how we understand the development of public policy (assuming there is greater value to understanding consumer advocacy greater than the scope of the literature might suggest).

¹ For example, Hutton *What are consumer organizations for? Some issues from Europe and elsewhere* Ruby Hutchison Memorial Lecture, 2004 at 1, available at <http://www.consumer.vic.gov.au/CA256F2B00224F55/page/Publications-Conference+%26+Seminar+proceedings-10th+Ruby+Hutchison+Memorial+Address?OpenDocument&1=80-Publications-~&2=960-Conference+%26+Seminar+proceedings-~&3=0-10th+Ruby+Hutchison+Memorial+Address->

“ Methodology ”

Literature review

The methodology utilised to prepare this Research Paper has largely consisted of identification, and then analysis, of literature relevant to consumer advocacy in Victoria. The literature reviewed includes:

- articles published in Australian and international journals (both scholarly and non-scholarly)
- books published in Australia and internationally (both scholarly and non-scholarly)
- websites of consumer and other organisations
- reports of government and consultants' inquiries into consumer advocacy in Victoria, Australia and internationally, and
- commentary by academics, regulators and consumer advocates available in the popular media (internet, print, radio and television).

A complete Bibliography appears at the end of the Research Paper.

The literature review has included a close examination of the views of consumer advocacy organisations as to their own role, effectiveness and future. The literature reviewed is deliberately diverse to enhance the robustness of the conclusions drawn in the Research Paper. Adding to the significant scope of these materials, the author has brought eight years of professional experience in Victorian (and Australian) consumer advocacy to inform each stage of the Research Paper. A final, important element of the methodology, is a series of interviews with consumer advocacy stakeholders.

Interviews with consumer advocacy stakeholders

Preparation of the Research Paper has been informed by interviews with five consumer advocacy stakeholders. These stakeholders were chosen to represent a wide range of views about consumer advocacy in Victoria. The stakeholders chosen represent senior executive views from a Victorian consumer advocacy organisation, a Victorian community organisation, a large national business, an Ombudsman and a government department with consumer affairs responsibilities. To promote full and frank contributions from these stakeholders (particularly given the small size of consumer advocacy in Victoria), the stakeholders have not been individually identified, although all comments made by stakeholders have been quoted and attributed as “Stakeholder Comments”. I sincerely thank each of these stakeholders for the generous contribution of their time and knowledge.

“ Format ”

The Research Paper has been prepared in four stages, each stage examining a question central to a discussion of consumer advocacy in Victoria. The four stages of the Research Paper are:

Stage 1 (Research Stage): What do we mean by the term “consumer advocacy”?

What is consumer advocacy? What is its purpose? What is its role? What is its value? The meaning of the term “consumer advocacy” is not self evident. Consumer advocacy can, however, be defined, as can its role, purpose and value, by analysing academic and non-academic literature, particularly literature related to the history, theory and practice of consumer advocacy.

Stage 2 (Mapping Stage): What is the current framework for consumer advocacy in Victoria?

Who undertakes consumer advocacy in Victoria and what is the scope of that advocacy? This stage of the Research Paper produces a map of consumer advocacy in Victoria.

Stage 3 (Evaluation Stage): What is the effectiveness of the current framework for consumer advocacy in Victoria?

Following on from the mapping stage, this evaluation stage sets parameters for measurement of the effectiveness of consumer advocacy, by reference to existing literature and new analysis undertaken for the Research Paper. The existing framework for consumer advocacy in Victoria (set out in the mapping stage) is then measured against these effectiveness parameters.

Stage 4 (Conclusions Stage): What are the options for the future of consumer advocacy in Victoria?

Following on from the evaluation stage, the Research Paper presents a series of options for the consideration of policymakers for the future of consumer advocacy.

“ Executive summary ”

1. What do we mean by the term “consumer advocacy”?

Consumer advocacy means providing a voice for consumers. This view is supported by a review of the history of Victorian (and Australian) consumer advocacy, literature that considers the term advocacy and an examination of the mission statements of organisations that describe themselves as consumer advocates. Consumer advocates should be a voice for this end: the maximisation of the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice. While this should be the end purpose of consumer advocacy, there are four means to this end, to which consumer advocates should direct their voice, namely, competitive markets, consumer protection regulation, consumer redress and distributive (or social) justice.

1.1 The purpose of consumer advocacy

Consumer advocacy should, as a first principle, be a voice for competition. While it is clear that the benefits of competition are not equally agreed in the community, in my view, the detriment to Victorian consumers caused by anti-competitive markets will generally be much greater than any detriment that embracing competitive markets might be thought to entail. Economies that lack competitive markets operate inefficiently and are less productive, robbing consumers of the opportunity to create greater wealth. This is a critical value of competition and the efficient allocation of resources that it creates – the greater the wealth created in society, the greater our capacity to distribute it in a way that creates social outcomes in accordance with our collective notions of justice, decency and inclusiveness.

Competitive markets do not necessarily (and in fact rarely ever do) operate perfectly. In short, markets fail and by that failure consumers can be harmed. Australian consumer protection policy – at Commonwealth level – has stagnated during the last decade. During the same 10 years, however, we have seen a comprehensive review of the competition policy provisions of the *Trade Practices Act 1974*, a review of the corporate governance arrangements for Commonwealth statutory agencies and independent regulators, a recently commenced review examining government “red tape” as well as a review of Australian infrastructure needs. Each of these reviews has followed campaigns by producer group interests for regulatory reform favourable to them. Consumer advocates have a critical role as a voice for consumer protection regulation, including a role in articulating the interface of competition and consumer protection policy.

Consumer advocacy should be a voice for consumers to achieve access to justice. Consumers will not all equally have the resources, finances, skills, experience or other attributes, to access methods to resolve problems that inevitably arise in the marketplace. This is a role for, among others, consumer advocates.

Competitive markets optimise efficient allocation of resources and maximise total wealth, but they do not necessarily distribute wealth in a way that will accord with agreed notions of justice or fairness. Consumer advocates should be a voice, where now there is too often silence, for a fair distribution of the wealth that deregulation and competitive markets create.

1.2 The practice of consumer advocacy

Consumer advocates act for individual consumers, groups of consumers, classes of consumers and consumers as a whole. Consumer advocates typically make distinctions as to who they represent based on income/vulnerability as well as types of consumer markets, for example, the credit market. Consumer advocates undertake individual advocacy (both legal and non-legal advocacy) as well as policy advocacy. The biggest gap in Victorian consumer advocacy is the undertaking of policy advocacy.

The consumer voice is heard in regulatory and political processes, by independent regulators, government departments, Ministers and their advisers, other members of parliament, industry and others who have decision-making roles in regulatory policy.

Are there criteria to qualify for the title “consumer advocate”? It is evident that there are no consumer advocacy degrees, professional bodies (as opposed to peak bodies) or other forms of restrictions on referring to a person or organisation as a consumer advocate. Overall the majority of stakeholders interviewed supported an inclusive view of consumer advocacy, believing that consumer advocacy was undertaken by non-profit, non-government organisations, some for-profit organisations, individuals and government bodies, particular consumer agencies.

It is apparent that consumer advocacy organisations see an important role for informing their policy voice – through the undertaking of individual advocacy to learn of new marketplace issues, undertaking research on new and emerging policy issues and designing policy solutions for presentation to policymakers.

2. What is the current framework for consumer advocacy in Victoria?

The Research Paper establishes the following framework for Victorian consumer advocacy consistent with the theoretical exercise undertaken in section 1 of the Research Paper.

Category 1: Generalist not-for-profit, non-government consumer organisations: The Consumer Law Centre Victoria, the Consumer Credit Legal Service, the Australian Consumers’ Association and the Consumers’ Federation of Australia.

Category 2: Specialist not-for-profit, non-government consumer organisations: The Consumer Utilities Advocacy Centre, the Communications Law Centre, the Consumers’ Telecommunications Network, the Health Issues Centre, the Tenants Union of Victoria, the Financial and Consumer Rights Council, the Public Transport Users’ Association and the Consumers’ Health Forum.

Category 3: Generalist not-for-profit, non-government community organisations: The Victorian Council of Social Service, the Australian Council of Social Service, Good Shepherd Youth and Family Services, St Vincent de Paul and Victorian Community Legal Centres.

Category 4: Individuals

Category 5: Industry, government and regulatory bodies: Consumer Affairs Victoria and the Australian Competition and Consumer Commission.

3. What is the effectiveness of the current framework for consumer advocacy in Victoria?

Consumer organisations are effective within the significant constraints of their resources and often, by working “smarter and harder” than those voices they seek to oppose, stretch those resources beyond their seemingly natural constraints. This is, of course, different to saying that consumer advocacy is effective for consumers. Existing arrangements for Victorian consumer advocacy are less effective than desirable. It is a widely shared view that consumer voices are not heard (or sufficiently heard) in Victorian (as well as Australian and overseas) political and regulatory processes.

3.1 How effective are consumer advocates in achieving the purpose of consumer advocacy?

The reality is that the interest that consumers have in competing producers is generally not shared by the producers themselves. In fact, producer groups devote very significant resources to arguing for protection from competitive disciplines. Given the importance of competitive markets for consumers, and the dominance of producer groups in the market for regulation, this is undoubtedly the area of advocacy work to which consumer groups should give particular focus. Unfortunately, it is the area of advocacy in which most consumer groups are the least effective. This is so for two primary reasons. First, a significant number of consumer organisations are disinclined to embrace the benefits of competitive markets (and the consumer detriment that flows from uncompetitive markets) and therefore either do not advocate for competitive disciplines, or, worse still, sometimes support anti-competitive proposals. Second, due to the fact there are some consumer organisations that do advocate the value of competitive markets, there is a conflict of consumer advocacy voices on this issue. The lack of a singular consumer voice speaking against anti-competitive protectionism proposed by government, regulators or producers results in consumer organisations’ approach to public policy appearing fragmented. This makes it easier for their voice (which is already small) to be even more marginalised.

Victorian consumer advocacy organisations have been an effective voice for world class Victorian consumer protection legislation, working with a Government that has sought to ensure an appropriate balance of market freedom with market regulation. Consumer advocates have (thus far) been less effective in their advocacy for national consumer protection initiatives. Part of the reason for this has been the ineffectiveness of consumer advocates in articulating consumer protection measures within a law and economics framework as well as embracing, articulating and persuading policymakers of the competition-enhancing nature of consumer protection regulations.

Consumer advocates have been a significant and effective voice over that last decade for consumers (particularly low income and vulnerable consumers) to have access to affordable, timely, fair and efficient dispute resolution.

While consumer advocates have participated effectively in debates regarding community service obligations (in areas such as telecommunications, electricity, gas and water), consumer advocates have not been a loud, clear and consistent voice for socially just distribution of wealth. These debates require participation in areas of public policy that are not obviously areas of consumer advocacy, particularly debates regarding tax policy and social security policy.

3.2 How effective are consumer advocates in their practice of consumer advocacy?

It is possible that consumer advocacy organisations that undertake both individual advocacy and policy advocacy might achieve more effective, efficient outcomes by directing their policy work to where they believe there is consumer detriment (that is, those individual consumers presenting for assistance to achieve redress). On the other hand, it is also possible that scarce resources might be misdirected inefficiently by organisations overly influenced by their individual advocacy practices. Within these practices, consumers presenting for individual assistance tend to be very low income consumers with “retail” or market end-use issues. Basing a policy advocacy practice on these consumers’ experiences may lead to insufficient attention to consumers at large and/or insufficient attention to matters that are not obviously retail issues, for example wholesale markets and other upstream issues, cartel behaviour and broad market design, which may be equally harmful (if not more so) to both low income consumers and consumers generally.

Consumer advocacy organisations, in general, focus their advocacy activities on the interests of low income and vulnerable consumers. It follows that consumer advocacy organisations are much more effective at advocating for these consumers than consumers at

large. It is also clear that consumer advocacy organisations, in general, are more effective at serving segments of markets, as opposed to markets generally. In particular, credit, financial services, utilities, tenancy and telecommunications markets are more effectively served by consumer advocacy organisations. However, this practice results in whole market areas either receiving only minor attention or being wholly ignored. Market segments where consumer advocacy is either less effective or wholly ineffective include insurance, superannuation, building and motor vehicles (the latter two markets are the most significant and expensive markets in which consumers participate and, arguably, markets with poor reputations in terms of, at least, retailing behaviour).

Consumer organisations do successfully undertake considerable research as part of their policy advocacy, but there is little doubt that greater resources directed to this area would enhance the effectiveness of consumer advocacy.

4. What are the options for the future of consumer advocacy in Victoria?

4.1 The purpose of consumer advocacy

The disproportionate influence of producer groups on regulatory development leads to regulatory outcomes that favour the protection of producer groups at the expense of the interests of consumers. The resolution of this problem does not lie in removing or reducing the right of businesses to promote their own interests. What is needed is the development of a more potent, sustained and considered voice by consumer advocates for the benefits of competition – a voice that will counter producer groups that seek anti-competitive arrangements harmful to consumers.

Consumer advocates are regularly accused of being “protectionists” – sceptical of markets, but with a faith in the ability of governments to regulate the markets which they distrust. In fact, the vast bulk of advocacy for protectionist regulation is undertaken not by consumer advocates, but rather, by business groups. Criticism of consumer advocates as unthinking protectionists is badly misguided. Nonetheless, consumer advocates have not been effective in displacing the myth that they are “heavy-handed” protectionists. This pejorative view of consumer advocates, and of consumer protection regulation, as anti-market (particularly within the current Commonwealth Government) is harmful to consumers. Consumer advocates must refine their voice for consumer protection regulation, arguing not just that consumer protection regulation is valuable per se, but that consumer protection regulation should only be

undertaken on the basis of demonstrated need and a careful analysis of costs and benefits. Moreover, consumer advocates must argue the benefits of consumer protection regulation, at least in part, within a law and economics framework, exploring the interplay and complementarity of competition policy and consumer protection policy.

Consumer advocates have been a significant and effective voice over the last decade for consumer (particularly low income and vulnerable consumer) access to affordable, timely, fair and efficient dispute resolution.

Competitive markets optimise efficient allocation of resources and maximise total wealth, but they do not necessarily distribute wealth in a way that will accord with agreed notions of justice or fairness. Consumer advocates must be a voice for both creating wealth and justly distributing that wealth. Success in this area represents, for consumer advocates, the bookend to their success in lobbying for pro-competitive market outcomes.

4.2 The practice of consumer advocacy

There is a strong case for consolidation of consumer advocacy organisations – these mergers will allow consumer organisations to achieve the benefits of economies of scale and scope otherwise unachievable by them. In particular, consideration should be given to merging the Consumer Law Centre Victoria, the Consumer Credit Legal Service and the Financial and Consumer Rights Council. A further way to deal with the problem of a number of small organisations is to ensure that organisations work collectively and collaboratively as well as with other non-government movements, universities and businesses to maximise the consumers' voice.

Government support for consumer advocacy is the most obvious way to provide greater resources to undertake consumer advocacy. There is a strong theoretical case for state sponsorship of interest group representation in public decision-making. The current Victorian Government has been a very generous supporter of consumer advocacy in Victoria, and wildly so in comparison to the current Commonwealth Government. Independent regulators are in a position quite different to government and much more akin to the judiciary – they have a particular need to be, and to be seen to be, scrupulously independent in their actions. For this reason, options such as direct financial support of consumer advocacy organisations by independent regulators will never be appropriate. Consumer organisations need to consider carefully any restrictions they place on receiving funding from industry sources. Clearly some industry funding has the potential to create conflicts of interests for organisations, but it is doubtful that, where these

conflicts are anything other than unmanageable, consumers would welcome organisations representing their interests less effectively because of having rejected industry funding. Philanthropic funders are often underwhelmed by the quantity (and particularly quality) of funding applications they receive. Having said that, most philanthropic funds persist with a policy of refusing to fund recurrent projects – a position locked in the past and inconsistent with present-day realities.

The biggest gap in the work of consumer advocacy organisations is the undertaking of policy advocacy (including policy advocacy supported by rigorous research). The benefits of policy advocacy are clear, including its long term beneficial (and cost-reducing) nature that can, over time, lead to a reduction in consumer detriment and, of course, the reduction in need for individual advocacy. A model for providing a consumers' policy voice that warrants close examination in Australia is the United Kingdom (UK) National Consumer Council. An Australian National Consumer Council would conduct rigorous research into consumer issues, developing policy solutions for consumers flowing from this research and undertake coherent, well reasoned and high level advocacy. Such a Council could also advocate in markets where consumer advocacy is currently less effective as well as concentrating on economy-wide behaviour of significance to all consumers. An Australian National Consumer Council would be more effective than suggested alternative models for undertaking consumer research, such as competitively tendered research projects from governments.

Additional to an Australian National Consumer Council, there is a case for an independent university-based centre dedicated to consumer policy research. Rigorous research, produced by a centre that is independent of any interest group, will enhance the likelihood of achieving public policy that will enhance the long term interests of consumers.

“What do we mean by the term “consumer advocacy”?”

1

1.1 Introduction

What is consumer advocacy? What is its purpose? What is its role? What is its value? The meaning of the term “consumer advocacy” is not self evident. Consumer advocacy can, however, be defined by analysing academic and non-academic literature, particularly literature related to the history, theory and practice of consumer advocacy. In this section of the Research Paper, I will explore the meaning of the term “consumer advocacy”.

1.2 A brief history of consumer advocacy in Victoria

It is difficult, and ultimately unhelpful, to examine the history of Victorian consumer advocacy without a broader examination of consumer advocacy in Australia. This is so because a number of organisations based outside of Victoria nonetheless operate nationally, including in Victoria. The first body in Australia to identify itself specifically as a consumer organisation was the Australian Consumers’ Association, established in 1959.² While this might seem an appropriate place to begin examining consumer advocacy, in fact there is agreement that the beginning of Australian consumer advocacy can be found much earlier than 1959, indeed placing it to the latter part of the nineteenth century. In their overview of the Australian consumer movement, Robin Brown and Jane Panetta observe that:

*consumer activism is at least half a century older. Women’s organisations were the driving force of a fledgling consumer movement which emerged around the turn of the century and intensified in response to economic hardships of WW1 and the Great Depression.*³

In short, these women’s organisations undertook two major functions. The first function was to provide, or establish the provision of, consumer services such as consumer co-operatives. The second function involved lobbying on behalf of consumers through protest marches, campaigns and similar activities.⁴

It should be no surprise then, that women (particularly a pioneering Western Australian, Ruby Hutchison) played a major role in the establishment of the Australian Consumers’ Association. The Australian Consumers’ Association followed the dual function model of the women’s organisations, in its case, by undertaking product testing and reporting those tests (in Choice magazine) as well as lobbying on behalf of consumers.

Following unsuccessful attempts to establish state branches of the Australian Consumers’ Association, “some of the people involved transformed their branches into independent State or Territory-based organisations”.⁵ For many years following this time, for example, the Consumers’ Association of Victoria played an active (albeit limited) role in Victorian consumer affairs issues.⁶

A further important part of the history of consumer advocacy was the creation, in 1974, of the Australian Federation of Consumer Organisations. The Australian Federation of Consumer Organisations (now the Consumers’ Federation of Australia), was the peak representative body for Australian consumer organisations and, until its defunding by the current Commonwealth Government upon election in 1996,⁷ was a very active policy lobbyist for consumers and attracted a number of highly talented staff.⁸

1.3 The purpose of consumer advocacy – providing a voice for consumers

A co-incidental development to the Australian Consumers' Association, the Australian Federation of Consumer Organisations and jurisdiction-based consumer associations, was the creation of access to individual advocacy (as well as policy advocacy) for low income and vulnerable consumers through the establishment of Commonwealth Legal Aid and community legal centres.⁹ Both Commonwealth Legal Aid (and later the Legal Aid Commission of Victoria, now Victoria Legal Aid) and community legal centres played a very significant role in individual consumer legal advocacy throughout the 1970s, 1980s and 1990s. Moreover, community legal centres (although not Victoria Legal Aid or its predecessors to any meaningful extent), played a large role in policy advocacy on consumer issues throughout this time (I examine the current role of Victoria Legal Aid and community legal centres both generalist and specialist, in section 2 of the Research Paper below). In his survey of the work of community legal centres as policy advocates (particularly during the 1980s), Jeff Giddings set out a number of lobbying campaigns undertaken by community legal centres that were focussed on consumer issues, for example the provision of credit. He observed that community legal centres were able to “challenge many finance industry practices which [had] previously been subject to very little scrutiny”.¹⁰ The central role of community legal centres during this period was to:

*provide a voice for members of the community who otherwise have real difficulty being heard, telling policy makers of the problems people experience with the legal system with the aim of seeing injustices and anomalies corrected.*¹¹

In summary, consumer advocacy historically can be seen as consisting of three essential elements (although not all elements necessarily featured at one place or one time in any given organisation):

1. the provision of a “voice” for consumers in the development of public policy
2. the provision of services for consumers, such as buying co-operatives or the supply of independent product/service information to inform consumer choice, and
3. the provision of individual advocacy and/or legal representation for consumers.

*Advocacy: The function of an advocate.*¹²

*Advocate: One who pleads, intercedes or speaks for another.*¹³

*Consumers by definition, include us all ... [t]hey are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group... whose views are not often heard.*¹⁴

A survey of the literature devoted to the concept of advocacy suggests many different possible meanings. Indeed, it is not clear that any one meaning will be “correct”, as advocacy may be contextual to a situation, type of organisation or similar variable. NPAction, an online resource that provides tools and information for non-profit advocacy, states that:

*[t]he word advocacy can mean many different things in the nonprofit world and can be at the heart of activities, strategies, mission, core values and overall organizational effectiveness.*¹⁵

Nonetheless, the brief survey of the history of Victorian (and Australian) consumer advocacy at 1.2 above, as well as a survey of the advocacy literature generally, suggests some commonality of view – in essence, consumer advocacy is about providing a voice for consumers. NPAction notes that “[f]undamentally, advocacy is about speaking out and making a case for something important”.¹⁶

Examining the mission statements of organisations that describe themselves as consumer advocates reveals the centrality of the idea of provision of a voice for consumers. For example, one of the leading consumer organisations in the United States of America, the Consumer Federation of America, states that “[s]ince 1968, the Consumer Federation of America has provided consumers a well reasoned and articulate voice in decisions that affect their lives”.¹⁷

The Victorian Consumer Utilities Advocacy Centre, a non-profit consumer organisation focussing on consumer utilities issues, states that it “provides a voice for, and strengthens the input of, Victorian utility consumers – particularly low income, disadvantaged, and rural and regional consumers – in the policy and regulatory debate”.¹⁸

The UK National Consumer Council, a self described consumer advocacy organisation, states its mission thus: “We help everyone get a better deal by making the consumer voice heard”.¹⁹

These organisational statements contain what I believe to be the essence of consumer advocacy – the provision of a voice for consumers.

