Easy and Transparent Trading - Empowering Consumers and Small Business

Consultation Paper – July 2018

NSW GOVERNMENT

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Minister's Message

I am proud to present this paper for public consultation on reforms to empower consumers and small businesses by liberalising commerce and facilitating easy and transparent trading in NSW.

Every person should be enabled and encouraged to thrive: they should be encouraged to dream big, to realise their aspirations and to make the most of their talents. This is the core idea of liberalism. It is an idea that underpins our most important civil liberties – freedom of speech; government for the people, by the people; freedom from discrimination; the right to a fair trial; and the rule of law.

But protecting our civil liberties is not enough. Liberal democracies need to ensure that we have the opportunity to thrive economically: to own our own homes, to provide for our families, to succeed at work. In the 1980s and 1990s, Australia, the United States and the United Kingdom enacted liberal reforms that drove unprecedented periods of economic growth, embracing free trade, deregulating economies, and fostering competition by clamping down on anti-competitive behaviour and abolishing state monopolies. For two decades, liberalism prevailed.

However, since the Global Financial Crisis, liberal ideals have come under threat. In a number of countries, everyday people have seen their living standards stagnate or fall and some commentators have called the end of liberalism.

But those who say that liberalism has run its course, that we need to reregulate, we need to revert to old ways of running an economy are wrong. It is precisely when people are working hard and not seeing their efforts rewarded that we need more liberalism not less: give people more freedom – make it easier for them to do business and prosper; increase competition – reward those who use their abilities to deliver for their customers not to fleece hardworking Australians; give people more choice and information – allow people to make meaningful decisions and they will make the best decisions for themselves and their families. And those of us who believe in liberalism need to find practical ways to make this happen.

The proposals set out in this paper are designed to do just that; to reward the effort of those who use their abilities to improve the lives of others by making it easier to do business, and increasing transparency and consumer choice.

I encourage you to take part in this consultation process to have your say on the proposed reforms. I look forward to your comments.

Matthew Kean MP

Minister for Innovation and Better Regulation

Introduction

The object of the laws of commerce is to encourage individuals to thrive – to prosper, to realise their ambitions, and to make the most of their abilities. Three key conditions are necessary to obtain this object:

These conditions drive efficient markets, support economic growth and facilitate easy and transparent trading to empower consumers and small businesses.

A well-designed system of commercial law can help ensure the above conditions are satisfied; a poorly designed system of commercial law can ensure they are not. In the former case, commercial laws address the market failures that may arise from information asymmetry, anti-competitive practices or other market failures with as little erosion of individual freedom as possible. In the latter case, commercial laws may enshrine anti-competitive or opaque practices or structures or promote them in a heavy-handed manner.

The NSW Government has already implemented a series of reforms to ensure that its stock of commercial laws is fit for purpose; including commissioning IPART to conduct a review into all 769 licences administered by the NSW Government and exceeding the Government's $750 million red tape reduction target by $146 million to reduce regulatory costs for businesses and the community by $896 million in annual terms. Those reforms have supported the NSW economy becoming the engine room of the national economy.

However, the economy changes, rendering laws that once served useful purposes unnecessary and giving rise to new issues for individuals. This paper explores areas of possible reform to ensure that the commercial laws of NSW make it easy to do business, and increase transparency and consumer choice.

On 14 May 2018 the Government announced the appointment of Mr Peter Achterstraat as the inaugural NSW Productivity Commissioner who is heading up the recently established NSW Productivity Commission. As Productivity Commissioner, Mr Achterstraat is responsible for helping to shape the NSW Government's productivity agenda and overseeing its regulatory framework and is initially focusing on four core themes:

- making it easier to do business
- lowering the cost of living
- making housing more affordable
- making NSW the easiest state to move to

The proposed reforms in this paper will help deliver on the Productivity Commission's agenda for the Innovation and Better Regulation portfolio.

The policy ideas are the result of a 'sweep' of legislation and regulations in the Better Regulation portfolio, a review of reports by think-tanks and government agencies on the Australian, NSW and other advanced economies and the Minister's call for ideas from more than 100 think-tanks, industry groups, academics and other stakeholders. Such an approach also delivers on a recommendation from the Final Report of the Independent Review of the NSW Regulatory Policy Framework's recommendation (the 'Greiner Review') that agencies adopt a stewardship approach to legislation that they administer.

The purpose of this Consultation Paper is to seek public comment on these ideas before the Government makes a final decision on their implementation.

HAVE YOUR SAY

We invite you to read this paper and provide comments. You may wish to comment on only one or two matters of particular interest, or all of the issues raised in this Consultation Paper.

We prefer to receive submissions by email and request that any documents provided to us are produced in an 'accessible' format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive). Further information on how you can make your submission accessible is contained at http://webaim.org/techniques/word

If you do not wish your submission or any part of your submission to be published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*.

Printed copies can be requested from NSW Fair Trading by calling 13 32 20.
You can provide a submission by email to policy@finance.nsw.gov.au or by post to the following address:

Easy and Transparent Trading Consultation Paper
Regulatory Policy, BRD
Department of Finance, Services and Innovation
Level 5, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

Submissions close 27 August 2018

NEXT STEPS

All submissions received will be acknowledged. Once the consultation period has closed, feedback will be analysed and all potential options assessed. More information about the progress of the review will be made available on NSW Fair Trading's website at www.fairtrading.nsw.gov.au

1. Making it easier to do business

The NSW Government is committed to a strong NSW economy and to making NSW the easiest state in which to start a business. Two of the focus areas for the NSW Productivity Commissioner are; Making it easier to do business, and making NSW the easiest state to move to.

This section is centred on removing unnecessary obligations that do not improve consumer outcomes, or worker safety and helping to deliver on these focus areas for the Innovation and Better Regulation portfolio.

The focus of the NSW Government is to create opportunities for businesses by reducing and removing barriers, costs and complexity and making existing regulation easier to navigate: it is about increasing economic freedom. Research suggests that more businesses will start if there are fewer procedures to comply with, and the cost of starting a business is reduced.[1]

This section is centred on removing obligations that impose unnecessary administrative or regulatory burdens on businesses and do not improve consumer outcomes or worker safety. Reducing unnecessary burdens like onerous licensing requirements, locational restrictions on where businesses may trade and duplicate financial reporting requirements will save NSW businesses time and money, so that they can focus on growing their organisation and developing new and innovative processes and products.

These reforms also give NSW businesses more freedom by reducing unnecessary government intervention, including giving businesses the opportunity to trade out of financial hardship and by progressing automatic mutual recognition to remove barriers to the movement of licensed workers in and out of NSW.

1.1 Extending licence durations

Context

NSW Fair Trading and SafeWork issue many accreditations, certificates and licences. Some have a one-year duration. Others have a three-year duration. Others have a five-year duration. A study by IPART on the maximum duration of licence types in NSW discovered a large variability across 769 licences:[2]

- 25% of licences had an ‘ongoing’ duration;
- 23% of licences had a duration between three and five years;
- 29% of licences had a duration less than three years; and
- 21% of licences had a one-year duration.

[1] Klapper, Leora, Raphael Amit and Mauro Guillen. 2010. “Entrepreneurship and Firm Formation across Countries.” In *International Differences in Entrepreneurship*, ed. Joshua Lerner and Antoinette Shoar. Chicago: University of Chicago Press

[2] Independent Pricing and Regulatory Tribunal, 'Chapter 7: Opportunities for ongoing licence reform'. *Reforming licensing in NSW: Review of licence rationale and design*, September 2014, p 221.

Policy objectives

Generally, the purpose of licensing schemes in the Fair Trading portfolio is to reduce consumer detriment by ensuring that only fit and proper persons are trading in the industry. The purpose of requiring licensees to renew their licence is to ensure that licensee details are up-to date so that the regulator can more closely monitor fitness and propriety and to collect revenue so that taxpayers do not disproportionately fund the regulation of an industry. However, these objectives should be achieved with as little hassle, inconvenience and expense being imposed on the industry as possible.

Extending licence durations will often result in the reduction of administrative burden and costs for businesses. In particular, licensees and regulators can save time and money by applying for and processing renewals less frequently.[3] These benefits have the potential to flow down to consumers by reducing prices for goods and services.

Consumer protection needs not be affected; the Commissioner for Fair Trading already has extensive powers to require licensees to provide her with information. This means she can audit a licensee to check their continuing fitness and propriety, and maintain an appropriate level of industry oversight.

Finally, licensing schemes should be consistent, unless there is a reason for different occupations to be treated differently. This is to ensure a measure of equality for citizens trading in different occupations.

Options for reform

1. *Maintaining the status quo*

Maintaining the current differing licence durations will continue to impose administrative burdens and costs on licensees and taxpayers, due to more frequent renewal processes. Additionally, the current differences across the licensing schemes will perpetuate often unjustified differential treatment of citizens trading in licensed occupations.

2. *Extend licence durations for temporal licences*

This is the preferred option. It is proposed to provide individuals with the option to renew their licence for one, three, or five-year periods across all licence types. Under this proposal, the Secretary would retain the power to grant or renew a licence for a shorter period than applied for in individual cases, when it is in the public interest to do so, for example because the licensee has had disciplinary issues and merits closer supervision.

This proposal would ensure consistency across occupations, provide more choice for licensees and lower administrative costs for licensees, while also continuing to protect consumers.

Questions

1. What option should be pursued?
2. Are there any factors that should be taken into account when making legislative change on this issue?

[3] Council of Australian Governments' National Licensing Steering Committee, Consultation Regulation Impact Statement, *Proposal for national licensing for property occupations*, 2012, pp 52-53.

1.2 Extending licence restoration periods

Context

Several weeks before a licence is due to expire, a licensee receives a renewal form from NSW Fair Trading or SafeWork, providing the individual with the option to renew online or in person at a Service NSW branch. If an individual does not renew on time or their licence expires, they may have to pay a 'restoration fee'. Generally, but not always, an individual will have three months to restore their licence once it expires. If an individual does not restore their licence in the three-month period, they will have to go through a new application process and pay a new application fee. This may be a lengthy process and the individual will be unable to trade until a new licence is issued. There are inconsistencies amongst licensing statutes for the restoration period when a licence has expired.

Policy objectives

The purpose of licence restorations is to ensure that licensees who do not pose a risk to consumers but miss the deadline for their licence renewal are not disproportionately prejudiced for their lapse. Often such lapses can happen for legitimate reasons.

However, because people should not be trading without a licence, such lapses should be rectified quickly.

Additionally, there should be similar licence restoration periods across licence categories (unless there is a special reason to depart from the standard restoration period), so that citizens trading in similar occupations are treated equally.

Options for reform

1. *Maintaining the status quo*

Licences with shorter restoration periods may increase the burden on individuals who are unable to renew their licence on reasonable grounds. These individuals will be required to re-apply for the licence which may put them out of work for a longer period of time and potentially exacerbate their situation.

2. *Provide a consistent three-month restoration period, with the Commissioner having the discretion to extend the restoration period, in exceptional circumstances*

This is the preferred option. This option will ensure consistency between licence categories, encourage licensees to promptly apply for a licence restoration, whilst conferring a power on the Commissioner which will enable her to deal with exceptional cases.

Questions

3. What option should be pursued?
4. Are there any factors that should be taken into account when making legislative change on this issue?

1.3 Increase the threshold for an owner builder permit

Context

The *Home Building Act 1989* generally prohibits individuals undertaking residential building and specialist work without an appropriate licence.

However, there is an exception for owner-builders. Owners can do building work on their home if the value of the labour and materials is less than $10,000. Where the market value of the building work is more than $10,000, the home owner must apply for an 'owner-builder' permit. There are restrictions on specialist work for owner-builders for safety reasons. For example, permits are not valid for specialist work such as plumbing, electrical or gas fitting.

To obtain a permit, home owners must also complete the *Work Health and Safety Training* for a construction site, a White Card Course ($70) and a general building instruction course known as an owner-builder course, which costs approximately $200 and takes about one week to complete.

