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TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

REVIEW OF AUSTRALIA'S CONSUMER POLICY FRAMEWORKS

MR R. FITZGERALD
MR P. WEICKHARDT

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON MONDAY, 18 FEBRUARY 2008, AT 9.06 AM

Continued from 11/2/08 in Melbourne

MR FITZGERALD: Good morning, everybody. Welcome to the second round of public hearings in relation to the review of Australia's consumer policy framework. Just before we commence, I'll just say a couple of formal things. Whilst these hearings are informal in nature, participants are required to tell the truth in providing the evidence. The proceedings are recorded. If anybody wishes to make a statement in confidence they need to advise the commissioners in advance, so otherwise all of the submissions will be made publicly available. So if we can just start with the ACCC, if you give your full names and the organisation you represent.

MR SAMUEL (ACCC): Graeme Samuel, chairman of the Australian Competition and Consumer Commission.

MR CASSIDY (ACCC): Brian Cassidy, CEO of the Australian Competition and Consumer Commission.

MR FITZGERALD: Over to you.

MR SAMUEL (ACCC): All right, thank you, Chairman. We have provided a short supplementary submission. It's short in the sense that we are broadly supportive and in agreement with the majority if not the substantial majority of the recommendations made in the draft report, but we felt it appropriate to signify some issues with which we wanted to put some further views and invite the commission to give some further consideration. I guess the principal issue that we wanted to focus on was the issue that can best be summarised under the heading of Single Law Single Regulator. As we have made it clear for some time, both in our principal submission and indeed in earlier public comments that have been made by various representatives of the ACCC, we are strongly of the view that we should be developing uniform generic fair trading and consumer protection laws that are modelled on the current provisions of the Trade Practices Act. The inconsistency in laws and regulations that have applied throughout Australia under the federal system have created uncertainty for regulators and for business alike, and indeed for consumers. Consumers are left in a position where they have difficulty in understanding what law does apply to protect them, whether it's a state or a federal level, particularly where the laws do vary on a state by state basis. We would very much doubt that there is a single substantial argument against the need and the desire for a single regulatory legislation that would apply across the country.

Where we do differ from the Productivity Commission's draft report is in the context of the issue of a single regulator. The Productivity Commission has recommended that the fair trading and consumer protection laws, if they become a single law, should be regulated by one body which is the ACCC. While we think that's right in respect of product safety - and we'll explain the reason for that in just a few moments - we don't think that's necessarily the best model in the context of consumer protection and

fair trading laws generally. I think the distinction and perhaps the line we'd like to draw is that between those issues, those transactions, those matters which are of a national basis as distinct from those that tend to be much more of a local nature. While the laws can be the same, essentially those contained in sections 52 and 53 of the Trade Practices Act and then separately contained in the product safety regulations, the nature of the enforcement of those laws informing consumers about their rights in relation to those laws and dealing with complaints does vary depending on whether the issue is of a local nature or is of a national nature.

For example, the vast majority of goods supplied in the Australian economy are supplied nationally and the commission considers that the enforcement of product safety laws is a national issue and these laws should be enforced by a single regulator. On the other hand, there are a range of fair trading issues that while governed by a single law and essentially a law that in one form or another takes the form of section 52 of the Trade Practices Act dealing with misleading and deceptive conduct, the nature of the regulation we believe is better handled by the process that occurs at the present time where matters of national issues, national significance are handled by the ACCC, but matters of a more local nature are handled where appropriate by the local offices of fair trading.

Our submission has gone into some detail as to some of the concerns we have in moving to a single regulator model, not the least of which is the vast infrastructure that currently exists at the level of the offices of fair trading in the context of their offices and the infrastructure they have to deal with consumers and indeed to deal with businesses at the licensing end throughout the various states and territories. I could elaborate on that, but it's set out there in some detail in our submission and perhaps it might be appropriate to deal with that as part of a discussion and question and answer. But suffice to say that our view is that the regulation of a national single generic law is better handled by the process that exists at the present time which is a cooperative process between the state offices of fair trading and the national regulator which is the ACCC.

We have considered the issue of the process of cooperation between the ACCC and fair trading agencies and our view is that that is best dealt with under the approach that currently occurs where both at a state level through our regional office directors and the local directors of offices of fair trading or consumer affairs, establish an cooperative relationship whereby depending upon the resources particularly available at the local offices of fair trading the ACCC is sensitive to those matters that should be referred to the local office of fair trading and those matters on the other hand that the office of fair trading would more appropriately refer to the ACCC. For the most part that cooperative relationship works very well indeed. There will always be instances in a cooperative relationship where cooperation can break down, but providing that the parties to that relationship are sensitive to and are focused on ensuring that breakdown does not occur to the disadvantage of consumers, then we believe that that process can work. That

requires a high level spirit of cooperation between ministers, between governments, and between directors. I think our experience has shown that that has developed. Where there's a will there's a way and that has developed very successfully throughout Australia over a period of time.

That is not to say that the ACCC is not sensitive to and aware of the fact that in some jurisdictions there are perhaps less resources that are allocated to the offices of fair trading and to fair trading laws and consumer protection issues generally, and in those circumstances the ACCC steps into the breach and deals with the issue on the basis that the fundamental objective of both the ACCC and the office of fair trading is to ensure the consumers are protected, that the fair trading laws are properly enforced, and where there is perhaps less resources in some jurisdictions from others then the ACCC will step in and will undertake the responsibility. We don't believe that it's possible to legislate for or to codify cooperation. Cooperation exists at a personnel level and on a personal level and involves a will on the part of ministers and a will on the part of directors of offices of fair trading and we believe that that's the process that can best achieve the best result for consumers. Why don't I stop perhaps on that issue and then we can come back to some of the other issues that are in our submission as is appropriate, Chairman.

MR FITZGERALD: Just a couple of questions if I might, Graeme. In relation to supporting the generic law but not in supporting the single regulator, one of the tensions that arises in that is that if the states and territories are to continue to be involved in the enforcement of regulation, they would seek to have a role in relation to the development of the law that they're requested to enforce. Over time even if you were able to achieve uniform generic law at the beginning, would that not set up a tension that ultimately might lead to a fracturing or a less than harmonised system in relation to the law itself?

MR SAMUEL (ACCC): That's always a weakness of any form of cooperation under the federal system, but we've seen the process work in the past with some tension as perhaps you and I would be acutely aware in relation to national competition policy. It's worked in relation to Part IV of the Trade Practices Act which operates under a cooperative system - Part IV under the competition principles agreement that was set up in 1995. It can only be modified with the approval of the majority of the states and that has been done under that agreement and has worked very well and to the best of our knowledge has not caused any friction or tension over the 10 to 13 years since it's been in place. It also worked historically very well in relation to the cooperative scheme that was set up to deal with securities regulation which was initially of course handled on a separate state by state basis to the great concern, irritation, frustration of business with the consequent inefficiencies flowing from that. But the step-by-step process that led to the ultimate national corporate and securities regulation did involve the establishment of the National Companies and Securities Commission which was set up under a cooperative arrangement between state and federal attorneys-general and again that legislation worked very well as a single piece of legislation but with a national regulator

to deal with national issues and the state regulators, the state corporate affairs commissions, dealing with some of the licensing and state regulatory issues. So, yes, it can work, but it requires a will.

MR FITZGERALD: The second aspect, just on that, so far we've had difficulties in achieving a harmonised or yet alone a national generic law. Whilst we have achieved that in some of the other areas, it seems that in relation to consumer policy areas notwithstanding goodwill, we've been unsuccessful in obtaining that harmonisation. We're going one step further and that it is to move it into a generic law. A number of the jurisdictions have continued to maintain that whilst there is attractiveness in a generic law, the capacity for states to be able to introduce innovative arrangements and approaches has been a strength, not a weakness, of the current system and indeed many have indicated that it's been the Commonwealth that has been strong to adopt new approaches. So is there a risk that in a generic law you may potentially lose that? We've come to a particular view about that. But the second thing is, how do we move forward to a generic law where that's not been able to be achieved thus far?

MR WEICKHARDT: Indeed, can I just tag an appendix onto that. Some people have put it to us that we recommended that if there were a national generic law that it be based on the guts of the Trade Practices Act with maybe some modifications like unfair contracts. A number of people have put it to us that that's an old-fashioned law, that the states and territories have moved well beyond that with modifications, innovations, and that that's not the starting point if you were to move to a national generic law. The same theme but - - -

MR SAMUEL (ACCC): Let me give two responses or three perhaps, and I'll take the hardest one first because it's the easiest one to answer, and that is how do you achieve a nationally consistent - I call it a nationally consistent set of laws rather than a national generic law. Frankly, that's one which is very easy to answer, which is something that's ultimately is in the hands of the politicians that govern the nine governments around the country. We've seen it happen. I've mentioned before the process which was torturous but it ultimately got us there in respect of corporations. We've had the process that led the competition principles agreement and the national competition policy reforms and the adoption of a national generic law with respect to competition policy in respect of the adoption of Part IV of the Trade Practices Act at state level. That system although it was torturous and painful to get us to the point of adoption and agreement has since worked very well and there has been to the best of my knowledge very little break-out from that at all or any sense of desire to break out from it. Consumer protection may have to go through the same process but if there's a will and if a cooperative process can be established between state and territory and federal governments, then you would expect that you could get to the same result by the same process as occurred save, for example, with respect to Part IV of the Trade Practices Act.

As to the base point, the starting point of the Trade Practices Act, I doubt that any government would debate the merits of a foundation stone contained in section 52 of the act which is the most litigated section of the Trade Practices Act and the most far-reaching. What it says is, you shall not engage in conduct that is misleading or deceptive, and that's a pretty good start for protection of consumers from misleading and deceptive conduct, from dishonest conduct on the part of traders. From that there has been built the next level up, if you like, from the basement has been built, section 53 and then we've had Part VC with the criminal provisions. In those provisions we find in our own experience that there are very, very few, if any, cases of consumers being left unprotected by the non-applicability of the laws contained in Part V of the Trade Practices Act and the other provisions that have flowed on from there particularly in relation to product safety, and then we'll talk a bit later about the statutory warranties and conditions.

The states and territories have introduced what they've described as "innovative" specific provisions. Some have related, for example, to real estate and there have been other areas. Some states have adopted specific unfair contract terms provisions. But they're matters again that the commission has addressed in the context of its draft report and what we'd suggest is that for the certainty for consumers and the certainty for business - and certainty for business ultimately ought to lead to more protection for consumers - we need to achieve national consistency on issues that ultimately do travel across state borders. Therefore consumers in one state, Victoria, don't deserve more or less protection from the misconduct of those, for example, in real estate sales than those who happen to live in New South Wales, or in South Australia, or wherever it might be.

It seems - perhaps I'm not sure what the right expression is - but it seems inconceivable today that we would still be arguing that some consumers in some states or territories deserve better or less protection than others in other states from unfair trading, from misleading and deceptive conduct, from conduct that does consumers damage as a result of it deceiving consumers in the conduct of their transactions. Therefore I'd suggest to you that the collective view of the ministerial council for consumer affairs, the collective view of consumer affairs ministers, ought to be brought together to bring about consistent laws across the country. The best way of achieving that in the experience that we've certainly had to date in respect of competition laws and Part IV is by the adoption of a process that is very similar to that which has been adopted with respect to Part IV.

MR CASSIDY (ACCC): I think it's partly about mindset and obviously it's a matter for governments, but what needs to happen is a move away from, "Well, you have Commonwealth law on the one hand and you have state law on the other," to a thought that, "Here's an area where you should have national law and that both the Commonwealth and the states and territories each have an interest and a rightful input so far as that national law is concerned." You could think of a model where looking at the

competition law components of the Trade Practices Act, the way that works is the agreements underpinning that give certain rights and obligations to both the Commonwealth and the states and territories in terms of the law and the way in which it might be amended. If governments were willing, those arrangements and those underlying agreements I think could be easily modified so as to make them apply not only to competition law but also to the consumer law, Part V of the Trade Practices Act as well in terms of the rights and obligations that are imposed on each level of government in terms of maintaining national law as truly a national law.

MR SAMUEL (ACCC): It has been interesting, the experience we've had since 1995 or 96 in respect of Part IV of the Trade Practices Act. It has been through a number of very significant changes in relation to the penalties that might be imposed upon those who engage in misconduct in relation to competition laws; in relation to what might be anti-competitive conduct issues relating to predatory pricing; section 46 of the Trade Practices Act, misuse of market power. There's a whole range of very significant amendments that have occurred since 1996, but they have occurred within the context of the competition principles agreement which requires any amendments to be submitted to the states and for a requisite majority of approval to be given by the states to the amendments before they can be legislated. Keeping in mind that that has also occurred in a political environment where the federal government has through that period of time been a coalition government and the state governments have I think with very few if any exceptions been Labor governments, and yet there has been achieved a consistency of approach through that period of time.

MR WEICKHARDT: Can I raise one issue that lies at the heart of some of that. You made the point that citizens in one state can or should expect to have a similar sort of level of protection as those in another state. Given the fact that there are choices to be made about the degree to which consumers are prepared to accept risk in return for perhaps a lower cost regime of less regulation, and on the other side more regulation but perhaps more cost, do you see it as a possibility that citizens in one state might elect politicians with a mandate to change that balance so that one state might consciously choose to have a different risk-cost balance in that sort of setting?

MR SAMUEL (ACCC): That's the nature of our federal system, isn't it, that there are certain areas where the state governments have an assumed responsibility, primary responsibility, and there are certain areas where federal government assumes primary responsibility, and then there are those that are in between where there requires a degree of cooperation. In the event in the area of consumer protection I think what consumers want is to be protected against traders who engage in misleading and deceptive conduct, who engage in conduct that's oppressive, that's harsh, that takes advantage of consumers, and draws consumers into a potential net of unfair trading practices and deceptive practices that lead to consumers losing out. That's a very, very broad statement and it's not said on the basis that it should be interpreted as a High Court judgment at all. It's a

very broad statement, but I would have thought that across the country that's what consumers want. They want to believe that they're being protected by laws and by regulators that have got those fundamental objectives.

The differences that we tend to have at state level will very much reflect not the change in the objective, but perhaps a perception as to how the objective is achieved, what the process is. But those process issues can often be modified to the benefit of consumers by having a collective view, a collective analysis of what might be best so that there's not a single reaction from a single state or territory to a set of circumstances that might be an issue that's very close to that government or to the consumer affairs minister in that state, but perhaps on a national basis and with a collective view coming from state ministers and state officials around the country and federal officials can lead to an ultimately better overall result.

The best example I can give just of recent memory is what has occurred perhaps in areas of real estate. There was a flurry of issues concerning real estate transactions some time ago which focused on two areas. The first was the issue of the real estate promoters with their promotion schemes and we'll make you a millionaire in a day and that was probably too long so we'll do it in an hour, and those sort of issues. That was one area and then the other area was that of the behaviour of sellers, estate agents, auctioneers and the like. The ACCC's view was that most if not all of these issues could be covered by the provisions of sections 52 and 53 of the Trade Practices Act with the only query being the role of the Australian Securities Commission in relation to some of the selling techniques being used by the promoters, and there were some jurisdictional issues there. But in terms of the real estate agents, the matters could be dealt with by a single law. What was required though was the resources to actually go out and apply and enforce that law, to attend auctions, to be watching web sites as to the selling techniques adopted.

What some governments did was introduce their own separate laws, but that means that buyers of real estate in one state have a particular set of regulatory obligations that they must perform if they wish to attend an auction. Buyers in other states don't have to perform those same regulatory obligations, they have a different means of attending and bidding at auctions. Sellers of real estate have different obligations as to what they must do and what they can and what they can't do, and you can only just assume that if people are travelling across borders that they're left in a state of some confusion, businesses are left in a state of some confusion, sellers are left in a state of some confusion as to what they can do, and it raises a question whether it mightn't have been more appropriate for government ministers to sit down around the table and say, "We have a common problem here and that is that consumers are being misled and deceived in relation to both the sale and the purchase of real estate. Surely we can apply our collective minds to determine what's the best way of dealing with this and then apply a national process for dealing with what is fundamentally covered by sections 52 and 53 of the Trade Practices Act, in particular section 52, misleading and deceptive conduct."

MR FITZGERALD: Before we move on to the more specific issues, in the report we have a recommendation that allows or suggests that states may refer their powers to the Commonwealth and the enforcement of consumer regulation to the ACCC subject to a full transfer or one law one regulator model. Just assume for a moment that a one regulator model isn't adopted, but one or other of the states decides that it would like to refer its powers. Is it a practical option for the ACCC to be the sole regulator in relation to one or two probably of the smaller jurisdictions, or is that an impractical suggestion?

MR SAMUEL (ACCC): No, it can be done and in fact in practice it does occur in one or two of the smaller jurisdictions where - I think I mentioned before, the cooperative process that we adopt at the moment is one with a great deal of sensitivity as to the resources that are able or are willing to be allocated by state and territory governments to their offices of fair trading and to the enforcement of consumer protection laws. So where we sent that there is - and where indeed - it's not a question of just sensing, it's a question of open cooperation with the state office of fair trading. Where there is a circumstance where the local office of fair trading has perhaps less resources to deal with issues of a local nature that might apply in some of the other states, particularly some of the larger states, then the ACCC steps into the breach and resources accordingly. That's the nature of the cooperative relations that exist. So to the extent that it happens in practice, if it were to happen de jure, that is by a reference of laws or of responsibilities, I don't think the circumstances would change significantly from that that exist in practice at the present time.

MR CASSIDY (ACCC): I suppose I'd put the view in terms of thinking about models, that's probably what economists would describe as heading towards a bit of a second-best sort of outcome in that you might argue that within the sort of model we're talking about, the ideal would be for each of the state and territory governments to ensure that their offices of fair trade were adequately resourced to be able to enforce the law particularly in relation to more localised matters. But that said, as I say, Graeme has indicated particularly for some of the smaller jurisdictions, if for one reason or another they decided this wasn't feasible for them to do that then it's certainly the case that we could step in - and in fact do now. I suppose the only issue is that if you draw a line and sort of say, well, really the preferred model is one of a single national law but with that law being enforced at different levels, where do you draw the line in terms of what's still a reasonably efficient outcome in terms of jurisdictions, if you like, handing over the enforcement powers to the commission, and what point you start to get into, perhaps, some inefficiencies in terms of the commission being handed, if you like, too many jurisdictions, powers and enforcement.

