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TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

REVIEW OF AUSTRALIA'S CONSUMER POLICY FRAMEWORK

MR R. FITZGERALD, Presiding Commissioner
MR P. WEICKHARDT, Commissioner
MR G. POTTS, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON MONDAY, 11 FEBRUARY 2007, AT 9.07 AM

MR FITZGERALD: I'll just say a couple of opening words as we're required to do. Welcome to the first of the public hearings in relation to the draft report of the review of Australia's Consumer Policy Framework. As you'd be familiar, these hearings are informal in nature, nevertheless, participants are required to be truthful in their submissions. The proceedings are recorded. If there are any issues of confidentiality that you wanted to be treated not for the public record, then you have to advise us accordingly. I'm Robert Fitzgerald, I'm the presiding commissioner on the inquiry and my colleagues are Phil Weickhardt and Gary Potts. We're the same as the three that did the hearings the first time round and we're ready to roll. So we might just start with you, Phil, if you can give your name and the organisation you represent.

MR DWYER (BCOA): Phillip John Dwyer, national president, Builders' Collective of Australia.

MR FITZGERALD: Great, thanks very much. If you just want to give us some opening thoughts. Can I just check something, have you provided a written submission at this stage?

MR DWYER (BCOA): No, I haven't. I felt it was more appropriate at this stage to provide you with a little bit of information, allow you to seek anything further that we may be able to help with the inquiry.

MR FITZGERALD: That's fine, thanks.

MR DWYER(BCOA): I'd just like to make the point that over the last five or so years or since the privatised insurance was changed in 2002 to reflect what we have today, this privatised insurance regime and the presentations we did at the time, going back at that time, still remain exactly the same today. We're still as critical of the privatised system as a consumer protection regime, that's what we were at that time, that's what Choice magazine were at that time and also what they had to say only just very recently on the 7.30 Report - one little paragraph:

> Basically our view is that home warranty insurance makes a mockery of consumer protection. It's not worth the paper that it's written on. It's completely useless and, in particular, the last resort clause makes it a junk insurance.

They're fairly profound words, we believe. But not only when you talk about consumer protection in this area, and we're talking to the Productivity Commission so it's very important that we talk about productivity as well as consumer protection. But in this instance home owners probably spend the largest amount of money of any consumer in the country when they enter into a contract with a builder to build a home or have a home renovated. So therefore we believe that it is a terribly important area that must be protected and must have the appropriate industry management, two areas that are significantly lacking in our belief.

In the draft report you have covered consumers and covered them very well and I thank the Productivity Commission for taking on board the concerns of consumers and so on and largely we presented those concerns and the detriment to consumers in the majority of our submissions and so on to this inquiry. I would like to focus on the builder aspect and while it is necessary to have consumer protection in the building industry, because there's always a certain element that do not perform the way we would all like them, so it is very necessary to have consumer protection. But the larger majority of builders do the right thing. According to the latest building commission figures, 6 per cent of consumers have got into trouble over the last five years since they've privatised insurance.

Given that figure, that's some 30,000 Victorian consumers - and I'm referring to Victoria where we can get this information - have been impacted and ended up in courts for years at a time without anything like a reasonable outcome. Coupled with that, if there's 30,000 consumers having a problem, there's obviously 30,000 builders having a problem. So it really does impact on a lot of Australian families when things go wrong.

Our view is that the builder in this instance of this so-called privatised insurance - I just want to focus on who does provide this insurance and who does in fact underwrite this insurance; is it legal, and is it appropriate? We believe not. The builders in all instances underwrite this insurance. I have provided applications within this document which I will leave with the inquiry that will just demonstrate this. Just to read a very brief passage out of Building Connection, a national magazine which is the current issue just released, and there's an article in there that refers to the hidden perils of warranty insurance:

> Deeds of indemnity are one sneaky way of making you put your assets on the line to go to work. Builders warranty insurance is constantly at the forefront of many builder's minds. It is a constant distraction from what needs your attention, running your business. Deeds of indemnity come in various forms. Recently many insurers have cunningly incorporated them into their application forms. Deeds will often be found disguised -

and so on and so forth. I've put in the copies of three of the insurers where the builder undertakes to repay the insurer every single cent including costs relating to any claim. So the builder is actually the underwriter. He is the reinsurer. That came about back on 19 March 2002 when ASIC or the Corporations Act was changed which this letter refers to that's dated 30 September last year. The specific act is the Corporations Regulation 7.1.12(2) where all regulatory control was removed from the product known as builders warranty insurance. Taking that a step further, back in June of 2007 there was a court case in Western Australia which is this one and the judgment is there. It clearly states within the document produced by Judge Eaton:

> Without being authorised under the act of providing or underwriting insurance anyone that does so is guilty of an offence. The approval of APRA must be in writing -

and then it goes on to say, this is Judge Eaton's opinion -

> It would appear to me that the transaction involving the general deeds of indemnity can be characterised as reinsurance, the reinsurers of the general insurer insofar as its exposure to the risk is concerned.

So basically what Judge Eaton is saying, that it's a triable issue because he says it's an offence to carry on an insurance business without being authorised under the act to do so. It goes on to say:

> The reinsurance without authorisation and falling outside the regulatory regime stipulated is illegal and unenforceable. I do consider that in the circumstances of this case -

and this is just one case and many builders are suffering under this -

> it is a triable issue as to the illegality and enforceability of the general deeds of indemnity required by the plaintiff of the defendants.

That has been our long held position right back from day 1, that builders cannot be reinsurers, that it is illegal, and yet just for our industry, just for this one product, we've had the corporations law changed to allow us to be reinsurers. Why should we be any different to every other insurance product in the nation? We believe it's totally inappropriate and it is wrong. Builders are just as much consumers are what consumers themselves are. Our industry measures the economy of the nation. Everything that happens in terms of the economy our industry is used as the guide as to how the economy is going. We're a very important part of business in Australia. We are also very, very important in terms of providing homes for people.

While we are very critical of the current arrangements, we support proper industry management and proper consumer protection. We want an industry management regime that will filter out and get rid of builders that do the wrong thing within our industry. All we have at the moment is consumers thrown into courts for years in litigation and we have builders treated exactly the same way, in courts for years, no resolution to the problems and so on. Many times they are very, very simple problems that could be adjudicated by someone that has the ability to do that and make it binding. That's why we seek to have the Queensland scheme.

When we go one step further, we find that on 17 January of this year on the back of your draft report, Minister Kons the attorney-general in Tasmania has scrapped builders warranty insurance. He is scathing in his comments of what it provides. Back in last October he gave the insurance industry the opportunity to demonstrate to him that their product was providing a benefit to the consumers of Tasmania. They chose to ignore him, the same way those insurers have been ignoring us for the last six years. He decided on 17 January to scrap it. His press

release is in this material I will leave with you. It is absolutely scathing on the worth of the product. He would ideally like to introduce the Queensland scheme that you have referred to in your draft report.

The Queensland scheme does work and provide appropriate consumer protection and appropriate industry management. It is a holistic regime that covers the whole sphere of industry management and consumer protection, and warranty insurance becomes one small part of that holistic regime. Last Friday a major builder in Queensland collapsed. 233 homeowners are left without their homes being built, however, the manager of the QBSA up there in the Australian Financial Review at the weekend:

> The real collapse called Queensland's worst and it's the biggest in history in the Queensland industry.

The Queensland industry in the last five or six years has grown to be bigger than Victoria and bigger than New South Wales, whereas it was half the size of those two states prior to that. The restriction on warranty insurance and what it's done to builders and so on has contributed to that circumstance. I just refer to what Mr Jennings the general manager of the QBA said:

> If this company were to fail in New South Wales or Victoria, the consumers would have virtually no recourse to insurance and be forced to resolve these problems on their own.

In a later statement he said that within 12 months the people that have just entered into a contract with this failed company, their homes will be completed at no cost to the consumers. That scheme is self-funding. It provides double the cover of the farce that no-one can get at here for half the cost. It is self-funding and no impost on the taxpayer, never has been. I ask you to consider that that Queensland scheme was the scheme that was operating here in Victoria under the Housing Guarantee Fund prior to being privatised in 1997. That is the scheme that we want that provides timely adjudication for disputes. If a builder does not rectify under direction, he has three opportunities, then he loses his registration. That's the type of scheme that we want, that builders that misbehave get removed out of the industry altogether. Consumers are dealt with in a very timely manner, so that the problem that they have at the time is dealt with very quickly, without recourse to courts and all this type of thing and we end up with what could be considered proper consumer protection.

For heaven's sake, people spend half a million dollars or a million dollars or whatever it might happen to be or 300,000, 200,000; you can't get any building done these days under 150,000 for a small renovation. We get better consumer protection for a $2 item at Coles. It is a farce, what we have at the moment. We seek the Productivity Commission's assistance in getting a better regime and ask what can we provide to you to assist you to bring a good result to your inquiry on this segment of warranty insurance, being the biggest consumer expenditure within the nation. So we believe it's very, very important and I thank you for your time and your draft

report at this time, but I want you to focus on the builder detriment as well.

MR FITZGERALD: Thanks very much for that. I'm not sure if you've had an opportunity to see or review the Housing Industry Association's recent submission.

MR DWYER (BCOA): No, I haven't.

MR FITZGERALD: I might just put a few of their positions to you. It's available on the web site but it's just recently come in. They have castigated the commission effectively for making recommendations in relation to this area, and just a couple of reasons for that: one of it is that they maintain that there is no evidence at all of market failure in this particular area. They say that we -

> have not detailed or confirmed the existence of market failure or the failure of the existing processes by which remedies may be sought, nor has it -

that's us -

> proved any analysis of the benefits versus the cost of further protection.

They go on in their submission to say that:

> Only one in every hundred building permits results in a claim before VCAT.

This is the Victorian operation. You've given some illustrations of why you think that may not be the case, but their opening gambit is that the scheme works well and there's no evidence that it's failing and there's no evidence that it needs further protection, so that's just their first point. I was just wondering how you might respond to that.

MR DWYER (BCOA): They would say that, wouldn't they, because they get something like $35 million a year from the sale of warranty insurance. Now, vested interest has no place in consumer protection at this level. I'm unaware of that submission. It wasn't there on Friday afternoon on the web site, so I am unaware of it. We have been critical of the HIA not representing.

Let's just refer to Victoria - I can refer to New South Wales as well and I will - but in Victoria, we have something like 12,000 working builders. There was a 10-point plan implemented - HIA, in conjunction, with Royal Sun Alliance - back in 2002. We had large builders criticising this arrangement that they were going to enter into. So the Victorian and New South Wales government underwrite the large builder for anything above $10 million. The bigger builders, again, building apartments and so on like Grollos and Australand and all the large builders, they were having terrible difficulty, so they removed them out of the need for warranty insurance. Now, why those consumers can be any different to another consumer

living on the ground, I don't know, but they were removed out, so they were okay to be removed out. They didn't need this consumer protection.

So we have the estate builders that get underwritten by the state government; that puts them in the category of small builders. The estate builders, there's only 50 or 60 of them, so there's 11,000 of those working builders that we're talking about have no representation unless HIA and MBA represent them. MBA did, back at that time, because their insurer was HIH; they'd lost that. They had no insurer, so they were screaming in support of the small builders. Suddenly they got insurance within 18 months or thereabouts and they were selling it again. It's a big income stream and it's mandated. It's mandated by government, so hey, it's money that just comes in. They don't have to do anything to sell it, market it or anything, because everyone has to have it.

HIA, their balance sheets and so on which are on the public record, they went from $30 million annual turnover to $80 million every year since. They had 93 per cent of all builders on their membership because it was the only place you could get warranty insurance at that time. So HIA in Tasmania, where they had no alternative, where the attorney-general has scrapped it, in the press releases which are also in here, have turned round in the Financial Review and also other press releases:

> HIA regional executive, director for Tasmania, Stuart Clues, said about 600 builders in the north would be affected by the scrapping of the scheme. "This is a historic day for the industry. It's one of the biggest legislative reforms in this state affecting the industry in the last decade."

That's totally contrary to the submission put in by HIA. We talk about the former president, immediate past president of HIA, Bob Day - and this is an article here in the Financial Review dated 22 March 2007, so it's not very long ago - the national president of HIA:

> Calls by former Housing Industry Association national president, Bob Day, to scrap builders warranty insurance are long overdue.

Then it goes on. This is all flying in the face of this submission. We've had an ongoing battle with HIA and MBA to represent the small builders of the nation. We had this suppressive regime over us where anyone that speaks out - and I can be testimony to this - gets their head knocked off. I've spent the last two and a half years in the courts in Canberra, in the Federal Court and the Supreme Court, with HIA suing the very life out of me because I have a contrary view to what they want to see presented. It is inappropriate, it is wrong. Everyone likes to earn money but this is beyond comprehension. Here, builders are forced to join trade associations to get warranty insurance. We had the audacity to put in a submission of that nature, that the regime is working well - tell that to the poor consumers that have been wiped out.

If we refer to a submission, George Korfiatis - I'm not quite sure if he's submitted to this inquiry at all, maybe he hasn't - but let's just refer to the small business commissioner here in Victoria, and this is his submission to the VCEC inquiry in 2005. He refers to the unfair market practices of the insurers. He also refers to supporting Consumer Affairs Victoria and part of their submission is here. Instead of hitting you with a lot of paperwork and so on, I've just kept it to the minimum. We talk about a regime that's working well, according to HIA. So rather than me say, "I don't believe it is," let's see what Consumer Affairs Victoria have to say about it:

> Moreover, CAV is aware that consumers have considerable difficulty accessing builders warranty insurance where a builder has died, disappeared or become insolvent. This is partly associated with the claim processes set up by the insurers. Given that BWI only protects consumers where the builder has died, disappeared or become insolvent, it may be preferable to relax or remove requirements for builders warranty insurance -

this is Consumer Affairs Victoria -

> and focus on improving builder practitioner registration and compliance. Such a change will not have a major impact on consumer protection and any detriment would be overtaken by the gains in consumer protection through increased registration levels. If builders warranty insurance arrangements were relaxed or removed, the number of domestic building projects where the owner is persuaded by a builder to take out the building permit as an owner-builder will reduce.

MR FITZGERALD: Can I just clarify something. In relation to the removal of the insurance itself, your recommendation is that it be scrapped and replaced by another statutory insurance based scheme such as the Queensland arrangement, it's not that it just be removed and not replaced by anything else obviously.

MR DWYER (BCOA): No, we would like our Queensland arrangement.

MR FITZGERALD: All right.

MR DWYER (BCOA): I believe that Tasmania would also like that too but they're too small a market to set up such a regime.

MR FITZGERALD: Without causing you to become more distressed, let me just quote a couple of other things. This submission is dated 6 February but it may have arrived on Friday night, because I picked up a bundle off the desk in Canberra when I flew down. It's said in relation to Queensland:

> It is not true to say that the Queensland model of state-run HBWI is generally seen to be working well. There are fundamental structural

conflicts of interest built into the BSA -

the Building Services Authority -

> operations as a licenser and insurer. Furthermore, the system imposes additional expense and arguably poses inevitable conflicts of interest that arise when the monopoly insurer is also the consumer advocate and the regulator.

I won't quote it all because it's not fair to you and to them. But it says:

> Part of the role of insurance is to influence behaviour through price signals communicated via premium differences. Under the Queensland model, this role is subverted because all builders are charged the same premium irrespective of their capacity and financial strength. Instead, the feedback mechanism is through enforcement and rectification orders and threats of licence cancellation. This is not insurance, it is a tax or levy designed to fund enforcement.

I'm not sure what your view about that would be.

MR DWYER (BCOA): We require consumer protection. We require compliance for builders. We have a regime at the moment that does not provide anything. It does not provide good industry management. This regime, while there may be a monopoly insurer, keep in mind that only a few years ago, there was a virtual monopoly provider only here in Victoria. So I don't understand; the monopoly insurer, it's not just insurance, it's a whole industry management role and it's a holistic role. It provides everything from contracts - everywhere. We have at the moment consumer protection in Victoria that's a dog's breakfast. We have contracts that are so conflicting. We have a master builders contract to provide to our consumers. We have a HIA contract. Both say that they are the ultimate contract, here, in the one industry, and yet they are poles apart in what they deliver and what the outcomes are. How can that be when it's the one industry?

We would like to see a Consumer Affairs contract, a proper adjudication process. We could go down the Tasmanian role of scrapping builders warranty and providing exactly those - that's exactly what's taking place in Tasmania. We've been very involved with Tasmania over a long period of time and these are the outcomes that have come out of discussions and it's been a long time coming, but in Tasmania, the attorney-general has decided that this is the way to go that would better protect Tasmanian consumers and this point of time. I am quite sure they would be very, very happy to have the Queensland scheme but their market is too small to instigate a holistic regime of that nature. It just could not sustain it.

However, if we did something on a national basis, then maybe they could access that from Victoria. But if we talk about New South Wales last week and we talk about builders that work outside of compliance and talk people into

owner-builder arrangements and all this type of thing and split contracts and so on and so forth where there's no warranty insurance, more than half the builders in Tasmania were working that way, more than half are working that way in Victoria, according to Consumer Affairs Victoria, and more than half in New South Wales. Let me quote the exact figures. This is a report from the Office of Fair Trading. The report identifies that as at the end of March, last year this is, but this is the current document, 14,418 builders hold eligibility for home warranty insurance. In comparison, licensing statistics show that at the end of June 2006, there were 34,173 holders of full builder licences and qualified supervisor contracts.

More than half the builders in New South Wales are also working outside of this regime. What is the purpose of it? Yet HIA has the audacity to say that the scheme is working well. None of these figures are my figures. These are all figures from statutory bodies and surely we would have to be very, very concerned that we have the Office of the Small Business Commissioner here in Victoria and Consumer Affairs Victoria both saying this is a failed regime. That's largely what they're saying.

MR WEICKHARDT: Can I ask what else you would like to see the commission do or say that it hasn't already said in its draft report?

MR DWYER (BCOA): I'd like more focus on the builders as consumers and the combination of the builder and consumer in terms of productivity. When you talk about, "We have this regime," I mentioned that we must underwrite this insurance; not only do we underwrite it, we then have an insurer that knows nothing about the building industry at all that decides under a document like that which is a letter of eligibility what the annual turnover of that builder can be and the size of the project he may build. So the size of the projects are limited and the income, the annual turnover, of the builder is limited, so the builder can never grow his business. What sort of an arrangement is that?

