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TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO AUSTRALIA'S CONSUMER POLICY FRAMEWORK

MR P. WEICKHARDT, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 23 MARCH 2007, AT 9.05 AM

Continued from 22/3/07 in Adelaide

MR WEICKHARDT: Good morning, ladies and gentlemen. Welcome to the public hearings for the Productivity Commission national inquiry into consumer policy. My name is Philip Weickhardt and I am one of the commissioners on this inquiry. My fellow commissioners are Mr Robert Fitzgerald, who is the presiding commissioner on this inquiry, and Mr Gary Potts, both of whom are unable to be with us here today.

The inquiry started with a reference from the treasurer in December last year and covers a review of Australia's consumer policy framework, including its administration. We have already talked to a range of organisations and individuals with an interest in the issues of this inquiry and submissions have been coming into the inquiry following the release of the issues papers in January 2007. We are grateful for the very significant contributions that many individuals and organisations have already made available to the commission on this inquiry and I'd also like to thank those people appearing at the hearings here today.

The purpose of these hearings is to provide an opportunity for interested parties to discuss their submissions and their views on the public record. Following these hearings in Perth hearings will also be shortly held in Canberra. Hearings have already been held in Adelaide and in Melbourne and we anticipate holding hearings in all states and territories provided there are people who wish to appear before the commission. We will then be working towards completing a draft report for public comment in August and we will invite participation at another round of hearings after interested parties have had time to read the draft report.

We like to conduct all hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken. For this reason comments from the floor cannot be taken, but at the end of the day's proceedings I will provide an opportunity for anyone who wishes to do so to make a brief presentation. Participants are not required to take an oath, but are required under the Productivity Commission Act to be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. A transcript will be made available to participants and will be available from the commission's web site following the hearings. Copies may also be purchased from the commission. Submissions are available on the web site.

To comply with the requirements of the Commonwealth Occupational Health and Safety Legislation I wish to advise you that in the unlikely event of an emergency requiring an evacuation of this building the exits are located immediately to the right and to the left as you exit this door. There is an alert signal that is a high-pitched, intermittent sound that indicates there is a potential hazard in the hotel, you should be prepared to evacuate. The evacuation signal is actually a "whoop whoop" sound and indicates that you should evacuate, proceed to the nearest emergency exit. The assembly point is in the carpark at the corner of Hay and Irwin

Streets. If you require any other assistance, please speak to our inquiry team member, Mr Wayne Crook, here today.

I'd now like to welcome our first participant, Mr Chris Field. Chris, please, for the record, if you could indicate your name and the capacity under which you're appearing here before the hearings.

MR FIELD: Certainly, thank you so much for that. My full name is Chris Field and I'm here principally in two capacities: one as a member of the Economic Regulation Authority of Western Australia, which is a position I hold three days per week, and the remainder of my time is spent as a professorial chair in consumer law at Latrobe University. As of about eight hours' time, commissioner, I will be resigning from those positions to begin on Monday my new role as the Western Australia Ombudsman.

MR WEICKHARDT: Let me say congratulations.

MR FIELD: Many thanks for that. Can I say that though specifically having named those roles, I do want to put quite directly on the record that the views I'm expressing are mine alone. They do not necessarily represent the views of those organisations that I've mentioned, nor indeed of any other organisations with which I'm currently involved. I have also tendered this morning, commissioner, a small paper for the record. I won't speak to that, of course, verbatim, in deference to the time of others today, but will speak to the highlights of that. Can I also express my appreciation of my opportunity to come and speak to you today.

I will make some comments on the overall approach of the commission's issues paper. I think it's a very good paper. I think it sets out what I think, in my opinion, are the key issues to be considered both by the commission but, of course, the wider community in the important debates we're going to have this year on consumer policy. Can I also say that I want to particularly strongly endorse the approach of the commission in relation to its stated high-level institutional, procedural and policy issue approach. I think that's an approach that should be welcomed. It is really a formidably difficult to task, I would have thought, to look in detail at both consumer policy and consumer regulation. As I'll go on to say a little later on it really is now a somewhat vast area of both law and policy and I think that high-level approach is really the sensible approach to take. But I'd also say this: I'm very hopeful that that high-level approach would encourage other stakeholders to, if I can say, resist the temptation to move directly to solutions and to actually focus on the principles upon which we actually build solutions that we seek to implement.

I have deliberately also kept my comments high level both in the paper that I've tendered and also the comments that I'll make today. The last comment I'd make on the overall approach is simply to say the last time there was anything of this

magnitude done in Australian consumer policy in this country was probably 1974 with the introduction of the Trade Practices Act. There's been enormous development since then, both internationally and in this country but I think this is the first significant review of consumer policy in that time and I think it's very welcome and it's very timely accordingly.

I want to talk a little about the first principles approach to consumer policy and I strongly believe that consumer policy should be based on such a first principles approach which of course begs the question what that first principles approach should be. I think it should be that consumer policy is directed exclusively to the long-term interests of consumers. I stress the "long-term" there, commissioner. You will be familiar with the use of long-term consumer interest in terms of our national competition policy, but there are many things that may be in the short-term interests of consumers and potentially matters which are not beneficial in the short-term but which are necessary to gain long-term benefit. Say, for example, in newly competitive markets headroom in pricing which would allow long-term downward movement in pricing to stimulate competitive economies. So we do have to distinguish between the short-term and the long-term and I'm firmly focused on the long-term interests of consumers.

I would say that flowing from that the first point of the review is around economic efficiency. I think the free operation of markets and not government regulation is the primary way to achieve economic efficiency. I think that's the bedrock effectively upon which the long-term interests of consumers is built and I think we need to be always aware of our second order or second-best likelihood of achieving what markets will otherwise achieve for us. Having said that, of course, regulation is important and needed and I would urge the commission to consider the sort of principles it's considered on many occasions in the past in its review of national competition policy and its red tape taskforce work, the work of the OECD and others, that we need to have a hierarchy of principles upon which we build regulation.

We start with the first principle and the first principle is markets work and we should not interfere in the operation of markets. We need to have, I think, (1) a demonstrated need for regulation; (2) that the proposed regulation will actually remedy the problem; of course, simply because there's a need doesn't mean that the regulation that we're proposing will actually solve the problem; (3) and critically, the proposed regulation is the least restrictive on consumer sovereignty of the policy tools are our disposal. There may be, of course, always ways that are less liberty restriction than a regulation proposed. (4) and very much in keeping, I think, with generally understood principles in regulatory design, that the costs imposed by the regulation are outweighed by the benefits of the regulation if we are to impose it.

I'd simply say in short that consumer regulatory protections that stifle

economic efficiency are, of their nature, undesirable unless it can be clearly demonstrated that the cost of that inefficiency is outweighed by the benefits of our protective actions. The issues paper also talks about social justice in the context of consumer policy and consumer policy having a social justice role. I strongly support social justice policies as part of a proper remit of what governments ought to pursue in this country. I would say though that I'm generally cautious about using consumer policy as a social justice or perhaps more technically correctly a distributive justice mechanism. I say that because our distributive aspirations are probably best served by the most efficient means possible and by that I mean the taxation and welfare systems and also spending on health, education and other sectors of the economy.

There is a wonderful quote which I have included in the paper from Michael Trebilcock, a very famous lawyer and economics scholar from Canada and his quote is along the lines of - I'm paraphrasing - "You can't spend what you don't make." Of course, economically efficient economies grow our productive capacity and grow our wealth and with that wealth we can choose to spend it in ways which, of course, meet our otherwise aspirations around socially just communities.

I want to read into the record this quote, moving now to the issue of red tape unnecessary regulatory duplication and it's as follows:

> Consumers should welcome proposals to remove unnecessary regulatory controls on business in Britain. After all it is customers, rather than companies, that ultimately foot the bill. We do not support regulation as a knee-jerk response to emerging issues. It is too easy for advocacy groups to be drawn into calling for regulation as a solution to most problems. Instead it should be considered on a case by case basis and introduced only when the benefits outweigh the disadvantages. Some regulation is pointless or counterproductive and both consumers and business would benefit from being swept away.

I am please to say, given hats that I've worn in the past, commissioner, that's not a quote from a business council, but a quote form a consumer organisation and that was from the UK National Consumer Council. I strongly endorse that principle. It seems to me that consumer protection regulation in the country has probably become so vast and complex now that it is absolutely certain that there is significant unnecessary duplication and repetition in our laws and there is a real opportunity to remove regulation through this review and to recommend principles upon which we do that. We have, of course, law in both general statutes. We have it in industry-specific regulation. We have it in court judgments. We have it in subordinate regulatory instruments. We have it in self-regulatory mechanisms. From my experience, and without detailing those today, there is significant overlap in those areas. Unnecessary overlap, overlap that adds costs to business and those costs to business are generally passed on to consumers. When it comes to

unnecessary regulation, the truth of the matter is consumers pay. It is not to their advantage.

I want to turn now to behavioural economics and the issues paper makes some specific note of this growing area of behavioural economics. The truth, of course, is behavioural economics has been around for some time, but it is also the case that both in the OECD in Australia, in America, New Zealand, other countries it is now gaining great attraction in relation to how we might think about its use in policy design. I want to say this: I think there is real value to behavioural economics in terms of at least two things: first, I think it can, as the issues paper articulates, help us look at the way we frame regulatory design in terms of the way consumers make decisions. Second of all, not so much articulated in the issues papers, but I would say that insofar as behavioural economics challenges some of the dominant economic thinking, particularly in classical thinking, then that's welcome only because, of course, debate is always welcome and it hopefully is a mechanism for increased rigour of our approach.