1.3.1 Consumer advocacy should be a voice for the maximisation of the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice

Of course, the idea that consumer advocacy means the provision of a voice for consumers does not provide anything beyond a superficial understanding of consumer advocacy.

Consumer advocacy is about speaking out and representing the interests of consumers in our society. (Stakeholder Comment)

In my view, at least at first glance, consumer advocacy is about providing a voice for the maximisation of the interests of consumers. This statement, however, begs at least three important questions:

1. What do we mean by “maximisation”?
2. What do we mean by “consumers”?
3. What do we mean by “interests”?

1.3.1.1 What do we mean by “maximisation”?

There is abundant literature, and within that literature an abundance of different views, as to what constitutes a just (and deserved) allocation of resources within a community (as well as the best way to maximise the resources to be allocated).²⁰ While an examination of the theory of justice is well beyond the scope of the Research Paper, important parts of what I will go on to say in the Research Paper are based on my conception of the creation of maximum community resources and the distribution of those resources. It is a conception that is influenced by welfare economics theory.²¹

Stated simply, in my view, consumer policy should in the first instance be directed to an economically efficient allocation of resources. The question to ask of any policy decision is “Will this transaction or change make somebody better off while making no one worse off?” (what economists would refer to as Pareto efficiency).²² Economic efficiency maximises the total wealth in our community for distribution which is undeniably a good thing, although it does not necessarily result in a “fair” distribution of wealth (that is, some will start with and/or accumulate much greater wealth than others).²³ Accordingly, within this efficiency paradigm, there will, however, be considerable scope to redistribute wealth (although attendant to this, there will be considerable scope for

governments to distort markets).²⁴ This redistribution may affect pre-existing wealth (what economists would refer to as prior endowment) or future wealth.²⁵

1.3.1.2 What do we mean by “consumers”?

When I refer to consumers in the Research Paper, I am generally referring to all consumers. This is not to say, particular attention will not need to be paid to certain classes of consumers (either in terms of devising policies to maximise economic efficiency, or with respect to distributive measures). Indeed, consumer advocates focus a significant amount of their time on the interests of low income and vulnerable consumers.²⁶ I examine this matter in further detail at 1.4.2 below. Paying particular attention to low income and vulnerable consumers may be warranted on the basis that they are less likely to be able to invest resources, either directly or indirectly, in influencing political/regulatory process to their collective benefit while at the same time being especially likely to suffer the greatest detriment of unfavourable market, political or regulatory behaviour. Nonetheless, there are a range of other voices in society for the needs of low income and vulnerable, including church-based welfare organisations and councils of social services. There is an obvious lack, however, of a broad-based consumer political lobby.²⁷ This is especially alarming given (and partly an explanation of) what I will go on to argue in the Research Paper, namely, that producer voices consistently succeed in extracting regulation favourable to them and costly to consumers (see section 3.2.1.1 below). For this reason, a broad-based approach to consumer interests is desirable. Such an approach, co-incidentally, is also likely to make the consumer advocacy voice more legitimate among consumers themselves, as well as those with political and regulatory power whom they are seeking to influence.

As a matter of completeness, I am aware of a broader debate that focuses on the difference between consumers as opposed to citizens.²⁸ While it is also the case that the words “consumers” and “citizens” are regularly used interchangeably,²⁹ generally speaking, when people refer to citizens they appear to be intending (though not necessarily defining) a wider set of interests than that which is assumed to pertain to consumers.³⁰ Often the notion of a relationship with a broader polity is intended – the connection between citizens and government is contrasted with the connection between consumers and markets.³¹ A further, sometimes related, debate is the attack on consumerism.³²

1.3.1.3 What do we mean by “interests”?

In the Research Paper, the term “consumer interests” is intended to be construed broadly and can include achieving lower prices, greater choice, greater quality of goods and services, greater wealth or fairer distribution of wealth. “Interests” can, of course, be even more broadly defined to include interests that consumers have in environmental sustainability, health, education and other social programs as well as a range of general non-pecuniary, but otherwise valued, matters of utility. Throughout the Research Paper, the complex interplay of these various (sometimes competing, sometimes complementary) interests cannot be understated. Take, for example, the debate regarding the deregulation of shop trading hours. It would be typical to argue, from a consumer perspective, that the greater freedom of choice and lower prices that flow from deregulation (and concomitant competitive stimulus) is in the long term interests of consumers. Nonetheless, some will argue that there are competing matters of utility, or broad community values, that are at play in the debate. While, on balance, I think the case is clear – consumer advocates should be a voice for deregulated shop trading hours – it is worth noting that the matter is not without contention, or legitimate alternative viewpoints, based upon assessment of interests.

A further question arises when considering interests. Do we mean the short term interests of consumers or their long term interests? For example, in some newly competitive markets, short term price rises may actually be desirable to achieve greater competition that will benefit consumers in the long term. In my view, there is a danger to advocacy that seeks short term benefits to consumers that are not consistent with achieving sustainable, long term consumer benefit. Generally speaking, consumers are best served by public policy that is directed towards maximising their interests in the long term.³³

Accordingly, in my view, consumer advocates should be a voice for this end: the maximisation of the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice.³⁴

While this is the end purpose of consumer advocacy, I believe there are four means to this end, to which consumer advocates should direct their voice, namely:

- competitive markets
- consumer protection regulation
- consumer redress, and
- distributive (or social) justice.³⁵

I will now proceed on the basis that I examine, in turn, each of the four means that I have set out, as I believe they are the critical steps to a singular end: the maximisation of the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice.

1.3.2 Consumer advocacy should provide a voice for competitive markets

1.3.2.1 Introduction

Consumption is the sole end and purpose for all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.³⁶

These famous words, written by the founder of modern economics, Adam Smith, are, in my view, the granite upon which all consumer advocacy is built. Consumer advocacy should, as a first principle, be a voice for competition.

I accept that there are divergent views in the community as to whether competition is good for consumers, including whether competition is good at all for consumers, whether competition has a place in some markets (or parts of markets) but not others, or whether competition should be applied subject to other factors, such as environmental or public interest concerns. Assuming we accept that competitive market policies have some value, there is also debate as to how much of Australia’s decade-long period of economic growth can be attributed to competition policy.³⁷ Regardless of views held about competition, one thing is certain – competition is never an end in itself, it is simply a means to an end, that end being to achieve an efficient allocation of resources and the maximisation of the long term interests of consumers.³⁸

1.3.2.2 The value of consumer groups being a voice for competitive markets – an efficient allocation of resources and maximisation of wealth

Theorists committed only to concepts of distributive justice ... are largely engaging in idle chatter as long as the wealth creation function is simply assumed. Creating wealth is a necessary pre-condition to distributing it.³⁹

Economies that lack competitive markets operate inefficiently and are less productive, robbing consumers of the opportunity to create greater wealth. This is a critical value of competition and the efficient allocation of resources that it creates – the greater the wealth created in society, the greater our capacity to distribute it in a way that creates social outcomes in accordance with our collective notions of justice, decency and inclusiveness.

While it is clear that the benefits of competition are not equally agreed in the community, in my view the detriment to Victorian consumers caused by anti-competitive markets will generally be much greater than any that may be entailed in embracing competitive markets. In fact, social theorists have long recognised the danger to consumers of a monopoly in production. Indeed, famous English philosopher, Bertrand Russell, hardly a thinker immediately associated with the value of free markets, noted that the “real enemy is the monopolist”.⁴⁰

Anti-competitive cartels, for example, can potentially rob consumers (including Victorian consumers) of billions of dollars, by artificially inflating the price consumers pay for goods or services. Similarly, industries that seek regulation protecting them from the tough discipline of competitive pressures do not do so because they are seeking to benefit consumers – they do so to benefit themselves.

In the process, their self interest in avoiding competitive pressures is, in fact, harmful to consumers. Lack of competitive pressures in markets fails consumers in many ways, for example resulting in higher prices, fewer choices or lower quality of goods and services.

Our economic welfare does not start or stop at the Victorian border. Victorian consumers are affected by national and international economies – this is the nature of our increasingly globalised economy. Globalised economies require us to increase our international competitiveness. We need businesses to compete effectively within Australia if they are to compete effectively outside of Australia. In the words of Harvard University’s Michael Porter, we need “vigorous domestic rivalry” for national, and in turn, international advantage.⁴¹

In its report on how Australia’s program of micro-economic reform (and the implementation of National Competition Policy Reform) has increased our competitive advantage, the Productivity Commission set out a series of benefits of the reform program:

- National Competition Policy was a key driver of marked improvement in Australia’s productivity performance in the second half of the 1990s.⁴²
- A permanent 2.5 per cent increase in our Gross Domestic Product (GDP). This equates to an additional \$20 billion for the Australian economy.⁴³
- Average real prices in the electricity sector, for example, have fallen by 18 per cent and in the telecommunications sector by 20 per cent⁴⁴ (although the report does note that some infrastructure reforms have led to higher charges, particularly for households).⁴⁵

1.3.3 Consumer advocacy should provide a voice for consumer protection regulation

1.3.3.1 Introduction

In the previous section of the Paper, I have said that consumer advocacy should, as a first principle, be a voice for competition – through competition, societal wealth is maximised and a greater level of wealth creates a greater resource pool to distribute to the members of our society. Competitive markets do not necessarily (and in fact rarely ever do) operate perfectly. In short, markets fail and by that failure consumers can be harmed. In this section of the Research Paper, I will reflect on what I believe to be the second important voice for consumer advocacy – a voice for consumer protection regulation.

Australian consumer protection policy – at Commonwealth level – has stagnated during the last decade.⁴⁶ Despite considerable reform to consumer protection laws in Australian state and territory jurisdictions as well as reform overseas, there has been no review of the consumer protection provisions in Commonwealth legislation. There are many examples of reform, but in particular laws prohibiting unfair contract terms, which have been enacted in the UK and Victoria, stand out for attention.

During the same 10 years, however, we have seen a comprehensive review of the competition policy provisions of the Trade Practices Act 1974 (commonly referred to as the Dawson review).⁴⁷

Similarly, we have seen a review of the corporate governance arrangements for Commonwealth statutory agencies and independent regulators (commonly referred to as the Uhrig Review),⁴⁸ a recently commenced review examining government “red tape”⁴⁹ as well as a review of Australian infrastructure needs.⁵⁰

Each of these reviews has followed campaigns by producer group interests (some of them monopolist interests) for regulatory reform favourable to them.⁵¹

1.3.3.2 *The value of consumer groups being a voice for consumer protection regulation – the interface of competition and consumer protection policy*

It is well accepted in the literature that consumer protection policy serves a valuable aim – to protect consumers from market failure.⁵² This is not to say that it is similarly accepted that it always succeeds, or that when it does, it does not sometimes cause more costs than benefits – on this there is a divergence of views.⁵³ There is a second stream of analysis about the role of consumer protection regulation that is evident from the literature – a stream of analysis that is not as well developed or prolific as the first. Nonetheless, this second stream of analysis is a potentially powerful, and

challenging, framework for the analysis of why we might value certain consumer protection regulation. This second stream of analysis examines the interface of competition policy and consumer protection policy.

A useful starting point for this analysis is 1983, when Ron Bannerman, the then Chairman of the (then) Trade Practices Commission (now the Australian Competition and Consumer Commission) said:

I have seen consumer protection on the one hand and competition on the other as principles that should be mutually supporting ... [c]onsumers not only benefit from competition, they activate it and one of the purposes of consumer protection law is to ensure that they are in a position to do so.⁵⁴

This idea of not only mutuality, but complementarity, between competition policy and consumer protection policy has been well accepted overseas. In 2002, Timothy Muris, (then) Chairman of the US Federal Trade Commission, reflected on a time when “linking antitrust analysis with economic thinking was radical and dangerous”.⁵⁵ While, as Muris points out, this time is now “safely behind us”,⁵⁶ the relationship between “antitrust and consumer protection” remains the next “policy interface”⁵⁷ to be explored and examined.

Similarly, the Chairman of the UK Office of Fair Trading, John Vickers, echoed Muris’ comments, pointing out that “consumer policy and competition policy are logically and institutionally intertwined. But while economics has had immense influence on competition policy, it has had much less to do with consumer policy”.⁵⁸

Where consumer protection measures promote confidence in markets, assist consumers to safely exercise choice of suppliers and eliminate unfair terms that exist due to lack of proper information, then those measures can make markets work more effectively – they can be pro-competitive. Recent academic research supports the view that well targeted consumer protection regulation can enhance consumer confidence in markets, encouraging competitive market outcomes.⁵⁹ This is particularly the case in newly competitive markets (such as utilities) where transaction costs can outweigh switching benefits and inappropriate marketing behaviour may prevent active market participation. In the words of Louise Sylvan, Deputy Chair of the Australian Competition and Consumer Commission, there is a need for “competition-enhancing consumer protection regulations” to “[generate] and [maintain] consumer trust in the market”.⁶⁰

1.3.4 Consumer advocacy should provide a voice for consumer redress

Consumer advocacy should be a voice for consumers to achieve access to justice. Assuming, as I have, that there is an important place for a consumer protection overlay on markets, it follows that for the availability of consumer protection remedies to consumers (or regulators as the case may be) is also important. If this were not the case, those consumer protections would be of no value beyond giving a façade of protection. Consumers will not all equally have the resources, finances, skills, experience or other attributes, to access methods to resolve problems that inevitably arise in the marketplace. This is a role for, among others, consumer advocates.

The role of consumer advocates in assisting individual consumers is considered in greater detail in section 1.4.1 below.

1.3.5 Consumer advocacy should provide a voice for distributive justice

Competitive markets optimise efficient allocation of resources and maximise total wealth, but they do not necessarily distribute wealth in a way that will accord with agreed notions of justice or fairness. Consumer advocates should be a voice, where now there is too often silence, for a fair distribution of the wealth that deregulation and competitive markets create.⁶¹ As Canadian academic Michael Trebilcock has powerfully observed:

for economists to claim that they are only concerned with maximising the total value of social resources, without being concerned about how gains in the value of social resources are to be distributed and whether these gains are in fact making the lives of individuals better ... reflects a highly impoverished view of the world.⁶²

Australian society, and Victoria no less so, retains its long-cherished cultural connection to the spirit of a fair go and egalitarianism. The vast majority of Victorian consumers, in my view, are genuinely, and rightly, concerned with distributional outcomes – in fact, it has been the seeming indifference of competition policy to this end that has understandably created distrust and anger in the general population (and among consumer advocates themselves) about competition. Economic growth exists within a social and environmental context – it exists to serve not just the majority of Australians, but all of them. In support of this view, we need look no further than the father of free market economics, Adam Smith. Smith tells us that:

Labourers and workmen of different kinds ... make up the far greater part of every political society. But what improves the circumstances of the greater part can never be regarded as an inconvenience to the whole.⁶³

1.4 The practice of consumer advocacy

Consumer advocacy is about identifying where activities in markets adversely affect consumers, bringing those activities out into the open, discussing, researching and analysing those activities and advocating changes to market practice, regulatory or political policies and processes to address those activities. (Stakeholder Comment)

So far in the Research Paper, I have suggested consumer advocacy means providing a voice for consumers. I have gone on to identify the end purpose of consumer advocacy as well as four means to that end. This leaves thus far unaddressed important questions about how consumer advocates undertake their advocacy and for whom that advocacy is undertaken.

1.4.1 Types of advocacy

Consumer advocates act for individual consumers, groups of consumers, classes of consumers and consumers as a whole. A typical classification applied during the stakeholder interviews was that consumer advocates undertook:

1. Individual advocacy: Within this category there were two identified sub-categories, namely:
 - 1.1 legal advocacy on either a one-time or ongoing basis for consumers who were seeking redress for a dispute with a business, regulator, government or other body/person, and
 - 1.2 non-legal advocacy on, generally a one-time basis, for people seeking general advice or advice about a dispute with a business, regulator, government or other body/person.
2. Group advocacy: Advocacy (typically legal) for a group of consumers similarly affected by the one problem.
3. Policy advocacy: Advocacy to governments, regulators and others for new regulation (or removal of regulation) or some other form of policy tool to benefit consumers.

Two points need to be made about these classifications. The first point is that, in my view, all three types of advocacy described can, either undertaken separately or in combination, legitimately be described as consumer advocacy. There is a view, expressed by some respondents in the stakeholder interviews, that only those organisations that undertake all three types of advocacy can be considered consumer advocates. Aside from the counter-intuitive nature of this suggestion (it would, for example exclude as consumer advocates the UK National Consumer Council, the Consumer Utilities Advocacy Centre and the Consumer Federation of America among others), it is not clear that having both individual and policy advocacy practices is necessarily optimal, more complete or better than having one function or the other. I examine this latter point in greater detail when I examine the effectiveness of consumer advocacy (see section 3 below).

The second point is that, although I suggest all three types of advocacy can independently be regarded as consumer advocacy, in my view, the biggest gap in Victorian consumer advocacy is the undertaking of policy advocacy. Again, I examine this latter point in greater detail when I examine the effectiveness of consumer advocacy (see section 3 below).

1.4.2 For whom do consumer advocates provide a voice?

I have already noted in section 1.4.1 above that consumer advocacy can involve advocacy for individual consumers, groups of consumers or consumers as a whole. Consumer advocates, though, will also typically make one other distinction in terms of who they represent based on income/vulnerability. While the Consumer Federation of America, for example, states that it represents:

some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people [which] enables CFA to speak for virtually all consumers⁶⁴

it goes on to note that it “looks out for those who have the greatest needs, especially the least affluent”.⁶⁵

Consumer advocacy is about speaking out and representing the interests of consumers in our society. (Stakeholder Comment)

Consumer advocacy organisations, in addition to the above distinctions, might also direct their advocacy to certain consumer markets, for example credit or financial services, rather than consumer markets generally. This is the case with, for example, the Communications Law Centre, the Consumer Utilities Advocacy Centre and the Consumer Credit Legal Service Victoria.

1.4.3 Who (or what) hears the consumer voice?

The consumer voice is heard in regulatory and political processes, by independent regulators, government departments, Ministers and their advisers, other Members of Parliament, industry and others who have decision-making roles in regulatory policy, although, as I will go on to argue, this voice is not heard equally across all of these spheres (see section 3.2.1.1 of the Research Paper).

1.4.4 Who can be a consumer advocate?

Are there criteria to qualify for the title “consumer advocate”? It is evident that there are no consumer advocacy degrees, professional bodies (as opposed to peak bodies) or other forms of restrictions on referring to a person or organisation as a consumer advocate. During the stakeholder interviews, each respondent was asked who undertakes consumer advocacy. As part of the response to this question, stakeholders identified criteria for consumer advocacy. The only criteria mentioned by all stakeholders were activities undertaken by not-for-profit and non-government organisations. Views among stakeholders varied about whether these criteria were exclusive or not. Should we recognise, for example,

- Advocacy undertaken by individuals as opposed to organisations?
- Advocacy undertaken by for-profit organisations or only those which are not-for-profit?
- Advocacy undertaken by government and/or regulatory bodies or only advocacy undertaken by non-government organisations?

Some stakeholders did not accept that consumer advocacy could be undertaken by individuals, while others believed consumer advocacy was clearly undertaken by individuals, indeed overly so, describing consumer advocacy as “personality-dependent”. Similarly, some stakeholders were firmly of the view that only non-government and non-profit organisations could undertake consumer advocacy, while others saw a role for certain commercial organisations and certainly for government agencies, such as Consumer Affairs Victoria. These matters are considered in greater detail in section 2.2.5.1 of the Research Paper. Overall the majority of stakeholders supported an inclusive view of consumer advocacy, believing that consumer advocacy was undertaken by:

- non-profit, non-government organisations
- some for-profit organisations
- individuals, and
- government bodies, particularly consumer agencies.

Whilst one stakeholder sensibly cautioned against use of criteria for who can be said to be undertaking consumer advocacy that were so “broad and banal that it is effectively meaningless”, I believe the inclusive view of consumer advocacy is preferable to the limited view. The limited view of consumer advocacy (that consumer advocacy can only be undertaken by non-profit and non-government organisations) potentially risks excluding extensive activities undertaken by organisations that are clearly motivated by, and directed towards, the best long term interests of consumers (see, for example, the discussion of the consumer advocacy undertaken by government agencies such as Consumer Affairs Victoria, at section 2.2.5.1 of the Research Paper). As such, it is the inclusive approach that I will adopt in the Research Paper.

1.5 Informing the voice – other important aspects of consumer advocacy

There is another important issue to address in our analysis of the meaning of consumer advocacy.⁶⁶ As already canvassed in the Research Paper (at section 1.3), consumer advocacy is a voice for consumers, but what informs that voice? It is apparent that consumer advocacy organisations see an important role for informing their policy voice – through the undertaking of individual advocacy to learn of new marketplace issues, undertaking research on new and emerging policy issues as well as designing policy solutions for presentation to policymakers. The Consumer Utilities Advocacy Centre states that it:

*initiates and supports research into issues of concern to Victorian utility consumers, through in-house research and building the capacity of consumers through its Grants Program ... [and] investigates and responds to systemic issues affecting Victorian consumers in the competitive electricity and gas markets and with regard to water.*⁶⁷

The Consumer Federation of America states that:

*[a]s a research organization, CFA investigates consumer issues, behavior, and attitudes using surveys, polling, focus groups, and literatures reviews. The findings of such projects are published in reports that assist consumer advocates and policymakers as well as individual consumers. This research also provides the basis for new consumer initiatives, public service advertising, and consumer information and education efforts.*⁶⁸

The undertaking of rigorous research to support public policy is a commodity insufficiently available in the regulatory “market”.⁶⁹

As a matter of completeness, I note that many consumer advocacy organisations also undertake a range of other functions that they might associate with consumer advocacy, for example, the provision of services, training, education programs and support for members. For example, the Consumer Federation of America notes that:

*[a]s an education organization, CFA disseminates information on consumer issues to the public and the media, as well as to policymakers and other public interest advocates. Conferences, reports, books, brochures, news releases, a newsletter, and a website all contribute to CFA's education program. Finally, as a service organization, CFA provides support to national, state, and local organizations committed to the goals of consumer advocacy, research, and education. Some of these organizations are consumer advocacy, education, or cooperative organizations that belong to the federation.*⁷⁰

Summary of section 1: What do we mean by the term “consumer advocacy”?

A voice for consumers

Consumer advocacy means providing a voice for consumers. This view is supported by a review of the history of Victorian (and Australian) consumer advocacy, literature that considers the term “advocacy” and an examination of the mission statements of organisations that describe themselves as consumer advocates. Consumer advocates should be a voice for this end: the maximisation of the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice. While this should be the end purpose of consumer advocacy, there are four means to this end to which consumer advocates should direct their voice, namely:

- competitive markets
- consumer protection regulation
- consumer redress, and
- distributive (or social) justice.