MR FITZGERALD: Just a last comment in this general area. It's been raised again with us in informal consultation since the draft has been released that there does seem to be some movement in relation to the issue of consumer product safety. Notwithstanding

previous COAG decisions, it appears that perhaps there is a willingness to consider a transference of some or if not all responsibility in relation to consumer product safety by some but not all jurisdictions. One issue that continues to emerge is the issue of a concern that the states, if they were to do this, would have little or no influence in relation to the way in which that function would be exercised by the ACCC. It goes back to, I suppose, the fundamental difference in the nature of governance of the ACCC from other bodies such as FSANZ, the national food regulator. You may not have any comments about that, but it still seems to be a concern by those jurisdictions that are willing to look at this that they would want some undertakings in relation to the way in which that particular function would be conducted by the ACCC, in a similar way that they say were given when there was a transference of competition powers and corporations powers previously. Again, you may well say that's policy and out of your area, but I was wondering whether you have any comments, because it continues to be raised in these considerations.

MR CASSIDY (ACCC): Again, I think we make the same sorts of comments, that looking at the law if basically you're dealing with national law, then all jurisdictions, both Commonwealth, state and territory, I think have an interest in that national law and what it says. But also, how it's administered, I think certainly from the commission's point of view, if we were to move to the sort of model that the Productivity Commission has advocated we, for our part, would certainly envisage some sort of consultative arrangement between the commission on the one hand and our - virtually say state and territory counterparts on the other in terms of the way in which we were administering and enforcing the product safety law issues that were arising and how we were dealing with those and how we should be dealing with those. So again I think if people are willing, there are ways of addressing these things on a national basis and as I say, from I think the commission's point of view we'd certainly be interested in playing our part in doing that.

MR SAMUEL (ACCC): We need to note perhaps for the record that there is a multifaceted process of involvement, oversight and consultation that occurs with the states and territories in relation to the work that we do both in the area of competition and consumer protection. The first of course is important to note that all appointments to the ACCC whether they be of a commissioner or of an associate commissioner require a two-stage process, the first of which is the federal government seeking nominations from the states or territories for positions on the commission, and then the second is once a nomination is made by the federal treasurer, or assistant treasurer as the case may be, then for that to be approved by a majority of states or territories, which is five states or territories out of the eight. That's the first area of involvement of states and territories, if you like, in having a say over how the process is ultimately regulated. The flows out of the competition principles agreement as it applies to of course Part IV of the Trade Practices Act, but also has its flow-on consequence in terms of the other areas of the Trade Practices Act right through Part V and Part IIIA and elsewhere.

The second area of consultation of course is at ministerial level through the ministerial councils, both at treasury level and the ministerial council for consumer protection. Then there's the SCOCA or the state consumers affairs officials meetings where there's a high-level consultation as well. But on top of all that and perhaps less known is the fact that Mr Cassidy and myself take it upon ourselves to tour the country and deal directly with ministers, be they consumer affairs ministers, premiers and treasurers in all the states and territories, with a view to both advising them face to face what is that we're doing, but more importantly to hear of any concerns they may have as to their perception about what the ACCC is doing and where there is a misperception then to deal with that, where there are concerns that need to be followed up then they're dealt with. That face-to-face meeting I have to say on a one-by-one basis tends to be as effective if not more effective than many of the institutional meetings because it does give us an opportunity to have a very frank sort of dialogue on the issues that may be of concern.

MR WEICKHARDT: I've got a couple of questions about enforcement issues. In our draft report we made a recommendation, responded to some input that we'd received from you and from others about this issue of giving regulators power to gather evidence after the initial application for injunctive relief had been granted, but prior to substantive proceedings commencing. Telstra and Optus have both made submissions that have recently arrived to this inquiry where they've challenged probably the whole suite of our enforcement recommendations, but in particular they've said that they feel that the regulator has more than adequate powers to continue to gather relevant evidence in this area where injunctive relief had been sought. I just wonder whether you have any comments to make about that. It may be unfair in that you haven't seen their submissions, but certainly we'd be appreciative of any input you've got in that area.

MR SAMUEL (ACCC): Certainly haven't seen them, but probably not surprised that the submission or the nature of the submissions that are made and we understand that.

MR CASSIDY (ACCC): It is the case now that if we approach the court seeking an injunction to try and stop conduct or behaviour fairly quickly. Regardless of whether we're successful or unsuccessful in obtaining that injunction, once we approach the court to seek that injunction we are precluded from using our statutory powers to gather information.

MR WEICKHARDT: Is that a blanket ban in all areas, or has it got some sort of relevance test?

MR CASSIDY (ACCC): Anything relating to the matter which is regarded as then being before the court we are precluded from using our statutory information gathering powers. The court does have the option of starting the so-called discovery

process prior to when we file our substantive proceedings. However, it's very rare for the court to use that other than to assist in filing our substantive proceedings by obtaining basic details about, say, the respondents in terms of their address, their actual location of office, their corporate structure, those sort of name, rank, serial number type details. The full-blown process does not start until after we've, if you like, made our substantive submissions to the court including our allegations regarding the conduct - which you can quite understand because until we do that there is no real area of focus as to what the proceedings are about as to what our allegations are.

So we have this period - and we've experienced this on several occasions - you have this period between when we seek an injunction - as I say, successful or not - and when we file our substantive proceedings, we are precluded from being able to use our statutory information gathering powers and where the courts are very reluctant to assist us other than, as I say, with some very basic details. That's the dilemma we face because it means we then have to choose between seeking an injunction to stop the conduct - and this is both in the competition side of things and the consumer protection side of things - which we think might be particularly injurious to consumers. But then on the one hand, once we do that, then losing a significant part of our investigative tools, and then there's a trade-off for us as between when we seek an injunction and how long we investigate and be able to use our full range of investigative tools.

MR SAMUEL (ACCC): Let's summarise the trade-off in the following principles. The commission with the use of investigation powers forms a reasonably strong view that there's a problem, that there's misconduct, and it might be very early in the piece. One of the suggestions that's been made is the commission ought to have the power to issue cease and desist orders or stop orders. We have consistently been opposed to that process because we believe the process of restraining parties from engaging in conduct is one that should be exercised by the judicial body, the court, not by an administrative body, the ACCC. But that is the balance in summary from of the arguments in relation to cease and desist orders.

MR CASSIDY (ACCC): I was going to say and indeed there's a real constitutional law issue as to whether at Commonwealth level the commission could issue cease and desist orders, which is something we've looked at in the past and we've had advice from the attorney-general's department on and there was a real question therefore.

MR SAMUEL (ACCC): Then let's take it to the next stage, which is that we take the view that the court is the institution, is the body that ought to issue cease and desist orders, if you like, which is the form of injunction. That requires at least prima facie evidence to be adduced by the commission that there is misconduct that is

appropriate to be restrained and that on the balance of convenience it's appropriate for the court to restrain that, the balance of convenience being assessing the potential damage that can be done to the business, how that might be rectified by the issuing of the injunction versus the continuing damage that might occur if the alleged misconduct can occur.

The problem the commission has is that as the law presently stands, the moment it takes specific action to institute proceedings it no longer can use its investigative powers. It can go to the court because it believes that there is misconduct that ought to be stopped quickly, but it does so with the knowledge that having done that its hands are then tied as to the use of its investigative powers. So what the commission has put to the Productivity Commission and indeed to government generally is that we ought not to have cease and desist powers for the reasons we've described, but that they ought to be vested as they are in the court, but that the commission needs to have that degree of flexibility that where it has a serious reason to believe that there is misconduct that ought to be stopped, that it can adduce sufficient evidence to the court for the court to make the judgment on the balance of convenience whether the conduct should be stopped. That's a matter for the court, so it will assess the damage that might be done to consumers, to the public, to businesses at large by the conduct continuing, as against the damage that can be done to the corporation or the business from preventing the conduct continuing. But then the commission ought to be able to continue its process of investigation of the matters that would be necessary to take the matter to a full substantive hearing, and that's why we've argued that we need to be able to carry those section 155 powers through.

MR WEICKHARDT: Just a second if we can on enforcement issues. Another submission we received from ASIC did say that they felt that our recommendation on civil pecuniary penalties would have limited value in their case because there were legal complications around taking that action. Do you have any comment on that?

MR SAMUEL (ACCC): Our view has been strong and forthright for some years now, that we ought to have the ability to extract civil penalties for civil actions in respect of breaches of Part V. I can say as the primary spokesperson of the commission in relation to enforcement matters that there is nothing more frustrating than to achieve a successful outcome with a court hearing and a court order in respect of a Part V matter and then to have consumers and to have members of the media say, "But you have been toothless in this matter. You've slapped the offender over the wrist with a light feather, because all you've got is an injunction to stop conduct that perhaps stopped some time ago. You might if you've been lucky have been able to get an order for correct advertisements, which is in many respects a sort of ex post apology to the consumer for having misled and deceived them. You haven't been able to recover any loss or damage sustained by consumers" - because of the constraints on our ability to seek restitution for consumers which after all is what consumers in many respects need to restore them to the position

that they were in prior to the damage being done and - "Why didn't you seek any penalties?" and then we point out that the law doesn't permit us to seek penalties and then the response is, "Well, that's a real failing."

It just doesn't seem consistent that those that breach competition laws, which are after all directed towards protecting consumer welfare, can suffer penalties of $10 million or three times their gain from breaching the competition laws, or indeed 10 per cent of the annual turnover of the whole corporate group engaged and hopefully within the next few months potentially people can go to gaol - and I'm not advocating that for consumer protection at the moment - but that can occur in respect of serious hardcore cartel activity, bit if you mislead and deceive consumers under a different section of the act, as distinct from the competition provisions, there are no financial penalties that apply. We should point out for the sake of completeness that of course we can get financial penalties if we commence a criminal prosecution. But criminal prosecutions have to be handled in a much more complex manner through the offices of the Director of Public Prosecutions and we have a high level of cooperation with the DPP in this area. But you can well understand that the commission and the DPP are concerned to reserve those criminal prosecutions for serious cases of fraud as distinct from matters that I'll call more general misleading and deceptive conduct.

MR CASSIDY (ACCC): We're looking at the ASIC submission, but we have experience of both civil and criminal law and I'd have to say I think the complications arise not with having civil penalties, but in a sense not having criminal penalties both in terms of the burden of proof involved having to - as Graeme has mentioned - as the DPP takes prosecutions rather than ourselves and it's in relation to criminal that you have a privilege against self-incrimination. So in a sense if we're starting from having civil and then talking about adding criminal then you might say, "Hang on a minute, there are some complications that this adds," and that sort of comment has been made in the competition area in relation to cartels where that's a proposition. But if you're, as you are with the consumer protection law, if you're starting at a position of having a possibility of criminal sanctions and you're talking about adding civil pecuniary penalties, then I don't think the complications are anywhere as great as they are in the reverse situation.

MR FITZGERALD: Just moving to a couple of areas before we conclude in relation to your specific comments, unfair practices and conduct we note your comment in relation to that. I was just wondering, we made a recommendation, or it was part of a recommendation that there could be the capacity for safe harbour contract terms. You've indicated that you don't support that because that would involve authorisation the ACCC. I was wondering if you could just elaborate a little bit on that. The second thing is, you've then said a preferred method may be - as we've foreshadowed - that the regulators provide guidance to business about indicative lists of terms that could be used. In an environment where there are nine regulators - given that we have one law but nine regulators - how would one be sure that we didn't have inconsistent lists appearing? Can

that be managed in a way, because in the one law one regulator that's not a problem, in the one law many regulators then these do become problematic issues.

MR SAMUEL (ACCC): Let's go to the issue first of safe harbours or authorisations. If I might say so, for those few of us in this room that are able to remember back to 1974 when the Trade Practices Act was first introduced, that's a bit of a reversion to the processes that applied then and I do remember, unfortunately, what happened then which was that in dealing with issues of competition and lessening of competition in markets, most lawyers in the practice of this area were very unfamiliar with what was a market and what was competition and what was a lessening of competition and therefore said, "Look, rather than them exercising any judgment on this matter or trying to establish what was a lessening of competition in a market, the easiest thing was just to seek a clearance from the Trade Practices Commission, and while I wasn't around in the commission at that time, my understanding is that there were tens of thousand of clearance notices filed with the commission, which has deluged the commission and they weren't able to deal with it. Then ultimately that process was removed from the Trade Practices Act on the basis that the legislators took the view that ultimately business and its advisers needed to make its own determination as to what was a lessening of competition in a market.

Now, the same thing we think in principle would apply here. That is, that businesses would at the institution of these sorts of proceedings - or, these sorts of regulations - flood the commission with countless terms and conditions and contracts, including many, many, many that would have no - wouldn't even be at the margin of being unfair, but they'd be flooded on the basis that, "Well, you, the commission, have got the resources, you read all these contracts, you make a determination as to which lines and which words are unfair and which are not and take the responsibility off us."

Now, I have to say I doubt that any reasonable resources available to the ACCC would allow us to be able to deal with that. Again what it does is throw the burden back on the regulator; it leaves the regulator starting to in a sense regulate in a very heavy-handed way the content of contracts and terms and conditions in a way that is best dealt with by business, provided that - and this the important proviso - provided that there are guidelines that are issued by the commission that indicates how it views these provisions applying and gives a sense as to how it operates.

We had this operate in a whole range of areas at the current time. The commission puts out many guidelines in a range of areas. Only most recently, in the past couple of weeks, we have put out two sets of guidelines, one of which relates to the way in which we determine merger clearances. They are not binding, each matter is dealt with, you know, in its own way, but these are draft guidelines that give a fairly good, and some would say an extremely good, guide to business and to

its advisers as to how the commission exercises its powers and its determinations, its consideration of merger matters in the context of section 50 of the Trade Practices Act.

Here at Consumer Protection just last week we issued some guidelines as to what I call green washing and the use of advertising practices, market selling practices in relation to environmental claims. Again, as I said to one journalist last week, a very simple way of describing that would be to simply say, "Be honest. Don't oversell and underdeliver." But on the other hand, what this does do in 28 pages is provide some significant guidance to business as to what is appropriate and what is not appropriate.

Now, business knows that if it oversteps the mark it will get prosecuted by the ACCC. In fact the likelihood of prosecution is indeed raised by the fact now that they have guidelines as to what is appropriate, what is misleading and deceptive and what is not. But the very guidelines are there to give some clear guidance to business so the business can't claim afterwards it didn't know. We think that we can establish clear guidelines that will give business some guidance as to what might be regarded as unfair and what might not. As to the issue of difference of attitude, again that comes down to cooperation.

MR CASSIDY (ACCC): I think it's partly certainly that. I think it's also partly about having a single agreed national law on unfair contracts. We do at the moment put our guidelines' incorporation with the states and territories, particularly in the area of scams, so, as I said, you know, it's not, certainly not beyond the realms of possibility of practice to do that. But I think the real touchstone is to have a single law that we're all talking about clearly. To be putting out some sort of guidelines where you have different laws would be a fairly difficult task.

MR FITZGERALD: Can I ask a question. Given that the guidelines, you've indicated, are voluntary, to what extent do the courts use them in guiding their determinations? Have we had much experience of the actual guidelines being brought in to court processes? I would imagine they're available for the parties to argue that this is industry practice or something, but to what extent have they in fact become more than simply voluntary, what you take indicates either private actions or actions by the ACCC?

MR CASSIDY (ACCC): Can I leave the word "voluntary". I don't think - that leads to some perhaps misconnotation - - -

MR FITZGERALD: Mm'hm.

MR SAMUEL (ACCC): - - - and misperception as to what they are. Rather than

being voluntary, they are guidelines that are not entirely prescriptive, they don't attempt to supplant the law. Now, in the few experiences that we've had going to court in respect of merger matters, I'm not aware of any where our 1998 guidelines have ever been referred to as anything - I mean, and indeed the current guidelines that we've just put out in draft form on mergers says as part of its introduction that these are not intended to be prescriptive, they're not intended to change the law or to change the way in which the commission deals with these matters.

They are intended to give guidance, which is the context of guidelines as to how the commission will administer the law, which remains the same as enunciated in section 50 of the Trade Practices Act. I'd envisage that the same prefatory paragraph would go into these guidelines that says, "Look, the law is set out there." In order to provide some clarification and some certainty to business, these guidelines are an indication of the way that the regulator intends to administer the law, and I'd also anticipate, frankly, they'd be in electronic or looseleaf form, because they will be updated as experience develops our thinking in this area.

MR CASSIDY (ACCC): We've had the courts refer to our guidelines in the consumer protection area, and typically the sort of guideline you'd have here would be saying that, "Look, as far as we're concerned, certain types of contract clauses are probably unfair," and, you know, we'd make that sort of fairly clear; others are more in a grey sort of area. The way the courts tend to, if you like, refer to our guidelines is not in deciding whether a particular course of conduct is a breach of the law or not, because that's a matter for the courts to decide.

But, having decided, say, it is, and then deciding what appropriate penalties, the courts do tend to have regard to, "Well, should the people involved have realised that what they were doing was contrary to the law?" and if we have guidelines which have been widely promulgated which make it fairly clear that this particular type of conduct is most likely a breach of the law, then that's something the court do have reference to in deciding on what the appropriate level of penalty ought be.

MR WEICKHARDT: Can I ask what I hope is a quick one, given the time? You take an issue with our suggestion that there be a public benefit test in regard to striking out an unfair contract. Given that our recommendation was that a form of unfair contracts clause was put into the national generic law, how do you guard against an overzealous regulator - in a state, for example, or a territory - striking out contracts that are perceived by them to be unfair but which perhaps are in the public interest. You can imagine that striking out certain contract terms, cancellation terms, might actually end up adding costs to all consumers. If you don't have a public benefits test there, how do you guard against that sort of action?

MR CASSIDY (ACCC): Well, I think we would look at the other criteria which

you have listed in relation to unfair contract terms that should be met before an alleged unfair contract term is struck down by the court. One of those was clear detriment to the consumers involved. Our view would be that if you have an unfair contract term that is causing clear detriment to the consumers involved, then, even if you were to have a public benefit test of sorts, the probability of the public benefit test being such that you could say "Well, here we are, there are public benefits which offset the fact that you've got an unfair contract term which is causing clear detriment to the consumers involved" would be fairly remote. So not only do we think it's a concept which courts operating as courts don't normally have to come to grips with; but also, given the other criteria that you've outlined for when a contract term would be found by a court to be unfair, we doubt that it really adds anything.

MR WEICKHARDT: Thank you.

MR FITZGERALD: Are there any other final comments you'd like to make on any of the specific areas?