In 2014, the Independent Pricing and Regulatory Tribunal (IPART) conducted an inquiry into licensing in NSW. The inquiry assessed all 769 licence types administered by the NSW Government against the IPART licensing framework and identified specific reforms to reduce red tape and improve economic outputs for NSW. The inquiry recommended that the NSW Government raise the value of the threshold for requiring an owner-builder permit to $20,000 by 2018.

Policy objectives

The purpose of the owner-builder permit threshold is to strike the right balance between, on the one hand, not imposing any unnecessary administrative burden on citizens, while ensuring that building work is done safely and to the requisite standard. Additionally, the threshold needs to increase over time to account for increases in building costs.

Options for reform

1. *Maintain the status quo*

This does not reduce red-tape for owner builders.

2. *Increasing the value threshold of the owner-builder permit to $20,000*

This is the preferred approach. Increasing the value threshold will only require homeowners to apply for a owner-builder permit when the value of the labour and materials exceeds $20,000. This will expand the scope of renovations a homeowner can undertake themselves, reducing red-tape and cost. For example, increasing the threshold to $20,000 will allow an owner-builder to build a deck or undertake a bathroom renovation without requiring a licence. Noting that Western Australia sets the threshold at $20,000, and that homebuilders are incentivised to do good, safe work, it is considered (subject to consultation) more appropriate to increase the threshold to $20,000.

Questions

5. Where should the financial threshold for an owner-builder permit in NSW be set?
6. What should be considered when setting the threshold for an owner-builder permit?

1.4 Exemptions from tow truck licensing requirements

Context

The *Tow Truck Industry Act 1998* ("the TTIA") was introduced to address specific concerns about the tow truck industry, including unacceptable, and at times, criminal behaviour. The TTIA requires any person who undertakes the towing of a motor vehicle using a tow truck, in the course of their business, to hold a tow truck operators licence.

Under the TTIA, operators can only use tow trucks that are specified in their licence and only certified drivers can drive and/or operate licensed tow trucks. In addition, operators must comply with detailed record keeping and record retention requirements, including keeping records of towing authorisations, non-accident tows, vehicles held in holding yards, drivers, tow trucks, tow truck usage, towing charges and invoicing.

Clause 13 of the *Tow Truck Industry Regulation 2008* exempts tow trucks that are registered outside NSW. For example, this means that interstate Recreational Vehicle (RV) businesses that exhibit at NSW caravan and camping expos and use tow trucks to transport their RVs, are relieved of the compliance burden imposed on NSW businesses.

The policy objectives

The purpose of the TTIA is to ensure that a tow truck business that has "the potential to influence the safety and efficiency of the road network and affect the experience of road users and other stakeholders through its business operations and conduct"[4] is a fit and proper business to do so. There is a high risk of consumer detriment when consumers need the services of a tow truck operator following an accident or breakdown and there is a need to protect consumers against this risk.

However, the requirements of the TTIA are onerous and should not be imposed on businesses whose conduct does no give rise to that risk.

Options for reform

1. *Maintain the status quo*

The difficulty with the status quo is that, although it protects consumers from misconduct and criminal behaviour, it regulates and imposes heavy burdens on those who do not give rise to consumer risk. Such businesses include businesses transporting their own equipment from one business location to another.

2. *Narrow the scope of the TTIA so that it does not require a licence for tow trucking that is incidental to the carrying on of a non-tow truck related business (e.g. taking a caravan from a dealership to a trade show)*

This would reduce some of the regulatory burden but would be difficult to define. On one view some uncertainty or lack of clarity could still exist as to whether or not a tow truck licence was required.

3. *Amend the Act to only require a tow truck licence when providing services directly to consumers*

This is the preferred option. This would effectively exclude a vehicle manufacturing or retailing business from the tow truck regulatory regime that uses its own trucks to transport vehicles to and from showrooms, expo venues and customers. This will reduce cost,

[4] *Independent Pricing and Regulatory Tribunal, Review of tow truck fees and licensing in NSW*, Transport – Final Report, December 2014, p 24.

inconvenience and administrative burden for business with no increase in risk of consumer harm.

Questions

7. What option should be pursued?
8. Are there any factors that should be taken into account when making legislative change on this issue?
9. Are there any unintended consequences with taking the above preferred option?

1.5 Real estate auctioneer licence

Context

Real estate and stock & station auctioneers are licensed to auction real property and stock on behalf of others for a fee. In NSW, it is a prerequisite to be an auctioneer that the person has obtained and holds a real estate agent's licence or a stock and station agent's licence. Other jurisdictions (Queensland, Western Australia and the Northern Territory) enable a person to be licensed separately as an auctioneer, without needing to also hold another licence as a prerequisite. In NSW, a person does not need a licence to auction personal property.

Policy objectives

The purpose of licensing laws with respect to real estate agents is to ensure that real estate agents discharge their functions in a fair, lawful and honest manner which does not improperly cause consumer detriment. However, auctioneers should not be required to undertake training or perform tasks that are not necessary to fulfil that purpose.

Options for reform

1. *Maintain the status quo*

Currently auctioneers are required to obtain a licence which requires them to be trained in matters that they do not need to be trained in to practice proficiently.

2. *Separate licence category for auctioneers*

This option would provide many of the benefits identified in the case for change; however, it would still require a licence of some sort to be obtained.

3. *Remove the requirement to hold an endorsed licence to be an auctioneer, if a licensed real estate agent has engaged the auctioneer and is present at the auction*

This is the preferred option. Removing the need to hold a licence altogether would likely provide the greatest net benefit. It achieves the aim of reducing costs for auctioneers. Consumer protections will be maintained by requiring engagement through an agent, who must also be present at the time of the auction. This reform could increase the pool of auctioneers and thereby increase competition, lowering prices for consumers. Auctioneers from other fields may be willing to conduct auctions of real estate or stock without the training and costs imposed by the current system.

Question

10. Would there be any unintended consequences with implementing the above option?

1.6 Removing 13 categories of home building licences

Context

NSW Fair Trading requires licences for approximately 40 categories of residential building and specialist work under the *Home Building Act 1989*. The categories cover work ranging from general residential building work to minor trades. For example, the installation of splashbacks, paving and painting.

The purpose of the *Home Building Act* is to protect consumers. Accordingly:

- sections 7-7E set out licensee requirements with respect to contracts to ensure that consumers have adequate notice of key contractual terms, the contract contains certain details and that it is fair;
- sections 8-8A set out certain protections for consumers to ensure that they do not pay for services that are not rendered;
- sections 22, 33A, 51 and 56 deal with the cancellation of authorities, disqualification from holding authorities, improper conduct and the grounds on which disciplinary action may be taken. Each is concerned with criminal conduct or conduct that may evidence a propensity to engage in conduct that puts consumers at risk;
- sections 48E-48F confer on inspectors the power to make rectification orders;
- part 2C sets out statutory warranties; and
- part 6 sets out a scheme for insurance.

The *Home Building Act* is not the only source of consumer protections. The *Australian Consumer Law* (ACL) also sets out a number of consumer protections including requirements that traders not engage in deceptive and misleading conduct, unconscionable conduct or contract on unfair terms and implies into consumer contracts consumer guarantees including that goods be of an acceptable quality (including safe) and services must be fit for purpose and be provided with acceptable care and skill or technical knowledge and taking all necessary steps to avoid loss and damage. Additionally, consumers have the benefit of a number of common law principles, including in the areas of contract law, equitable principles regarding unconscionable conduct and tort law.

The *Work Health and Safety Act 2011* also sets out a number of general protections to ensure the health and safety of workers.

The nature of licensing schemes

Licensing schemes of the type provided by the *Home Building Act* prohibit a person from trading or working in an industry or occupation without an authority to trade or work being granted by the regulator. As in the case of *Home Building Act*, the regulator's power to grant an authority is ordinarily conditional on the payment of a licensing fee and/or the regulator being satisfied of the person's fitness and propriety to trade or work, having regard to some public policy concerns. Licensing fees ensure that this section of the community, which benefits from an industry's regulation, pays a greater portion of the costs of doing so.

Requiring that an independent regulator assess a person's fitness and propriety prior to their trading in a certain industry or working in a certain occupation reduces the likelihood that the person will engage in conduct that is relevantly against the public interest.

Licensing schemes can also prescribe professional development requirements, which, not only lead to minimum standards being satisfied, but may help drive excellence in a field.

Licensing schemes are not the only means by which public policy benefits can be brought about. In the case of consumer protection, a consumer's primary protection is due diligence, including reading reviews of a trader's performance, acting on referrals, not rehiring traders who have done a bad job and assessing qualifications. However, there may be reasonable grounds on which consumers may be unable to complete effective due diligence. For example, they may not have the expertise to assess trader competence or the value of the work may not justify the costs of completing extensive due diligence, including time and inconvenience.

There may be non-regulatory alternatives to a licensing scheme. Where the public interest is in reducing consumer detriment, that may be providing consumers with more information so that they may better complete due diligence on a transaction.

A regulatory alternative to licensing a trade or occupation is regulating trader conduct. On this model, any person may trade or work in the industry or occupation, but, if they fail to satisfy certain standards, then they will be required to pay compensation, remedy the deficiency or face other penalties. The ACL provides an example of this model: it imposes penalties for (and requires traders to rectify) departures from certain minimum standards, such as engaging in misleading and deceptive conduct or supplying goods that are not of acceptable quality.

Another regulatory alternative to a licensing scheme is a negative licensing scheme. This allows a person to trade in a certain industry or work in a certain occupation without an authority, but confers the power on the regulator to prohibit the person from continuing to trade in that industry if they engage in misconduct.

It is appropriate to observe that licensing schemes, such as that provided by the *Home Building Act*, incorporate each of these elements: prescribing and enforcing minimum standards and conferring on regulators the power to prohibit a person trading in a certain industry or working in that occupation because of misconduct. However, they impose the additional requirement of a pre-emptive assessment of fitness and propriety, continuing professional development requirements and payment of licensing fees.

Licensing schemes also involve a number of costs:

First, licensing schemes are costly to administer and enforce: officials need to review and assess licence applications and assess complaints and conduct disciplinary investigations.

Second, licensing schemes create barriers to entry, resulting in less competition.

Third, licensing schemes may unnecessarily constrain an individual's economic freedom. Often licensing schemes set out grounds on which a licence may be refused or cancelled, such grounds evidencing that the person is not a fit and proper person to engage in the relevant industry. However, predictions as to future conduct are not always accurate; regulators can make the wrong decision.

Fourth, licensing schemes can stifle innovation because they can prescribe methods of work or qualifications which are not best suited to the industry. This result may especially arise if licensing requirements do not keep up with changes in technology.

When a licensing scheme may be the appropriate regulatory response

The Better Regulation Principles

The NSW Government's Better Regulations Principles are:

Principle 1: The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.

Principle 2: The objective of government action should be clear.

Principle 3: The impact of government action should be properly understood by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.

Principle 4: Government action should be effective and proportional.

Principle 5: Consultation with business and the community should inform regulatory development.

Principle 6: The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.

Principle 7: Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.

Principles 1-4 concern substantive policies. The balance concerns the process of developing and administering regulation. The premise of the substantive principles is that the test for regulation of any sort, including licensing, is whether that regulation best advances the public interest. Assessing a policy proposal against that question involves three steps. *First*, it requires a precise articulation of the social mischief in need of remedy (principles 1 and 2).

Second, it requires the identification of the potential remedies to the mischief, including those already implemented through other government policies, including laws (principle 3).

Third, it requires ranking the extent to which those remedies (in combination or alone) and the status quo advance the public interest. This involves assessing the totality of the extent to which the policy will remedy the mischief, the negative consequences of implementing the remedy and any ancillary benefits that may flow from the policy's implementation. It will also involve value judgments of how the public interest is to be assessed (principles 1, 3 and 4).