This is based on the financials of the builder, not his ability, not what he's maybe done in the last 20 or 30 years, it's just simply based on financials and whether the builder can afford to underwrite any potential claim if they end up having to have one. But even if they do - and it's on the public record in Hansard in parliaments - that even consumers, where a builder goes broke, there's no way they're going to get a payout from the insurance company. They have to take the builder to court and make him a bankrupt and he has to be listed with ITSA before any claim will even be accepted, let alone addressed or considered. What sort of consumer protection is that? That's years. Now, we have consumers that have been fighting this for years, thinking that they had a claim and they get on this legal merry-go-round and they can't get off it until they go broke and that's exactly what's taking place.

MR WEICKHARDT: I can understand your comment - after all, you represent a builders' collective - that you want to see builders as consumers considered, but ultimately the final consumer pays regardless, don't they?

MR DWYER (BCOA): Absolutely, but keep in mind that the builder is paying as well.

MR WEICKHARDT: Sure.

MR DWYER (BCOA): He's got to buy this warranty.

MR WEICKHARDT: But they pass it straight on to the final consumer.

MR DWYER (BCOA): Not always.

MR WEICKHARDT: Well, ultimately they do.

MR DWYER (BCOA): I guess ultimately, yes, but within that process, the builder has to get this eligibility and he has to put up what he has to put up to be able to operate in his own industry. It is achieving nothing, warranty insurance. The attorney-general in Tasmania doesn't make these decisions because he feels like it; he makes it for very good reason. I believe that he's made his decisions based on exactly the reasons we want change and we want a better arrangement for the building industry. The Builders' Collective unfortunately doesn't have an $80 million a year income stream. The Builders' Collective is voluntary. We spend our time and others that have appeared before this inquiry have freely given their time and so on. None of us get paid. We're not seeking anything for an end result in terms of a financial result. We're seeking a better building industry for the nation. This is right across the nation with the exception of Queensland. We want a better industry and we're having terrible trouble putting forward our views, and it's only more recently that we believe they have been vindicated by the actions of Tasmania and all the circumstances that have taken place, the documentation that's now available.

In terms of what HIA get out of it, what MBA used to get out of it prior to the HIH collapse, I have all of that documentation if you would like me to provide it. It's from the public record. It's a huge amount of money. Since 1 July 2002 consumers of this nation - builders and consumers, whatever you like to call it, whatever category you like to put it in, and ultimately the consumer does pay, and we're all consumers - we've spent over $2 billion for nothing, in our belief. All of that money has gone somewhere. Where has it gone? It's gone to agents of the insurers and the insurers. HIA has taken the stance that we don't get a cent out of builders warranty insurance. Unfortunately the part of the Cole Commission Inquiry in February 2004, the people that were running that with Senator Gavin Marshall and Senator Peter Cook, who is no longer with us, established that they get a commission from every single policy sold, and that's on the public record.

MR FITZGERALD: You just mentioned Tasmania again, just in fairness to HIA, and I just want to get your view. They say the single biggest reform required by both consumers and builders is in relation to the dispute resolution process. They go on

to say:

> No revamp of the insurance can proceed without comprehensively reviewing other mechanisms -

they go on to say -

> The Tasmanian government deserves credit for recognising this link in announcing a move to voluntary HBWI. It has also announced a package of regulatory chances that crucially include a streamlined process for resolving disputes over defective works.

So it seems that the HIA acknowledges that one area of reform is in relation to dispute resolution and goes on to urge the commission to be more specific in its recommendations around that, so that leads on from Phillip's comment about what would happen. So I just want to flesh this out a little bit. It seems to me that in at least aspects the Tasmania government's move is seen as worthwhile; that is in the arrangements around dispute resolution.

MR DWYER (BCOA): Yes, that is correct. Back in 2003 I wrote to all the directors of HIA asking them to consider a voluntary scheme. Some four months after that they produced a document saying we should make builders warranty insurance voluntary. The Tasmanian government have just released this document which I can forward to the inquiry if you like. It's a paper on the way they move forward. While they talk about voluntary, it's voluntary just at this moment. They are going to scrap it altogether. Their actual press releases refer to that fact. That's from Minister Kons the attorney-general, scrapping of mandatory builders warranty insurance. They intend getting rid of it altogether, and while they are adopting better dispute and resolution based on adjudication, that's part of the Queensland model and that's the path that they are going down at the moment in their small market.

I also understand that the new federal Labor government has specific interest in this matter and our dealings with that government when they were in opposition and now that they are in government indicates that they will play a role and possibly support the Productivity Commission and so on. They are very concerned about regulatory control that we have on every other area of business has been removed from builder's businesses or builders warranty insurance. It should be of grave concern to many of us and I think should also be of great concern to the commission that why would we remove such things. Why do we sell - as an insurance company - a product, charge a premium for it - whether the builder or the consumer pays for it doesn't matter, we pay a premium and so on, but yet they are not the underwriter? The builder is. How can that be? What is the purpose of that premium? What is the purpose of that insurance? Besides that, it's illegal. That's not me saying that; the judgment is here. So contrary to what HIA say, that it's working well, there would not be a Builders Collective if it was working well.

MR FITZGERALD: I hear that, yes.

MR POTTS: Phil, I mean clearly there's strong evidence that builders insurance is not working as you like. It's certainly the view you're putting forward and I think that's supported by some others as well. The mere fact that the private insurance industry has withdrawn to a significant extent in the last five years supports that view. I guess ideally the best solution would be to see proper insurance services provided by private industry in that builders, consumers, and the industry can work together to provide the best product. I guess the question I'd like to put to you with a view to perhaps moving in that direction is what can the building industry itself do to make the industry a more viable proposition for private insurers in the light of developments in the last five or six years.

You mentioned for instance in relation to the issue of registration where we've made a recommendation in the draft report - I think it was three strikes and you're out, to colloquialise it. I guess the question in my mind is, is that too weak a criteria to apply bearing in mind that a consumer, for instance, might be investing three or four hundred thousand dollars in a house and they can't afford a builder who is given the leniency of three strikes and you're out. They want someone who is going to deliver on each and every particular product, because there is a fundamental difference between this particular product we're talking about and going into a shop like Coles and buying something that costs $2. Here you're talking about the lifetime savings of individuals, so it's got to be spot on each and every time as far as possible. So I guess the question I'm putting to you is: in the longer term if we're going to move to a more viable arrangement that doesn't involve government intervention, if you like, through governments providing the services and so on, what can the industry do itself to make this a better viable long-term proposition?

MR DWYER (BCOA): I think largely the industry can provide a lot more transparency as to what it delivers to consumers. We could have a single contract that is very informative to consumers. We have this illusion of warranty insurance at the moment and consumers believe that they are covered, and they only find out that they are not covered and they don't have any of this protection when they go down the path of trying to access it. So we're misleading consumers. We believe that for a start undermines good consumer protection. We believe one single contract that lays out and demonstrates to a consumer what he should do, how he should decide on a builder, and what measures he should take, how variations should be dealt with. Get rid of the large majority of disputes out of the building industry because that's where most of them all start and we end up with a problem. We need to educate people a lot better. So I believe the building industry can provide a better contract, inform consumers a lot better, because the builder that doesn't do the wrong thing has nothing to fear with any of these measures.

We need better registration at government level. We need broader registration. We only register builders in Victoria. We get a bad name through subcontractors that misbehave and don't do the right thing. They're not accountable, they're not registered, so therefore there's no recourse against them other than civil action. That gives our industry a bad name. We should be incorporating all the people within the

industry and all the trades should be registered, they should be compliant, and where consumers can go to the authority's web site and check on a builder and if he's got anything adverse against him, it's listed on that site. That's the way it operates in Queensland.

There's no other models that we can look at. We know that there is a model in Queensland that's been working for many years, has never been an impost on the taxpayer. It's working. Fundamentally it's working very, very well, and there's not a trade association in sight that gets any money out of that. In fact in Queensland, we have a reversal of roles in Queensland, where we have HIA as the very dominant spokesman for the building industry in all the southern states. In Queensland, it's a complete reversal. There is no legislation that allows them to make money out of it. They are not involved in the QBSA industry regime whatsoever, and suddenly we have the amount of members in HIA in Queensland, 2600; in Master Builders Association, 10,000 and something right at the moment. Now, that only comes about because the MBA are providing a better service to members and they have to get their members by providing a service, whereas here in Victoria and New South Wales, we have a huge lobby organisation of HIA set up in Canberra; there are hardly any builders in Canberra but that's where they're set up because that's where the lobby base starts from. We have compulsory professional development. It's compulsory in New South Wales. Where do you go to learn to get your points for compulsory - well, you go and have a day's golf with HIA. You go and have this program, that program that you pay for.

I just make that point because we just need to really cut to the issue of where the problems lie within the building industry. It's been an extremely vexed industry. The product of builders warranty insurance has not stopped from being in the papers, in parliaments in every state. Hit "builders warranty insurance" into any parliament other than Queensland and see how many hits you get. See how much time has been wasted on this matter of builders warranty insurance.

MR POTTS: How many builders are there in Victoria, just roughly?

MR DWYER (BCOA): About 12,000 working builders.

MR POTTS: How many were deregistered last year?

MR DWYER (BCOA): I haven't got the figures right at the moment. They are available. What, new registrations?

MR POTTS: No, deregistered. They were registered and because of faulty work or whatever, they lost their registration.

MR DWYER (BCOA): None. We have the Building Commission that runs the industry here. The Building Commission costs our industry $22 million a year. It runs a practitioners' board, it registers those builders. It does have a team of ex-policemen to prosecute builders and they do prosecute them, sometimes not

deserved, but I wonder why we need a team of policemen - and I've put this specific question to the Building Commission - and they say, "Well, it's better to have ex-policemen because they know the prosecution process better." I would have thought it would be far better to have a retired builder that really knows what he's talking about to deal with the issues, but yet the whole Building Practitioners Board that prosecutes builders and so on is made up of ex-policemen. We're very concerned about those issues as well.

MR WEICKHARDT: Who appoints that board?

MR DWYER (BCOA): The commissioner, Tony Arnell.

MR WEICKHARDT: Who appoints the commissioner?

MR DWYER (BCOA): The government.

MR WEICKHARDT: The Victorian government?

MR DWYER (BCOA): Yes, self-appointee.

MR FITZGERALD: All right. Any other questions? Thanks very much for that.

MR DWYER (BCOA): Thank you.

MR FITZGERALD: We take on board what you've just said and any material you're going to give us, that would be much appreciated. Thanks very much.

MR DWYER (BCOA): I've just bounded together - I haven't put in a submission. I'm very happy to provide any further information that you require.

MR FITZGERALD: Is this for the public record?

MR DWYER (BCOA): Yes, it's all public information.

MR FITZGERALD: Good, thank you very much.

MR FITZGERALD: Thanks very much. Madeleine is going to present now while we try to find what's happened to TRUenergy. So thanks for being flexible and being able to do it earlier. We've had your original submission prior to the draft report, and there's no further written submission that you've put in at this stage. Is that correct? I'm sorry, I should ask you to give your full name.

MS KINGSTON: Madeleine Kingston, I'm a consumer and I'm representing today both the consumer interest and the interest of the second-tier retailers. I've had a fair bit of contact with them. I'm very concerned about their position. I'd like to stay in a fairly neutral position to represent two groups of people.

MR FITZGERALD: So if I could just ask, there's no further written submission that you've put in at this stage since the draft report. Is that correct?

MS KINGSTON: Not since the draft report, but you have a fair bit of informal material and I do have more material to submit.

MR FITZGERALD: No, that's fine. Okay, if you just give us a brief overview of the additional points that you want to make subsequent to the original submissions that you've already put in.

MS KINGSTON: I fully understand that this is not an AEMC meeting, but the submission that I intend to make will be directed to several parties and I hope you will excuse it. It's going to be very long, as well as covering both sorts of issues.

MR FITZGERALD: I just have a couple of things on the length. It can't be very long. We'd only like you to make some salient points, and if there are additional things you want us to deal with it, you can put that in by way of written submission or our staff are happy to talk with you.

MS KINGSTON: No, I don't mean my oral submission. My written submission will be substantial and it will be directed to several parties.

MR FITZGERALD: All right, it's my misunderstanding.

MS KINGSTON: I intended to go the retail policy working group, to ERIG, and I have composed something that will be relevant to several parties. I don't intend to make a very long speech today, but there is something in writing. The first thing I want to tackle is whether or not retail competition in energy has been successful. That is one of the issues that the Productivity Commission has upheld. There have been so many articulate submissions about the TPA. There are many other things that you can hear from other consumers, but these may be some perspectives that may not come up in a hearing like this.

So I have become very concerned along with other people, perhaps it's the second-tier retailers I should start with instead of the consumers. I've had some contact

with them recently. I'd like to refer to a submission by Victoria Electricity which was made only a few days ago and I've only had a very brief look at it. It starts by saying they're a second-tier retailer whose parent company is Infratil. They appear to be spokespeople for other second-tier retailers, in fact they're very concerned about the position. They say first up:

> Victoria Electricity along with the second-tier and new entrant retailers strongly contends that the new rule requiring the procurement of physical gas for injection at Longford is a major barrier to entry and growth. Continuing with this new rule will not only support incumbency domination and the risk of collapse of new entrant competition.

The next thing I want to say is suffice it to say that little has changed since our earlier submissions except that in order to protect itself, Victoria Electricity along with possibly others - they haven't actually named them - have already taken steps that will have the effect of reducing our ability to compete in the Victorian market. I'm not going to read any more of that. It has already been submitted to the AEMC. They wrote a previous submission on 9 November. This one is dated 1 February. Along with many other participants who are also consumers and consumer organisations, there have been extremely disappointed with the AMEC, the manner in which inquiries have been handled, and how objections have been handled.

I know this isn't the AMEC, but what I do want to say is that I made an extremely long list as a composition, a compiled list of problems that have arisen that people have brought to their attention. Numbers of people believe that the decision has been made on philosophical, ideological grounds and - as my researches indicate - that these decisions were made not last year, or last month, but years ago. There was a sustained - the evidence that I've looked at which I will be submitting to several groups of people is that this appears to be a philosophical decision to price deregulate, to change things, without due consultation with the public, with the second-tier retailers, and without due recognition that conditions have dramatically changed. From the winter of last year, I mean even the AER publication which is the start of the energy market, a lot of it was relevant. They gave many, many cautions at the time on looking at what was happening with vertical integration and the impacts of market power imbalances, none of which has been properly taken into account.

I understand this is a very short talk. You will get all of this in writing. There are just a few points that I want to run over. I've prepared about 10 chapters and one of them is on selected competition issues on the supply side. The supply side is more significant in some ways and lots of consumer organisations have already made valid points that today I don't necessarily want to repeat, because they're there and they'll be in writing. But I believe that there have been so many gaps in assessing at world standard the internal market, that gaps in the Australian setting - and it does say here from the Council of European Energy Regulators:

> If the internal energy market is not properly organised and if the increasing interaction between national, political, economic and

institutional decisions is not duly taken into account, it may engender inefficiencies leading to high energy prices and poor quality of service.

My contention - and you will get to read it - is that this decision is not only premature, but the impression I'm gaining from second-tier retailers, from consumers, from other bodies - which will all be in writing - is that this is a decision that is going to hurt so many people. I'm really passionate about this.

MR WEICKHARDT: Which decision?

MS KINGSTON: The decision to price deregulate for energy, and then there are some moves to change energy protection services. I have some very strong views about existing energy protection under what they call so-called ombudsman, funded, run, managed by industry participants with a constitution that is composed entirely of industry participants, although there are councils and there are committees that have three representatives. I'm very concerned about the whole way things are going. The Productivity Commission is recommending increasing reliance with some alteration of generic provisions. There are moves from the Victorian Parliamentary Law Reform Commission as well as the committee, and in fact today I had a double-booking. I was due to be at another hearing which was the Law Reform Committee's inquiry into alternative dispute resolution.

There's a lot of confusion in the minds of the public as to who is running what. Certainly in the state of Victoria who want to be ahead of everyone else, they are running a separate inquiry asking the question, whether nationalisation should take place, whether there should be more reliance on ADR provision, and they have listed amongst those providers, providers who don't offer ADR at all. For a start, I don't believe any industry associations. They act more like industry associations than they do consumer representatives. They have a success rate with financial hardship cases, but they don't have a brief. They have very limited jurisdiction. It is all covered in writing, but they have very limited jurisdiction for policy issues, for issues of tariff, for issues of regulatory deficiencies. They just can't do anything. They are so restricted. They are so closely connected with the regulators who themselves have problems interpreting things. The regulators, for example, have not a clue about contract law. There are regulations in place that are being upheld because they do not understand the operation of the law.

There are 26,000 Victorians that I have passionate views about, I cannot cover in the context of today but believe me it is in writing, who are being disadvantaged by provisions in Victoria and in other states mainly to do with bulk hot water arrangements where water meters are posing as gas meters. Residents are being charged in cents per litre. When we're talking about unfair provisions we're also talking about unfair provisions that regulators are putting into place. There seems to be nothing to protect the public from that sort of things. So I'm covering that. This is just a quick potted - this is coming to you in writing, I just can't cover the ground. Going back to the implications for second-tier retailers, I have said it is not only consumers who are at risk. The second-tier retailers have taken their share of pain and disappointment. In Jack Green's 2007 annual report he referred to gaming of wholesale prices:

It is clear to blind Freddie that gaming has occurred and the question was who caused it and who benefited from it. Again, the market activity is fairly transparent and somewhere north of the Murray and south of the Brisbane River you will find those most active.

I'll bypass that for now. I've become very concerned. I have backed it with 350 references I think, thereabouts, so I know that this is happening. Battling with market dominance, a volatile market, and a climate of instability and uncertainty in change, the check list of incompletely or altogether unaddressed issues includes examination of the whole market in context. Some of those issues include transmission capacity. Much of this is too technical for you. It will be there. It's for the AMEC. It's to demonstrate how little they have looked into this issue. Impact of future events on wholesale markets in an evolving market, no attention has been given to that. Flaws in the assessment of effective retail competition in the gas market, mainly due to hedging dependency issues.