Consumer advocacy should provide a voice for competitive markets

Consumer advocacy should, as a first principle, be a voice for competition. While it is clear that the benefits of competition are not equally agreed in the community, in my view, the detriment to Victorian consumers caused by anti-competitive markets will generally be much greater than any that may be entailed in embracing competitive markets. Economies that lack competitive markets operate inefficiently and are less productive, robbing consumers of the opportunity to create greater wealth. This is a critical value of competition and the efficient allocation of resources that it creates – the greater the wealth created in society, the greater our capacity to distribute it in a way that creates social outcomes in accordance with our collective notions of justice, decency and inclusiveness.

Consumer advocacy should provide a voice for consumer protection regulation

Competitive markets do not necessarily (and in fact rarely ever do) operate perfectly. In short, markets fail and by that failure consumers can be harmed. Australian consumer protection policy – at Commonwealth level – has stagnated during the last decade. During the same ten years, however, we have seen a comprehensive review of the competition policy provisions of the Trade Practices Act 1974, a review of the corporate governance arrangements for Commonwealth statutory agencies and independent regulators, a recently commenced review examining government “red tape”, as well as a review of Australian infrastructure needs. Each of these reviews has followed campaigns by producer group interests for regulatory reform favourable to them. Consumer advocates have a critical role as a voice for consumer protection regulation, including a role in articulating the interface of competition and consumer protection policy.

Consumer advocacy should provide a voice for consumer redress

Consumer advocacy should be a voice for consumers to achieve access to justice. Consumers will not all equally have the resources, finances, skills, experience or other attributes, to access methods to resolve problems that inevitably arise in the marketplace. This is a role for, among others, consumer advocates.

(continued)

Summary of section 1 (continued)

Consumer advocacy should provide a voice for distributive justice

Competitive markets optimise efficient allocation of resources and maximise total wealth, but they do not necessarily distribute wealth in a way that will accord with agreed notions of justice or fairness. Consumer advocates should be a voice, where now there is too often silence, for a fair distribution of the wealth that deregulation and competitive markets create.

The practice of consumer advocacy

Types of advocacy

Consumer advocates act for individual consumers, groups of consumers, classes of consumers and consumers as a whole. Consumer advocates typically make distinctions in terms of who they represent based on income/vulnerability as well as types of consumer markets, for example the credit market. Consumer advocates undertake individual advocacy (both legal and non-legal advocacy) as well as policy advocacy. The biggest gap in Victorian consumer advocacy is the undertaking of policy advocacy.

Who (or what) hears the consumer voice?

The consumer voice is heard in regulatory and political processes, by independent regulators, government departments, Ministers and their advisers, other Members of Parliament, industry and others who have decision-making roles in regulatory policy.

Who can be a consumer advocate?

Are there criteria to qualify for the title “consumer advocate”? It is evident that there are no consumer advocacy degrees, professional bodies (as opposed to peak bodies) or other forms of restrictions on referring to a person or organisation as a consumer advocate. Overall the majority of stakeholders supported an inclusive view of consumer advocacy, believing that consumer advocacy was undertaken by non-profit, non-government organisations, some for-profit organisations, individuals and government bodies, particular consumer agencies.

Informing the voice – other important aspects of consumer advocacy

It is apparent that consumer advocacy organisations see an important role for informing their policy voice – through the undertaking of individual advocacy to learn of new marketplace issues, undertaking research on new and emerging policy issues, and designing policy solutions for presentation to policymakers.

- ² I disclose to the reader that I have been a member of the Board of the Australian Consumers' Association since 2000. I am presently the immediate past Chair of the Australian Consumers' Association, having served as Chair for four years and Deputy Chair for one year.
- ³ Brown and Panetta “A View of the Australian Consumer Movement from the Middle of the Web” in *In the Consumer Interest – A selected history of consumer affairs in Australia* Smith (ed), Society of Consumer Affairs Professionals, 2000 at 10. Leanna Darvall identified the consumer movement as developing alongside both the health and women's movements: Darvall *Medicine, Law and Social Change* Dartmouth, 1993 at 7-21. She notes that “[c]onsumerism ... emerged as a social movement in the United States during the sixties” (at 8). The influence of the health movement on the general consumer movement is also explored in Tito “Health Care: The development of consumer rights” in *In the Consumer Interest – A selected history of consumer affairs in Australia* Smith (ed) Society of Consumer Affairs Professionals, 2000 at 113.
- ⁴ Brown and Panetta, fn 3 above at 10. The health movement was also influential on the general consumer movement, see, for example, Tito, fn 3 above at 113.
- ⁵ Brown and Panetta, fn 3 above at 11.
- ⁶ The Consumers' Association of Victoria was formally dissolved in 2003 by the then Chair, the late Associate Professor Suzanne Russell.
- ⁷ Somewhat ironically, as the Australian Federation of Consumer Organisations, first funded by the Whitlam Government, had their funding continued by the Fraser Government, the Consumer Affairs Minister of which was John Howard.
- ⁸ Among them, Denis Nelthorpe, Allan Asher, Lisa Carver, John Braithwaite and Jenni Mack. For a more detailed history of the Australian Federation of Consumer Organisations see Brown and Panetta, fn 3 above at 12-23. Additionally, Maureen Brunt and the late Associate Professor Suzanne Russell were prominent and important figures in the development of Victorian consumer advocacy. Suzanne Russell was, among other roles, an inaugural Director and Chair of the Consumer Law Centre Victoria as well as Chair of the Australian Consumers' Association. Suzanne also played a key role in teaching consumer studies as well as developing food standards and practices, including co-authoring the timeless publication *Cookery the Australian Way*. Maureen Brunt was, among other roles, an inaugural member of the Trade Practices Tribunal and the first woman to hold a professorial appointment in economics at Monash University, pioneering interdisciplinary teaching of law and economics. Maureen also championed consumers' interests through her role in the early development of Australian competition policy and the Victorian *Fair Trading Act 1985*. At separate times, both were Chair of the Victorian Consumer Affairs Council. See <http://www.clcv.net.au/downloads/May%202004.htm> for a short memorial for Suzanne Russell and <http://www.mbs.edu/main.cfm?pid=191&id=9> for a short biography of Maureen Brunt. Another very influential figure in the Australian consumer movement over that period (not directly associated with the Australian Federation of Consumer Organisations) was Louise Sylvan, CEO of the Consumers' Health Forum, then Policy Manager and later first CEO of the Australian Consumers' Association and now Deputy Chair of the Australian Competition and Consumer Commission.

- ⁹ Although these initiatives built upon previous arrangements for providing access to legal assistance for low income Victorians, for example, the Victorian Legal Aid Committee. For a detailed history of legal aid in Victoria see Field and Giddings, "A History of *Legal Aid in Victoria*" in *Legal Aid in Victoria – At the crossroads again* Giddings (ed), Fitzroy Legal Service Publications, 1998. Of course, the 1970s and 1980s saw many other institutional developments, such as the creation of Ombudsmen, that had a role in advocating for individuals, including consumers. For a comprehensive account of one of the first, and later largest and most activist community legal centres, see Chesterman *Poverty, Law and Social Change – The story of the Fitzroy Legal Service* Melbourne University Press, 1996. See also Field and Biondo "Back to the Future" 22 *Alternative Law Journal* 6 at 282.
- ¹⁰ Giddings "Casework, Bloody Casework" 17 *Alternative Law Journal* 261 at 262. The author notes in particular the campaign against finance company AVCO. See also Field "Pay Day Lending – An exploitative market practice" 27 *Alternative Law Journal* 1 at 37.
- ¹¹ Field and Giddings, fn 9 above at 25.
- ¹² *The Shorter Oxford English Dictionary on Historical Principles* Onions (ed), 1991, Volume 1 at 30. This section of the Discussion Paper develops (in a considerable way) initial thoughts contained in Field "Competition, Consumer Protection and Social Justice – Providing a consumer voice" 33 *Australian Business Law Review* 2 at 45 and *Out of Bounds or in the Courts? – Globalised consumers or Australian citizens*, a speech given at the Consumer Advisory Council Public Seminar held at the University of Western Australia on 11 November 2004 (Paper available from the author).
- ¹³ *The Shorter Oxford English Dictionary on Historical Principles* fn 12 above at 30.
- ¹⁴ Kennedy *Speech to the United States Congress* 15 March 1962. The original list of four consumer rights put forward in the same speech was later expanded (by the United Nations Assembly on 9 April 1985) to eight consumer rights, namely, the right to safety, the right to be informed, the right to choose, the right to be heard, the right to satisfaction of basic needs, the right to redress, the right to consumer education and the right to a healthy environment.
- ¹⁵ www.npaction.org/article/archive/198.
- ¹⁶ www.npaction.org/article/archive/225. A report by the Allen Consulting Group provides a very short examination on the meaning, purpose and role of consumer advocacy: Allen Consulting Group *National Energy Market Consumer Advocacy – Emerging needs and institutional models 2004* at 2-4 available at <http://www.allenconsult.com.au/publications/view.php?id=285>.
- ¹⁷ <http://www.consumerfed.org/about.cfm>. It says of itself, "CFA is an advocacy, research, education, and service organization. As an advocacy group, it works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. Its staff works with public officials to promote beneficial policies, to oppose harmful policies, and to ensure a balanced debate on important issues in which consumers have a stake".
- ¹⁸ <http://www.cuac.org.au/>. I draw the reader's attention to the fact that I have been a Director of the Consumer Utilities Advocacy Centre since its inception and that I am currently the Chair.
- ¹⁹ The National Consumer Council states that it was "set up by the UK government in 1975 to safeguard the interests of consumers and to ensure that these interests are represented to, and are taken account of by, decision-makers...[and]...makes a practical difference to the lives of consumers around the UK, using its insight into consumer needs to advocate change. We conduct rigorous research and policy analysis to investigate key consumer issues, and use this to influence organisations and people that make change happen": <http://www.ncc.org.uk/about/index.htm>
- ²⁰ See, for example, on one hand, Rawls *A Theory of Justice* Harvard University Press, 1974, and on the other, Nozick *Anarchy, State and Utopia* Basic Books, 1974. For an introduction to this area see, for example, Barry *An Introduction to Modern Political Theory* MacMillan Press, 1981 at 110-137 and Raphael *Problems of Political Philosophy* MacMillan Press, 1970 at 165-200.
- ²¹ "There are two sides to welfare economics: economic efficiency and income distribution. Economic efficiency is largely positive and deals with the 'size of the pie'. Income distribution is much more normative and deals with 'dividing up the pie': http://en.wikipedia.org/wiki/Welfare_economics. It is also a conception that has a basis in broader political and moral philosophical theories, particularly utilitarian (that is welfare maximising) and deontological (that is, normative standards of right and wrong) ethical perspectives. For a discussion of these topics see, for example, Frankena *Ethics* Prentice Hall, 1963 at 15-28 and 29-45; Feldman *Introductory Ethics* Prentice Hall, 1978 at 16-24.
- ²² Trebilcock "An Introduction to Law and Economics" 23 *Monash University Law Review* 1 at 132. An economic system is Pareto efficient where no individual can be made better off without another being made worse off.
- ²³ Noting, of course, that what is fair in this context has been the subject of enormous debate since the earliest of writings. See, for example, the different views about fair distribution of resources expressed by Rawls and Nozick, fn 20 above. Any number of distributive results can be considered Pareto optimal – some will feature very large inequalities of wealth, others a much more equal distribution.
- ²⁴ "[P]rovided nothing impairs the efficient operation of markets a society has a number of potential optimum solutions reflecting different price valuations and different income distributions. Unfortunately, this conclusion doesn't solve the problem. It is extremely difficult for a government to determine an appropriate distribution of income and introduce policies that attack poverty or change the distribution of income in a desirable way when the cost is a reduction in total production and a loss of efficiency": Waud and Hocking *Microeconomics* Harper and Row, 1986 at 441.
- ²⁵ One of the more egregious problems with Pareto efficiency is that it does not take into account the justice or otherwise of prior distributions of resources. Trebilcock notes, however, that "Paretianism is not inconsistent with redistribution of prior endowments justified on some independent normative principle": Trebilcock fn 22 at 134.
- ²⁶ For an extensive, and very useful, discussion of what we mean by low income, vulnerable and disadvantaged consumers see *What do we mean by "vulnerable" and "disadvantaged" consumers?* Consumer Affairs Victoria, 2004 at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/vulnerabledisadvantaged.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/vulnerabledisadvantaged.pdf). One of the respondents to the stakeholder interviews indicated their preference for consumer issues to be seen within a "human rights, rather than a market paradigm".
- ²⁷ Stigler and Cohen suggest that "[w]e can't construct – and I know of no historical example of – a viable, continuing broad-based consumer political lobby" Stigler and Cohen *Can Regulatory Agencies Protect Consumers?* American Enterprise Institute for Public Policy Research 1971 at 49. See, for example, Barnum "Let's Act Like Citizens, Not Consumers" 29 September 2003 at <http://www.commondreams.org/views03/0929-12.htm>.
- ²⁸ "To talk about the consumer interest is to talk about power – or more accurately, about the imbalance of power that exists between buyers and sellers, between citizens and their government. The consumer movement is dedicated to rectifying these imbalances of power by empowering individuals": Claybrook "A Consumer Agenda for the 21st Century: Regulation, deregulation and the consumer interest" *The Ruby Hutchison Memorial Address* 11 March 1988 at 1 (paper available from the author).
- ²⁹ Or even that the interests of citizens are virtuous and the behaviour of consumers a vice: see fn 32 below.
- ³⁰ Joan Claybook, fn 29 above at 1.
- ³¹ This thinking, in its more polemic form, sees consumers cast as a homogenous group, characterised by rapacious, unthinking and harmful consumption that leads to a worsening of the lives of both individual citizens and often society as a whole. "Consumerism is a pattern of behaviour that helps to destroy our environment, personal financial health, the common good of individuals and human institutions" at www.verdant.net/. See also the critique of consumerism and its alleged relationship with consumer debt and unhappiness, in Hamilton and Dennis *Affluenza: When too much is never enough* Allen & Unwin, 2005. The authors note that "[s]ince the early 1990s, Australia has been infected by affluenza, a growing and unhealthy preoccupation with money and material things. This illness is constantly reinforcing itself at both the individual and the social levels, constraining us to derive our identities and sense of place in the world through our consumption activity". The authors challenge the notion that outcomes of micro-economic reforms such as GDP improvements, and the maximisation of wealth through economic efficiency, necessarily lead to greater happiness. See also Klein *No Logo: Taking aim at the brand bullies* Picador, 2000.

33 Although there may be different definitions of what is meant by the long term and the short term.

34 I am aware that I have not here set out what would be an agreed notion of justice. As I have said earlier, social theorists have posited numerous theories for what might be an agreed notion of justice (see fn 20 above and accompanying text). Generally speaking, of course, agreement is not likely to be universal on such matters (in fact, there is likely to be fierce debate and division), nor will any agreed notions of justice remain static. My personal position, to the extent to which it is relevant for revealing any prejudices in the Discussion Paper, is that a preferred notion of justice would aim for economically efficient resource allocation to maximise social resources with an approach to distributive justice that seeks to correct prior and current endowments to simulate a more egalitarian model than presently exists within our community (while minimising market distortions).

35 These four purposes combined ensure the maximisation of consumer welfare.

36 Smith *Wealth of Nations* Volume 4, Chapter 8, Modern Library, 1937.

37 For example, Quiggan "Don't Believe in Miracles" *The Australian Financial Review* 22 April 2004.

38 "In perfect markets, where consumers have full information and the ability to process it, competition and choice are highly effective mechanisms to ensure that resources are properly allocated, goods and services are provided efficiently, and consumer needs are met, at both an individual and collective level. This can be a powerful driver of wealth creation, with far-reaching economic and social benefits. But markets can fail consumers and society for a number of reasons and a variety of policy responses are needed to mitigate failures": National Consumer Council *Policy Attitude* 2005 at 5 available at http://www.ncc.org.uk/about/board-papers_January05.htm.

39 Trebilcock, fn 22 above at 158.

40 Russell "The Theory of Surplus Value" *The Basic Writings of Bertrand Russell* Routledge, 1961 at 518.

41 Porter *The Competitive Advantage of Nations* Free Press, 1990.

42 Productivity Commission *Review of National Competition Policy Reforms – Discussion Draft* Canberra, 2004 at 293.

43 Productivity Commission, 2004, fn 42 above at 292-3.

44 Productivity Commission, 2004, fn 42 above at XIX.

45 Productivity Commission, 2004, fn 42 above at XXII.

46 See, for example, Smith "Consumer Affairs – The Cinderella of government policy making" 28 *Alternative Law Journal* 4 at 182.

47 Referring to the Chair of the Committee of Membership undertaking the review, Sir Daryl Dawson. The report is formally known as the *Review of the Competition Provisions of the Trade Practices Act* available at <http://tpareview.treasury.gov.au/content/report.asp>. It should be noted that, at the time of the preparation of the Discussion Paper (15 January 2006), none of the recommendations of the Dawson review have been implemented although it is expected a number will be, in 2006.

48 Referring to John Uhrig who undertook the review. The report is formally known as the *Review of the Corporate Governance of Statutory Authorities and Office Holders* June 2003 available at http://www.finance.gov.au/governancestructures/docs/The_Uhrig_Report_July_2003.pdf. It should be noted that the Uhrig recommendations were largely ignored by the Commonwealth Government.

49 See, for example, Brenchley "The Red Tape Battle Begins" *Australian Financial Review*, 1 December 2005 at 61.

50 *Australia's Export Infrastructure – Report to the Prime Minister by the Exports and Infrastructure Taskforce* May 2005 available at <http://www.infrastructure.gov.au/pdf/Report.pdf>.

51 "The corporate governance review itself, as well as the Dawson review of the Trade Practices Act, was the direct result of quiet lobbying by industry, including the Business Council of Australia": Fels and Brenchley "Chance Missed to Give Regulators More Teeth" *Australian Financial Review* 16 August 2004 at 63. Less quiet has been the lobbying of business, particularly the Business Council of Australia, for a review of "unnecessary" (or perhaps necessary, but overly "burdensome") regulation ("red tape") – cutting red tape has been one of the four actions required, according to the Business Council of Australia, to secure our economic future: <http://www.bca.com.au/content.asp?newsID=99077> (the other three include a renewal of infrastructure, industrial relations reform and tax reform). The four key reforms sought do not include further micro-economic reform, or the introduction of competition to areas of the economy currently protected from competition by anti-competitive regulation sought by business.

52 See, for example, Cranston "Consumer Protection and Economic Theory" *Consumer Protection Law and Theory* Duggan and Darvall (eds), LBC, 1990 at 254.

53 See, for example, Goldring, Maher, McKeough and Pearson *Consumer Protection Law* Fifth Edition, Federation Press, 1998 at 4-7 and 8-9 and Parish "Consumer Protection and the Ideology of Consumer Protectionists" in *Consumer Protection Law and Theory* Duggan and Darvall (eds), LBC, 1990 at 230; cf Cranston, fn 52 above at 255. See also Coronos and Clarke *Consumer Protection and Product Liability Laws* Second Edition, LBC, 2002 at 9-19.

54 Bannerman *Trade Practices Commission Annual Report 1983/4* AGPS, Canberra, 1984 at 184.

55 Muris *The Interface of Competition and Consumer Protection* Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy, New York City, 31 October 2002 at 2. For a recent, and very good analysis of these issues, see Sylvan "Activating Competition – The consumer/competition interface" (2004) 12(2) *Competition and Consumer Law Journal* 191.

56 Muris, fn 55 above at 2.

57 Muris, fn 55 above at 2.

58 Vickers *Economics for Consumer Policy* British Academy Keynes Lecture, 29 October 2003 at 1.

59 The research undertaken is by Paul Klemperer into the impact of switching costs on competition, including his working paper co-authored with Joseph Farrell is among the most important that has been conducted. Michael Waterson has also written about the sub-competitive outcomes which can result in potentially competitive industries when consumers are reluctant to search or to switch suppliers. See Farrell and Klemperer *Coordination and Lock-In: Competition with switching costs and network effects* (2004) available at www.paukklemperer.org; Klemperer "Competition when Consumers have Switching Costs" (1995) 62 *Review of Economic Studies* 515; Waterson "The Role of Consumers in Competition and Competition Policy" (2003) 21 *International Journal of Industrial Organisation* 129.

60 Sylvan *Consumer Regulation – How do we know it is effective?* National Consumer Congress, Melbourne, 15 March 2004 at 4.

61 "The current literature discusses the cost of regulation in detail, but largely ignores the distributional effects of deregulation": Cranston, fn 52 above at 255.

62 Trebilcock, fn 22 above at 158.

63 Smith, fn 36 above, Book 1, Ch 8.

64 <http://www.consumerfed.org/about.cfm>.

65 Fn 64 above.

66 There may, of course, be others that I have not identified.

67 <http://www.cuac.org.au/index.php>.

68 Fn 64 above.

69 Trebilcock, Prichard and Waverman "The Consumer Interest and the Regulatory Process" *Consumer Protection Law and Theory* Duggan and Darvall (eds), LBC, 1980 at 267.

70 Fn 64 above.

“ *What is the current framework for consumer advocacy in Victoria?* ”

2

2.1 Introduction

In the previous section of the Research Paper, I set out what I believe it means to undertake consumer advocacy. In this section I will examine who, in my view, undertakes consumer advocacy in Victoria.

2.2 Establishing a framework for Victorian consumer advocacy

Establishing a framework for consumer advocacy in Victoria depends on what criteria are applied in determining whether individuals or organisations are “consumer advocates” or “consumer advocacy organisations”. In section 1.4 of the Research Paper, I examined criteria for establishing whether consumer advocacy was being undertaken. This examination suggested that consumer advocacy may be undertaken equally by:

- non-profit, non-government organisations
- some for-profit organisations
- individuals, and
- government bodies, particularly consumer agencies.

Overall, the examination suggested that an inclusive approach to consumer advocacy was preferred by stakeholders. Accordingly, for the purposes of compiling this framework, I have deliberately taken an inclusive view of what constitutes consumer advocacy. This includes bodies that may act as a voice for either individual consumers, or for consumers as a class, or both.

It should be noted that some organisations (or individuals), will of course, identify themselves as consumer advocates (although whether they meet objective criteria for qualification is another matter). Similarly some organisations (or individuals) may not identify themselves as consumer advocates, but in fact appear to undertake at least some consumer advocacy.

I have also premised this section of the Research Paper on the view that a framework of consumer advocacy does not necessarily connote a view one way or the other about quality – it is simply a map. The appropriate time to examine whether the organisations or individuals who form the map are, in fact, a voice for the purposes that I believe constitute effective consumer advocacy is in the next section of the Paper. That section of the Paper evaluates the effectiveness of consumer advocacy organisations against, among other things, the outcome for which consumer advocates should be a voice and the four means to that outcome identified in section 1.3 of the Research Paper.