Because licensing requires regular industry-wide assessments of fitness and propriety by administrative officials and a general prohibition on trade, it has the highest implementation cost of any regulatory response and most impinges on citizens' economic freedom.

Additionally, many of the benefits of licensing can be achieved by regulating conduct and, if necessary, implementing a negative licensing scheme. As such, a licensing scheme will only best advance the public interest if one or a number of the three unique characteristics of a licensing scheme – pre-assessment of fitness and propriety, fee collection and continuing professional development requirements ("the conditions for a licensing scheme") – outweigh that cost. That directs attention to when those characteristics will carry substantial or weighty benefits.

In the context of consumer protection, an assessment of fitness and propriety involves assessing the risk posed by a person trading in an industry or working in an occupation having regard to the person's character and skills and the gravity of the consequences of any misconduct. The need for such an assessment increases the greater:

- the expertise required to proficiently trade in the industry or work in an occupation;
- the extent to which the industry attracts persons of poor character; and
- the gravity of any adverse consequences that may accompany misconduct, for example because the misconduct involves criminal activity, puts at risk a large sum of consumer money, involves substantial health and safety risks, or would be costly to rectify.

Government will be required to do this assessment (through pre-assessment) where there is a real risk of consumers not being able to protect themselves against substantial adverse consequences.

Fee collection will be required the more a sector requires a disproportionate level of resources devoted to its regulation. That will increase the greater the expertise required to regulate the industry, and the greater number of complaints that Government will have to deal with, including through the courts.

Continuing professional development will be required where high levels of expert knowledge are required to proficiently or lawfully trade in the industry or work in an occupation and that body of knowledge changes rapidly.

The IPART Framework

IPART commissioned Price Waterhouse Coopers (PWC) to develop a framework to assess whether a licensing scheme is the most appropriate regulatory response to a particular problem. In its Final Report entitled *Reforming licensing in NSW*, IPART set out four propositions that PWC advised must be established to justify a licensing scheme (at 45):

"1. there is an ongoing need for government to intervene
2. existing or generic laws are insufficient to address the problem
3. there is an ongoing need for specific regulation in this area – ie, that non-regulatory approaches are insufficient to address the problem, and
4. licensing is required to address the policy objectives."

As to the first proposition in the first stage, IPART considered that an ongoing need for Government intervention would be established only if there is a rationale for Government to intervene and that the benefit of such intervention exceeds the costs. IPART refers (at 45) to PWC's view that:

"this is likely to occur where **all** of the following factors are present:

- the risk of detriment from no action is high (using a simple risk assessment)
- the ability to remedy is poor, and
- the market is unable or unlikely to respond to solve the problem." [emphasis original]

The second proposition is concerned with identifying whether other laws address a particular problem.

The third proposition is concerned with identifying whether non-regulatory Government action, such as education, may more effectively remedy the social mischief.

The fourth proposition addresses the issue of whether licensing is the most appropriate regulatory response. In IPART's words (at 49):

> "It does this by requiring the regulator to:
>
> 1. clearly define the policy objectives of the specific regulation, and then to consider whether each of these objectives match the functions that licensing can achieve
> 2. consider whether licensing is the best option to perform those functions."

These propositions were set out in stage 1 of a four-stage test for licensing schemes. Relevantly, PWC explained (*A best practice approach to designing and reviewing licensing schemes – DRAFT guidance material* at 7) that the fourth stage involved the following questions:

> "Does a preliminary assessment suggest licensing will result in a net benefit?
> Are there other alternative options that could deliver policy objectives?
> Does a cost benefit analysis show licensing is the optimal option?"

The purpose of stage 1 was to act as a "screen tool to identify whether licensing should even be considered as a potential option" (PWC at 6), for this reason stages 1 and 4 overlap.

Case for change

The better regulation principles

As explained above, the primary purpose of *Home Building Act 1989* licences is to protect consumers from substandard workmanship and from financial loss arising from misconduct. An ancillary benefit of licensing is that tradespeople are required to have qualifications requiring them to know how to complete the work safely. As such, although maintaining work health and safety standards is not the focus of the *Home Building Act 1989*, it is arguable that its licensing scheme increases work health and safety standards.

The *Home Building Act 1989* protections overlap with the ACL, including the consumer guarantee provisions, the common law and the *Work Health and Safety Act 2011*. Additionally, not all of the *Home Building Act 1989* protections need a licensing scheme to be enforced: for example, the payment protections provided by ss8-8A could apply to unlicensed traders; and s48E rectification orders could be issued to unlicensed traders, so long as the trader was competent to rectify the work. Combined, these measures would both render unlawful conduct that is against the public interest on consumer protection or work health and safety grounds, and provide consumers with quick remedies to have defective work, which does not cause extensive damage to a building or risk human safety, rectified.

List of licences proposed to be removed:

1. Decorating
2. Painting
3. Fencing
4. Glazing
5. Kitchen and Bathroom Benchtop installation
6. Splashback installation
7. Paving
8. Shower screen installation
9. Ducting/mechanical ventilation
10. Shade sails and shade systems installation
11. Dry Plastering
12. Wet Plastering
13. Minor Maintenance/Cleaning

That directs attention to whether any of the conditions needed for a licensing scheme are satisfied by the occupations regulated by the *Home Building Act 1989*. The trades and occupations identified in the breakout box do not appear to justify the pre-assessment, the additional revenue raising (to pay for the regulation of the industry) or knowledge which requires refreshing through training. These trades appear to involve less complex tasks, which, if done badly, are not likely to give rise to major safety risks or risks of significant financial detriment (for example because other building work is badly damaged).

The IPART framework

Removal of the specific licences, identified above, were also considered using the IPART licensing framework. Applying the framework to each of the licences in the box below showed that licensing is no longer required, as it adds to the regulatory burden without providing a demonstrable benefit. Removing the licensing requirement may lead to better outcomes, as the market will rely on quality of work – often rated publicly on review websites – rather than the possession of a licence to drive purchasing decisions.

Other considerations

Additionally, it is arguable that occupational licence types for certain minor trade work are no longer the most effective regulatory tool. Most of these jobs would fall under the current $5000 licence threshold, allowing traders to do the work without requiring a licence. There is no evidence that there are greater risks with work over $5000. It should also be remembered that these trades do not require a licence for commercial work, regardless of the value.

Options for reform

1. *Maintain the status quo*

This was not considered the best option, having regard to the conclusions set out above.

2. *Remove the requirement to hold a licence for the above 13 categories*

In removing the requirements for these licences, consumers will still be protected under the ACL and through the retention of powers to issue rectification orders. Contract deposit progress payment requirements will also remain in place. These measures strengthen the protections offered by the ACL, and provide specific recourse for home building matters, ensuring that the removal of licence requirements will not expose consumers to increased risk. The result of removing the licences will be less cost for traders, and more competition.

Questions

11. Do you support the removal of the above 13 licence categories? If not, which do you believe need to be retained and why?
12. Are there any other licences categories that you believe should be removed?

1.7 LP gas and electricity licence category

Context

In NSW, a full gas or electrical trades licence takes at least three years to achieve. Because the installation of gas and electrical articles in RV's is relatively simple, the qualifications and training needed to attain a restricted licence solely for installing gas and electrical articles in RVs, without comprising safety, would be considerably less than that required for a full qualification. RVs can be high value (over $40,000) and are often purchased by vulnerable consumers, such as elderly retirees.

Queensland has introduced a gas work licence which is restricted to servicing and caravan certification. Under that licence, servicing and caravan certification licensees are permitted to service Type A gas devices (badged appliances) and associated gas systems including LP gas cylinders only, but not LP gas tanks. The scope of work includes testing, repairing, removing and refitting the same appliance if removed for service, but does not include installation of a new or identical device, or altering a device. In addition, licensees are also permitted to inspect and service caravan installations and issue Gas System Compliance Certificates to meet relevant inspection/certification requirements of the *Petroleum and Gas (Production and Safety) Regulation 2004* (Qld).

Under the Queensland model, holders of such licences are not permitted to:

- install a new or replacement gas appliance of any type including 'like for like'. However, they may 'refit' the same appliance which was removed for cleaning or checking, but only in the same place and in the same way;
- carry out any installation, modification or repair to pipework other than tightening existing joints to seal any leakage; and
- accept or certify any work that is not in strict compliance with the standard.

Policy objectives

The purpose of gas and electrical licensing is to protect consumers and workers from poor workmanship and unsafe work practices. However, these policy objectives should be achieved with minimum cost and administrative burden.

Options for reform

1. *Maintain the status quo*

This was not considered to be the better option, as it imposes unnecessary costs.

2. *Create a separate restricted licence category for LP gas and electrical articles in caravans and other recreational vehicles, based upon the Qld model*

This is the preferred option. The training and knowledge requirements for a full licence are arguably disproportionate when compared to the expertise and knowledge required to work on an RV only. It can be difficult and costly for businesses to put their staff members through the required training. In addition, the gas, electrical, air-conditioning and refrigeration components of RVs are simpler to work on compared to the rest of the vehicle.

Introducing a new restricted licence category could be a positive way to help improve the sector. It could increase the supply of qualified tradespeople. A new category would allow persons to work on RVs without having to become fully qualified in the trade, saving them time and money. It could also provide an additional employment pathway for tradespersons

(i.e. a restricted licence as a 'stepping stone' to getting a full licence). At the same time, consumer protection could be enhanced by mandating units of competency in the licences that recognise the unique safety issues posed by these vehicles (e.g. mobility, rugged environments, use of DC/AC, solar, etc).

Questions

13. Do you support the creation of a separate licence category for LP gas and electrical articles in caravans and other recreational vehicles?
14. If so, should the gas and electrical units in the current RV qualifications be used as the base trade qualification, with additional units/requirements for a restricted licence?

1.8 Allowing licence holders to trade out of external administration

Context

The *Corporations Act 2001* (Cth) sets out a scheme that outlines how insolvent corporations can deal with their debts. Under the Act, a company can be placed in administration either voluntarily by its Directors, or involuntarily by its creditors that are owed money for goods or services provided to the company. When a corporation enters voluntary administration under the *Corporations Act 2001*, it may be allowed to trade out of financial difficulties if creditors consider that they will have more of their debts paid if the corporation continues to trade instead of being wound up in insolvency.

While the Corporations Act gives discretion to a corporation's creditors as to whether it continues to trade, a number of NSW Fair Trading statutes requires the Secretary to refuse licence applications and cancel current licences of corporations or of persons involved in the management of an externally administered corporation.

The laws listed contain provisions about how to not only deal with corporations that are in external administration, but also how to deal with individuals who have managed corporations into external administration.

These statutes include:

1. *The Home Building Act 1989;*
   - Apart from specific exceptions, the Act requires people who engage in home building work to be licensed.
   - Corporate licensees that are in external administration must have their licences cancelled and applications for such licences refused.

2. *The Conveyancers Licensing Act 2002;*
   - The Act requires that conveyancers who are not Australian legal practitioners to be licensed.
   - A corporation which is in external administration cannot be granted a licence and may also have their licence cancelled. If a corporation's directors had been a director of a corporation that went into external administration, that corporation may also be refused a licence and may have its licence cancelled.

3. *The Pawnbrokers and Second-hand Dealers Act 1996;*
   - The Act requires pawnbrokers and second-hand dealers to be licensed.

- A corporation which is in external administration or has a director or executive officer who is a director or executive officer of another corporation in external administration may not be granted a licence. Such a corporation may also have its licence cancelled.

4. *The Property, Stock and Business Agents Act 2002;* and
   - The Act deals with the licensing of real estate agents, stock and station agents, business agents, strata managing agents and on-site residential property managers.
   - A corporation must have a licence refused and may have it cancelled if it enters external administration. The Act also provides that an individual may have a licence refused and may have it cancelled, unless the Secretary is satisfied that the person took all reasonable steps to avoid the corporation going into external administration.

5. *The Retirement Villages Act 1999*.
   - The Act regulates who may operate a retirement village.
   - Under s. 57(2), a corporation which is under external administration cannot operate a retirement village, although it may be able to trade out of its financial difficulties.