I need to make though some comments, I think, based on my reading of the behavioural economics literature and some of what I've seen in practice and I'd call them strong notes of caution around behavioural economics which, I think the commission may want to consider in terms of the way that it suggests behavioural economics ought to influence consumer regulatory design. The issues paper identifies behavioural economics as identifying when consumers are making "inferior purchasing decisions" and "not making decisions in their best interests". I would simply say this, and it's trite and you'll forgive me for it, but when it comes to making those sorts of judgments about consumers' decision-making says who?

I want to, somewhat more eloquently quote John Stuart Mill into the record - I hope I'm the only person in the commission's hearings to quote John Stuart Mill - and I want to put this into the record, and this is a quote from of course his most famous work on liberty:

> Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each other to live as seems good to the rest.

Of course the quote is self-evident, but we have to be awfully cautious, I think, about being paternalistic in our regulatory interventions for two reasons: one because that paternalistic intervention adds red tape and cost to consumer transactions. At the end of the day we have to pay for the paternalism we implement. But secondly and at the more fundamental level it goes fundamentally to the heart of the exercise of not just the way we conceive modern markets in society, but also of course the exercise of liberty and autonomy by consumers.

A second concern around behavioural economics is that we need to make mistakes. I'm a little concerned that some of behavioural economics is trying to make us mistake-free or correct mistakes that we otherwise may make. We learn from our mistakes and by those mistakes we make our subsequent decision-making stronger. It's the difference, of course, between transaction decision-making and whole of life decision-making or, as the philosophers would call it, the difference between a current and dispositional autonomy. At the end of the day a mistake today may, in hindsight, not look like a mistake at all, in fact it's made us much stronger in our long-term decision-making. So we have to be careful about what mistakes we take out of our decision-making process at any given point of our life.

I just want to use one example and that's the McDonald's heart tick example. It was a recent high profile example where a range of authors in Op Ed pieces and other places made observations about the use by McDonald's of the heart tick and, of course, McDonald's was using it to promote certain meals on their menu as healthier and had received the heart tick. I'll leave aside, of course, any issues around their payment for that; that's not the point of my submission today. But it was criticised by behavioural scientists on the basis that consumers exercise what's called bounded rationality which is a key, and perhaps the key, but certainly one of the key tenets of behavioural science and behavioural economics. Quoting from that author in an opinion piece in The Age he says this:

> Simply put, bounded rationality is a theory that suggests most of our decisions are not fully thought through and, as such, we can be rational only within limits such as time, desire to expend effort, and cognitive capability.

The author goes on to say:

> You would be surprised how often, when calculating expected utility, we do not make the best choices.

He then goes on to say:

> McDonald's has exploited our desire to simplify our busy, demanding lives and thought processes, particularly when it comes to the surfeit of choices that the marketplace offers us.

It was explained in that article that behavioural science tells us that process by McDonald's was about actually about one exploiting the lack of rationality of consumers and presumably there would be some form of intervention and you can imagine other examples of regulatory form of intervention to stop that. I'd counter it this way: that neoclassical economics, and perhaps even commonsense might tell us, that reliance on a well-known, trusted information source about healthy eating could

be for the time-poor modern consumer keen to limit their transaction costs, search costs, a perfectly rational act. It seems to me if I'm driving home to pick up a meal for my family, it might be perfectly rational to rely upon that and I am concerned that that's potentially not considered the case.

I would say this: I think it's particularly concerning if though some in our community are confidently able to say that a decision to eat a healthy or healthier fast food item is one of those times when we're not making the best choices. I think it simply points out some of the caution we need in this approach. It's a new area. It's an area which needs to be fully tested through and thought through and accordingly, whilst I think there is a potentially significant value, we need to be potentially also mindful that it itself can reveal costs and concerns.

The issues paper then goes on to a range of specific comments and I just want to touch upon a couple. First of all, on disadvantaged and vulnerable consumers, one of the areas which the commission is looking at and it rightfully points out in its issue paper that it's one of those arguments, that is the need to protect disadvantaged and vulnerable consumers, as to why you might intervene in markets. Of course, market failure would be the general reason why you would do that, things like asymmetric information. But the existence of vulnerable and disadvantaged consumers is another. I'd simply say about that, I agree. That will sometimes be a very good reason to intervene in markets, whilst quantitatively vulnerable consumers will be fewer, qualitatively their problems may be ones that quite properly make governments, regulators and others turn their mind to trying to resolve those issues.

But I would say these three further points about intervention in markets specifically for vulnerable consumers and they are these three points: (1) we should never abandon our first principles approach. If the regulation is not actually needed, if it's not the right regulation, if it won't actually fix the problem, if it imposes more costs than it does benefits, then making it in the name of vulnerable consumers does not make it virtuous, it's still bad regulation. (2) we have to recognise, of course, that protective regulation for vulnerable consumers that distorts economic efficiency might ultimately reduce our productive capacity and wealth in a way, of course, that is undesirable because that's the very wealth that we seek to use to spend on areas like health and education that actually creates opportunity for vulnerable consumers. (3) there is a potential, I think, for governments and regulators to potentially inefficiently misdirect their scarce resources in addressing issues specific to any group of consumers, particularly where they might be smaller retail issues and not allocating their resources to larger issues.

I say, for example, there may be small retail issues that affect a group of consumers, but within constrained resources that governments and regulators have they may therefore not allocate resources looking at, say, monopolistic wholesale markets or cartel behaviour which, of course, at the end of the day, whilst not

immediately obvious, may in fact be much more harmful to vulnerable consumers than the retail issue they were addressing.

On general and industry-specific regulation, I'd simply say that it's broadly a second order issue. The first order issue is, is the regulation required? Once we cross that threshold, then we can examine whether it should be industry-specific or general. I would broadly state a preference for general, rather than industry-specific regulation. I'd say it for these three reasons: first of all, general regulation leads to greater uniformity, certainty and consistency; second, probably less regulation, less cost and less conflict between regulation and third, and I base this on my belief on the economic theory of regulation, that it's possibly the case that a preference for general regulation as opposed to industry-specific regulation will lead to less likelihood of regulation designed to protect vested interests.

There will, of course, be times when sensible use of industry-specific regulation is required, but I only need to look at something like section 52 of the Trade Practices Act as a general regulatory prohibition and a very strong and successful one for many years on misleading marketing practices and then the wealth of section 52 equivalents across various industries in the country to say that may be an example of where a general regulatory approach is sufficient and certain enough that we don't need the various industry-specific approaches.

On unfair contract terms, I won't outline the history of unfair contract terms at all, it's in fact actually set out in the issues paper. This may be partly a redemptive matter for me, commissioner, but I do want to note today not the benefits of unfair contract terms because I've had an opportunity to do that in an academic journal, but unfortunately myself and every other author in this country who has so far published academic literature on unfair contract terms has singularly pointed out the benefits and not pointed out any costs. So I today just simply say that - and my own work, of course, is guilty of that - there are benefits to unfair contract terms legislation. It is legislation that is now in place in the UK, in Victoria, but I think it's absolutely critical that we don't ignore the costs of that legislation as well.

There are obvious compliance costs to that legislation. If we rewrite standard form contracts to make them fair, then those compliance costs will be passed on to consumers. But there's a potentially much more significant cost that's involved than compliance costs and it's around the interference with what I would call the complex balance of the contractual bargain. Put simply, the deletion of one term as unfair may see another term which the consumer values affected adversely. What, of course, then seems on its face attractive, which is the protection of powerless consumers from the excessive power of business, may in fact upset the complex balance of the contractual bargain in a way that's harmful to consumers.

A very short example would be in, for example, telecommunications contracts

where it's commonplace to put in a clause which would limit consumers, in effect it gives them a disincentive, a cost disincentive to change contracts early. It's an early termination clause. It's typical for those clauses to be considered unfair. Indeed, the UK legislation or the rules that followed that legislation would generally consider that sort of clause unfair. It would probably be considered unfair in Victoria as well. The difficulty, of course, with taking that clause out is that it's very likely to change the dynamic in the market. The pricing offered to consumers to enter into those contracts is premised on the fact that consumers will stay in that contract for a period of time and the early termination clause gives them the disincentive too or the incentive to stay or the disincentive to leave.

If you take that clause out, they'll probably act rationally and that is, two months after they've entered that contract they may well find the next contract offered in the market at a cheaper price and they'll move to that. Ultimately over a period of time that will shift the market dynamic. It will probably shift it in either one or two ways, either to raise prices, initial entry prices, it could potentially lessen competitors in the market place. Of course, if it lessens competitors in the marketplace over a period of time, then what you may ultimately have is a lower competitive dynamic and indeed, higher prices following from that.

I think here is an example of where you see the interference with the complex dynamics of exit and entry in a competitive market has potentially unexpected results. What is done in the name of fairness to consumers may not in fact be in their long-term interests. Indeed the examination of unfair contract terms by the commission is particularly welcome as these laws provide a window on the broader set of challenges for all consumer protection regulation. Potential prohibitions on unfair contract terms, like many other areas of consumer protection, demonstrate the need to understand, critically understand that law and economics intercept. Put simply, terms that unfair at law are not necessarily economically inefficient and there's a vast literature on that from both the United States and around the world and I've cited their Richard Craswell, a very well-known Chicago school economist, but there are many others.