MR CASSIDY (ACCC): No, I think it's all set out in our written submission.

MR FITZGERALD: Good. All right.

MR CASSIDY (ACCC): Thank you.

MR FITZGERALD: Good. Thanks very much, Graeme and Brian.

MR SAMUEL (ACCC): Thank you very much.

MR CASSIDY (ACCC): Thanks for the opportunity.

MR FITZGERALD: I should have right at the beginning just expressed an apology on behalf of third commissioner, Gary Potts, who is unable to be with us today and I should have introduced myself and Philip. I'm Robert Fitzgerald, the presiding commissioner, and Philip Weickhardt is one of the other commissioners on this inquiry. You know the drill. If you could give your full names and the association that you represent, that would be terrific, and then if you make some opening comments, that would be terrific. Mr Clare (ASFA)

MR CLARE (ASFA): My name is Ross Clare. I'm director, research and resource centre at the Association of Superannuation Funds of Australia Ltd.

MR HODGE (ASFA): My name is Robert Hodge. I am principal policy adviser at the Association of Superannuation Funds of Australia.

MR FITZGERALD: We've received a written submission from you, but Philip and I only received it on the weekend or this morning. So if we're not completely au fait with your submission, it's just that it's just arrived.

MR HODGE (ASFA): That's okay, we apologise for the lateness of getting it in. I'll make an opening statement and our opening statement actually touches on each of the points in our submission, so it may provide some assistance to you.

MR FITZGERALD: Good, thank you.

MR HODGE (ASFA): ASFA would like to thank the commissioners for the opportunity to appear before the commission. Let me open by saying that ASFA supports the efforts to improve Australia's consumer policy framework. ASFA agrees that although the current consumer policy framework is sound in many respects, some systemic impediments detract from its capacity to protect and empower consumers. ASFA has expressed concern in the past about some shortcomings in the current arrangements, particularly in the area of regulatory complexity. We welcome the opportunity to comment on those of the commission's draft recommendations that are directly relevant to Australia's superannuation funds and their members.

While a new national generic consumer law has a potential to create greater certainty and to reduce regulatory overlap, ASFA considers that this proposal should proceed only after a thorough investigation into any constitutional impediments and the potential advantages and disadvantages of such a measure. ASFA supports retaining the Australian Securities and Investments Commission as the primary consumer protection regulator for financial services. Financial services require a regulator that has the depth of specialist knowledge necessary to understand complex

and highly technical issues. Importantly, the impact on consumers can be significant when things go wrong. ASFA agrees that ASIC may need to work more closely with the Australian Competition and Consumer Commission to minimise the risks of both duplicated and effort and inadvertent failure to fully regulate some financial activities.

ASFA considers that the proposal to extend a generic consumer law to financial services would require some modifications. For example, the extension of strict liability to misleading and deceptive conduct has a potential to lead to risk adverse behaviour including longer and more complicated disclosure documents. This likely to decrease rather than increase the ability of consumers to understand disclosure documents. Such an outcome would be counter to the government policy of making consumer disclosure particularly in the superannuation area simpler and more accessible to consumers. ASFA supports any cost-effective initiative that would assist consumers to direct complaints to the appropriate alternative dispute resolution body. The large number of ADRs can make it difficult for some consumers to identify the appropriate body, interfering with consumer access. However, in the case of superannuation, superannuation funds already provide significant information through their disclosure material on the role of the superannuation complaints tribunal, including how fund members can access the tribunal. In particular, any member who makes a complaint to a fund is specifically informed of their right to object to a decision of the trustee, the process for seeking a review of the decision by the SCT, and the contact details of the tribunal.

ASFA supports a closer coordination of existing contact points and supports a proposal for the ACCC to provide an enhanced web based information tool with the aim of providing a more efficient mechanism to direct consumers to the appropriate dispute resolution contact point. ASFA has some concerns about the proposal to consolidate the existing financial alternative dispute resolution services into a single umbrella scheme. The Superannuation Complaints Tribunal, a statutory body established by the Commonwealth government, is currently responsible for complaints about superannuation. The creation of a superannuation-specific ADR was largely in recognition that the compulsory nature of superannuation required a greater level of consumer protection than was available under the existing financial sector dispute resolution schemes.

The SCT is independent of both the industry and complainants. It is funded by the Commonwealth government by means of a compulsory levy on superannuation funds. Tribunal members are appointed by the Commonwealth government. This independence has a potential to provide consumers with greater confidence in the integrity of the tribunal's determinations, particularly as superannuation disputes are generally more complex than other financial service complaints. Merging the SCT with other financial sector dispute resolution schemes has a potential to reduce the protection

currently available to superannuation fund members. However, ASFA supports the efforts by the current ADRs to better coordinate their activities. ASFA strongly supports the proposal that disclosure documents should be consumer tested and amended as required to facilitate good consumer decision-making.

ASFA has consistently advocated the consumer testing of disclosure documents. Our experiences in consumer testing have consistently demonstrated that consumers experience difficulty in understanding most financial disclosure documents and particularly those that are long and legalistic, and are often unable to make informed decisions on the basis of those documents. As financial services regulation relies heavily on disclosure requirements, it is essential that disclosure be in a form that is useable by consumers. This is best achieved if documents are consumer tested and revised as needed. ASFA also supports the proposal that disclosure requirements include the layering of complex information with the agreed key information that is necessary for decision-making being provided initially, and more detailed information being made available on request or otherwise referenced.

Ross and I are prepared to answer any questions you may have.

MR FITZGERALD: Thanks very much. Just in relation to your very first comment in relation to the generic law, I gather there's some sort of endorsement with a big "but" on it. I'd like if you could explain the "but" a little bit further. You say that ASFA recommends a national consumer law only be implemented with significant research or consultation. Could you explain to me what drives that particular recommendation that you've put.

MR CLARE (ASFA): I think it comes down to in terms of the dispute resolution the different nature of many of the disputes that arise in the superannuation area with the Superannuation Complaints Tribunal. A large part of their work is dealing with - - -

MR FITZGERALD: Yes, but I'm not talking about the tribunal. It's just going back to your recommendation, just the generic law, not the tribunal.

MR CLARE (ASFA): In terms of the nature of the product, the whole superannuation legislative framework, you're sort of getting into that area or - - -

MR FITZGERALD: Maybe there's a miscalculation. Have you read our recommendation as a generic consumer law that would take over the existing financial year?

MR CLARE (ASFA): Yes.

MR FITZGERALD: That's your concern?

MR CLARE (ASFA): That's our concern.

MR FITZGERALD: All right, because that's fundamental that, yes, because we're not doing that. Our recommendation is separating financial services regulation broadly speaking and other specific industry areas. But then there is the general consumer law that applies universally, so we're not talking about a situation where the generic law would take over from the existing financial services law. So is there a misunderstanding in the way that - - -

MR HODGE (ASFA): Yes, probably a slight misunderstanding there.

MR CLARE (ASFA): Perhaps we're being cautionary too in terms of possible interpretation of what the recommendation might bring.

MR HODGE (ASFA): There's also the notion sort of that anything which is sort of an overarching law needs to actually have universal application. I suppose we don't want to go down the track in consumer law that we have in industrial relations law where we have a supposed national system, but there's a whole range of people in various regimes who just aren't covered by it. So if you were going to have generic consumer law it would have to have universal application.

MR FITZGERALD: That's correct, but then there would be specific law in relation to superannuation and financial services generally. You've got a comment here agrees that ASIC would need to work more closely with the ACCC. As you would have seen in our recommendation, we've indicated that the Trade Practices Act should extend, without exception, across all industry sectors. But we have also said that ASIC would remain the primary regulator with its own legislation. Do you have any particular concerns in relation to that?

MR HODGE (ASFA): Basically we're against carving out powers and functions from the ACCC, but we recognise that in specific industry areas there might be need for a specific regulator or specific law. So the notion is an overarching regulatory framework and then a specific one. You haven't specifically mentioned that, so I just wonder whether you - - -

MR FITZGERALD: No. I suppose any concern we would have is that there's not duplication of effort, that you have both doing the same thing, and also that there are no gaps. You know, part of the problem with superannuation on its face is where you have two regulators ostensibly regulating on a similar line, right, but taking a slightly different approach in some areas.

MR HODGE (ASFA): We already have numerous regulators within the sector and

there's the Australian Prudential Regulatory Authority which occasionally will go into areas which ASIC also intervenes in, so it comes down to APRA having primary responsibility in terms of the way funds operate, the prudential framework, but how they operate also has implications for how customers are dealt with. So we already have that sort of dual area; and there's a few other regulators too, there's the Tax Office and we now have AUSTRAC. I suppose it comes down to some of our cautionary comments are, "How would this overarching framework work and how would it relate to the quite specific obligations that are imposed through the current regime on funds."

MR WEICKHARDT: I guess at the end of the day there's a sort of a balance of do you risk some clunkiness if the regulators traverse across sort of boundaries where there have been, you know, sort of, I guess agreements of "This is our territory; this is your territory" versus the risk of shonky people using boundary lines that are written into regulation, and there seems to be ample evidence in the financial services that innovative people have found cracks in, you know, sort of interface areas that have been to the detriment of consumers, and for that reason we suggested the carve-out be eliminated so there is always protection for consumers regardless. Now, there is of course then the risk of some overlap. But that seems the lesser of the two evils.

MR CLARE (ASFA): Well, I can understand that that's an argument. But in terms of the financial services sector, the superannuation trustees have to be fit and proper on entry and on an ongoing basis. APRA regulates very closely the operations of the sector. We also have ASIC with considerable powers, particularly in regard to disclosure. So I can understand that there may be some concerns about other areas of the financial services sector or the fringe where there hasn't been a high degree of regulation.

I read in the media about interest of governments and regulators and mortgage brokers and the like, which hasn't been a debenture issue, hasn't been a highly regulated areas, or, some people would argue, not sufficiently regulated. I don't think the superannuation sector could be accused of being underregulated, there's certainly no evidence of that. So in terms of an evil to be addressed, a gap to be filled, we do have difficulty with seeing what that gap is. We have suffered in the industry with regulatory consistency arguments for a considerable period of time and some of the Corporations Act provisions have attempted to bring in some elements of superannuation in a fairly clunky way, you know: everything is a financial product, they're all the same.

That has been a framework that has worked as well as it should. Certainly when you go back to the Wallace Inquiry and their recommendations, they certainly had this idea that everything was the same and should be treated the same in a

regulatory fashion in the financial sector, and things have clunked somewhat ever since in a number of specific areas. So that's the sort of background to our cautionary notes on this overarching framework.

Perhaps it's a little bit of we're not quite sure what the beast is that is being put together, but we also work on experience with other overarching regulation and also what particular problem is being addressed. The scope for innovation and products that may disadvantage consumers is quite limited within the superannuation sector because of the nature of the SIS act, the supervision of APRA, the taxation provisions, the nature of the trust system. It is a different framework to the manufacture and marketing of a number of other financial products or products generally in the economy.

MR FITZGERALD: You've mentioned here about misleading and deceptive conduct and you've supported our proposal that financial disclosures that are currently only subject to due diligence required should be exempted. We have received some submissions saying that that exemption should cease to exist and that all disclosures should be subject to the general misleading and deceptive conduct provisions. I was just wondering whether you'd like to expand further as to why there needs to continue to be this exemption, in light of your comments above that you're concerned about the impacts changes might have on the behaviour of providers.

MR HODGE (ASFA): Well, I suppose the bottom line is that if you go down strict liability for someone getting it wrong, right, then what they will do - and, sort of, trustees do do this - is they will bring in the lawyers and the lawyers will go through the document and, if something isn't clear or could be interpreted two ways, then the lawyers will add in the 15 words needed, right, to ensure that it can only be interpreted one way, even if that interpretation can only be, you know, proven and argued in a court of law.

So at the end of the day, right, because trustees will bear the loss, right, for any action - they're the ones who will be prosecuted, they're the ones who will be responsible - then what they would do is they would make sure that the documents could only be interpreted one way, and that can only be done by having extremely lengthy documents, and that is our concern.

MR CLARE (ASFA): It's a path that has already happened to a degree with the ASIC requirements and the Corporations Act requirements in regard to disclosure and conduct towards consumers where progressively - how many pages of the key features statement?

MR HODGE (ASFA): Key features statements were between, you know, six and

eight pages, and in a previous appearance I think we showed you some, brought some along. You have gone to a regime under financial services reform which is supposed to be clear, concise and effective, and we end up with 50 to 100-page disclosure documents purely and simply because of the black and white letter of the law requirements built into the act and the regulations.

MR CLARE (ASFA): Our fear is that another layer of liability might lead to a further increment in the length of those documents. The lawyers might say, "Everything has been disclosed, it's all there," but communication is a different exercise altogether and we have a new financial services working group set up by the federal government which is looking as one of its first tasks at the disclosure documents of superannuation funds. I think the objective of government and of the industry is to get down to more concise, more workable communication documents.

So the concern about layering of legal liabilities is not conducive to that process. What we want is effective communication to the great bulk of the customers. In Australia, most adult Australians have superannuation. So it's a very common product. It's a financial product. It's not well understood by a significant part of the population. So there's two different directions you can go: there is the shorter form communication type document, or there is the protection against every potential legal liability of the trustee document. The more legal responsibilities and liabilities attach, it's pretty clear to me which path the trustees will go down, so that's why we - you know, and if there is uncertainty, that's the other thing, that leads to the lawyers being more conservative, adding the greater layers.

In terms of due diligence, that may be - you know, the general principles of clear, concise and effective haven't worked practice, I think everyone would recognise that, that was a guiding principle, because it's difficult to demonstrate. Equally, if you just have a fairly general overriding principle which isn't clear to the trustees or their advisers, you will have overengineered disclosure documents in response to that uncertainty.

I suspect that we perhaps haven't entirely understood what you're proposing, but equally we're cautious from the episodes of the past where we have seen attempts to do the general sort of overall framework and the results have been really contrary to the intentions of those who were putting together that overall framework. So if legislation regulation is to go down that path, I think in the superannuation area the adoption area should only happen after very careful consideration, and it isn't clear to us that this layering for consistency's sake would need to a net benefit to the public.

MR HODGE (ASFA): As we said upfront, we have looked at this from the perspective of superannuation, and one of the important things to remember about superannuation is, unlike going and buying an insurance policy - if I want to buy an

insurance policy for travel insurance, I form that in my mind and I go out and I buy it; with superannuation the vast majority of the members of superannuation funds did not make the decision to join a superannuation fund, their employer joined them as part of a legal obligation. So for those people it is really important that they get some basic information so they understand what product it is they have been put in; having been joined by the employer, the law requires the superannuation fund to give them information about the product they are in.

So it's essential that that information be at a level that will enable people to engage with the product. If you have sort of black letter law, strict liability, right, on the provision of that information, right, then, rather than people getting information in a manner which is accessible and they can easily understand, the trend would be down the path we have gone now where you get 50 and 100-page disclosure documents which arrive in an envelope given to you, they open it and they put it in the drawer and they don't look at it. One of the biggest problems and issues we're facing in the industry is getting people to actively engage with their superannuation, to understand what it is and what it means to them.

MR FITZGERALD: Can I ask you just on that and then I will stop on this. Do you believe that consumers have in fact been disadvantaged by those disclosures, those due diligence disclosures, not being subject to an anti misleading and deceptive representation clause?

MR CLARE (ASFA): Well, there's no evidence of that. ASIC, in its enforcement actions over disclosure, has had such considerations in their minds. They certainly have the power to act in those areas and there have been examples where you could say that ASIC as a regulator has been extremely diligent in avoiding any disclosure or behaviour which could be regarded as deceptive. They are very strong requirements and obligations on superannuation fund trustees. Getting back to APRA and its prudential framework, where there's a very strong governance requirement for superannuation funds, APRA can basically disbar a trustee if they're no longer fit and proper.

If a trustee engaged in misleading behaviour on a regular basis, they're out of business. ASIC through its supervision of disclosure, has shown no reluctance to go down the path of dealing with any instances where they regard there being scope for consumers to be mislead by material. If anything, you know, some of the case they have pursued and the precedences that they have created have sort of led to this overengineering of disclosure documents; so there's no chance in a legal sense of the material being misleading, it's all there. Whether it's good communication or not is another matter.

MR HODGE (ACCC): But it's not misleading, it's not deceptive; it's just

inaccessible.

MR FITZGERALD: Yes, incomprehensible.

MR WEICKHARDT: Bizarre that lawyers seeking to make it clear make it absolutely unclear for everyone else.

MR FITZGERALD: That's true. Anyway, thanks for that. Philip?

MR WEICKHARDT: You have expressed some concerns about our proposal around ADR schemes and our comment about financial ADR and a single umbrella scheme. You're not the only person to have raised issues about this. We did stress that we saw there was an option for those services to retain their independence as arms within this, and you've made, you know, strong points that superannuation is different. I think it's fair to say however that, you know, there is evidence that people, for example who run their own do it yourself fund, might be concerned about a financial instrument that sits inside a fund and start down the track of complaining to somebody going to an ADR scheme and being unclear as to exactly - do they go to the superannuation ADR scheme or do they go to, you know, sort of some other ADR scheme.

Our point was not that the individual focus of these schemes should be destroyed but that there should be a single entry point and that the costs of these schemes, where it was sensible, be minimised and they be made as accessible as possible, simply by being in a umbrella organisation. Largely, we are told this has occurred. So I guess it's a matter of emphasis on the words in our recommendation, but we weren't seeking to sort of scramble eggs that didn't need to be scrambled.

MR HODGE: Yes, and that's why we supported the proposal to have someone say, like the ACCC, all right to have a portal, where that is where people would go for information about the dispute resolution schemes and they could work through the portal to work out where they needed to go for their particular dispute. I suppose and to that extent the SCT could be included as part of that portal, where people would go to there and find information about how it operated.

MR CLARE (ASFA): I'm not sure there's a lot of evidence available that superannuation fund members don't know where to go when they have a complaint. They're told when a trustee makes a decision of their ability to - of the member's right to make a complaint to the Superannuation Complaints Tribunal. You mentioned - - -

MR WEICKHARDT: Or in the case of do-it-yourself scheme, the people making the complaint might be the trustee.

MR CLARE (ASFA): Well, the answer in regard to the self-managed superannuation funds is quite clear, they're not covered by the SCT.

MR WEICKHARDT: So where they do go?