Additionally, a number of statutes also provide that an individual's licence either must or may be cancelled or their application for a licence refused if they have been involved in the management of a corporation that has been in external administration during a certain period, such as the last three years.

Policy objectives

It is often misunderstood that external administration is only a means to wind up a corporation. Administration is not just a way of winding up a company, it also provides an opportunity for the business to trade out of financial hardship. When this occurs, it is beneficial for creditors who are able to have more of their debts paid, customers who are more likely to see their partially finished work completed, and for employees, contractors and suppliers who rely on the corporation for their livelihood. Licensing laws should not unduly obstruct this outcome.

As to individual licences, often corporations enter administration through no fault of their directors or management, but, rather because of external affairs, beyond their control, such as an industry down-turn. The purpose of having limited liability corporations is to allow those people to recover when economic conditions improve.

However, there have been instances where individuals have strategically allowed their corporation to go into administration only to re-commence trading with a new corporation shortly after. This strategy is commonly referred to as phoenixing. In such cases, the individual and the corporation they manage should not be licensed.

Additionally, the licensing of corporations is sometimes based on the fitness and propriety of those administering the corporation. When an administrator is appointed, it may be appropriate to review the licensing status of the corporation in light of that person's industry skills and expertise.

Finally, a consistent approach should be taken across occupational licences on this issue, unless there are good reasons for a differential approach, to ensure that citizens in different occupations are treated equally.

Options for reform

1. *Maintain the status quo*

Maintaining the status quo will ensure licence-holders managing administered businesses will not be afforded the opportunity to trade out of administration and may result in opportunity costs arising from the organisation being prevented from contributing back to the NSW economy if it trades out of financial hardship.

2. *Amend the requirement in Fair Trading laws relating to the mandatory cancellation of licences*

This is the preferred option. Under this option:

a. Any *requirement* to refuse or cancel a licence because the corporation is in external administration would be amended, such that the corporation's licence is only cancelled once a corporation is being wound up, or if the Secretary is satisfied that the administrator is not a fit and proper person to manage the corporation in the relevant industry, having regard to their industry expertise.

b. Any *requirement* to refuse an application for a corporate licence or cancel a corporate licence because the corporation's directors or senior employees have been concerned with the management of a corporation that has entered into external administration would be amended such that the Secretary has a *discretion* to refuse the application or cancellation.

c. Any *requirement* to refuse an application to renew a personal licence or to cancel a personal licence because an individual has been involved in the management of a corporation that has entered external administration would be amended such that the Secretary would have the *discretion* to refuse the licence renewal or to cancel the licence because of the individual's involvement in such a corporation in the previous three years.

d. Any *requirement* to refuse an application for a new personal licence because of the applicant's involvement in the management of a corporation that has entered external administration will be standardised such that the involvement is limited to that of the three years prior to the application for the licence and the licence may still be granted if the Secretary is satisfied that the individual took reasonable steps to avoid the corporation entering into external administration.

This option would allow corporations to trade out of administration, but help prevent the practice of 'phoenixing', where individuals strategically allow their corporation to go into administration, only to re-commence trading with a new corporation soon afterwards. It would also provide consistency across occupations.

Questions

15. Should the cancellation of an individual and/or corporation licence due to external administration be mandatory? Why?
16. Are there any alternative options that would more effectively address this issue?

1.9 Streamlining financial reporting requirements

Context

A number of statutes contain record keeping requirements for financial information that has to be provided to different Government agencies.

i. Charitable fundraising sector

Currently, charities, non-for-profit organisations or incorporated associations that conduct authorised charitable fundraising appeals in NSW are required to prepare audited financial reports for Fair Trading, if their annual proceeds from fundraising are over $250,000. However, if these organisations are registered with the Australian Charities and Non-for-profit Commission (ACNC), then they also need to report separately to the ACNC.

It is not compulsory for charities or non-for-profit organisations to register with the ACNC, however there is an incentive to register if they wish to obtain tax benefits such as the deductible gift recipient status. The ACNC imposes rigorous financial accountability and organisational governance requirements on registrants. The ACNC has various requirements depending on the size of the charity:

- Small charities (annual revenue of less than $250,000) must submit an Annual Information Statement which does not need to be audited;
- Medium charities (annual revenue of between $250,000 and $1,000,000) must submit an Annual Information Statement and a Financial Report that is either reviewed or audited; and
- Large charities (annual revenue over $1,000,000) must submit an Annual Information Statement and an annual audited Financial Report.

If the organisation is incorporated, they are required to fulfil their obligations under the *Incorporated Associations Act 2009 (NSW)*. Tier one associations (annual revenue over $250,000 *or* assets over $500,000) must prepare and submit to the Annual General Meeting (AGM) and the Secretary a financial statement and auditors report. Tier two associations (annual revenue under $250,000 and assets under $500,000) must prepare a financial statement to the AGM and the Secretary.

ii. Conveyancers

When a licensed conveyancer receives money on another person's behalf in connection with the licensee's conveyancing business, the licensee is required to hold that money on trust. Such trusts are to be audited annually. However, there are a number of overlapping requirements with respect to such reports:

- the licensed conveyancer is to lodge the auditor's report with Fair Trading;
- the licensed conveyancer is to keep the audit report for three years; and
- the auditor is to provide Fair Trading with a copy of the report.

iii. Architects

Under cl. 10 of the NSW Architects Code of Professional Conduct (the Architect's Code), which has force pursuant to s 7 of the *Architects Act 2003*, an architect must keep the following records concerning architectural services provided to a client:

(a) correspondence sent and received,

(b) financial transactions, and

(c) client instructions and meetings held with the client.

Policy objectives

Regulators need information to enforce consumer protection laws. However, obtaining such information, for example by requiring citizens to hold records or provide them to Government, should impose as little burden as possible. Accordingly, such record keeping and reporting requirements should not be duplicative and should not be disproportionate.

Options for reform

1. *Maintain the status quo*

This option ignores the harmonisation approach that is supported across the national charity and non-for-profit sector. Charities will continue to spend a considerable amount of time and resources to produce duplicative financial reports to multiple regulators, in some cases audited, which could instead be spent towards achieving their charitable purpose. Further, other industries such as conveyancers will be subject to unnecessary overlapping reporting requirements. It is not supported.

2. *Streamline financial reporting requirements across industries*

This is the preferred approach. It is proposed that organisations registered with the ACNC would only need to comply with ACNC requirements. The Minister may retain a separate financial accountability and governance scheme in the Act for organisations who do not register with the ACNC. It is also proposed that duplicative reporting requirements be removed for charitable fundraisers that are incorporated associations in NSW and are also registered with the ACNC.

It is also proposed to abolish the requirement for licensed conveyancers to provide their audit report to Fair Trading and to keep it for three years. The requirement for the auditor to provide a copy of the auditor's report to Fair Trading will be retained. This will reduce the overlapping requirement and reduce administrative burden for conveyancers. It aligns with recent reforms to the property industry. There is an online portal being developed to enable auditors to submit their reports to Fair Trading in relation to licensed real estate agents. Auditor reports for conveyancers could potentially be added once to this service.

It is also proposed to abolish the requirement for architects to keep the records required to be kept under cl. 10 of the Architect's Code. Such record keeping should be left to architects to determine as a matter of their professional practice.

Questions

17. Are any of the reporting and record keeping requirements set out above still necessary? If yes, why?
18. Are there further record keeping requirements that may be abolished (without impacting consumer protection or worker safety) required by laws in the Minister's portfolio?

1.10 Reducing locational restrictions on motor vehicle dealers

Context

The *Motor Dealers and Repairers Act 2013* regulates the manner in which a motor dealer may engage and trade with consumers. Currently, the holder of a motor dealers licence must not trade at a place other than the place of business specified in the licence.

An exception – albeit not a full exception – to this restriction is trade shows. At a trade show, licensed dealers are permitted to advise customers on the quality, performance and characteristics of the vehicles but can only make offers to enter into agreements for their sale. The receipt of a deposit may be permitted if the balance of the purchase price and exchange of the vehicle is concluded at the place of business specified in the licence. New South Wales is the only state that imposes this specific geographical restriction on motor vehicle dealers.

Policy objectives

Motor vehicle dealers should be able to trade at sites that are appropriate to be used as dealerships. However, that objective should be realised in the lowest cost way possible.

Options for reform

1. *Maintain the Status Quo*

This option maintains burdensome and unnecessary restrictions on licensed businesses and unnecessarily restrains businesses from engaging with bona fide consumers. In an age where consumer transactions are increasingly occurring online, it is doubtful whether such restrictions on trade are necessary. NSW Fair Trading already investigates breaches of building licensing laws where building licences are not site-specific. Likewise, the ACL applies to businesses across the state, which NSW Fair Trading has the capacity to investigate and enforce.

This option fails to deliver on the NSW Government's responsibility to ensure regulation imposes the least burden on businesses.

2. *Reduce locational restrictions on licence motor vehicle dealers*

This is the preferred approach. Under this option, licensed motor vehicle dealers will no longer be required to have a licence for each specific site and will be able to sell cars at trade shows. They will, however, be required to inform Fair Trading of any site where they propose to trade (other than a trade show) and it will be a condition that they have planning approval to trade at non-trade show sites. This will reduce red-tape without seeing car-lots springing up at improper locations.

Questions

19. Should traders be able to trade at premises other than that specified on their licence? If not, why?
20. Is there an alternative, more appropriate approach to this issue? For example, by removing all licensing locational requirements for trading?

1.11 Streamlining uncollected goods regulation

Context

The purpose of the *Uncollected Goods Act 1995* is to protect owners of unclaimed goods, while ensuring bailees have a straightforward process to dispose of the goods where necessary. Common examples include clothes left for dry-cleaning that are never collected, a hotel's 'lost and found' or where a car is left for service or repairs and is never picked up and paid for. Different rules apply regarding how long the goods must be kept, what efforts must be made to return the goods to their owner and the process of selling or otherwise disposing of the goods. The thresholds have not changed for many years.

In this respect, if the value of the uncollected good is less than $100, the bailee may dispose of the goods if the bailor has been given notice in the prescribed way. If the uncollected goods are valued between $100 and $500, if people with a relevant interest in the goods have been given 3 months' notice in the prescribed manner. The goods may not be disposed of otherwise than by way of public auction or by private sale for a fair value. If the uncollected goods are valued between $500 and $5000, the bailee may dispose of the goods if the people with relevant interests have been given 6 months' notice in the prescribed form and newspaper advertisements have been published. Goods of this value must be disposed of other than by public auction. Goods of a value greater than $5000 may only be disposed of by court order.

If uncollected goods are sold, the proceeds from the sale becomes unpaid money and is paid to the Chief Commissioner for State Revenue: see the *Unclaimed Money Act 1995*. The owner of the money is then entitled to be paid that money, generally, within 6 years. The Chief Commissioner of State Revenue is to publish records regarding the unpaid money claim so that people can find it: s 12 of the *Unclaimed Money Act*.

Under s 23 of the *Uncollected Goods Act*, the *Uncollected Goods Regulation* may vary the limits set out above.

There is also a level of duplication, inconsistency and discrepancies between the general *Uncollected Goods Act* and specific provisions in other Acts, such as the *Residential Tenancies Act 2010,* the *Retirement Villages Act 1999* and the *Strata Schemes Management Act 2015,* that also address miscellaneous uncollected goods. In some of these other Acts, the provisions are quite prescriptive, including strict timeframes for action and requirements for newspaper notices.

Policy objectives

The purpose of the uncollected goods scheme is to protect the interests of those who have left goods, including those who have left goods unclaimed, while also ensuring that bailees do not have an overly burdensome process of disposing such goods. The schemes should be consistent across the circumstances to which they apply to ensure that citizens are being treated equally, unless there are sound reasons for a differential approach.

Options for reform

1. *Maintain the status quo*

The status quo involves overly burdensome processes having regard to the value of the goods involved.