Examining the true costs and benefits of the possible introduction of unfair contract terms laws can be a harsh but necessary way of exposing what I think is one of the important public policy truths about consumer policy and that is what is sometimes done as good for the individual or, in the short-term, may actually in fact cause significant long-term detriment for all consumers. On self and non-regulatory approaches I would simply say that I generally strongly encourage the use of self and non-regulatory approaches.

I did note the caution of the chairman of the Australian Competition and Consumer Commission, Graeme Samuel, that was quoted in the Financial Review the other day, that businesses don't always do everything they can do in terms of

making self-regulation work and I think that's right. It is effectively for business to ensure that self-regulation does work, but where they do I think that process is generally to be preferred to more heavy-handed regulatory approaches. The only other thing I'd say about self-regulation, of course, is that it still should be subject to a rigour and that is a cost and benefits rigour. Some self-regulation imposes more costs than it does benefits and it doesn't make it desirable simply because it's self-regulation.

Finally, on consumer advocacy which, in the commission's issues paper comes under the heading of Self-Regulation or Self and Non-Regulatory Approaches. I think I would say it's, still for a few hours wearing my professorial hat, I shouldn't say it's unarguable, but I'd say it's nearly unarguable that consumer voices are under-represented in the Australian marketplace. I do think we see a dominance of producer-group voices in this country. I have published some items on this. I cite them in my paper in the Australian Journal of Public Administration which is to be released this month and also a major research report which I authored for Consumer Affairs Victoria called Consumer Advocacy in Victoria which goes through a very long examination of both the economic theory of regulation, that's in theory, but also in practice for Australian purposes.

The conclusions I reach there were the same as many authors before me and that is that producer groups do dominate debates. The end result of that, of course, is generally consider to be the fact that regulation tends to favour producer groups at the expense and long-term interests of consumers. Some regularly cited examples include anti-competitive protections offered to pharmacists, to the media, to airlines, to agricultural marketing boards and to taxis. I have previously argued that a precedent exists for the establishment of a consumer advocacy body, that is, government created and funded the UK National Consumer Council.

Can I say today for the record I have two principal concerns with the establishment of a national consumer council, which I otherwise broadly support, and those two concerns are these: first of all, that for that group to be successful and to be sustainable it will need to be strictly independent and strictly bipartisan. The history of national consumer bodies - apart from the Australian Consumers Association which has long been strictly independent, financially and otherwise, and bipartisan - and I note just for the record that I was a chair of that organisation for four years, so you'll note the caveat on what I've said.

But I would simply say that the history of consumer advocacy bodies at a national level has been one which has not been characterised by sustainability through political cycles. If the organisation cannot be established in a way that will be sustainable through cycles, it's probably not worth establishing. It must be credible. Second, it will need to focus on creating consumer advantage through economic reform. I don't think we need to establish another consumer body that is a

protectionist body. There are good reasons in society to have consumer advocacy groups who are articulate advocates for protectionist policies, very good reasons to have those organisations and they currently exist and they are highly articulate advocates for that position and I support their existence. But I think what we lack is a consumer advocacy body which is fundamentally committed to economic reform of the long-term interests of consumers, that is, effectively a body that will counter the arguments of producer groups for anti-competitive conduct.

On that note, and in my final quote, I actually want to quote the Productivity Commission in what I thought was the excellent report that it did on national competition policy and it says this on consumer advocacy:

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

Indeed, I think the most relevant consumer organisation to establish, if one was to be established, is one that would ensure lower prices, higher quality services, more market innovation on the basis that it is countering effectively those who seek to protect their otherwise anticompetitive positions in the marketplace. Thank you.

MR WEICKHARDT: Thank you very much indeed for that very comprehensive and informative summary of many of the topics we're looking at. Perhaps I can start with the last issue you just raised. It's interesting that governments of every complexion in Australia over the last decade appear to have defunded contributions to consumer advocacy groups and yet in theory and in practice from everything you've said consumers, and therefore electors, ought to have both short and long-term interests in having their voices heard. It's in their self-interest that that be the case.

How do you explain the fact that consumers and electors and don't send signals to governments that this is an important priority to them and why do you think those advocacy groups have been unsuccessful at remaining bipartisan and independent?

MR FIELD: That's an excellent question. I think there's two answers to the first - well, there may be many answers too that I can think of. This is in relation to why the electorate generally doesn't seek out greater representation through consumer groups. One would be that theories of regulation would tell us that disparate groups, individuals generally don't collectivise their actions, the operation of free riders and other principles count against it. What you tend to find, of course, is that highly concentrated interests, like producer groups, do form to do that; consumer groups don't form accordingly.

The second reason is probably a historical Australian reason and that is we have been less - we've had welfare state traditions and I think it's been seen as a welfare function of government to provide consumer advocacy. Of course, that's not the case in, say, the United States which have had not a welfare state tradition and there their consumer groups are generally funded through exactly the sort of mechanisms you mention, commissioner. They're funded through Ralph Nader-like organisations which are funded, Public Citizen being a classic example; through large philanthropic donations from very generous philanthropic funders in the States and also from citizen contributions, direct citizen contributions to those organisations.

Many of those organisations, the energy advocacy bodies and also the citizenship bodies have multiple million dollar turnovers, much of it coming from direct citizen donations. That's not a typical case. There would be no typical case for that in Australia. The closest we would have, of course, would be the Australian Consumers Association which has a budget of around $10 million a year but, of course, that is revenue generated from selling a product which is Choice magazine. Indeed, the advocacy function of the organisation is actually small, only a few hundred thousand or so dollars and four or five staff.

In relation to why consumer advocacy organisations have been defunded, I think it principally comes from the fact that consumer advocacy organisations have done two things: first of all, they have not been consistent, articulate advocates for economic reform. The last 15 years in Australia of course, as everyone knows, has been a period of enormous economic reform, economic reform that has been hugely beneficial to Australian consumers. But that's not a view that's always been shared by consumer groups who have sometimes been very resistant to those reforms and I think they've been seen as being out of step with national reform processes that have been taking place.

The second reason, of course, and this has been very frank, those groups have not always been as sensibly bipartisan as they might have always been through the various cycles of government. My organisation, the Consumer Law Centre Victoria - when I say "my organisation" of some many years ago now, but a non-government organisation that I headed for seven years in Victoria - grew exponentially in the time that I was there and we receive funding from governments of all persuasions and indeed, worked very well with the federal government, but we had a very strongly bipartisan approach. We articulated what we thought the right principles were regardless and I think the hallmark of very successful advocacy organisations in this country is exactly that and I think some of those who have been defunded have not necessarily done that.

MR WEICKHARDT: Thank you. You talked about the benefit of generic legislation and the potential advantages that has. Indeed, one of the issues that has

constantly been drawn to our attention during this inquiry are some of the holes that are exploited between individual pieces of specific legislation that are exploited by people who, on the one hand should be applauded for being innovative and then sometimes that innovation helps consumer and the other time exploits consumers. One of the issues that was put to us recently is that there could be some merit, even where individual actions have been carved out of the ability of, say, the ACCC to act in the financial services area, for example, where ASIC have responsibility that there could be merit in allowing the Trade Practices Act to act right across all those areas to take back the carve out and to have an arrangement such that in normal circumstances the functionally specific regulator, say, ASIC in that particular case took action but where a hole was being exploited then there was no question that the Trade Practices Act and the ACCC had the ability to be brought to bear. Do you think that sort of concept has some merit?

MR FIELD: Yes, I do. I strongly do. I well remember a range of problems that arose, particularly around what was considered to be the regulatory gap and particularly the enforcement gap between ASIC and the ACCC around financial services regulation and that caused, many might remember, a range of problems, including in building and other areas some years ago and it's been a source of some concern for some time. I think there is enormous benefit in moving - and I noticed once again in the piece in the Financial Review in which Graeme Samuel was quoted, he was noting the potential for uniform legislation and then functional specific enforcement after that and I think that's an approach that would be broadly supported by myself.

I think a generally uniform approach to legislation, one then when regulators know exactly where and when they can't act is good for the credibility of the regulators and is good for consumers and also gives, of course very importantly, certainly to business in terms of how they operate in the marketplace because that uncertainty is not good for anyone.

MR WEICKHARDT: In terms of the contract terms legislation, you talked about some of the perhaps second order impacts of removing so-called unfair terms, but I understand notwithstanding that reservation you're still supportive of the unfair contracts model?

MR FIELD: I would now hesitate about introducing unfair contract terms. That may surprise some people who know that I was one of the principal protagonists for introducing it in Victoria. I would do so solely for this reason: unconscionability, as often quoted, is the reason why we don't need unfair contract terms. That's not right. Unconscionability only deals with the procedural aspects of contract formation, not the substantive and even though it may, under Trade Practices Act, do so, courts have been very reluctant to allow that to happen, so that's not the reason. The reason is for retrospective interference with contract terms.

I'm broadly supportive of the views of those law and economic scholars who express some real fear about our capacity to correctly identify those clauses we might take out as unfair and those which we don't and how that affects the contractual bargain. The evidence of unfairness in contract terms is rife. Once again there are sometimes comments made, "We don't need to reduce this legislation because there are no unfair terms." In fact unfair terms are rife in contracts looked at in isolation. But that's probably not the point. The point is, is the contract itself and the bargain that consumers strike across a market producing economically efficient outcomes? I think that's the question.