Nonetheless, within the overall map I have compiled, I have separated consumer advocates into categories that are consistent with the theoretical exercise undertaken in section 1 of the Research Paper. The categories reflect the discussion at section 1.4 of the Research Paper regarding whether consumer advocacy involves:

- advocacy on behalf of an individual consumer, groups of consumers or consumers as a whole
- advocacy undertaken by organisations or individuals
- advocacy undertaken for profit or not for profit
- advocacy undertaken by non-government, government or regulatory bodies, and
- advocacy undertaken for all consumers or a class of consumers.

2.2.1 Category 1: Generalist not-for-profit, non-government consumer organisations⁷¹

This category captures those organisations that undertake advocacy for consumers as a general class, albeit that in the case of the 2.2.1.1 organisations that class is heavily skewed towards low income and vulnerable consumers.

2.2.1.1 *Generalist not-for-profit, non-government consumer organisations undertaking individual advocacy and policy advocacy*

These are consumer advocacy organisations with the core business of consumer advocacy, both policy advocacy across a range of markets and individual advocacy for consumers. In my view, there are only two organisations in Victoria that fulfil this definition – the **Consumer Law Centre Victoria** and the **Consumer Credit Legal Service** (the work of this organisation extends beyond the credit market).

2.2.1.2 *Generalist not-for-profit, non-government consumer organisations undertaking policy advocacy, but not individual advocacy*

These are consumer advocacy organisations with the core business of consumer advocacy, but which only undertake policy advocacy (not individual legal advocacy) across a range of markets. In my view, there are two organisations which operate in Victoria that fulfil this definition – the **Australian Consumers' Association** and the **Consumers' Federation of Australia**. Both of these organisations do undertake other tasks. For example, the Consumers' Federation of Australia acts as a peak representative body for approximately 100 other consumer organisations, providing (albeit limited due to their lack of funding) services to those members. The Australian Consumers' Association undertakes a vital role for Australian consumers, and arguably for the proper functioning of many Australian markets – acting as a proxy for consumers in complex markets (through Choice magazine and Choice online), testing products and reporting on that testing, thus facilitating informed choice by consumers.⁷²

2.2.2 Category 2: Specialist not-for-profit, non-government consumer organisations

These are consumer advocacy organisations with the core business of consumer advocacy, but which only undertake policy advocacy (or in some cases such as the Tenants Union of Victoria, individual advocacy) in a specific market.

In my view, there are eight organisations who operate in Victoria that fulfil this definition – the **Consumer Utilities Advocacy Centre**, the **Communications Law Centre**, the **Consumers' Telecommunications Network**, the **Health Issues Centre**, the **Tenants Union of Victoria**, the **Financial and Consumer Rights Council**, the **Public Transport Users' Association** and the **Consumers' Health Forum**.

Like before, all of these organisations do undertake other tasks. For example, the Consumer Utilities Advocacy Centre has a grant-making function to other groups/individuals undertaking consumer advocacy.

The organisations listed in this category were mentioned by all, or a majority, of respondents in the stakeholder interviews. There was disagreement as to whether peak, activist or assistance organisations that acted for a class of people (such as AIDS, immigration, gay and lesbian, youth, disability, women's⁷³ and farmers' organisations) should be classified as consumer organisations. Given the level of disagreement about this matter, and the fact that only one of the respondents referred to these organisations as consumer organisations, they have not been included in the consumer advocacy map. As noted above, however, this is a mapping exercise of consumer organisations and in no way reflects upon the vital work done by these organisations.

2.2.3 Category 3: Generalist not-for-profit, non-government community organisations

These are generalist community organisations that may, from time to time, or perhaps regularly, undertake some consumer advocacy, but whose core business is not consumer advocacy. In this category, I would place the **Victorian Council of Social Service**, **Australian Council of Social Service**, **Good Shepherd Youth and Family Services**, **St Vincent de Paul** and **Victorian Community Legal Centres**. Not all community legal centres, however, undertake what consumer advocacy they do equally. Certain community legal centres, particularly the **Public Interest Law Clearing House** (and its **Homeless Persons' Legal Clinic**) and **Peninsula Legal Service** undertake both individual and policy advocacy that is worthy of separate mention due to the level of consumer advocacy work they undertake and the quality of that work. Within other community legal centres, varying levels of attention are given to individual advocacy and policy advocacy, with some community legal centres being much more active than others in policy advocacy.

2.2.4 Category 4: Individuals

In “mapping” the extent of consumer advocacy in Victoria, it is worthwhile to note that beyond the organisations that undertake consumer advocacy, there are a small number of individuals who are considered to be consumer advocates.⁷⁴

As noted in section 1.4.1 above, there was not unanimous agreement in the stakeholder interviews about whether individuals were properly seen as consumer advocates, if they did not work within a consumer advocacy organisation. Stakeholders also identified for separate recognition – properly in my view given the invaluable work they undertake for low income consumers – financial counsellors. While financial counsellors will generally be attached to an organisation, the organisation itself may not necessarily be identified as a consumer organisation.

2.2.5 Category 5: Industry, government and regulatory bodies

2.2.5.1 Governments and regulatory bodies

In Australia, consumer advocacy would typically be associated with non-government, not-for-profit organisations, such as the **Consumer Law Centre Victoria**.

In responding to the question “Who undertakes consumer advocacy in Victoria?”, four of five respondents in the stakeholder interviews identified not-for-profit, non-government agencies exclusively. One stakeholder, however, identified the **Australian Competition and Consumer Commission** and **Consumer Affairs Victoria** generally, and Louise Sylvan (as Deputy Chair, Australian Competition and Consumer Commission) and David Cousins (as Director, Consumer Affairs Victoria) specifically, when asked to describe who undertook consumer advocacy in Victoria.

Indeed, it would be unusual for any form of work undertaken by government or regulatory bodies to be described as consumer advocacy (either by the agencies themselves or by those outside of the agencies).⁷⁵

Despite this fact, many independent regulators, statutory agencies and government departments undertake a role that appears, at least at first glance, to be very similar to consumer advocacy. The sort of role I am referring to would include:

- commenting publicly on existing or proposed competition or consumer protection policies
- responding to requests from political processes or other government agencies or regulators for views about existing or proposed competition or consumer protection policies, and

- making submissions of their own initiative to political processes or other government agencies or regulators about existing or proposed competition or consumer protection policies.

The value of government consumer bodies promoting initiatives beneficial to consumers within government, as well as responding to proposals from other government departments, should not be underestimated. In discussing their consumer advocacy program, the current Chairman of the United States Federal Trade Commission (an institutional equivalent to our Australian Competition and Consumer Commission), Deborah Majoras, has said:

*Whether behind the scenes or publically, we ... are continually advising Federal and State legislatures, other agencies and courts about the likely effects of their actions on consumers and markets.*⁷⁶

This advice may have many positive outcomes, for example, to achieve appropriate consumer protection regulation or needed funding for consumer initiatives, or to “nip a restriction on competition in the bud before it can blossom into something harmful to consumers”.⁷⁷

This sort of work would be undertaken by a range of Australian regulatory and government consumer agencies, most particularly in the Victorian context, by Consumer Affairs Victoria and the Australian Competition and Consumer Commission.⁷⁸ In my view, both these agencies do undertake consumer advocacy in Victoria (although it may not be identified by those agencies as a discrete work program). Consumer Affairs Victoria, in particular, plays a critical role in promoting the long term interests of Victorian consumers by providing its expertise on a range of matters that will enhance competition and effective consumer protection to a range of policy-making processes.

In other jurisdictions, the idea that regulatory agencies undertake advocacy in the consumer interest is better understood. The United States Federal Trade Commission (an institutional equivalent to our Australian Competition and Consumer Commission), undertakes a program of internal advocacy that largely consists of the regulator undertaking research and making submissions (to other regulatory agencies, government departments and political processes) about existing or proposed policies that are potentially or actually anti-competitive and therefore detrimental to consumers. In short the program allows the Federal Trade Commission to use its expertise to reveal the “economic consequences of a policy choice”.⁷⁹

In their article examining the Federal Trade Commission advocacy program James Cooper, Paul Pautler and Todd Zywicki describe:

*Using [the Federal Trade Commission's] expertise to work with other governmental actors at all levels of the political system and in all branches of government to design policies that further competition and consumer choice.*⁸⁰

The authors explain the value of the advocacy undertaken by the Federal Trade Commission on the basis that while regulation is needed to correct market failures, "it can also be used to restrict competition in order to transfer wealth from consumers to a favoured industry",⁸¹ an occurrence that the economic theory of regulation suggests is both a possible, and indeed common, problem:

*A competition authority, expert in understanding the competitive process, can explain to the public and to generalist political actors whether these calls for industry-specific regulation will really further the public good. Advocacy can inform consumers of their interests in a regulation, perhaps spurring the desire to organise politically to oppose a regulation that will result in higher prices and less choice.*⁸²

Outside of this advocacy activity, Consumer Affairs Victoria, Victoria Legal Aid, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission provide telephone advice lines for Victorian consumers.

Additionally, Consumer Affairs Victoria undertakes extensive conciliation services between consumers and businesses unable to resolve disputes. Following the implementation of *The Way Forward Report*, Consumer Affairs Victoria continue to fund consumer organisations to undertake individual advocacy for low income and vulnerable consumers referred from Consumer Affairs Victoria.⁸³

2.2.5.2 The role of business organisations as consumer advocates

While I have said earlier (at section 1.3.2.2 above), that businesses are often lobbyists for outcomes harmful to consumers, it is certainly true that businesses can also be lobbyists for regulatory outcomes which are beneficial to consumers. Equally, through employment, taxation revenues and other similar contributions, businesses make very significant contributions to consumer welfare. Finally, businesses also undertake a range of work in the community, often classified as charitable works, that are beneficial. None of these matters, though, should be considered consumer advocacy.

Although the map of Victorian consumer advocacy organisations is not large, and I have suggested that an inclusive approach is preferable, there is, in my view, an argument to narrow the scope of the Victorian consumer advocacy framework. Only Category 1 and Category 2 organisations in the framework for consumer advocacy that I have developed (at section 2.2 above) have advocating for the consumer interest as their core business. This approach is supported by the comments I have recorded through the stakeholder interviews.

For these organisations, who I have described as the key Victorian consumer advocacy organisations, I have undertaken a more comprehensive mapping exercise, setting out the following details for each organisation:

- name
- role
- areas of work
- location
- structure
- funding sources
- budget 2004/5, and
- total staff.

The results of this more comprehensive exercise are set out at section 2.3 immediately below.

2.3 The key Victorian consumer advocacy organisations⁸⁴

Organisation	Role	Areas of work	Location	Structure	Funding sources	Budget 2004/05 (\$)	Total staff
Consumer Law Centre Victoria	Research, policy development, advocacy and legal practice.	Utilities, competition and consumer protection, financial services, telecommunications, exploitative credit and access to justice.	Melbourne. Outreach legal practice project: Gippsland, South-western Victoria and Central Victoria/Wimmera. Online legal practice. Works on Victorian and national issues.	Company limited by guarantee. Board of nine directors, appointed through Board nomination and nomination by external sources (including community organisations and the Victorian Minister for Consumer Affairs).	Trust fund, Consumer Affairs Victoria, grants, directors and consultancy fees.	684,628 total expenditure.	8
Consumer Credit Legal Service	Research, policy development, advocacy and legal practice.	Consumer credit, finance brokers and mortgage minimisation.	Melbourne. Works on Victorian and national issues.	Incorporated association. Board members not stated.	Consumer Affairs Victoria, Victoria Legal Aid and grants.	459,525	Not stated.
Consumer Utilities Advocacy Centre	Research, policy development, advocacy and grants program.	Consumer utilities issues.	Melbourne, including rural and regional networks. Works on Victorian issues.	Company limited by guarantee with sole member/shareholder being the Victorian Minister for Consumer Affairs. Board of five directors appointed by the shareholder/member.	Consumer Affairs Victoria, Victoria	500,000	5
Australian Consumers' Association	Research, policy development, advocacy, publications and independent product testing.	Publisher of <i>Choice</i> , <i>Choice</i> online and books. Product tester for manufacturers. Policy work in a range of areas, including health, food, financial services, utilities and telecommunications.	Sydney. Significant online presence through Choice online. Works on Victorian, other jurisdiction, national and international issues.	Company limited by guarantee. Board of 11 directors, elected by a membership of approximately 400.	Sale of publications and independent testing services.	12,029,744	80
Consumers' Federation of Australia	National peak body for consumer groups in Australia as well as policy development, advocacy and education.	Financial services, health and food, telecommunications, insurance, and corporate social responsibility.	Works on Victorian and national issues.	Incorporated association. Board of 10 directors, elected by member organisations.	Unfunded (except for membership fees).	Nil.	None (work done by Board).
Financial and Consumer Rights Council	Member-based peak body for financial counsellors.	Financial services.	Melbourne. Works on Victorian issues.	Incorporated association, with Board of 12 directors.	Consumer Affairs Victoria, membership fees and activities.	279,663 total expenditure.	2
Communications Law Centre	Research, teaching, public education and legal advice.	Telecommunications.	Melbourne. Works on Victorian and national issues.	Incorporation type not stated. Board of eight directors.	Victoria University and grants.	Not stated.	3

(continued)

2.3 The key Victorian consumer advocacy organisations (continued)

Organisation	Role	Areas of work	Location	Structure	Funding sources	Budget 2004/05 (\$)	Total staff
Consumers' Health Forum	Research, policy development, advocacy and member services.	Health.	Canberra. Works on Victorian and national issues.	Incorporation type not stated. Board of 12 directors, elected by member organisations.	Department of Health (Cth), members and grants.	970,127	11
Health Issues Centre	Research, policy development, education and training.	Health.	Melbourne. Works on Victorian issues.	Incorporated association. Board of 12 directors.	Not stated.	Not stated.	Not stated.
Tenants Union of Victoria	Research, policy development and advocacy.	Tenancy.	Melbourne. Works on Victorian and national issues.	Not stated.	Not stated.	2,548,206	Not stated.
Public Transport Users' Association	Research, policy development and advocacy.	Public transport.	Melbourne. Works on Victorian issues.	Incorporation type not stated. Board of 12 directors, elected by members.	Not stated.	Not stated.	Not stated.
Consumers, Telecommunications Network	Research, policy development, advocacy and member forums.	Telecommunications.	Sydney. Works on Victorian and national issues.	Incorporation type not stated. Board of 11 directors.	Not stated.	Not stated.	5

Summary of section 2: What is the current framework for consumer advocacy in Victoria?

The framework established separates consumer advocates into categories that are consistent with the theoretical exercise undertaken in section 1 of the Research Paper.

Category 1: Generalist not-for-profit, non-government consumer organisations

(a) Generalist not-for-profit, non-government consumer organisations undertaking individual advocacy and policy advocacy

The Consumer Law Centre Victoria and the Consumer Credit Legal Service.

(b) Generalist not-for-profit, non-government consumer organisations undertaking policy advocacy, but not individual advocacy

The Australian Consumers' Association and the Consumers' Federation of Australia.

Category 2: Specialist not-for-profit, non-government consumer organisations

The Consumer Utilities Advocacy Centre, the Communications Law Centre, the Consumers' Telecommunications Network, the Health Issues Centre, the Tenants Union of Victoria, the Financial and Consumer Rights Council, the Public Transport Users' Association and the Consumers' Health Forum.

Category 3: Generalist not-for-profit, non-government community organisations

The Victorian Council of Social Service, the Australian Council of Social Service, Good Shepherd Youth and Family Services, St Vincent de Paul and Victorian Community Legal Centres.

Category 4: Individuals

Category 5: Industry, government and regulatory bodies

Consumer Affairs Victoria and the Australian Competition and Consumer Commission.

- ⁷¹ Non-government organisations are those that are arm's length from governments with independent governance arrangements, but may (and regularly do) receive government funding.
- ⁷² This category defines individual advocacy according to the first sub-category of individual advocacy – legal advocacy – that I identified earlier in the Discussion Paper (at section 1.4.1 above). In fact the Australian Consumers' Association does undertake a telephone advice line for its subscribers, a form of individual advocacy, although it does not extend to ongoing legal advocacy provided. This non-legal individual advocacy is consistent with the second sub-category of individual advocacy that I identified earlier in the Discussion Paper (at section 1.4.1 above).
- ⁷³ Somewhat ironically given their foundation role in the development of an Australian consumer movement (see section 1.2 of the Discussion Paper). In my experience, both the Victorian Women's Legal Service and Victorian Women's Trust undertake work that is important and valuable for all Victorians. I note, in particular, the strong support (including financial support) given by both those organisations to a range of projects undertaken by the Consumer Law Centre Victoria, including research to determine whether women pay more than men for comparable goods and services, as well as litigation against a Melbourne hairdresser for charging a woman more than a man for a similar haircut. Some respondents in the stakeholder interviews noted that organisations that acted for a class of consumers were central to the constituents they served, but not central to consumers as a class. These organisations, it was suggested, had an adjunct role to consumer organisations, in the same way that consumer organisations might have an adjunct role to the specific classes of consumers that these organisations served. In addition, one respondent to the stakeholder interviews mentioned the National Electricity Code Administrator (now Australian Energy Markets Commission) Advocacy Panel as a funder of consumer research, although not as a consumer advocacy organisation in its own right.
- ⁷⁴ For example, Denis Nelthorpe, described as a "leading figure in consumer affairs for 20 years": Giddings "Stirring the Possum: Legal aid and the consumer interest" *In the Consumer Interest* Smith (ed), Society of Consumer Affairs Professionals, 2000 at 173. Other individuals could include people such as Fiona Stewart who operates the website "Not Good Enough".
- ⁷⁵ While it would be unusual, this is not to suggest that the view is correct or incorrect or that all government or regulatory agencies would hold this view.
- ⁷⁶ Majoras "A Dose of our Own Medicine: Applying a cost-benefit analysis to the FTC's Advocacy Program" *Current Topics in Antitrust Economics and Competition Policy* Charles River and Associates, 8 February 2005 at 1 available at <http://www.ftc.gov/speeches/majoras/050208currebtopics.pdf>.
- ⁷⁷ Majoras, fn 76 above at 2.
- ⁷⁸ Other agencies would include the Australian Securities and Investments Commission and the Productivity Commission.
- ⁷⁹ Cooper, Pautler and Zywicki *Theory and Practice of Competition Advocacy at the FTC* available at www.ftc.gov/ftc/history/040910zywicki.pdf, at 7.
- ⁸⁰ Cooper et al, fn 79 above at Abstract.
- ⁸¹ Cooper et al, fn 79 above at 2. "The FTC's competition advocacy program permits it to accomplish for consumers what prohibitive costs prevent them from tackling individually. It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program's continuance and expansion": Cooper et al, fn 79 above at 6 citing the "Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study Role of Federal Trade Commission, Antitrust and Trade Regulation Report" Vol.56 *Bureau of National Affairs Special Supplement* (April 6, 1989) at S-23 – also known as the "Kirkpatrick Report".
- ⁸² Cooper et al, fn 79 above at 6.
- ⁸³ It is not within the scope of the Discussion Paper to undertake a review of the Way Forward program. It should be noted, however, that two respondents in the stakeholder interviews, and one in particular, paid particular attention to the outcomes of the *Way Forward* program and the role of Consumer Affairs Victoria in undertaking, and supporting, consumer advocacy arrangements.
- ⁸⁴ I have based the format of this table on a similar mapping exercise undertaken by the UK National Consumer Council: see National Consumer Council *Existing Consumer Advocacy Arrangements* 2005 available at http://www.ncc.org.uk/about/board-papers_January05.htm. The information in the table has largely been compiled through information available from the websites and annual reports of the relevant organisations. There may be inaccuracies in the data, to the extent that website or annual report dates of organisations are not accurate. Additionally, where information was not available this is indicated as "Not stated" (the National Consumer Council used a question mark). Similar caveats applied equally to the work undertaken by the National Consumer Council.

“ What is the effectiveness of the current framework for consumer advocacy in Victoria? ”

3

3.1 Introduction

In section 1 of the Research Paper I constructed what I believe to be an optimal model for consumer advocacy. In section 2 of the Research Paper I drew a map of who currently undertakes consumer advocacy in Victoria, although I deliberately did not limit that map to those organisations that only complied with my theoretical optimal model. In this section, I now bring together the first two sections of the Paper, by analysing the effectiveness of existing consumer advocacy arrangements in Victoria against the theoretical optimal model that I have established.

In section 1.3 of the Research Paper, I identified that consumer advocacy could potentially have a range of meanings, depending on situational or organisational context or indeed other variables. In short, “[t]he word advocacy can mean many different things in the non-profit world and can be at the heart of activities, strategies, mission, core values and overall organisational effectiveness”.⁸⁵ Nonetheless, I established that there was some commonality of view – in essence, consumer advocacy is about providing a voice for consumers. This view is fortified by examining how organisations that think of themselves as consumer advocates describe their mission.

3.1.1 An important preliminary note

In this section of the Research Paper, I make a number of observations about the effectiveness of consumer advocacy in Victoria. These observations are not necessarily intended to constitute criticisms of existing consumer advocacy organisations (although some criticism may be warranted and this is explored). It is, of course, perfectly logical to argue that existing arrangements for Victorian consumer advocacy are less effective than desirable, yet current consumer advocacy organisations are undertaking what they do

effectively – the resources of these organisations might simply mean that no matter how well they worked, their achievements would still be less than effective when viewed in terms of the overall outcomes which consumer advocacy should ideally exist to serve. My view prior to beginning the Research Paper – a view fortified by the research undertaken to produce the Paper – is that consumer organisations are reasonably effective within the significant constraints of their resources and often, by working “smarter and harder” than those voices they seek to oppose, stretch those resources beyond their seemingly natural constraints. This is, of course, different to saying that consumer advocacy is effective for consumers, a matter which I will now examine in detail.

3.2 Consumer advocacy in Victoria – does it provide an effective voice for consumers?

3.2.1 Introduction

It is a widely shared view that consumer voices are not heard (or sufficiently heard) in Victorian (as well as Australian and overseas) political and regulatory processes. Allan Asher, a consumer expert of over 30 years’ experience as former Manager, Policy, Australian Consumers’ Association, former Deputy Chair of the Australian Competition and Consumer Commission and now CEO, EnergyWatch UK, has observed that: “[c]onsumers, although numerous and occasionally able to express their power through collective action, are generally poorly organised and no match for special interests groups”.⁸⁶

3.2.1.1 The economic theory of regulation

The extent to which the consumer voice is heard is, in my view, best understood in terms of the role that interest groups play in the process of regulating (or not regulating) markets. Indeed, a significant body of academic literature, written by political scientists, economists and legal scholars, has developed (and tested) theories of how regulation is made (and enforced) and the role of interest groups in developing regulation.