MR CLARE (ASFA): Well, it depends on the nature of their complaint. If someone takes on the responsibility of being a trustee of a self-managed fund, they have rights, responsibilities and opportunities. Part of the parcel is that they don't have an external trustee to make a complaint to. It comes down to what behaviour they are complaining about, and generally it would be in regard to someone who has advised them or someone who has sold them some financial product, which won't be a superannuation fund product as such, because the self-managed fund basically is dealing with financial investments outside the regulated superannuation sector.

MR WEICKHARDT: So might it not help those people to be able to phone a single number and be told, "No, you don't go to the SCT. You go to here."

MR CLARE (ASFA): We don't have any problem with a single number and the portal.

MR HODGE (ASFA): That's right, they could be assisted by that. I suppose the biggest difficulty that the self-managed superannuation fund members have is when the dispute is with a fellow trustee and that's just like a dispute with a business partner. Where do you go for those sort of disputes?

MR CLARE (ASFA): Or if the trustee has made a bad decision and later regrets it, that's one of the inevitable things in the financial sector. People take on a risk-return profile. They like the potential return. They don't like the downside of the risk and they're looking for someone. It's a matter of phoning up and trying to find someone they can get compensation from, but the difficulty for many self-managed superannuation funds is that the person who is responsible is the trustee themselves. It does come down to whether there is an external party who has a liability in regard to that fund, that trustee. Is there a behaviour which was unlawful, or misleading, or giving rise to a liability? Sometimes there will be, sometimes there isn't. One of the problems for self-managed funds is that if they deal with someone fraudulent it's a matter of getting a remedy. There may be a clear cause of action in civil law. The person they're dealing with has breached corporations law. But in terms of getting a person of substance with assets that can provide a remedy to the loss that has been encountered, that is often the problem within the self-managed fund area. An investment has gone wrong, then it's a matter of they have a dispute with the person who they were dealing with.

Whether there is an effective legal response in those situations is the difficulty. The financial planners with their professional indemnity insurance and with some firms with the backing of the parent company, there are some assets there. But in other cases if an investment goes wrong, it's very unfortunate for the individuals concerned. Whether there's a gap in the regulatory framework, whether there should be some compensation mechanism is another argument altogether. In the regulated superannuation area there's a capacity for the minister to decide on the payment of compensation, and then the rest of the regulated superannuation industry is levied for that. In the self-managed funds area there is no such mechanism, that fellow self-managed funds are not paying for the losses of individual funds where losses have occurred through fraud or theft.

MR FITZGERALD: I appreciate the differences in the nature of the Superannuation Complaints Tribunal, its differing character from just about all the other dispute resolution arrangements, including the fact that it's statutory, including the fact that it has determinative powers and so on and so forth. Do we have a good understanding is - obviously we do - have a good understanding of the major areas of complaints of consumers in relation to superannuation policies? Just very briefly without going to great detail, where are the areas of greatest consumer complaints being generated at the moment?

MR HODGE (ASFA): I think from the SCT's perspective, the matters they deal with, the biggest one is still the distribution of death benefits.

MR FITZGERALD: Of death benefits?

MR CLARE (ASFA): Yes, and then it's basically a dispute between potential claimants. It tends to be people in the messier arrangements where there are serial relationships, children from different partnerships, perhaps a parent who is unhappy about a benefit being paid to the girlfriend or boyfriend who may or may not be a de facto partner. There it's very, very difficult for superannuation fund trustees because basically they have to sort through the often chaotic lifestyle of the individuals and the complainants, you know, the member is dead, the person who was the member of the fund is no more and the complainants are the competing beneficiaries.

Invalidity benefits is one of the other big areas where the typical definition within a superannuation fund is for total and permanent incapacity. I think you, Robert, would be familiar in the social services area of the ambiguities and the complexities of determining when someone is totally and permanently incapacitated and we have the ongoing differences between what the Commonwealth might regard as someone who is totally incapacitated, or the military, or another employer in terms of workers compensation. So there are those sort of specialist areas where in the death benefits it's competing beneficiaries and dependency issues, and in the other insurance area it's what

is total and permanent incapacity. So quite a bit of their work is fairly specialist and differs from many of the other disputes that arise.

MR HODGE (ASFA): Right down the bottom of the list you get the disputes about trustees not acting quickly enough, or not acting on a request to, say, move money through benefit, or trustees not adequately explaining to members what will happen when a particular event occurs so far as moving money out of one investment option to another. But they're at the lower end, but the significant ones are the more complicated ones and not the sorts of disputes which occur in other areas of financial services.

MR FITZGERALD: Thanks for that thought. Just in relation to your disclosure document comments and laying of information, you've generally supported our recommendations. The question I have is, do you think we have gone far enough in relation to this. We understand that at the moment ASIC and the government is, as you've indicated, examining financial disclosure. We've certainly indicated we believe in both using comprehensibility as a test and also the actual market testing of disclosure. We haven't actually recommended that there be change to the law just yet. So my question is, whilst you've supported this, does this go far enough, do our recommendations and approach go far enough to meet the objectives or not.

MR HODGE (ASFA): I suppose from the perspective of a product issuer, if there was certainty in the law that information could be presented in a layered manner - that is the key information presented simply and pointers to other documents or where people could go for more information - then if there was certainty that they were allowed to do that under law - which is what we have been seeking and which we had the Corporations Act changed to allow it to happen in the superannuation sphere - then that provides greater comfort. So to the extent that people who might wish to go down that path might like the certainty of law behind a path which they choose to take in their disclosure, then we would support it and maybe recommend that that should be properly considered.

MR CLARE (ASFA): Basically at the very least you would need a ruling from ASIC on how they intend to interpret the law, or specific changes to the relevant provisions of the Corporations Act to provide that certainty for funds, and that comes back to the clear, concise and effective overall direction. Unless and until funds are confident that actual behaviours will be permitted they will be risk averse and they do respond to enforcement actions that can and do happen when there is ambiguity in regard to what these general requirements mean in practice. So trustees, their advisers are naturally cautious and they will go down the path of perhaps over-engineering disclosure if they consider that there is a risk to them because of ambiguity and uncertainty.

MR FITZGERALD: As far as I can recall, and I don't have it in front of me, the ASIC submission doesn't yet support an amendment to the legislation that would change the

wording of "clear, concise and effective". If I recall our discussions with ASIC, they would favour a period of time in which they try to add grater clarity to the disclosure that is required. So I suppose my more precise question is, would you support a legislative change at this stage away from or varying the words "clear, concise and effective" to incorporate some other concept, such as comprehensibility; or would you be prepared to wait and see how ASIC actually deals with these issues?

MR HODGE (ASFA): Well, see, I would have thought that "clear, concise and effective" was comprehensibility, and that has been the absolute frustration of ASFA with the current disclosure regime, because clear, concise and effective, ie comprehensibility to the consumer, is what our goal has been, and the legislation as it's structured has not got us there. Now, the approaches and the changes which have made the regulations which allow layering of information are getting there, because it allows you to pull that key information out so at a fundamental level the reader can understand what the product is they have got; and then, if they need more detailed information about some of the ins and outs of the products, then you can go elsewhere for it.

MR CLARE (ASFA): But exactly where you do it, I think that the superannuation industry wants certainty it can be provided in various ways. Most likely changing the high level legislative prescriptions isn't going to bring that certainty. It could be done at regulation level. It could be done, as I mentioned, through rulings from ASIC, the issuing of materials on how the high level principles are to be interpreted and applied. So for sure if the legislative draftspeople could come up with, you know, in the Corporations Act a clear, concise and effective guide on how to be clear, concise and effective, the industry would appreciate that. I think there'd be some scepticism about that happening in the short term, and we also have a number of processes under way at the moment, including the financial services working group, as you're aware.

I've been around the industry for quite a while, and Robert has too, and it has been one of the ongoing areas of concern to funds. We want to be able to communicate better with the customers. That's the aim. Achieving that in the current legislative framework has been difficult. So it comes down to, you know, what is the particular remedy to the current problem, and I think the industry, the regulator, is still working through that; and government, through its working group, which is quite internal to government, even though it will be consulting, will be part of that process.

MR FITZGERALD: Any other comments you'd like to make?

MR HODGE (ASFA): No. Just thank you once again for giving us the opportunity to appear.

MR FITZGERALD: Good. Thank you very much. Okay, we will just adjourn for our morning tea. We will resume at about a quarter past 11. Thank you.

MR FITZGERALD: All right, we might start just a couple of minutes early. Okay, if you could just give your names and the organisation you represent and then just an opening comment, and then we can open up discussion.

MR CONVERY (ERAA): My name is Nicholas Convery. I am executive manager of retail regulation with Energy Australia, but I appear before the commission this morning as Director of the Energy Retailers Association of Australia and also as chair of its Retail Standing Energy Market Working Group.

MR PHILLIPS (ERAA): And I'm Alistair Phillips. I'm the Director of Research and Policy at the Association.

MR FITZGERALD: Okay. Over to you. You just need to speak up so that people can hear you in the room.

MR CONVERY (ERAA): Certainly. Sorry. The association is a collective of retailers from across the country. I guess in the interests of fairly representing them, we have prepared a statement, I will read that out, and then if we can go on to some comments and questions thereafter. The association welcomes the opportunity to participate in the commission's hearing of the review of Australia's Consumer Protection framework. The ERAA is an independent association representing 13 retailers of electricity and gas throughout the national electricity market and other jurisdictional gas markets. The ERAA members collectively provide electricity and gas to over 12 million customers across Australia.

As a starting principle, the ERAA believes that competition represents the best form of consumer protection in the energy market. This is based on the belief that the entry or threat of entry of new retailers will force incumbent retailers to operate efficiently and provide competitive energy offers in order to win customers. Retailers who cannot do this will lose customer share and suffer financially. In order for a truly effective energy market to develop, the barriers to new retailers entering markets must be kept as low as possible and regulation should only be used when there is demonstrated market failure.

The ERAA thus supports a streamlined, efficient and low-cost regulatory framework. The ERAA and its members have long been concerned about the practices of jurisdictions introducing supplementary regulation that duplicates existing measures found in the Trade Practices Act, the Privacy Act and the Fair Trading Acts of the states and territories. In its draft report the commission has referred to these as "energy specific regulations". A most recent example of this has occurred in Victoria where the Essential Services Commission tightened regulation around early termination fees to the point of effectively not allowing them. This was

despite there being no demonstrated market failure in this area.

As another example, in New South Wales retailers are required to individually and in writing notify their customers on market - although, note, negotiated contracts as opposed to standard contracts, of any changes in their tariff in advance of those changes taking place. New South Wales is the only state in which this occurs, with all other states simply requiring retailers to notify customers vis newspaper advertisements. The cost of individually writing to customers far exceeds the cost of newspaper ads, meaning that retailers have even less to pass on to customers in the way of alternative or attractive market offers.

The Ministerial Counsel On Energy's retail policy working group, or the RPWG, is currently working on the transition of regulation governing retail energy markets to the national level. While this process involves the harmonisation of the existing regulatory frameworks from the various jurisdictions, it's also working to streamline these regulations to make the operation of the markets more efficient and less costly. The ERAA recognises the importance - sorry, just cutting through. Moving on to climate change, the ERAA recognises the importance of addressing climate change through encouraging energy efficiency, the development of renewable energy and the introduction of a national emissions trading scheme.

The ERAA is conscious of the additional costs that introduction of such government policies have had on energy customers. In Australia today we have over a dozen different schemes currently operating or planned which are aimed at either increasing the uptake of renewable energy and less carbon intrusive technologies or increasing energy efficiency. The ERAA recognises that both these types of strategies play an important part in addressing the issue of climate change, but the myriad of schemes are uncoordinated, costly and do not fully recognise the costs associated with climate change in a proportional manner.

Despite the work being done to establish a national emissions trading scheme, this has not prevented the introduction of further new schemes and the ERAA believes that COAG must assume responsibility for the oversight of renewable energy regulation. This, with the aim of ensuring that such schemes are either transitioned into the national emissions trading scheme or phased out completely. Ultimately, the ERAA remains concerned that the ongoing operation of these schemes will unnecessarily impose additional costs on consumers and undermine the efficient operation of a national emissions trading scheme.

Moving to the issue of price regulation, the ERAA makes the following comments. The regulation of energy prices represents the single biggest barrier to the entry of new retailers into the energy market. Price regulation is inefficient, stifles price and service competition, hinders product innovation and prevents the full

benefits of competition from being realised. At the time full retail contestability was introduced, governments and regulators expressed a desire to retain price regulation as a safety net for those consumers who were not able to or chose not to participate in the competitive market.

The price controls were introduced as a transitional measure and were intended to prevent the abuse of monopoly power by retailers by imposing a regulatory discipline as a proxy for market discipline. Accordingly, it was expected that at some stage retail price controls would be removed once competition had been established.

Since the introduction of full retail contestability, competition in the energy market has developed significantly. As demonstrated in the most recent Vaasa world energy market rankings, Australia has been shown to have some of the most active markets in terms of energy market competitiveness in the world, with the Victorian market rated at number 1. To this extent, the ERAA supports the commitment from the MCE for the Australian Energy Market Commission to review the effectiveness of competition in Victoria, South Australia, the ACT and New South Wales. These reviews are aimed at making an assessment as to whether the level of competition is sufficient to enable the removal of retail price regulation. The first of these assessments was undertaken in Victoria in 2007 and in that review the AEMC found that the level of retail competition in the Victorian market was highly effective and it was leading to beneficial outcomes for both households and businesses alike. The ERAA therefore supports the Productivity Commission's draft recommendation 5.4 relating to the removal of retail price regulation.

Turning to the issue of consumer hardship, one of the main arguments put forward by policymakers for maintaining regulated pricing of energy is to protect those customers in hardship. The ERAA considers there is no justifiable link between price regulation and consumer protection, and sees that more targeted arrangements are required to assist customers in genuine hardship. The ERAA strongly supports arrangements to protect customers in genuine financial hardship, however, more effective policies are needed to address these customers as continued price regulation is not part of the solution. Customers with insufficient income need to be adequately supported with direct and transparent subsidies through government welfare programs that are simple to administer and which do not interfere with the administration of the energy market. While energy retailers and community groups can assist governments in implementing such schemes, they should not be required to fund them. The ERAA maintains that the combination of government support and the presence of effective customer hardship programs on the part of retailers will support competition within vulnerable customer segments of the market and ensure that these customers do not miss out on the benefits of retail competition.

Our final comments in this opening statement relate to the commission's recommendation for the establishment of a national energy and water ombudsman. The ERAA recognises that from time to time disputes will arise between customers and energy companies. The establishment of the energy ombudsman schemes in the states and territories have been designed to assist with those disputes where customers feel that their issue has not been adequately dealt with by their retailer. The ERAA supports the establishment and operation of such schemes and the assistance they provide customers in resolving their disputes. However, the ERAA members' experiences with these ombudsman schemes and developments taking place in schemes operating within other industries both nationally and internationally, have identified that there are opportunities for such schemes to operate in a more efficient and effective manner, thus better serving the needs of customers, retailers, and governments alike.

The ERAA believes the commission's approach of harmonising the operation of the current ombudsman schemes is consistent with the move towards national retail energy regulation. The establishment of a national scheme would also assist in achieving greater consistency in the resolution of disputes. The ERAA believes that consistency in the resolution of disputes is a critical issues in terms of having an effective dispute resolution facility at the national level. In moving towards a national scheme, we would urge the drafting of a clear and strict charter in consultation with stakeholders. This would be in order to prevent the national body from becoming overly bureaucratic and detached from the jurisdictions in which the disputes arise.

These are our opening statements and includes that and be happy to answer any questions that the commission may have.

MR WEICKHARDT: I'd just like to clarify some comments you made. You've used the expression "regulation of retail prices". Our recommendation referred to retail price caps. In your mind, are those two absolutely synonymous, or are you trying to wrap in something more when you use the words retail price regulation"?

MR CONVERY (ERAA): We're talking about the removal of price caps. It's effectively established within regulatory bounds in each of the jurisdictions we operate within.

MR WEICKHARDT: You then make a comment saying that energy price regulation represents a significant barrier to entry to new retailers. If that's the case, by implication you're suggesting those energy price caps are actually suppressing profitability of retailers. Is that the implication I should draw?

MR CONVERY (ERAA): It's certainly impacting it and makes it far less attractive

for incumbents outside the industry to consider coming into the industry, yes.

MR WEICKHARDT: So in the short term, if I went the next step from that, is it fair to say that removal of the price caps would actually see average prices escalate?

MR CONVERY (ERAA): It would see prices for energy move to cost-reflective bases. At the moment most retailers would be of the view that the prices do not reflect the actual cost of production - well, the cost of production are effectively the words I used, but of generation, the retailing, and allowing a component there for margin.

MR WEICKHARDT: Thank you, I thought I had interpreted that correctly, but I just wanted to clarify that. Thank you for your point there. I guess the other question I had, if I may, was under energy specific regulation you said, "The association believes the current consumer protection arrangements governing the retailing of gas and electricity are complex, diverse, and efficient and compliance with these multijurisdiction regulations imposes significant costs upon retailers." Do you have any quantification of those costs?

MR CONVERY (ERAA): No, not available with me at this time today.

MR WEICKHARDT: Can you speak up a little bit, please.

MR CONVERY (ERAA): Sorry. Not today.

MR WEICKHARDT: Right. Could you provide some to the commission, because it would be helpful. It is the assertion of some of the individual states and territories that they acknowledge there are differences, but they would then say these differences are fairly small and minor and that they're really very - very uncertain as to whether or not they really cause a significant burden to the industries operating in that sector. Others have made the point that you've made but haven't quantified it, and we would be appreciative of any quantification you can add.

MR CONVERY (ERAA): I think some of the member retailers of the association have looked at this in depth. My organisation hasn't done it in depth but has done it on a rudimentary basis. I'd be happy to go back to our members and discuss that with them, and then some sort of release.

MR PHILLIPS (ERAA): Yes, I think the other point that needs to be made is that what you have also got to understand is that you've got retailers operating across different markets, and therefore if you have a single regulatory framework for the whole of Australia therefore you're not having to implement new systems to look at specific regulations. For example, in Victoria with - is it the early termination fees,

we have got a situation where - sorry, it's the wrongful disconnection of customers; you've got a situation where each time a customer is disconnected - you know, the company is actually having to implement a system to ensure that the disconnection is in line with the regulations which have been determined by the ESC.

If they're not, then they're up for horrendous sums of money for potential wrongful disconnection of customers. Currently the wrongful disconnection of customers has been quantified and that's quite substantial I think, and we can certainly get you those figures on what the cost of wrongful disconnection was in the last financial year. As for the actual costs of these regulations to the businesses, we could also look into that as well.