2. *Raise the thresholds for the disposal of goods processes*

This would involve increasing the $500 and $5,000 limits to $1,000 and $10,000, respectively. This would reduce compliance costs on businesses whilst ensuring that are still sufficient consumer protections.

3. *Streamline and harmonise existing uncollected goods legislative provisions*

Options 2 & 3 are the preferred option. The various uncollected goods provisions could be streamlined and harmonised into one set of laws. An updated disposal regime could utilise more contemporary communication means instead of newspaper advertisements, an example of which is 'Probate Online'. It is also possible to increase the stipulated financial amounts applying to different value goods in the Act. This approach would retain requirements which ensure that goods are disposed of at fair value, and allow people with a proprietary interest in the goods to collect funds from any sale of unclaimed goods under the *Unclaimed Money Act 1995*. Victoria adopted a similar approach to their uncollected goods legislation in 2012, which is now a part of their ACL and *Fair Trading Act 1999.*

Questions

21. Would there be any unintended consequences with taking this possible action?
22. Are there any other changes to the uncollected goods regime that you would like to see?

1.12 Repealing redundant statutes

The Guide to Better Regulation requires that opportunities to simplify, repeal, reform or consolidate existing regulation should be considered. A review of the current statutes has identified the following further opportunities for repeal and consolidation.

Name of Act	What we have found?	Preferred option
Prices Regulation Act 1948	This Act was a legacy of war-time rationing and an attempt by the government to control inflation and profiteering in the immediate post-war period. It is outdated (e.g. telegrams etc.). The last orders made were in 1995 and set a price cap on the resale of NRL Grand Final tickets. All jurisdictions once had similar laws but only SA & NT retain their Acts today.	This outdated and unused Act be repealed. Sections 41 (re speculating in goods) & 42 (attempts to corner the market) will be retained and transferred into the *Fair Trading Act 1987*.
Innkeepers Act 1968	The original purpose of this Act was to overcome the common law strict liability that placed an unfair burden on innkeepers for property of guests lost or stolen during their stay. The cap of $100 has not been changed in 50 years and is the lowest of all States. The Act contains outdated provisions such as the exclusion of a traveller's horse and harness equipment. Innkeepers are burdened by	The Victorian approach be adopted. The Act be repealed subject to provisions which still retain a useful purpose being redrafted in modern language and transferred into the Fair Trading Act. The liability cap could be raised to $300 in line with other states or higher to take into account actual inflation

	having to place a notice on the back of each room door. In 2012, Victoria repealed their Act and inserted relevant provisions into their Fair Trading Act.	over the past 50 years (i.e. this would be approximately $1100). The need for signage in each room can be removed and notice given instead at reception and in the booking terms and conditions.
Landlord and Tenant (Amendment) Act 1948	This Act was introduced as a post war measure to provide rent control and security of tenure for tenants, particularly servicemen and their families. A series of amendments over the decades has reduced the Act's coverage significantly. The law was last amended to prevent tenancies created after 1 January 1986 from having 'protected' status. Current laws allow protections to transfer to surviving spouse or a dependent child. NSW is the only state which retains this Act. Victoria was the last state to repeal its protected tenancies legislation in 2010. They inserted a savings provision into their *Residential Tenancies Act* stating that provisions regarding the control of rents and recovery of possession continued to apply to each 'protected tenant' until their death, or the death of any partner.	NSW follow the Victorian approach and repeal the Act, with appropriate savings provisions inserted into the *Residential Tenancies Act 2010* to protect the rights of the few remaining protected tenants (and their spouses) until their deaths. The succession rights of dependent children should be removed. To facilitate future full repeal the savings provisions could be linked to a register of protected premises kept by NSW Fair Trading. Protected tenants could be given 12 months to register. Monitoring the register will enable NSW fair Trading to know when the laws are no longer applying to anyone and can be fully removed.
Landlord and Tenant Act 1899	The original purpose of this Act was to regulate all tenancies in NSW. The Act no longer has any practical application. It was repealed as part of earlier reforms in 2015 (with the date set for 29 June 2020).	The repeal date could be brought forward and proclaimed to commence before the end of 2018.
Rural Workers Accommodation Act 1969	Specific legislation to ensure that rural workers are provided with reasonable accommodation has been in place in NSW since 1901, when concerns about the poor working conditions endured by shearers and other rural workers led to the introduction of the *Shearers Accommodation Act*. This legislation was replaced in 1969 by the current Act which was updated in 2006 to include a Code of Practice. The need for specific stand-alone legislation is now questionable given the creation of an overarching duty in the *Work Health and Safety Act 2011* (WHS Act), which is based on the national WHS model laws. The WHS Act requires a Person Conducting a Business or Undertaking (PCBU) to, so far as is reasonably practicable, maintain workers accommodation (that is owned by or	The Act be repealed with the requirement to provide accommodation inserted into the *WHS Act*. Clause 19(4) of the Model WHS Act specifically contemplates matters relating to workers accommodation and clause (4) of Schedule 1 expressly anticipates the making of regulations relating to the protection and welfare of workers including 'matters relating to health and safety in relation to accommodation provided to workers.' The current Code of Practice under the Act is quite extensive and possibly not all necessary. The Code could be reviewed as

	under the management or control of the PCBU) in such a way that workers occupying the premises are not exposed to risks to health and safety. There is potential to consolidate and modernise regulatory requirements for accommodation in the agricultural and pastoral sector. Most states have repealed their legislation with only Queensland retaining a specific Act.	part of the process of making the necessary amendments to the WHS laws. Consultation with stakeholders could identify any code provisions identified as necessary and not covered by other legislation which can be included in the WHS laws on the basis of a 'no net detriment to rural workers' approach.
Co-operative Housing and Starr-Bowkett Societies Act 1998	Starr-Bowkett societies are a terminating mutual organisation where each member of the organisation holds 'shares'. A ballot system determines the order in which members receive an interest free loan. Cooperative Housing Societies are also mutual organisations where the societies traditionally received funds as grants from Government or other sources which they then on-loaned to low income earners. The grant programs no longer exist for a variety of reasons and the remaining societies usually operate as a marketing entity to manage existing portfolios of loans. The sector has been in decline for many years with only four operational co-operative housing societies and nine Starr-Bowkett societies remaining. The last society was formed over 20 years ago. A separate and unique regulatory structure is no longer required.	Amend the *Co-operative Housing and Starr-Bowkett Societies Act 1998* to prohibit the registration of new societies, effectively 'grandfathering' the legislation and amend the *Fair Trading Act 1987* to prohibit similar societies from forming and carrying on business. DFSI will then investigate if the remaining societies can be transferred to the Commonwealth prudential regulatory framework, allowing the Act to be fully repealed in the future.

Questions

23. Would there be any unintended consequences with taking this possible action?
24. Are there any other redundant Acts in the Better Regulation portfolio that you would like to see repealed?

1.13 AMR – Architects and other building related occupations

Context

Automatic Mutual Recognition (AMR) allows an occupational licence holder in one jurisdiction to practice their occupation in another jurisdiction, without the need to apply for licence recognition. In effect, it allows a practitioner to work across the country with only one licence.

AMR schemes are currently in place for electricians in the eastern states of Australia, and for veterinarians in all Australian states except for Western Australia. These schemes were motivated by concerns to reduce unnecessary regulative and duplicative burdens, especially in border areas, and to assist in recovery efforts following major natural disasters.

Policy objectives

The benefit of AMR is that it allows a seamless transition for licensed individuals working in a jurisdiction that is outside of their home jurisdiction. It facilitates labour mobility and reduces regulatory burden and costs for businesses, which increases competition and productivity. These benefits potentially flow down to consumers by increasing choice, reducing prices and improving the quality of the services available.

Discussion

The Commonwealth Productivity Commission's 2015 research report on Mutual Recognition schemes identified automatic mutual recognition as a cost-effective method of achieving national harmonisation and cross-border movement.[5] The report also recommended that all Australian jurisdictions should adopt a proposed AMR scheme for architects. DFSI is also responsible for advancing automatic mutual recognition for architects and plumbers, drainers and gasfitters in the NSW Cross-Border Commissioner's work list for the Queensland – NSW and ACT – NSW cross border agreements.[6] This is because the regulation of architects, and plumbers, drainers and gasfitters, are in the Innovation and Better Regulation portfolio.

Architecture is an occupation that is appropriate to AMR, as the current training and qualification requirements are similar across jurisdictions. The requirements for registration as an architect in all states and territories have been harmonised by the Architect's Accreditation Council of Australia (AACA). Candidates must complete a five-year higher education program leading to an accredited Master of Architecture qualification, obtain at least two years' experience in the industry, and pass a three-part competency assessment process to be registered.

Plumbers, drainers and gasfitters were also identified in the Productivity Commission Report as being well suited to AMR. These occupations are trained in a nationally consistent manner and the regulated work must be performed to national standards. Critical plumbing, draining and gas-fitting work must be notified to regulatory authorities and a compliance certificate must be provided to the consumer. Unlicensed work is an offence in all jurisdictions.

These occupations and other building trades are normally carried out by small businesses whose workplace is the work site and not a fixed business premises. Accordingly, these licensed trade workers must hold two different licenses to work in their neighbourhood if they

[5] https://www.pc.gov.au/inquiries/completed/mutual-recognition-schemes/report
[6] https://www.dpc.nsw.gov.au/programs-and-services/nsw-cross-border-commissioner/about-the-office-of-the-nsw-cross-border-commissioner/

live on a border. It is only their geographic location which brings about this additional regulatory cost.

However, NSW traders should not be disadvantaged because other jurisdictions do not implement AMR. As such, it should only apply on a reciprocal basis.

Options for reform

1. *Maintain the status quo*

Under this option, there will continue to be restrictions to labour mobility, business productivity and competition for architects, plumbers, gasfitters and drainers. Without an automatic recognition arrangement, licensed individuals in these occupations need to apply, under mutual recognition, for another registration to work outside of their home jurisdiction. These multiple registrations are likely to cause impediments to the movement of licensed individuals across borders and impose additional application and registration costs.

2. *Introduce AMR for architects and other building occupations*

This is the preferred option

An AMR scheme for architects and other building occupations will allow a seamless transition for licensed individuals working in a jurisdiction that is outside of their home jurisdiction. The scheme would facilitate labour mobility and reduce regulatory burden and costs for businesses, which could increase competition and productivity. These benefits could potentially flow down to consumers by increasing choice, reducing prices and improving the quality of the services available. Jurisdictions will continue to separately regulate the occupations. However, this approach will need the support of the relevant Ministers in other jurisdictions to be implemented effectively. The Minister is currently contacting States and Territories in order to start a national discussion on AMR.

NSW will only offer AMR for traders in jurisdictions where AMR is reciprocated.

Questions

25. Which other licence categories administered by Fair Trading or SafeWork would AMR be of most value?

1.14 ID requirements

Context

Service NSW currently uses nine different methods of proving a customer's identity across forty Department of Finance, Services and Innovation transactions alone. The requirements differ across licence types and vary from the provision of simple information such as a driver's licence number to more stringent controls such as fingerprinting. For example, applicants for high-risk work or conveyancer licences need to provide one form of non-specific proof of identity whereas an applicant for an owner builder's permit needs to provide three forms of proof of identity from a list of 10 Australian identity documents. In addition, some licence types require certified documents, whereas other do not accept certified documents and require applicants to submit the application form in person.

Policy objective

To assist consumers by streamlining the proof of identity requirements so that consumers have to use no more than three methods. There may be scope to have a common

requirement for all licences, with more stringent industry-specific requirements where necessary for high risk licence types.

Discussion

The Department of Finance, Services and Innovation is currently developing options to streamline the identity verification requirements for transactions performed by Service NSW to reduce the regulatory burden on applicants. Streamlining may be based on characteristics such as risk or the implications of a transaction. This work includes reviewing the face to face requirements for some licence type applications, reducing requirements for fresh proof of identity at the renewal stage for some licences, and potentially removing the requirement for applicants to attend a post office to submit an application. Work will initially commence on forty licence types identified within the Innovation and Better Regulation portfolio as a pilot for the proposal. If successful it will be expanded across all appropriate NSW licences.

