

“
*Institutional arrangements
for consumer protection
agencies*
”

Research Paper No. 13 April 2008



“ Preface ”

Consumer policy in Australia is at a cross-road with new directions likely to be followed after completion of the Productivity Commission’s Review of the National Consumer Policy Framework. Greater consistency across jurisdictions, generic consumer law and less reliance on industry-specific law is likely. It is not sufficient, however just to have the right laws in place; it is also necessary to have regulators with the capability of ensuring these laws are complied with, including taking, as appropriate, effective enforcement action.

This paper focuses attention on the issue of how regulators should best be structured to achieve the objectives of consumer policy.

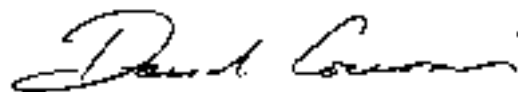
The paper reviews the literature in this regard and examines recent overseas experience which highlights the establishment of regulators as independent statutory boards. The relevance of this experience to the Victorian context is considered and the current structure of Consumer Affairs Victoria is shown to be out of step with the overseas experience and with the position of the other significant business regulators beyond the consumer policy field.

The conclusion is clear. There is a strong case for establishing an independent statutory agency headed by a board, rather than an individual, to lead consumer protection regulation in Victoria.

This research paper is the thirteenth in a series of papers designed to stimulate debate on consumer policy issues. It does not necessarily represent Government policy and is intended to provide a basis for further discussion over coming months.

Consumer Affairs Victoria would like to acknowledge the assistance of Mr Rod Overall in the preparation of this paper.

Comments on the paper can be forwarded to:
The Director
Consumer Affairs Victoria
Level 17
121 Exhibition Street
Melbourne VIC 3000



Dr David Cousins
Director
Consumer Affairs Victoria

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
BERR	[United Kingdom] Department of Business, Enterprise and Regulatory Reform
BPCPA	British Columbia Business Practices and Consumer Protection Authority
BRTF	[United Kingdom] Better Regulation Task Force
CAV	Consumer Affairs Victoria
CB	[Canada] Competition Bureau
CC	[New Zealand] Commerce Commission
CEO	Chief Executive Officer
COAG	Council of Australian Governments
CPB	[New York] Consumer Protection Board
CSG	[Ireland] Consumer Strategy Group
CTSA	[United Kingdom] Consumer and Trading Standards Agency'
DCA	[California] Department of Consumer Affairs
DCO	Danish Consumer Ombudsman
DGFT	[United Kingdom] Director-General of Fair Trading
DTI	[United Kingdom] Department of Trade and Industry
EU	European Union
FCC	[United States] Federal Communications Commission
FTC	[United States] Federal Trade Commission
GPRA	[United States] Government Performance Results Act 1993
LBRO	[United Kingdom] Local Better Regulation Office
NCA	[Ireland] National Consumer Agency
NDPB	non-departmental public body
NMD	non-ministerial department
OCA	[Canada] Office of Consumer Affairs
OCABR	[Massachusetts] Office of Consumer and Business Regulation
OCP	Office of Consumer Protection, South African Department of Trade and Industry
OECD	Organisation for Economic Cooperation and Development
OFT	[United Kingdom] Office of Fair Trading
OMB	Office of Management and Budget
PC	Productivity Commission
SADTI	South Africa Department of Trade and Industry
SANCC	South Africa National Consumer Commission
SCOCA	Standing Committee of Officials of Consumer Affairs
TGA	Therapeutic Goods Administration
UK	United Kingdom
UN	United Nations
USA	United States of America
VBLA	Victorian Business Licensing Authority
VCEC	Victorian Competition and Efficiency Commission

Contents

Preface	i	7.3 South African Consumer Policy Review and the proposed National Consumer Commission	33
Abbreviations	ii	7.4 OECD regulatory reform study	34
Executive Summary	01	7.5 UK House of Lords Select Committee review	35
1 Introduction	05	7.6 UK 'Hampton Review'	36
2 Broad objectives of institutional design	07	8 Conclusions	39
3 General or industry-specific regulators?	09	9 Relating the discussion to Victoria	41
3.1 Strengths of general and industry-specific regulators	09	9.1 Historical perspective	41
3.2 Proliferation of industry-specific regulators	12	9.2 The broader Victoria regulatory context	42
3.3 Other categorisations of regulators: 'economic', 'social' or 'technical'	13	9.3 Implications for the consumer protection regime	43
4 Independence of the regulator	15	9.4 Consumer affairs and social regulation	44
4.1 Tensions in the independent regulator model	15	9.5 An ongoing issue	44
4.2 What makes a regulator independent?	16	Appendix: Independent consumer protection agencies in international jurisdictions	45
4.3 Rationales for independent regulators	18	A.1 Summary of key features	45
4.4 Evidence of benefits of independent regulators	19	A.2 Danish Consumer Ombudsman	48
4.5 Risks associated with independent regulators	19	A.3 Irish National Consumer Agency	49
4.6 Independence with accountability and integration	21	A.4 New Zealand Commerce Commission	51
5 Allocation of consumer protection functions	23	A.5 UK Office of Fair Trading	52
5.1 Major functions	23	A.6 USA Federal Trade Commission	54
5.2 Models of functional integration and separation	24	A.7 British Columbia Business Practices & Consumer Protection Authority	55
5.3 Arguments for and against functional separation	25	A.8 California Department of Consumer Affairs	57
6 National or State regulators?	27	A.9 Massachusetts Office of Consumer Affairs and Business Regulation	58
7 Recent overseas reviews and examples of arrangements	31	A.10 New York Consumer Protection Board	59
7.1 UK Consumer Policy and establishment of the Office of Fair Trading	32	References	61
7.2 Ireland Consumer Strategy Group Review and establishment of the National Consumer Agency	32	Consumer Affairs Victoria research and discussion papers	63

“ Executive summary ”

The premise of this paper is that the effectiveness of consumer policy, in particular regulatory interventions in markets, will be influenced by the nature of the institutions charged with managing its development, implementation, operation and enforcement. It follows that changes to institutional arrangements are part of broader regulatory reform options for governments seeking improved effectiveness of regulation and reduced regulatory burdens on business.

Issues designing institutional arrangements

Designing the institutional form of a consumer protection agency is not straight forward. Trade-offs are inevitable and case-by-case judgement is required to balance a number of factors. The balance of strengths and weaknesses tends to favour general regulators over industry-specific regulators to administer industry specific regulation where it addresses consumer problems. In the literature, the case for independent regulators is strongly advanced, particularly where there are substantial incentives for capture or business rent-seeking behaviour is facilitated by concentrated industry structures or effective coordination of regulated entities by industry lobby associations. Careful consideration of adequate accountability and integration mechanisms will be necessary where independent regulators are established.

Incorporating the complete range of functions related to regulation, particularly combining policy advice and evaluation with the administration and enforcement of regulation, in a regulator potentially creates sufficient risks to justify reviewing such arrangements. The principal risk in an environment where governments at all levels are concerned to reduce regulatory burdens on business is regulatory creep.

National approaches in national markets, or where there is no significant variation in consumer detriments related to geographical location, seem highly desirable on effectiveness and efficiency grounds. This does not mean a single national regulator is necessarily warranted where there are multiple existing regulators. Greater cooperation and coordination among existing regulators to address problems through a variety of mechanisms may produce nationally effective and efficient protection for consumers.

The balance of the arguments in the paper suggests the following *prima facie* positions on key institutional issues for consumer protection agencies:

- general regulators in preference to industry-specific regulators (although this requires a case-by-case assessment depending on circumstances)
- statutory independence of regulatory functions in preference to their location in a unit of an administrative department of government, and
- separation of policy development and advice from the administration and enforcement of regulation.

There appears to be sufficient substance underlying these positions to constitute a case for a detailed examination of existing institutional arrangements relating to consumer protection in Victoria.

Developments in overseas jurisdictions and examples of independent agencies

In jurisdictions that conducted thorough reviews of consumer policy and legislation in recent years and consequently overhauled their consumer protection institutions, the new regulators established were statutory corporate bodies with boards including non-executive directors. This was the case in all three instances of wide-ranging national consumer policy reviews identified in the literature search – the United Kingdom, Ireland and South Africa. Furthermore, more general reviews of regulatory developments, for example by the Organisation for Economic Cooperation and Development and the United Kingdom's Better Regulation Task Force, have identified and supported a trend to statutory mandates for regulators, structural separation and autonomy from the executive branch of government and board-type corporate authorities instead of powers vested in individuals.

In the sample of overseas jurisdictions in the Appendix, statute-based consumer protection bodies generally fall into one of three broad categories in terms of structure and status:

- a statutory authority board or Commission and an associated administrative entity, with two main appointment methods for board/commission members – either appointed by the head of government (the Governor in some American States) or Cabinet (rather than the individual portfolio Minister) or appointed by the Minister for consumer affairs, or
- a statutory administrative body with a prescribed chief executive controlling the body instead of a board, or
- an individual statutory office-holder ('Commissioner', 'Director-General' etc.), appointed by the consumer affairs Minister, but with administrative support not established by legislation.

Consumer protection agencies less frequently take the form of non-statutory administrative units of broader government departments, such as the national Canadian Office of Consumer Affairs in Industry Canada and the Consumer Protection Division of the Illinois Office of the Attorney-General in the United States.

While the literature favours the separation of policy development and advice function from the administration and enforcement of regulation, in practice there is variation across the examples examined. In some jurisdictions it is located in the regulator – for example the US Federal Trade Commission, the Californian Department of Consumer Affairs, and the Massachusetts Office of Consumer and Business Regulation. In others, it is located in a department of government – for example the UK Department for Business, Enterprise and Regulatory Reform, the New Zealand Ministry of Consumer Affairs and the Irish Department of Enterprise, Trade and Employment. A further variable is whether consumer policy is located in a department primarily addressing economic issues and policy (Treasury, Industry, or Commerce etc.) or legal issues and policy (Attorney-General or Justice).

Relating the discussion to arrangements in Victoria

There are diverse institutional arrangements across regulators in Victoria. They range from statutory authorities with clear statutory objectives, powers and functions to units of administrative departments (such as Consumer Affairs Victoria) embedded among a range of policy and service delivery functions.

A comparison across the larger Victorian regulators shows there is some commonality among the larger regulators, with the exception of CAV. The four largest Victorian regulators with functions affecting businesses across a range of industries are the Victorian Workcover Authority (VWA), CAV, the Environment Protection Authority (EPA); and the Essential Services Commission (ESC). Comparing these regulators on the basis of several institutional variables, such as the statutory basis of the organisational entity, whether the entity is a body corporate, the method of appointment of the head of the entity and whether the head of the entity is subject to general public service employment conditions, reveals common arrangements across the VWA, ESC and EPA. CAV lacks the statutory basis common to the other three major business regulators.

A second comparison of the same institutional variables across the major regulators within the Justice portfolio that includes consumer affairs, similarly reveals CAV to be the odd one out. Unlike CAV, the Victorian Commission for Gambling Regulation (VCGR), the Legal Services Board (LSB), the Business Licensing Authority (BLA) and the Equal Opportunity Commission (EOC) are all bodies corporate established by statutes and with heads appointed by the Governor in Council and exempt from Part 3 of the *Public Administration Act 2004*.

Institutional arrangements an ongoing issue

Victoria's current consumer protection institutional arrangements reflect the historical circumstance of a past government translating the arguably low priority it allocated to consumer affairs into institutional arrangements through the removal in 1999 of the Governor in Council appointment of the 'Director of Fair Trading' and that office's exemption from public service employment. The statute-based Ministry of Consumer Affairs was abolished in 1993-94, ostensibly as part of the consolidation of departments into a small number of 'super departments'. Whatever the efficiency or other gains at the time from the consolidation, since then Victoria's consumer protection agency has had a lesser institutional status than the State's other major regulators.

Even allowing for the diversity across consumer protection jurisdictions, an arguable 'good practice' model emerges from the literature and overseas examples. In comparison with this model, the structure of CAV and associated arrangements differ from the main features of the model in three major respects:

- the arrangements lack clear statutory independence for the regulator, particularly since the above changes in the 1990s
- the absence of a board-type controlling body – with its likely benefits of a greater range of skills and experience addressing complex matters, greater potential for stability and consistency and lesser risks than may arise from the judgement of an individual, and
- the location of policy and regulation development within the regulator which carries potential risks, such as regulatory creep with associated growth in regulatory burdens on business, compromised independence through proximity to the political process and reduced accountability.

This paper raises a number of issues for discussion. Only some of those are also part of the debate initiated by the Productivity Commission's Draft Report on the Review of Australia's Consumer Policy Framework. The scope of its inquiry into Australia's consumer policy framework includes ways to improve the harmonisation of consumer policy and its administration across jurisdictions in Australia, including ways to improve institutional arrangements. However, the draft report's focus on institutional matters is mainly limited to general versus industry-specific and Commonwealth versus States issues. Wider issues in institutional arrangements are not canvassed. The critical issue of the independence of regulators in institutional design is not addressed in detail.

The Commission's draft report favours a single national generic consumer law and a single national regulator, but acknowledges that there are several considerations that militate against the adoption of the one-regulator model, at least in the short to medium term. Clearly the multiplicity of consumer regulators and the existing key role of State and Territory consumer affairs agencies in fair trading compliance and enforcement are going to continue for the foreseeable future. Changes to institutional design remain part of regulatory reform options for governments at both Commonwealth and State levels.

“Introduction”

1

Purpose

Institutional arrangements for consumer protection agencies have consequences for the overall efficacy of consumer protection policies and costs to the community through the administrative and compliance burden on businesses facing multiple consumer protection regimes within and across jurisdictions. The purpose of this paper is to identify from a review of the literature the objectives of institutional design, major issues that need to be addressed and any trends evident in overseas institutional arrangements. Drawing on the findings on these, implications for consumer protection arrangements in Victoria's broader regulatory context are set out. Victoria's arrangements are illustrative in broad detail of arrangements in the other States, although of course the details of organisational structures and the allocation of responsibilities between the various State agencies with some interest in consumer-related matters may differ to Victoria's.

Context

The Productivity Commission was requested by the Commonwealth Treasurer to undertake an inquiry into Australia's consumer policy framework, including its administration. The scope of the inquiry was specified to include ways to improve, the harmonisation and coordination of consumer policy and to improve institutional arrangements and to avoid duplication of effort.¹ The draft report accordingly considers institutional arrangements in Australia's consumer protection regime primarily from

the perspective of whether the current multi-jurisdictional nature of the regime is adequate for Australian consumers' future needs. This is clearly important as even a cursory examination of consumer protection regulation in Australia raises issues of potential overlap of functions, jurisdictional gaps, unclear boundaries and potential tensions between Commonwealth and State-based regulators and generalist and industry-specific regulators.

However, the 'Commonwealth versus States' issue is not the full extent of issues requiring examination in designing good consumer protection arrangements. Broader issues addressed in this paper, such as how best to ensure transparency, consistency and accountability of regulators, are also important. Whatever the response of governments to the Commission's favoured single national generic consumer law and single national regulator model, changes to institutional design remain an option in regulatory reform by governments at both Commonwealth and State levels.

Outline

Sections 2 to 6 discuss issues such as the objectives of institutional design, rationales for independent regulators, benefits and risks associated with independent regulators and arguments for and against functional separation in regulators. Section 7 examines recent overseas reviews of consumer protection to identify any trends in the design of consumer protection regulators. (The Appendix contains details of organisational structures and governance arrangements in a sample of overseas jurisdictions.) Section 8 sets out some conclusions from the discussion of issues and the review of overseas experience. Finally, Section 9 draws out some implications in the Victorian context.

¹ Treasurer, Terms of Reference: Review of Australia's Consumer Policy Framework, 11 December 2006.

“Broad objectives of institutional design”

2

Designing the institutional form of a consumer protection agency is not straight forward. Decisions on structure inevitably involve tradeoffs, for example between cost and complexity and reducing risks such as conflicts of interest, poor management, inefficiency and industry capture.

The structure of the relationships between the regulator, other organisations and external stakeholders – particularly the Minister responsible for consumer protection – and the scope of the regulator’s functions will affect its incentives and capacity to maintain a rigorous approach to regulation.

There are four main issues to consider in formulating institutional arrangements in the Australian context:

- 1 *General or industry-specific* – should the regulator have responsibilities relating to a single industry or cover similar regulation across a range of industries?
- 2 *Independence* – should the regulator have statutory independence, separating it from government or be an administrative unit of a department of government?
- 3 *Functions* – how much of the regulatory process should the regulator be responsible for, should the tasks of policy development, administration of regulation and enforcement be separated?
- 4 *National or State* – should a State regulator be established or should responsibility rest with a national regulator?

Before examining the issues in more detail, it is useful to define some objectives in selecting from the range of possible arrangements and structures. Consumer protection regulation should aim to produce the desired consumer protection outcomes set by government policy, as cost-effectively as possible.

Whether this is achieved in practice will be influenced in part by:

- the framework for regulators established by government, incorporating the rule-making processes, coherence of design and evaluation principles
- the operational effectiveness and efficiency of the consumer protection regulator(s) within that framework, and
- the level of resources allocated to regulators.²

There are some generally accepted characteristics of regulators’ operations which institutional arrangements should positively contribute to achieving. Commonly prescribed characteristics are outlined in **Box 1**. Choosing the right institutional arrangements involves a judgement as to how to maximise the likelihood of realising those characteristics when dealing with regulatory responses to consumer problems.

There are various formulations of the desirable attributes of regulation and regulatory design which institutional arrangements should contribute to. Examples in the overseas and Australian literature are the Organisation for Economic Cooperation and Development (OECD) *Reference Checklist for Regulatory Decision-making*³, the *Principles of Good Regulation* developed by the United Kingdom’s Better Regulation Task Force (BRTF)⁴, and the Council of Australian Governments’ *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*. In the Victorian jurisdiction, the *Victorian Guide to Regulation* published by the Department of Treasury and Finance also sets out ‘characteristics of good regulatory systems’ that should manifest in regulatory schemes.

² Organisation for Economic Cooperation and Development, 1995 *Recommendation on Regulatory Quality*, <http://www.oecd.org/subject/regreform>

³ OECD, *Reference Checklist for regulatory decision-making*, 1995, <http://www.oecd.org/subject/regreform>

⁴ Better Regulation Task Force, [United Kingdom] *Revised Principles of Good Regulation*, 2003, <http://www.brtf.gov.uk>

Box 1: Examples of commonly prescribed characteristics of regulators

- **Proportionality** regulators should only intervene when necessary and remedies should be appropriate to the risk posed, and costs identified and minimised
- **Accountability** regulators must be able to justify decisions, and be subject to public scrutiny
- **Consistency** rules and standards must be joined up (with regulators consistent and working with each other), and predictable to give certainty and fairness in the treatment of the regulated
- **Transparency** regulators should be open, and regulations kept simple and 'user-friendly' to promote public trust in the integrity of processes, and
- **Targeting** regulators should focus on the object of the regulation and adapt guidance and support to the different needs of client groups.⁵

The Victorian Guide to Regulation adds:

- **Effectiveness** regulators should achieve intended policy objectives with minimal side-effects and encourage innovation and complement the efficiency of markets
- **Flexibility** regulators should pursue a culture of continuous improvement and regularly review regulatory restrictions
- **Cooperation** regulators should seek to build a cooperative compliance culture, with the regulation developed with the participation of the community and business and in co-ordination with other jurisdictions, and
- **Subject to appeal** transparent and robust mechanism exists to provide for appeals against decisions made by the regulator.⁶

⁵ BRTE, *Revised Principles of Good Regulation*.

⁶ Department of Treasury and Finance, *Victorian Guide to Regulation*, April 2007, pp. 3-1 and 3-2.