MR WEICKHARDT: Yes. It's the differences, you know, sort of, and the fragmentation and the cost that that causes, as opposed to one uniform regulation absolutely.

MR CONVERY (ERAA): But even if the costs are not, you know, significant, there are real costs involved in this. The issue of the training that we have to provide with our people in different jurisdiction changes and often we're using centralised call centres and training providers. So it comes down to individuals having to know, you know, four or five different sets of legislation - or, regulations, in terms of doing their day-to-day jobs. That creates complexity. That creates issues for customers when they ring in. While we do our best to ensure that the call centre people are telling the customers the right thing, from time to time, you know, they get themselves confused and the customer might be provided with some misinformation. So having a more uniform approach serves the customers far better and serves us better, in terms of ensuring that consistency. The other thing that there has been a slow migration towards is for the highest common denominator, in terms of the most onerous jurisdictional regulations actually being looked to as the ones that apply across a retailer's operation.

That effectively makes redundant all of the other jurisdictions. So Victoria certainly likes to lead the race in terms of regulatory development and some organisations - not mine, but some organisations, I know, have looked down and just said, "Well, look, the easiest thing for us to do is to apply this at a national level; it saves us having variations in systems, it saves us having variations in training and it saves us having variations of collateral that we give to our customers."

MR FITZGERALD: Leading on from that then, just a couple of things. In this particular area we have got agreement that there will be a national market. We have got a Ministerial Council on Energy and we have got a regulator that is effectively jointly-owned by the nine jurisdictions. So unlike many other areas, we seem to have a couple of components which should lead to greater uniformity of that in other

areas of public policy. Why is it, do you think, you're continuing to get a break-out by the states or in terms or a reluctance to uniformity. The second part of that is how effective in your mind is or will be the retail policy working group that you're on in bringing about harmonisation.

MR CONVERY (ERAA): I think in answer to the first question why there's these attempted break-outs in terms of development at the jurisdictional level at the moment is because I think some of the states want to lead the national reform agenda. Sorry. There's merits in some states wanting to lead the national reform agenda. Victoria has taken a strong position on a number of areas, and I think what the preference is for retailers operating at the national level is that there is greater consistency so we don't find ourselves in a system where Victoria, or any jurisdiction, is necessarily the benchmark for where the national framework will end up.

In terms of the retail policy working group, I think what the outcome of that policy working group will be is that a substantive amount of the regulatory framework that is developed for the national level will obviously end up there, but there are going to be residual components that are left within the state jurisdictions, and that's where we see exposure to a fair amount of risk and variation going forward. So what we'd prefer to see is that as much as can possibly be moved to the national framework is moved there. But state interests are going to see things like, potentially, price regulation, customer hardship and a few other areas maintained back within the state jurisdictions.

MR FITZGERALD: Have those decisions yet been made or are they in the process of being made?

MR PHILLIPS (ERAA): Which parts of the regulations are attained?

MR FITZGERALD: Yes.

MR PHILLIPS (ERAA): Yes. That's in the amended Australian Energy Market agreement, they have stipulated those.

MR FITZGERALD: So they have now been agreed and they're not under review at the moment?

MR PHILLIPS (ERAA): I suppose each component of that, they have sort of worked out the high level areas, but then there's sort of bits under that which sort of cross over with what they RPWG is looking at and what will be retained. So there's still a bit more work to be done.

MR FITZGERALD: But can I just clarify that. So the broad areas that will remain wit the states is agreed - - -

MR PHILLIPS (ERAA): Yes.

MR FITZGERALD: - - - and not subject to review. It's what each of those now means?

MR PHILLIPS (ERAA): Yes.

MR CONVERY (ERAA): Yes.

MR FITZGERALD: Just on that then, to what extent does that carve-out that has been agreed significantly impede the development of a national market? I mean, clearly, obviously, you would regard pricing as one of those issues. But in your mind are they significant enough to distort the way in which the market will operate or are they really just hindrances which will cause unnecessary confusion?

MR CONVERY (ERAA): Well, I mean, in terms of what you're going to do and what you're trying to achieve with a national framework development, I mean, at the moment we're sort of half doing it if we're agreeing to leave some things back in the jurisdictions. For example, customer hardship, if you had a national policy for that, you'd have federal government funding or federal government programs that could come in across the top of each of the jurisdictions and adequately cater for an ensure that those customers are not left at a disadvantage.

At the moment where we're heading you've got a state by state approach to that and you'll almost have customers saying, "Well, look, you know, you're better off being a hardship customer in Victoria than you are in," say, "Queensland", or vice versa. So that doesn't seem to make sense in terms of overall objectives of trying to have a national framework and trying to treat consumers in a consistent manner across the nation.

MR FITZGERALD: Why do you believe this agreement has been reached? Is it simply that, as you said before, the states believe that they have, you know, better and different approaches and they want to be able to experiment, or is there some very strong underlying arguments in favour of these - - -

MR CONVERY (ERAA): I probably wouldn't comment in too much detail, but I'd suggest politics has a lot more to do with it than other issues.

MR FITZGERALD: Sure. All right. Well, that leads to the other one, if I can. A related issue then is the Energy Ombudsman's Schemes. As you know we have

made a recommendation that there should be a single Energy Ombusdman's Scheme. It won't surprise you to know that most of the jurisdictions and the peak body for those bodies have indicated they would prefer to have separate schemes. Again I'm just trying to get a sort of a sense. By having state jurisdictional schemes, to what extent does that impose a real burden on the providers, the energy providers, or is it more of an annoyance factor? In other words, what is the scale of the problem? I mean, clearly we have stated we prefer a national scheme. From your point of view, what is the scale of the inconvenience of difficulty that the industry faces from having these nine different approaches?

MR CONVERY (ERAA): I think the biggest issue for retailers is there is inconsistency of approach. The Queensland, the New South Wales and the Victorian ombudsmen all treat similar or the same issues in different ways. That level of inconsistency makes it very difficult to understand where we're going; to treat customers in a uniform manner, in terms of recommendations or suggestions that might come out of the ombudsmen's schemes, and from time to time issues do come up where the ombudsman gives not only the consumers guidance but also us guidance, in terms of how perhaps we should think about these things and offers that perspective that we don't always sit back and reflect on, given that day-to-day things happen.

In terms of it being a hindrance, we try as best as we can to work with any ombudsman's scheme to ensure that issues are dealt with quickly. Energy retailers are effectively members of ombudsmen's schemes and fund those schemes. So to any extent that we think they're hindrances and we cause them to do - well, not cause them, but prevent them from doing their work efficiently, just adds to the cost of our operations. So we actually have an incentive to try and ensure that those operations run effectively as well. That's why having a single approach would far better facilitate a cost-effective national scheme, keep our costs down and make things easy.

MR PHILLIPS (ERAA): I think moving towards a national regulation - you know, a national system, would also, you know, get more consistency with the interpretation of the national energy regulations as well.

MR WEICKHARDT: Just on that same topic, I think most - certainly I believe the majority of the states have at the moment Energy and Water Ombudsmen tied together.

MR PHILLIPS (ERAA): Yes.

MR WEICKHARDT: Whilst there is a move in the direction of a national market for energy, there certainly isn't at this stage for water. To what degree do you see it

as I guess providing dyssynergies or complications of either therefore having to split a national energy regulator away from various state based or state-driven water regulators or ending up with effectively a sort of mishmash of a national, you know, sort of ombudsman, who looks at the energy side, but at the same time has to cope with a whole range of different water regulations in each state?

MR CONVERY (ERAA): I think that's a challenge that each of the ombudsmen in each of the jurisdictions face today anyway, because there's a fair variety in the charters that they have. In terms of them going to a national framework for energy, I don't see that being a great impediment, in terms of their abilities continuing doing what they do for water. I think effectively what we're trying to say is that in terms of their day-to-day energy dispute resolution or other assistance that they provide customers that there be a consolidated view and a single set of principles or a single framework that they follow in dealing with those customers.

What they do with water could be separate, but often these organisations have different departments looking after different areas. Certainly the ombudsman oversees both sides of the fence, but certainly what we would be recommending would be an overarching framework that provides the ombudsmen with the guidance of what they should be looking at, how they should be looking at that and how they interact with the retailers.

MR FITZGERALD: Just on the hardship schemes comment, I notice just in that list that you mentioned that that's being left at the state level, is it? It's one of those headings that you've mentioned. One of the things, and it's a very specific issue, is the emergence in Tasmania of prepayment meters. I'm just wanting your comment on hardship arrangements generally. That seems to be a very different and radical approach to allowing people to exercise choice. Do those sorts of schemes in and of themselves concern you or is that the sort of local variation which we might think is reasonable, given that it's probably only going to stay in Tasmania. But I mean are there concerns about the actual programs that are being implemented?

MR PHILLIPS (ERAA): I think in relation to prepayment meters, the association has always believed that that's a product of choice and that, you know, it should be a product which is available to all consumers. In relation to the use of hardship, we have never advocated their use, that, you know, they be specifically used a measure of addressing hardship. We have always advocated that, you know, everybody should have access to energy.

That being said, I think that we have in seen some jurisdictions - I'm not too sure if you'd go as far as banning, but they have been very slow to allow the implementation of prepayment meters. For some people prepayment meters are a useful product because it allows them to I suppose manage their energy use, in that

they feel like they can manage their budget more effectively; and, you know, we would always say that it would be left up to the consumer whether they want to use a prepayment meter but we would never advocate the mandating of prepayment meters to address the issue of energy hardship.

MR CONVERY (ERAA): Irrespective of whether you've got a prepayment meter or a standard use meter that most people have in their homes today, when people in hardship are out of money they're out of money, and you still need to deal with the problem, in terms of supporting those customers. Often I guess the easiest way has traditionally been that you disconnect the site, but most retailers now have moved beyond that for these category of customers, they're offering them assistance, they're offering them payment options; they're offering them other incentives; and also access to other avenues of support that they can get that are generally out there in the community, like no-interest loan schemes and other organisations that actually provide assistance. So you need a framework that better caters for these customers, rather than just having a prepayment meter and when the credit runs out, that's it, they're still in the dark.

MR PHILLIPS (ERAA): I think the other thing is that Nick's point sort of draws to the issue of energy hardship but it's not a one-size-fits-all sort of solution. Every case needs to be looked at individually. The industry and consumer groups and government have struggled with the issue of addressing: what is a vulnerable customer. That has been an issue which no-one has been able to satisfactorily identify. So, you know, just coming back to the point of hardship, you know, you can't just simply say, "Well, we will give them this product or that product to address their issue."

MR CONVERY (ERAA): One other thing on prepayment meters, and it sort of goes back to the question of choice, but with hardship customers, for example if you chose to have a prepayment meter as an option for them as part of the assistance packages, it to some extent could give them some visibility of their actual usage on a far shorter time frame. At the moment people get their bill and then three months later they get another bill and in the intervening period you've got very little idea of what your consumption was, you don't know that on one day you've used twice as much as you do on the average day, and, you know, you try and think back and think, "Well, that was maybe a cold day," or "It was a hot day and I had the airconditioner on." So whatever products that retailers can come up with to offer - not just hardship customers too, this is any customer - some greater assistance in the profile of their energy use and when they're using more and when they're using less, I mean, that's going to assist all customers.

MR FITZGERALD: Just one other area. You've mentioned green energy issues and you've listed - and I think TRUenergy who presented to us in Melbourne last

week also did so - a range of government initiatives in relation to renewable energy. Just explain to me why you think this would be a matter for a consumer policy inquiry. I'm not saying it's not; I just want a way of understanding.

MR PHILLIPS (ERAA): No. Going forward, I think that it's a considerable issue for all governments and that it's addressing the issue of climate change and at the same time realising that in addressing the issue of climate change the price of energy is going to go up and how that affects consumers and consumer hardship. I think already the federal government, and I think both sides of politics, had as part of their election commitments some sort of assistance package to help those vulnerable customers with the future additional costs of meeting climate change requirements.

MR FITZGERALD: If you were to put this anywhere, where would you put it? I mean, you wouldn't give it to the Ministerial Council of Energy, would you?

MR PHILLIPS (ERAA): No. It's an issue for COAG, because it's climate change. It's a big picture issue and it's something which needs to be looked at, because the costs - and we have actually quantified those previously, but since then we have actually had a number of additional schemes been introduced, and it is substantial. You know, I think that it really requires a commitment from the premiers and the federal government to actually wind these back and say that we're committed to a national emissions trading scheme and then look at something else which fits in line with supporting the uptake of renewable energy.

MR FITZGERALD: Okay. My final question is - and you haven't commented on it specifically - is the institutional arrangements that exist. Notwithstanding the state carve-out of those particular areas, is the industry by and large now happy with the institutional arrangements that exist in relation to energy?

MR CONVERY: (ERAA): I will let you come back.

MR PHILLIPS: (ERAA): I think we're getting there. I think that we're doing not too badly. I think that there's still some areas which need some more work. But on the whole I think that when you look at other industries we're doing a hell of a lot better. That being said, I think that the RPWG is a huge undertaking. I think that originally we were looking at end of 2008, and now we're looking at end of 2009 for implementation for 2010. So we have got a whole year ahead of us of this. So it's pretty tough going.

MR FITZGERALD: Who chairs that group?

MR PHILLIPS (ERAA): The federal Minister for Energy.

MR FITZGERALD: (indistinct)

MR CONVERY (ERAA): I think that's one of the things too, I think the framework is fairly adequate. But it's the resourcing of those different areas and institutions that has proven to be a little bit difficult. There has been a fairly high level of turnover in most of those organisations. I know in the last two or three years our dealings with various head of different areas have changed two or three times, so that has made it increasingly difficult; but then that reflects most state jurisdictions as well.

MR FITZGERALD: Sure. That's true. All right. Any other final comments from yourselves?

MR CONVERY (ERAA): No.

MR FITZGERALD: Good. Thank you very much.

MR PHILLIPS (ERAA): Thank you.

MR CONVERY (ERAA): Thank you.

MR WEICKHARDT: Good. Thanks for that.

MR FITZGERALD: Come and join us. We are running a little bit ahead of time, which is always nice. Robert.

MR SEKULESS: Peter Sekuless.

MR HAYMAN: Hi. Richard Hayman.

MR FITZGERALD: Just one moment. We've got your written submission. I saw it; I have just got it to find it. Just give me one sec. If you'd like to give your full names and the organisation you represent and then just any comments you'd like to make, and then we can have a discussion about those comments and the submission. So over to you.

MR HAYMAN (ATA): My name is Richard Hayman, representing the ATA and I'm a member of the ATA safety committee.

MR SEKULESS (ATA): Peter Sekuless, also representing the ATA, in a humble capacity, as a consultant. But Richard has got the opening remarks.

MR FITZGERALD: Okay, fine, Richard.

MR HAYMAN (ATA): I'm afraid I'm going to read these to you. First of all, we wanted to thank you for the opportunity to address the commission, and, as stated in our submission, the ATA represents the key stakeholders involved in the manufacture and distribution and sale of children's toys. Unfortunately our CEO Beverley Jenkins is out of the country, so she has asked me to attend in her place. As I said, I'm a member of the ATA safety and compliance committee, and my experience in this area comes through involvement with the Australian Standards committee on safety of toys and the International Standards Organisation, the equivalent.

The ATA welcomes this inquiry as being the best opportunity to date to achieve a nationally consistent consumer product regulation. We're keenly interested in this as we believe that roughly 50 per cent of consumer product regulation in place today concerns children's products and our members are frequently dealing with the complexities and costs of the current system. The ATA's submission is a short one, as we support the content of the draft and we only wish to add emphasis to certain areas. The first of these is the issue of informed participation. We're concerned at the complexity of the current regulations and process for drafting them, and we wish to bring the practicalities of fixing this to the commission's attention.

Our submission is that the system of drafting requirements based on existing voluntary standards should remain. However, regulations should be written in full,

not by reference and then variation to the standard, and these regulations should be freely available both to consumers and to industry. Also regulations should not change the intent of the requirements unless it actually means to. In other words, interpretation of the way things are worded should not change what the original requirement was intended, and in this regard clarifications as to intent should be accepted from standards committees of relevance.

Secondly, on the issue of a new national consumer law, the ATA believes that having a single law and a single authority is critical to the achievement of intended outcomes from consumer product regulation. The current system where a supplier may have to settle issues with up to nine different regulators does give a number of different outcomes and is very complex and adds cost. We do understand the level of change that this requires and do not want the commission to interpret any silence on this issue as a lack of support so we will continue to agree with that whenever we're given the opportunity.

Lastly, we see the issue of industry-specific regulation as also being important to emphasise. We have recently seen examples of product-specific regulation in bans on a Bindeez product where a ban was made on a product as opposed to identifying a particular hazard involved. These types of regulations do not properly protect consumers or actually give the supplier the opportunity to fix the product. Regulatory requirements we believe should be directed at specific hazards, not products or industries. In this regard we see the hazard identification system as a critical tool to determine the need for regulation and the system will need to be properly funded and set up to ensure the validity and usefulness of the data obtained. That's ends the introduction.

MR FITZGERALD: Thank you. I was wondering if I could just start with your last one about the Bindeez beads.

MR HAYMAN (ATA): Yes.

MR FITZGERALD: I am not sure if there is any litigation taking place so clearly I want to be a touch careful. I was wondering whether you could give me your commentary about how the regulatory system worked or failed to work in relation to that. We've had various comments about that. Some say it showed the strength of the state's system, that is, that they're able to respond quickly and effectively, I think in particular in New South Wales. We've heard other views that it's a clear demonstration of why the system doesn't work and why the Commonwealth should have been in the case and, of course, you've added a third element and that is that it probably banned the wrong component which was not the beads itself, but the part. So just talk to me about what happened and how you think - if you can to the extent that you feel able.

MR HAYMAN (ATA): Yes, and I guess given that I'm not directly involved in it.

MR FITZGERALD: No, but just from an association's point of view.

MR HAYMAN (ATA): The hazard was a particular compound within the bead, 1,4-Butanediol and it turns out that that compound can metabolise in the stomach into the party drug. So a ban on the Bindeez beads themselves means that the supplier was unable to immediately go out there and replace Butanediol with another safe compound and continue to market the product because his product itself was banned. In addition to that there may well have been other products on the market that contained 1,4-Butanediol and the whole point of that being the hazard was missed and there was no inquiry as to what other product might have been affected by this.