1.15 Review of Continuing Professional Development (CPD) requirements

Context

The Innovation and Better Regulation Portfolio currently has inconsistent CPD requirements across the licence regimes. Not every category of licence is required to undertake CPD, and the categories of licence that are required to undertake CPD as a condition of their licence are subject to varying annual requirements (from 5 points to 15 points).

The final report of the IPART Review of Licensing in NSW also recommended that an independent overarching review of CPD requirements across Government should be undertaken.

Discussion

To ensure that CPD continues to provide the intended benefits, and that the costs of compliance do not outweigh those benefits, in line with the IPART recommendation, consideration is being given to undertaking an external review of the CPD requirements across the Better Regulation portfolio in 2019. This review would also encompass improving the consistency of IPART requirements across the portfolio, and ensuring that the requirements for each licensing regime are still reasonable.

If the review determined that CPD still delivered valuable benefits for some, or all of the licensing regimes, then the review could consider whether the existing structures and specific requirements are the most appropriate. However, if the review considered that CPD requirements should be altered, this will also be considered.

Questions

26. What issues should be considered in the proposed review of CPD arrangements?
27. Should a review of CPD requirements be undertaken across the whole of the NSW Government first rather than commence in the Innovation and Better Regulation portfolio?

2. Increasing transparency and consumer choice

Transparency in the market helps consumers make informed choices. Accurate, relevant and easily accessible information increases individual autonomy and supports their right to make meaningful decisions on issues that impact their lives. Ideally, consumers would have any information available to them that may affect their decision to purchase a particular product or service at a particular price.

One of the primary reasons for government intervention in a market is to address information asymmetry to create a level playing field. It means that consumers can make the best choice for themselves based on all the available information.

Because one purpose of transparency is to allow consumers to make better comparisons between goods and services, it is also important that the information is in a form which allows products and services to be easily compared.

The NSW Government provides a range of quality services to consumers to inform smart decision making, such as Fuel Check, and Fair Trading and SafeWork online licence registers. The possible reforms discussed in this section aim to extend existing services to new and existing industries and provide new services that benefit both consumers and businesses across the Better Regulation portfolio.

2.1 Notice of key terms in a consumer contract

Context

Everyday experience indicates that consumers do not always fully inform themselves of the terms and conditions on which they transact. Frequently, consumers press “agree” to online terms and conditions without reading them or sign a contract without having read it first. In testimony to the US Congress, Facebook CEO, Mr Mark Zuckerberg, in response to the proposition that a very small percentage of Facebook users “actually read the terms of service, the privacy policy, the statement of rights and responsibilities” accepted that “most people do not read the whole thing”. The issue is not new: over 45 years ago, Lord Denning MR observed in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, on a series of cases relating to tickets for travel that “[n]o customer in a thousand ever read the conditions. If he stopped to do so, he would have missed the train or the boat.”

Often such terms and conditions are lengthy, difficult to find and are not written in plain English: CHOICE found that Amazon Kindle's terms and conditions contained 73,198 words and took nine hours for a person to read out loud. Another major e-reader brand on the market, Kobo, had 9,844 words in its terms and conditions. Facebook has at least five sets of relevant terms and conditions, policies and guidelines, totalling more than 8,500 words.

Some of the adverse consequences that can arise when consumers do not understand the terms and conditions they have agreed to include: having their personal data used in a

manner they did not expect; waiving the liability of the trader; bearing the risks for shipping after making an online purchase; and being rolled onto inferior contracts.

Policy objectives

Central to enable consumers to economically thrive is ensuring that they have the economic freedom needed to choose what is best for them. *Meaningful* choices require that individuals understand the nature of their decisions. In trade and commerce that includes understanding the terms and conditions on which they contract.

Consumers are unable to make the most appropriate decisions for themselves when entering into transactions relating to trade and commerce, if they do not fully understand the terms and conditions that are part of that transaction. If they make a decision based on inaccurate information, it may not be in their best interests, and could also send inaccurate market signals about their actual preferences.

Additionally, any obligation should provide consumers with as much certainty as possible and do so in the most cost-effective way.

Options for reform

There are a number of ways this problem could be addressed:

1. *An awareness campaign to encourage consumers to read the terms and conditions on consumer contracts.*

   This is unlikely to be successful because consumers are already regularly encouraged to read the terms and conditions of products.

2. *Creating a duty on traders not to take advantage of consumer ignorance arising from consumers not understanding terms and conditions.*

   The duty on traders would operate as a form of unconscionable conduct. If it were complied with, this approach could be effective, but it is likely to be hard to enforce.

3. *Requiring product disclosure statements in more industries*.

   There are a number of industries, including the retirement village, real estate and financial services industries that already require product disclosure statements. Although this model would provide certainty for business, and therefore reduce enforcement costs for consumers, regulators and traders, it could lead to gaps in regulation.

4. *Requiring traders to provide clear, upfront, explicit notice of terms that may substantially prejudice a consumer's interests, with those terms listed in statute.*

   The advantage of this approach is that it provides consumers with more notice of relevant terms, and businesses with certainty. The disadvantage of this approach is that there will always be terms which are not identified by the statute, resulting in regulatory gaps.

5. *Requiring traders to provide clear, upfront, explicit notice of terms that may substantially prejudice a consumer's interests, with a list of examples to provide more clarity as to the meaning of "substantially prejudice".*

   This option is preferred, as to the extent to which this option achieves the policy objectives, although this option does not provide the certainty of option four, it does not have the same risk of gaps.

Additionally, because the threshold of "substantially prejudicing" a consumer's interests is high, traders who take a prudential approach to disclosure will have scope to err on the side of caution. This proposal would provide more certainty to traders in enabling them to adopt compliant practices than existing "unconscionable conduct" or "unjust conduct" prohibitions. To reduce the regulatory burden on business it is proposed that the obligation would:

- apply to transactions involving consumers as defined by the ACL;
- only apply where there are terms and conditions for the sale of a product or service;
- not be required where a product disclosure statement is already mandatory; and
- not be required where a trader has previously dealt with a consumer and has provided the relevant notice.

Potential remedies for traders not giving consumers sufficient notice could be the unconscionable conduct remedies in the ACL, which include:

- compensation for loss or damage;
- financial penalties;
- having the contract declared void in whole or in part;
- having the contract or arrangement varied; and
- a refund or performance of specified services.

Questions

28. Do you agree that this issue needs to be addressed? If so, what key information should be disclosed to consumers in a contract?
29. What would be appropriate remedies for non-compliance?

2.2 Disclosure of Broker Commissions and Referral Fees

Context

When consumers are deciding whether to purchase a particular product or service, they have access to a range of information to help inform their decisions. Consumers often rely on third party businesses for referrals, professional advice, information or recommendations on goods and services. Referrals can come from a range of different sources, including accountants, travel agents, real estate agents, brokers and aggregation websites.

In many of these instances, a person or business does not disclose whether they have a commercial relationship with a service provider that they may be recommending, nor whether they will receive any financial benefit from a referral.

Financial incentives to sell products can bias, or at least appear to bias, the advice, information or recommendations provided to consumers. The issue of product/service advice, information or recommendations appearing to be biased because the provider of the advice is financially incentivised to recommend certain products is a longstanding issue. A recent example of this is the Australian Securities and Investments Commission finding that in 75% of cases that it reviewed, financial advisers provided advice that did not comply with the duty to act in the best interests of their clients.

Product aggregation websites are an emerging risk area. Product aggregation websites provide consumers with comparisons of goods and services on a range of criteria and can

be powerful tools in helping consumers make good purchasing decisions and encouraging competition. However, often such product aggregators receive commissions for the sale of products sold on their websites. It is unclear that consumers understand that products may only be shown on such websites if the website owner receives commissions on the products shown.

Policy Objective

Central to enabling people to thrive is ensuring that they have the economic freedom needed to choose what is best for them. *Meaningful* choices require an assessment of the options. When customers rely on referrals or recommendations, they do so on the assumption that the person making the recommendation or referral has objectively and dispassionately assessed those products. In the case of product aggregation websites, consumers assume that the products being aggregated are broadly reflective of the market and are being recommended in their interests.

However, where a person making a recommendation or referral receives a commission or referral fee from the product's seller, that person is incentivised to make the referral in the interests of maximising the commission or referral fee, not in the interest of the consumer. Advice that is biased in this way can lead to poor purchasing decisions, consumers entering transactions on false pretences and inaccurate market signals being sent as to consumer preferences.

For this reason, it is important that consumers understand whether the referrals, recommendations and information they receive are influenced by financial incentives so they can accurately assess their integrity.

In ensuring that consumers have such information, the interests of both consumers and traders need to be assessed together, so that the remedy does not unfairly impinge on the trader's economic freedom. Any obligation on this issue should provide businesses with clarity as to their legal obligations. In determining the form and scope of disclosures, the costs of disclosing commissions and referrals fees should be evaluated against the benefits of disclosure.

Case study - Comparison Websites

A number of comparison sites provide consumers with information and recommendations about a range of products (e.g. insurance products, utilities or hotels). Many comparison websites do not charge consumers; they make their money via commissions paid by the businesses to which they are referring customers.

Comparison websites have a number of benefits for consumers in that they:

- Save time in researching and comparing offers for products or services,
- Enable comparison of products that are often quite complex or involve a long-term investment,
- Match products or services that suit the customer's preferences,
- Help customers switch from one service provider to another with relative ease.

On the other hand, the information and recommendations do not always cover all products in the market and it is not always explicit for customers to know what commission the website will be paid for a referral. In addition, some comparison websites are owned by the same companies that they include in the comparisons. In these circumstances, there is a risk that customers are making decisions based on what they perceive to be impartial advice, when it is biased and / or is based on only a subset of the full market.

Options for reform

An opportunity exists to require traders, suppliers and businesses to disclose potential financial benefits associated with a referral so that consumers are able to weigh up this information when making a purchasing decision. There are four potential options.

1. *A public education campaign*

   NSW Fair Trading could conduct a campaign to raise awareness about conflicted product advice.

Pros: Consumers would be educated to look for conflicts.

Cons: It would still be unclear whether a particular trader is receiving a commission or referral fees, especially in the case of online traders. This option would also not sufficiently address the problem.

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2. *A prohibition on misleading and deceptive conduct (already enacted by the ACL)*

Pros: A prohibition would prevent traders from being able to falsely represent that the information they are providing is impartial.

Cons: This option would also not sufficiently address the problem. It requires the disclosure of conflicts of interest, but does not necessarily require that they be disclosed in a clear and upfront manner, and does not require the extent of the conflict to be disclosed, for example by disclosing the value of commissions. This option also does not provide traders with a clear obligation to disclose conflicts of interest arising from referral fees and commissions, resulting in uncertainty for businesses and consumers.

3. *Disclosure of the extent of any financial benefit*

   Businesses could be required to disclose any fees or commissions that they would be likely to receive for a referral. The customer could then weigh this up when making a decision. It could also prompt the customer to seek out other, genuinely unbiased, information. This is already required of real estate agents and fiduciaries.

Pros: Consumers would have access to significantly more information when making purchasing decisions.

Cons: There would be increased complexity for businesses if they were required to outline the terms of their financial benefits up front for all referrals.

The additional information could be confusing for consumers to understand, particularly where the commercial arrangements were complex.

4. *General Information about the payment of commissions*

   Businesses could be required to advise customers when they will receive some form of financial benefit for a referral or recommendation. This would alert the customer to the fact that the agent has a financial relationship with the service provider, but it would not extend to disclosure of the amount.

Pros: Consumers would understand that referrals may not be genuinely impartial. Businesses would be able to treat payments as “commercial-in-confidence”.