“General or industry-specific regulators?”

A major issue in institutional design is the market, industry or sectoral scope of the regulator’s responsibilities, that is, should the regulator have responsibilities confined to a single industry or cover similar regulation across a range of industries? The arguments for and against general and industry-specific regulators reflect to a large extent the arguments about general and industry specific regulation which are contained in a separate CAV discussion paper, *Choosing between General and Industry Specific Consumer Regulation*.

The discussion in this section takes as its starting point that general or industry specific regulation has been chosen to address a problem: the next step is to decide whether that regulation is better administered by a general or industry specific regulator. Given that it would be nonsensical to have (multiple) industry specific regulators administering a general scheme of regulation, the options boil down to two: where industry specific regulation is selected, should it be administered by a general regulator (for example CAV in relation to about a dozen or so industry schemes); or should it be administered by a regulator established solely for that purpose (for example the Victorian Gambling Regulation Commission in relation to gambling regulation)? The options in practice for choosing the institutional form of the regulator are set out in **Table 1**. Consideration of the relative strengths and weaknesses of each type of regulator helps inform the choice.

Table 1: Options for the regulator, given the regulation type

Regulation type	Regulator	
	General	Industry-specific
General	✓	×
Industry-specific	?	?

⁷ These risks are greatest under industry specific regulation that exempts an industry from the application of general regulation.

3.1 Strengths of general and industry-specific regulators

Both general and industry specific regulators have their own strengths and each is likely to be preferred under different circumstances. Some of the generalised arguments for each type are outlined below. The list is not exhaustive. The strengths of one, expressed in the negative, are by implication largely the relative weaknesses of the other. Although the weaknesses of each type are not explicitly recorded below, they may arise and would enter a choice between the two.

General regulators

First, general regulators are more likely to provide universal coverage and consistent approaches across industries. This means that consumers who face the same risks receive the same protection and traders that engage in the same types of behaviour suffer the same consequences. Boundary problems, often with attendant legal expenses, are avoided, further reducing the risks of gaps, overlap, uncertainty or inconsistency.⁷ As the OECD has noted:

Sector-specific regulation by definition creates a need to define jurisdictional boundaries, and this in turn could produce three important problems:

- 1 uncertainty concerning which regulations apply for firms operating in several distinct markets and even a risk that they will be subject to inconsistent regulatory demands...*
- 2 competitive distortions and consequent misallocation of resources caused by competing firms being subjected to different regulatory regimes, and*

- 3 *further competitive distortions due to regulators trying to preserve their jurisdiction over firms by restricting the businesses that regulated firms can engage in.*⁸

Second, general regulators tend to have lower unit costs of administration and compliance – there is no need to develop and manage multiple regulatory regimes and the cumulative costs of regulation are more readily monitored and for businesses, not having to understand and comply with multiple Acts reduces compliance costs. A United Kingdom study, *Reducing administrative burdens: effective inspection and enforcement* (Hampton Report), has observed:

*...fragmented regulators, which concentrate on specialist areas of regulation, are often understandably unable to see that although the administrative burden that they place on business may be small, it is only one part of a cumulative burden. On the other hand, larger regulators have a better view of the overall burden of regulation.*⁹

Third, a general regulator reduces, but does not necessarily eliminate, the risk of excessive influence by industry-based interest groups. The OECD has commented:

*...the relative specialisation of the regulator by sector is another dimension which needs to be considered. Regulators specialised in one single sector may develop a more narrow perspective and are more prone to regulatory capture than regulators overseeing multiple sectors, which are necessarily farther away from the regulatees.*¹⁰

Fourth, as the rationale and structure of a general regulator will not be tied to a particular industry's or sector's outcomes and perhaps even its structure, a general regulator may better cope with market developments over time, including structural and technological change. An industry specific regulator will tend to reflect the problem (and industry arrangements) existing at the time of its establishment.

Finally, general regulators are more likely to develop greater expertise in regulatory issues – knowledge and insights gained in regulatory practice in one industry can be more readily distilled and applied across others within a general regulator's jurisdiction. The same staff expertise can be applied to a number of related problems across a number of industries.

Industry-specific regulators

First, industry specific regulators can provide more targeted solutions. The regulator is able to develop a solution that targets a particular problem within a particular market, especially where there are highly technical issues, and there is less risk that the regulation would unintentionally apply to markets or industries where it is not needed.

Second, enforcement may be more readily initiated by a sector specific regulator. Enforcement actions can be facilitated by specific or technical standards or preconditions for entering an industry. It can be easier for a specific regulator to detect and prove that a business breached a standard if the industry is subject to ongoing compliance monitoring or reporting arrangements. Such arrangements across a number of industries would be difficult for a general regulator to manage, as they probably would require it to digest such large amounts of information as to be prohibitive.

Third, an industry specific regulator may identify market problems earlier. The more intensive knowledge of an industry likely to be developed by a narrowly-focused industry specific regulator (together with monitoring or reporting requirements where they exist) means the regulator is more likely to detect emerging consumer problems earlier and therefore be in a position to address them proactively. However, a potential weakness associated with intensive knowledge of an industry may be that the regulator becomes unduly concerned with the minutiae of the industry's operations and overly prescriptive.

Finally, the existence of a number of specific regulators could facilitate regulatory improvement through benchmarking of performance.

If choosing between general or industry specific regulators is largely about maximising the likelihood of realising desirable operational characteristics, such as those summarised in Box 1, Table 2 provides an example of a comparative analysis drawing on the preceding discussion of strengths and weaknesses.

⁸ Directorate for Financial Fiscal and Enterprise Affairs, OECD, *Relationship between Regulators and Competition Authorities*, Paris, 1999, p. 31.

⁹ Hampton, P., *Reducing Administrative Burdens: Effective Inspection and Enforcement*, HM Treasury London, March 2005, p. 58.

¹⁰ OECD, *Regulatory Reform in Norway: Modernising Regulators and Supervisory Agencies*, Paris, 2003, p.16. See Section 4 for a more detailed discussion of regulatory capture.

Table 2: Illustrative analysis of regulator types against Box 1 characteristics

Desirable Characteristic (from Box 1)	✓ = relative strength ✗ = relative weakness	
	Regulator type	
	General	Industry specific
Proportionality	No likely differentiation?	
Accountability		✗ Susceptibility to industry capture raises concerns about accountability.
Consistency		✗ Potential across regulators for differing approaches to be taken on similar issues.
Transparency		✗ Susceptibility to industry capture raises concerns about transparency of decision-making.
Targeting	✗ Potential for focus to be diffused and less responsive to the different circumstances/needs of 'clients'.	
Effectiveness	✗ Potential for more unintended consequences of regulatory activities because of wider remit.	✗ If capture occurs, likely to compromise objectives. ✓ Greater understanding of particular industry and development of technical expertise.
Flexibility	✓ Familiarity with a variety of markets/industries facilitates application of 'regulatory lessons' across sectors. ✓ Resources can be re-allocated to meet emerging problems or market innovations in particular sectors. Not wedded to a particular 'client' industry structure.	
Cooperation	No likely differentiation?	
Subject to appeal	No likely differentiation?	

3.2 Proliferation of industry-specific regulators

The Victorian regulatory framework, and those in other States and the federal jurisdiction, is characterised by a significant amount of industry specific regulation and multiple specialist regulators. In Victoria alone, there are 72 separate agencies with regulatory functions affecting businesses in some way and about 40 of these regulators arguably have rationales in varying degrees related to consumer protection and consumer safety.¹¹ Of these, only three have responsibilities extending across numerous industries.

It has been argued elsewhere that there are incentives that bias policy decisions towards the use of industry specific regulation.¹² The large number of industry specific regulators, despite the absence of any overwhelming inherent advantage, as indicated in the preceding analysis, suggests a similar bias may exist in selecting the type of regulator. A new industry regulator may be perceived as more directly 'fixing the problem', even though the use of an existing regulator (and perhaps even existing legislation) could be more cost effective.

However, this can lead to situations of multiple regulators administering (perhaps differently) regulatory requirements which are essentially the same. **Box 2** contains examples of industry specific regulators which are outside the consumer affairs portfolio, but have consumer protection objectives and enabling statutes prohibiting false, misleading or deceptive advertising. Section 12 of the Fair Trading Act administered by CAV has the same prohibition.

The Victorian Competition and Consumer Commission (VCEC) reports there are 34 regulators (including those listed in **Box 2**) having powers to monitor or enforce false, misleading and deceptive conduct. Of these regulators, just under half are responsible for occupational licensing of various professions. Seventeen of these 34 regulators have identified overlap and duplication with other

regulators at the State or Commonwealth level; one regulator did not have information available on the extent to which there is overlap or duplication in their regulation of misleading and deceptive conduct.¹³

A recent VCEC inquiry into food regulation noted there is potential for overlap or gaps in regulatory coverage because of multiple regulators (both general and industry specific) operating in this area, including under the misleading and deceptive conduct provisions in the federal *Trade Practices Act 1974* and the Victorian Fair Trading and Food Acts. In food regulation, not only is there overlap among various Victorian regulators and between State agencies and the ACCC, local councils also have a role in enforcement of the misleading and deceptive conduct provisions of the Food Act.¹⁴

In summary, there may be several reasons why stakeholders prefer an industry specific over a general regulator:

- an industry association may consider it will have more influence over the regulator because its views are not competing with those of other industries and the regulator will better 'understand' its problems
- governments may perceive that establishing a specialist regulator conveys to the community the politically desirable message of greater government activity and commitment to fixing the problem, compared to allocating the problem to an existing general regulator, and
- an individual Minister is more likely to gain an increment to his/her portfolio status through a new specialist regulator, whereas an existing general regulator may reside in another's portfolio.

¹¹ VCEC, *The Victorian Regulatory System*, April 2007, p. 5. The VCEC defined a business regulator as a State Government entity (either independent or within a department) that derives from primary or subordinate legislation one or more of the following powers in relation to businesses and occupations: inspection; referral; advice to a third party; licensing; accreditation or enforcement. Using this definition, the Commission identified 72 State-based regulators whose activities affect Victorian businesses, other private sector entities (such as private schools and hospitals) and occupations.

¹² CAV Discussion Paper, *Choosing between General and Industry Specific Consumer Regulation*, January 2006.

¹³ 'Conduct' would include advertising. VCEC, *The Victorian Regulatory System*, April 2007, p. 10-11.

¹⁴ VCEC, *Simplifying the Menu: Food regulation in Victoria*, (Draft report), April 2007.

Box 2 Victorian industry specific regulators administering legislative prohibitions on misleading or deceptive advertising

Regulator	Legislation
Chinese Medicine Registration Board	<i>Health Professions Registration Act 2005</i>
Chiropractors Registration Board	<i>Health Professions Registration Act 2005</i>
Dental Practice Board	<i>Health Professions Registration Act 2005</i>
Food Safety Unit, Department of Human Services	<i>Food Act 1984</i>
Legal Profession	<i>Legal Profession Act 2004</i>
Medical Practitioners Board	<i>Health Professions Registration Act 2005</i>
Nurses Board	<i>Health Professions Registration Act 2005</i>
Optometrists Board	<i>Health Professions Registration Act 2005</i>
Osteopaths Registration Board	<i>Health Professions Registration Act 2005</i>
Pharmacy Board	<i>Health Professions Registration Act 2005</i>
Physiotherapists Registration Board	<i>Health Professions Registration Act 2005</i>
Podiatrists Registration Board	<i>Health Professions Registration Act 2005</i>
Psychologists Registration Board	<i>Health Professions Registration Act 2005</i>
Veterinary Practitioners Registration Board	<i>Veterinary Practice Act 1997</i>

3.3 Other categorisations of regulators: 'economic', 'social' or 'technical'

There are other ways of categorising regulators in addition to the scope of industries their functions extend to. One categorisation sometimes used refers to the nature of the activity sought to be regulated and the objectives of intervention: are they economic or social? 'Social regulation' can be defined as government intervention addressing social activity primarily to protect public health, minimise harm or to achieve social objectives, for example 'law and order' or regulation of drug consumption. This can be contrasted in principle with 'economic regulation' which is government intervention to control market activity such as pricing, market entry, abuse of market power and the conduct of market participants (sellers and buyers). It could be argued that social regulation centres on issues of health, safety, welfare, and working conditions; whereas economic regulation concentrates on the efficient functioning of markets. This would suggest that most consumer protection regulation is primarily economic in character.

Regulation that deals with issues that have wider impacts than just on the individuals most directly involved in the sale or consumption of the goods or services involved (externalities) is often regarded as social in character. An example of a consumption externality is where the excessive consumption of liquor by a person gives rise to public disturbances, violence or dangerous driving. Regulation may seek to internalise these externalities – to make the individuals involved take account of these external impacts – and thus improve the functioning of markets. However, while the objective sought may be regarded as social in character, in some cases economic regulation (for example regulating entry of suppliers into a market) is used to help achieve it. The objectives of regulation and the instruments used to regulate in some cases have a mix of social and economic elements. The distinction is more a continuum reflecting degrees of emphasis than a clear dichotomy.

Of course, what makes for good design of regulation is the same whether the objectives are at the social or economic ends of the continuum. The diversity of views and the often strong emotions about some of the values implicit in social regulation require the regulator's practices to particularly emphasise consultation, responsiveness, transparency and accountability.

A third category of regulator can be identified: 'technical' regulators, by definition also industry-specific (and mostly highly technical industries such as the telecommunications industry), that regulate the detailed parameters of business operations or establish business process and/or output standards for all industry participants. A technical regulator will probably also share the 'regulatory space' for the particular industry with a more generalist economic regulator.

An example of a technical regulator is the Australian Communications and Media Authority (ACMA). ACMA issues spectrum licenses which authorise the use of a parcel of spectrum space. The spectrum is a continuous range of electromagnetic radiation. It extends from the longest radio waves, through infra-red, light, ultra-violet and x-rays, to gamma rays. The radiofrequency spectrum is the portion of this spectrum that is used for transmitting radio waves. It is used for a range of communications, including radio, radar and television. Licensees are able to deploy any device from any site within their spectrum space, provided that device operation is compatible with the licence conditions and the technical framework established for the band by ACMA. The Australian Competition and Consumer Commission (ACCC), the general competition and consumer protection regulator, also regulates telecommunications businesses not only through its general powers but also specific powers to arbitrate telecommunications access disputes about access to declared telecommunications services.

“Independence of the regulator”

4

Another major issue to consider in formulating institutional arrangements is the degree of independence of the regulator. A dictionary definition of ‘independent’ includes ‘not subject to external control or rule, self-governing’ and ‘not influenced or biased by the opinions of others...’¹⁵ The BRTE, by way of illustration, defines an independent regulator as: ‘A body which has been established by an Act of Parliament, but which operates at arm’s length from Government and which has one or more of the following powers: referral; advice to a third party; licensing; accreditation; or enforcement’ [emphasis added].¹⁶ However, it should be emphasised at the outset that regulatory independence always exists within the parameters of the regulatory framework set by the legislature. The issue concerns the nature and extent of external influences on a regulator’s day-to-day decisions and activities within a legislative framework.

Before examining in detail what makes a regulator independent, the possible rationales for independence and the benefits and risks associated with establishing independent regulators, it may be useful to note the ambiguous nature of the concept of an ‘independent regulatory agency’ and the implication of that for institutional arrangements.

4.1 Tensions in the independent regulator model

Politicians delegate certain powers to regulators through legislation on the assumption that the regulators will exert them to fulfil the longer-term goals that justified their establishment. Majone notes that the term ‘independent regulatory agency’ is, strictly speaking, an oxymoron:

*The core concept of agency implies a relationship in which the principal retains the power to control and direct the activities of the agent. In which sense, then, can one speak of an “independent” agency? ...this question poses a serious conceptual ambiguity in prevailing ideas about the delegation of powers to regulatory agencies.*¹⁷

The principal-agent problem arises almost invariably because even the most detailed legislation is unlikely to be a sufficiently complete ‘contract’ to ensure a regulator performs exactly as the government establishing it (or subsequent governments) desire. In practice much legislation is vague, general, ambiguous, and occasionally internally inconsistent, and increases the potential for discretion by regulators and hence the possibility of regulators departing from governmental objectives or priorities.

¹⁵ The *Shorter Oxford English Dictionary on Historical Principles*, Volume I, Oxford University Press, 1973, p. 1054.

¹⁶ BRTE, *Independent Regulators*, October 2003, p. 6.

¹⁷ Majone, G., *Strategy and Structure: the Political Economy of Agency Independence and Accountability* in OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, Paris, January 2005, p. 126.

Despite these complications, there can be benefits in delegating responsibilities to regulators. It can make the regulatory process more certain and less susceptible to short term political imperatives:

- delegation reduces decision-making costs – the time and effort available to sufficiently refine legislation to reach agreement on disputed policy details can be economised by delegating to a regulator who can undertake that within an agreed broad policy framework
- delegation facilitates ‘unpopular’, though arguably necessary, decisions in the long term public interest by shifting the responsibility to decision-makers other than politicians and thereby lessening the impact of miscellaneous short term political pressures, and
- because statutory institutions are less easily changed than government policies, delegation is a means for politicians to fix policies so that they will last beyond their term of office. Politicians currently in office lose some control, but prevent or impede future governments undoing their policy choices.¹⁸ From the perspective of regulated industries, this has the fortuitous by-product of providing more stability and certainty in the regulatory environment for business.

The delegation problem, combined with the non-democratic nature of regulators (neither elected by the people nor directly managed by elected officials), means that their accountability for regulatory outcomes automatically becomes an issue in institutional design and regulatory governance. Majone concludes that ‘What is most important is that independence and accountability be perceived as complementary and mutually supportive, rather than mutually exclusive values’.¹⁹ Expressed more colloquially, having given up control to a regulator (for whatever reason), politicians are likely to be keen, at the same time, to ensure the regulator is not out of control.

4.2 What makes a regulator ‘independent’?

The fundamental pre-condition of independence is the existence of distinct, detailed legislation establishing the organisation, governing the regulator’s objectives, powers and functions and requiring reports to parliament on activities and outcomes. This is in contrast to a situation where regulatory functions are embedded among a range of policy or service delivery functions within a Ministerial department, often without a clear, unambiguous mandate.²⁰ However, the BRTF observes that while in theory statute makes regulators independent, in reality it is a much more complicated condition.²¹

Even with well-defined statutory objectives and functions, a regulator’s independence can be constrained in effect by government decisions and policies. There are a number of areas where statutory independence can be compromised, including finance, personnel, operations and enforcement. In practice the other major determinants of independence, in addition to foundation in statute, are:

- an adequate resource base – the means of funding (such as government budget allocations, a levy on the regulated industry or fees charged for licence or inspections, or a combination of these), the level of funding and the certainty of funding over the medium term – will have a bearing on the nature and scope of the regulator’s activities, either directly or indirectly
- staffing flexibility – the government may centrally set salaries and conditions and staffing policies that affect the regulator’s ability to attract and retain competent staff, particularly if there is a need for highly specialised staff for certain regulatory functions

¹⁸ Gilardi, F., *Evaluating Independent Regulators* in OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, p. 103.

¹⁹ Majone, *Strategy and Structure* in OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, p. 153.

²⁰ For example, the objectives of Victoria’s regime for regulating the supply of liquor include contributing to the responsible *development* of the liquor and licensed hospitality industries and facilitating the *development* of a diversity of licensed facilities [emphasis added] (section 4, *Liquor Control Reform Act 1998*).

²¹ For an elaboration of these points see BRTF, *Independent Regulators*, Chapter 4.