MR FITZGERALD: Given that we've been talking about hazard identification as a way forward for some years and our previous Productivity Commission inquiry into consumer product safety identified that as a way to go. What do you think is the obstacle to that actually occurring in practice. Why would it be that the various jurisdictions would have proceeded on the basis of banning the product rather than owning a product that contained that material?

MR HAYMAN (ATA): I think sometimes jurisdictions are in a hurry to react and show that they react quickly rather than actually going through an investigation process as understanding it. As to the obstacle for a hazard identification system, it's probably the funds and resources and a system in place to actually have that, there's very limited collection of data at all in Australia at the moment and I think that's probably true worldwide. If we could set in place something that allows the collection of that data in a useable format it's going to be of great benefit to justifying regulation in the first place or lack of regulation and making it relevant to the actual hazard.

MR SEKULESS (ATA): If I could just add to that too, because we look at your recommendation, for instance, in box A2, "Key recommendations from the review of Australia's consumer product safety arrangement carried forward," and while there is at the third dot point developing a broad based hazard identification system which we applaud loudly, the first one still refers to introduction of a single national product safety law. So I guess we are making the point that we think it should be the hazard, that product safety is the term, the most commonly used term and we're a little concerned that that will continue to be the case, it will be the product. We're making the point that in our experience and in the experience of the last six months has possibly been that it's the hazard, you should be thinking about the hazard, not the product.

MR FITZGERALD: Can I just ask this then: for a jurisdiction, irrespective of whether it's a state or a Commonwealth jurisdiction, isn't part of the problem that in order to inform the consumer in relation to the ban, it's the product itself at that moment in history that is significant, whereas if you were developing a standard, then of course you would go to the hazard. So have we not got an innate conflict that you want to inform the consumers and, of course, the suppliers with product and that requires one sort of approach, whereas if you were developing a standard or a permanent ban, then in fact it would be the actual hazard. How do we deal with that sort of thing?

MR SEKULESS (ATA): I believe that's actually dealt with through the recall process. So the product does have a hazard, it's dangerous, the product itself is recalled for that reason. The Bindeez product was going to be recalled, or was recalled because it had this hazard in it. It didn't actually need to have the banning order out there to make that happen.

MR WEICKHARDT: In practical terms what's the mechanism that would be used by the manufacturer of a product that had been banned to say, "I've now reformulated or respecified this product. It no longer contains the hazardous material. I want the banning order released"?

MR HAYMAN (ATA): I believe the manufacturer is in the process of going through this at the moment. What he has to do now is actually go and reach agreement with each of the individual regulators and say, "This is what's happening and I'd like you to take your ban back and perhaps change it to the hazard," but in reality the Commonwealth would put out a regulation addressing the hazard. So whether the states needs to as such I'm not sure but, yes, he would have to go and negotiate with each of the states and say, "The situation has changed. Can you please withdraw your ban?" They would probably want something in return, you know, to check his product development process to try and understand what happened, I guess. He's got to talk through it probably eight or nine times.

MR FITZGERALD: The manufacturer of that product is an overseas manufacturer, or is a local manufacturer?

MR HAYMAN (ATA): It's actually a local company. I believe the product was based on a Japanese product originally, but it was redeveloped in Australia.

MR FITZGERALD: So we don't have that problem of what happens on importation with that particular product.

MR SEKULESS (ATA): It was manufactured overseas.

MR FITZGERALD: So it was manufactured overseas.

MR HAYMAN (ATA): Yes, but it was developed by an Australian company.

MR FITZGERALD: Just the second part of that is, one of the issues around that particular product was the resurgence of the issue about how do you deal with imported products that potentially don't meet mandatory standards. I'm not quite sure in this case whether there's a mandatory standard that potentially could have been breached or not.

MR HAYMAN (ATA): Other than the Trade Practices Act statement that products should be fit for use and safe, because for us certainly that was an unknown issue which is kind of like the magnet issue that you may have also heard of. We weren't aware of the potential for harm of small, powerful magnets, until that happened, until they started being used in toys.

MR SEKULESS (ATA): The catch-all ones prevail.

MR HAYMAN (ATA): Yes, which hasn't stopped the industry from implementing standards and, as you know, recalling product that wasn't safe.

MR FITZGERALD: Can I just explore that for just a sec. We didn't detail with it in great detail in this report, although we did deal with defective products to a degree, largely because we felt with it in the other report, but can I just ask this question. To what extent do you believe that the Trade Practices Act and the equivalent fair trading acts which contain fitness for purpose provisions, or Sale of Goods Act depending on which one they're in, to what extent they need to be more actively used rather than a recourse to standards. Your comment is interesting that you believe that that product could be dealt with under the general prohibition, you know, theoretically.

MR HAYMAN (ATA): Yes, and I think it's a combination of both because the specific regulation that might be made identifies more something that's been experienced in the market, I guess, and really brings to top of mind for importers and distributors, and is probably a little bit easier to enforce.

MR WEICKHARDT: You made a comment that you have an issue where standards are adopted as a regulation but the requirement being enforced is entirely different to that as intended by the writers of the standard. Can you give me some examples of that and perhaps tease out for me why you think this has happened.

MR HAYMAN (ATA): I would imagine the reason it's happened is more political

in nature. A specific example that we have at the moment is a requirement for projectiles in New South Wales where the regulation is a direct adoption - sorry, it's not quite a direct adoption - there is some variation in wording from the toy standard, but because it's possible to interpret the wording in different ways it's been interpreted one way by the regulator and it's not the way the requirement was written or intended by the committee that wrote the requirement up. This was clarified both through Standards Australia and the International Standards Organisation where the requirement first came from, but that had no impact.

MR WEICKHARDT: So if I can paraphrase that whole expression, was this a conspiracy or was it an accident?

MR HAYMAN (ATA): As to why it happened?

MR WEICKHARDT: Yes.

MR HAYMAN (ATA): I don't know.

MR WEICKHARDT: But you say even after clarifications by the standards writers that that wasn't the interpretation the regulation continued.

MR HAYMAN (ATA): Continues to be misinterpreted and product which is perfectly safe elsewhere in the world is restricted in New South Wales.

MR WEICKHARDT: You said that you think that regulations that are based on standards should actually incorporate the entire standard into the regulation. Is that purely for accessibility reasons?

MR HAYMAN (ATA): It's accessibility and to remove a lot of the complexity. Currently if you want to understand a regulation you would have to have the regulation, you'd have to go out and buy the standard because the standard is not freely available, and you would then have to cut and paste the variations that might be made within the standard. That's getting beyond what the industry can actually cope with, let alone a consumer. If we want the consumers to be informed about whether a product that they're buying is actually safe or meets the regulations, I think we've got to enable them to have that information.

MR FITZGERALD: That's true, and I understand the point you're making and I understand that it has become a bit of a dog's breakfast in the sense of trying to understand the standards. On the other hand, the whole purpose of having standards and referring to any legislation is in fact to allow the standards to change and move, whereas regulation is actually very difficult to change, as you know. So you want the regulatory link, but you want the capacity for the standards to vary over time.

MR HAYMAN (ATA): Which is great, however, the regulators specifically make the comment that they do not want the standards writers to be making registrations. The standard can still change. That does not stop the standard from changing.

MR FITZGERALD: It's the part that is in fact mandated by regulation.

MR HAYMAN (ATA): Yes, and from time to time we actually want the regulations to be reviewed if there has been a change in the standard. Even now we have regulation and an example would be flotation toys which is being reviewed at the moment, but the regulation reflects a 1991 version of the standard. The standard was updated in 2002 and until Canberra thinks it's a priority that flotation toys get looked at above cigarette lighters and any number of other dangerous products, we have a regulation that reflects outdated product safety requirements. That's going to be a problem either way, I guess.

MR FITZGERALD: As I understand it in America isn't it the case that the regulator there is able to rule make. Here everything goes back through parliament in terms of regulation. I may be incorrect on this, but I thought the American system had a capacity for the regulator to be a rule-maker as well, but I don't know whether that's so and I don't know whether that overcomes the problem we're talking about. There is this difficulty in the current system.

MR HAYMAN (ATA): Yes, and I don't think that this review will fix that problem because regardless of whether the regulation refers to a standard or actually writes the standard out in full, it's still going to depend on the regulator going back and revisiting the regulation before it gets updated, unless of course he refers to an undated version of the standard which is not common.

MR SEKULESS (ATA): If you go back, you look at food when food was, you know, the National Food Authority came out of a IOC report picked up by an incoming Labor government and by COAG on of the first things that the newly formed National Food Authority did was to make the laws governing the production and sale of food online and accessible because it had been the nightmare of pasting little things in and making sure you had the vic reg and so on. I'd hate you to feel that was an impediment going forward.

MR FITZGERALD: Just taking that practical example, is it possible for the ACCC to do the same? Can you get there without having to change entirely the system that we currently have?

MR SEKULESS (ATA): I would expect there might be something about Standards Australia revenue where maybe the government has to pay for the right to use the

wording, I'm not sure.

MR FITZGERALD: Interesting you should say that. I am familiar with that issue, that's true. Thanks for raising it. For those that don't realise, we also did an inquiry into Standards Australia and laboratory accreditation so we're familiar with some of those issues.

MR WEICKHARDT: You make a comment that the Trade Practices Act only applies to corporations and you say, "Clearly the act needs to be updated so all entities that sell 'in trade' are caught." You have a constitutional way around the impediments to that, do you?

MR HAYMAN (ATA): No, I don't, sorry. We're just saying that we're aware of the issue and they understand that that's one of the state's rationales for continuing with the existing system which clearly is the way around that needs to be found.

MR SEKULESS (ATA): It's an issue for us, the sole trader issue is a problem in the toy industry. We haven't got a way round it, but, yes, it's problem.

MR FITZGERALD: Just finally, from my point of view, people's assumptions in relation to the toys is that they're all covered by standards and, of course, that's not true. There is a universal standard or a European toy standard that we have adopted to some degree.

MR HAYMAN (ATA): Not quite correct. There is a European standard, there is an American standard, there is an international standard which is the one that we've adopted, with some minor variations because there were some specific things that we didn't agree with.

MR FITZGERALD: So we've adopted the international standard?

MR HAYMAN (ATA): Correct.

MR FITZGERALD: Fine. To what extend does that now cover all toy products? Does this now have universal application to all toy products that are manufactured in and imported into Australia or are there still products that are not bound by that standard?

MR HAYMAN (ATA): By definition a toy is a product intended to be used in play by a child from zero to 14 years of age. The standard is made up in a number parts, there's mechanical and physical properties which is part 1; part 2 is flammability; part 3 is the heavy metals part; there's other parts covering organic compounds and so forth. Any product that is defined as a toy is covered by those standards.

MR FITZGERALD: By the international standards in relation to those various component parts.

MR HAYMAN (ATA): Correct.

MR FITZGERALD: Is the international standard now mandatory in Australia?

MR HAYMAN (ATA): No, only the parts of it that have been mandated by our laws.

MR FITZGERALD: When we say we've adopted the international standards, that's in general terms, but in terms of mandatory requirements, it's still fairly specific. Is that correct?

MR HAYMAN (ATA): Yes. Standards in general are put in place as voluntary requirements and the regulators tend to look for specific or if they've identified specific issues - small parts for children under 36 months is the biggest one. They mandate those particular parts of it to give surety.

MR FITZGERALD: So in a sense consumers become confused because in one sense it looks like there's a standard that covers it, but when you actually look to what is mandated, it is much narrower and much more specific.

MR HAYMAN (ATA): I think the standards though are written and intended for the use of industry more than consumers. They're not highly readable by consumers and I would think that consumers become more aware of things as they become made regulation perhaps and in fact that's probably a good way to bring it more to the consumers' attention, so those parts of it that are most critical.

MR FITZGERALD: One last comment, and again I'm pushing the boundaries of this inquiry, given that we've looked at it in another. A lot of the discussion in recent times has been around the manufacture of products in China. I'm sure some of that criticism is justified and some of it is not. But that level of discussion and public interest, does it require a different approach than the approach that we currently have in Australia or do you believe as an association that the current arrangements we have, subject to the things you've commented on, are sufficient to satisfy the requirements of consumers in relation to safety and concerns?

MR HAYMAN (ATA): I think the arrangements that have been proposed with a single national law will certainly be sufficient. I think whether a product is manufactured in China, in Australia, in America the same rules should apply and in fact some of the additional requirements on lead in toys were more restrictive coming

into Australia than they were if you actually manufactured a toy in Australia because that requirement existed in customs legislation but did not exist if you had actually made the product here. As to manufacture in China, probably 80 per cent of the world's production of toys and many other products is made in China. China is a place where you get what you pay for. You can buy good product and you can buy bad product and the legislative or mandatory requirements in the country need to govern what the suppliers are going to go out and buy. My experience and contention is that you generally get better product out of China than you do anywhere else in the world, so long as you ask for it and specify it. They do have the ability to make good products.

MR FITZGERALD: Sure. Are there any other questions or comments? Any other final comments or areas that we haven't touched on?

MR SEKULESS (ATA): No, but I think that you make about the experience of the last six months, underlines the need for a national approach. To have nine different sets when we're dealing in a globalised market. It's not - I mean, China in 10 years' time, it may be Bangladesh, it may be Kenya but we are going to be looking at stuff that's coming in. It's a global problem and we're still trying to address it in a 19th-century way.

MR FITZGERALD: Thank you very much for that.

MR HAYMAN (ATA): Thank you.

MR SEKULESS (ATA): Thank you.

MR FITZGERALD: We'll now adjourn for lunch and resume at 2 o'clock when we're got another four participants in the afternoon.

(Luncheon adjournment)

MR FITZGERALD: We might just resume a little bit earlier so that might help everybody. If you can give your name.

MS COOMBRIDGE: Dawn Coombridge.

MR FITZGERALD: Any organisation you're representing or yourself.

MS COOMBRIDGE: Myself and the interests of consumers.

MR FITZGERALD: That's terrific. We've got a brief written submission, thanks, Dawn. So if you just want to make any comments and then we can have a discussions.

MS COOMBRIDGE: Yes, all right. I'll be brief, I'll just go through the - - -

MR FITZGERALD: That's fine, take your time.

MS COOMBRIDGE: Okay. My issue is about building insurance. It's called different things in different states but we called it building insurance. I want to talk about how it relates to consumer rights and how various organisations do or do not work together. We had a housing project and we had a contract with a builder to build our home. It was going well until it was 90 per cent finished, and it was an excellent builder, and the builder become insolvent. We didn't have issues with that at all because we thought that's all right, we've got insurance for which we pay over $4000 for, this is in 2003. Three years later we still don't have a 149 certificate, although we are living in our house. We do have interim occupancy. In the meantime we had lots of issues. We had issues with council because our project ceased to be actually managed by the builder of course because he was insolvent. We had lots of site problems; we had erosion and things like that. Our bank would not pay the final 10 per cent because they wanted to pay that when the project was finished, which is fair enough. So we had no money and we had no builder.

We went to get some legal advice which was next to useless. I think I knew more than the legal person at that stage. So we put in a claim to Vero Insurance because we thought they will help us out, we will get finance and they will help us with all the building, they will help us with the site protection and things like that, because the actual insurance is supposed to be - you are supposed to be able to make claims when the builder dies, becomes insolvent, or disappears. Our builder had become insolvent so we thought, here's our claim. Vero was blatant in its refusal to discuss things with us. The only time they ever rang us or actually contacted us was when there was a minor detail wrong on the form. Every other contact was initiated by us. They would write to us, but after we had asked what was going on.

After the 45 days when Vero hadn't responded and it's deemed to be that they are refusing the claim or something like that - I can't remember the finer details now - we went to the Department of Fair Trading and we ended up going to the Consumer, Trader and Tenancy Tribunal. I don't know what authority or power they have to assist but it was pretty mild. Vero turned up the first time and we tried to discuss it until at one stage Vero got up from the table and said, "No, we'll need to go to the actual hearing." We went to the hearing and Vero argued that we didn't have a loss and we were trying to argue yes, we do have a loss. The builder has gone insolvent. We don't know how to manage the project. We've got no money. We can't move into the house.

They wanted more information, so it was set down for another date and in the meantime we sent Vero information about finance and we'd sent it all to them before - we thought we had anyway. They didn't turn up to the second hearing, they actually sending a fax 15 seconds virtually before the hearing was due saying that they couldn't be there and - I can't remember what else they were saying. I'm not happy with the Consumer, Trader and Tenancy Tribunal. I don't think they were looking at actually properly and anyway in the meantime we withdrew that application because we found a very good bank, Members Equity, who listened to us and said they would provide the final 10 per cent finance. Then we managed to get a building person who we thought was okay and we continued to build the building.

We go not help from the insurance company. We thought they would help us, not only with finance, but with actually managing the site, liaising with council, all those things that the builder would have done leading up to the 149 certificate, and none of that happened at all. Every time I rang Vero they virtually didn't say anything on the phone. They just were so cool and so blatantly disinterested. What we're really want to know in relation to consumer policy, we think with builders warranty insurance that the basic principle should be all the same across the country and maybe with different states tailoring some things to their own needs. We think that the builders warranty insurance should cover all those things like helping the people manage their project or getting someone else to manage for them, all that liaison with council, and we're still having difficulties with council and this has cost us a lot more. It's cost us a lot more in health I'm sure too. Finally we might be getting to the end and we might have our 149 certificate by next year time, but it's just not good enough. When you pay for insurance, you really do expect that it will cover you for what you thought it was going to cover you for.

Even if Vero couldn't cover us, even if there was some clause that said they could get out of it, at least they could have talked to us about it. It's all that sort of stuff that was terrible too. So we just think that the builders warranty insurance needs to be much better, much more consumer-orientated, and perhaps state

governments should take it over themselves or at least have the option of taking it over themselves maybe with private insurers. I don't know how that all works, I'm just a consumer, but it's just not good enough how it's working now.

MR WEICKHARDT: It's a very sad story, I have to say, Dawn, and thank you for sharing it with us. Can you glean from anything that Vero hasn't said to you, or anyone else has said to you whether they are relying on some technicality? Do they claim that the builder wasn't really insolvent, or do they claim that you didn't really suffer a loss?

MS COOMBRIDGE: They knew the builder was insolvent. I mean, it had gone through those processes.

MR WEICKHARDT: He filed for bankruptcy, did he?