The contention has been put forward by the AEMC that it is consumers and as soon as they lift the regulations against standing offers everybody will have a free-for-all and they'll be able to find some sort of effective market. But the fundamental reason for market failure has nothing to do with those standing offers. It's to do with inability to get hold of gas contracts. It's to do with market dominance factors. It's to do with the fact that they just can't make it work for them. So if it's not going to work for them - and some of them are already halting, there have been a number of failures. Some of them since the publication of the AEMC report have withdrawn and are no longer cultivating the market. If that's not looked at, my concern from the point of view of consumers is that if several components of this market are not working out well, starting with some of the retailers, then heaven help us all. Whilst it takes years for the Productivity Commission to implement their recommendations, it takes years for the federalism debate to be resolved, for the anti-federalism debate to be resolved, for the states to make some agreement. This isn't a matter of months; it's going to take years. In the meantime consumers and retailers are failing. The detriment is enormous. I have put six months of work into this and there are 300 pages coming to you by the end of the week.

I can assure you that I am very concerned that we're starting at the wrong end of the scale; let's get protections in place, let's have a look and see how we can patch up the industry associations. That's not where it should be starting. So I guess that I'm not at an AEMC meeting, I didn't get to that, but what I'm really saying is that there's a lot to be looked at. There are certain target areas that you will be looking at and one is energy, one is telecommunications, and I can say something about each of them, but this is where my interest lies. So a lot of this will deal with the barriers on the financial side, the demand management, all of that is covered in there, and then it goes on to talk about no allowance being made for climate change, emissions trading, all of these are business considerations that appear not to have been even looked at.

On the demand side, in terms of management, the essential nature of energy, many

people have said this, the proper recognition of market failure from a consumer perspective hasn't been considered. The competition framework that enables an effective and equitable spread, that just hasn't been looked at. So if you're looking at making things better for consumers and you're doing it in a climate where there is so much uncertainty, I don't see how the market is going to work at all, no matter what you do. There is so little confidence, the community at large has so little confidence in what the AEMC is doing and how they are operating. So some of material will be referring to universal service obligations, the longstanding attitude of the Essential Services Commission as encapsulated by John Tamblyn the current chairman of the AEMC. At the Rome conference I'll be discussing in great detail how he put forward his views about how the shift of responsibility can be effectively achieved - for the greater benefit of the community mind you - by moving that responsibility from the community as a whole. It's my contention that it is the responsibility of the community as a whole to take responsibility for those who are vulnerable, disadvantaged, or otherwise cannot effectively participate in the market. That isn't happening.

What's happening is that there is a shift. Let's put it to the community organisations. Let the charities take responsibility for it. There are gaps. I'll be referring to papers like Andrea Sharam's Power and Market Failure - forgive me, I forget the exact title, but she wrote something four years ago around the time that retail competition came into place and she was very concerned then that only a fraction of the consumers will be covered by new provisions yet to be determined in detail, because if they are going to be farmed off to agencies who are going to pay them, they have to meet certain criteria. There will be so many amongst those who will just not fit in. They may be actually working, but they are only barely breaking even against the normal grants that they get from Centrelink. So there will be hundreds and thousands of consumers who won't be eligible for those sorts of handouts.

When the select senate committee met in 1999 and then again published their reports on the national consumer, they drew some conclusions about the gaps. I haven't time and I know that time will run out in a few minutes but it's covered here. I'll be discussing their report. I'll be discussing why they thought this kind of arrangement wasn't working then. That's 10 years ago when they first started to think about it. So I'm not going to cover much except what's in writing. I would just like to say that I'm very concerned about premature decisions, how it's going to affect everybody, and as for the points that the consumer bodies have raised, much of my material will be repeating and referring to that, upholding most of their recommendations. I am also concerned about proposed alterations to unfair trade provisions. The Victorian provisions have modelled themselves on the UK model. I'm concerned about some of the proposals that have been made from my perspective to dilute the impact of those sorts of provisions.

I'm also concerned about the advocacy provisions and the very modest unspecified sum that the Productivity Commission will be offering for advocacy. I support other agencies' recommendations that there is a national body that is as independent that is run along the UK lines. I'm really sorry that there was a lot of material but as I say, you will get most of it - - -

MR FITZGERALD: I just might ask these couple of questions. Just taking your last point first, so in relation to our recommendations about consumer advocacy, you've just indicated you favour the UK model.

MS KINGSTON: I do, I favour the model where you have a separate body. In case you're not away, PIAC have made a separate submission into the treasurer. That is the model that I personally support. I believe that there should be adequate funds for ongoing support for an independent body who can do that research, who can sustain it, and who can act as the voice. Whilst I'm at it, I also think that the second-tier retailers should have their own association, that they should have some representation. The cries that I'm hearing from their submission is that their viewpoints are under-represented. It's all very well asking for something for consumers, but in many ways I see them as small businessmen who are competing with market forces that they shouldn't have to, and that they should be separately represented. I'm not here to set that up, but I think it should be considered. I am extremely concerned that the current proposals to deregulate and the way the market is going and the speed at which things are being done is leaving the market open to dominance and corruption that the entire community will pay for for 20 years to come.

MR FITZGERALD: Some would say that electricity and energy reform more generally has in fact been very slow. I understand what you're saying.

MS KINGSTON: Some would say that, but I'm here to disagree with that viewpoint.

MR FITZGERALD: I hear it loud and clear.

MS KINGSTON: I'm passionate about it.

MR POTTS: Just an observation, Madeleine, in your submission, in your presentation here you've talked about problems with the current arrangements, or the proposed arrangements. I think it would be useful for us if in your submission you could set out clearly what you think should happen, rather than just what the problems are.

MS KINGSTON: I've sent you a draft. I have some definite suggestions. I'm running out of pace. I'm not as organised as I should be today. If you will bear with me until I can tidy that up. You have a draft of the things that I have proposed, the things that I have attacked. The rest of it is almost done, hopefully by the end of this week, if you can bear with me.

MR POTTS: If you could prioritise, say, the top three items that you think would make the biggest difference, that would be very helpful to us.

MS KINGSTON: Since one of your recommendations is to support the AEMC stuff in detail - and that will come in detail - one of them is to rethink that, have a look at what's submitted, have a look at what the second-tier retailers are saying, have a look at what the gaps are. I'm happy to send you that tonight in draft form, or I have it on a disc here. You can have my drafts today on a disc. That's one of them, to reconsider that and

reconsider whether in fact the net benefit to the community is as projected by them. Then I would like to see much more emphasis put on advocacy for two groups of people as I have just said, one for the consumers along the model that has been proposed by PIAC to the treasurer direct on 18 January and thirdly, some kind of representation for the second-tier retailers who are falling apart, who are not able to compete in the market, and are absolutely distraught about it. Then the rest of it will fall into place. I'd like to support everything that all the community organisations have said about fair trading, unfair trade contacts, the inadequacy of the TPA. I could go on but if you could just be patient until it's in writing.

MR FITZGERALD: But in relation to your comments about the AEMC, you're not proposing that we move away from a national energy - - -

MS KINGSTON: No, let me say that front up. Certainly in Victoria, I'm a Victorian, I should be very loyal to what's happening here and to the regulators. I am not. I believe that we're overdue for a nationalisation. I believe that it's absolutely imperative that there should be some consistency and it is far too untidy. There are far too many cooks, most of them running around without heads. They don't know what they're doing. They've the DPI, they've got the Essential Services Commission, you've got an inactive Consumers Affairs Victoria, you have legislation that is archaic and is just not delivering the goods. There is no way that I would be wanting to stay with the state. What I do want to say is: exercise caution. Just find out whether the market is ready for some of the recommendations that are being made, but for heaven's sake let's get on with the principle of nationalising everything and making proper representation instead of just a cursory lip service, you know, appeasement of community needs. That won't do the trick. The community are very dissatisfied. They're angry about the way things are happening. They're angry about poor consultation. I am angry. I am angry for everybody and I just don't feel everybody is going to be here to say it, so I want to say it for the whole of the Victorian community and for the whole of Australia.

MR FITZGERALD: Thanks very much, Madeleine, that's great.

MS KINGSTON: Thank you.

MR FITZGERALD: If you can give your full name and the organisation you represent, and then give us some of the key points. Can I just check with you also, you've put in a submission since the draft, I think.

MR HRISTODOULIDIS (TRU): That's correct yes.

MR FITZGERALD: A brief one which we've just received, so thanks for that. All right, your name and the organisation.

MR HRISTODOULIDIS (TRU): My name is Mr Con Hristodoulidis and I'm a regulatory manager with TRUenergy.

MR HAMILTON (TRU): I'm Graeme Hamilton, also a regulatory manager at

TRUenergy.

MR FITZGERALD: Good, if you want to just give us your key points.

MR HRISTODOULIDIS (TRU): Okay, we'll be brief. What we'll do is just sort of give you a quick overview of what was contained in our submission in response to the draft and then we're happy to answer some questions regarding our comments as well. So just briefly to start with, we generally support the main thrust of the draft report. We talk about having COAG oversight in terms of developing a national consumer protection sort of agreement along the lines of national competition policy type agreement. We think it's a good step. We agree with many of the recommendations that you had specifically around energy where you talked about retail price regulation, you talked about transfer, community service obligations to do with customers in hardship, and the third area you talked about was having a national framework basically through the MCE process.

Specifically on that MCE process, Graeme has been working through the retail regulation work and he'll give you some comments about that, but generally what we have said in our submissions to the draft was we believe that the energy reform program that's going through the MCE process should also be part of the COAG oversight. COAG should have oversight of that whole problem. We're concerned that as we're still in the infancy stage of the MCE that some comments that have been published by some jurisdictions about really derogating either the retail price regulation and/or the consumer protection framework outside of the MCE process. We're concerned that that's not going to lead to an outcome that we were hoping for when we first embarked on national reform. So having some sort of COAG oversight with incentive payments we believe is a stronger incentive to get that national framework right.

The other issue we want to talk about briefly which we don't think was touched on in the draft report was the emergence of green energy regulation. We believe at the moment at last count there's at least 10 schemes that have emerged with another two or three already on the drawing boards by different jurisdictions both at state and national levels. The influx of all these schemes we don't think is in the interest of either the industry and/or consumers. It's better to have one national scheme that really captures the market failure that people perceive in green energy, and that that should be the one scheme, that it should allow us to move to an environment where consumers are buying more green and the industry are producing more renewable type fuel sources. That said, I'm happy to just hand over to Graeme to make some comments maybe around the MCE program and then maybe take some questions.

MR HAMILTON (TRU): I think one of the areas that we would agree with Madeleine in terms of the need for the national reform process and consistency in regulatory arrangements covering the industry and that current arrangements are very much broken in terms of the ways they're currently operating and the raft of acts, codes, guidelines that we have to comply with is quite daunting. In fact it is a concern in particular for second-tier retailers trying to enter the market and having to deal with the level of complexity across jurisdictions.

The difficulty that actually appears to be going on within the MCE process itself though is that whilst there is a commitment to consistency, there perhaps isn't a commitment to efficiency in regulatory outcomes. So you've got a process at the moment whereby Allens Arthur Robinson consultants have drafted up recommendations through to the MCE process, but those deliberations have now gone in camera and the jurisdictions are discussing their draft recommendations in terms of the national framework. Our concern is, as it has been from the start, that what you get there is almost in a sense a bidding process whereby jurisdictions bid up to the most onerous framework that could emerge when you put all the different frameworks together. So rather than having somewhere where you have an independent assessment, such as Allens Arthur Robinson did actually do, reducing it down to a level similar to the regulatory frameworks that operate in Queensland, for example, the opposite process happens and each of the jurisdictions bid in their own particular obligations.

You've got statements that have come out of Victoria which on the one hand has actually been quite proactive and quite a champion of the national reform process, making statements that irrespective of what comes out of the national reform process, the Victorian framework will remain largely unchanged and that the regulations will continue to operate. That seems to be a bit of a contradiction to both the Australia Energy Market Agreement in terms of what's going to come out of that process and to COAG itself, so that's sort of the driver of our view that these things really need to go up to COAG where perhaps there's a bigger picture of what the objective is, not just consistency, it's about actually having an efficient regulatory outcome, it's about reducing costs, it's about having the lowest cost framework for a particular policy objective. From our point of view, when you look around the jurisdictions they've all got robust energy protection frameworks. Some jurisdictions do it at significantly lower cost than others and that doesn't appear to be emerging at this stage through the MCE process.

There's also been comments from South Australia and New South Wales in terms of price regulation. Again, the ministers have signed up to the Australian Energy Market Agreement which provides a commitment to remove price regulation once the AEMC has determined that competition is effective. The ministers are talking about actually extending the price regulation framework irrespective of the outcomes of the AEMC process and again, that seems to be a concern given that the drivers of COAG in terms of their priorities and what the jurisdictions are doing in a ministerial forum. I'll just touch on a couple of issues that were raised previously as well in terms of the effectiveness of competition in the market.

It's certainly true that in the Victorian gas market it is less competitive than the electricity market. Having said that, it's still one of the most effective gas retail markets in the world in terms of its level of competitiveness. The primary issue really is the level of price regulation in the Victorian gas market. The margins are significantly lower in gas compared to what they are in electricity, and that's driven by the imposition of price regulation. Second-tier retailers would be the first to advocate the removal of price regulation to create the margins needed to compete in that market. There has been a lot

of talk about the changes to the gas market rules recently in terms of second-tier retailers. I think the AEMC has reviewed that, made an assessment that it largely affects their forward contracting position during a very volatile period in the market, and that going forward with the removal of price regulation the market should be expected to become more competitive over time.

The other thing to bear in mind is that second-tier retailers have in fact joined the Energy Retailers Association and I'm glad to advise that Australian Power and Gas and Simply Energy, who are two small start-up energy retailers, have joined the ERAA, the Energy Retailers Association, and are quite committed to the reform process that the ERAA have been advocating. I think that pretty much covers the MCE process.

MR HRISTODOULIDIS (TRU): Yes, we're happy to take any questions, if you like.

MR FITZGERALD: Can I just get a clarification. You've mentioned the - it's my ignorance - AMEC and the MCE, can you just refresh my memory.

MR HAMILTON (TRU): Sorry, the Ministerial Council of Energy.

MR FITZGERALD: That's the MCE.

MR HAMILTON (TRU): MCE, so that's the jurisdictional minister - - -

MR FITZGERALD: So there isn't an AMC or an ACM?

MR HAMILTON (TRU): The AEMC is the Australian Energy Market Commission, so that's John Tamblyn's group who are making the assessment about retail competition in Victoria at the moment.

MR FITZGERALD: That's fine. Can I ask this question: given that you say in your submission and you've just indicated that a number of jurisdictions may have made statements rejecting the transference of consumer protection powers to the national level, why do you think that is so, given that in this particular industry segment the states remain at the centre of policy making through the ministerial council, and the regulator is effectively a jointly owned regulator, unlike the ACCC, unlike ASIC, unlike other areas where they're Commonwealth in nature only. Why do you believe that the state jurisdictions will be reticent to transfer consumer protection areas where they remain active participants in both the regulator and the setting of policy?

MR HAMILTON (TRU): That's a very good question, isn't it, in terms of why they're actually doing it. The statement has been made - just to clarify it - in New South Wales and South Australia it's regarding price regulation. So in both those jurisdictions there is a commitment to enter into the consumer protection framework. It's a concern in terms of when the removal of price regulation would actually occur. New South Wales have said that they will extend price regulation to 2013. The AMEC is due to do a review of New South Wales in 2009, so there will be a gap. Presumably you'd have to talk to the New South Wales government about the rationale in terms of actually proving that

reassurance.

In South Australia there will be a review of price regulation removal this year, although the current price path extends to 2010. So there's an opportunity for them to fall into alignment whereby the AMEC would actually recommend the removal of price regulation at the end of that price path period, but really the views of the government would really need to be investigated with the government. Victoria is a slightly different situation whereby they're talking about the consumer protection framework rather than price regulation extending. Victoria does have a number of unique consumer protection measures which are governed through legislation rather than the code itself. The Victorian government seems quite keen for that to be adopted in the national framework and if not they've indicated that they would derogate out of the national framework and impose those. So it's not that they wouldn't transfer to the national framework, it's that they would transfer but retain their own unique areas of regulation, if they didn't manage to bid them in, in terms of that negotiating process.

MR FITZGERALD: For the other states you think it is primarily about price regulation that is the key issue?

MR HAMILTON (TRU): It is, yes, certainly they've made no public statements about not wanting to transition into the consumer protection framework for energy in either New South Wales or South Australia.

MR FITZGERALD: We've indicated in one of the recommendations the removal of price caps when the markets are sufficiently competitive, and that's always a contentious recommendation by the commission. It's been made in previous inquiry reports. When do you think the time will come both in electricity and gas for price deregulation to occur?

MR HAMILTON (TRU): I think the time has come in Victoria. They have already removed price regulation for business customers. The AMEC report has found that competition is effective in the residential and business sector for gas and electricity. They're going through the process now of publishing their transitional report, how to transition through to the removal of price regulation, but that work has really been done for Victoria and I think that to a large extent the debate is over. With South Australia, ASCOSA commissioned a report by NERA Consulting about the level of competition in the South Australian gas and electricity markets which also found that competition was effective in South Australia, expectation would be that the AMEC would reach the same conclusion during their deliberations this year.

The difficulty of course is that the biggest impediment to effective competition is in fact the retention of price regulation. We've got this bizarre situation where we're trying to prove a market is effective whilst the largest constraint on effectiveness and competition is in fact the imposition of price regulation, which is New South Wales' greatest challenge whereby historically they've held retail price caps below market clearing levels and the level of competition has been retarded because of it. They're starting to slowly move through that process now, but whether they'll reach the level at

which the AMEC would be able to identify that the market is competitive or not is still to be determined. But it's ironic that the single thing that's actually holding it back is retail price regulation itself.

MR HRISTODOULIDIS (TRU): Just to clarify in Victoria that small businesses now aren't operating with price caps so the market in Victoria for the last, what, six weeks, or this year has been operating in a non-retail price environment. So the three host retailers have published rates for small businesses for their local areas that they are required to provide energy for, that there is no retail price regulation for small businesses. So they are operating in that environment now and there hasn't been any uproar about it. The small business groups haven't made any noise about it in terms of it failing them. Industry associations representing small businesses haven't come out and said small businesses can't get quotes or can't get access to the market. So it seems to be working. I know it's only six weeks in.