One of the most important of these scholars, George Stigler, developed the economic theory of regulation to explain how regulation is made. Posner has explained that the economic theory of regulation “conceives regulation as a service supplied to effective political interest groups”⁸⁷ and, as such, is susceptible to explanation by way of concepts of supply and demand as well as economic analysis generally.

In short, Stigler suggested that governments operate to balance the interests of competing groups. Within that framework, Trebilcock has observed that “producer groups are likely to have disproportionate influence on government ... in obtaining anti-competitive forms of regulation from it”.⁸⁸ Additionally, Stigler pointed out the preponderance of producer group voices in the “market” for regulation and their ability to trade their promise of political support (or their threat of withdrawal of support) for regulation favourable to their interests. Equally, though, Stigler recognised the absence of the consumer voice.

The logical conclusion of this thinking is neatly summarised by law and economics scholar Sam Peltzman, who observed that the:

*common, though not universal, conclusion has become that, as between the two main contending interests in the regulatory processes, the producer interest tends to prevail over the consumer interest.*⁸⁹

Similarly, in an article exploring the role of advocacy within the United States Federal Trade Commission (an organisational equivalent to our Australian Competition and Consumer Commission), James C Cooper, Paul A Pautler and Todd J Zywicki note that:

*It has long been recognised that because of industry’s superior ability to organise political support relative to consumers, consumer interests often are subservient to industry interests in the regulatory processes.*⁹⁰

It is important to note that the economic theory of regulation is only one of a number of theories to explain the process of why societies regulate activity (either within markets for products and services or more broadly).⁹¹ Having made this point, most forms of regulation theory, albeit to a greater or lesser degree, attribute to interest groups a fundamental role in the making of regulation.

3.2.1.2 A contrary view

Before leaving this section of the Research Paper, it is important to reflect a view, albeit one not widely shared from the literature review that I have undertaken, that is contrary to my general claim that the consumer voice is not heard (or, at least, not sufficiently heard). Alan Moran has argued that, far from not being heard in regulatory processes, the consumer voice in fact dominates (or is given too much heed):

*“Regulatory capture” is a notion that has long shaped a good deal of thinking about the interaction of government agencies and businesses. Analysts pointed to seemingly over-sympathetic decisions of regulators, for example in favouring incumbent firms over new entrants. Whether or not this accurately describes yesterday’s regulatory bodies, their contemporaries’ affinities are closer to anti-business groups.*⁹²

This view, while strongly expressed by the author, is not supported by the preponderance of literature devoted to regulatory theory, a review of which leads to the broad conclusion that producer groups dominate regulatory processes at the expense of consumers.

It is evident from the exploration of the previous assumption that the widely held view of both theorists and practitioners is that the consumer voice is either unheard in many political/regulatory debates or not sufficiently heard.

That the consumer voice is ineffective in the making of regulation is, upon analysis, easy to understand. The economic theory of regulation sees:

*politicians and constituents [as] rational actors. As such, constituents demand favourable regulation and politicians use the state’s coercive powers to supply it in return for political support. When adopting a policy, [politicians]/regulators weigh the political support from those who stand to gain against political opposition from those who stand to lose.*⁹³

Within this framework, small groups with similar interests (such as industry) have an obvious incentive to marshal their resources to lobby for favourable regulatory outcomes, at least where the benefit they will receive from favourable regulation outweighs the costs of obtaining that regulation.⁹⁴ The same incentive will be much less obvious for individual consumers, who may see little value in expending effort in voicing their concern within the political/regulatory process, when the benefits that might conceivably flow through to them from that effort are less than the effort expended. Expressed another way, “the smaller the per capita benefit ... the less likely it is that informing one’s self on the impact of a regulation makes economic sense”.⁹⁵

Here, of course, the obvious answer is for consumers to collectivise their interests such that their voice is heard, thus extracting regulatory benefits. As Stigler (and Cohen) noted, however, “[w]e can’t construct – and I know of no historical example of – a viable, continuing broad based consumer political lobby”.⁹⁶

In summary, the costs for thinly-spread consumer interests of obtaining sufficient information, combined with the costs of involvement in regulatory processes (as well as the existence of “free riders” – consumers who either take more than their “fair” share of the benefits of collective action, or alternatively, do not bear the “fair” costs of their involvement in collection action), is “in general a much greater disincentive to participation in public decision-making than in the case of highly concentrated interests”.⁹⁷

The ineffectiveness of the consumer voice is supported not just by academic literature but also by empirical surveys. In an article titled “Public service lends industry its ear”, Verona Burgess, reporting on the *State of the Service* report, notes that:

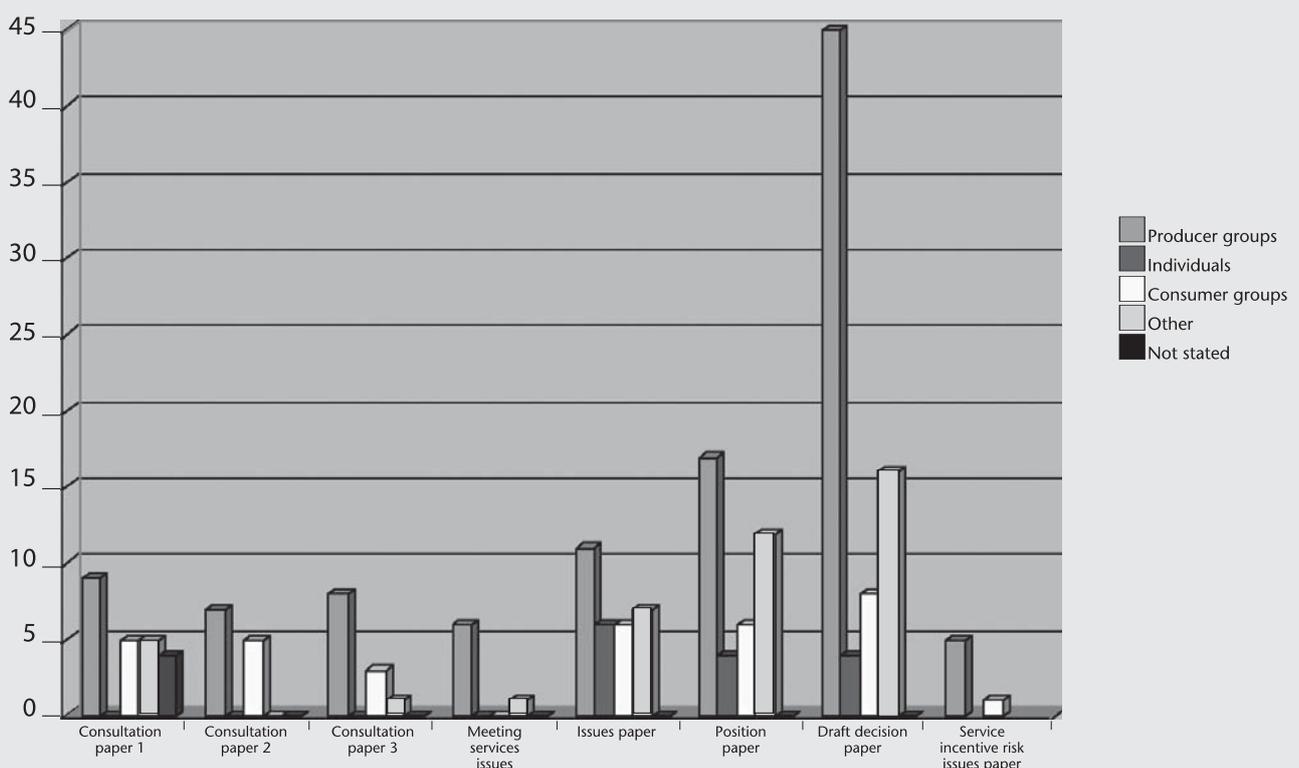
*The public service holds more formal consultations with industry than any other stakeholder group when developing policy, programs and regulations ... industry groups were the key group usually consulted by agencies about ... government regulation (66 per cent) ... [which] rose to ... 87 per cent ... when added to industry consultations that occurred sometimes.*⁹⁸

While it might be expected that the Victorian public service has performed somewhat better than its Commonwealth counterpart, given the greater commitment of the current Victorian Government to balanced consultation than the current Commonwealth Government, broadly speaking this imbalance is likely to be similar.

3.2.2 Regulatory decision-making processes – a case study of the dominance of the producer group voice

For the purposes of compiling the Research Paper, I have undertaken a short survey of one of the recent decision-making processes undertaken by a Victorian regulatory agency to test the proposition of producer group domination of regulatory processes.⁹⁹ (A much more sophisticated exercise, beyond the scope of the Research Paper, would also test the size of each submission, as well as not simply the quantitative nature of written submissions, but also qualitative measures. Such an exercise would also evaluate against other quantitative and qualitative interfaces such as meetings with the regulator and use of consultants and lobbyists, as well measuring the impact submissions were actually having on decision-makers.) The results of this survey are shown in graphical representation.

The following submissions were made to the Victorian Essential Services Commission’s Electricity Price Review 2006–2010, conducted in 2005.



3.3 The purpose of consumer advocacy – how effective are Victorian consumer advocates in achieving the purpose of consumer advocacy?

The analysis I have undertaken in this section so far is not, however, a sufficient answer to whether existing Victorian consumer advocacy arrangements are effective. This is so as, while I have said at the broadest level that the consumer voice is not effective, I have already established earlier in the Research Paper (at section 1.3.1 above) that describing consumer advocacy as simply a voice for consumers does too little to describe what consumer advocacy actually means. I have said that consumer advocates should be a voice for the maximisation of the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice, and that they should achieve that end through advocating for:

- competitive markets
- consumer protection regulation
- consumer redress, and
- distributive justice.¹⁰⁰

3.3.1 Are Victorian consumer advocates an effective voice for competitive markets?

*Consumption is the sole end and purpose for all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.*¹⁰¹

I stated earlier in the Research Paper that these famous words, written by the founder of modern economics, Adam Smith, are, in my view, the granite upon which all consumer advocacy is built. In section 1.3.2 of the Research Paper, I developed the case for why consumer advocates should be a voice for competition – competitive markets are in the long term interests of consumers.

The reality is that the interest that consumers have in competing producers is generally not shared by the producers themselves. As Trebilcock et al have observed “[i]t is, of course, a myth that business ... likes competition”.¹⁰²

In fact, producer groups devote very significant resources, both in Victoria and Australia more generally, to argue for protection from competitive disciplines. This resource allocation is entirely rational for producers – any significant lessening of competition will be an easier path to profit-taking. As leading economist Michael Porter describes it “managers [of businesses] are often the first and the loudest voices for easy approval of mergers or alliances, because eliminating domestic rivalry is a tempting way to raise short term profits”.¹⁰³

Given the first order importance of competitive markets for consumers, and the dominance of producer groups in the market for regulation, this is undoubtedly the area of advocacy work to which consumer groups should give particular focus. Unfortunately, it is in the area of advocacy in which most consumer groups are the least effective. This is so for two primary reasons:

- A significant number of consumer organisations are disinclined to embrace the benefits of competitive markets (and the consumer detriment that flows from uncompetitive markets) and therefore either do not advocate for competitive disciplines, or, worse still, sometimes support anti-competitive proposals.
- Due to the fact there are some consumer organisations that do advocate the value of competitive markets, there is a conflict of consumer advocacy voices on this issue. The lack of a singular consumer voice speaking against anti-competitive protectionism proposed by government, regulators or producers results in consumer organisations’ approach to public policy appearing fragmented (and enhancing the possibility of being “cherry-picked” by governments, industry and regulators)¹⁰⁴ thus making it easier for their voice (which is already small) to be even more marginalised.¹⁰⁵

3.3.3.1 Pharmacists – a case study of the dominance of the producer group voice

Very recently, Australian pharmacists have secured a new five year arrangement with the Commonwealth Government that, among other things, prevents geographical competition among pharmacists as well as competition from external providers, such as supermarkets. The latter form of competition was not a matter of idle speculation – at least one supermarket chain, Woolworths, had indicated its desire to enter the market.¹⁰⁶ The agreement, brokered by arguably Australia's most successful producer lobby – the Pharmacy Guild of Australia – raises consumer prices 6.2 per cent over the life of the agreement.

In the Research Paper, I have asserted that anti-competitive arrangements lead to consumers paying higher prices and suffering lower quality services (see above 1.3.2). As John Vickers, Chairman of the UK Office of Fair Trading, has stated, “[c]ompetition is pro-consumer for the simple reason that rivalry among suppliers to serve consumers well is good for customers”.¹⁰⁷ How do pharmacists perform in terms of price and service? Are the protections from competition they receive beneficial to consumers?

These issues were examined by Choice magazine in May 2004. At this time “three female Choice researchers visited a total of 87 pharmacies – both chains and independents – in Sydney, the Wollongong area and Adelaide. Before their pharmacy visits we gave the researchers relevant information and trained them to act out three scenarios – travellers' diarrhoea, alternative remedy and tummy troubles – which we'd developed in consultation with experts in the pharmacy industry”.¹⁰⁸

- **Anti-competitive arrangements lead to consumers paying higher prices for goods and services**

In their survey of 87 pharmacists, Choice magazine undertook a price spot-check of two products and found that “the most expensive of each product in a supermarket was still cheaper than the cheapest pharmacy price for the same item”.¹⁰⁹ The Financial Review observed that:

*Generic drug makers have opened up a new world of cheaper medicines but this has largely bypassed the consumer. The Pharmaceutical Benefits Pricing Authority's 2004 annual report reveals that 43 per cent of consumers are paying unnecessary brand premiums.*¹¹⁰

- **Anti-competitive arrangements lead to consumers suffering lower quality services**

In their survey of 87 pharmacists, Choice magazine concluded that the “[a]dvice given in 58 out of the 87 pharmacies we visited was rated “poor” by our experts. The pharmacy profession needs to improve the quality of advice being given to consumers”.¹¹¹ The survey found that only one time out of every five, was quality of advice rated as good.

No more obvious example exists to demonstrate the theoretical position I have described in section 3.2.1.1 above. A powerful producer group lobby, in the absence of the counter-balancing effect of an effective consumer voice, secures protection from competition that benefits industry at the significant expense of consumers.

In describing the pharmacists' deal as a “protectionist farce”, the Financial Review summed up the situation succinctly:

*The Fourth Community Pharmacy Agreement is a document to be ashamed of. A powerful lobby group has rendered the government impotent at its most important task: pulling down protective barriers.*¹¹²

3.3.2 Are Victorian consumer advocates an effective voice for consumer protection regulation?

As stated earlier in the Research Paper (see section 1.3.2 above), while consumer advocacy should, as a first principle, be a voice for competition, competitive markets do not necessarily (and in fact rarely ever do) operate perfectly. In short, markets fail and by that failure consumers can be harmed. Are Victorian consumer advocates an effective voice for consumer protection regulation? Consumer advocacy organisations are more comfortable with protection regulation, an attitude which in part stems from their suspicion as to the likelihood of competitive markets delivering that protection.

Indeed, Victorian consumer advocacy organisations have been an effective voice for world class Victorian consumer protection legislation and working with a Government that has sought to ensure an appropriate balance of market freedom with market regulation.

In particular, Victorian consumer advocacy organisations played an important role in perhaps the most significant Australian consumer protection initiative since the passage of the *Trade Practices Act 1974* – the passage of laws prohibiting unfair contract terms.

Victorian consumer advocates have (thus far) been less effective in their advocacy for national consumer protection initiatives, in particular, Australian consumer protection policy at Commonwealth level has stagnated during the last decade, with no review of the consumer protection provisions (Part V) of the Commonwealth *Trade Practices Act 1974*, despite significant advances in consumer protection regulation here and overseas.

Part of the reason for this has been the ineffectiveness of consumer advocates in articulating consumer protection measures within a law and economics framework as well as embracing, articulating and persuading policymakers of the competition-enhancing nature of consumer protection regulations.

Once again resistance to the overwhelmingly beneficial nature of competition has partly seen a lack of willingness to embrace consumer protection regulation within a paradigm of competitive markets – that is, to take the view that consumer protection is not so much an end in itself, but rather a means to protecting and enhancing efficient, effective markets.

3.3.2.1 A note of caution – consumer protection regulation involves costs and benefits

Despite my strong belief that consumer protection regulation is both important per se as well as for its competition-enhancing effects, I also believe that consumer advocates must advocate for regulation only on the basis of demonstrated need and careful cost/benefit analysis. Consumer advocates should be a voice for regulatory intervention in markets when, but only when:¹¹³

1. there is a demonstrable market failure (for example, what economists refer to as information asymmetries – imbalances of information between producers and consumers)
2. the regulation proposed is directed to addressing that market failure (on the basis that the more specified and more targeted regulation is, the less likely it will be to have unintended consequences and costs)
3. the regulation is the least restrictive way of achieving its remedial purpose (this is an adaptation of Gerard Dworkin's principle of avoiding interference with liberty),¹¹⁴ and
4. the regulation does not create more costs than the benefits that it seeks to achieve.¹¹⁵

Of these four criteria, perhaps the last is the most difficult to apply. Exactly what is a cost and what is a benefit?

Let us take a topical issue – the possible introduction of laws prohibiting unfair contract terms – as a means of exploring the complexity of cost/benefit analysis. Are laws prohibiting unfair contract terms:

- A cost to business (in terms of compliance costs or uncertainty created by retrospective interference with contracts)?¹¹⁶
- A cost to consumers (through passing on of compliance costs and costs of insurance against risk or due to the interference with the inherent balance of the contractual bargain – the deletion of a harsh term may see a term consumers value more, say price, affected adversely)?
- A benefit to business (based on increased consumer confidence to use the market)?
- A benefit to consumers (through the elimination of harsh terms not counter-balanced by a greater benefit or perhaps, more controversially, the value that consumers might place in fairness)?

Of course, other costs and benefits could be said to occur through assessments of interference with optimal allocation of resources – an argument that no matter how unfair contract terms are, what matters is whether they are inefficient or efficient. Richard Craswell, Professor of Law, University of Chicago, has expressed it this way (in relation to unfair contract terms):

*Even when we are quite sure that the market is not working perfectly, the market can be improved upon only if a court or legislature can ban the inefficient terms without also banning the efficient ones. This requires the court to be able to determine whether any given clause is inefficient or not. But a direct analysis of the efficiency of any given clause will often be very difficult, and courts (or other legal institutions) may not be very good at this task.*¹¹⁷

Once we have determined what are costs and what are benefits, how do we weight or score them, such that they can be balanced? Do we use broad utilitarian calculus, or other economic models?¹¹⁸ While it is beyond the scope of the Research Paper to undertake a full examination of cost/benefit analysis, in essence the starting point is that we must always be mindful of the risk of regulatory failure, thus ensuring that our otherwise good intentions do not have a distorting effect on competition that outweighs the benefits we were seeking to create.¹¹⁹

The UK National Consumer Council has neatly summarised what I think is the correct position on assessing regulation:

*[c]onsumers should welcome proposals to remove unnecessary regulatory controls on business in Britain – after all it is customers, rather than companies, that ultimately foot the bill. We do not support regulation as a knee-jerk response to emerging issues – it is too easy for advocacy groups to be drawn into calling for regulation as a solution to most problems. Instead, it should be considered on a case-by-case basis, and introduced only when the benefits outweigh the disadvantages. Some regulation is pointless or counter-productive, and both consumers and businesses would benefit from it being swept away. But at the same time much regulation is critically important and benefits us all, and business leaders are wrong to describe this as a “burden”.*¹²⁰

They go on to lament that:

*all too often, the debate about regulation in the UK feels remarkably predictable and unproductive – we will all be better off if we can have a more sophisticated discussion about what works and what doesn't.*¹²¹

Victorian and Australian consumer advocates have an important role to play in the current Australian debate regarding “cutting red tape”, a debate that similarly has lacked sophistication and merits much greater time for appropriate and thoughtful analysis.

Consumer advocates are hampered in this cause by not having been completely effective in displacing the myth that they are “heavy-handed” protectionists. This pejorative view of consumer advocates, although a view that I think is largely misguided, has meant that consumer advocates’ calls for thought, caution and care in debates about regulation are viewed less favourably.¹²²

3.3.3 Are Victorian consumer advocates an effective voice for consumer redress?

Consumer advocacy should be a voice for consumers to achieve access to justice. Assuming, as I have, that there is an important place for consumer protection overlays on markets, it follows that it must also be important for those remedies to be available to consumers (or regulators as the case may be). If this wasn't the case, those consumer protections would be of no value beyond a façade of protection.

Of the four matters for which consumer advocates should be a voice, the effectiveness of the voice for consumer redress is the most clear. Consumer advocates have been a significant and effective voice over the last decade for consumer (particularly low income and vulnerable consumer) access to affordable, timely, fair and efficient dispute resolution.

3.3.3.1 Advocacy for dispute resolution mechanisms

The consumer voice, for example, has been a major and effective force behind the establishment (and ongoing governance as well as operation) of industry-based dispute resolution schemes – schemes that are now widely acknowledged for providing world-leading dispute resolution for consumers and efficient pricing signals to industries to optimise their customer service, and internal dispute resolution and debt management procedures.¹²³ Consumer advocates have also been a voice – though with less effect than compared to industry schemes – for measures to enhance public dispute resolution mechanisms, most notably those offered by Consumer Affairs Victoria and the Victorian Civil and Administrative Tribunal.

3.3.4 Are Victorian consumer advocates an effective voice for distributive justice?

Competitive markets optimise efficient allocation of resources and maximise total wealth, but they do not necessarily distribute wealth in a way that will accord with agreed notions of justice or fairness. Consumer advocates should be a voice, where now there is too often silence, for a fair distribution of the wealth that competitive markets create.

Not only it is important for consumer advocates to argue for distributive assessments to be embedded into our economic reform programs (so long as this does not conflict with a paramount need to focus on economic efficiency), it is also critical that consumer advocates are a voice in broader social justice debates that are concerned with efficient measures to redistribute wealth (for example, the taxation and social security system).

In its final report on National Competition Policy the Productivity Commission acknowledged that:

*The framework(s) used to progress future nationally co-ordinated reforms should make explicit reference to the need for up-front assessment of distributional and adjustment issues. It should also include criteria relating to circumstances in which support to ease adjustment difficulties or adverse distributional outcomes is likely to be warranted, and the characteristics such support embody to facilitate rather than frustrate adjustment and avoid duplication with generally applicable income and other support measures.*¹²⁴

3.3.4.1 An example of distributional effects of competitive markets – bank fees

In April 2003, a Reserve Bank of Australia (RBA) report on bank fees revealed that fee income derived by banks had increased 10 per cent on the previous year.¹²⁵ In their report, the RBA observed that:

*Bank customers have not been affected uniformly by these trends in fees and interest margins. Arguably, those who have benefited most are those with a loan secured by a residential mortgage, who use electronic payment channels and who avoid late payment and other similar charges. Such customers have benefited from lower interest rates margins and can avoid many of the banking fees introduced over the past decade. In contrast, those customers without a loan, who have low balances and have a high volume of transactions would not have benefited from the fall in interest margins and would be paying higher fees.*¹²⁶

It is self evident that low income consumers are more likely than high income earners to maintain low account balances, less likely to have mortgages, and (arguably) more likely to have series of small value transactions.