So I think in some ways with unfair contract terms we've asked the wrong question. We need to ask the correct question with it. If you ask the correct question which is, "Are these terms efficient?" and, of course, the vast bulk of consumers - and they were subject to those unfair terms - is generally only a very small portion of any market that are, then you probably get to an answer to say, "Those laws may not be necessary." That is not to say that from time to time certain unfairness in contract terms that is also inefficient ought not be taken out. First of all, the market will probably achieve that, that's one thing to say. Second of all, there may be some regulatory intervention that's required. But broadly speaking a broad brush unfair contract terms approach is probably not one that I would now support and I'm currently, commissioner, working through those issues for a paper that I'll publish later this year in one of the major law journals and I'll come to the conclusion, I think, in that article - not I think, I will come to the conclusion - that a broad based unfair contract terms approach is not one I'd now endorse.

MR WEICKHARDT: Okay. That's very useful and helpful. Thank you. I guess one of the points that has been put to us is that although one has argued that - I mean, there is no such thing as a free lunch and that if you have an unfair term in a contract that consumers effectively will price that in a competitive market. But others have said, "Well, consumers don't do that, they don't - even if they're aware of some of those unfair terms because they're around eventualities that are a long way away, they're much more focused on bargaining around price and immediate quality issues and those sort of contractual issues don't get priced in a competitive market in a way that theoretically you might expect." Have you got any comment on that?

MR FIELD: My comment is consumers are being rational when they're doing that probably because the truth of the matter is price is the single most important thing to them and that's the thing that they will probably see throughout the contract term. The vast bulk of consumers who enter into those sorts of standard form contracts won't fall foul of those terms which otherwise might be considered unfair. So it's perfectly rational for them to focus on the price issue because that's the issue which is of concern to them. I also don't accept the proposition which is regularly said that it matters or is concerning that consumers don't know what are in those contracts.

The truth of the matter is that not knowing every detail of a standard form contract is not the issue. The issue is over a period of time in a marketplace will the contracts being delivered be efficient and if they are, then exact knowledge of every single detail of that contract is not actually an issue.

MR WEICKHARDT: Okay. That brings me to some of the comments you're making about behavioural economics. A recent paper released by Community Affairs Victoria on consumer detriment has quite section on behavioural economics and I think it's fair to say that one of the outcomes that they postulate might be a government response here is to spend more time educating consumers to be aware of their own biases and perhaps the fact that in other people's views they sometimes do not behave rationally. But do you think in terms of some form of government intervention that an investment in education that warns consumers that research suggests sometimes they react impulsively and perhaps don't make "considered judgments" or "considered decisions" it would be a sensible investment by government?

MR FIELD: I think we have to think through very carefully where that leads us. Two questions: first of all, a simple costs benefit analysis, that will be a costly exercise and therefore will there tangible benefits that will outweigh the costs that we spend there, that's an opportunity cost to government to spend in other areas and should we spend in that area and I think we can only reveal the correctness of that policy choice by undertaking that sort of cost benefit analysis. The second thing I would say is in determining what the benefits are, we need to think through what would the ramifications be of educating consumers in those areas? How will that change the way they operate in markets and how will that change the dynamic of markets, if at all?

As I say, I have some concerns that those things which are considered to be biases which may not be rational are either (a) not necessary, equally be looked at as being rational when looked through another lens or (b), may not be the sort of actions which in the sort of society we want to live in we do actually want to change those biases. We may say that sort of intuitive action is freely part of what you're able to do. There may be some biases which we think are ones that we do want to educate consumers about and if we do, I think we need to think, "If we do empower consumers in a different way, if we do educate them in a different way, where will that lead to," and to think through the ramifications of that. I suppose I might be broadly sceptical doing it.

MR WEICKHARDT: Just going back to the conversation we were having before about unfairness, you made the point that unconscionability is about conduct. However, as I understand it - and I should stress I'm not a lawyer so I don't understand it very well - but as I understand it the way that courts in Australia have

interpreted unconscionability in conduct puts a very much higher hurdle in terms of getting some sort of action and redress in that area than has been the case in, for example, the United States.

MR FIELD: Yes.

MR WEICKHARDT: Obviously you're saying the courts are wrong in interpreting the current legislation would probably not be a sensible approach. But do you think there is a gap in terms of the sort of protections that the current law under the Trade Practices Act offers that's missing here and is there some need to redefine the legislation so that the courts accept a lower hurdle in terms of conduct that perhaps a US court might see as unconscionable?

MR FIELD: You're absolutely right. I am a lawyer but haven't be practising for some time so you'll have to forgive me for not being expert as well on it. But you're absolutely right, the courts historically of course introduced the principles around unconscionability, particularly Amadio being the very well-known Australian case. The legislators through the Trade Practices Act did make amendments to effectively allow unconscionability which was at common law a strictly procedural remedy, that is, defects in the formation of the contract of illness and other matters to actually be substantive, that is, things which are substantively unconscionable or unfair, unconscientious in the actual contract itself. The legislation does effectively allow that. Courts have been reluctant to take unconscionability even under that legislative remit down that path.

One of the ways to examine unconscionability is to potentially examine, looking again at that legislation and making the directions clearer in relation to the sovereign's desire. That court has actually examined unconscionability within that frame. It would also be true to say that if we were to go down that path I would be strongly encouraging legislature to think of giving some useful directions to courts as well about looking at the overall contractual bargain. We still have the issue with unconscionability, for example, that are selectively taking out one aspect of the contract without looking at the overall contractual bargain potentially leaves us in difficult places for the competitive balance in marketplaces.

So that's a problem with unconscionability as it is a problem with unfair contract terms and it's well known to many people, of course, that unconscionability made many of the Chicago school economists rather upset and as much as anything it's because people didn't fully think through the costs of doing those things. When you have an Amadio-like case, you end up having a rational reaction from the business world to say, "Well, every single time we have the third party guarantor you'll have to go and see a lawyer and you'll have to go and do this, this and this," and of course that adds enormously to the costs of those transactions, costs which are ultimately passed on to consumers.

So that still needs to be considered through. That's not an argument against unconscionability, it's simply an argument to say law and economics perpetually intercept and you don't have to be a law and economist's scholar to want to actually embrace the fact that law and economics intercept. They are nothing else, simply saying every policy choice has a cost.

MR WEICKHARDT: Thank you, that's helpful. One of the earlier submissions that we received raises an issue that I'm not very familiar with, so forgive me if I don't express this entirely correctly, but they invite us to consider whether or not an opportunity that exists in the UK where the Office of Fair Trading can apparently make market investigation references to the Commission and, as I understand it from reading this documentation, this is instances where there isn't necessarily any particular breach of competition policy, there's no collusion necessarily or cartel-type behaviour, but where the structure of the market is such that in the view of the Office of Fair Trading consumers may not be getting the full benefits of a competitive market.

What I'm not quite clear of in reading this documentation so far is exactly what remedy is then proposed. Clearly it's the dream of every producer and manufacturer to operate in such markets because they tend to pay high rents, but exactly what you do to then produce a more competitive market that gives favour to consumers I'm not clear of. Would you like to comment on that market investigation process and whether or not it has any merit in terms of an Australian context?

MR FIELD: I say that my general view is that between the operation of the Productivity Commission and the Australian Competition and Consumer Commission there is a very robust framework I think in Australia as currently exists. The Productivity Commission in taking by reference from government examination as it has on many, many issues of microeconomic reform, those areas where the economy can be freed up, it can be reformed to make it as competitive as it possibly can be. I think we've seen through the NCP processes, the operation of the National Consumer Council by the work for the Productivity Commission enormous advantage wrought from our economy over the past 10 or 15 years. I think Part IV of the Trade Practices Act and successive leadership of the ACCC in my time in professional life under Alan Fels, Bob Baxt and now Graeme Samuel, I think we've seen some very strong leadership on ensuring that the benefits of competition are know, but also that Part IV is strongly utilised to ensure that anticompetitive matters are not a feature of our economy, or as much as they can be.

So whether that additional power is necessary in Australia would be an open question. At the end of the day I would broadly, I think, support any capacity for governments and regulators to ensure our economy is as open and as competitive as it possibly can be. At the end of the day there is no - Adam Smith's line, of course, is

the one that resonates most strongly with me, "It's absolutely proper and right to attend to the interests of producers and we ought to in this country, but only to the extent to which it advances the interests of consumers." We ought to do those things which is necessary to achieve that. I query whether we have the structures already to do that though.

MR WEICKHARDT: Thank you. In your opening remarks you noted that consumer policy should be driven by long-term interests of consumers and is one of the principles of best practice regulation that regulators clearly articulate the objectives behind the regulation.

MR FIELD: Yes.

MR WEICKHARDT: That helps sharpen the whole debate about the necessity of them. We are asked to fundamentally look at the framework of consumer policy in Australia. Where would we turn to see concisely but eloquently written what the overriding objectives of consumer policy should be other than that fairly short summary that you gave which, I guess, is a very good starting point, but may not be totally comprehensive.

MR FIELD: Yes, of course. Modesty forbids me from pointing out any of my own work. My work is very much minor in the scope of that sort of endeavour. I have put down some references to my university textbook and in particular chapters 3, 4 and 5 that go through these issues, some articles that I've published in the Australian Business Review and otherwise that go through some of these first principle approaches to consumer policy. But the work that has been done on this is actually abundant, I think, and the Productivity Commission will be aware of much of it because in fact, first of all, it's a source of some of that work and second of all it has sourced from other places much of that work which it has referenced in its previous endeavours like the red tape taskforce report and the review of national competition policy.