MR WEICKHARDT: We made a recommendation in the draft report about alternative dispute resolution schemes and the possibility of there being a national ombudsman. Do you have any comments about that recommendation?

MR HRISTODOULIDIS (TRU): As you move along to a national process, that makes sense to have a national ombudsman scheme. From our perspective, the real issue about the ombudsman scheme is about the framework that it's operating in. We operate across four or five different jurisdictions having to deal with four or five different ombudsman schemes. We've said it before and we'll say it again: it's the different cultures and the different way that the different ombudsman schemes operate that causes the greatest grief. Having one national scheme does obviously provide some cost benefits in terms of one fee. In terms of the way ombudsman schemes are set up though, the biggest fee is through the amount of cases you actually have that go through an ombudsman scheme.

MR WEICKHARDT: Sorry?

MR HRISTODOULIDIS (TRU): The biggest fee each year is the cases that go through the ombudsman scheme. So it's not the one-off annual fee you pay, that's quite a small amount. So whether we have, you know, five jurisdictions where we have 1000 cases, or one ombudsman scheme with 1000 cases, the large chunk of the cost is going to be the same. Our biggest concern at the moment with the five different schemes is that some schemes operate on a merit basis where they'll assess cases based on the merits of that case and tell the consumer whether they genuinely have a case to pursue or not, other jurisdictions operate on a jurisdictional basis so regardless of the merits of the case they'll take that case on and undertake investigation. In those jurisdictions obviously the costs of running those schemes are a lot higher because you're having a lot more cases come through regardless of the merits or not with those schemes. So from our perspective, whether you have a national scheme or a state based scheme, it's getting the rules set up at the front end to make sure you - - -

MR FITZGERALD: Do you have a particular preference for which of those types of

schemes is most appropriate?

MR HRISTODOULIDIS (TRU): The merit based one is the much better scheme because then you're seeing cases which generally have a merit to them as opposed to at the moment we would get cases sent through to us on a jurisdictional basis where we spend time and effort providing response back where there is generally no recourse available to the consumer because there's no merit to the case. That also generates situations where sometimes you see these cases come through and you're happy to resolve it through making a small payment of, you know, 30 to 40 or 50 dollars just because it's a quicker way of getting it through and the cost of the business alive than having to argue the case that there is no merit to that particular case. So a jurisdictional based approach is a far more effective approach.

MR WEICKHARDT: So what happens to most of the cases where they or others eventually decide there was no merit to the case but they take the case on?

MR HRISTODOULIDIS (TRU): That's what I'm saying, we make a decision whether we will resolve it with a small payment to the consumer, or take it on. If we take it on obviously there's a cost to us in terms of having to deal with it. In those cases you take it on and you fight until the process is finalised, and at the end of the day the way the ombudsman schemes are run is the ombudsman will make a binding decision on the business and you accept that decision, or the ombudsman makes a decision in favour of the business and then the consumer has other recourse.

MR WEICKHARDT: But in those states where you say it is not run on a merits based concept, is the ombudsman making final ultimate decisions that suggest that - - -

MR HRISTODOULIDIS (TRU): No, you would find that maybe one or two cases a year get to a final binding decision. Generally retailers will make an assessment at the front end once the case comes through to try and resolve the case, whether it is a small payment or making an argument back. You'll find in cases, even those on jurisdictional basis, there will be some sort of decision reached between the parties, because running it right through to its end is not cost-effective to us, it's not worth it. If you look at case numbers you can see that the case loads that come through the different jurisdictions, those different ombudsman schemes, those who run on a jurisdictional basis have a higher amount of cases come through on a per account basis as opposed to those with merit bases. A good example is if you look at the numbers of Victoria versus New South Wales ombudsman schemes. There's far more accounts in New South Wales, but they have probably half the caseload in nsw as the Victorian scheme does. Both schemes have been operating for about the same period of time, so their level of awareness in the community is about the same. So you can actually see there is cost-effectiveness in a New South Wales scheme as opposed to the Victorian scheme.

MR WEICKHARDT: Do you have any numbers on how much ultimate compensation, what the settlement numbers are that go to consumers in both states?

MR HRISTODOULIDIS (TRU): I could get that number for you but not off the top

of my head, no. That's something we can shoot through to you, yes, just on an average per case, yes.

MR WEICKHARDT: Numbers of cases and average.

MR HRISTODOULIDIS (TRU): Yes.

MR WEICKHARDT: There's a sort of implication behind what you've suggested that in the jurisdiction schemes lots of cases without merit get raised, but you basically settle those, so from a consumer's point of view they might say, "Well, that's a good scheme, we like it".

MR HRISTODOULIDIS (TRU): I can see definitely from a consumer's point of view it's a good scheme. But I think at the end of the day you want a scheme that actually provides adjudication on cases where customers have genuinely been aggrieved and deserve a payment. You don't want a scheme where you run to the ombudsman and you're still going to get some sort of credit on to your account just for the sheer fact that you've got to the scheme. I don't think that's a good outcome.

MR WEICKHARDT: I guess ultimately consumers pay for that one way or the other.

MR HRISTODOULIDIS (TRU): That's right. Those consumers who don't raise complaints bear the costs of those that do raise complaints. There are other differences around the margins. Again, in the Victorian scheme businesses who are outside the scope of the consumer protection framework have access to the scheme and we're talking large businesses, you know, whether it's a BHP or a property group or a financial institution, they have access to a no-cost scheme to raise a dispute. In other jurisdictions those who are protected by the consumer protection framework if they want to raise a dispute or make a claim against the retailer have to use resources and you would think large businesses who are in the business of negotiating energy contracts or negotiating some other contracts if they have a dispute have an effective mechanism of dealing with that.

Again, we've had cases come through sporadically through the Victorian scheme where a large business has deliberately the course of the ombudsman because it's at no cost to them.

MR POTTS: Just on green energy which you raise in your submission, do you propose that it be brought under the COAG umbrella? No doubt this will be looked at in the light of the Emissions Trading Report coming forward later this year, but are there any issues that we ought to be aware of that you would need to think about very carefully in relation to moving in the direction that you're proposing that you haven't mentioned in the submission here and we ought to be aware of?

MR HRISTODOULIDIS (TRU): Movement on the national emissions framework we're still a couple of years away. But what we haven't heard from the jurisdictions is, you know, in Victoria you've got a renewable energy target scheme, in New South

Wales you've got a renewable energy target scheme that's going through legislation, you've got an abatement scheme. For Queensland you've got a gas scheme. Victoria have just an introduction of an energy efficiency target scheme. There hasn't really been talk through the jurisdictions even though we get an emissions trading scheme that those schemes will be captured by the emissions trading scheme. So effectively we could be operating in an environment where you've got a national emissions trading scheme and then you've got all the other plug-ins at different jurisdictional levels who are also trying to generate either further investment in renewable resources or change consumer behaviour towards more energy efficiency-type activities.

If you believe that the emissions trading scheme will get you there and the pricing laws will be the most cost effective way of getting there, there doesn't seem to be a need to have all these other underlying schemes there. They just seem to be, if any, a nuisance value in terms of generating costs and uncertainty for consumers and industry. I suppose what we're saying is by having COAG take responsibility and oversight of the development of a national scheme, that there is again incentive for the states to actually transition those other scheme out of the process and just have one large scheme that deals with the issue of green energy.

MR FITZGERALD: In relation to those 10 schemes which you have identified in your submission, to what extent do they impact on any of the decision-making processes that are taking place in relation to the energy regulator and the ministry or the council of energy or are they wholly divorced from that and can in fact be dealt with as a separate national reform agenda? In other words, is there much cross-over between the issues that have been considered by - - -

MR HAMILTON (TRU): No, it's not been covered in that context really.

MR FITZGERALD: If we were to recommend this, it's not because there is in fact a duplication taking place, it's just that you're concerned about the policy in that area.

MR HRISTODOULIDIS (TRU): That is exactly right. The only thing that the MCE is actually looking at from a green energy perspective is a national framework for energy efficiency which they're developing their own measures. All the other schemes are outside the MCE process and have developed ad hocly on their own.

MR POTTS: I guess the question I was trying to get at was that there's nothing special about green energy that wouldn't encourage you to move in the direction that you've suggested in here. Are there any peculiarities of this part of the industry that we would be need to be aware of?

MR HAMILTON (TRU): Exactly the same principles should apply in terms of achieving a particular policy objective at the lowest cost. The way to do that isn't to set up jurisdictional schemes, it's just insane. It's the dual railway gauge of the 21st century really.

MR FITZGERALD: Can I just ask this: you've supported our recommendations in relation to the maintenance of hardship programs and other targeted mechanisms to assist disadvantaged consumers. I was just wondering whether or not there are emerging schemes, programs, arrangements that are starting to tell us the right direction in relation to the general handling of hardship issues or disadvantage. I mean, we've seen, rather surprisingly I suppose, in Tasmania the introduction of meters, almost coin meters, in electricity and there are pros and cons for doing that. It's not in your supplementary submission but I was just wondering are we starting to get a much clearer understanding of what really is working to advantage or disadvantage vulnerable consumers as distinct from what really looks good but isn't perhaps achieving those ends.

MR HRISTODOULIDIS (TRU): Yes, it's interesting hardship because again in Victoria most people would argue that it's got the most robust process in terms of dealing with hardship where it's embedded in legislation retailers need to undertake certain activities in managing customers through financial hardships. Other jurisdictions have taken different approaches. In South Australia there is a memorandum of understanding between retailers, community groups and the government. New South Wales has started to move down towards the Victorian model of legislating for specific programs. The critical issue with hardship is though - and I don't think this work has ever been taken - is to take a step back and say, "Well, what's driving hardship?" and if it's a lack of income for consumers to be able pay for essential services like housing, energy, food then we've really got to look at the social welfare system and say, "Are we providing enough income support in the social welfare system where people can provide for themselves a basic standard of living?"

At the moment the decision has been taken in Energy that that cost is going to be worn within the energy sector through hardship programs with retailers, government assistance programs where they provide utility relief grants as one-off grants to help people, when they've accumulated a large debt, pay that debt off. That cost is then spread across a base of about six or seven million energy accounts. If you say, "How do we spread that cost across the tax transfer system?" then you're talking about a base of 15, 16 million and the cost is less per person and effectively you can actually probably put in place, if you do the work at the front end, an income support system that actually provides enough income support to say to consumers, "We think this amount of income per week or per month or per fortnight is enough to provide you with at least a minimum standard of living which will help you pay for your housing cost, your energy costs, your food and essential items that you need to get through."

That work hasn't been done at that sort of bigger-level picture and the approach has been taken, "We'll develop hardship programs," where those who are not in hardship and are paying their bills are actually cross-subsidising those others who are in hardship. That's where we're at at the moment. Is that the best way? I don't know. I think it's probably better to go through the tax transfer system and spread that cost across a wider tax base. That is where we are at. I don't know which

system is the best. The best indicator of hardship is disconnection rates. Most jurisdictions are running at disconnection rates of about .5 to one customer per 100 customers, so they're actually quite low. Victoria would argue that they've got the best rate because they're down at about .35, .4 but that's because 15 months ago in Victoria they introduced a new measure called Wrongful Disconnection Compensation Payments and effectively the industry stopped disconnecting for nine months while we worked with government and regulators to work through the legislation and the regulations surrounding it.

If you look in the last year or so the disconnection rates again in Victoria are coming up towards New South Wales, South Australia and Queensland at that .5 to one customer level. So again you've got to argue, "What is the ideal rate of disconnection that you want and what's the most cost effective way of getting there?" I don't think we know the answer to that at the moment.

MR FITZGERALD: You're saying the disconnect rate on average around Australia is about .5?

MR HRISTODOULIDIS (TRU): To one, yes, per hundred customers.

MR FITZGERALD: Yes. Are there any other questions, Phil or Gary? No. Any other comments you would like to make?

MR HRISTODOULIDIS (TRU): No, that's all thank you.

MR FITZGERALD: All right. Thank you very much for that, that's terrific.

MR HRISTODOULIDIS (TRU): Thank you. Thanks for your time.

MR FITZGERALD: We will now break for morning tea. We are just waiting for the next participant. There is coffee and tea just at the back.

MR FITZGERALD: All right, thanks very much. Peter, if you can just give your full name, the three of you, and the organisation you represent and the same drill as last time, just some initial comments and then we will ask questions. Also could just clarify whether or not we've received at this stage a further written submission. We have those received those now. Thank you.

MR BROHIER: Yes, we sent one in. My full name is Peter Neville Brohier. I am a retired solicitor and resident in 143 Kooyong Road, North Caulfield.

MR PENHALLURIACK: My name is Frank William Penhalluriack. I am a hardware proprietor and I have a deep interest in equalisation schemes within Victoria and Tasmania.

MS FORGE: I'm Cheryl Forge. I am an individual public interest lobbyist. My background is a degree in physiotherapy and I am the Victorian secretary of Save Our Suburbs.

MR BROHIER: Thank you, Mr Commissioner. We are lobbying with members of my former committees, Sue McDonald, Jane Rudd, Andrew Sena and Steve Voss. Between 1992 and 1996 the people of Tasmania and in Victoria asked for a national sea highway crossing Bass Strait. Soon many major industries and organisations across south-eastern joined the lobby expecting substantial commercial benefits. An uncapped funded, federally-funded sea highway equalisation scheme, the Bass Strait Passenger Vehicle Equalisation Scheme was introduced. This, commissioners, was a very hard thing to achieve from nowhere. Despite three opportunities for full equalisation offered by two prime ministers, the Bass Strait scheme has been allowed to meet principally the goals of just one section of Tasmanian tourism.

We are glad that core, high level Tasmanian tourism has enjoyed so much benefit from our vision and lobbying. Without it there may have been no ferries and no cars taken cheaply, there would be no boom in tourism over the last 10 years and no millions or hundreds of million and maybe more than that generated by that industry as a result. But it now seems clear that through some political moves recommended by officers and with the sanction of Canberra officials and in the absence of sea-based competition, a form of tourism targeting under the Bass Strait Equalisation Scheme has now replaced highway equivalents. Tourism targeting is common across the nation, but usually there is no such opportunity to introduce it over a national interstate highway route. The result is what seems to be almost an alienation of a whole state through a focus on high-yield tourism in lieu of the equitable movement of people and vehicles based on bitumen equivalents.

The people's mandate was for an equitable sea highway. The generous Bass Strait Passenger Vehicle Equalisation Scheme should not be allowed to fundamentally move from its original intention into a single industry assistance scheme. The scheme already has the in-built capacity to encourage high yield targeting and with some conditions imposed by Canberra can easily offer the more

efficient, high volume highway equivalents. If necessary the Bass Strait Passenger Vehicle Equalisation Scheme can be applied in a way to also cover both.

For over 11 years Canberra still hasn't delivered comprehensive equalisation for the rest of us by adopting an appropriate policy framework. One can't expect an industry to meet national interstate transport goals or do the job of Canberra's bureaucracy. Tourism is entitled to protect and advantage their industry within the framework Canberra has set and within its sphere of influence. We can't think of a better way they could have acted. We don't mind them benefiting, but unfortunately, this focus has been largely to the detriment of many others by not achieving the equalisation purposes of the scheme. Tasmanian tourism directly contributes about 27,000 jobs or about 7 per cent of the gross state product in Tasmania, other industries within Tasmania support possibly 200,000 employees. Most need high volume, untargeted sea highway access, so do many industries in Victoria.

Naturally the sea highway was to benefit tourism. A general understanding would be that the word "tourism" means a focus on attracting more and more people. High yield targeted tourism can have a much more restricted application. For a casual observer, this difference may not be easily apparent but it is critical as to whether the major economic drivers of the whole state of Tasmania and Victoria are engaged or they are not. Targeting on the other hand has the capacity to make Tasmania similar to a four or five-star Barrier Reef island, encouraging increased costs of crossings through higher class, surface transport facilities and increasing standard of ferry accommodation; applying the Bass Strait scheme to the car alone when the scheme allowed flexibility; longer routes; travel packages and an untargeted Bass Strait equalisation scheme is a formula for encouraging higher access costs across Bass Strait, not lower ones. Air and sea packages then would compete replacing highway equivalence.

Equivalence requires sea fares of about $60 for a person or $299 including a car and all its passengers each way or less to compete with air fares and the cost of travel on other interstate highways. Why is Canberra pumping billions of dollars into every intercapital link to achieve highway or bitumen cost equalisation for the rest of the nation while encouraging targeting over Bass Strait whilst highway equivalence is the current stated public aim of Canberra's political leadership and I go to the Labor announcements that are in the documents that I have provided.

Targeting limits the volume of travellers crossing. Monitoring reports to ministers generally focus on issues other than whether the Bass Strait Passenger Vehicle Equalisation Scheme delivers bitumen equivalence. As a result of these reports further conditions to direct the Bass Strait funding to deliver equalisation and low fares are possibly thought unnecessary by ministers. Without these conditions highway equivalence is being ignored. The Bass Strait Passenger Vehicle Equalisation Scheme was to be a Bass Strait scheme, a whole of Bass Strait scheme, not just the Tasmanian scheme as its name implies. The names is Bass Strait Passenger Vehicle Equalisation Scheme and monitoring reports were to adjust the scheme manually in line with the cost of road travel. Fair, consistent priced, low

cost, all-year interstate transport, a low cost of consumables and access to essential services are vital elements to any community. It is even more critical when living in an island state with a broad based economy or Melbourne facing population growth and need volumes of surface travellers transiting in both directions.

Comprehensive highway equalisation across Bass Strait will deliver these elements and population for Tasmania filling rather empty towns. There is no justification for an Auslink gap in what is supposed to be a national and integrated transport system. It can't be integrated without this gap. The equitable link between the two states has been already justified on equitable grounds 11 years ago and not by economic assessments as suggested by the Productivity Commission in the TFES report. Without a modelled assessment the Bass Strait Passenger Vehicle Equalisation Scheme and the consequential increased capacity with lower total fares delivered in one year what was expected in five.

We accept that some economic assessments may be required to enhance the link to more than a notional single lane in each direction. But Auslink's highest priority should include at least one fare link between states or capital cities. Its predecessor, the Australian Land Transport Development Act, from my recollection, provided for a ferry to be part of a definition of a road including intercity national highway links. It seems nonsense to revisit the reasons for equalisation schemes again and again. Here, now is an opportunity for the schemes to be made to work. There is a substantial unused shipping capacity, uncapped federal funding and a new Labor government that supports the highway concept of moving the cost of crossing to the cost of bitumen on national highways. That move can be fully delivered within weeks using existing Bass Strait funding streams - and I say that more particularly in relation to the Bass Strait Passenger Vehicle Equalisation Scheme.