- operational clarity – the clarity of the regulator’s objectives, their linkages to wider government policy and other agencies and any guidelines on the exercise of regulatory powers will influence how effectively the regulator develops the policies and delivery mechanisms for achieving the objectives, and
- enforcement decision-making – while there are a wide range of enforcement powers and possible approaches to their use, any compromise of a regulator’s exclusivity of decision-making about enforcing its regulatory regime will jeopardise its overall independence.

A further area of relevance to the extent of independence in practice is the method and terms and conditions of appointments to regulatory boards and chief executive positions. Examples of views on what is required for independence are contained in **Box 3**.

Box 3: Two views on requirements for regulatory independence

(i) The OECD suggests that desirable requirements for independence include:

- a legal mandate
- structural separation and autonomy from the government
- a multi-party process for appointment of the regulator (for example involving both executive and legislative bodies)
- protection from arbitrary removal (for example through fixed terms)
- defined professional standards and adequate remuneration for the regulator’s staff, and
- a designated reliable source of funding (for example through industry fees instead of government budgets).

(ii) The **United States Federal Communications Commission (FCC)**, the statutory authority directly responsible to the US Congress for the regulation of the American communications industry (including consumer information and education functions), describes the ‘defining features’ of an independent regulatory body as follows:

- independence from the regulated entities (the body and its staff have no direct or indirect interests in any of the entities)
- shielding from political pressure, and
- transparency in decision-making – the process of arriving at policies and other decisions is open, consistent and predictable.

In addition to these features the FCC adds **effective** independent regulators require:

- the full ability to regulate the market by making policy and enforcement decisions
- the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously, and
- adequate funding from reliable and predictable revenue sources.²³

²³ Federal Communications Commission, *Connecting the Globe: A Regulator’s Guide to Building A Global Information Community*, Washington DC, June 1999 at www.fcc.gov/connectglobe/sec1.html

4.3 Rationales for independent regulators

It is useful to distinguish between rationales that have a normative element – prescribing standards for ‘good’ regulation – and those that only aim to explain the pattern of establishing independent regulators without judging its desirability. The empirical bases of the hypotheses identified below vary considerably.

Probably the main normative rationale for the independent regulator model is to structure relationships so as to shield market interventions from interference from politicians, their advisers or departmental bureaucrats who may be unduly influenced by regulated firms and/or other interest groups. Statute-based independence may also assist the regulator deflect attempts by particular interests such as regulated firms, industry organisations or other non-government groups to directly exert influence. In turn, this is likely to contribute to improved objectivity, consistency and predicability in the administration of regulation.

Regulators can become ‘captured’ and act in the interests of the regulated entities or other interest groups, particularly in relatively concentrated industries. The OECD has commented on regulatory capture and institutional design as follows:

One of the tasks of institutional design is...to find ways to reduce the influence that interest groups have in regulation. Many OECD countries aim at limiting the danger of regulatory capture by attempting to create regulatory institutions that are “independent” of the executive branch of government...Making the regulator’s status less dependent on political power limits the risk that private sector lobbies may use their political influence to affect regulatory decisions...

Independent regulators may sever the link with politicians, but they do not eliminate the danger of capture by the regulated industry. For example, the “revolving door” phenomenon where regulators leave to take jobs in the regulated industries...indicates that it is very difficult in practice to establish regulatory independence.²⁴

An autonomous regulator may create important ‘checks and balances’ to the power of government departments and private interest groups. Independence, depending on other design variables, may also facilitate greater accountability, transparency, stability and expertise.

Other rationales for establishing independent regulators can be identified:²⁵

- *Expertise* – independent regulators can gather relevant information from the regulated sector more easily and their more flexible organisation is more likely to attract technical experts than the ‘ordinary’ bureaucracy
- *Flexibility* – independent regulators’ autonomy makes them more able to adjust regulation to meet changing market conditions²⁶
- *Stability* – distance from day-to-day political pressures on government means that the rules of a regulatory regime will be less likely to be subject to sudden and unexpected change
- *Credible commitments* – again due to distance from day-to-day political pressures and electoral constraints, independent regulators have longer time-horizons than politicians and their existence can increase the credibility of government commitments to concepts such as competitive markets, fair regulation or investor-friendly rules (depending on the political objectives)
- *Efficacy and efficiency* – as a result of the previous factors, independent regulators lead to better regulatory outcomes which are translated into a better performance of markets
- *Public participation and transparency* – independent regulators’ decision-making processes are more open and transparent than those of ministerial departments and thus more sensitive to the diffuse and unorganised interests of consumers. This is likely to contribute to better informed decision-making. Openness and transparency are not only means but also ends in themselves as they are related to accountability.

²⁴ OECD, *Economic Studies*, No. 32, 2001/I, p. 63.

²⁵ The rationales are taken from Gilardi, F., *Evaluating Independent Regulators* in OECD, *Designing Independent and Accountable Regulatory Authorities*, p. 102-3.

²⁶ However a criticism sometimes made is that independent regulators tend to be inflexible in practice. See Section 4.5 on risks.

Independent regulators are expected to produce a number of positive outcomes for the public and regulated entities as they work to achieve the objectives set down by government. In summary, the major expected benefit is the protection of the regulator's market interventions from direct political influence and the influence of specific interests, particularly the regulated entities. Secondary, but still significant, expected benefits are greater transparency, consistency and longer term focus than from a regulator that is part of a government department. The independent regulator model also readily accommodates the separation of policy and regulatory functions discussed in detail later in Section 5.

4.4 Evidence of benefits of independent regulators

Whether, and to what extent, these expected benefits are delivered in practice would be difficult to empirically measure, not least because the benefits are relative to what 'non-independent' regulators would have delivered and involve a counter-factual analysis. A recent BRTF report on independent regulators provided some anecdotal evidence based on the experience of regulated entities in the United Kingdom. Nearly all regulated entities consulted by it expressed the view that being regulated by an independent regulator was preferable to being regulated by a department of government. The BRTF reported the following benefits from the perspective of the regulated:

- more consistency of decision-making
- long term decisions rather than short term
- more transparency
- better accountability
- more trust between the regulated and the regulator, and
- freedom from political interference.²⁷

An OECD review of regulatory policies in member countries in 2002 made the following conclusion from its observation of international experience with independent regulators:

There is little doubt that compared to regulatory functions embedded in line ministries without clear mandates for consumer welfare, the independent regulators represent an important improvement. This theoretical point is supported by the empirical observation that the economic benefits of market opening – in terms of both domestic and international investment – have been greatest in precisely those sectors – financial services and telecommunications – where independent regulators are most prevalent, though the causality is not entirely clear. But independent regulators are not immune to serious risks, such as capture, or may contribute to expensive regulatory failures. Furthermore, they can create new potential problems that have not been adequately assessed. A critical assessment of the performance of independent regulators is needed to determine if improved design can avoid future problems with regulatory quality.²⁸

As noted by the OECD, there are risks associated with independent regulators and the need for mechanisms to ensure adequate accountability is universally highlighted in the literature on institutional design.

4.5 Risks associated with independent regulators

The risks associated with the independent regulator institutional model broadly relate to:

- capture by the regulated entities
- inadequate accountability, and
- fragmentation of overall government policy and action.

Independent regulators are likely to be more costly because a separate organisation with associated accountability mechanisms is established.

²⁷ BRTF, *Independent Regulators*, p. 11

²⁸ OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*, Paris 2002, p. 95.

Capture by regulated entities

It is generally argued that statutory independence reduces the risk of political and administrative interference, it does not eliminate and it may not necessarily reduce, the risk of regulated businesses exerting undue influence on regulatory decisions. Indeed some writers argue that 'regulatory independence from political control enlarges the collusive opportunities between regulators and interest groups' by stressing the importance of information asymmetries in the principal-agent relationship of the government and its regulator.²⁹ This view argues that the political principal is informationally disadvantaged relative to regulated firms. There is likely to be an economic rent associated with the information gap. The regulator is a means of bridging the informational gap, but the regulator and the regulated share information that is not available to the political principal and this creates scope for capture to preserve the information rent to the firms. Faure-Grimaud and Martimort comment:

*This capture may take different forms that all reward the regulators in one way or the other for having taken a lenient stance vis-à-vis the sector they are supposed to regulate. For instance, regulators may benefit from in-kind favors or find attractive job opportunities in this sector when they leave the civil service. Capture thus creates a control problem between the government and the bureaucracy...*³⁰

Inadequate accountability

Although independent regulators are created by legislation and have powers delegated to them by elected officials, they are organisationally separate from governments and are not directly managed by elected officials. There is a risk of insufficient accountability and excessive discretion in the exercise of the basic delegation from Parliament. The risk may arise from the actions and omissions of the regulator or from the drafting of the enabling statute. It may be a more subtle phenomenon where over time a regulator develops a degree of prioritisation or method of operation that the Minister of the day may not always agree with. There is no point in delegating functions and powers to regulators to achieve certain objectives without periodic checks by the principal on the continuing relevance of objectives in dynamic markets and the regulator's performance in relation to those objectives.

Another dimension of accountability is the relationship of independent regulatory authorities with Parliament and with the public as a whole. One of the implications of independence is that regulatory authorities as agents of politicians have to be accountable in a political sense, through a continuing dialogue with Ministers, Parliament and with public opinion more broadly. Section 4.6 indicates ways to avoid or minimise these potential problems.

Fragmenting government policies and action

An area of risk that overlaps with the 'general versus industry-specific regulators' debate is that of fragmentation of overall government policies and interventions. The risk is probably highest where there are multiple independent regulators organised on sectoral lines. However fragmentation of policy can also arise where there are multiple regulators existing as administrative units within Departments, so the risk of fragmentation is not exclusive to independent regulators. It is likely most regulators would have some impacts, to varying extents, on other government policies and programs. There is potential for overlap, duplication and confusion and a lack of clear strategic direction. A related issue is the relationships between industry regulators and the authority responsible for implementing overall competition policy. Industry regulators may fragment or undermine competition policy and give rise to inconsistent approaches. Inconsistencies can affect incentives in markets and lead to businesses changing behaviours to avoid regulation rather than to more effectively serve consumers.

The consequences of fragmentation can be unnecessary extension of regulation, higher budgetary costs to government and higher business administration and compliance costs. The BRTF observed in the British rail industry that a lack of clear strategic direction can lead to 'regulatory creep' as each body pursues different objectives and takes a different focus.³¹ Also, those subject to regulation may find themselves responding to competing or confusing demands. The United Kingdom Hampton Review on reducing the administrative burden of regulation argued that there is less awareness of the cumulative burden of regulation on businesses and that comprehensive risk assessment is more difficult in a situation where there are many smaller regulators.³²

²⁹ See for example Faure-Grimaud, A. and Martimort, D., *Regulatory Inertia* in *RAND Journal of Economics*, Vol. 34 No. 3, Autumn 2003, pp. 413-4.

³⁰ Faure-Grimaud, A. and Martimort, D., *Regulatory Inertia* in *RAND Journal of Economics*, p. 414.

³¹ BRTF, *Avoiding Regulatory Creep*, October 2004, p. 36.

³² Hampton, P., *Reducing Administrative Burdens*, p. 6.

4.6 Independence with accountability and integration

The risks in the independent regulator model can be minimised and benefits maximised by careful regulatory design. A major challenge is to ensure that independent regulators are adequately accountable for their activities.

There are a number of mechanisms which collectively can operate to ensure adequate accountability. The starting point is for the enabling statute to specify clear, unambiguous outcomes sought from regulation and the types of activities the regulator should be involved in to achieve them. Other mechanisms include requirements for:

- regular public reporting on activities and outcomes
- procedural transparency including due process, stakeholder consultation, regulatory impact assessments, announcement and explanations of policy and enforcement decisions and actions³³

and the establishment of:

- a system of appeals from decisions by regulators (but without transforming the appellate body into the ultimate regulator), and
- a system for assessing performance *ex post* which addresses both
 - performance against assigned objectives, and
 - conformity with regulatory quality standards for transparency, responsiveness, consultation and so on.

Another major design challenge is to ensure the satisfactory integration of individual regulators into the government-wide policy framework. This probably requires explicit co-ordination procedures across regulators to identify and cope with interactive policy objectives in a manner that ensures related policies are treated coherently.³⁴ Another co-ordination problem arises in Australia's federal system of government where cooperation regarding national and international markets is necessary to avoid issues of regulatory overlap and duplication, and, perhaps, issues of internal barriers to trade. (This is discussed further in Section 6.) In addition cooperation on governance issues relevant to independent regulators is essential if reform efforts by one level of government are not to be frustrated by the actions of other governments.

³³ Transparency in an operational sense is more than public consultation and regulatory impact assessment and refers to the capacity of regulated entities to identify, understand and express their views on their obligations under the rule of law. See R. Deighton-Smith, *Regulatory Transparency in OECD Countries: Overview, trends and challenges* in *Australian Journal of Public Administration*, Volume 63 Number 1, March 2004, pp.66 -73.

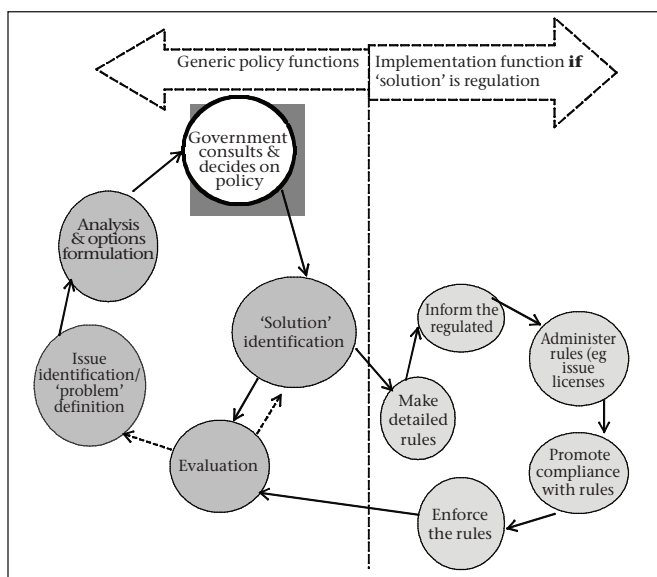
³⁴ Ladegaard, P., 'Good Governance and Regulatory Management': a background note for an OECD Regulatory Management and Reform Seminar, 19-20 November 2001, Moscow.

“ Allocation of consumer protection functions ”

5

The third of the four main issues in formulating institutional arrangements concerns the scope of the functions assigned to consumer protection agencies. How much of the range of functions involved in protecting consumers should be assigned to bodies responsible for implementing regulatory interventions to protect consumers?

Diagram 1: Simplified functions in consumer protection policy



5.1 Major functions

Diagram 1 provides a schematic representation of the major functions, although much simplified, involved in dealing with consumer protection problems. The left-hand half illustrates the major generic stages in public policy-making. The right-hand half adds the major functions involved in policy implementation where the response selected for dealing with a consumer problem is regulatory intervention in a market. The functions are not exclusive to regulation

to protect consumers but would apply to regulation for other objectives such as protecting the environment. The broad generic public policy functions identified in Diagram 1 are:

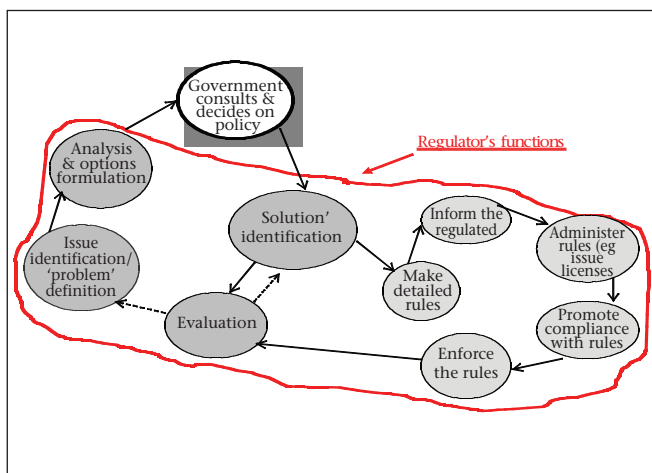
- 1 identifying issues and defining problems requiring public attention and consideration
- 2 analysing the causes and consequences of the problem and formulating options to deal with it, including the possibility of positive action by government
- 3 recommending the most suitable option based on an assessment of the costs and benefits of the various alternatives
- 4 implementing the selected option where the solution to a consumer problem involves regulation of some aspects of a market (or markets), implementation broadly will involve:
 - 4.1 making the rules for regulating the market
 - 4.2 informing the regulated and market participants generally of their rights and responsibilities under the rules
 - 4.3 administering regulatory requirements (eg issuing licenses)
 - 4.4 promoting compliance with the rules by the regulated, and
 - 4.5 enforcing the rules where breaches occur
- 5 evaluating the effectiveness of the solution implemented and modifying as necessary.

5.2 Models of functional integration and separation

The institutional design issue arising from these functions is whether all of the functions should be performed within a single organisation or split between two or more governmental organisations and, if so, how? The functions particularly at issue as to their location are:

- policy development (functions 1 to 3 above)
- regulation-making (function 4.1)
- enforcement (function 4.5), and
- evaluation (function 5).

Diagram 2: 'Integration model'—regulator undertakes all functions

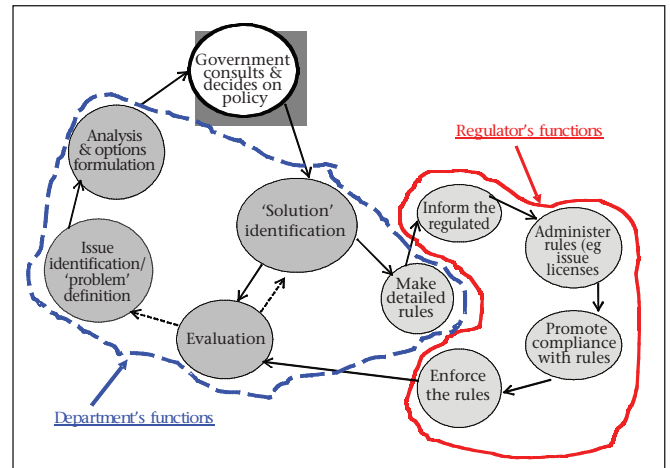


For the purposes of illustrating the issue, the many possible organisational arrangements of functions where regulation is the policy solution are simplified to two models – the 'integration model' and the 'separation model'. These models are more or less observable in practice and so provide a useful basis for discussion.

The integration model, where all of the functions occur within a single organisation, is illustrated in **Diagram 2**. Here all of the functions portrayed in Diagram 1 except the decision on policy which is the preserve of government are undertaken by a regulator – from issue identification through regulation implementation to evaluation. The informal survey of consumer protection agencies by CAV for the SCOCA also included information on the location of the consumer policy function. The regulatory agencies were asked: 'Is your agency responsible for influencing and formulating policy for consideration by Government?' Answers from the agencies indicate that all of the State consumer protection agencies perform policy and regulatory functions.

The separation model, where the functions are split across organisations (in this case two), is illustrated in **Diagram 3**. Here the generic public policy functions plus the making of regulations are undertaken by a government department; but the implementation of regulation is undertaken by the regulator. A practical example, though somewhat simplified, is the split between the Commonwealth Treasury and ASIC which is an independent statutory authority.

Diagram 3: 'Separation model'—functions split between department and regulator



In practice the dividing line between regulator and the relevant 'parent' Ministerial department will not be as clear-cut as the model illustration suggests. Even where there is a formal separation of functions the regulator will at least have some input into policy development.

The UK DTI comparative study of consumer regimes noted:

In some countries there tended to be a degree of delegation from the Ministry to the main enforcement body in terms of policy development which was carried out by the latter either on a formal (for example the FTC) or an informal (for example the ACCC) basis.³⁵

³⁵ DTI, Comparative Report, p.15. The 'ACCC' referred to in the quote is the Australian Competition and Consumer Commission.