The consumer movement might be described as a social justice movement, yet as a movement, consumer advocates have not been as adept as they have been in areas such as consumer redress, in being an effective voice. While consumer advocates have participated effectively in debates regarding community service obligations (in areas such as telecommunications, electricity, gas and water), consumer advocates have not been a loud, clear and consistent voice for socially just distribution of wealth. These debates require participation in areas of public policy not obviously areas of consumer advocacy, particularly debates regarding tax policy and social security policy (although, the Australian Council of Social Service and its jurisdictional equivalents do participate in these debates).

3.4 The practice of consumer advocacy – how effective are Victorian consumer advocates in their practice of consumer advocacy?

3.4.1 Introduction

So far in this section, I have assessed the effectiveness of consumer advocacy against the four matters for which consumer advocacy should be a voice. This leaves thus far unaddressed how effective consumer advocates are in the way that they undertake their advocacy (the practice of consumer advocacy, as opposed to the outcomes).

3.4.2 Are consumer advocates more effective at some types of advocacy than others?

Earlier in the Research Paper (see section 1.4), I established that consumer advocates undertake individual advocacy, group advocacy and policy advocacy.

1. Individual advocacy: Within this category two sub-categories were identified, namely:
 - 1.1 legal advocacy on either a one-time or ongoing basis for consumers who were seeking redress for dispute with businesses, regulators, governments or other bodies/persons, and
 - 1.2 non-legal advocacy, on generally a one-time basis, for people seeking general advice or advice about dispute with businesses, regulators, governments or other bodies/persons.

2. Group advocacy: Advocacy (typically legal) for a group of consumers similarly affected by the one problem.
3. Policy advocacy: Advocacy to governments, regulators and others for new regulation (or removal of regulation) or some other form of policy tool to benefit consumers.

Earlier in the Research Paper, I suggested that while all three types of advocacy can independently be regarded as consumer advocacy, in my view, the biggest gap in Victorian consumer advocacy is in the undertaking of policy advocacy (see section 1.4.1).

I have argued (in section 3.3.3), that consumer advocacy organisations provide their greatest resources and most effective advocacy to individual consumers and policy advocacy directed towards individual consumer redress. Consumer organisations are less effective in their undertaking of policy advocacy, particularly in relation to arguing for competitive markets and distributive justice.

I have also stated earlier in the Research Paper (see section 3.4.2) that it is not clear that undertaking both individual and policy advocacy practices is necessarily optimal, more complete or more effective than undertaking one function or the other.

It is possible that consumer advocacy organisations that undertake both individual advocacy and policy advocacy might achieve more effective, efficient outcomes by directing their policy work to where they believe there is consumer detriment (that is, those individual consumers presenting for assistance to achieve redress). For example, if a number of consumers present with a similar problem with a credit product, the consumer organisation may well believe that this is an area that deserves a systemic, policy-based approach for all affected consumers. Similarly, they may tailor their selection criteria for individual advocacy by reference to areas of systemic market failure.

On the other hand, it is also possible that scarce resources might be misdirected inefficiently by organisations overly influenced by their individual advocacy practices.¹²⁷ Within these practices, consumers presenting for individual assistance tend to be very low income consumers with “retail” or market end-use issues. Basing a policy advocacy practice on these consumers’ experiences may lead to insufficient attention to consumers at large and/or insufficient attention to matters that are not obviously retail issues, for example wholesale markets and other upstream issues, cartel behaviour and broad market design, which may be equally harmful (if not more so) to both low income consumers and consumers generally.

3.4.3 Are consumer advocates more effective at advocating for some classes of consumers than others?

I have already noted in section 1.4.1 above that consumer advocacy can involve advocacy for individual consumers, groups of consumers or consumers as a whole. Consumer advocates, though, will also typically make one other distinction in terms of who they represent based on income/vulnerability.

Consumer advocates act for those less able and the vulnerable. (Stakeholder Comment)

It is clear from the mapping exercise undertaken in section 2 of the Research Paper that consumer advocacy organisations, in general, focus their advocacy activities on the interests of low income and vulnerable consumers. It follows that consumer advocacy organisations are much more effective at advocating for these consumers than consumers at large.

It is also clear that consumer advocacy organisations, in general, are more effective at serving segments of markets, as opposed to markets generally. In particular, credit, financial services, utilities, tenancy and telecommunications markets are more effectively served by consumer advocacy organisations. Of course, there are many good reasons for this, including the essential nature of many of these goods and services for consumers. However, this practice results in whole market areas either receiving only minor attention or being wholly ignored. The lack of a countervailing voice to producer interests in these markets is of serious concern. Market segments where consumer advocacy is either less effective or wholly ineffective include insurance, superannuation, building and motor vehicle market segments (the latter two are the most significant and expensive markets in which consumers participate and, arguably, markets with poor reputations in terms of, at least, retailing behaviour).¹²⁸

3.4.4 Are consumer advocates effective at informing their voice?

Consumer advocacy is about policy development and policy analysis, review of policy and contribution to debate around social policy issues. (Stakeholder Comment)

As discussed earlier in the Research Paper (at section 1.5), consumer advocates see an important role for informing their policy voice – through the undertaking of individual advocacy to learn of new marketplace issues, undertaking research on new and emerging policy issues as well as designing policy solutions for presentation to policymakers.

These views were shared in the stakeholder interviews.

Consumer advocacy is about research. Resourcing is critical to undertake consumer surveys and evidence-based research, and to react to markets by measuring them. (Stakeholder Comment)

Ultimately, sufficient resources to identify issues is critical to consumer advocacy if it is to succeed in its role as a voice for consumer policy reform. Even more critical is the capacity to undertake rigorous research to inform the consumer voice and make it credible.¹²⁹

Consumer advocates are under-funded, part-timers. How can you expect them to produce high-quality output? (Stakeholder Comment)

In fact, consumer organisations do successfully undertake considerable research as part of their policy advocacy. This research includes:

- examining issues and trends arising from individual advocacy projects
- identifying issues and undertaking qualitative and quantitative research
- funding the undertaking of research by other organisations
- undertaking “shadow shopping” (anonymous testing of the sale of goods and services) and reporting on the results of that research, and
- undertaking product and service testing.

In particular, the Consumer Law Centre Victoria has undertaken a number of leading research reports, as have Consumer Credit Legal Service and the Consumer Utilities Advocacy Centre (which has also funded several research reports undertaken by others through its granting program).¹³⁰ The Australian Consumers’ Association undertakes extensive product and service testing as part of its publications *Choice* and *Choice* online.¹³¹

Consumer advocates are not very effective – they need a big boost in resources to undertake research and a rethink about how they use those research resources. (Stakeholder Comment)

Nonetheless, the resources to undertake even more intensive short term research (particularly costly, but persuasive, empirical research), timely research in response to new issues or to meet short consultation timeframes, or long term research over a number of years, are limited. There is little doubt that consumer advocacy organisations would be more effective with a greater capacity to undertake research.

Summary of section 3: Assessing the effectiveness of consumer advocacy in Victoria

Consumer organisations are effective within the significant constraints of their resources and often, by working “smarter and harder” than those voices they seek to oppose, stretch those resources beyond their seemingly natural constraints. This is, of course, different to saying that consumer advocacy is effective for consumers. Existing arrangements for Victorian consumer advocacy are less effective than is desirable. It is a widely shared view that consumer voices are not heard (or sufficiently heard) in Victorian (as well as Australian and overseas) political and regulatory processes.

The purpose of consumer advocacy – how effective are Victorian consumer advocates in achieving the purpose of consumer advocacy?

Are Victorian consumer advocates an effective voice for competitive markets?

The reality is that the interest that consumers have in competing producers is generally not shared by the producers themselves. In fact, producer groups devote very significant resources to arguing for protection from competitive disciplines. Given the importance of competitive markets for consumers, and the dominance of producer groups in the market for regulation, this is undoubtedly the area of advocacy work to which consumer groups should give particular focus. Unfortunately, it is the area of advocacy in which most consumer groups are the least effective. This is so for two primary reasons. First, a significant number of consumer organisations are disinclined to embrace the benefits of competitive markets (and the consumer detriment that flows from uncompetitive markets) and therefore either do not advocate for competitive disciplines, or, worse still, sometimes support anti-competitive proposals. Second, due to the fact there are some consumer organisations that do advocate the value of competitive markets, there is a conflict of consumer advocacy voices on this issue. The lack of a singular consumer voice speaking against anti-competitive protectionism proposed by government, regulators or producers results in consumer organisations’ approach to public policy appearing fragmented. This makes it easier for their voice (which is already small) to be even more marginalised.

Are Victorian consumer advocates an effective voice for consumer protection regulation?

Victorian consumer advocacy organisations have been an effective voice for world class Victorian consumer protection legislation, working with a Government that has sought to ensure an appropriate balance of market freedom with market regulation. Consumer advocates have (thus far) been less effective in their advocacy for national consumer protection initiatives. Part of the reason for this has been the ineffectiveness of consumer advocates in articulating consumer protection measures within a law and economics framework as well as embracing, articulating and persuading policymakers of, the competition-enhancing nature of consumer protection regulations.

Are Victorian consumer advocates an effective voice for consumer redress?

Consumer advocates have been a significant and effective voice over the last decade for consumers (particularly low income and vulnerable consumers) to have access to affordable, timely, fair and efficient dispute resolution.

Are Victorian consumer advocates an effective voice for distributive justice?

While consumer advocates have participated effectively in debates regarding community service obligations (in areas such as telecommunications, electricity, gas and water), consumer advocates have not been a loud, clear and consistent voice for socially just distribution of wealth. These debates require participation in areas of public policy not obviously areas of consumer advocacy, particularly debates regarding tax policy and social security policy.

(continued)

Summary of section 3 (continued)

The practice of consumer advocacy – how effective are Victorian consumer advocates in their practice of consumer advocacy?

It is possible that consumer advocacy organisations that undertake both individual advocacy and policy advocacy might achieve more effective, efficient outcomes by directing their policy work to where they believe there is consumer detriment (that is, those individual consumers presenting for assistance to achieve redress). On the other hand, it is also possible that scarce resources might be misdirected inefficiently by organisations overly influenced by their individual advocacy practices. Within these practices, consumers presenting for individual assistance tend to be very low income consumers with “retail” or market end-use issues. Basing a policy advocacy practice on these consumers’ experiences may lead to insufficient attention to consumers at large and/or insufficient attention to matters that are not obviously retail issues, for example wholesale markets and other upstream issues, cartel behaviour and broad market design, which may be equally harmful (if not more so) to both low income consumers and consumers generally.

Are consumer advocates more effective at advocating for some classes of consumers than others?

Consumer advocacy organisations, in general, focus their advocacy activities on the interests of low income and vulnerable consumers. It follows that consumer advocacy organisations are much more effective at advocating for these consumers than consumers at large. It is also clear that consumer advocacy organisations, in general, are more effective at serving segments of markets, as opposed to markets generally. In particular, credit, financial services, utilities, tenancy and telecommunications markets are more effectively served by consumer advocacy organisations. However, this practice results in whole market areas either receiving only minor attention or being wholly ignored. Market segments where consumer advocacy is either less effective or wholly ineffective include insurance, superannuation, building and motor vehicle market segments (the latter two are the most significant and expensive markets in which consumers participate and, arguably, markets with poor reputations in terms of, at least, retailing behaviour).

Are consumer advocates effective at informing their voice?

Consumer organisations do successfully undertake considerable research as part of their policy advocacy, but there is little doubt that greater resources directed to this area would enhance the effectiveness of consumer advocacy.

85 www.npaction.org/article/archive/198.

86 Asher *Enhancing the Standing of Competition Authorities with Consumers* International Competition Network Conference, Korea, 2004 at 3.

87 Posner "Theories of Economic Regulation" *The Economics of Public Law – The collected economic essays of Richard A. Posner Volume Three* Parisi and Elgar (eds), 2001 at 260. See also Stigler "The Theory of Economic Regulation" *2 Bell Journal of Economics and Management Science* 3 (1971).

88 Trebilcock et al, fn 69 above at 266. The situation was worsened by the fact that "producer groups will subsequently have disproportionate influence on those charged with administering a regulatory regime", an idea also known as "regulatory capture" (at 266).

89 Peltzman "Toward a More General Theory of Economic Regulation" *19 Journal of Law and Economics* 211 at 212.

90 Cooper et al, fn 79 above at 2.

91 Posner, fn 87 above at 239-247.

92 Moran "The 'R' Files – Funding the consumerist NGOs" Review September, 2004 at 1, available at http://www.ipa.org.au/publications/publisting_detail.asp?pubid=332. See also Johns "Participatory Democracy – Cracks in the façade" *IPA Background* available at http://ipa.org.au/publications/publisting_detail.asp?pubid=444 which also questions "granting privileges" to the viewpoints of non-government organisations, but does not similarly question the granting of privileges (and arguably, much more privileged access) to large business organisations (which, it should be noted, fund the operation of the IPA).

93 Cooper et al, fn 79 above at 4.

94 By "costs" I mean the sort of costs that economists would refer to as information and transaction costs.

95 Cooper et al, fn 79 above at 5.

96 Stigler and Cohen, fn 27 above at 49.

97 Regulated industries have a highly concentrated stake (often amounting to ten of millions of dollars or more) in making investments in influencing regulatory outcomes, whereas consumers, who are widely dispersed and may only have a very small dollar incentive, do not have similar motivations to become involved in regulatory decision-making. Combined with the difficulties of creating consumer coalitions, it is "an observed fact that non-producer interests rarely participate seriously in this [regulatory] process": Michael Trebilcock et al, fn 69 above at 265.

98 Burgess "Public Service Lends Industry its Ear" *Financial Review* 2 December 2005 at 68.

99 The accuracy of the survey is affected by the correct classification of those making submissions. Where in doubt about whether a submission was made by a consumer group or a producer group I have allocated the submission to a category classified as "other".

100 This should be the core business of consumer organisations, though not necessarily the only policy advocacy, or other advocacy/services they undertake.

101 Smith, fn 36 above, Ch 8.

102 Trebilcock et al, fn 69 above at 258.

103 Porter, fn 41 above.

104 In this context, cherry-picking means choosing one consumer group over others to work with or listen to on the basis that the chosen group holds a view that is consistent with government, industry or regulatory policy.

105 I am aware of an argument that suggests that a plurality of views on this issue is, in fact, desirable. I refute this argument at section 4.3.1 below.

106 "Pharmacists' Deal a Protectionist Farce" *Financial Review* 22 November 2005 at 70.

107 Vickers, fn 58 above at 4.

108 See <http://www.choice.com.au/viewArticle.aspx?id=104436&catid=100231&tid=100008&p=1>.

109 Fn 108 above.

110 See fn 106 above at 70.

111 Fn 108 above.

112 Fn 106 above at 70. The Editorial also notes that "[p]harmacists are not alone in exercising influence. Media owners have escaped the competitive pressures the government would like to expose them to. Agricultural marketing bodies have resisted reform. For decades, Qantas has had minimal competition on its Pacific routes".

113 In formulating these four criteria, I have been influenced by the clear and very good articulation of when regulatory intervention in markets may be justified given by Lyndon Rowe, Chairman of the Economic Regulation Authority to the Australian Institute of Energy, Perth Branch on 1 June 2004 (available at www.era.wa.gov.au). I have also considered aspects of the *Competition Policy Agreements*, in particular sub-sections 1(3) and 5(9) as well as Gerald Dworkin's seminal piece on paternalism: Dworkin "Paternalism" *Paternalism* Sartorius (ed), University of Minnesota Press, 1983 at 19.

114 Dworkin, fn 114 above at 34.

115 That consumer advocates regularly fail to do this is one of the principal allegations made by those who criticise consumer advocates: see, for example, Ross Parish, fn 54 above at 229-242.

116 In commenting upon the desirability of prohibitions on unfair contract terms, Graeme Samuel, Chairman of the Australian Competition and Consumer Commission, stated this note of caution:
I'm always just a little bit cautious about enabling courts to vary contracts retrospectively on the basis that the court has found after the event that certain provisions are unfair. I think that can lead to circumstances where there is such uncertainty for businesses and indeed for consumers that businesses ultimately say "We're not prepared to offer choice to consumers in those sets of circumstances. We will take that choice away" and consumers then ultimately say "But why have you done that to us?" The reason is because regulation starts to distort the marketplace.
Samuel "Too Much Choice: Consumers and competition" Background Briefing ABC Radio National, 6 June 2004. On unfair contract terms generally see Field "The Death of Unfair Contracts" *29 Alternative Law Journal* 1 at 35, Field "Fair's Fair" *Consuming Interest* Spring 2003 at 16 and Field "Fair for All" *Consuming Interest* Autumn 2004 at 16.

117 Craswell *Freedom of Contract* The Coase Lecture, Autumn 1994 at 20. Much of this analysis can be described as Chicago school theory, a largely neo-classical theory. "Neo-classical economists in general attach strong normative value to rules of private exchange and private ordering, and often bring some degree of scepticism to bear on the capacity of collective decision-makers ... to adopt policies or laws that will unambiguously increase net social welfare": Trebilcock, fn 22 above at 132.

118 As Trebilcock correctly observes "Either Kaldor-Hicks efficiency or a broader utilitarian calculus forces us to confront the full opportunity costs of our choices": Trebilcock, fn 22 above at 157.

119 Trebilcock, fn 22 above at 157.

120 National Consumer Council, fn 38 above at 6.

121 National Consumer Council, fn 38 above at 6.

122 See, generally, Parish, fn 53 above.

123 Consumer advocates have also played an integral role in the governance of these bodies.

124 Productivity Commission *Review of National Competition Policy Reforms – Inquiry Report* Canberra, No 33, 28 February 2005 at I.III.

125 "Banking Fees in Australia" *Reserve Bank of Australia Bulletin* April 2003.

126 "Banking Fees in Australia" fn 125 above.

127 "Energywatch's approach of relying largely on an analysis of complaints to identify problem areas could adversely affect the setting of work priorities as the number and profile of complaints may not accurately reflect the overall problems of consumers": National Audit Office quoted in UK National Consumer Council *Future Arrangements for Consumer Advocacy* 2005 at 15, available at http://www.ncc.org.uk/about/board-papers_January05.htm. In the same document at 7 the UK National Consumer Council notes that "arrangements for consumer advocacy must ensure that all major topic areas are covered".

- ¹²⁸ The UK National Consumer Council has noted that “arrangements for consumer advocacy must ensure that all major topic areas are covered”: see National Consumer Council, fn 127 at 7.
- ¹²⁹ This research needs to be both proactive, initiating research on issues that appear to be in the long term interests of consumers, and reactive, responding to research, advocacy and policy/decision-making undertaken by government, regulators and producer groups.
- ¹³⁰ See, for example, *Wilson Payday Lending in Victoria – A research report* Consumer Law Centre Victoria, July 2002; *Rich Unfair Fees: A report into penalty fees charged by Australian banks* Consumer Law Centre Victoria, December 2004 and *Do the Poor Pay More? – A research report* Stewart (ed) Consumer Law Centre Victoria, January 2005. I draw the reader's attention to my potential bias in these comments as the former Executive Director of the Consumer Law Centre Victoria for a period of seven years (1998-2005) and as the current Chair of the Consumer Utilities Advocacy Centre since 2005 and a Director since the inception of the Centre in 2002.
- ¹³¹ For example, the “shadow shopping” of pharmacists referred to at fn 106 and accompanying text.

“ *What are the options for the future of consumer advocacy in Victoria?* ”

4

4.1 Introduction

In section 3 of the Research Paper, I concluded that consumer advocacy in Victoria is not as effective as is desirable in providing a voice for Victorian consumers. In this section of the Research Paper, I will present a series of options for the future of consumer advocacy in Victoria. Consistent with the framework I adopted in the first section of the Research Paper, I will examine future options for consumer advocacy in terms of both the purpose of consumer advocacy and the practice of consumer advocacy.

4.2 The purpose of Victorian consumer advocacy

Earlier in the Research Paper (at section 1.3.1), I argued that consumer advocacy should be a voice for the maximisation of the long term interests of consumers, distributed in a way that accords with our agreed notions of justice. I set out four matters for which consumer organisations should advocate to achieve this end, namely:

- competitive markets
- consumer protection regulation
- consumer redress, and
- distributive justice.

I will now examine the ways that consumer advocates could improve the effectiveness of their voice for these four matters.

4.2.1 In the future consumer advocates must strengthen and unify their position on the benefits of competition

In section 1.3.2 of the Research Paper, I have said that consumer advocacy should, as a first principle, be a voice for competition – through competition, societal wealth is maximised and a greater level of wealth creates a greater resource pool to distribute to the members of our society.

Yet, despite the fact that competitive markets are the bedrock upon which the long term interests of consumers are built, ironically, this is the area of activity which Victorian consumer advocates are most disinclined to embrace. It is, therefore, unsurprising that consumer advocates are regularly ineffective as a voice against anti-competitive industry protectionism – they are suspicious of the benefits of competition (or, put another way, the harm caused by anti-competitive behaviour).

The dominance of producer groups in political and regulatory debates is of serious concern. The very significant imbalance in the presentation of interests to decision-making and policy-setting processes in this country, particularly during the last decade of micro-economic reform, is ironic when one considers that the purpose of competition policy is to maximise the interests of consumers, not to increase business profitability or protect inefficient businesses from stronger competitors. This is what I will refer to as the “paradox of disproportionate voices”. This paradox can be expressed as such:

- The end point of Australian micro-economic policy should be (and is stated by political and regulatory actors to be) the maximisation of the long term interests of consumers. The extent to which we attend to the interests of producers should only be to facilitate the interests of consumers.

- The development of regulatory policy is influenced by producer groups and consumer groups, but we observe that producer groups disproportionately influence the development of public policy.
- Producer groups argue for the maximisation of their own interests in a way that is regularly (although not always) harmful to consumers.
- This disproportionate influence of producer groups on regulatory development leads to regulatory outcomes that favour the protection of producer groups at the expense of the interests of consumers.¹³²

The resolution of this paradox does not, in my view, lie in removing or reducing the right of businesses to promote their own interests (even if, assuming the economic theory of regulation is correct, such an outcome was possible). Businesses have a right to promote their interests, in fact, companies have legal obligations to their shareholders to do so.