It is sheer discrimination against principally Tasmanians and then Victorians and then the rest of the nation to not deliver equity over Bass Strait. Given the public's long-standing initiation and involvement in the original campaign, Canberra is significantly eroding faith in the democratic process. It was the people of Victoria that sought and obtained the Bass Strait Passenger Vehicle Equalisation funding. Community service obligations need to be imposed on the Bass Strait Passenger Vehicle Equalisation Scheme now and a similar effort put into applying the Bass Strait Passenger Vehicle Equalisation Scheme as the Productivity Commission made in respect to the application of TFES. Full equalisation can offer the certainty of dramatically lower all-year fares based on the cost of bitumen travel and is consequently capable of moving large numbers of passengers efficiently across Bass Strait. Large volumes of passengers were expected to be carried sufficiently to fill two ferries all year with multiple sailings, see the 2000-2001 $28 million a year estimate by officers of three government departments over two states and the Commonwealth.

This expectation was also met by the very low cost Rundle subsidy of about 350,000. A movement out of demand curves of many industries, rather than a movement just along those demand curves is and was expected as a result of lower

consistent access costs. It would change the whole parameter of Tasmania's remoteness with an equalisation scheme. This would increase numbers crossing even further, untapped demand for low fares was there in 1996 and discount air was described by the operator of the current sea operator about a year or so ago as "too plane expensive". Tourism targeting maintains inequality for all other industries. Those industries contribute 93 per cent of gross state product in Tasmania and also gross state product interstate. It leaves them to possibly share indirectly in limited benefits from the advancement of core Tasmanian tourism but not directly through a highway connection. It therefore discriminates against them, limiting many of their markets, their access to people and the level and type of investment made in Tasmania in the end. Pricing capacity are the major determinants of crossing by sea, a $400,000 study indicated that.

Canberra's approach at officer level seems to be to turn the Bass Strait scheme into solely an assistance scheme. The consequential loss is significant for many industries and individuals over south-eastern Australia who joined together seeking highway equivalents. The people are the ultimate end users here of both equalisation schemes and the commission in Canberra should act strongly in their interests and fairly within the people's mandate.

Bass Strait remains Victoria's justifiable third intercapital, interstate link, or an extension of the Hume Highway. The sea highway was not to be just for Tasmania. Also billions of dollars of federally funded interconnecting infrastructure relieving Victoria's congested roads can be dependent upon this link. The Victorian government has asked for an AusLink link over Bass Strait to offer equity to its manufacturers and presumably to encourage international exports from Tasmania. I call on the president of the Productivity Commission to review the Productivity Commission's TFES final report and to base the reasons for continuing in enhancing the TFES and the associated Bass Strait Passenger Vehicle Equalisation Scheme on the only sound economic and equitable basis for it, as advanced by the former prime minister and now by Rudd Labor as "A link to the national highway moving towards the cost of bitumen or to equalise cost disadvantages between states" and in relation to that I'd add an addendum, for equalised cost disadvantage for both Tasmania as well as Victoria, as advanced by the former Prime Minister Howard.

Are we not to enjoy the combined economic impact of this policy by linking the two states? Under TFES there is no fair and efficient surface trade between Victoria and Tasmania. The name of the TFES, Tasmanian Freight Equalisation Scheme, would imply the cover of consumables - it does not. The scheme has been described as discriminatory by the Productivity Commission. They are right. The Tasmanian Freight Equalisation Scheme does not cover southbound consumables and international exports through Melbourne. Northbound and southbound manufactures are treated differently. Fair trade would lower the cost of living through lower consumer prices in Tasmania. It's advocated internationally by Australia - why not for Tasmania? Fair access builds population allowing services critical mass to survive and spreads overheads bringing down prices. Southbound TFES would add to this benefit. Also with an AusLink link, international exports crossing Bass Strait are likely to be covered without World Trade

Organisation difficulties. Freight volumes would increase, and why I say that about no World Trade Organisation difficulties, we have no hesitation in building factories in Albury and being able to send our goods down to Melbourne on highways paid for by the Commonwealth. If Bass Strait was similar on an AusLink link, there should be no difficulty in sending goods across Bass Strait for that same reason.

Passenger and vehicle equalisation allows access to one's own country and between two states having a broad base of industries. It offers equal air and surface links with all other states, fair competition between air and sea, and allows the civil and political right of freedom of movement across this country. Highway connections bring population, investment and jobs. They would do that on land; they will do that on sea. What will the consumer framework inquiry or officers in Canberra do to ensure that current ministerial directives do not limit the nation's right to essentials? We call on the Rudd government to fund access for freight comprehensively, based on bitumen equivalents and to fairly link this nation after first equalising people and vehicles under the Bass Strait scheme as Prime Minister Keating had attempted to do before the introduction of the Bass Strait Passenger Vehicle Equalisation Scheme.

The Productivity Commission has wide obligations in its charter. Where is an effective consumer framework for Victoria and Tasmania? The Productivity Commission has suggested targeted regional development programs to replace the TEFS in another inquiry. These will not deliver equity and ignores Tasmania's statehood. The Productivity Commission described Tasmania as a small regional economy. This approach fails to recognise Tasmania's natural strengths and attractiveness and its proximity to the largest population corridor in this country, and the low cost of moving people and goods by sea compared with national highways. My suggestion is that it would be good to link Tasmania and it will grow. If we cut the Geelong Road, I'm sure Geelong wouldn't grow.

This review offers a chance for a recommendation that the nation's transport system be integrated from Cape York to South East Cape in Tasmania and restore the equality all states enjoyed when the great sea lanes linked capital cities a century ago. The omission of this link by application of existing schemes is unjustifiably stifling a free market and economic growth in south-eastern Australia. It is a very serious case of interstate economic and social injustice, but the remedy is easy. We obtain the funding. Where is the promised outcome? This issue is impacting on Tasmanians and Victorians and is possibly of more direct importance of many of them than all other recommendations made in an interim report by the Productivity Commission.
I would like to read to you an excerpt - - -

MR FITZGERALD: We just need to cut it short so if this very short reading, that's fine.

MR BROHIER: It's a short reading and then one more paragraph, Mr Commissioner. This is a letter from Will Hodgman MHA, leader of the opposition in Tasmania, dated 7 August, so it came since our April meeting:

> Dear Mr Brohier, thank you for your letter of 24 July. I am aware of the history of the Bass Strait Passenger Vehicle Equalisation Scheme and also appreciate the concept that competition drives down prices and this is difficult to achieve with a monopoly service. While this service has been tremendously beneficial to our tourism industry, we have constantly lobbied the state government to keep fares to a minimum to utilise capacity. This also goes to the spirit of the Bass Strait scheme of a fair and equitable sea highway. Instead, TT Line fares have steadily increased on the back of massive subsidies from the Commonwealth government. The Bass Strait Passenger Vehicle Equalisation Scheme was not designed to prop up a government enterprise, but provide a fair and equitable access to the national highway for Tasmanians.

There's one more paragraph, but it relates to a domestic meeting. This has been a very hard campaign for me, but I might say this, that on a personal note over the last 16 years of this voluntary campaign - I'm sure this reflects on my supporters as well - we wish to thank you all including those who sometimes may oppose us, but for giving us a very rare insight into a very timeless story of Don Quixote. Thank you, Mr Commissioner.

MR FITZGERALD: Thanks very much, Peter. Are there other comments from your colleagues?

MS FORGE: No, not really, no.

MR FITZGERALD: Perhaps not at this time maybe. I suppose - and I raised this with Peter over morning tea - the difficulty for this inquiry is how does this fit within the notion of a consumer policy framework? I fully appreciate your concerns in relation to our previous inquiry and unless I'm corrected, I understand that the final report has gone to the government some time ago. So in one sense, that inquiry has come to a conclusion and I think at this stage it's awaiting the formal government response. So I suppose you'll have to, in a sense, convince me that we can take this up within the context of the broad consumer policy framework as you've now seen it described within the draft. That's the first stumbling point and I'd just like you to convince us that we can deal with it in that particular context.

MR BROHIER: I think I may have mentioned on a previous occasion that these Bass Strait schemes are initiated by ministerial directive. I think I put to you last time - either in a DVD form or some form - that I felt that where a minister signed off to a scheme under ministerial directive and that scheme interfered with the normal rights of a consumer in terms of access to fair trade or access to a right of freedom of movement that transport gives this nation, interstate freedom of movement, that that minister be required to report to parliament as to the reasons why he's signing off to directives that don't achieve that. I think that would allow parliament to look at the fairness of an issue if a minister chose not to be fair.

MR FITZGERALD: But if I could just push it a little bit further - and I'm not

trying to be difficult about this, I'm trying to give you the chance to convince us - notwithstanding that, why should it fit within a consumer policy framework inquiry?

MR BROHIER: When you look at the fundamental issues here, especially in relation to Tasmania, we're looking at a fundamental right of freedom to move, in a state that has a history of not being able to move. You're looking at the fundamental pricing of goods within Tasmania and you're not giving them the right that we advocate as a nation internationally. Surely that puts it well and truly within the essentials of a network or a framework that needs to be there and the only way I could suggest that it be there was the way that I've suggested to you.

MR WEICKHARDT: Peter, can I just try and understand; in making these proposals, you're suggesting that this would help growth in Tasmania and maybe indirectly in Victoria. I mean, some people like growth and some people don't. Are you convinced that all the residents in Tasmania actually want this extra growth and would like it or do they enjoy the isolation that they have? Is the tourist attraction of Tasmania partly related to its isolation?

MR BROHIER: No, Mr Commissioner, I can't tell you that every Tasmanian would want what I put to you but what I can tell you is this: that the whole of Tasmania voted John Howard in and gave a mandate for the national highway connection. I can tell you this as well: industry almost to a man across Tasmania, including the tourism industry, wanted that outcome because the National Sea Highway Committee that I chaired was probably the largest commercial committee, based upon a citizens' application for highways, and most important commercial committee at that time in Tasmania. That's why it was able to get two of our nation's political leaders to do something no-one had every been able to achieve before. We took that from nowhere, a public meeting in a city called Burnie.

What I might say is this: that if there is a view that Tasmania ought to protect its natural heritage, then I'm suggesting the best way to do it is to give people jobs in their towns. You don't need to tear the trees down, you don't need to do that to give them jobs. There's enough. If you open the border to Tasmania, you will see that people will take an advantage of sea change and move there, the population will increase. We've seen some evidence of that. You don't need to destroy Tasmania's natural beauty but I can say this: in isolated areas across this world, when people don't have jobs, they turn their trees into charcoal.

MR POTTS: It's certainly a fact that Tasmanians have the right to move. It's a question of what price do they have to pay to do it and you're suggesting they're paying too much. Just looking at developments over the last decade or two and looking at the cost of travel within Australia, particularly Victoria and Tasmania and the mainland, I think it's the case, although I haven't seen the figures to verify it, that the relative cost of air travel has fallen in Australia which suggests to me that the problem that you're talking about, particularly in relation to tourism, is relatively smaller than it was 10 years because the relative cost disadvantage in taking the air travel, vis-à-vis sea travel, has fallen and so it's become relatively less expensive for

tourists or for Tasmanians to move between Tasmania and the mainland.

So I guess the proposition I'm putting is to what extent do you believe that the problem you're identifying has become smaller in the last 10 years, of less significance, because of the change in the relative travel costs between Tasmania and the mainland?

MR BROHIER: I don't believe it's been of less significance now than it ever was. I think we have roads across deserts to Perth and the air travel to Perth may have reduced as well, but we still maintain those roads. It provides an all-year, everyday consistent access price between every other capital city except Victoria and Tasmania. Bass Strait is about the interests of Victoria as well as Tasmania but let's take the Tasmanian focus because you asked that question. A few months ago or a year ago or so, the shipping line, as I mentioned in my submission, had a big ad on the Nepean Highway that said, "Air travel is too plane" or "Discount air fares" or words to that effect, "are too plane expensive," p-l-a-n-e. It was a pun on the word.

The reality is this for ordinary Australians wanting to travel short distances: they use their car when they travel. If Bass Strait was similar to a bridge or a highway, the reality is they would go there and they would go there at the same cost of travelling on bitumen. Now, why would the shipping line say that air is "too plane expensive" - you know, they're not in the air market - but they would say this: that for an ordinary family, they pay the costs of getting to the airport, they pay the costs of parking, they pay the costs of crossing and they pay the rent-a-car costs. The reality is, families go to Tasmania maybe once or twice in a lifetime with a highway, and ferries are tantamount to a highway system across Europe. They get on a ferry. They travel across, $60. If five of us put $60 on the table, we'd take the car for nothing under equalisation, all costed by three government departments a few years ago, but just update the cost.

The reality is that this provides a very ready access that every other state enjoys. In my view, if there is a focus on targeted tourism, then the decision made by Melburnians or anybody on the mainland is basically, "Shall I take an air package or shall I take a sea package?" and then one package competes with another. Where the rent-a-car costs rise, then the cost of that air package for practical purposes - because they need to take a rent-a-car at the other end - will go up, and the sea package may then rise to compete with the air package and costs go up. If you have a high-yield approach to this, costs keep going up, whereas a highway provides all-year ordinary access.

MR WEICKHARDT: Can I understand, Peter, your fundamental argument for this is on equity grounds or do you believe that if it were put in place that overall, economically all citizens of Australia would be better off?

MR BROHIER: I'm putting it on that basis that I believe it's on equity grounds principally but it's principally also on economic grounds.

MR WEICKHARDT: It can only be principally on one.

MR BROHIER: Well, I'm going to say it's principally on two because both are critically important.

MR WEICKHARDT: A bivalent principle.

MR BROHIER: Possibly. Look, the reality is this: we've effectively proven this works economically because when the fares were reduced and the capacity was increased and the Rundle subsidy, the figures were enormous. The increases in figures were enormous in relation to the movement of people across there.

MR WEICKHARDT: But somebody is paying for that. There's a cost.

MR BROHIER: Yes.

MR WEICKHARDT: Other taxpayers in Australia are paying.

MR BROHIER: Yes, and I'm delighted they're paying because I can say this: I don't use the road between Adelaide and Perth very often but they're paying for that road through a common pool. I'm suggesting here that the common pool be paid for by taxpayers. I haven't found too many taxpayers that would like to throw Tasmania into the regional part of Australia, not recognise them as a state, but if they want to do it, they might save some money. But the reality is that we share a national integrated grid. I mean, there is a strange irony here where this nation can advertise an AusLink as a national integrated transport system when it isn't. Your report in the Productivity Commission TFES inquiry talked about there being an AusLink link in Tasmania. Well, there is and there's an AusLink right up to the ports, or some of the relevant ports in Victoria, but you don't have a hose and put a big hole in it and say we won't join it. If you have a hose you join it. If you have a road you join it. If we're prepared economically to fund every other link with billions of dollars, why don't Victorians have a right? Adelaide is enjoying three interstate, intercapital links under AusLink: one to Darwin; one to Perth; and one to Melbourne. We are being denied the amenity of three fabulous links; one by sea. But sea travel is a cheap option. We're not asking you to build a metre of more concrete under a road. I hope I'm not being too flippant here, but basically all you need is a bucket and a motor and effectively you could move people, vehicles and freight across water - it's cheap. So the reality is, we're not asking for an arm and a leg here, and can I say this one more thing. Do you know, it's not only cheap, you could have it within weeks.

MR FITZGERALD: Your total estimate of the cost of this subsidisation or equalisation you say $120 million if it was just on freight alone and then it would increase if you had passenger equalisation. Have you got any current estimates of what the equalisation subsidy would really amount to if you embraced your proposal?

MR BROHIER: Mr Commissioner, I would say this, that I would have had them on this table if the TFES inquiry for the Productivity Commission had followed the prime

minister's advice and the mandate to the people of Tasmania and actually worked them out. But bearing in mind that it might have been rather difficult for them to do so, I will say that I don't. What I've done is this. We know that freight volumes are such that we've doubled the freight volumes and we've added another 30 million to cover international amounts. But I would say this, in relation to the Bass Strait Passenger Vehicle Equalisation Scheme it was $28 million back in 2000-2001. That was the estimate of a number of sailings across Bass Street. If we put a factor to increase that we'd have the figure.

MR FITZGERALD: It is capable of being calculated. I was just wondering whether you had a rounded figure. I notice you hadn't put that in, but I just thought I'd ask.

MR BROHIER: No, there was a reason.

MR POTTS: I presume though, just going back to what you were saying before in response to the first question, there are two principal reasons why you think this is important, one of which is an economic one, that it's going to be economically beneficial to the country. If you believe that, I'd presume then that you would then continue to support this if the proposal stood up to proper cost benefit analysis, which would demonstrate whether it was economically viable or not for the country as a whole.

MR BROHIER: I would have no difficulty in agreeing to that, but I would also say in fairness that every other interstate surface link, intercapital surface link ought to stand up to that rigorous scrutiny. I would surmise that on a national basis that Tasmania has some very unique strengths and I have made inquiries of Monash University to see whether there could be an economic model made of this proposal. Bear in mind that the Commonwealth have acted without that modelling, and bear in mind that the Tasmanian Chamber of Commerce also put a report to government dealing with economic benefits for Victoria and Tasmania and it was substantial. I asked that question and I believe that there is no economic model in Australia and may not be in the world that could actually model the impact of this. I would imagine - I don't know how you model the impact of the Hume Highway but I guess it would be the same.

MR FITZGERALD: There are ways but - yes. Any other comments or questions? Any other comments from your colleagues before we conclude?

MR PENHALLURIACK: Simply that this is obviously a question of being fair to all Australians. My background is fighting for shop trading hours deregulation in Victoria and the commissioner made the comment that many Tasmanians may not want to use the ferry. That's fine. Many consumers may not want to use my shop on a Sunday. The beauty is it's available, and it is grossly unfair that at present for Tasmanians and for Victorians that link is missing. One of my staff has recently - only a few days ago in fact - effectively migrated to Tasmania. His father is blind and he wants to come back every few weeks. Had he migrated to Albury, there's no question he wouldn't have been flying down to Melbourne. He'd pop in the car as it suited him and visit his father. He's denied that opportunity because he's moved south instead of moving north. That's unfair.