5.3 Arguments for and against functional separation

The main arguments revolve around the appropriateness of one organisation carrying on the key functions, particularly:

- should regulators undertake policy development and provide policy advice (including preparation of regulatory impact statements)
- should regulators enforce the regulations they administer, and
- should regulators evaluate the regulation they formulate and administer?

Separating policy development/advice and regulatory functions

The BRTF observed in its report on independent regulators:

It is too simplistic to say that Government sets policy and regulators deliver. In reality Ministers/Parliament set the objectives for a regulator and the regulator develops the policy and delivery mechanisms for delivering those objectives.³⁶

Similarly, the VCEC in its report on housing construction regulation posed the question as ‘...not whether regulators should be involved in providing policy advice at all, but rather the extent to which they should be involved and the channels through which this policy advice should be provided’.³⁷ Should the regulator have primary responsibility for developing policy and the regulatory instruments intended to achieve the government’s objectives? Or should it contribute to the public policy process through its parent department (or some other agency) which is responsible for providing policy advice to the Minister?

The main argument for having a regulatory agency undertake policy work is that the expertise developed at one stage of the policy process can be used to inform other stages, thereby making regulation more effective and responsive. Having expertise in implementing policies (albeit by definition expertise which is limited to policies involving regulatory

responses to problems) means the regulator is well placed to identify problems and assess the technical feasibility of policy options.

However, the combination of policy and regulatory functions carries a number of risks. The main arguments against combining them are:

- the increased risk of regulatory ‘creep’³⁸ because of the likely predisposition of a regulator to align policy preferences with its institutional interest to maintain or expand its role³⁹
- the potential for a regulator to be drawn into the political process and thereby possibly compromise its perceived and actual independence and its capacity to make impartial decisions
- the greater likelihood of a narrower policy perspective being applied by a regulator compared to its parent department, particularly where the regulator is industry or sector specific – this may manifest in a bias towards regulatory responses to problems or inadequate cost/benefit assessments of alternatives through lack of awareness of other government objectives and actions
- where a regulator is the advisor, the objectivity of policy advice is potentially compromised by virtue of its interest in the selection of a response which involves regulation
- the risk of reduced accountability as there is a built-in incentive for a regulator to less rigorously specify objectives against which its subsequent regulatory performance can be assessed
- the increased risk of a regulator being captured by the regulated who will perceive the regulator as able to heavily influence policy development and therefore devote commensurate resources to exerting influence
- the risk that regulated stakeholders may be unwilling to substantially engage in policy debates due to concerns that to do so may affect the regulator’s attitude towards them or even influence enforcement decisions, and
- the potential distortion of risk assessment in policy responses – a regulator may be more risk adverse and advocate regulation simply because it does not want to be criticised for missing a problem after deciding not to regulate a risk that later materialises.

³⁶ BRTF, *Independent Regulators*, p. 20.

³⁷ VCEC, *Housing Regulation in Victoria*, p. 232. The following discussion draws on the Commission’s discussion in chapter 9 of the report.

³⁸ Regulatory creep is the extension of the scope or impact of regulation in a non-transparent manner either deliberately or unintentionally. BRTF, *Avoiding Regulatory Creep*, October 2004, p. 5.

³⁹ Another response by a regulator to poor regulatory outcomes also may be to blame the scope and detail of the regulation rather than its own performance and respond by expanding the scope, prescriptiveness or complexity of regulation.

Separating the political process from enforcement

Regulators' enforcement activities potentially lead to the imposition of substantial sanctions against individuals and/or corporations with associated damage to reputation and, in some cases, business closure or loss of personal livelihood. On the other hand, while there are potentially serious consequences for the regulated from enforcement action, there can be severe consequences for customers of the regulated or members of the public where compliance is poor and breaches of regulation go undetected and uncorrected.

One aspect of enforcement related to institutional arrangements is the potential for political influence, either directly or indirectly, in enforcement priorities or even, at the extreme, specific enforcement actions. The main consumer protection agencies in the States are non-statutory units of government departments. Under this type of structure State Ministers for consumer affairs, and perhaps through them other participants in the political process, have potential influence over the regulators' enforcement approaches and actions. This is not to say that such influence occurs, but rather to identify another way in which regulators who are not statutorily independent risk being, or being perceived to be, drawn into the political process.

Separating evaluation from implementation of regulation

A longstanding issue in public policy is who should evaluate policy effectiveness. It should not be assumed that the policy-maker, implementer and evaluator should be one and the same. Whether evaluations are carried out by those delivering a policy (in this discussion a regulator) can have important implications for the robustness of the evaluation and its usefulness to improve policy effectiveness.

The main argument for combining the functions so that evaluation is undertaken by 'insiders' is that a regulator will have detailed knowledge of what is involved in administering and enforcing the regulations and of any problems affecting outcomes that were not foreseen at the design stage. Another argument is that if the evaluation leads to modifications of the regulatory scheme they will have to be carried out by the regulator. If the regulator has been actively involved in the evaluation the likelihood of more effective implementation may be increased.

The main arguments against combining implementation and evaluation reflect some of the risks of combining policy and regulatory functions. In brief these concern increased risks of compromised objectivity due to institutional interests biasing evaluation assessments and reduced transparency and accountability for performance due to the ability to keep poor regulatory performance 'in-house' and minimise public scrutiny.

“National or State regulator?”

6

The final issue in formulating institutional arrangements concerns the constitutional basis and geographic scope of consumer protection agencies and the allocation of roles and responsibilities between national and State agencies. Australia’s current nine sets of consumer legislation, between probably one to two hundred separate agencies with consumer-related purposes and a mix of industry-specific and general regulators in each jurisdiction are unlikely to be the optimal institutional arrangement for consumer protection.⁴⁰

Like many aspects of regulatory design and practice, the answer to whether the institutional form is more appropriately national or State-based depends on exactly what the problem is. One way of analysing consumer problems in this context, after establishing whether the consumer problem is new (not currently dealt with by a regulator); or an old problem (already subject to regulation in some way), is to ask the sorts of questions set out in **Box 4** (on page 28).

These questions suggest at least four key issues relevant to determining the appropriateness of national or State regulators:

- What are the constitutional limitations on the roles of either a national or state regulator?
- How important is consistency of regulatory approach to achieving objectives and to what extent is a national regulator necessary to ensure a consistent approach? Can State regulators operating within a national framework deliver consistency as cost-effectively as a single national regulator?
- What are the benefits to industry of only having to deal with one regulator, rather than different regulators in different States?
- What are the costs of a national regulator not accounting for State differences?

There appears to be a growing concern with the overall adequacy of the current ‘architecture’ of multiple national and State-based regulators dealing with consumer protection issues (and other matters) due to a range of factors such as:

- the trend to increasingly national (and international) markets with rapid advances in communications technology such as the use of the Internet for retail advertising and sales
- increasing business dissatisfaction with the administrative costs of complying with growing regulatory demands (not necessarily for consumer protection purposes)
- increasing business dissatisfaction with the sometimes conflicting or confusing information demands and other requirements of business regulators
- government central agencies’ concerns about the cost-effectiveness of a multiplicity of small regulatory agencies, and
- concerns about the equity of outcomes where businesses (often the same business operating in several States) in the same circumstances can face different regulation.

⁴⁰ Victoria alone has about 40 separate business regulators that have some relevance to consumer protection issues. See VCEC, *The Victorian Regulatory System*, p. 10.

Box 4: Identifying issues in national versus State-based regulatory structure

Problem not regulated



- What is the nature of the consumer problem?⁴¹
- What is the geographic dimension of the market in which affected consumers and suppliers operate? Is it international, national, State, regional or local?
- What constitutional powers are necessary for government intervention?
- Which level of government holds these powers? Commonwealth or State?
- Is the problem potentially within the jurisdiction of an existing regulator (or regulators)?
- If the market is a State market but the problem exists in all or several States, what are the benefits and costs of:
 - a national regulator administering Commonwealth regulation applying in each State
 - State regulators administering common (template) State regulation within a national framework, and
 - State regulators separately administering differing State-based regulation?
- If the market is a national market (and implicitly the problem is national), what are the benefits and costs of:
 - a national regulator administering Commonwealth regulation applying in each State
 - State regulators administering common State regulation within a national framework, and
 - State regulators separately administering differing State-based regulation?

Problem currently regulated



- What is the nature of the consumer problem? Has it changed since the inception of the existing regulation?
- What is the geographic dimension of the market in which affected consumers and suppliers operate? Has it changed?
- Are constitutional powers of the existing regulator adequate to address the problem? Are there constitutional barriers to change?
- If the market is a State market and the existing regulator is national, are there differences across States material to the effectiveness of regulation and what are the costs of the national regulator not accounting for these differences?
- If the market is a national market, is a national regulator necessary to ensure consistent regulation? What are the benefits and costs of:
 - a national regulator administering Commonwealth regulation applying in each State
 - State regulators administering common State regulation within a national framework, and
 - State regulators separately administering differing State-based regulation?
- What are benefits/costs to interstate businesses of dealing with a single regulator versus multiple State regulators?

⁴¹ This in turn involves questions such as: What is the consumer detriment? How extensive is the actual detriment? What is the risk of detriment? In what circumstances will the risk arise? Who is most at risk?

Regulation for consumer product safety provides an illustration of the issues arising from multiple jurisdictions and considerations in national or State-based arrangements. The Productivity Commission (PC) discussion draft *Review of the Australian Consumer Product Safety System* concluded on the multi-jurisdictional regime underpinned by the *Trade Practices Act 1974* and the fair trading acts of the States and Territories:

*Fragmented policy making, administration and enforcement impose an unnecessary compliance cost on business and undermines the efficient operation of national consumer product markets. Inconsistencies and duplication of effort across jurisdictions suggests that government resources could be better used.*⁴²

The PC considered that the main cost of differing product safety systems is extra business compliance costs. These were considered to outweigh the potential benefits of a multi-jurisdictional system which may be more prompt responses to (probably infrequent) jurisdiction-specific safety issues than a single national system might provide and possible short term gains in regulatory effectiveness through varying regulatory approaches.

Victoria has supported a harmonised product safety regime and worked with the other jurisdictions to produce a harmonised model based on one national law with one national set of bans and standards and cooperative enforcement. This would address the issue of inconsistency for business and provide for a robust national system. All States and Territories have agreed to a model. However, progress to implement this has been delayed by an inability to obtain unanimous agreement with the Commonwealth Government.

The Hampton Report (discussed in more detail in Section 7) is an overseas example of recent consideration of consumer policy institutional arrangements, albeit from the particular perspective of reviewing regulatory inspection and enforcement functions. One of several issues under review was 'larger versus smaller' regulators. While this is not the same as 'national versus State' regulators in the Australian federal context, as only national regulators in a unitary system of government were within its scope, Hampton's arguments could be extrapolated to the Australian scene where State regulators, with the exception of a handful of the larger business regulators in the two largest States, tend to be small. Hampton expressed a clear preference for larger regulators and recommended significant rationalisation of regulators in the United Kingdom. He recommended the

rationalisation of 31 of 63 national regulators into seven bodies, one of which was a proposed 'Consumer and Trading Standards Agency (CTSA) replacing four existing bodies.

Hampton concluded:

*Small regulators' although focussed, are less able to join up their work, and are less aware of the cumulative burdens on businesses. It is more difficult and more expensive to have a comprehensive risk assessment system if data is split across several regulators with similar areas of responsibility. In such circumstances, a holistic view of business risk becomes difficult, if not impossible. Small regulators are also more expensive.*⁴³

However, reforms in one country are not necessarily appropriate in another and sweeping organisational rationalisation towards national regulators is not the only way to obtain the desired more consistent and efficient approaches to consumer problems, even assuming political and constitutional feasibility. Cooperative arrangements among existing State and federal agencies with consumer protection policy and regulation responsibilities can address problems of overlap, duplication and gaps in consumer protection. Greater cooperation within coordinated national frameworks may generate significant improvements in regulatory outcomes and/or reductions in the administrative costs to regulated businesses and government. Of course such cooperation requires sustained goodwill and a common vision for consumer protection outcomes, not to mention considerable patience and flexibility to negotiate workable cooperative arrangements.

⁴² Productivity Commission, *Review of the Australian Consumer Product Safety System*, (Discussion draft) August 2005, p.xxvii.

⁴³ Hampton, P., *Reducing Regulatory Burdens*, p. 6.

“Overseas reviews and examples of arrangements”

7

There is considerable variation in institutional arrangements internationally. An international perspective is provided by a study by the United Kingdom government agency responsible for consumer policy, then titled the Department of Trade and Industry (DTI). After comparing consumer policy regimes in nine industrialised countries, including Australia, in 2003 it reported:

The institutional framework varied widely between countries because of differences in government structure and in particular, the extent to which state and federal powers were divided constitutionally...In all the countries studied consumer affairs tended not to be central. It also varied as to whether it was linked to competition policy or not.

...Another factor present was that in a number of countries several ministries were responsible for different areas of consumer policy with Justice Ministries often having a role via small claim procedures. Typically the Minister responsible for the consumer brief would have a number of other demanding portfolios in addition to any consumer responsibility, for example financial regulation.⁴⁴

In regard to regulatory arrangements more generally, the VCEC commented recently when addressing issues of institutional arrangements in the particular case of house building regulation then before it:

The...Commission would have liked to answer these [institutional] questions by comparing the functions of the building regulators with a best practice ‘template’ for independent regulators, but it is not aware of such a template.⁴⁵

While a definitive best practice template may not exist, it is possible, in respect of consumer protection agencies at least, to identify a trend in institutional arrangements resulting from comprehensive reviews of consumer policy in national jurisdictions overseas. A trend favouring independent board-type statutory corporations as the new institutional arrangement is evident in all three jurisdictions where consumer policy and administration has been put up for review: the United Kingdom (over 1999 to 2002); Ireland (2004 to 2007) and South Africa (2004 to 2007).

This section firstly outlines the arguments, conclusions and outcomes of the three consumer policy reviews and then three studies of regulatory arrangements more generally are discussed: one by the Organisation for Economic Cooperation and Development (OECD); one by a UK House of Lords Select Committee and the Hampton review. In addition, the **Appendix** compares the organisational structures and governance arrangements of consumer protection agencies that could be characterised as ‘independent’ regulators. Examples are drawn from a sample of English-speaking countries and countries with sufficient English-language information on government Internet sites. The examples include both national and sub-national institutions in federations.

⁴⁴ United Kingdom Department of Trade and Industry, *Comparative Report on Consumer Policy Regimes*, October 2003, p.15.

⁴⁵ Victorian Competition and Efficiency Commission, *Housing Regulation in Victoria: Building better Outcomes*, (Final Report) October 2005, p. 297.

7.1 UK Consumer Policy and establishment of the Office of Fair Trading

The United Kingdom Government undertook a comprehensive review of consumer policy and published a White Paper, *Modern Markets: Confident Consumers*, in 1999. The central hypothesis of the paper was that confident demanding consumers are good for business: they promote innovation and stimulate better value and in return, they get better products at lower prices. A range of high-level reform measures was proposed in the White Paper. In relation to organisational arrangements, particularly the existing consumer protection role of the Office of Fair Trading (OFT), the White Paper concluded:

It is...time for a fundamental review of the OFT's consumer affairs functions to ensure it can rise to the challenges. The Director General of Fair Trading will lead this review, involving consumer and business representatives as well as government departments.

It will cover:

- *consumer affairs objectives and powers, including on consumer education*
- *resources*
- *liaison and co-ordination with other government departments*
- *liaison and co-ordination with other enforcement agencies.*⁴⁶

The body then known as the OFT was not a statutory body, but the administrative support that had grown up around the Director General of Fair Trading (DGFT) – a statutory office for an individual person appointed under the *Fair Trading Act 1973*. The OFT name was traditionally used when publicising and explaining the work of the Director General of Fair Trading (DGFT). (Around the same period, Victoria established a similar statutory office of 'Director of Consumer Affairs'⁴⁷ and a Ministry of Consumer Affairs, but the Ministry was abolished in the early 1990s and the Director position is now an employee under the *Public Administration Act 2004*. See Section 9.1.)

The specific measures foreshadowed in the White Paper and the findings of the review of the OFT were given effect in the *Enterprise Act 2002*. This Act reformed existing competition, consumer and

insolvency legislation. Consumer protection powers through the 'Stop Now Orders' regime were extended, a new regime of approval of business-to-consumer codes of practice was established, and certain designated consumer bodies were given the right to make 'super-complaints' which the reformed OFT is obliged to respond to within a specified time.

The Enterprise Act replaced the office of the DGFT with a new statutory corporate body consisting of a Chairman and at least four other members, most of whom are non-executive appointments. Current details of the OFT regarding its statutory status, structure, appointment method and current composition, scope of functions and accountability obligations are provided in the Appendix at A.5.

7.2 Ireland's Consumer Strategy Group review and the establishment of the National Consumer Agency

In March 2004, the Irish Minister for Enterprise, Trade and Employment established the Consumer Strategy Group (CSG) and asked it to make proposals for the development of a national consumer strategy. This was against the background of a clear lack of a national consumer strategy, the increasing international focus on consumer empowerment and the widespread perception among Irish consumers that they were continually overcharged for goods and services. The CSG was requested to examine best international practice concerning the promotion and representation of consumer interests. The Group commissioned the most extensive research ever carried out in Ireland on consumer issues. The CSG's report, *Make Consumers Count: A New Direction for Irish Consumers*, was published in April 2005.⁴⁸

The CSG considered a consumer policy framework that supports and empowers consumers must incorporate the functions of information, enforcement, research, advocacy and education and awareness. It concluded these functions were addressed unevenly in Ireland by a wide range of Government Departments, State agencies, regulatory bodies and voluntary organisations.

⁴⁶ Department of trade and Industry (UK), *Modern Markets: Confident Consumers*, July 1999, p. 39.

⁴⁷ Under the Ministry of Consumer Affairs Act 1973 to administer the *Consumer Affairs Act 1972*. Section 6 of the Ministry of Consumer Affairs Act provided the Director was *not* subject to the *Public Service Act 1958*.

⁴⁸ Consumer Strategy Group, *Make Consumers Count: A New Direction for Irish Consumers*, Dublin, April 2005

It noted that in other European countries the principle underlying their consumer policies is that empowered consumers could make better choices and hence drive the marketplace. Information and awareness is a priority and the state plays an important role in providing services for consumers. Businesses in those countries play a greater role in consumer affairs and benefit from the improved relationship. The business sector recognises the importance of good consumer policy, works closely with consumer institutions and operates sectoral codes of practice and dispute resolution procedures. These countries have strong and influential consumers' associations which are also the main advocates for consumers. In some cases, these are privately funded; in others, they are subsidised by the state.

In contrast, the CSG observed the Irish Government provides no services in research, advocacy, and in education and awareness which it regarded as central pillars of consumer policy. Their absence from government support to the consumer in Ireland reflects the low priority that has been given to consumer interests. Voluntary organisations have not filled these gaps. In spite of the efforts of Consumers' Association of Ireland, in particular, the CSG concluded the Irish consumer lacks a strong, interested and well-resourced source of support.

On balance, the Group felt that the establishment of a new national agency would give Ireland a comprehensive and forceful consumer policy, and that the advantages would outweigh the cost of establishing the agency. Thus, the major recommendation of the CSG was to establish an independent National Consumer Agency (NCA)—subsuming the existing Office of the Director of Consumer Affairs⁴⁹—to raise the profile of consumer issues and provide consumers with a strong and effective voice. The agency proposed by the CSG would be responsible for consumer research, advocacy, information, enforcement, and education and awareness. It would also develop a partnership approach with Government, regulators, business, consumer organisations and unions in promoting and safeguarding the interests of consumers.