What is needed is the development of a more potent, sustained and considered voice by consumer advocates for the benefits of competition – a voice that will counter producer groups who seek anti-competitive arrangements harmful to consumers. In an important observation, the Productivity Commission, in discussing the role of consumer advocacy in advancing economic reform says:

*In a reform-specific context, it is the role of consumer advocates in providing a counterbalance to producer groups seeking to maintain anti-competitive arrangements that lead to higher prices, reduced service quality or less market innovation, that is most relevant.*¹³³

I am aware of a potential criticism of my thesis on these matters. If it is correct that national competition policy has been so successful for consumers, as I have suggested, then does it not seem reasonable to deduce that to the extent to which producer groups have argued for anti-competitive protections they must have been unsuccessful (or that I have overstated their success), or perhaps alternatively, or in addition, consumer groups have successfully argued for competitive outcomes to benefit consumers (or that I have understated their contribution)? It is, of course, the case that producer groups have supported much micro-economic reform, as have consumer groups. Of course, producer groups do not always suggest anti-competitive regulations, nor is it true that consumer groups never argue against anti-competitive regulations. My point is simply that in the market for regulation or, put in non-economic terms, political and regulatory policy-making, producer groups dominate debate, too often arguing for anti-competitive arrangements to the detriment of

consumers, without the counter-balancing effect of a focussed, well organised consumer lobby. Additionally, the analysis that I have undertaken does not reveal counter-factuals, in other words, how much more successful our micro-economic reform program might have been (and might be in the future, particularly as reform fatigue grows), if it had included consumer voices strongly advocating the value of competitive reforms.

4.2.2 In the future consumer advocates should refine their message regarding consumer protection regulation

It is typical, particularly among free market advocates, to assume that consumer advocates are “protectionists” – sceptical of markets, and with an unthinking faith in the ability of governments to regulate the markets which they distrust.¹³⁴ Consumer protectionists, they claim, reject the underlying values of free market economies, namely, the autonomous capacity of individuals to best arrange their own affairs, particularly those of private exchange and ordering.¹³⁵ These sentiments often mix with a grab-bag of other views, for example, that consumer advocates are “anti-market” (as opposed to mere sceptics), “anti-business” or, in the more extreme polemics, such as those by the Institute of Public Affairs, “splenetically anti-privatization”.¹³⁶

In fact, of course, the vast bulk of advocacy for protectionist regulation is undertaken not by consumer advocates, but rather by business groups. Even, for example, as business leaders join in a public “clarion call”¹³⁷ for the reduction of government “red tape” (unnecessary regulation), some of those same business leaders will separately be calling for regulation to enhance their interests, including protecting them from their current or aspiring competitors. As Deborah Majoras, Chairman of the US Federal Trade Commission, has observed: “While firms generally profess a desire to keep government out of business, the instinct to seek protection from government is widespread”.¹³⁸

I strongly believe that criticism of consumer advocates as unthinking protectionists is badly misguided. Consumer advocacy as I have conceived it in the Research Paper, far from being an activity that should be viewed pejoratively, is in fact a vital part of good public policy and democratic process. Nonetheless, consumer advocates have not been completely effective in displacing the myth that they are “heavy-handed” protectionists. This pejorative view of consumer advocates, and of consumer protection regulation as anti-market (particularly within the current Commonwealth Government) is harmful to consumers.

In my view, consumer advocates must refine their voice for consumer protection regulation, arguing not that consumer protection regulation is always valuable *per se*, but that consumer protection regulation should only be undertaken on the basis of demonstrated need and careful analysis of costs and benefits. Moreover, consumer advocates must argue the benefits of consumer protection regulation, at least in part, within a law and economics (both neo-classical and behavioural economics) framework, exploring the interplay and complementarity of competition policy and consumer protection policy.

It is worth noting that while I believe the first purpose of consumer advocates should be to argue for the benefits of competitive markets, this advocacy is potentially dangerous for consumers if it becomes a simile for advocacy of completely free markets. Consumer advocates must be successful in their advocacy for appropriately regulated markets to ensure that markets deliver optimal results for consumers.

Where consumer protection measures promote confidence in markets, assist consumers to safely exercise choice of suppliers and eliminate unfair terms that exist due to lack of proper information, then those measures can make markets work more effectively – they can be pro-competitive. Support for a review of Australian consumer protection policy, particularly reviewing how consumer protection policy could complement effective markets, has come from the Productivity Commission. In their report on National Competition Policy, the Commission considered that:

*a national review of consumer protection policy ... would provide the opportunity to examine whether such policies are continuing to meet the needs of consumers in a more competitive environment, as well as look at the complementarities between competition and consumer protection laws and how these might be most appropriately harnessed.*¹³⁹

The Commission goes on to recommended that:

*The Australian Government in consultation with the States and Territories should establish a national review into consumer protection policy and administration in Australia. The review should focus particularly on: the effectiveness of existing measures in protecting consumers in the more competitive environment; mechanisms for coordinating policy development and application across jurisdictions and for avoiding regulatory duplication; the scope for self-regulatory and co-regulatory approaches; and to resolve any tensions between the administrative and advocacy roles of consumer affairs bodies.*¹⁴⁰

These calls are currently likely to go unheeded – in part because of the lack of a consumer voice able to not only call for this reform, but articulate why the reform is good for competition, our economy, productivity and, generally, the long term interests of consumers.¹⁴¹

4.2.3 In the future consumer advocates must continue to be effective voices for consumer redress

Of the four matters for which consumer advocates should be a voice, the effectiveness of the voice for consumer redress is the most apparent. Consumer advocates have been a significant and effective voice over the last decade for consumers (particularly low income and vulnerable consumers) to have access to affordable, timely, fair and efficient dispute resolution. The consumer voice, for example, has been a major and effective force behind the establishment (and ongoing governance as well as operation) of industry-based dispute resolution schemes and consumer organisations should continue that role.

Consumer advocates, however, have not paid similar attention to public dispute resolution schemes, most notably those offered by Consumer Affairs Victoria and the Victorian Civil and Administrative Tribunal, and could do so beneficially for consumers in the future.

4.2.4 In the future consumer advocates should become more engaged in debates regarding social justice

Competitive markets optimise efficient allocation of resources and maximise total wealth, but they do not necessarily distribute wealth in a way that will accord with agreed notions of justice or fairness. Consumer advocates should be a voice, where now there is too often silence, for a fair distribution of the wealth that competitive markets create.

The consumer movement has not been as adept as they have been in areas such as consumer redress, in being an effective voice for social justice. While consumer advocates have participated effectively in debates regarding community service obligations (in areas such as telecommunications, electricity, gas and water), consumer advocates have not been a loud, clear and consistent voice for socially just distribution of wealth.

These debates are critical to the welfare of Victorian consumers. Success in these debates represents, for consumer advocates, the bookend to the success in lobbying for pro-competitive market outcomes. Consumer advocates must become a more profound voice in areas of public policy not immediately associated with consumer advocacy, particularly debates regarding tax policy and social security policy (although the Australian Council of Social Service and its jurisdictional equivalents do participate in these debates). In short, if the consumer movement is to be effective in pursuing its ultimate outcome – to maximise the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice – it must be a voice for both creating wealth and justly distributing that wealth.

4.3 The practice of Victorian consumer advocacy

4.3.1 In the future consumer advocates should aim to achieve an optimal size for their organisations

It is apparent from the mapping exercise that I undertook earlier in the Research Paper (in section 2) that consumer advocacy organisations are neither numerous, nor individually large (with the exception of the Australian Consumers' Association). In fact, the staff complement of most organisations undertaking consumer advocacy is generally in a range of 3–10, with only a proportion of those staff directly engaged in either individual or policy advocacy. Even within Australia's largest consumer organisation, the Australian Consumers' Association which has around 80 staff, only five people are dedicated to providing a policy voice for consumers.¹⁴²

A large group of small consumer groups is, in my view, less likely to be an effective framework for consumer advocacy than a small group of large consumer groups.

The opportunities for consumer advocates are limited because of the size of their organisations that doesn't allow for upward movement. (Stakeholder Comment)

Recently consumer advocacy arrangements in the UK have been reviewed by the UK Government, with one key outcome being a consolidation of existing consumer advocacy organisations.¹⁴³ In their recent analysis of the criteria of future consumer advocacy arrangements, the UK National Consumer Council nominated "critical mass and capacity" as a key criterion:

*while consumer organisations will never be anywhere near as large as the sectors or providers they seek to investigate, they do need sufficient scale to undertake major pieces of work when necessary.*¹⁴⁴

Larger consumer groups have a number of virtues:

- the capacity to enhance hierarchical management structures offering internal succession planning, thus optimising staff retention (and avoiding costly short term turnover) as well as enhancing the capacity to attract ambitious staff otherwise unattracted to organisations with flat management structures¹⁴⁵
- the capacity to offer multiple organisational entry points for new staff
- the capacity to fully utilise administrative staff, who can be under-utilised in very small organisational structures, thus enhancing organisational efficiency
- the capacity to gain higher utilisation from infrastructure costs and other sunk costs that can be under-utilised in very small organisational structures, thus enhancing organisational efficiency, and
- the capacity to develop larger profiles, louder voices and more effective participation in political and regulatory processes.

In fact, the virtues of larger management structures in terms of organisational efficiency, organisational expertise and organisational effectiveness are so significant that it is surprising that such a preponderance of small organisations, largely serving the same interests, exists.

One of the main, if not only, arguments made for the retention of a number of consumer organisations is that with amalgamation of existing voices comes a loss of diversity of voices.¹⁴⁶

In my view, this argument has little appeal. Arguments against amalgamation would be much stronger if the current "voices" were highly effective for consumers – they are not. Merging those voices is a way to address the current ineffectiveness.

Moreover, a reduction in diversity of voices is likely to be a good thing for consumers. The consumer interest is served by consumer advocates being a singular voice for a sole outcome: the long term interests of consumers. In reality only larger consumer groups have any real hope of countering, on a sustainable basis, the voices of well resourced producer groups, who as I have demonstrated, enjoy an enormous incumbency advantage in political and regulatory processes – they have the ear of policymakers and protect that position zealously.

A plurality of voices does exist within the broader non-government/community sector, for example, outside of the consumer movement there exist strong voices opposed to privatisation, opposed to, or sceptical of, competition, supportive of regulation as an automatic response to perceived problems, and so on.

While contrary arguments are, of course, legitimate and very often intelligently and passionately held, there are also those who seek protection of the status quo for their organisations for the wrong reasons. Consumer advocates must be very careful to always ensure that their motivation for action is not to protect themselves, their organisation or any societal sectoral interests other than those of consumers in general. As Diedre Hutton reminds us, “[t]he work [of consumer organisations] should speak for itself, and should respond to the needs of consumers, not its own self-perpetuation”.¹⁴⁷

In creating a new consumer organisation she observed, “it is not just setting up an organisation that matters: it is setting it up with a passion and a purpose that serves society”.¹⁴⁸

Moreover, the desire to self-perpetuate, to obtain funding for funding’s sake, has little to recommend itself in principle and, in practice, it is generally a poor model for organisational commitment in non-profit organisations.

4.3.1.1 Achieving optimal size by consolidating existing resources

In section 2 of the Research Paper, I identified two consumer advocacy organisations that have consumer advocacy as their core business: the Consumer Law Centre Victoria and the Consumer Credit Legal Service. Both undertake individual and policy advocacy for Victorian consumers. In my view, consideration should be given to the merger of these two organisations. Consideration could also be given to merging with these organisations a further organisation, the Financial and Consumer Rights Council.

There may also be a case for consolidation of other consumer advocacy organisations, particularly those involved in telecommunications advocacy and utilities advocacy. In my view, there is a generally applicable case to be made for greater consolidation – such mergers will allow consumer organisations to achieve the benefits of economies of scale and scope otherwise unachievable by them. It must be noted, however, that like industry consolidations, not all mergers are successful, either in terms of exacting efficiencies or appropriate cultural consolidation.

4.3.1.2 Achieving optimal size by working collaboratively

A further way to deal with the problem of a number of small organisations is to ensure that organisations work collectively and collaboratively as well as with other non-government movements, universities and businesses to maximise the consumers’ voice. This collaboration will include work with more traditional allies, such as councils for social services and, increasingly, and I think properly, with environmental and other organisations. Although it will not always be the case that all of these segments of our society will be representing the long term interests of consumers, very often they will be, and we should recognise the efficiency and effectiveness of collective action where that is the case.

4.3.1.3 Achieving optimal size through external resources

Society – governments, industry, regulators and others – need to decide whether it is appropriate or not appropriate to fund consumer advocacy organisations. If it is appropriate, then they need to provide the levels of funding that would enable them to undertake advocacy successfully.
(Stakeholder Comment)

4.3.1.3.1 Government

Government support for consumer advocacy is the most obvious way to provide greater resources to undertake consumer advocacy. The current Victorian Government has been a very generous supporter of consumer advocacy in Victoria, and wildly so in comparison to the current Commonwealth Government. In fact the current Victorian Government has been the most generous supporter of consumer advocacy of any state or jurisdiction in Australia, with Western Australia and Queensland also notable for their support. The Victorian Government support has included funding of the Consumer Law Centre Victoria, the Consumer Credit Legal Service, the community-based consumer advocacy program (as part of the implementation of recommendations contained in the *Way Forward Report*) and financial counselling services. The Victorian Government also created the Consumer Utilities Advocacy Centre with a grant of \$500,000 on a recurrent basis.

Should governments fund consumer advocacy?

While many consumer and community organisations would automatically assume such a question should not even need to be asked – the answer being yes – this response ignores views held by a wide range of influential members of the community, and articulated publicly by some, that while consumer advocacy organisations may be legitimate, governments should not provide funding for consumer advocacy. Alan Moran of the Institute of Public Affairs has stated that:

*funding to groups with a highly militant anti-business perspective provides oxygen to organizations which have no representational credentials, being elites rather like those who used to claim they were the “vanguard of the proletariat”.*¹⁴⁹

It is further suggested that funding consumer advocacy actually abrogates the proper role of government. Moran again:

*Unfortunately, by establishing these forms of pressure groups, governments are apparently acknowledging their inability to fulfil their prime functions of defending the weak through an unbiased public service. This might have merit if the funding levels were forms of outsourcing of policy analysis. The partisan nature of the NGOs and the quality of their advice, however, shows that they cannot be relied on. The absence of corresponding reductions in staffing of mainline agencies demonstrates that governments, too, regard such outsourcing as unwise.*¹⁵⁰

I am unconvinced that these arguments are correct. In my view there is a critical legitimacy to consumer advocacy, if only as a countervailing voice to producer group pressure for anti-competitive regulations (although I think the legitimacy of the consumer voice goes much further than that). A compelling theoretical argument can be mounted for consumer advocacy. In short the argument is constructed thus:

- Regulation is best explained as an outcome of a market for regulation with interest groups lobbying for their own self interest within this market.
- Within this market, there is a market failure – namely a monopolistic presence of producer groups voices, which, like all monopoly situations, is likely to lead to sub-optimal outcomes.
- Consumer groups, on their own, are not likely to collectivise their voice to provide effective competition in the market for regulation and therefore funding consumer advocacy corrects this market failure and helps to optimise the market for regulation and its outputs (in this case, the outputs are regulations beneficial to the long term interests of consumers).
- Outside of the economic theory of regulation, the electorate may perfectly sensibly place a value on pluralism and participatory democracy that they expect government to support financially.

Whilst this last point, is seen as:

*a “soft variable” in a strictly economic calculus ... [it] may well enter a community’s social welfare function in quite a significant way. This “process” value, like the social value often attached to the act of voting, should not be lightly dismissed in evaluating the costs and benefits of alternative institutional arrangements for promoting access to public decision-making.*¹⁵¹

In the words of Trebilcock et al:

*Thus, in summary, the theoretical case for state sponsorship of interest group representation in public decision-making involves the following elements: first, theories of pluralism as principally explaining the outcome of political processes; second, a recognition that thinly-spread groups such as consumers, cannot, unaided, rationally afford to participate extensively in those processes; third, a recognition that vigorous competition in ideas in a modern and increasingly complex society where good ideas are always in short supply, is a virtue worth promoting in itself; and fourth, a process value attached by the community to enhanced public participation in collective decision-making.*¹⁵²

Of course governments may also wish to contract out, sensibly in my view, other “service” functions such as ensuring independent legal representation for individual consumers (either through Victoria Legal Aid, community legal centres, the private legal profession or consumer advocacy organisations).

Having made the case for government funding for consumer advocacy, I should immediately add that I believe the receipt and expenditure of public monies should be conditional on the fulfilment of certain requirements, namely:

- regularly and independently monitored accountability to government and consumers, and
- a focus on achieving welfare-maximising outcomes for consumers within political and regulatory processes – based on my theory of why governments should fund consumer advocacy, it follows that the funding ought to be tied to enhancing participation in collective decision-making as a service.¹⁵³

4.3.1.3.2 Independent regulators

Independent regulators can be seen, at first glance, to have the same interest in supporting consumer advocacy as government for much the same reasons that I have articulated in the immediately preceding section. Having said that, independent regulators are in a position quite different to government and much more akin to the judiciary – they have a particular need to be, and to be seen to be, scrupulously independent in their actions. For this reason, options such as direct financial support of consumer advocacy organisations by independent regulators will never be appropriate, in my view.

4.3.1.3.3 Industry

Consumer organisations need to consider carefully any restrictions they place on receiving funding from industry sources. Clearly some industry funding has the potential to create conflicts of interests for organisations, but, where these conflicts are anything other than unmanageable, it is doubtful that consumers would welcome less effective representation of their interests because of consumer organisations having rejected industry funding.

For government, industry and business alike it is important that consultation timeframes be sympathetic to the resource constraints faced by consumer organisations and that acknowledgment of expertise where appropriate be recognised through appropriate consultation fees. This, in part, requires a recognition of centrality of the voice of consumers in the policy-making process.

Consumer advocacy must be accepted as legitimate. It must be “hard-wired” into the policy-making processes of governments and regulators. (Stakeholder Comment)

4.3.1.3.4 Philanthropic funds

Consumer advocacy organisations must be prepared to present their ideas to philanthropic funders in a professional and well argued manner, quantifying the benefits to be delivered – philanthropic funders are, in fact, often underwhelmed by the quantity (and particularly quality) of funding applications they receive. Having said that, most philanthropic funds persist with a policy of refusing to fund recurrent projects (regardless of whether those recurrent programmes may be superior to new seed funding proposals) – a position locked in the past and inconsistent with present-day realities. Quite simply, in the absence of citizen funding or significant corporate philanthropy (both of which are evident in the USA), and in an era of reduced commitments by Australian governments to the welfare state, philanthropic funds do have a role in supporting ongoing programmes.

4.3.2 In the future we need to create a stronger and better informed policy voice for consumers

I have already suggested in the Research Paper (at section 1.4.1), that the biggest gap in the work of consumer advocacy organisations is the undertaking of policy advocacy. The benefits of policy advocacy are clear:

- First, the long term beneficial (and cost-reducing) nature of policy advocacy (that can, over time, lead to a reduction in consumer detriment and, of course, the reduction in need for individual advocacy) places paramount importance on the undertaking of policy advocacy. To borrow a metaphor, it is better to dig a well than endlessly supply bottles of water.
- Second, producer voices consistently succeed in extracting regulation favourable to them and costly to consumers due to their dominance in political and regulatory processes – policy advocacy by consumers is severely under-developed and even small improvements are likely to have highly beneficial effects.

Consumer organisations need to be funded to undertake adequate evidence-based research and surveys, to measure markets and to be able to respond quickly to the research work of others. (Stakeholder Comment)

Consumer advocates will typically be a voice for policy reform where their research and investigation has suggested a policy solution to benefit consumers. It is clear and compelling arguments, founded on research and reason, as opposed to polemics, that will, almost always, be the path to sustained success in policy advocacy. Ultimately, a well informed policy voice is likely to be much more credible and effective than a voice for policy change that has no basis.

While it is evident that quality consumer research is central to effective policy advocacy, there is insufficient consumer research undertaken and, it follows, there is a case for supporting a greater research capacity. In the words of Trebilcock et al:

*In the absence of state assistance, production of ideas, at least in the present context, is likely to be sub-optimal, given the uncompensated positive externalities that they frequently generate (another form of free rider problem). Indeed, this is the conventional rationale for state support of basic research. Given that there is likely to be no more scarcity in the future in new and useful ideas about the scope and nature of government intervention in the economy, state support for the production of ideas in this area would seem a sound investment.*¹⁵⁴

The need for this research has recently received very welcome recognition and support from Australian Ministers for Consumer Affairs. In their *Joint Communiqué* of 22 April 2005, the Ministerial Council for Consumer Affairs stated that:

*Ministers discussed the importance of consumer focussed research to the development of consumer policy. Consequently Ministers have requested that officials develop a structure for undertaking research into consumer concerns and trade practices, so as to assist in the development of a policy agenda.*¹⁵⁵

The support of governments in Australia for greater consumer research should be welcomed unreservedly. Their recognition of the importance of consumer research, and the willingness to commit resources to ensuring high quality consumer research is undertaken, helps to address one of the most significant areas of ineffectiveness that I have identified in consumer advocacy. There are multiple models for the implementation of a greater consumer research capacity. In their *Joint Communiqué* of 22 September 2005, the Ministerial Council on Consumer Affairs announced one possible model:

*Today MCCA agreed to develop and maintain a nationally significant consumer affairs research agenda. A key aim is to assist the Council to identify priority emerging issues that are of critical importance to consumers. A working party will be established to develop an initial consumer policy research agenda through consultation with the consumer movement and others for consideration by MCCA Ministers by the end of 2005. It is anticipated that particular research projects will be tendered on a competitive basis.*¹⁵⁶

This model – establishing a governmental agenda for consumer policy research, with particular projects tendered on a competitive basis – has potential advantages:

- It may be that consumer research projects can be dealt with on a centralised basis, examining issues of national importance, while avoiding duplication between jurisdictions, thus enhancing efficiency.
- Governments may perceive an advantage in central control in both setting and handling a research agenda.

This second matter, however, points to the principal weakness of the model as well. In my view, possible disadvantages of the approach are:

- A research agenda set by governments, and controlled by governments, runs the risk of not identifying those issues where governments, for a range of possible reasons, may feel uncomfortable in commissioning consumer research. In these circumstances, it is possible that policies that may not be in the long term interests of consumers will not be identified and subject to rigorous consumer research. It is critical to remember that while independent consumer research may well come to conclusions that happen to be supportive of the current policy of any government, similarly, such research might also suggest that the current policy of any government is not in the long term interests of consumers. Indeed, for example, Deborah Majoras, Chairman of the Federal Trade Commission has observed that “government-imposed restrictions are among the most durable and effective restraints on competition”.¹⁵⁷

- An opportunity to create greater organisational capacity for consumer advocacy, the lack of which, I have argued, is a key problem undermining the effectiveness of consumer advocacy, would be missed. Greater organisational capacity can be used as leverage to obtain additional funding from business, philanthropic funds or other forms of private funding. For example, the Consumer Law Centre Victoria was established with a trust grant of \$2.25 million, such capital (it was shortly after decided) to be expended over a period of 10 years on consumer research and policy. Over the next 12 years, the Centre leveraged off that initial grant and attracted nearly \$4 million worth of additional funds, greatly expanding the amount of consumer research, consumer policy advocacy and individual legal advocacy, than otherwise could have been undertaken through the initial grant alone.¹⁵⁸
- There is a risk that the credibility of the consumer research undertaken would be compromised if it were not undertaken independently.