MS COOMBRIDGE: Yes, definitely, I've got papers to say that. They were very brief. The person who came to the CTTT, he was very brief, but he did say that we haven't suffered a loss. The person who was running the hearing said, "They did suffer a consequential loss," but when the words actually say you can make a claim when your builder becomes insolvent, and they're saying it's a last-resort insurance, surely that's the last resort. I think they were really not wanting to pay out and wanted us to go away. I think they were acting like that so that we'd get sick of it and go away, which we did. But I'm here today, so I haven't gone away.

MR WEICKHARDT: Good, I'm glad you haven't. We've got a submission from the Housing Industry Association, who will appear later in these hearings, who have disputed the comments that we made in our draft inquiry and have disputed that there is a problem. Indeed they say that our statements need justification and assume either the price of insurance is inappropriate for the risk insured, or broader category of risks should be covered. But in your case you're not arguing necessarily about the cost of the insurance nor for a broader category of risk. You're just saying even in the narrow category of risks the insurance was no good to you.

MS COOMBRIDGE: No, it wasn't. What more can you do that proved that your builder has become insolvent? I can't see anywhere where it says that they should have actually refused our claim.

MR WEICKHARDT: How did you attempt to demonstrate that you had suffered a loss?

MS COOMBRIDGE: Just the sort of things I've been saying to you, that we don't know how to manage the project, we haven't got any money because our usual bank will not pay out the last 10 per cent. To me that's a loss.

MR WEICKHARDT: Presumably, you were having to rent accommodation in the meantime, were you?

MS COOMBRIDGE: We were renting, yes. That's another loss, and all the going around there and trying to shovel all the silt back, and hiring skips to get rid of the rubbish, and worrying, and talking to council people who weren't very helpful, that's a loss. It was a loss of project management I think is the main thing. I must say too, two weeks ago we had terrible storms in the mountains, and our beautiful house, one of the rooms is absolutely flooded, carpet is flooded. Now it's within the six years that warranty covers that. Where do we go there? We're having to pay another builder, so that's another loss. We've actually lost that six-year cover too.

MR FITZGERALD: When you spoke to Vero at the beginning, what was the procedure that they asked you to follow? Did they say, "This is where you take your claim to"? Did anybody at any stage say, "This is the process which will now be followed"?

MS COOMBRIDGE: No, they received our claim and then they rang to say there was a minor detail wrong not, "Thank you, we've got your claim." I think then we may have got a letter saying, "We've received your claim," and there was some process there. Every time I rang there was just a stony sort of, "Yes, we've got that." I'm a health professional and I believe that their job is to guide the people along the way, but they obviously didn't want to do that. I think it was blatant that they didn't want to help. You'd have to be really, really clever and canny to be able to know the questions to ask them.

MR FITZGERALD: So when you went to the tribunal, the tribunal didn't recommend a means of having dispute resolution or anything, or was there a process that they recommended when you went to them?

MS COOMBRIDGE: I can't remember. They didn't say much at all. I didn't feel that we were being supported, or that the whole issue was being dug into and sifted out. It's like buying a loaf of bread.

MR FITZGERALD: When the tribunal finally met and as you say, Vero didn't turn up or what have you - - -

MS COOMBRIDGE: They turned up the first time, but not the second time.

MR FITZGERALD: Then you discontinued, you withdrew.

MS COOMBRIDGE: We withdrew following that because we just felt, no, we're

just going to do this on our own. Luckily, Members Equity helped us. If they hadn't come and funded that last 10 per cent, I don't know where we would be today.

MR FITZGERALD: Have you been able to tally up your the cost of the project now as compared to the cost of the project if it had been completed on time by the original builder?

MS COOMBRIDGE: I would be able to tally it up, but I haven't as yet.

MR FITZGERALD: My question there is: is there a possibility, or has anybody given you advice that you could still make that claim on Vero once you got the damages worked out?

MS COOMBRIDGE: No-one has. I mean, we've just accepted that Vero has gone, the insurance gone. Actually coming in on the train this morning I thought, maybe we could make a claim, but no-one has told us.

MR FITZGERALD: You actually made the claim within the right time.

MS COOMBRIDGE: Yes, we made it within the 12 months.

MR FITZGERALD: The problem is it hasn't continued on. I'm not saying you can. I just wanted to ask whether anyone had given you advice as to whether you could or not.

MS COOMBRIDGE: No, no-one from fair trading. We actually wrote to the then minister for fair trading. We got no reply from her. I actually rang the office several times and again I got this blank, stony, "Well, this is how the process works," so I wrote to the Insurance Council and I wrote to the local member and I wrote - no-one can help. No-one seems to know.

MR WEICKHARDT: Did you contact the Housing Industry Association?

MS COOMBRIDGE: No. I may have written the original letter to them as well. No, I wrote to the local member, the Insurance Council of Australia, the Insurance Ombudsman - that was a funny reply - Department for Fair Trading, Consumer Trading, and Consumers Association - no, I didn't, no.

MR WEICKHARDT: The minister for fair trading, no help.

MS COOMBRIDGE: No help.

MR WEICKHARDT: It's a very sad story.

MS COOMBRIDGE: I don't think that anyone knows what they're doing.

MR WEICKHARDT: You've said that copies of all this correspondence are available. Has the commission got copies of this?

MS COOMBRIDGE: I'm pretty sure you've got a copy of what we sent to - no, "Copies of the correspondence to and from minister, Bob Deveson, insurance are available," no, they don't have it.

MR WEICKHARDT: I think it might be helpful if we did see that because it's an interesting case study of somebody who appears to have been right in the eye of the area that this insurance is supposed to cover. Most people's complaint is that they've got a problem but it's outside those narrow sort of areas.

MS COOMBRIDGE: Yes, I was almost at pains to say we were happy with the building. It was an excellent building except for the problems we've had now, but anyway, it was. The builder was so good I think that's why he went insolvent. He paid his workers well.

MR FITZGERALD: In terms of the information, I presume you've gone back and had a look at the insurance policy now.

MS COOMBRIDGE: Yes.

MR FITZGERALD: If you can read it. I don't mean that about you. I mean, some of them are so hard to read, let me assure you. We've all entered into those contracts and I'm sure we don't know what's in them. But one of the things that is intriguing is it seems - and we've had now a number of people both in the first round of public hearings prior to our draft and subsequently, even in Melbourne the other day, who are very dissatisfied with this insurance and as I said genuinely, most of us have entered into it and very few of us have read it. But it does seem that people's expectations like your own as to what this insurance will deliver are very different to what it turns out to be.

MS COOMBRIDGE: Yes.

MR FITZGERALD: When you looked at it after all of this time and you said you wanted them to help you with this and that and the other things, did you believe that when you looked at the contract you were entitled to that, or was that just your belief? In other words, did you look at it and say, "Yes, I am entitled to this," after the incident?

MS COOMBRIDGE: No, it was my belief because it was my belief if we had engaged another builder then all what we'd expected our original builder to do would have been done in terms of all that liaison with council and that, that's been a big problem.

MR FITZGERALD: Have you been a party with other people that are in this same situation? Have you had contact with to been involved in any of the groups?

MS COOMBRIDGE: I've had some contact with someone in Melbourne, but only by email and phone, nothing sort of - - -

MR WEICKHARDT: From the sound of it, you've also sent Choice copies of this correspondence, have you?

MS COOMBRIDGE: Yes, I sent them copies too, yes.

MR WEICKHARDT: Did they follow that up with you at all?

MS COOMBRIDGE: It's interesting. They just sent me a copy of something off the Internet about business interest and fair trading. It seemed that by that time I knew as much as anyone, and that's very worrying. When the Department of Fair Trading doesn't know any more than I do, a layperson - - -

MR WEICKHARDT: Have you through your sort of journey here come across other people in similar circumstances to yourself?

MS COOMBRIDGE: No, only what I've seen on television and things like that.

MR FITZGERALD: I suppose when you engage the next builder, you have to have another set of home warranty insurance as well.

MS COOMBRIDGE: No, and I'm not going to say what we did in public.

MR FITZGERALD: No, that's fine, all right. The point that you've made and you've been constructive in sort of trying to outline what might need to happen into the future, which I'm very grateful for. One of the things that has come up is early alternative dispute resolution very early in the process and that's why I was asking before, at no stage that was made available to you, or people told you how that might work, because that seems to be a critical missing element apart from the actual insurance itself.

MS COOMBRIDGE: Yes, dispute resolution - - -

MR FITZGERALD: With the insurance company.

MS COOMBRIDGE: Apart from turning up at the Consumer, Trader and Tenancy Tribunal and sitting and waiting for the hearing to start and the person who runs it coming in and say, "Well, have you talked?" and both of us said no. He said, "Go way and talk," and that's when we tried to talk. We thought we were getting somewhere until Vero said something that we thought, there's something going wrong here. He was trying to get us to agree to something that we thought wasn't correct. Then we thought we'd better go back to the hearing and we'd better get some help.

MR FITZGERALD: There was no mediator. It was just you two.

MS COOMBRIDGE: It was just us two, which is fairly - you know. You've got this legal person from Vero, staring down the table at me and my partner, who were fairly mild-mannered and just want everything to work out for everybody. It's not fair.

MR FITZGERALD: The other thing that people will say is that - and I've already raised it - is a real lack of understanding as to what the insurance will achieve. Although, in your case, as Philip has indicated, the circumstances for which this insurance is meant to apply seems to be certainly triggered by insolvency.

MS COOMBRIDGE: Yes, it is.

MR FITZGERALD: The question then is whether or not there was losses, and that's a point of contention between you and Vero obviously.

MS COOMBRIDGE: Yes.

MR FITZGERALD: Okay. As Philip said, if you could get us some extra papers, that would be a helpful case study.

MS COOMBRIDGE: Yes, I will.

MR WEICKHARDT: In particular, it'd be helpful if you could give us any of the sort of correspondence or the claim lodged with Vero where you attempted to demonstrate that you'd suffered a loss, because all I can conclude is that, from what you've said, that they must be resting on the grounds that you didn't demonstrate you suffered a loss here.

MS COOMBRIDGE: Right.

MR WEICKHARDT: It'd just be interesting - not that we can investigate it - but it would be interesting as a case study to really understand that better.

MS COOMBRIDGE: Yes, yes.

MR WEICKHARDT: Unfortunately our role here is unfortunately not one that can help you, but maybe it can help consumers in your situation in the future.

MS COOMBRIDGE: Yes. As far as productivity in Australia is concerned, people might stop engaging builders to build their houses if they think that insurance is not going to cover them.

MR WEICKHARDT: Unfortunately it's not a discretionary item. It's compulsory in most states.

MS COOMBRIDGE: The insurance is compulsory. Therefore, they might think well, if it's not going to help, they won't get any more houses built.

MR WEICKHARDT: That's why they get the owner builder - - -

MS COOMBRIDGE: Yes.

MR FITZGERALD: I should just say - and Ian might be able to tell me - I think we have a submission from Vero, a written submission from Vero. So there is a written submission in from Vero, which will be on the web site shortly.

MS COOMBRIDGE: Yes, right.

MR FITZGERALD: You might care to have a look at that document.

MS COOMBRIDGE: Yes.

MR FITZGERALD: I don't think I'm dreaming, but I've actually read it. Is it Suncorp, which is Vero?

MS COOMBRIDGE: Suncorp.

MR FITZGERALD: Vero is part of Suncorp.

MS COOMBRIDGE: Yes.

MR FITZGERALD: So there is in fact a written submission by Suncorp - - -

MS COOMBRIDGE: That's another confusion.

MR FITZGERALD: - - - and as I say, I have in fact read it. So if you'd like to have a look at that, you may well then wish to give further comments to us, without necessarily going into all the details about your own circumstances, but my recollection of that submission was that, by and large, that particular insurance was working reasonably well, so I'd be interested in your own comments on that.

MR WEICKHARDT: They claim it is working well.

MR FITZGERALD: Yes, sorry. That's what I - - -

MS COOMBRIDGE: Yes. I suppose getting back to your comments then about - our claim might not have shown a loss and that's another thing I think people probably expect then the insurance company to come back and say, "Well, you haven't shown" - I mean, I know that sounds naive, but if we don't know how to say we've had a loss, who's going to help us?

MR WEICKHARDT: Well, at least you should have been able to find somebody who could have helped you.

MS COOMBRIDGE: Yes.

MR WEICKHARDT: It perhaps is a bit optimistic about human nature to suggest that an insurance company will necessarily say, "This is how you can help yourself to extract more money from us." But the world should work in situations like this to help people like you.

MS COOMBRIDGE: Yes.

MR FITZGERALD: But as I say, in closing, some of the stories we've heard previously have been even more devastating, because the losses have been huge and ongoing.

MS COOMBRIDGE: Yes.

MR FITZGERALD: So your story is very important and we've heard ones that are even more extreme.

MS COOMBRIDGE: Yes. That's probably why I've got some energy left to actually try and do something about it and the broader issue.

MR FITZGERALD: You may well have a house at the end of all this, which is

good.

MS COOMBRIDGE: Yes, we do.

MR WEICKHARDT: I hope so. Thank you for making the effort to come here.

MR FITZGERALD: Thank you - - -

MS COOMBRIDGE: Okay, thank you.

MR FITZGERALD: I don't think our next participants are here yet, Karen Cox and Katherine Lane. So we're a little bit early, so we'll just wait. They're scheduled for 2.30. So as soon as they arrive, we'll resume. Five minutes? Okay, thanks.

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MR FITZGERALD: We're still on time.

MR WEICKHARDT: We were about to have a division without the speaker here.

MR FITZGERALD: You know the drill. If you can give your full names and the organisation that you represent, and then we'll lead off with your main comments, and then we'll have a good discussion.

MS COX (CCLC): Okay. Karen Cox, coordinator of the Consumer Credit Legal Centre in Sydney.

MS LANE (CCLC): And Katherine Lane, principal solicitor, Consumer Credit Legal Centre, New South Wales.

MR FITZGERALD: Can I just clarify, have we received a written submission from you at this stage?

MS COX (CCLC): No, you haven't.

MR FITZGERALD: Fine.

MS COX (CCLC): We have actually contributed to a joint submission that's been prepared by a number of consumer agencies, but I don't think you've received that either at this stage.

MR FITZGERALD: No, I didn't think we had, so thanks for that.

MS LANE (CCLC): First of all, we'd like to thank the commission for the draft report and particularly to commend the commission on some of the recommendations. Of course the recommendations that we're particularly happy with are those about developing objectives and principles for consumer policy; improving enforcement powers for regulators; increased consumer input into policy development; increased consumer market research; better access to external dispute resolution for consumers; and of course better funding for civil and consumer law and for financial counselling. These are all positives things and things that we thoroughly support.

Of course our main reason for being here, however, is to talk about our somewhat disappointed response to the commission's treatment of credit. We appreciate that the commission did draw credit out as one area that unlike all areas of consumer policy did get some specific treatment, but we'd just like to make a few comments of response to that. Firstly, to update the commissioners on a few matters

discussed when we previously gave evidence in April last year. We reported then that our service had taken 9955 calls in 2006 from distressed consumers. The number for the 06-07 financial year was in fact around 11,300 and this year with the help of a little bit of extra money from the Office of Fair Trading we've already taken 8000 calls, which if projected forward will mean around 12,500 this year and in fact our busiest months are usually January to June as opposed to July to December, so that could be a rather conservative estimate.

This year so far just in 2008 we have received 59 calls to our credit and debt hotline from people who are facing imminent repossession of their home. That's more than the 49 days of the year so far and around 1.2 calls per day. Again, this is likely to be an underestimate because our solicitors also gave legal advice in relation to home mortgage products on 83 occasions in the same 49 days. Some of those would be an overlap because clients do ring in and speak to our financial counsellors and if possession proceedings really are imminent they will be referred immediately to a solicitor for legal advice as well. So there's some overlap but as you can see, with 83 calls for advice and 59 to the hotline, some of those are actually going to be calls that independently arrived via the legal advice line.

Financial stress in the community is real and in our experience it is growing. It's no longer just consumer representatives and welfare groups who are reporting this, but the major consumer credit reporting bureau, Veda Advantage, was quoted in the weekend media saying that there has been a 35 per cent increase in defaults on consumer credit agreements in the past year. It is our view that the commission has touched on issues in credit that are already being solved through other processes, but failed to grapple with the biggest single issue, which is responsible lending, or perhaps less emotively, matching credit products to consumer needs and capacity. While this issue was covered briefly in the House of Representatives home lending inquiry report, there is no concrete proposal anywhere on the table that we're aware of. There are some things in train in relation to credit card lending being prepared by the states, but there's no overarching attempt to grapple with responsible lending. To quote from the commission's report at page 388:

> To the extent that higher debt levels pose risks to the stability of the financial system and wider economy, other policy tools such as monetary policy and prudential requirements will generally provide for a more effective response.

While we understand the commission's statement, and we certainly concede a vital role for monetary policy and prudential requirements, we cannot accept that there is no role for consumer policy in the consumer protection framework. It is consumer advisers such as ourself who began sounding the alarm at around the turn of the millennium about serious and systemic mismatching of consumer loan product

to consumers' ability to pay beginning with credit card lending and quickly spreading to the home loan market. It is also within the consumer protection framework and credit regulation in particular that the possible solution to this problem would best sit. Attacking this issue via prudential regulations is clearly one part of the problem although, as we pointed out in our written submission, there are a number of lenders currently active in the market who are not subject to prudential regulation. Further, given the current situation in the US and the report put out by APRA itself last year about declining standards among lenders within their jurisdiction, we query whether prudential regulation itself doesn't need a bit of a shake-up.

Another part of the solution, however, must be at the level of the lender and the borrower. The developments in both the credit card market and the home loan market have brought down prices and created a variety of new options that would have been largely positive if there had been positive obligations on lenders and advisers and intermediaries to actively access ability to pay and for credit advice where it is given to take into account a realistic account of both the potential borrower's financial position and known aspects of consumer behaviour. To quote an example of that, our centre is currently helping around 15 or more - I think we've got 15 active files and a whole lot of other people we're shadowing on the telephone - who are trying to get compensation from a broker group called Sample and Partners. ASIC obtained orders for misleading and deceptive conduct and consumers were to apply individually for compensation. It's proving a very difficult and complicated matter to assist all those people. One of the basic problems here apart from a whole lot of misleading representations that led to people paying fees and higher interest, is that a lot of people were advised to take up additional credit or to make additional credit available just in case when they had no specific current purpose in mind - and our experience is that a large number of those people ending up using up that credit. It is simply poor advice.