The CSG recommended the NCA be an independent, statutory state agency, with a board appointed by the Minister for Enterprise, Trade and Employment, and a chief executive appointed by the Board. In recognition of the wide remit of the agency, the CSG recommended that the chief executive position be on the same level as the chair of the Irish Competition Authority.

The NCA would be independent of the Department of Enterprise, Trade and Employment and have the resources to carry out its functions effectively through its own separate budget. The proposed agency would report annually to the Minister and the Parliament. The Comptroller and Auditor-General would audit its accounts. The NCA was established by the Irish Government in May 2007 in response to the CSG report. The Government largely adopted the Group's recommendations and details of the arrangements established are set out in the Appendix at A.3.

7.3 South Africa's review of consumer policy and the proposed National Consumer Commission

As in the United Kingdom and Ireland over the last seven years, the national government of South Africa initiated a comprehensive review of consumer protection and opted for an independent, board-type statutory authority – the 'National Consumer Commission' (SANCC) – to be the consumer protection body.

South Africa's Department of Trade and Industry (SADTI) is leading the establishment of new consumer protection regulation. The SADTI initiated a review of the country's consumer legislative framework that culminated in the publication of a draft green paper on consumer policy in 2004. As part of the review, the SADTI commissioned research to assist in providing guidelines in the establishment of a new legal environment through which consumers will be given rights that can be enforced and protected. The green paper provided a broad framework for consumer protection, in particular, to promote consistency, coherence and efficiency in the implementation of consumer laws.

In order to achieve these policy objectives the SADTI formulated a draft *Consumer Protection Bill 2007*. A third draft of the Bill has been finalised after stakeholder consultation and further consultation will be available when tabled in Parliament.

⁴⁹ ODCA was responsible for enforcing consumer-related legislation and informing the public about consumer rights.

7.4 OECD regulatory reform study

Enactment of the Bill would give statutory status and content to various consumer rights, largely derived from the United Nations guidelines on consumer rights.⁵⁰ Enforcement of those rights, among other functions, would be the responsibility of the new SANCC. The Bill provides for the establishment of the SANCC which is 'independent and subject only to the Constitution and the law'. The SANCC is to be governed by Board consisting of a member appointed by each Minister with responsibility for social development, education, transportation, housing, environment; and health. In addition, the chairperson, deputy chairperson and up to six other members are to be appointed by the Minister for Trade and Industry.

The Board is to be responsible for:

- guiding the strategic development of the Commission
- overseeing and ensuring the efficient and effective use of the resources of the Commission
- ensuring that the Commission is in compliance with all of its legal requirements, and reporting and financial accountability obligations, and
- providing advice to the Chief Executive Officer concerning the exercise of the functions and powers of the Commission.

The Board may refer to the Minister any matter concerning the functioning of the Commission. The CEO must be a 'suitably qualified and experienced person' who with the advice, and subject to the oversight, of the Board, is responsible for all functional responsibilities pertaining to the Commission; and is accountable to the Board. The CEO is an *ex officio* member of the Board, but may not vote at its meetings. The Commission must report to the Minister at least once every year on its activities, as required by the *Public Finance Management Act 1999*. At least once every five years, the Minister must conduct an audit review of the exercise of its functions and powers.

An OECD study in 2001, *The Implementation and the Effects of Regulatory Reform: Past Experience and Current Issues*,⁵¹ reviewed regulatory developments in OECD countries and summarised the main lessons to be drawn from recent policy experience. It concentrated on several dimensions of regulatory reform: its scope and impact on performance, issues of regulatory design in network and transportation industries and, of most relevance for the purpose of this paper, what the authors termed the 'political economy' issues related to the design of regulatory institutions and mechanisms. The regulatory reforms the study considered involved liberalising prices and access to markets which had previously been restricted by legal and regulatory barriers or handing (or returning to) the private sector activities that had been run directly by the government. The industries concerned were electricity, telecommunications, railways, air travel, road freight and retail distribution. The authors concluded that, 'looking at this sample of industries makes it possible to highlight features of the regulatory reform process, and of its economic impact, and draw lessons that are applicable to other industries as well.'

The regulatory agencies in the review had substantial regulatory powers encompassing the promotion of competition, tariff setting and consumer protection. Thus, the regulatory provisions examined were justified on the basis of both economic and non-economic reasons. Often, government ministries retained a policy-making role in the industry (such as defining the entry regime or 'universal service obligations'), while independent regulators had a legal mandate to define and enforce detailed regulations.

On the issue of institutional arrangements, the OECD authors concluded:

*Political economy considerations suggest that regulatory institutions should be designed to i) ensure independence of the regulator from the executive branch of the government; ii) impose constraints on the regulator's discretion (for example by allowing appeal procedures with general competition authorities); iii) enhance transparency of the regulatory process so as to limit information asymmetries and reduce regulatory discretion; and iv) ensure consistency of regulatory approaches across industries.*⁵²

⁵⁰ Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection (as expanded in 1999)* United Nations, New York, 2003, <http://www.un.org/documents>.

⁵¹ Göneç, R., Maher, M. and Nicoletti, G., *The Implementation and the Effects of Regulatory Reform: Past Experience and Current Issues*, *OECD Economic Studies* No. 32, 2001/I, pp. 11-98.

⁵² *Ibid.*, p. 15.

Although complete independence may not be attainable in practice, desirable requirements may include i) providing the regulator with a legal mandate (covering also the cases and procedures for overruling its decisions); ii) ensuring that it is structurally separated and autonomous from the government; iii) defining a multi-party process for its appointment (e.g. involving both executive and legislative bodies); iv) protecting it from arbitrary removal (e.g. through fixed terms); v) defining its professional standards and adequate remuneration levels; and vi) designing a reliable source of funding (e.g. through industry fees instead of government budgets).⁵³

7.5 UK House of Lords Select Committee review

Background

In 2004, the House of Lords Select Committee on the Constitution inquired into the workings of Government-appointed regulators; the extent to which their activities are monitored by Parliament; their accessibility to the public and the regulated; and their responsibility to the citizen and those whom they regulate. The Committee saw the existence of regulators as also raising fundamental questions of accountability, how the performance of regulators is monitored to ensure that the public interest is properly served.

The Committee's report, *The Regulatory State: Ensuring its Accountability*, noted that the direction of UK Government regulatory policy in recent years has been the establishment of independent regulators, acting at arms-length from ministers, empowered and constrained by their own statutory authority but often responsible for issues hitherto dealt with by government departments. In addition, regulators with powers vested in the individual (for example, the Director Generals covering the utility and network industries) have been replaced with regulatory Authorities, comprising a board. The board is generally to be structured on lines consistent with the Code of Practice on Corporate Governance applying to companies: this includes the separation of the role of chair and chief executive and the appointment of a majority of independent non-executive directors.

Replacement of individual regulators by boards

The Committee commented on the trend to board-type arrangements for regulators as follows:

We received considerable evidence on the reasons for the move from individual regulators to boards. The move in many respects mirrors practice in most companies, which have a Chairman, Board and Chief Executive Officer. The move has been generally welcomed, though there were caveats expressed by some who had served as individual regulators... The move towards boards has been motivated by the need to bring in a greater range of skills – even individual regulators variously appointed a body or board of experienced people to advise them – and to avoid the pitfalls that may occur from relying on the judgement of a single regulator.

The creation of boards also facilitates a more efficient use of resources, with a clear division between chairman and chief executive, rather than combining the responsibilities in a single post. The board structure also enables the burdens of regulation to be borne by several people, especially valuable in those sectors where the regulatory responsibility is broad and heavy, as for example with the newly created Ofcom framework.

Boards, like individual regulators, work within a clearly stipulated statutory framework. Experience has enabled that framework to be refined and enhanced. The requirement on a regulator to apply the principles of good regulation in their decision-making, and to be accountable for that, applies equally whether it is a board or an individual...⁵⁵

The Committee argued that the transition from individual regulators to board structures was an evolutionary or 'developmental' one:

We recognise that individual regulators were important in the initial stages of establishing a regulatory framework. They enabled a regulatory regime to be brought into being relatively quickly and for decisions to be made with some expedition... However, we take a developmental view. We believe that it is appropriate on the whole that regulators appointed as individuals give way to the appointment of boards. Once a regulatory framework is in place, boards can offer not only an efficient structure but also the potential for greater stability than may be possible with an individual. By drawing on the expertise of the different members, they can test propositions and take a wider view than is possible with a single individual. We believe that a board is better placed than an individual regulator to avoid some of the pitfalls identified... and to manage risk better.⁵⁶

⁵⁴ House of Lords Select Committee on the Constitution, *The Regulatory State: Ensuring its Accountability*, HL Paper 68-I, London, May 2004.

⁵⁵ House of Lords, *op. cit.*, p. 39.

⁵⁶ *Ibid.*, p. 40.

7.6 UK 'Hampton Review'

Regarding regulatory structure the Committee recommended that there be a move to more collective board structures, rather than sole regulators, as one of the principal mechanisms for improving the quality and consistency of regulatory decision-making, and urged that this should be the norm for regulatory regimes. To ensure that there is no loss of accountability it recommended that boards designate one of their number as the public face of the regulator in order not to lose engagement with the public and to perform the role of building confidence and understanding. In the Committee's view, this normally this should be the Chairman or Chief Executive.⁵⁷

The Committee's report also considered institutional arrangements and the principles of independence and accountability. The Committee concluded that there was no conflict in principle between independence and accountability:

The Committee's report also considered institutional arrangements and the principles of independence and accountability. The Committee concluded that there was no conflict in principle between independence and accountability:

We have received clear evidence that independence of regulators from Ministers is welcomed by Ministers and is seen as a vital ingredient for maintaining consistency, for ensuring that regulatory decisions are taken by 'competent authorities'..., and for promoting confidence about regulation among the regulated, those investing in regulated enterprises, and the customers and citizens on whose behalf regulation is carried out.

Ministers have clearly given up some freedoms, and regulators' decision-making is protected. However, whilst their decision making may be protected, they should be no less - and need not be any the less - accountable for their decisions. They have a duty to explain, they should be exposed to scrutiny, and be subject to the full rigours of the possibility of legal challenge. We have received much evidence that these disciplines apply. We have found no conflict in principle between independence and accountability.

In 2005, the UK Chancellor commissioned Philip Hampton to identify ways in which the administrative burden of regulation on businesses could be reduced, while maintaining or improving regulatory outcomes. The review concluded that some of the problems identified are rooted in, or exacerbated by, the complicated structure of regulation in the UK, particularly the division of regulatory inspection and enforcement between national regulators and trading standards offices and environmental health offices in local authorities.

The review report strongly supported the principle of regulatory independence which it regarded as a strength of the present regulatory system. The review recommended regulators should be structured around simple, thematic areas, in order to create fewer interfaces for businesses, to improve risk assessment and to reduce the amount of conflicting advice and information that businesses receive.⁵⁸ More specifically Hampton recommended 31 national regulatory bodies be consolidated into seven. In relation to consumer protection he recommended a new 'Consumer and Trading Standards Agency' (CTSA) incorporating the work of four existing regulators, to coordinate work on consumer protection and trading standards. This body would have lead policy responsibility for trading standards nationally and responsibility of overseeing the work of local authorities on trading standards issues, as the Food Standards Agency does in respect of food.

A number of structural options were identified in a subsequent Government consultation paper on Hampton's recommendations.⁵⁹ The National Consumer Council (NCC) is an independent, publicly-funded body undertaking research, information provision and policy advocacy work on consumer-related issues. The relationship between the proposed CTSA and Ministers was one of the variables differentiating the structural options.

⁵⁷ *Ibid.*, p. 8

⁵⁸ Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, London March 2005.

⁵⁹ See UK Department of Trade and Industry (DTI), *Reducing Administrative Burdens – the Consumer Trading Standards Agency, Consultation, July 2005 and Reducing Administrative Burdens – the Consumer Trading Standards Agency, Consultation, Summary of Responses to the Consultation*, March 2006.

Regarding this, the NCC submitted:

*The CTSA should be demonstrably independent from government with the freedom to make policy and to choose where to allocate its resources. At the same time, while the CTSA must be able to achieve maximum clout for consumers, it must also be accountable to the parliaments and assemblies, either directly or through ministers...*⁶⁰

*Our preference is for the CTSA to operate as a non-ministerial department. The non-ministerial department (NMD)⁶¹ model would give the CTSA the greatest freedom and flexibility to evolve policy in its own right, while retaining some government input into the wider policy context... Similarly, the NMD model would give the CTSA the most freedom to allocate resources where it sees fit. The experience of the Food Standards Agency is that this model enables it to put the interests of consumers as its first priority, and to use its legal powers to openly publish its views and advice to Ministers, on any issue that may affect consumers. These arrangements guarantee its independence, and enable it to inspire consumer confidence - a key consideration for the CTSA.*⁶²

In November 2006, the Chancellor announced the Government was not going to proceed with establishing the proposed CTSA. Rather, it brought forward the timetable for establishing the Local Better Regulation Office (LBRO) and split the areas of work originally envisaged for CTSA between LBRO and the OFT. LBRO is to implement the Hampton recommendations in relation to trading standards to improve national co-ordination between Government departments and local regulators and consistency in enforcement between local authorities. OFT is to become 'the champion for consumer enforcement issues'.⁶³

⁶⁰ National Consumer Council, *The Consumer and Trading Standards Agency – Response to the DTI consultation*, October 2005, p. 23.

⁶¹ 'Non-Ministerial Department' is a small Government Department in its own right, established to deliver a specific service. General Ministerial relationship varies, but the rationale is to distance day-to-day functions from Ministerial control.

⁶² *Ibid.*, p. 24. 'Non-Departmental Public Body' permits a service or function to be carried out at arm's length from the Government and one stage removed from Ministers. It operates under statutory provisions and is legally incorporated.

⁶³ DTI, *Reducing Administrative Burdens – the Consumer Trading Standards Agency, Consultation, Summary of Responses to the Consultation*, March 2006, p. 4.

Designing the institutional form of a consumer protection agency is not straight forward. Trade-offs are inevitable and case-by-case judgement is required to balance a number of factors. The balance of strengths and weaknesses tends to favour general regulators over industry-specific regulators to administer industry specific regulation where it addresses consumer problems. In the literature, the case for independent regulators is strongly advanced, particularly where there are substantial incentives for capture or business rent-seeking behaviour is facilitated by concentrated industry structures or effective coordination of regulated entities by industry lobby associations. Careful consideration of adequate accountability and integration mechanisms will be necessary where independent regulators are warranted.

Incorporating the complete range of functions related to regulation, particularly combining policy advice and evaluation with the administration and enforcement of regulation, in a regulator potentially creates sufficient risks to justify reviewing such arrangements. The principal risk in an environment where governments at all levels are concerned to reduce regulatory burdens on business is regulatory creep.

National approaches in national markets, or where there is no significant variation in consumer detriments related to geographical location, seem highly desirable on effectiveness and efficiency grounds. This does not mean a single national regulator is necessarily warranted where there are multiple existing regulators. Greater cooperation and coordination among existing regulators to address problems through a variety of mechanisms may produce nationally effective and efficient protection for consumers.

The balance of the arguments in the paper suggests the following *prima facie* positions on key institutional issues for consumer protection agencies:

- general regulators in preference to industry-specific regulators (although this requires a case-by-case assessment depending on circumstances)
- statutory independence of regulatory functions in preference to their location in a unit of an administrative department of government, and
- separation of policy development and advice from the administration and enforcement of regulation.

There appears to be sufficient substance underlying these positions to constitute a case for a detailed examination of existing institutional arrangements relating to consumer protection in Victoria.

Developments in overseas jurisdictions

In jurisdictions that conducted thorough reviews of consumer policy and legislation in recent years and consequently overhauled their consumer protection institutions, the new regulators established were statutory corporate bodies with boards including non-executive directors. This was the case in all three instances of wide-ranging national consumer policy reviews identified in the literature search – the United Kingdom, Ireland and South Africa. Furthermore, more general reviews of regulatory developments, for example by the Organisation for Economic Cooperation and Development and the United Kingdom’s Better Regulation Task Force, have identified and supported a trend to statutory mandates for regulators, structural separation and autonomy from the executive branch of government and board-type corporate authorities instead of powers vested in individuals.

In the sample of overseas jurisdictions in the Appendix, statute-based consumer protection bodies generally fall into one of three broad categories in terms of structure and status:

- a statutory authority board or Commission and an associated administrative entity, with two main appointment methods for board/commission members – either appointed by the head of government (the Governor in some American States) or Cabinet (rather than the individual portfolio Minister) or appointed by the Minister for consumer affairs, or
- a statutory administrative body with a prescribed chief executive controlling the body instead of a board, or
- an individual statutory office-holder ('Commissioner', 'Director-General' etc.), appointed by the consumer affairs Minister, but with administrative support not established by legislation.

Consumer protection agencies less frequently take the form of non-statutory administrative units of broader government departments, such as the national Canadian Office of Consumer Affairs in Industry Canada and the Consumer Protection Division of the Illinois Office of the Attorney-General in the United States.

While the literature favours the separation of policy development and advice function from the administration and enforcement of regulation, in practice there is variation across the examples examined. In some jurisdictions it is located in the regulator – for example the US Federal Trade Commission, the Californian Department of Consumer Affairs, and the Massachusetts Office of Consumer and Business Regulation. In others, it is located in a department of government – for example the UK Department for Business, Enterprise and Regulatory Reform, the New Zealand Ministry of Consumer Affairs and the Irish Department of Enterprise, Trade and Employment. A further variable is whether consumer policy is located in a department primarily addressing economic issues and policy (Treasury, Industry, or Commerce etc.) or legal issues and policy (Attorney-General or Justice).

“Relating the discussion to Victoria”

9

This section examines current arrangements in Victoria in the light of the discussion in the preceding sections and identifies some implications for the reform of arrangements.

9.1 Historical perspective

In 1974 Victoria established a statutory office of ‘Director of Consumer Affairs’ under the *Ministry of Consumer Affairs Act 1973* to administer the *Consumer Affairs Act 1972* and the Ministry of Consumer Affairs. Section 6 of the Ministry of Consumer Affairs Act provided for the Director to be appointed by the Governor in Council and that the Director was not subject to the *Public Service Act 1958* in respect of the office.⁶⁴ The Ministry of Consumer Affairs Act also explicitly provided for a ‘Ministry of Consumer Affairs’ consisting of a Minister of Consumer Affairs, a Director of Consumer Affairs and ‘such other officers and employees’ as were necessary for the purposes of the Act.

The Ministry of Consumer Affairs was abolished in 1993-94, ostensibly as part of the consolidation of departments into fewer ‘super departments’. Whatever the efficiency or other gains at the time from the consolidation, Victoria’s consumer protection agency has since had a lesser institutional status than the State’s other major regulators. The current organisational entity administering consumer law, ‘Consumer Affairs Victoria’, is not established by, or in any other way provided for or referred to, in Victoria’s consumer law, the *Fair Trading Act 1999*.

From 1974 until 1999, the Director of Consumer Affairs statutory office remained a Governor in Council appointment. However, since late 1999, under section 98 of the Fair Trading Act, the ‘Director of Consumer Affairs Victoria’ position is no longer a Governor in Council appointment. Instead the Director is subject to public service employment under Part 3 of the *Public Administration Act 2004* and potentially subject to direction by a higher executive officer. There was no explanation of this change at the time in the Minister’s second reading speech on the Bill introducing the changes or in the course of parliamentary debate on the Bill.⁶⁵

⁶⁴ This exemption meant that the Director was not in the public service ‘line management;’ and could not be subject to direction by an official more senior in the public service hierarchy.