Cons: Consumers would not know the exact amount that would be paid for a referral (e.g. they would not know that Product A paid a higher commission than Product B).

Options 3 and 4 appear to be better options.

Questions

30. When should providers of a product or service be required to disclose financial incentives which would appear to bias consumer advice or recommendations?
31. What information should a trader be required to disclose to a consumer when referring a product or service?

2.3 Non-Disclosure Agreements

Context

When a customer raises a complaint with a trader, in some cases, the trader may require the customer to sign a non-disclosure agreement as part of the complaint's resolution. This can prevent the customer from commenting publicly or discussing the issue with the regulator.

A number of reports have highlighted concerns with consumers being required to sign non-disclosure agreements.

- In the 2017 Australia Consumer Law Review (ACL Review), consumer groups expressed concerns "that non-disclosure clauses could prevent claimants discussing their problem publicly and with regulators, limiting the amount of public information about common concerns (particularly product safety concerns)."[7]
- In its 2017 market study of the new car retailing industry, the ACCC found that a key issue contributing to the "systemic failures in the ability of consumers to enforce their consumer guarantee rights after the purchase of a new car was the widespread use of non-disclosure agreements by manufacturers when resolving complaints".[8]
- Consumer group CHOICE highlighted concerns regarding non-disclosure agreements in a 2016 study into the new car market, which found that "16% of consumers who had problems with their new cars reported being asked to sign [a non-disclosure agreement] in order to access a repair or replacement."[9]
- In August 2016, CHOICE reported that a "disaffected customer had to agree 'not to disparage or otherwise comment negatively about Thermomix or Vorwerk and not to take any action which it is intended, or would reasonably be expected, to harm the reputation of Thermomix or Vorwerk, or lead to unwanted or unfavourable publicity'" in order to avail themselves of their consumer law rights.[10]
- In February 2018, the Financial Services Royal Commission was required to warn individuals not to provide information voluntarily to the Commission if they were

[7] ACL Review – Final Report (2017) at 84.
[8] Ibid at 6.
[9] Choice (2016), *Turning Lemons into Lemonade – Consumer experience in the new car market* at 12: available at: https://www.choice.com.au/transport/cars/general/articles/lemon-cars-and-consumer-law#report
[10] https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/non-disclosure-agreements

subject to non-disclosure agreements, with the Sydney Morning Herald reporting that "non-disclosure agreements are standard in most settlement agreements between the banks and their victims".[11]

Policy Objective

The enforcement of NSW consumer protection laws is undermined by traders settling consumer complaints against them, on terms which limit the consumer's capacity to provide details of the complaint to NSW Fair Trading. The consequences of this practice are twofold. It stymies the ability of the regulator to take enforcement action against the trader due to a lack of evidence and, as noted in the 2017 review of the ACL, "…(limits)…the amount of public information about common concerns (particularly product safety concerns)".

The need for transparency

When a customer is prevented from commenting on their experience or providing information to the regulator, it reduces transparency in the market. Transparency enables regulators to identify breaches of consumer protection laws so that enforcement action may be taken. This is particularly important if the breach involves physical harm to consumers.

Transparency also allows consumers to understand the costs, risks and benefits of the goods or services they purchase. This in turn incentivises traders to improve the quality and safety of their goods and services.

The benefits of non-disclosure agreements

There are situations where non-disclosure agreements are beneficial to both the trader and the consumer. The ACCC has noted that, "some consumers may still wish to agree to non-disclosure in exchange for more favourable terms or earlier settlement. This is particularly where the negotiation is based on the costs of taking the issue to court rather than the merits of the consumer's claim where it is legitimately uncertain or disputed."[12]

Accordingly, the law must balance, on the one hand, the public interest in swift and cheap dispute resolution and, on the other hand, the public interest in transparency on trader conduct.

Where the evidence supporting an alleged breach is weak, or the consumer detriment suffered as a result of a trader's departure from their consumer law obligations is small having regard to the gravity and frequency of the breach[es], that balance is properly struck in favour of giving non-disclosure agreements effect so as to encourage swift settlements. Conversely, where the consumer detriment is significant, such as the trader's substantiated conduct puts consumer safety at risk or involves frequent departures from their legal obligations, the balance is properly struck in favour of transparency.

Options for Reform

1. *Do not allow non-disclosure agreements to form part of any complaint resolution between traders and customers.*

Pros: Consumers could not be pressured into signing a non-disclosure agreement when they were entitled to restitution under the ACL.

[11] https://www.smh.com.au/business/banking-and-finance/banking-royal-commission-warns-victims-to-not-breach-gag-orders-20180207-p4yzlp.html
[12] ACL Review – Final Report at 85.

Relevant consumer experiences would be able to be shared with other consumers to inform their purchasing decisions.

Cons: Preventing the use of non-disclosure agreements could remove the incentive for traders to offer customers a fast resolution in exchange for non-disclosure. This could have the perverse effect of seeing consumers not pursuing legitimate complaints because of the time and cost involved.

2. *Void non-disclosure agreements to the extent that they constrain a person from reporting an alleged breach of NSW consumer laws to the regulator, NSW Fair Trading.*

This is the preferred option. It is proposed to introduce legislative amendments that enable the NSW Fair Trading Commissioner to override the operation of non-disclosure clauses in settlement agreements, to allow a complainant to provide the evidence necessary for the regulator to enforce consumer protection laws.

The Commissioner would be able to use and disclose information provided under the proposal in the exercise of her public functions including in legal proceedings, in taking disciplinary action or in issuing public warnings. The power could only be exercised where it is in the public interest to do so and not for minor infractions or unsubstantiated allegations. The proposal will facilitate enforcement action and public disclosure of complaints in those serious circumstances where the need for transparency is the dominant consideration.

Pros: Consumers could provide information to the regulator to allow the regulator to investigate breaches of consumer protection laws.

Consumers and traders would retain the option of meaningful non-disclosure agreements, but with appropriate exceptions where disclosure was allowed.

Cons: Consumers would not be able to make public comment about their experience with a particular trader.

The limitations of non-disclosure agreements could be confusing - customers may not be aware that the non-disclosure agreement did not prevent them from reporting an alleged breach of NSW consumer laws to the regulator.

Question

32. Do you agree with the preferred option outlined above? Would there be any unintended consequences of implementing this option?

2.4 Trailing Commissions

Context

Unlike a ‘one off’ commission, ‘trailing commissions’ continue to be made to the referrer for as long as the customer continues to pay for the advice, product or service. This practice is most prevalent in the financial and insurance sector. However, it appears to be an emerging remuneration model in the IT sector.

Australia has adopted strategies to disclose, ban, cap, and deemphasise commission payments. Other jurisdictions have banned or are considering banning commissions.

However, research undertaken by ASIC has shown that, in the financial services market, despite clear disclosure requirements, consumers generally do not know how brokers get paid. ASIC has also found compelling evidence of consumer detriment.

ASIC has undertaken a number of studies relevant to commission payments. These include reports on insurance and mortgage brokers. It has published reports on consumer credit insurance, add-on insurance and life insurance in conjunction with car sales, a review of claims practices in life insurance, and an account of lender payments to mortgage brokers and other third parties including comparison sites and referrers.

Commission payments align the seller with the interests of the issuer or provider, not the consumer. As stated in Australian Securities and Investments Commission, in the matter of *NSG Services Pty Ltd v NSG Services Pty Ltd* [2017] FCA 345:

> "[t]he commission-based salary structures created an incentive for representatives to emphasise sales imperatives over compliance requirements and a culture in which the best interests and appropriate advice duties were more likely to be overlooked".

Since 2012, the Commonwealth Government has been introducing reforms to corporations and other financial and insurance legislation as part the Future of Financial Advice (FoFA) reform package. It was initially proposed to do away with many types of commissions, but subsequent amendments permitted a range of commissions to remain. While the FoFA reforms generally put an end to most "conflicted remuneration" schemes, as the Financial Services Royal Commission has highlighted, there are still a number of consumer detriments arising from the both trailing and fixed commissions.

Under the FoFA reforms, any fee remuneration is not allowed to be "conflicted". In other words, the adviser is prohibited by law from making a recommendation based on the size of the commission he or she stands to receive, rather than on the best interests of the client.

The most common payments are upfront commissions, which take a percentage of the initial investment and future contributions. Trailing commissions, on the other hand, are annual payments based on the balance of investment funds. In some cases, advisers may be earning these payments by providing the consumer with ongoing advice, regular appraisals of investments and strategy, and other services. In other cases, they are not. The commission is not based on the additional advice. Australia is one of the last markets in the world – along with some lenders in New Zealand – to pay trailing commissions to mortgage brokers.

However, the removal of trailing commissions has been identified as a significant factor in the reduction of fees imposed by corporate master trusts. An analysis prepared for the Productivity Commission has confirmed that while the introduction of MySuper products has acted to reduce fees in Australia, so too has the removal of trailing commissions.

The problem of trailing commissions is that they result in sellers of products continuing to receive income, irrespective of the level of service they are providing to consumers. This increases costs for consumers. Indeed, sellers have little incentive to apply their skills to improve the situation of people to whom they have already sold products. Additionally, where the fees are paid by consumers, it can be unclear for consumers what the total cost of the commission will be for the life of the product.

The Royal Commission has indicated that it will most likely make recommendations on conflicted payments in the financial and insurance sector. This highlights the need to ensure that all consumers, regardless of the service to which they are referred, have the benefit of

consumer protections available in other sectors. These commissions contribute to consumer detriment through higher prices. In addition, non-disclosure of such commissions means that consumers cannot make a fully informed choice to proceed with the referred service.

Policy objectives

Consumers should understand the terms of the deals which they are striking and that includes the price they are paying. Additionally, traders should be incentivised to provide services and products that consumers consider improve their lives. Any mechanisms which achieve this should be effected in a cost minimising manner.

Options for reform

There are several options for addressing this issue:

1. *Amend the Fair Trading Act to prohibit providers of services, products or advice from paying trailer commissions to intermediaries who recommend or refer customers to their business*

2. *Require all intermediaries who refer consumers to third parties to fully disclose the benefit the intermediary will receive if a trailing commission will be paid on a successful referral, over the life of the product*

3. *Prescribe that a trailing fee or commission is a 'key term' which must be fully and clearly disclosed by the service or advisory business when entering into the service contract with the customer*

Public comment is sought on the appropriateness of these commissions.

Questions

33. What industry sectors, other than financial services, feature commission selling that could lead to consumer detriment?
34. What would be a workable solution to balance the needs of industry and consumers where trailing commissions impact negatively on the market?

2.5 Consumer Information Standards

Context

Information standards regulate the type and amount of information provided to consumers about goods and services, and set the form or manner of this information. Currently, information standards in the *Fair Trading Act* and ACL extend to fuel price signs, textile labels and content labelling for cosmetics and toiletries. The result of these standards is that petrol stations are required to display the availability and price of unleaded, liquid petroleum gas and diesel fuels clearly for consumers to see before deciding to purchase fuel from a provider.

In addition to informing consumers at the point of sale, Fair Trading collects and publishes this information on freely available websites and applications like FuelCheck, to increase transparency as to the price, availability and quality of goods and services and to motivate traders to compete for consumer business.

Policy objectives

Consumer information standards – that is a legal requirement for businesses to provide information to consumers in the manner and form specified in the standard – are only justified if they benefit consumers such that their decision-making is materially improved because they now have information which allows them to be assess a product or service and/or to enable them to compare such products or services.

However, it is important that they do not impose disproportionate compliance costs on businesses, which will often be (at least in part) passed onto consumers.

They should also be created in manner which is consistent with the Better Regulation Principles, which require the clear identification of a problem and options and require consultation. However, they should be able to be created with sufficient speed to ensure that emerging information asymmetries do not cause consumer detriment.

Options for reform

1. *Maintain the status quo*

The status quo does not allow Fair Trading or the NSW Government to create new information standards quickly, in response to emerging issues.