So I would point to some of the work of the OECD around regulatory design principles, the commission's own work, the red tape taskforce report, some of the academic literature from the United States and particularly around Chicago school theorists around regulatory design and very well-known theorists, Posner and others around those area; Trebilcock from Canada, another well-known theorist in this area, particularly around the intersection of law in economics and the fundamental need to have those two matters coalesce. In Australia you have the sort of regulatory design principles that have been articulated by academics like John Braithwaite and others and, as I say, my work, very modest in scale, has only been in areas in consumer policy.

The very radical question to ask - not one that I subscribe to, but it's always

good to start with asking a radical question - is, why have consumer policy at all? At the end of the day for the vast bulk of consumers freely operating markets will deliver what they want which is lower prices, higher service quality and product diversity and innovation. So that's a radical starting point, not one which would be my end point but it's an interest way to ask yourself, "What is the first principal question?"

MR WEICKHARDT: Thank you. That's useful. My final question is around the issue you raised at the start about the degree to which consumer policy should be really, I guess, about economic efficiency and social justice and distributive issues should be handled separately. On Tuesday in the hearings in Melbourne it was put to us by somebody else that consumer policy, where possible, if it does not compromise economic efficiency should be mindful of social justice issues and they raised issues around some of the energy regulation, for example, where they believe social justice issues and fairness could be incorporated without compromising economic efficiency. I assume in those circumstances you would have no objection to that?

MR FIELD: Absolutely. That would strike me as being absolutely sensible. Indeed, even in my own submission, certainly my tendered submission, the point I want to make about consumer policy as a social justice policy is that's highly desirable so long as it does not distort economic efficiency. What economists, of course, would say is, "That's a nice thing to say, but the truth of the matter is virtually every consumer policy will ultimately distort economic efficiency in some way," and I accept that. So it's probably more a question of, in the overall circumstances, looking at the costs and the benefits and the complex balance of those matters to determine consumer policy's interaction with economic efficiency.

What I would broadly say is this though: at a principal level your efficient economy will be your most productive economy which will produce the greatest wealth. 15 years of national competition policy and microeconomic reform has led to, in the Productivity Commission's own reckoning - and this was a conservative number - around $20 billion additional wealth to GDP. That's $20 billion more to spend on hospitals, to give us tax relief, to spend on health, to spend on education. The greatest determinants of long-term opportunity and movement from vulnerability to greater advantage is probably the health and education systems. That is where that money can be spent. Inefficient economies don't create that money to spend.

So vulnerable consumers, social justice considerations are fundamentally interested in economic efficiency. There I would simply say that I broadly hold the view that economic efficiency is of paramount importance but consumer policy and economic efficiency coalesce and I haven't put it in my tendered paper, but in his valedictory speech to the UK National Labor Party Tony Blair made the point, which I have cited in a range of my other articles, that economic efficiency and social justice are not necessarily opposites, but can be partners in progress. The truth of the

matter is we can see those two concepts as partners but we must be mindful of the potentially distortive aspects and where we want to spend our policy and our dollars as wisely as possible.

MR WEICKHARDT: Perhaps I will ask one more question. If you come from the school that says if you can't measure it, you can't manage it. What should policy-makers be looking at in terms of trying to measure whether or not consumer policy is working in the best interests of the community and whether or not it really is enhancing the overall welfare of Australians?

MR FIELD: Policy-making, and I'm still at an earlier point of my career, I might have different views in 20 years' time, but maybe I'll just have a view that it's even harder than what I currently think it is. It's a hard task policy-making and it's a hard task making it, it's a hard task enforcing it. So governments and regulators do have invidious roles to play. First and foremost having the right aspirations around policy is probably the right thing and that is making it in the long-term public interest. So we can usually distinguish what is producer group rent seeking for a long-term interest. We don't always get that right, of course, but we do have to look for those who are rent seekers and those policy choices which are actually in the public interest in the long term.

I'm a very strong believer in regulatory impact statements and the capacity to actually fully examine the costs of our choices. We know, of course, from the work that's been done in Australia, indeed from the red tape task force recently that one of the problems is not regulatory impact statements but the fact that they're so regularly not done. We must put rigours of approach on our policy-making and if we put rigours of approach on our policy-making around first principles, that is, is the regulation required, does it meet the need, what are the costs and benefits, if we have those principles in place, many of the sorts of anticompetitive regulations that are sought in this country wouldn't pass muster if we enforce those sorts of principles upon all of our policy-making decisions. Within those principles, of course, we do have to have ways of measure and testing. Saying costs and benefits is in and of itself almost trite. You need to have ways to measure and assess that and regulatory impact statements are a well-known way of doing that and probably more the problem with those is not the statements per se, but they're not done.

MR WEICKHARDT: Thank you very much indeed. That's been extremely useful and I very much appreciate you going to the trouble of appearing before the commission and preparing this submission. I wish you the very best for you and your family in your new role.

MR FIELD: Thank you so much, commissioner. It's been a pleasure to appear before you and I wish the commission luck with what's an incredibly important review task this year.

MR WEICKHARDT: Thank you. We'll adjourn very briefly now.

MR WEICHKHARDT: We will resume now and our next participant is Marianne Mayer from the Financial Counsellors Association. Marianne, if you could just give your name and your capacity in which you're appearing before the hearings for the record, please.

MS MAYER: Yes. My name is Marianne Mayer. I am a financial counsellor but I'm also president of the Financial Counsellor Association of WA.

MR WEICKHARDT: Thank you very much indeed for appearing at the hearings and perhaps you'd tell us a little bit about what the Financial Counsellors Association does and some of the issues that concern you and your clients.

MS MAYER: The Financial Council of WA is a state association in WA for financial counsellors. Financial Council services work with low income, disadvantaged and vulnerable people by providing services which are community based and not for profit, free to service users and act exclusively in the interests of service users free of conflict of interest. We have approximately 80 financial counsellors in Western Australia employed in a number of community organisations and local shire offices. We are funded generally by Department of Community Development and the local shire offices do have top-up funds provided by the shires.

Financial counsellors certainly support the Productivity Commission review of consumer protection and welcomes the opportunity to participate, although it was very, very short notice for me so for that I do apologise.

MR WEICKHARDT: That's fine.

MS MAYER: Do I just - - -

MR WEICKHARDT: Perhaps you'd tell us some of the sort of issues that most commonly affect the people that you end up counselling and the sort of concerns that you're wrestling with on a regular basis.

MS MAYER: Okay, I can do that. First of all I'd just like to say that while financial counsellors do not necessarily want more regulations, we know from our work that some regulation is essential to protect the rights of low income, disadvantaged and vulnerable consumers who may not be able to access markets at all or on safe and fair terms. These people do not experience all the benefits from competitions that most Australians enjoy. Competition does not deliver the positive outcomes for disadvantaged and vulnerable consumers that flow to those with more resources, more money, better education and the ability to be aware of and assert their rights.

For our service users, disadvantage can be exasperated by competition limiting their ability to access markets at all or on safe and fair terms. They may not be eligible for low cost in banking and telecommunication which flows on from bundling of services. They are less likely to be aware of and able to assert their rights in complaints processes as most of these require complaints to be submitted in writing and are increasingly legalistic in their processes. Industry relies heavily on disclosure as a consumer protection strategy, but his has limited effectiveness of ordinary Australians and even more so for disadvantaged and vulnerable consumers.

The costs involved are disproportionate to the incomers of the service users of financial counsellors et cetera. It is common to see people who pay more than 50 per cent of their income on accommodation, mainly private rent. There is high financial and emotional stress experienced by our service users. Where competition does not deliver advantages evenly or at all, includes the growing crisis in the home loan market, in particular in relation to unaffordable, low documentation home loans provided by non-mainstream lenders and sold through intermediaries, changes to superannuation which can deliver the financial benefits of turning to intermediaries such as financial planners.

There are emerging risks for low income consumers in the move to full retail contestability in the utility markets. Further, there is lack of investment in consumer capacity in Australia to assist disadvantaged and vulnerable consumers evidenced by inadequate funding or financial counselling service by federal and state governments. These services advocate for and with disadvantaged and vulnerable consumers, the funding of consumer peak bodies which can represent disadvantaged and vulnerable consumers in policy forums.

Some of the issues that we deal with on an almost daily basis as financial counsellors can be most explained in just bringing some small case studies or how we do deal with it. The voluntary industry codes of conduct and arrangements for providing information to consumers to assist their purchasing decision, this has in many cases failed the most vulnerable consumers. This especially evident in the area of telecommunications. Financial counsel clients often present with mobile phone contracts which are often over 20 pages long. Consumers in the market for a new mobile phone or an Internet service are finding it increasingly more difficult to compare one service to another. A large number of these contracts seem to be written to confuse.

This complexity makes it hard for the average consumer to compare one service with another. Financial counsellors believe that a voluntary code in this area is ineffective would recommend that the code needs to be enforceable. Financial counsellors would suggest that the Consumer Credit Code has made a positive impact on their ability to negotiate with creditors on behalf of their clients. However, it falls short in some areas. For instance, financial counsellors who use

section 163 of the code to obtain copies of original contracts from creditors. The code is quite specific and states creditors must provide these documents in the specific time frame. The creditors often ignore these request. The code states that if these documents are not provided in the stated period a fine can occur.