⁶⁵ See *Hansard*, House of Assembly, 25 March (pp. 187-190,191) and 21 April (pp. 523-531) 1999.

9.2 The broader Victorian regulatory context

Regulators with consumer protection related objectives

In addition to CAV as noted previously, there are approximately 40 separate regulatory bodies in Victoria undertaking some consumer protection related activity.⁶⁶ In the health services sector there are 12 bodies administering the practitioner registration scheme.⁶⁷ The Business Licensing Authority (BLA) also issues business licenses under eight separate schemes largely justified by consumer protection objectives. Skilled trades' occupational licenses come under another set of arrangements.

In addition to multiple regulators with some consumer protection rationale, CAV administers about 50 pieces of mostly consumer-related legislation.⁶⁸ Machinery of government changes in December 2002 resulted in the shift of Liquor Licensing Victoria and Trade Measurement Victoria to CAV. The administration of bodies corporate and retirement villages legislation was also transferred to CAV at this time, and gaming and racing regulation and policy were transferred to the Department of Justice.

Victorian regulators generally

There is a mixture of institutional arrangements across the jurisdiction as a whole. Regulators in Victoria range from statutory authorities with clear statutory objectives, powers and functions to units of administrative departments (such as CAV) embedded among a range of policy and service delivery functions and sometimes lacking clear mandates. Employment sizes of consumer-related agencies range from about 1,000 employees to less than one full-time equivalent.

The four largest regulators with functions affecting businesses across a range of industries, in order of size by number of staff, are:

- the Victorian Workcover Authority (VWA)
- CAV
- the Environment Protection Authority (EPA), and
- the Essential Services Commission (ESC).

Table 3 compares these regulators on the basis of selected indicators likely to be relevant to independence:

- the statutory basis of the organisational entity
- whether the entity is a body corporate
- the method of appointment of the head of the entity (appointed by the Governor in Council or by the head of the parent government department the entity is part of), and
- whether the head of the entity is subject to general public service employment conditions (under Part 3 of the *Public Administration Act 2004*) and therefore potentially subject to direction by a higher executive.

Table 3 shows there is uniformity of structural arrangements among the largest regulators of businesses, with the exception of CAV which stands out in contrast to the consistency of arrangements for the other three regulators. CAV lacks the statutory basis and status of the other major business regulators.

A second comparison, in **Table 4**, of the same variables across the major regulators within the Justice portfolios similarly reveals CAV to be the 'odd one out'. Unlike CAV, the Victorian Commission for Gambling Regulation (VCGR), the Legal Services Board (LSB), the Business Licensing Authority (BLA) and the Equal Opportunity Commission (EOC) are all bodies corporate established by statutes and with heads appointed by the Governor in Council and exempt from Part 3 of the *Public Administration Act 2004*.

⁶⁶ Victorian Competition and Efficiency Commission, *The Victorian Regulatory System*, April 2007.

⁶⁷ The *Health Professions Registration Act 2005* was passed by the Victorian Parliament in November 2005. It came into operation on 1 July 2007 and repealed eleven separate health practitioner registration Acts previously in operation (and section 108AL of the *Health Act 1958* relating to medical radiation practitioners). The Act applies to the twelve health professions regulated in Victoria and continues the operation of the 11 existing health practitioner registration boards, and the establishment of a new Medical Radiation Practitioners Board of Victoria.

⁶⁸ As at 30 June 2007, *Consumer Affairs Victoria Annual Report 2006-07*.

Table 3: Institutional arrangements of Victoria's major business regulators

	VWA	EPA	EPA	CAV
Approximate number of staff (2006-07)	981	386	62	413
Statute-based?	Yes	Yes	Yes	No
Body Corporate?	Yes	Yes	Yes	No
Head appointed by Governor-in-Council?	Yes	Yes	Yes	No
Head employed as public servant?	No	No	No	Yes

Table 4: Institutional arrangements of major Justice portfolio regulators

	VCGR	LSB	EOC	BLA	CAV
Approximate number of staff (2006-07)	134	31	45	2.6	413
Statute-based?	Yes	Yes	Yes	Yes	No
Body Corporate?	Yes	Yes	Yes	Yes	No
Head appointed by Governor-in-Council?	Yes	Yes	Yes	Yes	No
Head employed as public servant?	No	No	No	No	Yes

9.3 Implications for the consumer protection regime

Even allowing for the diversity across consumer protection jurisdictions, an arguable 'good practice' model emerges from the literature and overseas examples. In comparison with this model, the structure of CAV and associated arrangements differ from the main features of the model in three major respects:

- the arrangements lack clear statutory independence for the regulator
- the absence of a board-type controlling body – with its likely benefits of a greater range of skills and experience addressing complex matters, greater potential for stability and consistency and lesser risks than may arise from the judgement of an individual, and

- the location of policy and regulation development within the regulator which carries potential risks, such as regulatory creep with associated growth in regulatory burdens on business, compromised independence through proximity to the political process and reduced accountability.

Addressing these differences would also bring CAV into line with the implicit structural model applied to Victoria's other major regulators as revealed in Tables 3 and 4.

9.4 Consumer affairs and social regulation

Another issue for consideration is the ‘consumer-relatedness’ and industry scope of CAV’s current legislative responsibilities. The consumer affairs portfolio in Victoria contains sixteen industry-specific regulatory schemes involving licensing or registration requirements with varying policy objectives.⁶⁹ This range of schemes occurs to varying extents in other State consumer protection jurisdictions. Two of these industry-specific schemes are the licensing of liquor supply and prostitution services. The regulation of the sale and supply of liquor and of prostitution services is more social regulation in character than is the case with the other occupational licensing schemes within the portfolio.⁷⁰ Both the liquor and prostitution legislation restrict who can run legal businesses and prohibit minors from supplying or consuming liquor or prostitution services on licensed premises. The liquor legislation seeks to minimise the associated harm and inconvenience caused by misuse, whilst the prostitution legislation seeks to protect the welfare of workers and prevent the spread of sexually transmitted disease. The *Prostitution Control Act 1994* also regulates advertising and street prostitution. The wider Justice portfolio within which consumer affairs sits also contains gambling regulation. These three schemes are examples of social regulation as discussed in Section 3.3.

Social regulation generally raises broader and more complex issues and is more likely to impact across a number of government departments and therefore more likely to require a whole-of-government approach. For example, liquor, gambling and prostitution regulation raise significant health, planning and policing issues as well as consumer protection issues. The input of the range of government agencies working in these areas is necessary to fully achieve policy objectives. The concept of social regulation may provide an option for at least a partial rationalisation of the multiplicity of industry-specific regulators. In considering the structure of the consumer protection regulator, consideration could also be given to establishing a ‘social regulator’ to draw together those schemes predominantly founded on society’s concerns to minimise harm, arising both directly and indirectly, from particular activities.

⁶⁹ Machinery of government changes in December 2002 resulted in the shift of Liquor Licensing Victoria and Trade Measurement Victoria to CAV. The administration of bodies corporate and retirement villages legislation was also transferred to CAV at this time, and gaming and racing regulation and policy were transferred to the Department of Justice.

⁷⁰ David Cousins, *The Role of Social Regulation in Building a Civil Society: a Consumer Affairs Perspective*, Institute of Public Administration Australia (Victorian Division), Forum Melbourne, 29 July 2003.

9.5 An ongoing issue

This paper raises a number of issues for discussion. Only some of those are also part of the debate initiated by the Productivity Commission’s Draft Report on the *Review of Australia’s Consumer Policy Framework*. The scope of its inquiry into Australia’s consumer policy framework includes ways to improve the harmonisation of consumer policy and its administration across jurisdictions in Australia, including ways to improve institutional arrangements. However, the draft report’s focus on institutional matters is mainly limited to general versus industry-specific and Commonwealth versus States issues. Wider issues in institutional arrangements are not canvassed. The critical issue of the independence of regulators in institutional design is not addressed in detail.

The Commission’s draft report favours a single national generic consumer law and a single national regulator, but acknowledges that there are several considerations that militate against the adoption of the one-regulator model, at least in the short to medium term. Clearly the multiplicity of consumer regulators and the existing key role of State and Territory consumer affairs agencies in fair trading compliance and enforcement are going to continue for the foreseeable future. Changes to institutional design remain part of regulatory reform options for Governments at both Commonwealth and State levels.

“Appendix—Independent consumer protection agencies in international jurisdictions”

The Appendix compares the organisational structures and governance arrangements consumer protection agencies that could be characterised as ‘independent’ regulators – that is organisations which are distinguishable from administrative units of a department of government. The Appendix adopts the UK BRTF’s definition of independent previously referred to: ‘A body which has been established by an Act of Parliament, but which operates at arm’s length from Government and which has one or more of the following powers: referral; advice to a third party; licensing; accreditation; or enforcement’.⁷¹

A1 Summary of key features

Examples of primary consumer protection agencies with statutory independence are drawn from a sample of English-speaking countries and countries with sufficient English-language information on government Internet sites. The examples fall into two groups: (i) national institutions; and (ii) state/provincial institutions in federations. The national jurisdictions are:

- Danish Consumer Ombudsman
- Ireland’s National Consumer Agency
- New Zealand’s Commerce Commission
- United Kingdom’s Office of Fair Trading, and
- United States’ Federal Trade Commission.

The State and Provincial examples are from the American and Canadian federations to provide comparisons with Victoria:

- British Columbia Business Practices & Consumer Protection Authority
- California Department of Consumer Affairs
- Massachusetts Office of Consumer Affairs and Business Regulation, and
- New York Consumer Protection Board.

A summary of their features is contained in **Table A1**. Following Table A1, aspects of these independent regulators are described in more detail, agency-by-agency. The description covers:

- *consumer protection context* – outlines the broad allocation of consumer protection responsibilities across levels of government and major institutions, largely drawing on a UK Department of Trade and Industry comparative study in 2003
- *statutory status* – sets out the legal nature of the regulator and the statute establishing the regulator
- *structure, appointment and current composition* – outlines the structure of the regulator (for example a board), the method of appointing statutory officeholders and the backgrounds of incumbents (where available from the regulator’s Internet site)
- *scope of functions* – describes the scope of the regulator’s functions, and
- *accountability obligations* – describes the reporting obligations placed on the regulator and current practice and any other particular accountability mechanisms between the regulator and government.

⁷¹ BRTF, *Independent Regulators*, October 2003, p. 6.

Table A1: Examples of overseas independent consumer protection agencies

Country	Agency	Minister	Statutory basis	Related department	Main functions
Denmark	Danish Consumer Ombudsman (DCO)	Minister of Family and Consumer Affairs	The DCO appointed by the Minister of Family and Consumer Affairs under the Market Practices Act	Ministry of Family and Consumer Affairs	Information provision to consumers and businesses. Promotes compliance with and enforces the Marketing Practices Act prohibiting unfair business conduct and the Act on Certain Payment Instruments. Injunctive powers and can bring civil cases before the Maritime and Commercial Court. Refers criminal matters to police.
	Consumer Complaints Board	Minister of Economic and Business Affairs	Board members appointed by Minister of Economic and Business Affairs under the Act on <i>Consumer Complaints</i>	Ministry of Family and Consumer Affairs	Deals with complaints by private consumers concerning goods or services provided by businesses. Decisions not binding or enforceable.
Ireland	National Consumer Agency (NCA)	Minister for Enterprise, Trade & Employment	Established by s.7 of the <i>Consumer Protection Act 2007</i> . NCA Board Members appointed by the Minister.		Functions prescribed in s.8 include research, information provision, education, advocacy, complaints handling and investigation, dispute resolution, enforcement, referral of criminal prosecutions.
New Zealand	Commerce Commission	Minister of Commerce	Established by s.8 of the <i>Commerce Act 1986</i> . Functions and powers re unfair trading practices prescribed under the <i>Fair Trading Act 1986</i> . Commissioners appointed by Governor-General on advice of the Minister of Commerce.	Ministry of Economic Development	Provision of information, investigation and enforcement of <i>Fair Trading Act</i> , <i>Commerce Act</i> and <i>Credit Contracts and Consumer Finance Act 2003</i> . Consumer protection provisions of Fair Trading Act relate to misleading and deceptive conduct, unfair trading practices, product safety standards and consumer goods labelling.
United Kingdom	Office of Fair Trading (OFT)	Secretary of State for Business, Enterprise & Regulatory Reform	Established by s.1 of the <i>Enterprise Act 2002</i> . Members appointed by the Secretary of State	A 'non-Ministerial department'	Research and analysis of markets, information provision, education and advice to consumers, enforces consumer protection provisions of various legislation including the <i>Enterprise Act</i> , <i>Unfair Terms in Consumer Contracts Regulations</i> , <i>Control of Misleading Advertisements Regulations</i> , and the <i>Consumer Credit Act</i> .
United States of America	Federal Trade Commission (FTC) – consumer protection functions performed by FTC's Bureau of Consumer Protection	Reports direct to Congress	Established under the <i>Federal Trade Commission Act</i> (15 USC Sec.41). Commissioners nominated by the US President, confirmed by the Senate. President selects Chair.	Does not appear to be related to a Department	Consumer education, investigations and enforcement of a variety of consumer protection legislation and trade regulation rules issued by the FTC intended to protect consumers against unfair, deceptive or fraudulent practices. The FTC's Office of Planning Policy undertakes competition and consumer protection policy development.

Table A1: Examples of overseas independent consumer protection agencies continued

State or Province	Agency	Minister	Statutory basis	Related department	Main functions
British Columbia (Canada)	Business Practices & Consumer Protection Authority of British Columbia (BPCPA).	Minister of Public Safety and Solicitor General	Established as a not-for-profit corporation under s.2 of the <i>Business Practices and Consumer Protection Authority Act</i> . Minister may appoint one of up to 9 Directors. (The <i>Public Service Act</i> does not apply to the authority's employees.)	Not applicable	Handles consumer inquiries and complaints, educates business and consumers about their rights and responsibilities, investigates breaches of consumer protection laws (including the Business Practices and Consumer Protection Act and Consumer Contracts Regulations) and takes enforcement actions, licences businesses in specific industries and inspects these industries and recommends improvement to the regulatory framework.
California (United States)	Department of Consumer Affairs (DCA)	Secretary of State and Consumer Services Agency	DCA established by the Business and Professions Code (originally the <i>Consumer Affairs Act 1970</i> . The Director is appointed by the Governor under the Code.	Not applicable	Provides information to consumers, deals with consumer inquiries and complaints, mediates disputes between consumers and traders, enforces consumer laws through actions such as temporary restraining orders, 'cease and desist orders, licence suspensions or revocations. DCA licences more than 100 business and 200 professional categories.
Massachusetts (United States)	Office of Consumer Affairs and Business Regulation (OCABR)		OCABR established under Chapter 24A of the <i>General Laws of Massachusetts</i> . The Governor appoints the Director.	Office of the Attorney General	Advocacy and education to promote fair business practices among the companies and licensees within its regulatory jurisdiction. Licenses certain businesses and professions who provide services to consumers and enforces the statutes and regulations of the boards of registration (29 boards of registration regulating more than 40 trades and professions). OCABR also offers mediation services to help resolve lemon law disputes.
New York (United States)	Consumer Protection Board (CPB)	Governor	Established under ss550-553 of the Executive Law Article 20 - State Consumer Protection Board. Board Members are statutory office holders ⁷² and an Executive Director. ED chairs the Board and is appointed by the Governor 'with advice and consent of the Senate'.	Not applicable	Provides information and education for consumers, operates a complaints line and mediates and resolves complaints, develops policy on consumer issues, investigates breaches and enforces certain consumer protection laws and represents consumer interests in utility-related matters before the Public Service Commission (State regulator of the telecommunications, electricity, gas and water utilities.) CPB operates as the State Government's 'think tank' on consumer issues. [The Department of State licences and registers certain occupations and business.]

⁷² Chairman of the Public Service Commission, Superintendents of Banking and Insurance, Commissioners of Agriculture and Markets, Environmental Conservation, Commerce and Health and the Secretary of State.

A.2 Danish Consumer Ombudsman

In Nordic law the word ‘Ombudsman’ is commonly used about an official whose task is to protect the ordinary citizens against misuse of political or administrative power, a guardian of the civil rights. The Danish Parliamentary Ombudsman has that task, whereas the Consumer Ombudsman makes sure that private and public business activities are conducted in accordance with good market practices. He decides on his own priorities and does not deal with individual complaints. He is an independent powerful figure supported by staff from the National Consumer Agency.

Consumer protection context⁷³

Denmark’s consumer policy traditionally focused on protecting weak or vulnerable consumers. In the 1990s, the focus shifted to empowering consumers to make better choices by providing them with better information and greater transparency and more effective means of allowing them to get redress. A new consumer policy announced in January 2003 carried this process further by re-organising the various consumer institutions, improving the level of and access to information and increasing the level of choice available in various services including those provided by the State. There is also an emphasis on improving the dialogue between business and consumer so that they take greater responsibility for solving problems via self-regulation, in particular by placing greater reliance on private rather than public mechanisms to resolve complaints.

The Danish Consumer Ombudsman (DCO) is one of three related entities involved in implementing Denmark’s national consumer protection regime. The other entities are the National Consumer Agency of Denmark and the Consumer Complaints Board. The DCO is characterised by the Danish Government as ‘the Consumer Watchdog’ because of his role in supervising and enforcing compliance with key consumer legislation *The Marketing Practices Act 2006* and *The Act on Certain Payment Instruments*.

The National Consumer Agency provides information and advice to consumers and businesses (for example guidelines on good marketing practice) in conjunction with the DCO) and refers complaints for determination by the Consumer Complaints Board. The Agency has primary responsibility for consumer product safety in Denmark. The development of policy on consumer issues is the responsibility of the Ministry of Family and Consumer Affairs through the Agency. The Agency provides staff and other resources to the DCO and is the secretariat to the Consumer Complaints Board.

The Consumer Complaints Board deals with and decides complaints from private consumers regarding goods, labour or services provided by businesses within minimum and maximum price limits.⁷⁴ Decisions are based on written documentation and are not binding or enforceable. After a Board decision, either party may take the matter to the courts and a decision not complied with may be taken to court by the National Consumer Agency at the request of the consumer.

The Danish Consumer Council represents the interests of consumers and is independent of public authorities and commercial interests. Founded in 1947, the Consumer Council is the spokesperson for consumers’ interests, lobbying vis-à-vis the Government, the Parliament, public authorities and the business community. The Council is involved in a wide range of consumer issues: food quality, environmental protection, health services, financial and legal services, and issues connected with media, telecommunications, universal services, etc.

Statutory status

The Marketing Practices Act establishes the institution of the DCO. Section 22(3) of the 2006 Act provides for an Ombudsman to be appointed by the Minister for Family and Consumer Affairs.

⁷³ Department of Trade and Industry (UK) *Comparative Report on Consumer Policy Regimes: Country Reports – Denmark*, October 2003.

⁷⁴ Certain goods and services are exempt (eg vehicle repairs and services provided by ‘craftsmen’) under regulation.

Structure, appointment and current composition

The structure is a single-person statutory office of an Ombudsman appointed for a period of six years with no extension or reappointment permitted. The person appointed is to fulfil 'the general conditions for appointment as a judge'. The Ombudsman can only be removed from office for health reasons or if unfit to remain in the post because of criminality, misconduct in service or fraud. Staff assisting the DCO is provided by the National Consumer Agency which is an arm of the Ministry of Family and Consumer Affairs. The current Ombudsman is a lawyer and former head of the Property Law Division in the Danish Ministry of Justice.