2. *Provide a general power to prescribe information standards*

This is the preferred option. In this option, *the Fair Trading Act* would be amended to provide a general power to make an information standard. This general power would supplant the need for individual provisions that establish specific information standards, such as for employment services and fuel and textile products.

Exercises of this power would significantly increase transparency and competition across all markets and allow Fair Trading to develop and support a greater range of objective comparison services across more industries. It will also allow standards to be prescribed where a market failure is identified in the future which arises from information asymmetry.

Examples for how this power may be used are set out in the break-out boxes, below.

N.B. All existing disclosure obligations would remain in force.

Questions

34. Should the Fair Trading Act be amended to insert a general information standards provision?
35. What other industries have a market failure that could be addressed by an information standard?

Proposal – Mandatory disclosures for extended warranties

Context

The ACL provides overarching protections for consumers about the quality, fitness for purpose, and representations made about purchased goods or services. These are known as consumer guarantees. Businesses, through manufacturers warranties, can go beyond what is required by the ACL in order to entice consumers with a higher standard or longer warranty than is covered by consumer protection laws. While most extended warranties provide consumers with peace of mind, many consumers are unaware of their existing rights under the ACL and may be encouraged into purchasing extended warranties that are already covered by statutory rights and provide no additional protection for consumers.

The Australian Consumer Law Review noted that consumer protection body CHOICE conducted a shadow shopping exercise across the electrical sector in 2013 and again in 2015. In the repeated exercise, 48 per cent of sales staff failed to give accurate advice as to consumer rights under the ACL.

Policy Objective

Consumers need to be aware of their rights under the ACL so they can make informed and meaningful decisions about purchasing extended warranties. Any obligation on traders should be clear and impose as little cost as possible.

Possible approaches

The ACL Review recommended that the following be required on extended warranties:

- agreements for extended warranties should be clear and in writing;
- additional information about what the ACL offers in comparison; and
- a cooling-off period of ten working days (or an unlimited time if the supplier has not met their disclosure obligations) that must be disclosed verbally and in writing.

This recommendation has significant merit because it addresses the information asymmetry, allowing consumers to make materially more informed decisions. It would also be clear and not impose significant costs.

Because the ACL is a national framework which can only be amended by agreement from participating jurisdictions, it is proposed that in the first instance NSW should advocate for reforms requiring mandatory disclosure about extended warranties at an appropriate national forum.

However, this power would allow NSW to require disclosure of information regarding the ACL and consumer guarantees when traders are selling extended warranties to customers, until the ACL proposal is effected, nationally.

Proposal – Funeral services check

Context

There are currently over 700 funeral service providers in NSW. The *Fair Trading Act* requires those providers to inform consumers of the cost of a basic funeral, if they provide such a package. There is no requirement to publicly advertise this price on their website.

Because of the nature of the service, consumers have a very limited time to conduct due diligence to determine which service provider will provide the best service for their individual needs, for the most appropriate price.

Policy Objective

Consumers should be able to easily access information about the price and types of services different funeral operators provide, so that they are able to make an informed decision about which service is the most appropriate during what can be a stressful and emotionally difficult time. However, this should be done with the lowest and not a disproportionate cost for business.

Options for Reform

1. *Maintain the status quo*

This option involves the lowest cost for business but does not meet the policy objective.

Require funeral service providers to publish prices of basic funeral packages on their own website in a searchable form

This is the preferred option. This option would prevent consumers from having to engage face-to-face with individual providers. However, it would require consumers to conduct their own due diligence across multiple websites, at least until product comparison sites are developed.

2. *Establishing a Funeral Service Check*

This option would see NSW Fair Trading establish a searchable database that enables consumers to compare the price of basic funeral packages based on a geographical location.

Fair Trading already provides publicly available price and service comparison platforms for other products and industries like Fuel Check for petrol stations, and the online retirement village calculator.

A Funeral Service Check would mean that consumers could access all of the relevant information they need to make an informed decision in one easily accessible format, within a matter of minutes, simply by using their digital device.

2.6 Publish Data on Traders and Licensees (online portal of registers)

Context

NSW Fair Trading and SafeWork NSW currently maintain public registers that consumers are able to access and search, that contain information both agencies hold on traders, licensees and authority holders. The information that the registers contain relate to licensing, compliance and enforcement and occupational health and safety information. Other general information about licensees and traders are located in separate areas on the agency websites.

The information contained across NSW Fair Trading and SafeWork NSW's registers is currently inconsistent. The registers and other publicly available data and information is also not currently contained in the one location. Consumers must search several webpages or websites to access all the information they would need to make an informed decision about a licensee, authority holder or trader.

NSW Fair Trading also publishes a 'complaints register', which lists all traders that have had more than 10 consumer complaints made to NSW Fair Trading in the previous calendar month.

Policy objective

Consumers should be able to easily access consistent information across all licensing regime registers for Fair Trading and SafeWork, in one centralised location. However, this reform should be fair for traders such that they do not have records of misconduct publicly available where they have since demonstrated themselves to have improved their performance.

Options for reform

1. *Maintaining the current status quo*

This is not considered to be appropriate. It also does not assist in meeting the objective of the government having 70% of government transactions occur across digital channels by 2019. Nor does it address the inconsistent approach to what information is publicly available about licensees, authority holders and traders.

2. *Incremental changes to the public registers*

While this option brings many of the beneficial outcomes identified in the case for change, it does so in an ad-hoc way and many of those benefits, like having consistency of information across licensing regimes and having a centralised on-line location, would not be realised for many years. It also relies on building a connection between IT projects that would be undertaken separately and over long period of time.

3. *Establish an on-line portal for centralised access to information and ensure consistency of information across all licensing regimes*

This is the preferred option: In this option there would be one, user friendly on-line portal established, which would allow consumers centralised access to data held on traders, licensees and authority holders. The information contained on the portal would be consistent and freely available and would include:

- name of the licence holder
- licence number and licence class or type
- date of issue and current expiry date of the licence (if any)
- details of any surrender, cancellation or suspension of the licence
- details of any licence conditions (if any)
- details of successful enforcement and administrative action including disciplinary action, and the issue of Penalty Infringement Notices, rectification orders, and NCAT orders issued in connection with the licence (if any)
- results of any successful prosecutions against the licence holder under the WHS Act, the Fair Trading Act or the ACL (if any)
- any other particulars as the regulator thinks appropriate for inclusion in the register

The publication of this information would also be subject to appropriate privacy protections.

Questions

36. What information should consumers be able to publicly access about a trader online?
37. What information should be kept confidential?
38. What factors should be considered in developing this proposal?
39. Do you agree with option 3?

2.7 Rental bond surety products

Context

The *Residential Tenancies Act 2010* prohibits a landlord, agent or any other person from requiring or receiving anything other than a rental bond as security for a tenant's failure to comply with the terms of a tenancy agreement. A bond's lodgement, custody and release are controlled by the Act, and the amount of a bond cannot be more than four weeks' rent. The interest accrued on the investment of rental bonds helps fund tenancy services offered by Fair Trading and the NSW Civil and Administrative Tribunal, as well as other services, including non-government advice and advocacy services.

A rental bond is only paid once at the start of a tenancy and there are no fees payable. However, when moving between rental properties, tenants are often required to fund a new bond before they have received the return of their old bond, thus effectively tying up money for two bonds despite only living in one rental property.

The private sector has started to develop other products as possible alternatives to rental bonds. This includes surety bond products, which are guarantees provided in lieu of the traditional cash bond. Other innovative products, such as bond insurance, may also be possible but all require reforms to the Act to enable their legal use in NSW

Policy objective

Given the growing private rental market and changes in technology, there is scope to consider whether the rental bond system for private tenants could operate more efficiently. This could include improvements to the government rental bond system, as well as enabling

greater choice for tenants. It is not intended that these reforms would apply to social housing tenants or social housing rental bonds at this stage.

The main potential benefit of alternative bond products is that tenants could need to pay a smaller upfront fee at the start of a tenancy (sometimes as little as 5-10% of the bond amount), instead of the 4 weeks rent required for a bond. However, such fees may also be annual, non-refundable and may not contribute towards the cost of any successful claim paid to the landlord. Depending on the product, tenants could also still required to pay for any successful claims against them. As such, it is important that tenants are able to decide whether the product is right for them and they need to have sufficient information provided to them so that they can make a meaningful decision.

Landlords need to be protected so that the claims experience does not leave them in a worse position than what they currently face when claiming a rental bond.

Additionally, taxpayers should not be required to further subsidise Fair Trading, Tribunal and advocate activities currently funded by renters and landlords (through lower rents) by the interest on rental bonds.

Options for reform

1. *Maintain the status quo*

This may be appropriate if it is not possible to give effect to the following reforms in a cost-effective manner.

2. *Allow alternative rental bond products for tenancies to operate subject to regulation to protect tenants and landlords (excluding social housing tenancies managed by FACS)*

This option would involve:

a) tenants deciding whether to purchase alternative rental bond products as an alternative to a traditional government bonds, it could not be imposed on them;
b) regulation to ensure that tenants are aware of the costs of using these products. For example, some could cost them more over the life of a tenancy than a traditional bond, and that they may still need to pay any amounts for damage or rent owing;
c) integrating the claims process so that landlords are not left worse off, including mandating a role for the Civil and Administrative Tribunal in resolving disputes; and
d) requiring providers to contribute to the cost of tenant advice services and the NSW Civil and Administrative Tribunal.

3. *Improve the efficiency of the existing rental bond system*

This option would involve reforming the bond system to allow for the partial or full transfer of bonds between rental properties. This would reduce the need for tenants to be paying a ‘double bond’ when they move between rental properties.

Questions

40. Which option do you support? Why?
41. How should the claims process against products be integrated with the claims process for rental bonds?
42. How should rental bond interest revenue be recouped from surety product providers?

43. What information should be provided to tenants to ensure they make sound purchasing decisions? What other factors should be considered in designing the model?
44. What protections would be required if tenants were allowed to transfer bonds between rental properties?

2.8 Allowing strata lots to choose their own utilities provider

Context

In certain strata developments, owners and residents are bound to long term utility contracts through up-front agreements made by developers or later by the owners corporation. The benefit for a developer is that they are able to negotiate a bulk discount on behalf of the scheme which can then be used as a sales point. It can also reduce their costs for utilities associated with the common property and the remaining lots that they own. Such arrangements may only be offered if all owners and residents are locked in. However, this means that individual owners and residents cannot take advantage of special offers and switch providers if they are dissatisfied with the service.

Policy objective

Individual home owners and tenants living in strata schemes should be able to choose their own utility provider. This would enable them to take advantage of special offers or to change providers if they are dissatisfied with the service they are receiving.

Options for reform

1. *Maintain the status quo*

Continuing to allow developers and owners corporations in strata schemes to lock in residents to a particular utility provider is not preferred because of its anti-competitive effects, on the premise that solutions can be practically developed.

2. *Legislative change to provide that residents in strata schemes are to be free to choose their own utility provider. One option would be to make any by-law that sought to remove the freedom of individuals to choose their own utility service provider void.*

This option may achieve the policy objective but could also undermine the freedom of a scheme to determine the best by-laws for their particular circumstance.

3. *Amend the Strata Schemes Management Act to treat long term utility/service contracts in the same way as long-term strata management contracts are now being dealt with. That is, prohibit locking in future owners corporations into long term contracts and prohibit automatic roll-ons of contracts. In addition, make it a compulsory standing item at the owners corporation AGM to discuss the current and future status of the utility contracts in the scheme.*

4. *Prohibit developers and owners corporations from entering into utility contracts if the contract does not contain a clause which allows future owners corporations from ending the contract if the price and conditions of the contract are less than what is available from at least two other providers. [An appropriate transitional provision could need to be put in place to deal with existing arrangements. For example, the law could say that such arrangements end after a specified time (e.g. 2 or 3 years).]*

Options 3 or 4 appear to be the most suitable responses to this issue.

Questions

45. Would legislative reform assist in addressing this issue?
46. Which option do you support and why?