It seems impossible for the debtors and their advocates to enforce these regulations. This becomes even more difficult when the debt has been assigned, yet under the code the new assignees must comply with the regulation just as the original contract holder. So it becomes really a big problem even just to get your client's contracts, the original contracts that they have signed and that they are having difficulties in making payments. For them to make an offer, you need to have a look at that contract first and it is extremely difficult to get these contracts, although the code definitely says under 163 and 166 that they must be provided. The code is simply not strong enough to be able to enforce this.

MR WEICKHARDT: Are you saying in practice that the lenders just won't produce these contracts?

MS MAYER: The lenders couldn't care less, even if in your request letters you use the sections of the code to actually request the contracts. I even photocopy the sections and attach it to my letters, as do most financial counsellors, and they take absolutely no notice whatsoever. Sometimes three or four letters may be sent and we still don't get even a reply to our requests. The code is there to be used but yet the credit providers obviously thing it doesn't have any teeth and don't comply at all.

MR WEICKHARDT: Who in theory should be enforcing that particular part of the code?

MS MAYER: I think Consumer Protection does do some work in this area, but eventually if we don't get an answer from the credit provided, we do actually involve our Consumer Protection, but it's very, very unusual to get a good outcome for these clients in this area and we generally have to go without contracts which makes it really difficult for us to - - -

MR WEICKHARDT: Sorry, you have to go to?

MS MAYER: We have to go into bat for these clients without having that contract available for us to look at, because it all just takes far too long and by that time clients usually already have court summonses and all kinds of statement of claims against them. Another area is unsolicited credit limit increases by the banks and credit providers. This area is a major concern for low income and consumers. Financial counsellors are seeing a large increase in clients whose credit card debts push them into bankruptcy. Low income clients, many on Centrelink benefits, are offered credit increases for far beyond their means to pay. These clients find it

difficult to refuse these offers to increase their borrowing capacity as they often arrive when the consumer is in a very vulnerable state and consumers often think, "The bank would not offer me an increase if they thought I'm not able to afford it and my situation will improve. I will get a job next week. I will get better soon and be able to return to work." Unfortunately, for many consumers, although their intentions are good, reality does not always match.

Banks and other lending institutions need to behave in a more responsible manner and proper evaluation as to the capacity to pay needs to be built into the banking code of practice. I had a client just myself the other day who actually came into me to petition in bankruptcy. We had been discussing her situation for a number of sessions and that's the option that she decided to take up. Her debt was not particularly a very large one, but it was enough to completely stress her out. So she decided that she would petition. When she actually brought me the petition and the statement of affairs, she also came with a gold letter from the ANZ Bank and this letter was increasing her credit card to double. She had $3500 credit limit, they were offering to increase it to $7000.

This client was petitioning bankruptcy. She had never paid any more than minimal payments on a monthly basis to this credit card and indeed was about four payments behind at this stage. So this is quite irresponsible banking practice. That's just an illustration of what we see on a daily basis. I sit on a consumer liaison forum at DOCEP and the bankers there who are also on that liaison forum - and I bring this point up quite regularly - will tell you that 98 per cent of all Australians with credit cards pay the full balance due every month. It's not what we see as financial counsellors, but most probably see the other 2 per cent, I would say, and 2 per cent of 10 million people - if 10 million people have a credit card - 2 per cent of that is quite a large amount of money we're looking at here.

The Financial Counsellor Association would recommend strong investment in consumer capacity by the government. The lack of peak body funding has been a major challenge for the association in WA. Our state is a very large area and the lack of funding has been extremely detrimental, both for city, but in particular for our country financial counsellors who often work 2000 kilometres away. Without funding we're severely restricted in providing appropriate training and professional development to all financial counselling in this ever-changing environment of credit provision. That's really all that I have.

MR WEICKHARDT: That's very helpful. Thank you. Marianne, can you tell me a little bit about the training that financial counsellors typically would receive before they act in this sort of area.

MS MAYER: Up to now we haven't had any specific diploma or degree that you have to do to become a financial counsellor which we, as an association, are working

on now on an accreditation process. Most agencies would look for somebody that's got a diploma in the human service area of some sort. We do have a lot of lawyers and social workers work in our area, but it's not a requirement as such. Unfortunately, we have far too many agencies that - I think because of the low funding and the low wages which are offered to financial counsellors, we find it extremely difficult to keep and maintain financial counselling at the level that it is at the moment.

People are just not entering this industry because there is no growth, there's no going up, no promotion availability at all. We have established a diploma in financial counselling through the TAFE system in WA which is going right throughout Australia. We believe that this will certainly increase the knowledge base of financial counsellors but because there's such an ever increasing credit availability in our country, it just never stops, our training has to be kept up to date and relevant at all time. So even if you have a diploma and financial counselling, as I do, you still have to maintain your training at all times. This is extremely difficult when the funding for your agency only allows you to work on a part-time basis and then you have to take off time to be able to attend training sessions, to keep up with interstate conferences and so forth and most agencies are very reluctant to let their financial counsellors actually have the time off to do this. Yet without this training, we're just going to fall more and more behind.

MR WEICKHARDT: Do you have much interaction with, for example, the banking ombudsman in terms of trying to resolve some of the issues your clients get themselves into?

MS MAYER: Very much so.

MR WEICKHARDT: Can you describe that experience? Is it a satisfactory one?

MS MAYER: I find the banking ombudsman, Colin Neave, and his staff excellent. I often do deal with them, especially in the area which I've already discussed and that's the unsolicited credit. I find some of the work that's been done by the banking ombudsman has been extremely useful for our client level and I believe it's quite heavily used by the financial counsellors in Western Australia and we do have regular meetings with the banking ombudsman, he regularly comes to WA. But, unfortunately, once again it's the same agencies which are proactive and want their counsellors to improve which allow their financial counsellors to attend these sessions. But there is many agencies which simply will not release their counsellors to attend those sessions.

MR WEICKHARDT: Those agencies are typically funded by whom?

MS MAYER: DCD, Department of Community Development.

MR WEICKHARDT: Right. Is that a departmental policy or is it just the local administration?

MS MAYER: It's local administration. It's not departmental. Unfortunately, it's a flow-on from the department's funding to us that the funding is just so low that the agencies just don't believe that they can afford to let the counsellors go to training and to sessions such as the banking ombudsman sessions. If you're lucky enough to work in an agency which is proactive, they can see the benefits of this, but some of the smaller agencies and maybe the church aid agencies, like the Salvation Army, they have different approach to this. They'll look more at financial counselling as providing emergency relief. DCD do not fund us to provide emergency relief. It has to go beyond that. But we're finding it difficult to shift those agencies from that and it's simply they'll tell you that there's just no funding.

MR WEICKHARDT: Is there any other ombudsman who you have regular contact with?

MS MAYER: Yes, the telecommunications ombudsman is a much used service as well.

MR WEICKHARDT: Your experience there?

MS MAYER: Very positive but I think there is frustration. There appears to be frustration within the telecommunications ombudsman scheme as they're finding it very difficult to move forward as well. So although we present with cases, I think it's very difficult to find resolutions, even if you use the ombudsman scheme.

MR WEICKHARDT: Do you understand what the problem is there?

MS MAYER: From what I understand - and that's limited being in WA - but having met with one of the members quite regularly and we do have a speaker from the telecommunications ombudsman at our conference most years, it seems to be that - I think it's the ever-changing and fast-growing industry that this mobile and Internet providers are and I think that their particular scheme is just too small to cope. That's what I've been told, of course.

MR WEICKHARDT: So what, the coverage of their scheme doesn't extend into these new areas?

MS MAYER: Yes.

MR WEICKHARDT: All right. What about coverage of some form of dispute resolution into some of these other areas of fringe lenders? Are there any other

dispute mechanisms or dispute resolution mechanisms that exist there?

MS MAYER: With the fringe lenders, especially like Aussie Cash, Payday Lenders, we find it difficult. The only means that we have to do anything about this and we are working very closely with the Department of Consumer Employment and Protection, but it is very difficult, I believe, for DOCEP even to prosecute because a lot of these fringe lenders like Aussie Cash they work on promissory notes which don't fit under any codes. So we really need to have stronger regulation that enables departments such as the Department of Consumer Protection to be able to deal with this.

I know that they are working extremely hard and the Financial Counsellors Association has certainly been working with them to try to do something about these lenders which are charging up to 889 per cent interest on their loans. So for vulnerable consumers a $100 debt - I know I also do inquiries in the local courts - and I come up against this particular lender every month and I just not long ago had a hundred dollar loan turned into a $4500 loan in 18 months. We are certainly trying to work with Consumer Protection. But once again, our agencies find at the time, for instance, the time to release me to be on forums and sessions like this I really have to go with cap in hand and beg to be allowed to go to be proactive.

MR WEICKHARDT: I'm very conscious of your time and your time constraints from that point of view, Marianne, and I'm grateful for you appearing before the hearings today. Thank you very much indeed, it's important work you're doing. Thank you for your contribution.

MS MAYER: Thank you.

MR WEICKHARDT: We will adjourn just briefly.

MR WEICKHARDT: We'll resume the hearings. Our next participant is Simon Thackray from Synergy Energy. If you could just give your name and your capacity in which you're appearing before the commission.