In my view, on balance, there is a preferable way to achieve an increase in rigorous consumer research to enhance an efficient, effective and national policy voice for consumers – an Australian National Consumer Council.

4.3.2.1 An Australian National Consumer Council¹⁵⁹

A good model for providing a consumers' policy voice that I think could be used sensibly in Australia is the UK National Consumer Council. The UK National Consumer Council is a research and policy organisation that informs government (and business) thinking about the operation of markets.¹⁶⁰ The UK National Consumer Council has been a considered voice for consumers for 30 years, having been created in 1975 by the UK Government to safeguard and promote the interests of consumers. The UK National Consumer Council is funded by the UK Government. In its 1974 White Paper on a "National Consumer Agency" (which led to the creation of the National Consumer Council), the (then) UK Government noted the need for an:

*independent national consumer body sufficiently representative and influential to ensure that those who take decisions which will affect the consumer can have a balanced and authoritative view before them.*¹⁶¹

The establishment of such a body in Australia is, based on the UK experience, overdue. In the Research Paper, I have argued that the effectiveness of consumer advocacy is greatly diminished by the lack of a profound policy voice – one that is consistent, coherent, well reasoned and, perhaps most importantly, informed by empirically-based rigorous research (see section 3.2 of the Research Paper).

Along with the creation of a University-based research centre (see section 4.3.2 of the Research Paper), there is, in my view, a pressing need to undertake a detailed examination of the creation of an Australian National Consumer Council. Apart from making the consumer voice more credible and more likely to be heard, some of this consumer research would be an important counter-balance to the research undertaken by producer groups to promote their advocacy. This counter-balancing effect would ensure that a more complete picture was available to regulators and politicians of the costs and benefits of reforms urged upon them by producer groups. Flowing from this (for the reasons I have argued in the Research Paper) would likely be a reduction in inefficient producer group benefits, which would instead be transferred as benefits to consumers.¹⁶²

The UK National Consumer Council does not test products, provide direct advice to the public or act as a peak body for other consumer organisations, nor would there be any need for its Australian counterpart to undertake these services.

An Australian National Consumer Council could also address another identified weakness in the focus of consumer advocacy organisations – research, policy development and advocacy in those market segments where consumer advocacy is either less effective or wholly ineffective, including insurance, superannuation, building and motor vehicle market segments. An Australian National Consumer Council could, while paying particular care to the interests of low income and vulnerable consumers, also ensure that it concentrated on economy-wide behaviour that is of significance to consumers, including market structures and demand-side competition.

4.3.2.1.1 A Victorian Consumer Council

Given the national operation of most major consumer markets, there is little appeal in establishing a separate Victorian Consumer Council. This is particularly so given that Victoria is already reasonably served by the Consumer Law Centre Victoria in terms of consumer research. Having said this, achieving an Australian National Consumer Council will require long and considerable work, and strong agreement among jurisdictional governments. The Victorian Government, therefore, may wish to consider the creation of a Victorian Consumer Council to both create a greater policy voice for a greater breadth of Victorian consumers across a greater range of markets and as a precursor to a national body. Such an approach would be similar to their very welcome decision to regulate unfair contract terms (an area of law, on its face, most appropriately regulated on a national basis).

4.3.2.2 *In the future we need to create more scholarly consumer research*

In addition to the research work undertaken by existing consumer advocacy organisations and the work that would be undertaken by the proposed Australian National Consumer Council, I believe there is a case for an independent university-based centre dedicated to consumer policy research.¹⁶³ A University research centre is premised on the basis that:

- there is considerable value in the creation of scholarly research that informs the making of political and regulatory decisions,¹⁶⁴ and
- there is currently little or no such research being undertaken.

While there are a number of university centres in Australia dedicated to undertaking research into industry, regulatory or competition law and policy, there is no university centre dedicated to the study of consumer law and policy.¹⁶⁵ Thoughtful and substantiated consumer research, produced by a centre that is independent of any interest group or sectoral lobby, will enhance the likelihood of further successful economic reform and productive growth for the long term benefit of consumers. The centre's research could be directed to real problems facing consumers, providing robust scholarly thinking that could be applied to create effective solutions to those problems.

To ensure that it focuses on its core business of producing high quality research as well as maintaining strict independence and credibility, any University centre should not be a consumer advocate and should have no involvement in consumer advocacy. Its work would, however, be made available to policymakers and advocates, including government, non-government and regulatory bodies.

Initial research projects could focus on the following areas:

- the deregulation of regulated markets and the introduction of competition to these markets
- consumer redress and dispute resolution
- effectiveness of consumer protection regulations
- the interface of competition and consumer law
- the interface of consumer/social and economic policy
- the relevance to victoria of emerging consumer protection issues in the global market, and
- new developments in misleading and deceptive and unconscionable conduct.

Summary of section 4: What are the options for the future of consumer advocacy in Victoria?

In the future consumer advocates must strengthen and unify their position on the benefits of competition

Our political and regulatory processes give rise to the following paradox:

- The end point of Australian micro-economic policy should be (and is stated by political and regulatory actors to be) the maximisation of the long term interests of consumers. We should attend to the interests of producers only to the extent that this is necessary to facilitate the interests of consumers.
- The development of regulatory policy is influenced by producer groups and consumer groups, but we observe that producer groups disproportionately influence the development of public policy.
- Producer groups argue for the maximisation of their own interests in a way that is regularly (although not always) harmful to consumers.
- This disproportionate influence of producer groups on regulatory development leads to regulatory outcomes that favour the protection of producer groups at the expense of the interests of consumers.

The resolution of this problem does not lie in removing or reducing the right of businesses to promote their own interests (even if, assuming the economic theory of regulation is correct, such an outcome were possible). What is needed is the development of a more potent, sustained and considered voice by consumer advocates for the benefits of competition – a voice that will counter producer groups who seek anti-competitive arrangements harmful to consumers.

In the future consumer advocates should refine their message regarding consumer protection regulation

Consumer advocates are regularly accused of being “protectionists” – sceptical of markets, and with a faith in the ability of governments to regulate the markets which they distrust. In fact, the vast bulk of advocacy for protectionist regulation is undertaken not by consumer advocates, but rather by business groups. Criticism of consumer advocates as unthinking protectionists is badly misguided. Far from being viewed pejoratively, consumer advocacy should be recognised as a vital part of good public policy and democratic process. Nonetheless, consumer advocates have not been effective in displacing the myth that they are “heavy-handed” protectionists. This pejorative view of consumer advocates, and of consumer protection regulation as anti-market (particularly within the current Commonwealth Government) is harmful to consumers. Consumer advocates must refine their voice for consumer protection regulation, arguing not that consumer protection regulation is valuable per se, but that consumer protection regulation should only be undertaken on the basis of demonstrated need and a careful analysis of costs and benefits. Moreover, consumer advocates must argue the benefits of consumer protection regulation, at least in part, within a law and economics framework, exploring the interplay and complementarity of competition policy and consumer protection policy.

In the future consumer advocates must continue to be effective voices for consumer redress

Consumer advocates have been a significant and effective voice over the last decade for consumers (particularly low income and vulnerable consumers) to have access to affordable, timely, fair and efficient dispute resolution. The consumer voice, for example, has been a major and effective force, behind the establishment (and ongoing governance as well as operation) of industry-based dispute resolution schemes and consumer organisations should continue that role. Consumer advocates, however, have not paid similar attention to public dispute resolution schemes, most notably those offered by Consumer Affairs Victoria and the Victorian Civil and Administrative Tribunal, and could do so beneficially for consumers in the future.

(continued)

Summary of section 4 (continued)

In the future consumer advocates should become more engaged in debates regarding social justice

Competitive markets optimise efficient allocation of resources and maximise total wealth, but they do not necessarily distribute wealth in a way that will accord with agreed notions of justice or fairness. Consumer advocates should be a voice, where now there is too often silence, for a fair distribution of the wealth that competitive markets create. Success in this area represents, for consumer advocates, the bookend to their success in lobbying for pro-competitive market outcomes. Consumer advocates must become a more profound voice in areas of public policy not immediately associated with consumer advocacy, particularly debates regarding tax policy and social security policy (although the Australian Council of Social Service and its jurisdictional equivalents do participate in these debates). In short, the consumer movement must be a voice for both creating wealth and justly distributing that wealth.

In the future consumer advocates should aim to achieve an optimal size for their organisations

Achieving optimal size by consolidating existing resources

There is a strong case for consolidation of consumer advocacy organisations – these mergers will allow consumer organisations to achieve the benefits of economies of scale and scope otherwise unachievable by them. It must be noted, however, that like industry consolidations, not all mergers are successful, either in terms of exacting efficiencies or appropriate cultural consolidation. In particular, consideration should be given to merging the Consumer Law Centre Victoria, Consumer Credit Legal Service and the Financial and Consumer Rights Council.

Achieving optimal size by working collaboratively

A further way to deal with the problem of a number of small organisations is to ensure that organisations work collectively and collaboratively as well as with other non-government movements, universities and businesses to maximise the consumers' voice.

Achieving optimal size through external resources

- Government

Government support for consumer advocacy is the most obvious way to provide greater resources to undertake consumer advocacy. The theoretical case for state sponsorship of interest group representation in public decision-making involves the following elements: first, theories of pluralism as principally explaining the outcome of political processes; second, a recognition that thinly-spread groups such as consumers cannot, unaided, rationally afford to participate extensively in those processes; third, a recognition that vigorous competition in ideas in a modern and increasingly complex society where good ideas are always in short supply, is a virtue worth promoting in itself; and fourth, a process value attached by the community to enhanced public participation in collective decision-making. The current Victorian Government has been a very generous supporter of consumer advocacy in Victoria, and wildly so in comparison to the current Commonwealth Government.

Government funding for consumer advocacy should be conditional on certain factors, including:

- regularly and independently monitored accountability to Government and consumers, and
- a focus on achieving welfare-maximising outcomes for consumers within political and regulatory processes – based on my theory of why governments should fund consumer advocacy, it follows that the funding ought to be tied to enhancing participation in collective decision-making as a service.

- Independent regulators

Independent regulators are in a position quite different to government and much more akin to the judiciary – they have a particular need to be, and to be seen to be, scrupulously independent in their actions. For this reason, options such as direct financial support of consumer advocacy organisations by independent regulators will never be appropriate.

(continued)

Summary of section 4 (continued)

- Industry

Consumer organisations need to consider carefully any restrictions they place on receiving funding from industry sources. Clearly some industry funding has the potential to create conflicts of interests for organisations, but, where these conflicts are anything other than unmanageable, it is doubtful that consumers would welcome organisations representing their interests less effectively because of having rejected industry funding.

- Philanthropic funds

Philanthropic funders are, in fact, often underwhelmed by the quantity (and particularly quality) of funding applications they receive. Having said that, most philanthropic funds persist with a policy of refusing to fund recurrent projects – a position locked in the past and inconsistent with present-day realities.

In the future we need to create a greater policy voice for consumers

The biggest gap in the work of consumer advocacy organisations is the undertaking of policy advocacy. The benefits of policy advocacy are clear. First, the long term beneficial (and cost-reducing) nature of policy advocacy (that can, over time, lead to a reduction in consumer detriment and, of course, the reduction in need for individual advocacy) places paramount importance on the undertaking of policy advocacy. Second, producer voices consistently succeed in extracting regulation favourable to them and costly to consumers due to their dominance in political and regulatory processes – policy advocacy by consumers is severely under-developed and even small improvements are likely to have highly beneficial effects.

An Australian National Consumer Council

A model for providing a consumers' policy voice that warrants close examination in Australia is the UK National Consumer Council. An Australian National Consumer Council would provide a profound policy voice for Australian consumers – one that is consistent, coherent, well reasoned and, perhaps most importantly, informed by empirically-based rigorous research into consumer issues as well as developing policy solutions for consumers flowing from this research. An Australian National Consumer Council could also address other identified weaknesses in the focus of consumer advocacy organisations – advocacy in market segments where consumer advocacy is currently either less effective or wholly ineffective, and in regard to economy-wide behaviour of significance to all consumers.

In the future we need to create a greater research capacity for consumer organisations

There is a case for an independent University-based research centre dedicated to academically rigorous consumer policy research. There is considerable value to the creation of such rigorous consumer research: it informs the consumer voice and makes it more credible, which ultimately makes the process and outcomes of participatory decision-making more credible. Thoughtful and substantiated consumer research, produced by a centre that is independent of any interest group or sectoral lobby, will enhance the likelihood of further successful economic reform and productive growth for the long term benefit of consumers.

- ¹³² “[T]hus the equilibrium outcome of the political process is likely to be regulation that harms consumers by protecting a favoured industry from competition”: Cooper et al, fn 79 above at 5.
- ¹³³ Productivity Commission, 2004, fn 42 above at 301.
- ¹³⁴ Parish, fn 53 above at 233.
- ¹³⁵ Parish, fn 53 above at 233; see also Trebilcock, fn 22 above at 132.
- ¹³⁶ Despite this commentary by Alan Moran specifically referring to the Consumer Law Centre Victoria (at a time that I was Executive Director of the Centre), the facts are quite different. During my period as the Executive Director of the Consumer Law Centre Victoria we were either agnostic about the effects of privatisation on consumers or, in fact, supported privatisation in some areas as beneficial to consumers. The UK National Consumer Council states its (very sensible) view on privatisations as such: “[t]he real consumer interest is in quality of service received rather than the *ownership* of the service provider ... [c]onsumers are usually much less concerned with the ownership structure of the organisation” (original emphasis): National Consumer Council, fn 38 above at 9.
- ¹³⁷ Durie “A Clarion Call to Cut Red Tape” *Financial Review* 28 December 2005 at 64.
- ¹³⁸ Majoras, fn 76 above at 3.
- ¹³⁹ Productivity Commission, 2004, fn 42 above at XXXI.
- ¹⁴⁰ Productivity Commission, 2004, fn 42 above at XL.
- ¹⁴¹ I understand that a proposal for a review of consumer protection regulations at a federal level was recently proposed by the Parliamentary Secretary assisting the Treasurer, but rejected by the office of Prime Minister and Cabinet.
- ¹⁴² Although both the CEO and Deputy CEO undertake some consumer advocacy activities, particularly at a high level within policy debates, which of course, is a vital part of the consumer voice.
- ¹⁴³ National Consumer Council, fn 127 above at 1.
- ¹⁴⁴ National Consumer Council, fn 127 above at 7.
- ¹⁴⁵ This is not to say that flat management structures are inherently flawed or always wrong. My own view is that in small community organisations, flat management structures lead to a loss of organisational accountability and incentives for staff development.
- ¹⁴⁶ Within community legal centres a further argument can be made that geographical proximity for vulnerable, non-mobile clients can be compromised by organisations merging and “leaving” a geographical area previously serviced.
- ¹⁴⁷ Hutton, fn 1 above at 2.
- ¹⁴⁸ Hutton, fn 1 above at 2.
- ¹⁴⁹ Moran, fn 92 above at 18.
- ¹⁵⁰ Moran, fn 92 above at 19.
- ¹⁵¹ Trebilcock et al, fn 69 above at 267.
- ¹⁵² Trebilcock et al, fn 69 above at 267.
- ¹⁵³ The UK National Consumer Council has stated that “consumer bodies need to have organizational legitimacy – this requires robust governance, transparency and openness”: National Consumer Council, fn 127 above at 7-8. There will be a range of other potential innovative ways to fund consumer advocacy such as *cy pres* settlements.
- ¹⁵⁴ Trebilcock et al, fn 69 above at 267.
- ¹⁵⁵ Ministerial Council on Consumer Affairs *Joint Communiqué* 22 April 2005, available at http://www.consumer.gov.au/html/jointcommuniqué_April2005.htm.
- ¹⁵⁶ Ministerial Council on Consumer Affairs *Joint Communiqué* 2 September 2005 available at http://www.consumer.gov.au/html/joint_communiqué/jointcommuniqué_september2005.htm
- ¹⁵⁷ Majoras, fn 76 above at 2.
- ¹⁵⁸ I draw the reader's attention to the fact that I was the Executive Director of the Consumer Law Centre Victoria between 1998 and 2005.
- ¹⁵⁹ Simon Smith has noted the need for a national and independent consumer policy research centre, noting that an “obvious model is the National Consumer Council in the United Kingdom” and that such a centre would “provide greater research continuity than is offered by the presently fragmented and under resourced consumer groups”: Smith, fn 46 above at 183-4. I have previously argued for the establishment of a National Consumer Council: Field “A Balancing Act” *Consuming Interest* Autumn 2005 at 28. See also Tennant “Australia's Desperate Need for an Australian National Consumer Council” paper presented to the Australian National Consumer Congress 2005 available at <http://www.fairtrading.nsw.gov.au/pdfs/corporate/davidtennantpaper.pdf#search=louise%20sylvan%20and%20competition%20and%20consumer%20law%20journal>.
- ¹⁶⁰ For a more detailed examination of the National Consumer Council, see Hutton, fn 1 above and National Consumer Council *Corporate Plan* 2005-8 at 8 available at <http://www.ncc.org.uk/about/index.htm>.
- ¹⁶¹ Quoted in National Consumer Council, fn 127 above at 8.
- ¹⁶² On this point, Louise Sylvan has observed that “organisations need the ability to undertake rigorous economic analysis, as well as amassing the empirical evidence to support their advocacy. The stronger this is, the more influence they will have and the more democracy will be enhanced”: Vincent “Splurge – How Louise Sylvan would spoil herself” *Sydney Morning Herald* 19 January 2005 quoted in Tennant, fn 159 above at 1.
- ¹⁶³ I should bring to the reader's attention that I am an Adjunct Professor at La Trobe University.
- ¹⁶⁴ See, for example, Trebilcock et al, fn 69 above at 267.
- ¹⁶⁵ For example, the Monash University Centre for Regulatory Studies, Australian Centre for Regulatory Studies, Australian National University and the Centre for Regulation and Market Analysis, University of South Australia.

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Internet resources

Consumer advocacy organisations examined by this report

Australian Consumers' Association
<http://www.choice.com.au>

Communications Law Centre
<http://www.comslaw.org.au>

Consumer Credit Legal Service
<http://www.ccls.org.au>

Consumer Law Centre Victoria
<http://clcv.net.au>

Consumer Utilities Advocacy Centre
<http://www.cuac.org.au>

Consumers' Federation of Australia
<http://www.consumersfederation.com>

Consumers' Health Forum
<http://www.chf.org.au>

Consumers' Telecommunications Network
<http://www.ctn.org.au>

Financial and Consumer Rights Council
<http://www.fcrc.org.au>

Health Issues Centre
<http://www.healthissuescentre.org.au>

Public Transport Users' Association
<http://www.ptua.org.au>

Tenants Union of Victoria
<http://www.tuv.org.au>

Other websites

Business Council of Australia
<http://www.bca.com.au>

Consumer Affairs Victoria
<http://www.consumer.vic.gov.au>

Consumer Federation of America
<http://www.consumerfed.org>

Federal Trade Commission (US)
<http://www.ftc.gov>

Institute of Public Affairs
<http://ipa.org.au>

National Consumer Council (UK)
<http://www.ncc.org.uk>

Social policy resources

NP Action
www.npaction.org/article/archive/198

Overcoming Consumerism
www.verdant.net

Wikipedia Encyclopedia
http://en.wikipedia.org/wiki/Welfare_economics

“Appendix 1: Key performance indicators”

It is not within the scope of the Paper to develop a comprehensive set of key performance indicators for consumer advocacy organisations. However, based on the issues covered by the Paper a number of key performance indicators or service standards for consumer advocacy organisations suggest themselves.

Key performance indicators can help ensure that high standards for the provision of consumer advocacy are aimed for and achieved.

1. Guiding principle for the provision of consumer advocacy by Victorian consumer advocacy organisations

Consumer advocacy organisations should be a voice for the maximisation of the long term interests of all consumers, distributed in a way that accords with our agreed notions of justice.

This guiding principle should be used to underpin the strategic direction and inform the work of consumer advocacy organisations.

2. Key performance indicators for Victorian consumer advocacy organisations

Key performance indicators should be developed to address the following:

- the purpose of consumer advocacy organisations
- the function of consumer advocacy organisations, and
- the organisational management of consumer advocacy organisations.

2.1 Purpose key performance indicators

Key performance indicators should be established to address each of the four matters for which consumer advocacy organisations should provide a voice for:

- competitive markets
- consumer protection regulation
- consumer redress, and
- distributive justice.

Example of a purpose key performance indicator for competitive markets

Consumer advocacy organisations should provide a clear, consistent and considered voice for the benefits of competition and to counter producer groups that seek anti-competitive arrangements harmful to consumers.

2.2 Function key performance indicators

Key performance indicators should be established to address each of the following activities undertaken by Victorian consumer advocacy organisations:

1. Individual advocacy

1.1 Legal advocacy on either a one-time or ongoing basis for consumers seeking redress for disputes with businesses, regulators, governments or other bodies/persons.

1.2 Non-legal advocacy on generally a one-time basis, for people seeking general advice or advice about disputes with businesses, regulators, governments or other bodies/persons.

2. Group advocacy: Advocacy (typically legal) for a group of consumers similarly affected by the one problem.

3. Policy advocacy: Advocacy to governments, regulators and others for new regulation (or removal of regulation) or some other form of policy tool to benefit consumers.

Example of a function key performance indicator: Policy advocacy

Consumer advocacy organisations should provide advocacy to governments, regulators and others for new regulation (or removal of regulation) or some other form of policy tool to benefit consumers.

2.3 Organisational management key performance indicators

Key performance indicators should also be established to address the organisational management of consumer advocacy organisations. These key performance indicators should include, for example:

- optimal size
- appropriate market and consumer coverage
- flexibility and responsiveness
- good governance and executive management, and
- efficiency and effectiveness.

Example of an organisational management key performance indicator: Optimal size

Consumer advocacy organisations should aim to achieve an optimal size for their organisations by:

- consolidating existing resources
- working collaboratively, and
- securing external resources from government, industry and philanthropic funds.

“ *Consumer Affairs Victoria Research and Discussion Papers* ”

1. *Consumer Education in Schools: Background report*
November 2003
2. *What do we Mean by ‘Vulnerable’ and ‘Disadvantaged’
Consumers?* March 2004
3. *Information Provision and Education Strategies*
March 2006
4. *Social Marketing and Consumer Policy* March 2006
5. *Designing Quality Rating Schemes for Service Providers*
March 2006
6. *Regulating the Cost of Credit* March 2006
7. *Consumer Advocacy in Victoria* March 2006

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