MS FORGE: From my point of view I'm a foundation member of Save Our Suburbs nine years ago and I can see the terrible congestion of traffic and population and rising prices in real estate. We have a huge problem, a growing problem. I see that the freer travel between Tasmania and Victoria will free up some of that congestion and also it's much cheaper housing over there. It would bring more a competitive basis if more people could get jobs down there and more affordable housing, not to mention the horrific traffic situation we're in. This is 2008. How is it going to be in another 22 years? God help us. Recently we were coming back from Tasmania and there was a passenger with us with her daughter and her budgerigar. She had to save up to move to Victoria so she could be with her son because she couldn't afford the visits to and from her home in Tasmania. So she had to permanently migrate to Victoria.

MR FITZGERALD: All right, thank you very much for that. That's much appreciated. At the end of the day we normally invite people to make a short statement if they wish to, those who haven't already done so or been scheduled to do so. Because we've only got one submission after lunch - although it's an important one - I just might make that offer now. If there's anybody here who would like to make a statement for the record prior to us breaking for lunch. No? Okay, we'll resume at 2 o'clock with the Consumer Action Law Centre of Victoria.

(Luncheon adjournment)

MR FITZGERALD: Welcome and thanks for your ongoing contribution to the inquiry. So if you can give your full names and the organisation that you represent and we'll get under way.

MS LOWE (CALC): Catriona Lowe from the Consumer Action Law Centre.

MR BRODY (CALC): And Gerard Brody from Consumer Action Law Centre.

MR FITZGERALD: Good, over to you.

MS LOWE (CALC): We thought we would begin today, I just thought I'd give you a very quick sketch of the matters we wanted to touch on in our remarks today, and we thought given there's obviously some ground been travelled already so far we thought we might, if you like, hit the highlights of the remarks that we wanted to make and then perhaps allow more time for there to be particular questions, if there's areas that you're particularly interested in that we expand on.

We thought we would begin by letting you know some elements of the report that we have very much welcomed and support. We also then wanted to talk with you about some of the areas where we would have perhaps liked to see more treatment of issues or where we think that we may have to respectfully disagree with the conclusions that have been reached in the draft report. Specifically we wanted to speak with you about the way in which the consumer policy objective has been framed. We wanted to speak with you about marketing inquiries and super complaints and, as no doubt you're expecting, we wanted to talk with you a bit about unfair contract terms and also the general fair trading prohibition and then lastly Gerard will pick up some remarks in relation to the energy components that are there.

But turning first importantly to those elements - there are many elements of the report which Consumer Action and indeed, I think it's safe to say, the consumer movement more broadly strongly welcomes. Primarily it's an esoteric element in the report but the notions that are there around the need for an overarching framework for clearly understood objectives within which other more specific initiatives or programs may then fit is one of the elements of the report that we think is enormously important. We've seen the benefit that that overarching approach can have, not least in the approach that we have taken in recent times to national competition policy and we think that is one of the areas where consumer policy has very much suffered is that fragmented, albeit well-intentioned, approach that has perhaps developed over recent years. So we are very, very pleased to see that recognition front and centre in terms of the remarks that the commission has made.

We are also very, very strongly in favour of a number of the more specific elements of the report. We are in favour of proposals to introduce a generic consumer law. We can well see the benefits that will flow from consistency. We, of course, don't seek any lowest common denominator-type approach, but the report is obviously cognisant of those issues and we'll talk in the submission that the

consumer groups will make in slightly more detail about how the process of going through that development of the generic law may be implemented.

We also, as I've mentioned, strongly support the notion of an objective and then some more detailed principles that underlie that objective for consumer law. We strongly support recommendations around transfer of regulation and enforcement in the areas of credit and product safety to a national regime. They just quite simply make sense and we certainly hope that the commission's calls to action in those areas will be heated and heated quickly. We also, it's very important to say, very strongly welcome and support the recognition that the report does give for the importance of the issue of unfair contract terms. We may have disagreement in terms of the approach or how best to address that issue, but we certainly strongly welcome the recognition in the report of the importance of the issue and its potential significance and therefore the proposed responses that the report has proposed.

There are a number of other elements of the report that are also very important. The section in relation to enforcement powers for consumer protection regulators picks up some elements of reform that have been waiting far too long to come frankly, but it also goes to make some new and fresh proposals in terms of enforcement powers for regulators and given the recognition of the importance of the role played by regulators particularly in perhaps being an offset to calls for new regulation, that's a very important element of the framework in our view.

We also, of course, welcome the recognition of the importance of consumer input into the policy-making process and welcome indeed some of the specific recommendations that the commission has made there in terms of funding for a peak organisation for a policy development framework, but then flowing through also to the importance of recognition of the role of financial counselling and legal aid in terms of providing individual redress to consumers, but also providing a channel for information to flow through to regulators and policy-makers in terms of problems that are being experience.

Just moving back for a moment in relation to enforcement powers and remedies, one area that we would very much like to see the commission perhaps give some further consideration to in formulating the final report is in relation to what we call cy pres remedies, this is a Latin name for "as near as possible" basically. It's a notion developed in equity, but it seems particularly applicable in a consumer law context because where it works best is where there may have been a wrong suffered by a very large number of consumers, but it may be a relatively small loss, for example, and there is a notion that it may be too administratively costly to actually identify and provide a refund or compensation to each individual consumer, but nevertheless a recognition that it is appropriate that both the company not profit from the wrongdoing, but also that there is some remedy that is directed to consumers at large or broadly the category of consumers that may have suffered detriment as a result of that conduct.

MR WEICKHARDT: Just for ignorant commissioners and maybe for the

transcript too, how do you spell cy pres.

MS LOWE (CALC): C-y p-r-e-s.

MR WEICKHARDT: Thank you.

MS LOWE (CALC): There are examples where it has been used. The Consumer Law Centre, which is one of the predecessor centres to Consumer Action was indeed formed as the result of a cy pres settlement. There was allegations of forced selling of consumer credit insurance as part of the provision of credit. It wasn't possible to identify exhaustively which consumers would not have taken up the products had they not been told they had to, so one of the remedies that the court put in place was to set up a centre that would advocate on behalf of Victorian consumers, as that was seen as somewhat directing the funds to the nature, I suppose, of the transgression that occurred. But, of course, it could be used in a whole range of ways, educative programs, publication of resources or materials for consumers, undertaking of consumer research is another obvious place where such funds can be directed.

MR FITZGERALD: Can I ask, what legislative change needs to take place in order for those types of remedies or settlements to be available?

MS LOWE (CALC): As with doubtless many of the issues you have looked at over the course of the inquiry, it will depend on the jurisdiction that we're talking about.

MR FITZGERALD: Assume it's the Commonwealth for the moment.

MS LOWE (CALC): If it's the Commonwealth, then there is certainly no impediment as far as we're aware to the provision of such powers to regulators. So it would simply require that there be a head of power, if you like, for a regulator such as the ACCC or ASIC to approach the court for such an order. There are some powers that exist already in the Trade Practices Act and the ASIC Act around community service orders and there is an argument that they could be directed towards this purpose, but that hasn't traditionally been the way in which those orders have been used or at least not in the broader sense that a cy pres order tends to encompass. So there may be a desire to look at whether the existing provisions could serve with perhaps some encouragement and additional language to regulators to utilise those in a different way. However, our feeling is that there would probably need to be a specific provision that would address this issue.

I guess a related power or head of damages perhaps, more properly, is a notion around disgorgement, where a company has effectively profited from unlawful activity that may be to a greater degree than are disclosed consumer losses or to a greater degree than the current heads of penalty might allow for those profits to be clawed back. It may be that investigation would show that those two things could prove to be the same halves of a coin, but certainly again that notion that corporations that have breached the law ought not effectively have their cost-benefit

analysis impacted by the fact that they may still be better off as a result of the unlawful conduct, even where that conduct may have been identified and indeed prosecuted.

Lastly, I should say we also strongly welcomed the attention that the commission gave to the issue of builders warranty insurance. I know it's an issue on which you heard from a number of members of the public as well as organisations and I would simply like to, I suppose, underline that our centre has had a very limited involvement with consumers who have problems in this area and it's an issue that we will be pursuing further with our state government. We've got a case with us at the moment where but for the pro bono assistance that our centre was able to provide, the consumers would have had to expend in excess of $80,000 to recover 60; ie, they would be $20,000 worse off at the end of the exercise because there are severe limitations on how our insurance addresses the question of legal costs. So we would simply wholeheartedly agree that this is an area that is very much in need of attention.

MR WEICKHARDT: If in your submission you can provide some of those facts, that would be useful. We had a presentation this morning and a discussion, and we were urged to I guess strengthen up the recommendations. Additional facts and cases would be helpful in that regard.

MS LOWE (CALC): We'd be more than happy to do that. It makes fairly scandalous reading unfortunately and it's important that it be aired, so we'll certainly make that available to you. Are there any other questions that arise from any of the remarks that I've just made?

MR FITZGERALD: We'll come back to some of those later.

MS LOWE (CALC): Sure. Turning now then to some of the other issues that we have flagged, in terms of the objective, as I've mentioned, we support the notion of having one and we are very supportive of the matters that are recognised in the operating objectives. We obviously strongly welcome the recognition in those words around particularly issues such as disadvantaged and vulnerable consumers and some of the issues, that it's obviously going to be more difficult to address in an overarching objective.

In terms of the overarching objective, the concern I suppose that we have with the way that it's presently framed is that perhaps unlike, for example, the objective in the Trade Practices Act, we are concerned that it puts the process rather than the outcome at the centre of the equation, so it puts perhaps competition or fair trading or informed consumers - all of which of course we agree are very, very important things - but it puts those things perhaps at the centre of the objective, rather than the outcome which we're seeking which is to enhance the long-term interests of consumers. So it's perhaps even a question of ordering or emphasis; we, as I say, are strongly in agreement with the commission that competition, informed consumers and fair trading are critical elements in achieving that objective but we'd like to see

the long-term interests of consumers being the anchor in that objective.

MR WEICKHARDT: Will you suggest an alternative wording?

MS LOWE (CALC): We certainly will do it. In fact I'm just looking and we will have some alternate wording in our joint consumer submission for you.

MR POTTS: It would need to go beyond the obvious, I suppose. If you want to go down that track, it needs to go beyond the obvious. It seems to me to be pretty obvious that the objective of policy should be to enhance consumer welfare. What we're trying to do here is to formulate something which can be useful for policy development and implementation alike.

MS LOWE (CALC): We certainly would agree with an approach that included factors that you may want to strongly encourage as a means of getting to the objective. Look, this is probably partly me with my lawyer hat on, I suspect, engaging in some forecasting about statutory interpretation, but I also know that courts do pay very strong attention to these sorts of notions and that will indeed and should properly flow through then any interpretation of policies or regulations that flow through them. Lawyers, as I'm sure you're more than aware, can spend a lot of time arguing about the ordering of words and why particular words have been chosen over others and it's for that reason that we're focusing on what is the central element of the objective. As I say, we're looking for one that is outcome focused rather than the process by which you might get to the outcome, while recognising that there are some good reasons to include elements of process in there.

MR FITZGERALD: Did you find that the operational objectives, I think we've called them, or principles, are reasonable in achieving that ultimate objective?

MS LOWE (CALC): Yes.

MR FITZGERALD: Or do you have questions about whether or not the six operational objectives actually work?

MS LOWE (CALC): Look, we do have a couple more specific comments about the operational objectives. One is that we would like to see perhaps one that reflects some of the discussion in your report but also in many of the submissions that came before the commission about the importance of consumer behaviour and how consumers actually behave in markets, so we thought that there could be a case for some words that perhaps reflect that developing strand of thinking. In terms of the informed consumer limb of the operational objectives, we absolutely agree with you that informed consumers are important but we would also, I suppose, advocate for an approach somewhat akin to that taken by the UK government which talks not only about informed consumers but confident consumers, so I suppose recognising that extra step that, yes, information is an important element in consumer participation but also those more esoteric notions about consumers feeling confident to participate in the market and to go forth and wield that information in their purchasing decisions

with something that we thought could be reflected probably in that same - - -

MR FITZGERALD: Those words are used of course in the introduction, the overarching - - -

MS LOWE (CALC): Yes.

MR FITZGERALD: I think perhaps give us your piece - as you can perhaps imagine, there were quite a few iterations of this version.

MS LOWE (CALC): I have no doubt. Of course what we have in our overarching words affects what goes beneath, so yes, we'll put an alternative formulation forward for some consideration. Gerard, do you want to talk for a moment about market inquiries and super complaints.

MR BRODY (CALC): Sure, thanks, Catriona. I'll just mention a couple of points from the report, being market inquiries and then super complaints. From our reading, the draft report doesn't really provide a lot of discussion about the concept of market studies or market investigations that have existed in the United Kingdom. In 2004, market studies were introduced by the Office of Fair Trading in the UK as a means of identifying and addressing aspects of market failure from competition issues and consumer issues We think that they are a very useful mechanism, particularly that they promote a focus on demand side competition. So really looking at how consumers behave in markets and also they're a very public consultative driven process which enables accountability around what the regulator says and does it in a particular sector.

Market studies then really strengthen that commitment to analysing and diagnosing what's going wrong in particular markets. They have been used in a variety of areas including doorstep selling, debt consolidation, as well as new car warranties. So they could be used in a range of different types of market segments or practices to really investigate what's happening in that areas of the market. It's interesting that the OFT in the UK doesn't have a particular head of power which undertakes these market studies. It undertakes them under their general functions powers. We actually believe that Australian regulators which have very similar general functions, powers, could undertake such investigations but they're really not accustomed to do so. I've got an example here that section 28 of the Trade Practices Act identifies the ACCC'S general functions and there's a similar section in the ASIC Act, which really provide them with the power to monitor and promote market integrity and consumer protection. We believe that those powers could be used.

I have one example of an Australian regulator that has used its general function power to undertake some sort of similar sort of market study investigation, and that's of the Essential Services Commission here in Victoria. It undertook a study back in 2006, the start of 2007 to look at the practice of charging early termination fees in energy contracts. That reduced report recommended some changes about the energy retail code, about looking at whether such fees were lawful in the law of penalties

and whether they were fair and reasonable sort of protections that should be in a regulated energy contract. So we believe that although our regulators are not necessarily accustomed to undertaking such inquiries, there could be some direction from the PC for them to do so.

MR FITZGERALD: Can I ask a question just on that. You're right, when Gary and I were in the UK we heard of these functions being used and as you rightfully indicated, I would have thought that the regulators here innately have that capacity through their general function powers. So what is it that either precludes them from doing so or discourages them from doing so in Australia, and what would be the benefits that would flow from that, that don't already flow? I mean, some of the issues you've already talked about. Can't you achieve the same objectives through the current investigative arrangements and so on that we have? So if they have the capacity to do it, then why not? But the other question is: would you really achieve significant benefits over and above that which can be achieved through the current processes?

MR BRODY (CALC): I think that the reasons that they do not undertake them, even though they might have the powers to do so, are highly complex and have to do with the political environment and what sort of work they should focus on according to the political masters of the regulators perhaps. We think that if there were some direction from government about "This is an appropriate area of work for you" then they could so under their current powers.

MR WEICKHARDT: But I'm assuming in the UK this is not a random sort of exercise. They presumably conduct these exercises where they have some cause for concern. I would have thought the ACCC pretty regularly does that sort of thing, whether it's petrol retailing, or shopper dockets, or things. They carry out investigations where they're getting a lot of mail or they've got concern. So I'm struggling to understand what the difference in the behaviour really is that you're calling for.

MS LOWE (CALC): Perhaps if I could comment on that briefly. Firstly, the ACCC is perhaps - I mean, yes, of course it does do these sorts of things, generally speaking in response to a request from government, not always but generally speaking if the ACCC is going to undertake a study of a market as distinct from a particular practice within a market, or a particular complaint-driven response, then that has more commonly been something the commission will do in response to a request from government. The OFT framework certainly allows for requests for government but it also allows for, if you like, a range of other motivating factors, one of which is super complaints, which we'll talk to you about in a moment but it is also - it appears that the regulator there has used that, for example, where they may be getting a series of complaints in a particular industry, or seeing patterns of conduct or something of that kind, and it seems to enable a broader-type response than we're traditionally used to here in Australia. That's partly just a cultural - that's the way it's been done factor. To be honest, I think regulators are very often driven by the complaints that they receive, but will perhaps then tend to zero in on an element

of that complaint which may be then able to be linked to a particular breach of a particular provision of the act that they administer.

What this power does is those complaints are still a trigger, but it doesn't require you to fit something within section 52 or section 46. It is more of a general look at that market and it provides a different suite of responses that the regulator may then take. Enforcement action is certainly one of them, but they may also decide that consumer education in a particular area may be appropriate, they may decide that they want to make recommendations to government in relation to regulatory reform or issues that may require further investigation and attention. So it certainly doesn't seek to take away from any of those other functions, it's really an additional way of looking at a market that's perhaps more likely to encourage regulators to look at them in a slightly different way perhaps than they are traditionally. I mean, we don't mean in any way to be critical of our regulators when we say that. It's just that we have looked at these tools and they way they've been used in the UK, and they seem to wrap together a number of elements that people here in Australia are spending a lot of time perhaps talking about but aren't quite sure how to make them then work in a policy setting or regulatory environment. This market studies power seems to be one of a number of elements that perhaps offers some better scope to do some of those things.

MR BRODY (CALC): Related to studies is, as Catriona said, the super complaints mechanism which also exists in the UK whereby consumer organisations are designated and being able to identify a particular practice, or market conduct, or issue that they think is worthy of consideration by the regulator, and the regulator then is statutorily obliged to respond. It can actually do nothing - and that's fine - but it must set out reasons why it thinks it should do nothing. One of the things it could do is then undertake one of these market studies or investigations.

In the draft report we note that the commission says that there's not really any material shortcomings in the current complaints handling system and therefore it does not recommend the super complaints process. We're a bit concerned with that assumption that there are not problems with the way in which regulators receive and respond to complaints. In many areas they do very well, but in some there's often an inadequate or slow response by regulators to complaints raised by consumer groups. There's significant delay or no confirmation about any action that's being undertaking in a particular issue. I'll just give two examples of that with work we've done with our centre. One is in relation to a complaint we raised which we saw as a systemic complaint, the listing of old Telstra debts on credit files, with the Office of the Federal Privacy Commissioner. We actually raised that back in the start of 2006. It got to about May 2007 and we hadn't had any response from that body at that stage. Only then did we raise the fact in media that we hadn't had any response that they decided it was an issue to come and talk to us about it.