Scope of functions

The DCO monitors compliance with the Marketing Practices Act and orders made under the Act, 'especially in the interests of consumers'. He can initiate investigations on his own motion or following submission of a complaint, but the DCO is not obliged to investigate all complaints submitted. In deciding on whether to investigate complaints, the DCO 'must primarily take into consideration his duty to prioritise consumer protection activities.'⁷⁵

The DCO is required to influence traders' compliance with the Marketing Practices Act by negotiation in the first instance. Where a trader's negotiated undertaking to comply is disregarded, the DCO may impose injunctions on the trader necessary to ensure compliance with the undertaking. The DCO may, as may any other party with 'a legal interest' in an action in conflict with the Marketing Practices Act, seek an injunction or prohibition against such action before the Maritime and Commercial Court of Copenhagen.⁷⁶ If the purpose of an injunction obviously would be lost waiting for the court's decision, the DCO has power to impose a provisional prohibition with subsequent review by the court.

The DCO is able to require the disclosure of all details considered necessary for his activities, including a decision as to whether a matter falls within the scope of the Marketing Practices Act.

Accountability obligations

Executive Order no. 890 of 26 October 1994 concerning the rules governing the organisation of the Ombudsman institution and its work states:

The Ombudsman must keep the public informed about cases of general interest or of particular importance in relation to the definition of the rules set out in the Danish Marketing Practices Act whether investigated by the institution itself or the court system. (Section 2)

Cases and judgements are posted on the Ombudsman's website among other consumer-related information such guidelines, statements and observations.

Section 5 of the same Order requires the National Consumer Agency to report annually on the Ombudsman's activities and administration. The Agency publishes an annual report which is also available on its website.

A.3 Irish National Consumer Agency

The NCA was established by the Irish Government in May 2007 in response to the CSG report. The consumer policy context of its establishment is discussed in section 7.

Statutory status and appointment method

The *Consumer Protection Act 2007* establishes the NCA as a body corporate with perpetual succession and has power to sue, and may be sued, in its corporate name. Section 10 provides for membership of the Board of the Agency, its numbers, how they are to be appointed, paid, replaced, removed etc. The Section provides that the Board shall consist of a chairperson and 12 ordinary members and that the chief executive (CEO) shall be a member of the Board. The Minister is obliged to appoint to the Board persons of experience or capacity in matters relevant to the functions of the Agency and to ensure an equitable balance between men and women in the composition of the Board. The Minister designates one member of the Board as the chairperson with a term of office of five years and a term may be renewed.

⁷⁵ Executive Order no. 890 of 26 October 1994.

⁷⁶ Section 27 of the Marketing Practices Act. Cases concerning prohibitions, damages and remuneration may also be brought by anyone with a legal interest.

Section 13 provides that the Board may establish committees to assist performing its functions, with committees including persons who are not on the Board or staff of the Agency. The Board is obliged when appointing a committee to have regard to the qualifications and experience necessary to enable the committee to discharge its functions and the gender balance of the committee.

Section 14 provides for a CEO to be appointed (and may be removed from office) by the Board with the approval of the Minister. The CEO is appointed under a contract for not more than five years subject to terms and conditions determined by the Board with the approval of the Minister and the consent of the Minister for Finance. The contract may be renewed.

Governance arrangements and current composition

The CEO is subject to the control of the members of the Board and specifically the chief executive is answerable to the Board for the performance of his or her functions and the implementation of the Agency's policies. The Act requires the Agency to submit an annual work program to the Minister at least two months before the commencement of the financial year and that the Minister may issue guidelines or directions to the Agency in relation to the preparation of the work program.

Section 10 provides that members of the Board 'shall be persons who in the opinion of the Minister have experience of or shown capacity in matters relevant to the functions of the Agency. The NCA Board is comprised currently of 11 members, a chairman and chief executive. The chairman is a former chief executive of Marks & Spencer in Ireland; three are in business; three are 'consumer representatives' (from the community services sector); one is a 'consumer champion (formerly a director of the Consumers' Association of Ireland); two are economics and law academics in the competition and consumer regulation fields; one is from the education sector and the chairperson of the Irish Competition Authority is also a Board member.

Scope of functions and powers

The Act establishes the NCA with a general function of promoting and protecting the interests and welfare of consumers with specific responsibility for investigating, enforcing and encouraging compliance with consumer protection legislation including, where appropriate, referring cases involving possible indictable offences to the Director of Public Prosecutions.

In addition, the NCA is to advise and make recommendations to the Government on any policy or legislative proposals impacting or likely to impact upon consumer protection and welfare. The NCA may initiate proposals to the Government to amend any existing legislation or to introduce new legislation in relation to consumer protection and welfare as well as enabling the Agency to advise and make recommendations to the Government, public bodies or other bodies prescribed under the Act in relation to any matter concerning consumer protection and welfare. The Minister is empowered to direct the NCA to undertake reviews of existing consumer protection legislation and to request it to assist in the preparation of draft legislation. The Agency is obliged to consult with appropriate persons prior to submitting proposals to the Minister or other Ministers. The Agency is to consult with consumer groups and representatives and co-operate with other competent authorities to promote consumer welfare and the enforcement of consumer protection laws.

The NCA has specific functions to promote alternative dispute resolution mechanisms for resolving consumer complaints, conduct and commission research relating to its functions and, where it sees fit, publishing any findings from such research, promote awareness and conduct information campaigns on consumer protection and welfare, promote educational initiatives and activities for consumer protection. The NCA may, financially or otherwise, support the activities of voluntary bodies relating to consumer protection and welfare. The Act also requires the Agency to prepare and publish guidelines to traders and to review and approve Codes of Practice submitted to it.

Accountability obligations

The Act provides that the CEO can be required to account for the general administration of the Agency before the relevant Parliamentary Committee. Section 20 also obliges the NCA to submit a strategy statement for the following three-year period to the Minister every three years and stipulates the information to be included in the strategy statement. The Section empowers the Agency to consult appropriate persons or bodies when preparing its strategy statement. The Minister is obliged to table the statement in Parliament as soon as practicable after it has been submitted to him. The NCA is also required to provide the Minister with an annual report, which is to include such information as the Minister may direct and the Minister is required to table it in Parliament. The Act also provides that the Agency may submit to the Minister such other reports, advice or information in relation to its functions as it feels appropriate or as requested by the Minister.

A.4 New Zealand Commerce Commission

Consumer protection context

As in Denmark, responsibility for various aspects of consumer protection in New Zealand is spread across several entities. The Ministry of Consumer Affairs, part of the Ministry Economic Development, provides policy advice to the Government on consumer protection matters generally, product safety and trade measurement. It also provides information for consumers and businesses on their responsibilities and rights under consumer legislation. The Ministry enforces product safety and trade measurement legislation. However, it does not enforce the *Fair Trading Act 1986* nor give advice to, or take civil actions on behalf of, aggrieved consumers.

The Commerce Commission (CC) enforces the Fair Trading Act's provision intended to protect consumers from misleading and deceptive conduct and unfair trading practices. The CC also is the primary competition regulator and has responsibility for some industry-specific regulation in the energy, telecommunications, finance and dairy sectors.

The volunteer-based Citizens Advice Bureaux (CAB) provides general consumer information and advice. CAB is the only organisation in New Zealand which provides a free, national, face-to-face service to members of the public regarding consumer rights issues. The service is confidential and impartial and can be accessed in person, by phone or by email.

Statutory status

The CC is an 'independent Crown entity' established under section 8 of the *Commerce Act 1986*. The Act requires that 'the Commission must act independently in performing its statutory functions and duties and exercising its statutory powers' except as expressly provided otherwise in the Act or other legislation. The Commission is not subject to direction from the Government in carrying out its enforcement and regulatory control activities.⁷⁷ Section 105 of the *Crown Entities Act 2004* provides that 'a responsible Minister of an independent Crown entity...may not direct the entity or company to have regard to or to give effect to a government policy unless specifically provided in another Act. The Commerce Act provides that in exercising its powers, the Commission 'shall

have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister' (section 26). The Minister is required to table in Parliament every statement of economic policy transmitted to the Commission. A statement of economic policy transmitted to the Commission is not a direction for the purposes of section 105 of the *Crown Entities Act 2004*.

Structure, appointment method and current composition

The Commission comprises no less than four, and no more than six, members. No less than three, and no more than five, of these must be appointed by the Governor-General on the recommendation of the responsible Minister. One of these must be appointed as Telecommunications Commissioner under the Telecommunications Act 2001. The Minister may only recommend a person who, in the responsible Minister's opinion, 'is qualified for appointment, having regard to the functions of the Commission, by virtue of that person's knowledge of or experience in industry, commerce, economics, law, accountancy, public administration, or consumer affairs' (section 9(4)(b)). At least one member appointed by the Governor-General must be a barrister and solicitor of at least five years' standing and the Minister must have consulted the Attorney-General prior to recommending that person.

The Commission currently comprises a Chair and Deputy Chair, three Commissioners and the Telecommunications Commissioner. The current Chair was formerly a senior public servant, the Deputy Chair a partner in a law firm, and the three commissioners have law, accounting and economics backgrounds respectively.

Scope of functions

In relation to direct consumer protection (as distinct from promoting competition which can be viewed as ultimately also protecting consumers), as noted above the, CC is primarily the enforcement agency for the Fair Trading Act which prohibits misleading and deceptive conduct by traders. In ensuring compliance with the legislation, the Commission undertakes investigation and where appropriate takes court action.

⁷⁷ Commerce Commission website 'Overview' Refer www.comcomgovt.nz/The Commission/Overview.aspx

Accountability obligations

Members are accountable to the responsible Minister for performing their duties as members. Section 150 of the Crown Entities Act requires the Commission at the end of each financial year to report to the responsible Minister who must then table the report in Parliament. The annual report must provide information necessary to enable an informed assessment of the its operations and performance for that financial year, including an assessment against the intentions, measures, and standards set out in the statement of intent prepared at the beginning of the financial year.

A.5 UK Office of Fair Trading

The origins of the OFT are outlined in Section 7.1.

Consumer protection context⁷⁸

Consumer policy is the day-to-day responsibility of the Parliamentary Under Secretary of State for Employment Relations, Competition and Consumers in the Department for Business, Enterprise and Regulatory Reform (BERR) (formerly the Department of Trade and Industry, 'DTI'). The Consumer and Competition Policy Directorate is responsible for fair and safe trading issues in relation to the economic interests and safety of consumers, although some specific safety issues (for example gas and electrical products) fall to other Directorates in the Department. Legislation on consumer matters is a matter for Westminster in respect of England, Scotland and Wales. Enforcement of consumer law is undertaken by the Office of Fair Trading, local authorities and some specified designated bodies.

The *Consumers, Estate Agents and Redress Act 2007* established a 'new' National Consumer Council (NCC) as a body corporate to replace the company limited by guarantee of then same name, which was originally established in 1975, and energywatch and Postwatch. It is funded by the Government which recovers some of the Council's costs from payments made by licensees in the utilities and postal services sectors. The Council has three core functions: to provide advice and information, to make proposals about consumer matters and to represent the views of consumers to Ministers, regulators, the European Commission and anyone else the Council considers might have an interest. The NCC is also required to

enter into cooperation arrangements with other bodies, including the Office of Fair Trading, to secure the coordination of activities relating to the provision of advice or information to consumers.

The NCC is not required to act for individual consumers (except in respect of utility disconnections), but is able to investigate complaints made by vulnerable consumers or where the Council considers that the subject matter is of general relevance to consumers. The main role of the Council is to act on behalf of all consumers, as opposed to dealing with individual complaints, which is the role of Consumer Direct (the consumer advice service supported by the OFT) and other existing the redress schemes.

Statutory status

As noted in Section 7.1, the Enterprise Act replaced the office of the Director General of Fair Trading with the OFT. The OFT is a statutory corporate body consisting of a Chairman and at least four other members, most of whom are non-executive appointments. The OFT was established as a Non-Ministerial Government Department, is a Crown body and is staffed by civil servants.

Structure, appointment and current composition

The OFT has a board structure with the chairperson appointed by the Secretary of State; the other members are appointed by the Secretary of State in consultation with the chairperson. Terms of appointment cannot exceed five years. There is also a Chief Executive who may be, and currently is, a member of the Board.

The current Board is comprised of ten members: four executives (including the Chair) and six non-executives. The backgrounds of the current members are:

- executive members
 - Chairman – lawyer specialising in UK and European competition law
 - Chief Executive – economist and formerly Chairperson of the Irish Competition Authority
 - executive director – OFT Executive Director of Policy and Strategy and formerly competition policy adviser in the Department of Business, Enterprise and Regulatory Reform

⁷⁸ Department of Trade and Industry (UK) *Comparative Report on Consumer Policy Regimes: Country Reports – United Kingdom*, October 2003.

- executive director – OFT Executive Director of Markets and Projects and formerly a partner in a consulting firm and adviser in the Prime Minister’s Policy Unit
- non-executive members:
 - a consumer advocate
 - two company directors
 - a business economist
 - an academic economist specialising in competition law and policy, and
 - an academic lawyer specialising in competition law and policy.

Scope of functions

The OFT’s goal is to make markets work well for consumers. It aims to achieve this through the enforcement of consumer (and competition) law, the investigation of markets, investigation of complaints and communication with consumers, business, Government and others working in consumer and business focussed organisations. Specific consumer protection functions set out in the Enterprise Act are: provision of information and advice to the public, including publication of educational materials; provision of information and advice to Ministers; promoting good trading practices, including approving consumer codes⁷⁹. Key consumer protection legislation where the OFT has responsibility for enforcement are:

- *Consumer Credit Act 1974* (credit licensing)
- Unfair Terms in Consumer Contracts Regulations 1999
- Consumer Protection (Distance Selling) Regulations 2000
- *Estate Agents Act 1979* (estate agent licensing)
- Control of Misleading Advertisements Regulations 1988, and
- ‘Stop Now Orders’ under the *Enterprise Act 2002*.

Accountability obligations

Under the Enterprise Act the OFT is obliged to publish before the start of each financial year an ‘annual plan’ containing a statement of its main objectives and priorities for the year. A draft plan for consultation must be published at least two months before the final plan is published. As soon as practicable after the end of each financial year the OFT is also required to provide an annual report on its activities and performance during that year to the Secretary of State. Annual plans and annual reports must be tabled in Parliament. The annual report must include:

- a general survey of developments relating to the OFT’s functions
- an assessment of the extent to which objectives and priorities for the year (as set out in the annual plan) were met
- a summary of significant decisions, investigations or other activities
- an assessment of enforcement performance and practices, and
- a summary of the allocation of financial resources to its various activities.

A Minister may request the OFT to make proposals or give other information or advice on any matter relating to any of its functions; and the OFT is obliged to comply with the request, so far as is reasonably practicable and consistent with its other functions.

The OFT is also accountable to the public through Parliamentary scrutiny both in Westminster and the devolved administrations, for example through investigations by select committees. The OFT’s licensing decisions under the Consumer Credit Act are subject to appeal heard by an independent panel. Where the OFT enforces consumer protection law, through the courts, its actions can be appealed there.

⁷⁹ A code of practice or other document (however described) intended, with a view to safeguarding or promoting the interests of consumers, to regulate by any means the conduct of persons engaged in the supply of goods or services to consumers.

A.6 USA Federal Trade Commission

Consumer protection context⁸⁰

Responsibility for consumer policy is split between federal agencies (principally, in the economic field, the Federal Trade Commission (FTC) and consumer departments at state, county and city level. The result is a 'patchwork quilt' of different state and federal rules, coupled with overlapping jurisdictions for traders doing business in more than one state. The FTC leads on policy, law and enforcement issues with a federal (multi-state or inter-state) dimension and is responsible for the core legislation on the protection of consumers' economic interests, the Federal Trade Commission Act. Product safety is the responsibility of a federal agency, the Consumer Product Safety Commission, which is to 'protect the public against unreasonable risks of injuries and deaths associated with consumer products'. Some particular types of products are covered by other federal agencies, such as the Department of Transportation; the Food and Drug Administration; and the Department of the Treasury.

Many of the states have their own consumer protection statutes and sale of goods legislation (in uniform commercial codes) which mirror and supplement federal laws. Federal statutes can end up as minimum requirements in the way that some European Community directives are for Member States. States may also conduct investigations, prosecute offenders, provide information, mediate complaints and advocate in the consumer interest. Many states and some cities and counties license or register professionals and traders such as doctors, lawyers, home improvement firms, car repairers, debt collectors and child carers. City and county consumer offices tend to administer local ordinances including licensing systems.

Enforcement at state level is usually the responsibility of the Attorney-General, who is the chief legal officer and in most cases publicly elected. The Attorney-General's Office, (or in some cases the Department of Justice which the Attorney-General heads) may include a consumer protection division. Smaller states tend to have this arrangement, rather than separate consumer affairs departments or statutory bodies. Some states also have separate consumer affairs departments that are responsible for work such as licensing. State

Weights and Measures Offices enforce laws and regulations about the labelling, weight, measure or count of packaged items like food and household products. They also check the accuracy of weighing and measuring devices such as supermarket scales and petrol pumps. Some city and county offices also have weights and measures functions. In addition to major federal regulators such as the Securities and Exchange Commission and the Federal Reserve System, there are networks of state banking authorities, insurance regulators and securities administrators.

Statutory status

The FTC is an independent agency first established under the Federal Trade Commission Act in 1914.

Structure, appointment and current composition

The Commission is comprised of five members appointed by the President of the United States 'by and with the advice of the Senate' for terms of up to seven years' duration. The President selects one Commissioner to act as Chairman. No more than three Commissioners can be of the same political party. The current Chairman was formerly a lawyer specialising in antitrust law and a senior official in the US Department of Justice's Antitrust Division. All of the four Commissioners have legal backgrounds, with specialisations in antitrust law, and variously held senior positions in federal government departments or agencies, Senate committees' staffs or law firms.

The FTC's major organisational components are three 'Bureaus' – Consumer Protection, Competition and Economics – nine functional offices and seven regional offices.

Scope of functions

The FTC Consumer Protection Bureau's mandate is to protect consumers against unfair, deceptive or fraudulent practices. The Bureau combines responsibility for both policy/lawmaking and enforcement. Its work includes company and industry investigations, administrative and federal court litigation, rulemaking proceedings, and consumer and business information and education. The Bureau contributes to the Commission's work of informing Congress and other government entities of the impact that proposed actions could have on consumers.

⁸⁰ Department of Trade and Industry (UK) Comparative Report on *Consumer policy Regimes: Country Reports – United States*, October 2003

It enforces a range of consumer laws enacted by Congress and trade regulation rules issued by the Commission. The basic consumer protection statute enforced by the FTC is Section 5(a) of the FTC Act, which provides that ‘unfair or deceptive acts or practices in or affecting commerce are declared unlawful’.⁸¹ The FTC also enforces a considerable number of specific consumer protection statutes, such as the Textile Fiber Products Identification Act, the Fair Packaging and Labeling Act and the Truth in Lending Act. These prohibit certain practices and generally treat violations as unfair or deceptive acts or practices under Section 5(a). They rely heavily on information disclosures. The legislation also authorises or directs the Commission to issue more detailed regulations, such as the rules on telemarketing, sales made at homes, funerals, franchises and mail or telephone orders. The FTC publishes a series of detailed guides, statements and interpretations in relation to particular sectors or issues.

Accountability obligations

Until 1998, the FTC reported annually to Congress. Since 1999, the FTC has published its annual performance reports to the Office of Management and Budget (OMB) and since 2002 has published annual reports by the Chairman. In addition to the Chairman’s report, the FTC currently prepares and publishes each year two major statements related to accountability.