MR THACKRAY: Thank you, Philip. Synergy welcomes the opportunity to participate in the Productivity Commission's review of consumer policy frameworks. My name is Simon Thackray, I'm the manager of regulatory within Synergy. I'm responsible for ensuring that Synergy complies with specific energy law for both gas and electricity, while also participating in regulatory processes affecting the business. What I'd like to do this morning is to give you a microperspective from Western Australia in terms of Synergy's experience as being an energy service provider. So what I'd like to do is just briefly outline the regulatory environment that we operate within, highlight some of the issues that are confronting us as a business, put forward our views as to the potential solutions that may wish to be considered by the commission and also highlight briefly some of what I consider to be WA's success stories in terms of regulatory and consumer policy issues.

MR WEICKHARDT: Yes, good.

MR THACKRAY: Synergy is a fairly new organisation. We were created on 1 April 2006 consistent with the Western Australia's government policy agenda to structure the state's electricity market. Synergy was previously the retail arm of Western Power Corporation which was the state government owned vertically integrated service provider. So that was a business which generated, transported and sold electricity. We are still a government owned corporation. We're a statutory corporation, so we operate under the auspices of the Electricity Corporations Act 2005. We have approximately 900,000 customers predominantly electricity and we have current revenues of about $1.5 billion per annum. We have a total permanent workforce of about 350 people, of which there's probably about 150 or 180 that work within our call centre. So we're the incumbent electricity retailer in Western Australia and we're also the second-largest gas retailer in Western Australia.

Just to highlight the regulatory environment that we operate within, again, as part of the government's electricity reform agenda the electricity market in Western Australia has undergone significant change since 2004. We went from a regime which was principally dominated by the incumbent government-owned corporation, Western Power. It was the major player and, to a certain extent, it was also the industry regulator. But since 2004 we've seen the establishment of the Economic Regulation Authority, we've seen the establishment of a Western Australian wholesale electricity market, we've seen the establishment of an independent adjudicated electricity access regime in terms of mandatory access to transmission and distribution capacity. We've seen the establishment of a electricity licensing regime. So, for example, if you wish to sell electricity to consumers of any size

you're required to obtain a retail licence from the Economic Regulation Authority.

I suppose more specifically we saw the establishment of a Western Australia customer protection framework for electricity supply. In terms of that electricity supply framework, we've seen the creation of the energy ombudsman which deals with small-use gas and electricity customer complaints. That threshold is set at 160 megawatt hours, so that's effectively someone who uses about $28,000 worth of electricity per year, so that includes small business and residential customers.

We've seen the establishment of a Western Australia customer service code which is a highly prescriptive instrument which deals with the marketing of electricity; the billing arrangements for electricity; information provision to customers; it specifies the arrangements for disconnection so the process and the time frame; it provides for assistance for consumers who are suffering payment difficulties and financial hardship. It establishes a service standard payment regime where a retailer or distributor fails to meet specific standards within the customer service code, then customers are eligible for a service standard payment. It also deals with things such as performance reporting. For example, the Economic Regulation Authority has the ability to request specific data and then publish that data and that's things such as complaints handling, performance, number of disconnections, number of customers requiring financial assistance and the like.

We also saw in 2005 the establishment of a prescribed contract regime applicable to small use customers. So in effect they are regulated, standard form contracts. We have a set of regulations which governs what goes within a standard form of contract, that contract is approved by the Economic Regulation Authority. Synergy as the incumbent supplier is subject to specific regulation in isolation to other market participants. For example, we operate under a capped tariff regime so our electricity prices are regulated through tariff by-laws akin to a regulation which are approved by government and tabled in parliament. Again, Synergy in isolation has an obligation to offer to supply so if a customer requests supply, Synergy is obliged by law to offer to supply small use customers. Again, that's set at the 160 megawatt hour level.

In addition Synergy is the supplier of last resort. That's to cover a situation where an existing marketing participant makes an unplanned exit from the market and which Synergy in obliged to in effect supply the customer base of the failed retailer. So that's a bit of a snapshot in terms of the Western Australian regulatory environment. I will just move to some of the issues that we're currently facing in terms of that environment. From my experience at the time that governments opened up, certainly markets to competition, there can be a tendency to overregulate at the onset of the opening of that market. Obviously there's a degree of uncertainty as to the impacts of competition.

Just to give you a tangible example, under the Western Australian Electricity Customer Service Code it's legislated that an electricity retailer's bill must contain 28 items. In terms of our licence obligations, we're obliged to monitor and report annually in regard to about 250 statutory obligations and they're obligations under our retail licence, under various industry codes. They're relating to standard form contracts and the underlying. So there's an extensive amount of regulation which has been imposed on the industry since 2004.

Other issues confronting the industry. In terms of regulatory outcomes, I think it's very important that regulation provides protection at the base level, so it provides for base level service standards. To give you a tangible example, payment options. There's current debate in Western Australia, for example, there's a review of our customer service code as to what additional payment options should possibly be mandated. But as an industry participant my view is that really the regulatory framework should provide the base level service standards ad then it should be up to the market to determine or exceed those base level service standards. That's a way of security market share.

I mean, electricity is a homogeneous product, it's very difficult to differentiate the supply of electricity, especially from a retailer's point of view because you're not generating electricity, you're not transporting electricity, so there must be flexibility in terms of the regulatory environment in which electricity service providers have the ability to complete and also differentiate their product and service offerings. Also I think in terms of energy - and this is something that's not restricted to just Western Australia - most of the states have very similar frameworks to Western Australia in terms of things such as retail codes, standard form contracts to a certain extent, price regulation.

But I think there can be a tendency in terms of when regulation is reviewed for what I call forum shopping. That is where one particular state legislates a particular service standard there can be a tendency for other states to say, "Okay, that standard is actually higher than Western Australia, therefore, we should consider adopting that standard in Western Australia." But really to my mind it should be a situation that there needs to be demonstrated market failure before you impose regulation and that's one thing I've been very encouraged in terms of reading the literature produced by the Productivity Commission is that they are looking at issues in terms of demonstrable or evidence market failure. To my mind that's quite critical, there can be a tendency for regulation to be imposed because of perceived problems or because certain regulation is deemed desirable but people and markets must be aware that regulation comes at a cost in terms of an implementation cost and a compliance cost and that cost is ultimately borne by consumers.

So I believe that regulation is necessary but it should be specific and it should be targeted at those consumers who area most at risk. In terms of what the

Productivity Commission is examining in terms of generic legislation relative to specific legislation. What I mean by that is, for example, regulation prescribed under the Trade Practices Act relative to industry-specific legislation. It's my view that we should tend to rely on the generic legislation. We should only enact specific legislation when again there's demonstrable need and when there's evidence that the generic legislation that there are gaps that do exist. So I think there is need for specific industry legislation but, as I say, it has to be on the basis that there is evidenced market failure for particular sectors.

MR WEICKHARDT: Do you want to continue?

MR THACKRAY: Yes, I'm happy to continue or, if you would like to ask questions.

MR WEICKHARDT: On that particular score, and it often appears to be the industry, that is, the party that introduces or suggests the introduction of the industry-specific regulation and it sometimes starts as a voluntary code and then becomes co-regulated in some sort of way and often this is justified by the industry as saying it provides certainty, it helps in specific areas so they may be complex or different where there are unique characteristics and energy is probably one of them and the industry often argues this provides certainty to both the consumer and also to the providers. You're disputing whether that is the case in your industry?

MR THACKRAY: There are different ways of going about regulation. It can be extremely prescriptive. One of the success stories in Western Australia is the arrangements relating to payment difficulties and financial hardship. The Western Australia regulatory framework on that matter isn't overly prescriptive. Basically the legislation specifies the outcome that there needs to be, the retailers need to establish a payment difficulty and financial hardship policies in collaboration with consumer groups. To my mind that's probably more ideal than a prescriptive arrangement because the objective is well known and it's transparent, industry is aware of the outcome that the regulator is seeking, but it still provides the industry with the flexibility to implement that policy.

I think it's one of the initiatives in Western Australia is the energy ombudsman which was introduced in October of last year and that's something that Synergy strongly supports. I think it's very important that we have an external dispute resolution mechanism which is easily accessible by customers. To my mind, given the existence of the energy ombudsman, he may not necessarily need an extensive amount of regulation as to what has occurred in the past prior to the establishment of the ombudsman.

So you provided you've got an effective dispute resolution mechanism that can deal with matters quickly, I would also suggest that in terms of the site based

regulator, they should have determination powers to develop codes, to develop licence conditions, again to act fairly quickly where there is demonstrable evidence in terms of market failure. I suppose the points I'm seeking to make is that there can be regulation made after the event when situations dictate that there does need to be prescribed regulation. From Synergy's point of view we do recognise that certainly electricity is an essential service and you do need to provide customer protection, so you do need to regulate.

But it's really that issue of getting a balance. Synergy is in a unique position in that we don't operate on a national basis but obviously we do take account of national developments. Each state tends to do things slightly differently, so I'd think you'd find that each of the states have their own retail code, their own standard form contract regimes. So certainly from an industry point of view it's certainly desirable to try and achieve national consistency because if those regulations vary widely between states, undoubtedly there will be barriers to entry, so we think there's real potential for standardisation or harmonisation across states.

Simply within Western Australia there's the ability for harmonisation between utilities. So, for example - and again, this is a very encouraging development by the state based regulator in that they've identified the various material differences between the regulatory framework between gas and electricity. They are now instigating a process to harmonise both sets of regulatory arrangements for consistency. That will benefit industry in terms of being able to provide dual fuel offers to customers.