Another example is our centre over the last 12 months has been receiving numerous complaints about one particular licensed motor car trader here in Victoria. We continue to act on behalf of consumers and most often with mediated results

which obviously are usually positive for our clients. We were well aware that it's actually hiding a systemic problem with the conduct of that trader. We have raised this issue with a number of regulators including the Consumer Affairs here in Victoria and ASIC, because there are credit-related issues with the selling of these vehicles. Although we are aware that perhaps they're looking in what they might do, there is no way in which they let us know what it is they're doing, or what actions might be considered taken, or when any action would be taken. Meanwhile we're getting more and more complaints about this particular practice. So we think that by allowing designated consumer organisations to make complaints and then they have to statutorily respond will engender more confidence in the regulatory process and provide a bit more accountability to the regulators.

MR WEICKHARDT: You by implication see yourself as being a designated group in this process, do you?

MR BRODY (CALC): I'm not necessarily saying that at all.

MR WEICKHARDT: In the UK, just remind me, how many designated groups are there?

MS LOWE (CALC): There are quite a number because as we understand it, there's Which - Which is the equivalent of Choice. They've also got a network of citizens' advice bureaux and we understand that those bureaux themselves have - I don't think it's a case that every single CAB is scheduled, but there is the peak body and obviously then arrangements for - - -

MR WEICKHARDT: I think thought there very few.

MR FITZGERALD: It's less than a dozen.

MS LOWE (CALC): It's a small number.

MR WEICKHARDT: So you might expect that by scale two or three in Australia, and I guess the question is, does that freeze out everyone else from making complaints and getting them heard, probably that shouldn't be the case.

MS LOWE (CALC): Certainly, no, it ought not be the case and as we understand the way the UK mechanism works, there are tiers and you only get to the super tier in certain circumstances, but certainly there are other mechanisms by which other complaints can and ought properly be made, and of course the regulators do have mechanisms already for some of those things, both ASIC and the ACCC and indeed Consumer Affairs Victoria have consultative mechanisms where consumer groups come and interact with them, and we're certainly not proposing that those things are done away with. I guess it's more a notion that unlike individual consumers, consumer organisations do tend to try and at least bring some systematic approach to which complaints they make, which issues they pursue, and how they pursue them.

This provides a mechanism for, in our view, better interaction between the regulators and consumer organisations which may mean the consumer organisations will be somewhat better informed about what the regulators are doing and may do then activities which are complementary to those efforts or may, for example, direct their activities in a different arena knowing better that there is a process in train to deal with a particular issue. The reality is the regulators are constrained on a whole range of levels about what they can say and quite rightly what they can say about investigations that they may be undertaking. But that lack of ability to transmit that information can have some pretty unfortunate impacts in terms of the work that other organisations may be doing from time to time, so this is a way of getting a bit of information flowing a bit better under the rubric of a well understood and well recognised framework and, you know, the 90-day requirement to respond obviously has some pretty useful accountability functions to it as well.

MR POTTS: I imagine the regulators probably say, "Well, we do quite a lot of internal reviews in particular malfunctions or long activities or whatever, being undertaken in the marketplace," and once you elevate it to a public process naturally it becomes a lot more time-consuming and demanding on resources because of the need for natural justice and the like. So I think inevitably you would be put in a position where priorities had to be established in terms of how the resources of the organisation should be applied. So how would you see that as working in practice where the regulator, whether it be the ACCC or some other body, actually had to establish priorities to go down this track of having to respond to requests, suggestions from individual consumer organisations?

MS LOWE (CALC): A couple of things about that I guess firstly, is that there is this tiered system and I mean we haven't had the opportunity to observe it in minute detail but, as we understand it, there are criteria that have to be filled before something raises to the level of the super complaint, which is the one that has the statutory requirement to respond. So there would be and could be built into a process filters which would mean that the regulator wasn't obviously constantly chasing its tail. The second thing is to say that a consumer organisation just can't sort of lob in and say, "Okay, doorstep selling, thanks," there is also a set of criteria that apply to the sort of information that needs to be provided to the regulator and the sorts of thresholds that have to be reached in terms of evidence or material that suggests a problem and all of those sorts of factors. I guess the third thing to say that those other two things being the case that we don't necessarily see it as a problem that consumer protection regulators at least in part should have their agenda set by their stakeholders, consumers.

MR POTTS: My recollection of the UK system is it's quite a demanding process that they go through in undertaking these studies. It's not something that's done in the space of two or three months. I think I'm right in saying, Robert, it would be easily 18 months to two years, I think.

MR FITZGERALD: The market studies are definitely - - -

MR POTTS: Their market studies are quite exhaustive studies.

MS LOWE (CALC): That's right, and indeed the 90-day time frame, they can at the end of that time say, "We need to do more," and indeed one of the mechanisms by which they may decide to do more is to say, "We've had a look in our 90 days. We can't give you a definitive answer, but there does seem to be an issue here," and they then choose to take a market study and indeed the doorstep selling is an example of exactly that process in action in the sense that - which brought the doorstep selling complaints under the super complaints mechanism and that then led to a market inquiry, which in turn led to a suite of initiatives including some educative initiatives but also some recommendations for legislative change.

MR FITZGERALD: It's fair to say that in the UK the super complaint mechanism is used very rarely. When we met with Which, they'd only used it once or twice and one was in relation to bank fees. So it's not an over-used tool, mechanism. But nevertheless it does force the regulator to prioritise in a way that they might not regard as being optimal. On the other hand it does require them, as you say, within X-period of time, 90 days or whatever the figure is, to actually report back, so there's a discipline on them. So obviously we would be interested to see how you flesh that out in the report. I suppose the question that ultimately remains is: can you achieve the same objectives without the need for additional mechanisms? That's the real question. If there answer was, there's a demonstrable failure with the regulators, then the case for this might be higher. You don't have to have demonstrable failure to do something that's worthwhile. It's just to add these new mechanisms in - I suppose that's what we're looking to say, well, can you achieve this without the need for that. But anyway, let's have a look at what we've got on that.

MS LOWE (CALC): I just wanted to touch on two further items. Firstly, the general unfair trading prohibition or the notion of such an initiative and obviously the commission in its report I suppose recognised the attractions of such a mechanism, but has chosen a position where they recommend waiting and seeing how it plays out in terms of some of the processes that the EU are presently putting in place. We, I suppose, have three primary comments to make in relation to that. Firstly, whilst the European initiative is a more recent one, there is some precedent that we can see in the processes that the US have adopted in terms of their approach is obviously quite different with the rule-making process, but nevertheless it has explored for some time this notion of a general principle, I suppose, that then is derived down into more detail. We recognise too that the commission has made comment about some of the swings and roundabouts, shall we say, in implementation of that United States process, but in our view that learning is now there in the sense that that experience has been had and whilst I certainly wouldn't suggest for a that because something hasn't happened overseas it doesn't mean it won't be repeated here. But we do think that there are learnings out there in the consumer landscape that obviously Australian policy-makers and Australian regulators could and should draw on in terms of the way in which they would go about drawing and then implementing a provision of this kind.

The second comment we would make is that somewhat like I guess the comments we've made in relation to market studies, we see that one of the great potential benefits of a general unfair trading directive is that it would enable us to get at some of these problems which perhaps don't at present neatly fit within our misleading and deceptive, or unconscionability baskets. In particular we're thinking of some of the practices that may exploit behavioural biases or characteristics on the parts of consumers, and the potential for this mechanism perhaps more than the other mechanisms we presently have to be a way in which we may be able to use some of the learnings coming out of behavioural economics in implementing such a general provision.

MR WEICKHARDT: Can I just clarify, Catriona, you used the expression "unfair trading", I think we use the expression "unfair contract" so - - -

MR FITZGERALD: No, we're talking about the general principle of - - -

MR WEICKHARDT: The general principle.

MS LOWE (CALC): Yes.

MR WEICKHARDT: Okay.

MS LOWE (CALC): So I suppose in thinking about this, envisaging this in our minds we sort of thought that if we were to go down the path of having an unfair trading prohibition that that would sort of sit at the top and then under that you might have then some more specific iterations of that which would be misleading and deceptive conduct, unconscionable, and unfair contract terms potentially there as a third element of that. I think the commission is well familiar with the reasons in general that principle-based regulation of this kind might be ideal, but we certainly are of the view that there is conduct taking place at the moment that is not addressed by section 52 or section 51AB, conduct of the nature that falls short of coercion but nevertheless is highly exploitative of consumer biases and weaknesses. Some of the high-pressure selling cases that we see coming through our centre, some of the exploitative sales practices, one of the traders that Gerard was just referring to as well, they don't really strictly speaking mislead consumers about what they're doing, they just rip them off. There are a whole set of circumstances that go with this that we can probably usefully put before you, I think. It's a business strategy to which a one-by-one redress helps the individuals but it doesn't stop the problem because it just happens again to a whole fresh wave of consumers.

MR FITZGERALD: The challenge of this area is trying to find, I suppose, the evidence that would again lead you to the view that you need a new mechanism to achieve an outcome. If you can provide evidence or examples where the current system fails, and the only way by which it could be redressed is a general principle - when I went to the UK I was very much attracted to a principles based approach, and in general I am. But what we discovered there was that of course that's the very first layer, but then what you have is very high levels of prescription either through

regulation and/or through guidance, you know, there's 90 pages.

MS LOWE (CALC): Yes, absolutely.

MR FITZGERALD: Similarly, in America where they talk about principles based - but it by nature becomes fairly prescriptive over time. So the question was then was, well, if you introduce these broader-based principles, what of the prescriptive legislation would go, and the answer is almost none. So that's one issue. The second thing is, what are you trying to achieve that can't already be achieved, and they're the examples you're talking about. The third thing is, if you introduce a new principle of course everyone says, "Well, there's a period of uncertainty and there's a cost in doing that." But I think it's more the others are saying, "Well, if you go to principles based, very shortly thereafter it becomes highly prescriptive." If you look at the European unfair trading regime, superficially I think it's very attractive and I mean that in a very sincere sense. But then when you look under it, is it that much difference in practice to what we've got? It may well be - and as I said, I start this by saying that I'm generally in favour of principle-based legislation,. But when you look at the reality, the systems are not as different as one might first see.

MS LOWE (CALC): Yes.

MR FITZGERALD: One may be better but they're not as different as we first perhaps imagined, I suspect.

MS LOWE (CALC): Yes, and indeed resisting the urge to then legislate by default through very detailed guidelines is quite obviously one of the problems of a principle-based approach and it may be that - I mean, we've seen some working coming out of the UK in the context of their financial services regime which is similarly principle based and they talk about resisting and how hard it is to resist the urge to write really detailed guidelines about what "unfair" means. But there is some useful learning, I think, that's beginning to emerge about how that may be done - with a lot of fierce discipline is what it sounds like. But we'd certainly be very happy to put some remarks before you on that point as well.

MR FITZGERALD: I think that if you can demonstrate - as I go back - those examples where you believe the current system simply fails - - -

MS LOWE (CALC): Yes.

MR FITZGERALD: The other question of course is, a lot of it does seem to be caught up in the unconscionability provisions, which few people seem happy with, but on the other hand few people recommending you actually change them. So we've got this slight conundrum which we state in the report fairly openly that not too many people are happy with the unconscionable provisions but not too many people are actually putting a forward a way of changing them. So I suppose that's the other issue, to what extent it is caught up in this whole issue around the way in which "unconscionability" has become defined. It's arisen in other inquiries including the

inquiry into retail tenancies which is currently under way. So it is a bit of a conundrum as to which way one should go. That's certainly my own thinking as principle-based legislation is fine, but before you introduce it, are you simply just changing the name but not changing the outcome.

MS LOWE (CALC): That's certainly not what we'd be advocating of course, so we'd be happy to go to some more detail on those points. I suppose simply in terms of the unconscionability issue, I mean we certainly agree that - like with everybody else it sounds - that those provisions don't work as well as they ought. It's a very difficult question how you fix that, because theoretically they should work a lot better than they do. I mean, if you look at the second-reading speeches and all the words around what they were introduced to do, there's a pretty big gap between that and then the way that they've actually been interpreted by our courts. One can't, for very good reason, march down to our judges and say, "Hold on a second," but even were they to operate perhaps as we envisage they ought to have been, which is to perhaps be able to address slightly more broad-based conduct than requiring, you know, consumer, trader, transaction, off we all go to court in that bundle, we would still say that this is a threshold question. There's the breadth of the application of the unconscionability provision and that's probably where we would say the problem is, but then there's also the threshold question, and without remaking the law of unconscionability that threshold, in our view, will remain a high one and probably that's not a bad thing, but that does then mean that there is conduct that we would say is unfair that is not beyond conscience as that threshold requires, and that is the bundle of conduct that we're interested in, in terms of the unfair trading prohibition.

Just lastly then, to the question of unfair contract terms regulation, let me begin again by saying that we very much welcome the fact that the commission has recognised this as a problem. That of itself is a step forward in some respects in terms of where we were. However, we do have a concern that the mechanism that the commission has proposed in the draft report will not fix the problem that has been recognised in essence. There's a section in the report where you sort of say there are issues around the breadth of the problem, the use of the terms and I suppose defining the scope of the detriment and then propose (a) and (b) solutions and plump in favour of solution (a) on balance. We would encourage you toward solution (b) which is the - sorry, I've got that the wrong way around. We like (a) and you like (b).

We strongly take the view that the ex ante action by the regulator is a very important component of the success of these laws because in our view, the existence of the terms themselves does matter in terms of the consumer perception to the extent that they read them, their consumer perception of the bargain that they have and their status and ability to argue with a trader where they perceive that conduct has been unfair and that that magnifies through into a broader impact of the sort that we were adverting to in the supplementary submission that we lodged with you very late in the piece for which we apologise and that is that it has two overarching effects which is the overwillingness to buy and then the consequent inefficiency that that can build into the system because the price that the consumer pays - you know, the efficient

price is not the ticket price, if we take that view, it's the ticket price plus whatever price one might be able to ascertain were it's possible to go through this exercise for the risk.

So for that reason, we feel that it is important that there is the capacity to have a more broad based approach to this problem because whilst the solution that reacts to detriment will address the instances where the terms are exercised, it won't address what we feel is equally a concern, which is this point of the existence of the terms and the other impacts that that can have. Now, we do appreciate that the commission has concerns around questions such as regulatory overreach. There are really two comments I guess that we would make in relation to that: one is the evidence to date is not that that's what happens. I appreciate we're at a point in time - and that may be different at some point in time - but to date, the regulators that have had these sorts of powers, we have not seen screams of outrage from industry in terms of either the cost that's been imposed on them as a result of the regulation or in terms of the manner in which they have been implemented.

Indeed, it's interesting to see that in the UK at the moment, the case in relation to penalty fees which we're taking a very deep interest in for a range of reasons, is the result of a bargain between the financial institutions and the regulator where the regulator had begun the conversation with the industry about penalty fees. It had pushed them to a point in relation to credit cards; it was about to push them more on transaction accounts and the industry said, "Hold on, this is all getting a bit serious, let's agree to take a case to court and find out the answer," and that's exactly what's happened. So indeed we would argue that it actually enables dialogues of a sort that perhaps a more purely enforcement based approach may not permit.

There are a couple of other boundaries that you've talked about in your report in terms of limiting the operation of the law, say, to exclude core terms, the price and the fundamentals of the bargain and also the safe harbour notion that you have introduced. We would not be averse to those sorts of limitations with one very important qualification: in terms of price, we would see a different case where it's not a full-price payment up front. So where there is a payment by instalments, for example - and we see many cases where consumers may not actually be told the full price or the full price is very hidden - so where it's an instalment based arrangement, we would see that differently to something where I walk in, I buy my widgets and there's my standard form contract and off I go again. So with that exception, we would certainly see some much greater attractions to those sorts of mechanisms than limiting the scope of the regulator to be proactive in this area because it really is that proactiveness that we think is the great strength of the regimes that are already extant in the UK and Victoria.

MR WEICKHARDT: Do you have evidence that it's a great strength or does it just feel good?

MS LOWE (CALC): It depends. I mean, whether or not it's a strength, I suppose to a degree depends on how you define the problem. But as I say, we take the view

that, yes, there is the actual detriment that I might suffer as a result of an early termination clause and I can quantify very easily and go and complain about that detriment, but there are other detriments that are much less amenable to certainly dollar quantification but require generalisation and persist more broadly than may just impact on the individual consumer. It is that basket, I suppose, of detriment, if I can put it that way, that we see as being a strength of a regulator, rather than having to say, "Okay, telco X has got this clause, they've now gone out and exercised it, so that term is going to be declared unfair for the purposes of this exercise. Y telco has a different clause, they haven't exercised it yet." Do they get to have an argument that our clause is different to theirs and in any event, "We're not planning to use it in the same way" and therefore there's nothing that can be done about that issue, or do we have to wait till telco Y then exercises that clause, because the other feature of this clause is often - and the telecommunications industry is a good example of this - it's not necessarily a case where you can simply say, "Well, I don't like telco X's contract so I'm going to go looking at telco Y," because it tends to persist across - I mean, in some of the worst instances, they persist across industries. I mean, you would have heard about car rental contracts. Again, there are not too many instances where you can walk into a car rental company and say, "Actually, I'd rather not pay hundreds of dollars to reduce my excess down to $250," instead of $2500, or, "I'd like to negotiate about the cover of my insurance." That is just not the reality of the consumer experience.

The proactive of it really, we think, does give the regulator a capacity to respond to what is in fact an important part of the problem. I will sit here and think about that other point that I wanted to make and I will interrupt Gerard if it comes back to me.

MR WEICKHARDT: We had another one though, that there had to be demonstrable public benefit from removing the unfair contract - - -

MS LOWE (CALC): You've reminded me, thank you, Phillip.

MR WEICKHARDT: There are lots of things that I guess on the face of it you might regard as being unfair - you can't cancel out of a contract if you change your mind - but maybe the greater good of all consumers is served by one person who's indecisive, not being able to cause cost to the company and therefore all consumers by making a cancellation.