- A Performance and Accountability Report prepared pursuant to the requirements of the Accountability of *Tax Dollars Act 2002* and subject to regulations issued by the OMB. This contains annual performance information required by the OMB’s and the *Government Performance Results Act 1993* (GPRA) including a detailed discussion and analysis of the FTC’s performance related to its two GPRA strategic goals and related objectives.
- A five-year period Strategic Plan in accordance with the GPRA which includes:
 - the FTC’s mission statement
 - strategic goals and objectives defining how the FTC will fulfil its mission
 - a description of the means and strategies that will be used to achieve the strategic goals and objectives

- descriptions of the relation between performance goals or measures in the annual performance budget and the strategic goal framework
- identification of key factors that could affect achievement of the strategic goals and objectives, and
- a description of program evaluations used in preparing the Strategic Plan and a schedule for future evaluations.

A.7 British Columbia Business Practices & Consumer Protection Authority

Consumer protection context⁸²

The Canadian Constitution Act does not specifically assign consumer affairs to federal or provincial jurisdiction. The federal government is responsible for the broad rules of the marketplace relating to peace, order and good government, trade and commerce, criminal law, currency, banking and weights and measures. In practice the federal government is responsible for national standards relating to food safety, transport safety, product safety (except electrical), labelling, legal metrology, banking and interest rates, competition policy. Federal legislation relating to misleading advertising and unfair practices is seen as competition not consumer policy, part of ensuring a level playing field for traders.

Provincial governments, under their power to regulate property and civil rights, regulate individual transactions, contracts and sales of goods and services, and most industry specific issues. They are responsible for sale of goods and services, guarantees, licensing of traders, electrical safety, credit unions and structural safety. Ontario, with the largest population, tends to set the standards that other provinces will follow, for example in the area of electrical safety.

There also exist areas that require cooperation between the two levels of government as both have some degree of responsibility (for example, misleading advertising, company registration, financial institutions). Mechanisms for harmonisation in these areas include the *Agreement on Internal Trade*, the *Uniform Law Conference* and legislated codes (for example, electrical code, building code).

⁸¹ Unfair practices are defined to mean those that cause or are likely to cause substantial injury which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

⁸² Department of Trade and Industry (UK) *Comparative Report on Consumer policy Regimes: Country Reports – Canada*, October 2003.

The federal Office of Consumer Affairs (OCA) – part of the Ministry of Industry ('Industry Canada') – works to: give consumers tools they can use to make informed decisions by creating information products; expand practical consumer protections in the marketplace by encouraging the development of voluntary codes and standards; build the capacity of consumer organizations so that they can contribute more meaningfully to public policy development; and to develop a co-operative agenda with the provinces and territories by facilitating harmonisation of consumer protection legislation and regulations.

The federal Minister co-chairs the Federal-Provincial-Territorial Committee of Ministers Responsible for Consumer Affairs.

Statutory status

The Business Practices and Consumer Protection Authority (BPCPA) was established to strengthen consumer protection in British Columbia and assumed the consumer protection activities previously performed by the Ministry of Public Safety and the Solicitor General. As an independent authority, the BPCPA is intended to have greater flexibility to respond quickly to a changing business environment.

The BPCPA is established under the *Business Practices & Consumer Protection Authority Act 2004*. The purposes of the Authority are 'to deliver consumer protection services...to promote fairness and understanding in the marketplace and to administer in the public interest any Act...delegated to the authority' (section 4). It is a not-for-profit corporation without share capital and consists of a board of directors appointed under the Act. The BPCPA is not an agent of the Government of British Columbia and employees of the Authority are not public servants.

Structure, appointment and current composition

The board of directors consists of up to nine directors, one of whom is appointed by the Minister. The initial board appointed in 2004 under the Act's transitional provisions was a chair appointed by the Minister and two other directors appointed by the chair from a list of candidates selected on merit according to their knowledge, skills and abilities. The normal appointment process after the initial board is that the board appoints directors from a list of candidates recommended by a nominating committee of the board. The directors may appoint any director to be the chair of the board, except the director appointed by the Minister. Eligibility for appointment to the board requires that a person is not an undischarged bankrupt and has no convictions relating to business activities.

The current board of BPCPA has five directors. The Chair is a chartered accountant with public and private sector consulting experience, including a term as Assistant Auditor-General of British Columbia. Other directors are: a lawyer with extensive experience in provincial criminal law; a partner in a private consulting firm specialising in corporate communication and planning; the chairman of a private consulting firm who also has substantial experience in the pharmaceutical industry; and the president of a construction industry association.

Scope of functions

The principal consumer protection law the BPCPA administers is the Business Practices and Consumer Protection Act. In addition, the BPCPA administers the following regulations:

- the Business Practices and Consumer Protection Regulation
- the Consumer Contracts Regulation
- the Debt Collection Industry Regulation
- the Travel Industry Regulation
- the Telemarketer Licensing Regulation
- the Fee Setting Criteria Regulation
- the Cremation, Interment and Funeral Services Regulation
- the Administrative Penalties Regulation, and
- the Motion Picture Act Regulations.

The BPCPA protects consumers and encourages fair business practices by:

- responding to inquiries and complaints from consumers and businesses
- informing and educating consumers and businesses about their rights and responsibilities and consumer protection
- licensing businesses in specific industries
- inspecting these licensed industries to ensure they are complying with Business Practices and Consumer Protection Act consumer protection laws
- investigating alleged violations of consumer protection laws and following up with appropriate enforcement action, and
- recommending amendments to consumer protection laws to the British Columbia government.

Accountability obligations

The Business Practices & Consumer Protection Authority Act requires the BPCPA to prepare and publish an annual report on its operations, including operational programs showing a comparison of actual results with expected results for the year. It is also required to prepare and publish a business plan for the next three fiscal years before the commencement of each fiscal year.

A.8 California Department of Consumer Affairs

Consumer protection context

The broader United States' consumer protection institutional context is outlined in Section 8.5 above. The Department of Consumer Affairs (DCA) includes 40 regulatory entities (nine bureaus, one program, 25 boards, three committees, one commission and one office). The committees, commission and boards are semi-autonomous bodies whose members are appointed by the Governor and the Legislature. DCA provides them with administrative support. Almost exclusively fees from licensing businesses and occupations fund DCA's operations. DCA licences more than 2.4 million professionals in more than 255 professions.

Statutory status

The DCA is established by the California Business and Professions Code (sections 100-144). It was originally established by the *Consumer Affairs Act 1970*.⁸³ The Code provides for a civil executive office, the holder of which is known as the Director of Consumer Affairs, to control the Department. Personnel of the Department are employed under the State Civil Service Act.

Structure, appointment and current composition

The Director is appointed by the Governor of California under the Code and holds office at the Governor's pleasure.

Scope of functions

The role of the DCA is to promote and protect the interests of by facilitating the functioning of the market economy through: (a) educating and informing consumers to promote rational consumer choice in the marketplace; (b) protecting consumers from the sale of goods and services which use of deceptive methods, acts, or other unfair practices inimical to the welfare of consumers; (c) fostering competition; and (d) promoting effective representation of consumers' interests in all branches and levels of government. The DCA operates a call centre to receive inquiries and complaints, publishes guides for consumers and businesses, mediates disputes between businesses and customers and enforces a wide range of consumer laws including laws covering false advertising, unfair trade practices, weights and measures, business names, trademark registration, second-hand goods, gambling and franchise relations.

The director is under a statutory obligation to 'recommend and propose the enactment of such legislation as necessary to protect and promote the interests of consumers' and must maintain contact and liaison with consumer groups in California and nationally (section 310).

Accountability obligations

The Director is required to submit annual reports to the Governor and the Legislature. Each annual report is to report programmatic and statistical information regarding the activities of the DCA and its constituent entities. The report must also include information on the number and general patterns of consumer complaints and the action taken on those complaints.

⁸³ Chapter 4 of the current Code is referred to as the Consumer Protection Act.

A.9 Massachusetts Office of Consumer Affairs and Business Regulation

Consumer protection context

The broader United States consumer protection context is outlined in Section 8.5. Within the State of Massachusetts, there are two main entities with consumer protection responsibilities. The Office of Consumer Affairs and Business Regulation (OCABR) is responsible for consumer advocacy and education, administration and enforcement of business licensing and mediation services to help resolve lemon law disputes. The Consumer Protection Division of the Office of the Attorney General is the principal agency enforcing consumer law and it funds local consumer programs that receive and mediate written consumer complaints.

Statutory status

Chapter 24A of the General Laws of Massachusetts (GLM) provides for an 'Office of Consumer Affairs and Business Regulation' (OCABR). The law provides for OCABR to be headed by a full-time Director of Consumer Affairs and Business Regulation.

Structure, appointment and current composition

The GLM specifies the OCABR shall contain the State Racing Commission, a Division of Business Regulation, a Division of Banks, a Division of Insurance, a Division of Standards (trade weights and measures), a Division of Professional Licensure, and a Division of Consumer Affairs including boards of registration.

Scope of functions

The OCABR's broad consumer protection function is to protect consumers through advocacy, education and ensuring fair and honest business practices among the companies and licensees within its jurisdiction. Chapter 24A, Section 2 of the GLM specifies the following duties for OCABR:

- maintaining a telephone information service
- conducting surveys of consumer needs
- investigating consumer problems in cooperation with the attorney general
- publishing educational brochures
- establishing programs and services to assist consumers in understanding their rights and responsibilities in consumer transactions
- recommending and implementing consumer protection policies
- monitoring the marketplace to promote fair and honest competition, and
- establishing a trust fund for the purpose of consumer education and to further the Office's other purposes.

Accountability obligations

Under MGL Chapter 30A, the Director of Consumer Affairs and Business Regulation is required to develop performance measures to evaluate the effectiveness of the Office's programs in accomplishing their objectives. MGL Chapter 98, Section 57 requires the Director of the OCABR to prepare and submit to the Governor, and Parliamentary committees on audit and oversight an annual report of the activities of the Division of Standards, including the net loss restored to consumers and merchants as a result of its enforcement program.

Consumer protection context

The broader United States consumer protection institutional context is outlined in Section 8.5. Within New York State, there are two bodies with consumer protection responsibilities: the Consumer Protection Board (CPB) created in 1970 to be the State's 'consumer watchdog' and the Bureau of Consumer Frauds and Protection in the Office of the New York Attorney-General. CPB is discussed in detail below.

The Bureau prosecutes businesses and individuals engaged in fraudulent, misleading, deceptive or illegal trade practices. In addition to litigating, the Bureau mediates complaints from individual consumers, a large percentage of which are resolved satisfactorily through the mediation process. The Bureau provides information to consumers and seeks to ensure a fair and vigorous market place. The Bureau also drafts legislation and conducts studies and writes reports on emerging consumer problems and issues. At first glance, there seems to be duplication between these two bodies around consumer information, complaint handling and dispute resolution and policy development. However, under State law, the CPB is given the role of coordinating the activities of all state agencies performing consumer protection functions and the Attorney-General is required to coordinate the enforcement powers of his office with the activities of the CPB.⁸⁴

Statutory status

The CPB is established under Article 20 ('State Consumer Protection Board') of the New York State Executive Law, sections 550-553. The Law also establishes the office of executive director.

Structure, appointment and current composition

The Board consists of an executive director and, *ex officio*, a number of appointed State statutory officeholders (effectively heads of various State departments and regulatory agencies): the Chairman of the Public Service Commission; the Superintendent of Banking; the Superintendent of Insurance; the Commissioners of Agriculture and Markets, Environmental Conservation, Commerce and Health, and the Secretary of State. Members of the Board other than the executive director receive no remuneration for their services as members, other than expenses incurred.

The executive director is the chair of the CPB. The executive director is appointed by the Governor of New York 'with the advice and consent of' the New York Senate and holds office 'during the pleasure of the Governor'. The executive director has broad statutory power to 'establish, consolidate, reorganize or abolish any organizational units under the Board as he determines to be necessary for efficient operation'. The executive director can appoint staff, agents and consultants as considered necessary and fix their remuneration within the CPB's budgetary appropriation.

Scope of functions

The Board coordinates the activities of all state agencies performing consumer protection functions. The executive director supported by staff, at the direction of the Board, has the following functions:

- conducting investigations, research, studies and analyses of matters affecting the interests of consumers
- cooperating with and assist the Attorney-General in the carrying out of his legal enforcement responsibilities for the protection of consumers
- cooperating with and assisting consumers in class actions
- representing the interests of consumers before federal, state and local administrative and regulatory agencies
- studying the operation of consumer protection laws and recommending to the Governor new laws and amendments of laws for consumer protection
- conducting (or organising through contractors) product research and testing

⁸⁴ Article 20 of the *New York State Executive Law*, sections 550 and 553.

- initiating and promoting consumer education programs
- cooperating with and assisting local governments in the development of consumer protection activities
- establishing advisory councils to assist in policy formulation on specific consumer problems, and
- encouraging business and industry to maintain high standards of honesty, fair business practices and public responsibility in the production, promotion and sale of consumer goods and services.

The CPB is organised into three main bureaus or divisions to achieve its mission of protecting, educating and representing consumers: The Outreach and Program Development Bureau develops comprehensive consumer education programs.

A Consumer Assistance Unit within the Bureau takes complaints on a variety of topics including product refunds and returns, credit card disputes, Internet services, home improvement and identity theft and mediates to resolve them. The Counsel, Policy and Research Bureau is responsible for the agency's legal functions including, enforcement of the New York State 'Do Not Call' law; implementation of legislative programs; conducting investigations; developing policy; filing comments on state and federal consumer issues; conducting public hearings; and, collaborating with federal and local consumer protection agencies.

The Utility, Telecommunications and New Technologies Bureau intervenes on behalf of consumers regarding utility-related matters before the Public Service Commission and handles consumer complaints about the Long Island Power Authority. Additionally, the Bureau considers matters relating to new technologies; landline and wireless telecommunications, radio frequency, satellite and broadband communication. The CPB serves as the consumer "think-tank" for the State, initiating policy development and providing consumers with greater access to the information and tools they need to make educated marketplace decisions.

Accountability obligations

The legislation establishing the CPB requires the Board to prepare quarterly a report to the Governor and legislature on the category and number of consumer complaints received by the board. The executive director is required to prepare an annual report to the Governor and to the legislature on the CPB's activities.

“ References ”

Better Regulation Task Force [United Kingdom],
Independent Regulators, October 2003,
<http://www.brtf.gov.uk>

_____ *Revised Principles of Good Regulation 2003*,
<http://www.brtf.gov.uk>

_____ *Avoiding Regulatory Creep*, October 2004
<http://www.brtf.gov.uk>

Consumer Affairs Victoria, *Choosing between General
and Industry Specific Consumer Regulation*, CAV
Discussion Paper, January 2006

Consumer Strategy Group [Ireland], *Make Consumers
Count: A New Direction for Irish Consumers*, Dublin,
April 2005.

Cousins, D., *The Role of Social Regulation in Building a
Civil Society: a Consumer Affairs Perspective*, Institute
of Public Administration Australia (Victorian Division),
Forum Melbourne, 29 July 2003.

Deighton-Smith, R., 'Regulatory Transparency in OECD
Countries: Overview, trends and challenges' in
Australian Journal of Public Administration, Volume 63
Number 1, March 2004.

Department of Treasury and Finance, *Victorian Guide to
Regulation*, February 2005.

Department of Trade and Industry [United Kingdom],
Modern Markets: Confident Consumers, July 1999.

_____ *Comparative Report on Consumer Policy
Regimes*, October 2003.

_____ *Comparative Report on Consumer policy
Regimes: Country Reports – Denmark*, October 2003

_____ *Comparative Report on Consumer policy
Regimes: Country Reports – United Kingdom*, October
2003

_____ *Comparative Report on Consumer policy
Regimes: Country Reports – United States*, October 2003

_____ *Comparative Report on Consumer policy
Regimes: Country Reports – Canada*, October 2003

_____ *Reducing Administrative Burdens – the
Consumer Trading Standards Agency, Consultation*, July
2005.

_____ *Reducing Administrative Burdens – the
Consumer Trading Standards Agency, Consultation,
Summary of Responses to the Consultation*, March 2006.

Faure-Grimaud, A. and Martimort, D., 'Regulatory
Inertia' in *RAND Journal of Economics*, Vol. 34 No. 3,
Autumn 2003, pp. 413-4.

Federal Communications Commission, *Connecting the
Globe: A Regulator's Guide to Building A Global
Information Community*, Washington DC, June 1999
www.fcc.gov/connectglobe/sec1.html

Göneç, R., Maher, M. and Nicoletti, G., *The
Implementation and the Effects of Regulatory Reform: Past
Experience and Current Issues*, OECD Economic Studies
No. 32, 2001/I.

Gilardi, F., 'Evaluating Independent regulators' in
OECD, *Designing Independent and Accountable Regulatory
Authorities for High Quality Regulation*, Paris, January
2005. <http://www.oecd.org/subject/regreform>

Hampton, P., *Reducing Administrative Burdens: Effective
Inspection and Enforcement*, HM Treasury London,
March 2005.

House of Lords Select Committee on the Constitution,
The Regulatory State: Ensuring its Accountability, HL Paper
68-I, London, May 2004.

Jacobzone, S., 'Independent Regulatory Authorities in
OECD Countries: an overview' in OECD, *Designing
Independent and Accountable Regulatory Authorities for
High Quality Regulation*, Paris, January 2005.
<http://www.oecd.org/subject/regreform>

Ladegaard, P., 'Good Governance and Regulatory
Management' background note for *OECD Regulatory
Management and Reform Seminar*, 19-20 November
2001, Moscow.

Majone, G., 'Strategy and Structure: the Political Economy of Agency Independence and Accountability' in OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, Paris, January 2005. <http://www.oecd.org/subject/regreform>

Organisation for Economic Cooperation and Development, *Recommendation on Regulatory Quality*, 1995. <http://www.oecd.org/subject/regreform>

_____ *Reference Checklist for regulatory decision-making*, 1995, <http://www.oecd.org/subject/regreform>

_____ 'The Implementation and the Effects of Regulatory Reform: Past Experience and Current Issues', *OECD Economic Studies*, No. 32, 2001/I.

_____ *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*, Paris 2002.

Productivity Commission, *Review of the Australian Consumer Product Safety System* (Discussion draft), August 2005.

_____ *Review of National Competition Policy Reforms*, Inquiry Report No. 33, February 2005.

Smith, F. and Ward, S., 'Regulatory Architecture: Practitioners Perspectives', paper presented at the *National Consumer Congress*, Melbourne, 16 March 2004.

Victorian Competition and Efficiency Commission, *Housing Regulation in Victoria: Building Better Outcomes* (Draft Report), July 2005.

United Nations Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection (as expanded in 1999)* United Nations, New York, 2003.

“ *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
- 8 *Choosing Between General and Industry-specific Regulation*, November 2006
- 9 *Using Licensing to Protect Consumers’ Interests*, November 2006
- 10 *Consumer Detriment in Victoria: a Survey of its Nature, Costs and Implications*, October 2006
- 11 *Stopping Rogue Traders*, November 2006
- 12 *Unfair Contract Terms in Victoria: Research into their Extent, Nature, Cost and Implications*, October 2007
- 13 *Institutional Arrangements for Consumer Protection Agencies*, April 2008

Consumer Affairs Victoria

Victorian Consumer & Business Centre

113 Exhibition Street

Melbourne 3000

Telephone 1300 55 81 81 (local call charge)

Email consumer@justice.vic.gov.au

Website www.consumer.vic.gov.au

Regional offices are located in Ballarat,
Bendigo, Geelong, Morwell, Mildura,
Wangaratta and Warrnambool.

April 2008

C-65-01-1080

 *Confident Consumers, Protected Communities.* 