MR WEICKHARDT: Won't that happen anyway under the national scheme that's being introduced?

MR THACKRAY: It will be eventually. That is a material exercise and it won't happen quickly. From Synergy's point of view that's something that we would strongly encourage, that once the developments on a national basis have been concluded that Western Australia looks seriously in terms of adopting those arrangements with respect to retail and customer service standards, standard form contracts and the like.

MR WEICKHARDT: Right. You mentioned as an electricity supplier it's difficult to differentiate electricity as a product and you need some flexibility therefore with your packages to try and differentiate your offering. I have to say this has given rise to what some people call "confusopoly" where you get offers from utility suppliers now that most mortals, certainly myself included, decided they don't have either the time or the energy to try and decipher all sorts of conditional things: if it's a Monday afternoon and the sky is blue and your telephone rings three times, your power bill go down a little bit, and if you use a bit more gas it will go up a bit more. At the end of the day is the industry satisfied that the track to go into these sorts of bundled

contracts is actually working for them and working for consumers, or are consumers simply avoiding switching because they just don't understand all these things?

MR THACKRAY: In Western Australia it's early days in terms of a competitive market. For example, in the case of electricity we don't have full retail contestability, so Synergy at this point in time is the franchise supplier for the vast majority of Western Australian consumers. The level of contestability in Western Australia is 50 megawatt hours, which is about $28,000, so Synergy still has a large franchise in terms of residential and small business customers. Similarly in terms of the gas market, because we have a franchise for electricity, Synergy is not permitted to supply small use gas customers. That moratorium which presently exists is being relaxed on 1 July, but we still don't have the ability to compete at the grass roots for residential customers in gas.

So in reply to your comment in terms of dual fuel offers, it's developing in Western Australia but I think it's fair to say that it's in its infancy, at the lower rungs of the chain. But I think that's really the challenge for the industry: that they have to make it as simple as possible for customers to see the benefit in their product offerings. One of the things I heard about this morning was the length of contracts. I've mentioned previously we operate within a regulated contract regime, so we're very, very tightly defined as to what we can place within our standard contract. The standard contract is in effect the contract that we offer alongside a regulated tariff.

In Western Australia, for example, if you have a look at all the retailers' regulated contracts, they're fairly similar because they have to be in terms of the legislative framework. In terms of your standard contract it's very difficult to differentiate, so we have to operate within the confines of that market.

MR WEICKHARDT: Do you believe that your standard contracts would be deemed to be unfair under the Victorian legislation, or would they be deemed to be acceptable?

MR THACKRAY: I think they'd be deemed to be acceptable because they have to comply with applicable law. In the case of Western Australia, they have to be submitted to the state based independent regulator, the Economic Regulation Authority. The ERA publishes the retailer's draft contracts for public comment, and it's obliged to take into account the outcomes of that public consultation process. The retailers themselves are obliged to consider the outworkings of their consultation process. So in terms of the standard contracts in Western Australia we have a very transparent set of arrangements.

MR WEICKHARDT: Is there a fairness test, though?

MR THACKRAY: A fairness test? I can't recall in terms of the regulations that

exist that deal with that contract, so possibly not in terms of the contractual provisions. But I'd say that, as the ERA is the decision-making body, and given that it must consider the public interest test when it's considering regulatory decisions, that's obviously something that the ERA will take into account as part of its decision-making process. For example, the ERA has determination powers. If it considers that a standard form contract isn't consistent with the regulatory framework, it has the ability to direct change to that. Similarly, as circumstances change over time, the ERA has the ability to direct change to the contract. To my mind that's probably a better regulatory outcome - to provide the regulator or the determining body with that determination power than prescribing very, very tightly as to the matters that go under a contract.

Certainly within reason, from industry's point of view, it's very, very useful to receive guidelines or policy guidance from the ERA as to various instruments, but I think the arrangements can be improved if we look towards potentially more outcome base regulation.

MR WEICKHARDT: You mention that there's a tendency initially when markets are deregulated for there to be an overhang of regulation, and you referred to 250 items you have to report in your annual report and things of that sort. Are there in your view review mechanisms and sunset clauses which will eventually cause this excessive regulation to be reviewed and tested?

MR THACKRAY: I think so. My experience in Western Australia is that the state based regulator has certainly taken that on board. There have been some very encouraging developments. The state regulator has reviewed its gas licence framework, its gas marketing code, and it has reduced some of the coverage of the regulation, again where it's been satisfied that there were demonstrable reasons for pulling back on some of the regulation. So I'm reasonably comfortable in Western Australia.

The state based regulator certainly factors into the need for periodic reviews. As a market participant it's contingent upon ourselves to make sure that we participate in regulatory processes. I don't think you necessarily have to rely on a statutory time period in which to undertake the review. Certainly from a market participant's point of view, we have the ability to approach the authority at any point in time seeking a review of a particular provision or, alternatively, requesting amendment of a particular statutory provision.

Some of the industry associations and the consumer groups have that ability, and that's a right which I strongly support, not just from an industry point of view but basically from all stakeholders' points of view. I think it's contingent on the marketplace itself that they can't be complacent. I think there should be a real responsibility within the markets they operate in to make sure that they periodically

review and identify potential market inefficiencies, and then put forward cases to the regulators, to policy-makers, for change. But, again, it has to be demonstrable; there has to be evidence.

In terms of regulatory design, I noted Chris Field's comments in terms of him support regulatory impact statements. I'm of the same view. At the time that regulation is drafted, or prior to its enactment, I'm a firm believer that regulatory impact statement should be undertaken, certainly to identify the costs of regulation in terms of both implementation and ongoing compliance, and also to ensure that the benefits of the regulation do exceed the costs.

MR WEICKHARDT: In terms of dispute resolution, is the system in WA working? Do you think consumers get access to timely and cost effective dispute resolution?

MR THACKRAY: Certainly in terms of the Energy Ombudsman scheme, and it's fairly early days for that, so that scheme operates at no cost to the customer. Certainly the government, the regulator, the ombudsman themselves, are promoting the scheme. We also promote details of the scheme, so every account that we produce, for example, includes the ombudsman's contact details. When we issue a disconnection warning to a customer, it includes the ombudsman's contact details on there. So I think it's in everyone's interest to make sure that schemes such as the Energy Ombudsman are transparent and certainly easily accessible to consumers.

Being a retailer, basically we live or die in terms of our customer relationship, and that's something that we focus on very strongly. One initiative that Synergy implemented recently was a customer advocate. Basically it's a nominated contact point within the organisation, a very senior person, and basically they're the customer's champion within Synergy. That's something that's not legislated, it's not regulated. It's something that we've implemented because it's good business, it's good customer relations and we can enhance the customer's experience by establishing that role.

MR WEICKHARDT: So that's your internal dispute resolution process?

MR THACKRAY: It's one of the internal dispute resolution processes. For example, consistent with the Australian standard on complaints handling, we provide for escalation of disputes at the call centre, managerial level, senior representation, but in addition to that we also have the customer advocate. One of the things that we try to do is to engage our stakeholders very effectively. To my mind communication can be very, very effective as a supplement to regulation. So we're very keen to ensure that we engage effectively consumer groups, policy makers and regulators and that we can deal with issues as they occur and we can try and deal with issues perhaps in the absence of regulation or legislation. So in terms of consumer policy I

think it's in everyone's interest to ensure that we have open communication and dialogue between all stakeholders.

MR WEICKHARDT: And what are the major generic classes of dispute that either go to the internal dispute resolution processes or to the ombudsman?

MR THACKRAY: They're principally billing-related issues and marketing issues. So when I say "billing" it's a perception that the meter is faulty, that is probably the key one; it's in terms of disconnection - - -

MR WEICKHARDT: Do you have multiple tariffs at different times of day that cause confusion or - - -

MR THACKRAY: We do have time-of-use tariffs. That's a product of choice, so the customer is under an obligation.

MR WEICKHARDT: How many different pricing points are there?

MR THACKRAY: In terms of residential customers we've probably got about three or four. So we have the standard tariff which in Western Australia is the A1 tariff. We have a smart power tariff which is a time-of-use tariff. We have a natural power product where people can pay a premium on their electricity account in exchange for receiving or contributing to the uptake of renewable energy. So we don't have a huge amount of product offerings at the residential level, there's probably, as I say, about four or five.

MR WEICKHARDT: At the time-of-use tariff how many different tranches of prices of times are there?

MR THACKRAY: In terms of tranches we probably have three during the week, so you have off-peak, peak and shoulder and I think there's two on the weekend. In terms of smart power - just to give you an indication of customer numbers - we probably have about 15,000 residential customers on time-of-use out of a customer base of about 850,000.

MR WEICKHARDT: So it's a fairly minor uptake at this stage?

MR THACKRAY: At this point in time, yes.

MR WEICKHARDT: Thank you very much indeed. Do you have any other comments you wanted to make?

MR THACKRAY: No, I've covered the important points.

MR WEICKHARDT: Thank you very much indeed for appearing before the hearings. That brings us to the end of today's proceedings. For the record, is there anyone else who wants to appear today before the commission? In that case I adjourn these proceedings and the commission will resume hearings next week. Thank you very much indeed.

AT 11.12 AM THE INQUIRY WAS ADJOURNED
UNTIL MONDAY, 26 MARCH 2007

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