MS LOWE (CALC): I think there are two things to say about that; one is this point that's been eluding me. The report talks about the fact that you might get rid of the early termination clause but that might mean that the up-front price jumps up a bit and I suppose we'd give you the same response to this as we say in our penalty fees campaign when this argument is put. All other things being equal, we would rather that the price were there because price and core fundamentals of the bargain is what consumers do pay attention to. So the competitive pressure on that part of the transaction is going to be there, whereas it is not in relation to the early termination fee or the various other contingencies that a consumer needs to calculate in order to

work out what the true price they should be paying under a contract is. So we would rather that the cost is in a place where competition will apply pressure, because I think we would probably all agree that competition doesn't really apply pressure in terms of clause 47B of a 50-page contract. Consumers don't tend to pay attention to those things. If they do, there's not a lot they can do about it, and even if they do it's arguable it's not actually possible for them to properly calculate what the price is there.

The second element, I suppose, of that argument is that it places in the hands of the business the determination of what is the fair bargain for a consumer, taking into account all of the complex weighings, whereas we would say the courts are the arbiters of what is ultimately the fair bargain. I mean, that's what we have regulations there to do. Yes, of course the market will arbitrate that but I mean, businesses have interests which are not always directly aligned with those of consumers because of the complexities of the transactions, because consumers have less than imperfect information, because the businesses have better information available. It's not necessarily the case that what businesses see as fair or for the greater good is right about those things, any more than I as a consumer who thinks it's unfair that I can't take my frock back after I've changed my mind is unfair. That is an individual determinant and we don't necessarily see that that determination ought to rest solely in the hands of the business, and that seems to underlie that argument to our mind.

MR BRODY (CALC): I guess just to add to that, is the question of whether a particular term is demonstrably in the public benefit or public good, it's worth considering the way the unfair contract terms legislation has worked here in Victoria, has seen the regulator go out and look at contracts. Their mission or standing is to act in the public good and the public interest, so you would think that it's just a doubling up of what they're doing anyway. They wouldn't declare a term as unfair or seek to have it changed if it wasn't in the public good. So it just seems to me a hurdle that's kind of already there in how the regulator would act in that situation.

MR FITZGERALD: It does seem to us we've certainly come to a view that we would think that the Victorian model is too wide. In many senses they would acknowledge that it's wider than the UK in its application. Informally, people have said to us that the proposal we've put is too constrained, and you've indicated some of the reasons why that is. I mean, just to try and think it through, are there modifications that one can make to either or to get you to a happier space, not a dumbing down, because that's not appropriate, and there are some core principles in what we've put forward which are fairly important.

MS LOWE (CALC): Yes.

MR FITZGERALD: But are we really in two worlds that are quite apart, or with modifications are you capable of achieving somewhat of a better response in your minds than what's the case?

MS LOWE (CALC): It certainly seems to us that the commission has recognised some of those really important fundamental principles. I mean, there's the definition around what would found the notion of unfair; there's the notions of keeping the schedules of indicative terms in some form, which of course goes to the uncertainty point to a degree because it's not as though there's guidance there as to what unfair means. That acts not only as a day-to-day restraint but ultimately, you know, were a matter to go to court, a court is not going to look at that list and then decide that something that sits completely separate from it or outside it is somehow within that framework. That's not how courts intend to interpret legislation, so that's both a practical and a legal framework within which that concept would sit. So those two recognitions we think are very important.

It is perhaps more around the mechanism by which the law itself may be administered, I think, that is perhaps where our most fundamental disagreement sits because, as I say, we see that proactive more wide-reaching approach as being a very, very important element to these - I mean, what is there would address some issues, there's no question, but we don't feel that it would address as many issues or as well as a framework that incorporated a proactive element may be able to do. I think that it would be useful perhaps for us to expand on that in our submission, because there are many elements in here which we would simply say yes, that's right, and indeed some of the other sorts of frames around a law such as a safe harbour notion, or a limiting of the scope of the law and so I think we would be generally much more comfortable with than the mechanism sort of side of things which we do see as fundamentally very important.

MR POTTS: The fundamental difference, I think, listening to what you're saying is that you're advocating an ex ante approach, I guess, in summarising it. We're advocating an ex post approach. So the regulator has to demonstrate that there has been detriment to a group of consumers. I've been thinking about what that means in practice. I find it hard to believe that you wouldn't agree with the principle that regulators should not act unless they have evidence that there is detriment to a significant body of consumers, that they shouldn't be acting simply on the basis of what they think might be the case, because that would be a dangerous basis - - -

MS LOWE (CALC): Certainly, but there are practical ways, there are differences, I guess, in how these things are presented in terms of what the - I mean, I agree, I don't think there is the slightest likelihood, you know, having familiarity with the regulators that we do, that they would just decide that they want to go off and attack that term. I mean, they would of course look at the complaints that they had had. They would look at the context of the contract. They would look at the nature of the product. They would do all those things in any event before going off and acting. Placing a threshold of detriment before - I suppose it's the way the detriment acts that we are concerned about. We would be very concerned with an approach that says, "Okay, company X has this clause and has caused this problem, therefore we will go and address that company and that clause," where it might be the fact that that clause with some pretty similar features exists entirely, right throughout the industry in which company X operates, and we would not want to see a scenario in which

companies A to Z have to exercise that clause before the regulator had the capacity to go in and say, "Okay, enough, this is - - -"

MR POTTS: So your concern is more that it's linked specifically to cases of detriment which is - and what is said here is would be voided only for the contracts of those consumers subject to detriment.

MS LOWE (CALC): That's right.

MR POTTS: So it's more that point than the fact that it's ex post.

MS LOWE (CALC): I suppose the other concern - and I mean, this would come down to some degree to quite specifics of drafting, but there is a practical difference between a regulator sort of saying, "Okay, we've got some complaints about this. We've got some concerns about this. We're going to go out and decide. We're going to have a discussion with this industry about the nature of its contracts and the sorts of terms," there's a bit of a difference between that and there being a threshold legislative requirement that there will be arguments around the table about, "Well, you say that's detriment, we say it isn't. You say it's too much, we say it's not enough." It's practical impediments to a regulator going out and doing its job when I think we would all agree that the regulator is going to assess detriment in any event as part of its job. What we don't want to do is put additional hurdles in the way of them exercising a job that they would do anyway. That is our concern that this notion of detriment will become a contest point in implementation of the law; that's what bothers us about I suppose placing it too highly within the requirements.

MR WEICKHARDT: But surely the way it's worded here, the regulator has to satisfy a court that detriment is there, whereas you seem to be suggesting you want the regulator to have the power to be able to decide there was detriment without having to satisfy a court.

MS LOWE (CALC): No, what I'm talking about is potentially taking the court part of it out of the process altogether in the sense that - I mean, the court option would ultimately be there, but that's really been one of the very interesting features of the laws that exist at the moment is that in the UK the penalty fees case as best I'm aware is the second or third case under that law which has been extant for some considerable period of time because the schedule gives a pretty good guide about what sorts of terms are likely to be in the gun and it's preceded by a process of negotiation and it's enabled rather than say, you know, as we've been discussing, "Company X has caused this problem to this many consumers. It's cost them that much money," they can say, "Okay, a termination fee that applies in the same amount whether you cancel in month 1 or month 23 of a 24-month contract is unfair." You might have a provision in there instead that says, "This is the way we'll work out the fee," and that's going to be referential to the number of months that you've been involved in the contract. So, yes, you could go out and find consumers that had suffered detriment under the one-month cancellation example, but it's just a logical conclusion of the way that the provision operates, that it can operate unfairly

and that that's the basis on which the conversation happens.

MR FITZGERALD: We've put the court at the centre of the process, whereas in the current system in Victoria the court comes in if there's a contestability about the regulator's decision. In our case the court is the clear determiner and it's constrained to that contract and that circumstance, so there is a very different application.

MR WEICKHARDT: Unless there was an agreement between the regulator and the company concerned, you know, "We'll fix it," in both cases probably 99 per cent of the action will occur informally outside a court setting.

MS LOWE (CALC): Yes, but I suppose having the mechanism which allows the conversation as distinct from the one that requires you to go to court at the end of the day, we think, can operate as a stronger incentive to the negotiating table.

MR FITZGERALD: We're going to have to move onto a couple of other issues.

MS LOWE (CALC): I appreciate we're a bit over time.

MR FITZGERALD: No, that's fine. There's a number of things you haven't mentioned today and no doubt you may in your written submission. You mentioned your support for the transference of both regulatory and enforcement powers going to the Commonwealth in relation to consumer credit and consumer product safety. The third element of that is the generic or general consumer policy area which we've not recommended go. We've said that there should be an examination of removing the impediments to it going. It may well be the same thing.

MS LOWE (CALC): Quite.

MR FITZGERALD: Obviously the states and territories will have different views about different parts of that. But have you got any particular view - you don't have to - on that aspect of it?

MS LOWE (CALC): It's not an area that we've focused on hugely partly, I think, because the commission did a very good job of outlining the impediments to that occurring and it seems to us that those impediments are very, very, very significant indeed, not to say they're insurmountable but there are very significant changes that would have to be made to our landscape to enable those things to occur and I guess we weren't probably of the view that that was likely to happen. To the extent that we may have a view other than that, there are definitely obviously attractions to a one law, one regulator model. However, the issues that get discussed whenever you have this conversation, I think, become exponentially more important when you are talking about your generic consumer law, and so issues such as what would happen to the complaints handling functions that are currently held by state-based agencies, for example, which are critical but certainly not what the ACCC does.

There is that local presence, how will we deal effectively with state and

territory issues if we had a model of that kind because, you know, there tends to be a pull towards centralisation I think once you have a single agency model, and so there would need to be a mechanism whereby state offices or territory offices, if that's what were to exist, would be able to still operate with some degree of discretion I think within their local area, because I think the risk of those local issues just somehow getting lost or dropping off the side of the table would be too great. That would not be an acceptable outcome because there will be issues that will continue to be primarily state based I think at least for the foreseeable future even as we move more and more toward national markets.

So some of those sorts of issues, there would need to be some very robust ways, we think, of addressing those sorts of problems, and not least information sharing too. I mean, if you've got a complaints handling function, or a complaints handling agency that exists at a state level, the information flows between that body and the national enforcement body have just got to be exemplary because of course that will be one of the primary sources of intelligence for the enforcement agency. So there are attractions to it, but there are also some really big important problems that would have to be overcome before we went down that path, I think.

MR FITZGERALD: Just a second area, we've made some recommendations in relation to complaint handling bodies differentially depending on in the financial services sector an umbrella body and in relation to energy and water a single ombudsman scheme, and a couple of other recommendations. Have you got any particular views around those recommendations at this stage and again, you may well not have those views.

MS LOWE (CALC): There's some comments that we'd make particularly in relation to the energy recommendation. There's some logical seductiveness to it, but there are some practical difficulties.

MR BRODY (CALC): It does make sense to have a national ombudsman and probably the energy market is becoming more national as we move forward, then it does increasingly make sense. But some of the practical hurdles, we think, is particularly what would happen to water. In Victoria and New South Wales the energy and water ombudsman are together. In the other states they aren't. Water is still very state-based regulated and there's not the same sort of impetus for a national regime, and they're very different markets in the different states. So for example here in Victoria we've got about 22 water businesses compared to hundreds in New South Wales and Queensland. So they're very different sorts of markets and complaint handling functions needed and we're not sure a national - if there was going to be a national energy ombudsman, there's not necessarily enough complaints to sustain a water ombudsman in each state either. That's one issue.

Also we think that energy ombudsman, even more so than some of the other national ombudsman schemes, needs to have an understanding of what's going on locally. Energy being an essential service, being something that everybody has it their house, really does leave itself to a lot more complaints. Energy ombudsmen

receive the highest level of complaints. There has been especially with our experience with energy-water ombudsman here in Victoria has been very good at making sure it gets out in the community, it does outreach work, has an understanding of particular problems. For example, at the moment they're doing research with how electricity accounts work for people moving into transitional housing where bills are often left unpaid and people get disconnected, et cetera. That sort of work we're concerned might get lost in a move to a one office in Canberra model. So there's a couple of hurdles that we see would need to be overcome.

MR FITZGERALD: I might just say we're not recommending one office. We're very supportive of a state based and regional presence. I just want to make that comment. It's just who runs the scheme effectively.

MS LOWE (CALC): Yes.

MR FITZGERALD: My last one - and Philip and Gary might have others. We've made some recommendations in relation to individual advocacy, which you've referred to, but systemic advocacy - we've taken a view of maintaining the notion of peak bodies and funding, albeit modestly, a national peak body, as distinct from going down the full-blown route that the UK have in the NCC. Also, in relation to research, we've talked about a contracting out of research, although I think we'll have to address just who runs that agenda. But just any early thoughts on that - and again you're quite welcome to have none at this stage.

MS LOWE (CALC): We do, as you'd expect. Certainly, we very much welcome the recommendation that the commission has made around a peak body. We do see though that the functions that would be carried out by, say, a peak-type body and the sorts of functions the consumer movement have been talking about in terms of the needs for research are really quite different. I mean, obviously a peak body may conduct, you know, some individual research, it may conduct research based on issues that are coming up through the membership, but we don't see that as the place for the sort of hardcore long-term, you know, academic-type research that we've perhaps been advocating in an NCC model, if I can use that shorthand.

In relation to the peak body, we think it's clearly necessary. I mean, I'm the current chair of the Consumers Federation of Australia and I can say with conviction that there are many calls for our input that we are utterly unable to service because we have a volunteer executive of eight people that work in other organisations and there is a very significant limit in terms of what you can put forward on that basis. But there are many calls for consumer representatives to sit on ongoing committees, for ongoing consumer input into various consultative processes, for responses to, you know, authorisations from the ACCC, from regulation-making processes, from all kinds of government.

We joke from time to time about building a pile of requests that we can't answer and having some sort of symbolic bonfire, but there is no doubt that there is a need for

that sort of body and also for someone that can capture what's happening, because there are a range of direct-service organisations out there and we are very concerned that some of the very excellent that those organisations have is lost because of the lack of ability to pull it together and direct it into the right policy places. So we think it's a very important recommendation. We can perhaps have discussions another time around what modest might mean.

MR FITZGERALD: We might suggest you have that with the treasurer.

MS LOWE (CALC): Indeed, and it may well be that that's exactly what we do, but in general terms we're deeply welcoming of that recommendation. In terms of the research, look, we do think there's possibly a place for a contestable research fund, but I suppose our concern is - and there will be others I suspect that will be able to speak to you very passionately on this subject because they're living it at the moment. What is needed is core, ongoing capacity to do the research, and the problem with a contestable model is that it relies on the fact that there's already strong, well-resourced organisations with a sufficient core funding base to be there to pitch for the research, and that's just not necessarily the reality of the consumer organisation experience.

For example, the director at the Centre for Consumer Law in Griffith in Queensland, she's been doing that job now for many years and she's decided to move on, not least because every year it's not clear whether there's going to be more core funding for the organisation, and you can't run an organisation based on pitching for projects and using that as your core operating - because it is simply not a sustainable model. So we see that there's a need for both in the sense that there ought to be a centre of expertise and excellence that conducts this research and that may then mean that the project-based money can be utilised by those organisations that are already - - -

MR FITZGERALD: It just occurred to me that in relation to some of the welfare policy areas, for a long time the government funded the university centre at New South Wales, the Social Policy Research Centre, for many years, almost exclusively. So it wasn't government but it had long-term contracts. Halfway through the former government's term, I think they allowed some of that but had opened up the rest for contestability and a couple of other centres ended up - but it is true that the capacity within the SPRC was very substantial and built over a long period of time.

So here's another potential model: that at least in the initial stages you finance one or two academic centres until such time as you build capacity. You don't go to the expense of establishing an NCC which is government-owned and run, effectively. Is that a model that becomes attractive or not, because I think the notion of setting up a government-run, government-funded research centre is not all that attractive to the commission if there are alternatives that can achieve the same end.

MS LOWE (CALC): I suppose. I mean, I certainly couldn't speak for the consumer movement in responding to that.

MR FITZGERALD: Sure.

MS LOWE (CALC): But I'm certainly happy to give you some initial thoughts. I think it then comes down to the other issue that you mentioned, which is then the agenda of that research and how input from the sector is then made sure - is got into setting that research agenda and making sure that the research isn't just sort of - you know, what the institution decides might be of interest but there are genuine and real ways of feeding in the experience of the consumer movement and direct-service organisations to say, "This is the sort of information or research that we need."

MR FITZGERALD: On that, it would be helpful if we got some guidance from you and others as to who should set that agenda. In the consumer product safety one, we talked about the ministry or council being responsible. It's been put to us informally that perhaps CCAAC, the Commonwealth Advisory Committee Consumer - what it is called?

MS LOWE (CALC): Commonwealth Consumer Affairs Advisory Council, I think.

MR FITZGERALD: CCAAC will do for the moment - could be more actively - both resourced and more active with the agenda-setting. So again when we talk about setting the agenda, is that simply a matter for the government itself, is it for the ministry or council, is it for their advisory body, because given that there's always limited funds, who sets that agenda is quite important, or who influences that agenda.

MS LOWE (CALC): Yes.

MR FITZGERALD: So you might have some thoughts about that at some stage.

MS LOWE (CALC): Certainly.

MR FITZGERALD: I've asked more than my quota of questions. Philip?

MR WEICKHARDT: I think I'm done, thank you. I look forward to seeing your submission. Gary, you all right?

MR FITZGERALD: Look, thanks very much for that. We wanted to spend a little bit of time and we haven't scheduled anyone after you so that you could go on a little bit, because we knew that you would cover the whole range of the report and you've done that very thoroughly for us. So look, thanks for that.

MS LOWE (CALC): You're very, very welcome.

MR FITZGERALD: Good.

MS LOWE (CALC): We welcome the opportunity.

MR FITZGERALD: Again if anybody would like to make a formal statement before we conclude this afternoon, they're entitled to. Anyone?

MS KINGSTON: I was (indistinct)

MR FITZGERALD: Yes, we'd prefer that in writing, so that it's just anybody who hasn't had an opportunity to comment. So does anyone want to put a formal statement on the record? Going, going, gone. That being the case, we'll now adjourn the public hearing until we meet in Sydney and then Canberra. Thank you very much.

AT 3.36 PM THE INQUIRY WAS ADJOURNED UNTIL
MONDAY, 18 FEBRUARY 2008

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