Every day we talk to consumers who are long-term low income and yet have credit debt of between $5000 and $65,000. Obviously we have actually spoken to people with much higher credit card limits, but these ones are actually fairly common, the 40,000, the 60,000 not unusual. Every day we talk to home loan borrowers who are over-extended on their home loan commitments, some of whom have loans they could clearly never afford as a result of low-doc and no-doc products. Others have experienced changes of income, but even a cursory examination of their financial history would demonstrate that they have experienced volatile income problems for many, many years.

We note the commission's statement that while it is true that some of the innovation has resulted in an increase in risk for both borrowers and lenders, its overwhelming effect has been to widen the range of households who can get access to finance. We agree with that statement. Unfortunately, many of those borrowers

are now our clients because the finance they were able to access was completely inappropriate. For home loan borrowers this is likely to entail devastating disappointment and social upheaval as they are forced to give up the home they have tried so hard to purchase. We are not suggesting we should turn back the clock. Developments that have occurred in the finance sector can still deliver benefits. We are simply asking for simple checks and balances to be placed on lenders to ensure that we are not forced to turn back the clock by dire economic consequences.

We would further put forward that a targeted response that actually makes the lender look at the circumstances of the individual borrower is preferable to some possible broad based monetary policy type responses that will affect all people regardless of the appropriateness of that. There are some people who have access to finance now appropriately who would never had finance to before. That is a good thing. By making lenders look at an individual's needs and capacity we actually make sure we only fix a situation where it's required.

We also note the commission's comments in relation to the ACT legislation in relation to credit cards where it's alleged that consumers experienced delays in accessing additional credit after the Canberra bushfires as a direct result of the ACT legislation. We're informed by our counterpart in the ACT that they intend to take issue with the accuracy of that assertion. We would like to note that there is more than one way to achieve a desired outcome and that the unpopularity of the ACT provisions among credit providers does not denigrate from the basic proposition that there is a serious problem that needs addressing. Further, legislation that dictated a principle that lenders profess to agree with and proposed remedies and penalties for failure to comply, should present no significant risk to any lender which is behaving appropriately. Further, if responsibility for credit was to be transferred to the Commonwealth as is suggested in the report, we would envisage that most of the issues addressed in the commission's section on credit would have already been attended to by the states who are working through them at the moment. Responsible appropriate lending would be the most urgent remaining challenge.

On the issue of the possible move of credit legislation to the Commonwealth from the states, we actually support that and we were one of the parties who were calling for that, but we would emphasise that we would not want to see a lowest common denominator approach. It has been a long time coming but we think we have almost through the state system addressed many of the major issues that have been outstanding for the last seven or eight years and we don't want to lose that progress. In particular, the interest rate cap in New South Wales is extremely important to us. We have - we see very little problems now with small amount lending, very few coming through our door. Those few that are coming through are actually breaching the law and there is an option to deal with it.

With the closing of the loophole of promissory notes and bills of exchange towards the end of last year we have seen a definite drop in the types of complaints that we're getting. We note that Queensland is also about to introduce a cap. We have heard arguments from small amount lenders that the issue is responsible lending, not cost of credit. We would argue that number (1) it is cost of credit, that is a key issue but number (2) in our experience by forcing lenders to charge a reasonable amount for credit or a lower amount for credit, you force the lender to focus on that particular person's ability to pay because they can't rely on charging extra to other consumers or huge amounts on default charges to recoup their profits.

Another thing that wasn't specifically covered in the report, and we're not even suggesting, perhaps, that it should have but we'd like to just put it forward as an option is that there was suggestion that there could be additional funds for both consumer law and for financial counselling. We'd like to draw the commission's attention to the model we have in New South Wales where we do have independent financial counsellors in the community but the Consumer Credit Legal Centre as an independent community legal centre also employs financial counsellors who staff our hotline. The advantage that that gives us is that one, we have one central place where we can actually track trends in credit provision and in problems that are arising in credit because all the calls and all the records come to one place.

Secondly, and as importantly, we can also perform triage. So to everyone who calls us we actually make an assessment as to whether this person can solve their own problem going forward with a bit of help from us using fact sheets on our web site, sample letters, things we dictate over the phone, and people who actually really need a financially counsellor to assist them on an ongoing basis. That way we can provide assistance to more people for less money and we can ensure that those who end up referred to financial counsellors are the ones who are the most in need. I'd also like to remind the commission that in our written submission we suggested that one of the goals of consumer policy should be to guide against broader risk to the population or economy posed by particular business models or practices. We went on to say that the immediate impact on the housing market of mortgagee sales on any significant scale is one possible threat in the credit area.

A less immediate and less understood threat is the flow-on effect to the economy both nationally and internationally as a result of losses worn by lenders and investors in this sector. For example, nearly 100 per cent of subprime lending in Australia is funded via the capital market compared to only 7 to 25 per cent of the mortgage lending of major and regional banks. Since that time there has been a barrage of media coverage in relation to the collapse of the subprime market in the US. Our own major banks have taken the unprecedented step of increasing interest rates above and beyond the movements in the Reserve Bank cash rate. Further, the New York governor was recently reported saying that the subprime fallout may

trigger a tsunami extending beyond financial markets.

This brings us back to the objective for consumer policy posed in the commission's draft report. While the dot points contained in the overarching policy statement are to be commended, we feel that the opening statement itself is somewhat deficient. Firstly, it poses competitive markets as an end in themselves rather than in order to promote consumer welfare. We see credit as a prime example of a market in which competition can produce benefits but unchecked, many disadvantages for both borrowers and the broader the community. While we would suggest that the role of consumer policy should be to advance consumer welfare through fair, competitive and sustainable markets, we would also add that there should be a capacity to also consider the broader public interest. This may need to be done in concert with broader policy objectives and in consultations with other parts of government. But to say that these things are irrelevant to consumer policy and consumer regulation is a nonsense. After all, borrowers affected by the reason bank-initiated rises may not be the consumers that regulators had in mind in developing the credit regulation but they are also consumers.

MR FITZGERALD: Well, thanks very much for that and very focused opening comments. If I can just start. We obviously are concerned about the issues you've raised. I suppose the challenge is what is the best way forward on it. But if I can just put responsible lending to one side just for one moment, because I think that's - we need to explore that in much greater detail. The transference of consumer credit to the Commonwealth - and I'm pleased you're supportive of it and I think you were, as you say, one of the supporters of it. We are concerned that the initiatives that are already in train are not lost.

MS COX (CCLC): Or even delayed.

MR FITZGERALD: But what we avoided doing - and maybe you think this is not appropriate - we avoided endorsing any one or other of them on the basis that there had already been agreement and that we hadn't the time to actually go into each and every one and re-assess them. So we took a view that given what the consumer groups and government had said to us that there was widespread endorsement for the package of measure that would go forward and be taken into the national regime. But there is an issue about that. You may have a view. Should those changes be effected first before there's a transference or should they be transferred - the powers transferred and then introduced by the Commonwealth? Now, you may have no view on that but there is actually a transitional problem - - -

MS COX (CCLC): Yes.

MR FITZGERALD: - - - now that we've got quite a number of proposals that

appear to be agreed by the jurisdiction. So just a very practical issue, if I can start with that narrow point.

MS COX (CCLC): Did you want to respond to that or do you want me to?

MS LANE (CCLC): Look, obviously what we're worried about is making sure that those protections remain in place continuously so the transition wouldn't affect it. As long as that occurred then, you know - that would be the overarching - you know, that would be the most important thing.

MS COX (CCLC): Yes, I mean in a way we would be happy to leave it for those in government to determine the best way of doing it but our main concern would be to ensure that (1) the things that we're waiting for come in as soon as possible and (2) that there is no sort of glitch in the transition process. I mean, to take an example, our understanding is there is a broad-based agreement across the states about bringing in external dispute resolution but Victoria has decided to go it alone and introduce a bill to say that it's now a condition of registration. We'd like New South Wales to jump in and do the same thing right now because we've got a mortgage meltdown in western Sydney, we've got a lot of borrowers - a lot of lenders who aren't necessarily in external dispute resolution and we want them in yesterday, not in three years' time when the Commonwealth has finalised the process for taking over credit.

MS LANE (CCLC): That's right.

MR FITZGERALD: Well, I don't want to sidetrack. I won't get sidetracked. I'll just come back to that, because there's an issue you have just raised. In relation to the package of measures that appear to be agreed between the states at this stage, are there - putting aside the responsible lending issue just for one second, there seems to be widespread support for those initiatives, and you've mentioned a couple today. So in our report, which is going back - we didn't go through them line by line but were there issues that you believed that needed to be given greater emphasis or are you satisfied that that package is well on its way to solving some of the issues, not all of them but some of the issues.

MS LANE (CCLC): Well, it's going to solve some of the issues but one of the things that occurred to me when I was reading the report and thinking about what they're going to be doing in terms of that package is that the biggest problem is still enforcement. The package of issues is not - I mean the fair trading agencies are often telling me they don't have enough powers to actually effectively enforce. I mean, for example, it took them three years to get rid of one dodgy broker. I mean one little dodgy - it's Supreme Court hearing after Supreme Court. I mean it's just ridiculous. Meanwhile, they took thousands and thousands off dollars. So for me that's still an

enormous problem.

Going back to the previous point is that one thing I'd like to see is if the under-resourced fair trading agency - one of the biggest problems I see - reasons we're wanting to move it to the Commonwealth is to get resources onto enforcement and to have really effective enforcement. So that was one thing that could go across earlier for me, whereas the laws - that can transition across later. But to me that's one of the things that's massively missing from the current package.

MS COX (CCLC): Can I just say though that although we do support that we are a little concerned about leaving no residual jurisdiction for enforcement with the states, simply because there are occasion with very localised issues that it's actually hard for us to grapple with the idea that they would be priorities for the Commonwealth.

MR FITZGERALD: Well, can I ask you a question just on that, and I'm conscious that you may or may not want to comment. We have made this recommendation on the premise that ASIC would have a very active - a proactive interest in this area. In the lead-up to the draft there were some doubts cast by various participants to the inquiry that that would be the case, because as you say, it's all about enforcement, the willingness of regulators to act and the ability for them to act. Have you got any comments about that issue, about ASIC's capacity and willingness in this area?

MS LANE (CCLC): Well, I think they've got enormous capacity and willingness. I just think that it would be really important that their brief when it came across was to deal with local issues in areas as well. I think there does - I agree with Karen, of course, that there needs to be some residual enforcement powers but what we really want is - I mean, ASIC does concentrate on local areas as well already due to particularly disadvantaged Aboriginal persons and so forth who have been exploited in relation to credit arrangements. We want more resources and more enforcement to make a fairer market to occur, so the answer is yes.

MS COX (CCLC): I think our concern with the overall enforcement thing is that whereas we think ASIC probably does make very good choices in terms of identifying priorities there still will be, for instance, a local broker based in Chatswood - just to pull something out of the air - who's causing enormous havoc but really doesn't kind of rate on the national scale.

MR WEICKHARDT: Is the biggest enforcement lack of resources or lack of tools in the regulator's toolkit or their prioritisation?

MS LANE (CCLC): I think it's resources myself. I think the priorities do get a bit skewed sometimes in large government organisations. For instance, the highest priority at the moment for me is predatory lending, so every time I turn up to ASIC I

say, "Predatory lending, predatory lending, predatory lending," and irresponsible lending is the one thing that consumes our casework and everything else, but I don't think they have got that yet and I think they're only just getting it. That's the sort of thing that we want them to be reactive to the types of things we see on the ground, but resources, resources, resources.

MS COX (CCLC): I think that resources are definitely a large part of the problem but I also think there are some issues around tools and around powers and things like that because, for instance, a huge amount of resources went into getting rid of one broker in New South Wales. We're also aware of another case that was being prepared against another broker and we know this because we've got clients also involved with their own individual proceedings on foot. That broker has now gone into liquidation, so there's an argument that a lot of that enforcement work is going to have been a waste of time. But the only reason all that resource intensive work has to be done is because there's no barrier to entry in the first place, so there's no way people can be excluded, you have to mount a case against them and fight to have them excluded. Part of the problem there has been just that resources have had to be channelled into getting rid of particular people when there needed to be a far more comprehensive system in place to both include and exclude people from the market.

MS LANE (CCLC): Yes, negative licensing hasn't worked at all well in relation to brokers and credit. I mean, there's just so many dodgy groups out there and they're multiplying by the minute.

MS COX (CCLC): Another example, for instance, is with the business purposes declaration loophole. We would have liked Fair Trading to have taken more enforcement action to close that loophole a long time ago, but there's an argument that says that it's very difficult to take that action because they don't actually have jurisdiction until a business purpose declaration is actually set aside. If they have got to establish jurisdiction in each individual case before they can take any action, then you've got a barrier to effective enforcement.

MR FITZGERALD: In relation to that issue, in the mix of measures that are being contemplated for the uniform consumer credit code, a lot of those deal with the objections you raised with us previously in relation to some of those issues. But I'm not sure - and you can enlighten me if I'm wrong - that there's much in there about enforcement. Would that be right?

MS LANE (CCLC): That's right.

MS COX (CCLC): I don't think there's anything.

MR FITZGERALD: I suppose the question I've got - not being knowledgeable

enough on that - what are the enforcement powers that you would add to the uniform credit code, because we have made a whole lot of recommendations around general enforcement but this is quite narrow. I suppose at some stage it would be helpful for you to identify the additional enforcement measures that you would want to see assuming it went to ASIC, ASIC would have.

MS LANE (CCLC): Well, I do want to mention the super complaint issue again because that got a bit killed in the - and I just can't stress enough that people like us who work in a legal centre where we see so many cases, have a really good idea what the systemic issues are. I mean, at the moment what I do is I have to ring up ASIC and beg and say, "Look, I think this is systemic," and all of those things, because I'm a public interest lawyer I know what is going to be systemic. I think getting rid of the super complaint mechanism, not even considering a super complaint mechanism is a mistake.

MR FITZGERALD: Can I just push you on that. We've had this discussion recently with a number of people about the super complaint - and it will come up in the issues. I suppose we came to a view that by and large, in relation to systemic issues in Australia, they will get onto the radar of the regulator through the active advocacy by a number of groups, and we were unable to see that a super complaint mechanism would necessarily achieve that objective. There is an issue about super complaints and that is it forces the regulator to deal with it and it forces them to respond and tell you back, so we understand that. But we didn't receive much evidence that regulators were ignoring significant systemic issues. You're saying that's not a right assessment.

MS LANE (CCLC): I do have evidence of that. I do not have a good relationship with the ACCC. When I refer systemic complaints to them - I mean, I don't think they're a very good regulator unfortunately.

MR FITZGERALD: ACCC?

MS LANE (CCLC): Yes, ACCC. I'm having a go at Mr Samuel just straight out.

MR FITZGERALD: He was here this morning.

MS COX (CCLC): You've dodged him.

MS LANE (CCLC): I've dodged him. But the answer is, when I wrote to the ACCC and said, "Look, there's one debt collector that's debt collecting across Australia statute-barred debts," they told me to go jump off a pier - well, in nicer words than that but still the same effect; whereas when I would go to ASIC - so in other words, there's political stuff in play. My impression is that the ACCC does not

value a consumer credit legal centre like ASIC does. I don't think it should depend on that. It should depend on the fact that I'm an expert and our centre is an expert in the area. We see the people, we know what the systemic issues are, we are entitled to a response. It took me six months to get one response from the ACCC about what I considered - we had so many cases - a serious systemic issue and it still remains unfixed. Political times and so forth, I don't think that's enough.

MS COX (CCLC): I agree. I think it's all very well to have a good relationship at a particular point in time with a particular regulator, but when those things are not functioning as well as they could then there needs to be a fall-back mechanism.

MS LANE (CCLC): Yes.

MS COX (CCLC): Can I also say that we would be loath to use a super complaint.

MS LANE (CCLC): We'd only save it up.

MS COX (CCLC): We recognise that that's something that would divert resources from what the regulator perhaps saw as a priority. We don't have time to sit around making up super complaints just for the sake of it. We would see it as something that we did use in circumstances where we felt there was an entrenched resistance to something and that was unjustified, and that the problem was big enough to justify our investment of time.

MS LANE (CCLC): Yes.

MR WEICKHARDT: How many agencies in Australia do you see in your perfect world would be blessed with the ability to raise a super complaint.

MS COX (CCLC): I don't know that I could answer that.

MS LANE (CCLC): My view would be that if you want to - - -

MR WEICKHARDT: Is it a handful or - - -

MS LANE (CCLC): It's a handful because in my little vision of the world, which is not what the world is, is that you'd have a consumer and credit legal centre in every state and territory of Australia and that you'd have - where there's civil legal aid, and those would be the only people entitled to raise a super complaint.

MR WEICKHARDT: But credit is not the only issue that consumers have problems with.

MS LANE (CCLC): I said consumer and credit.

MR WEICKHARDT: Okay.

MS LANE (CCLC): So they would be a specialist consumer, specialist credit, all in the same centre, like the Consumer Action Law Centre, or the Consumer Law Centre of the ACT. We're not consumer as well, but we dabble - - -

MS COX (CCLC): We're a financial services focus.

MR WEICKHARDT: Okay. Can you tease out for me what it is you think needs to be done in this area of responsible lending and in particular flesh out where better consumer education and better consumer responsibility comes into all this. It seems to me to be overly optimistic about human nature to expect that a provider of credit, who may not always have the interests of the consumer at heart but has their own self-interest at heart, even if they go through the motions of some sort of process, it seems a bit naive to expect that that's really going to work. It's relevant to your comments about the ACT credit card legislation, regardless of whether or not there was a problem with the bushfires and extra credit limits. The evidence we were given is that this extra check and balance just hasn't had any effect on default rates. So you put in place these processes, sound good and feel good, but do they actually have any beneficial effect?

MS COX (CCLC): On that specific point, we probably would be slightly different to some of our consumer colleagues on that. We wouldn't necessarily want the provision to look like the ACT provision, and in fact, we would be happy to sit down with credit providers and nut out something that even they thought might have some chance of being effective.

But what we want to see is that the principle of making some reasonable attempt to match products to needs and capacity was given some sort of legislative enforcement, not just because of the law, but because it could also then be applied by the external dispute resolution schemes, when they look at disputes, and we would like to see both penalties and remedies that were actually sufficient to drive behavioural change within the lenders who were not necessarily using best practice.

Our response, though, to your specific comments about the ACT legislation, I think that to a degree, you're right. It focuses on process, rather than outcome, and we think that probably a focus on outcome would be preferable - and I don't mean an outcome in terms of broad default rates. I mean, an outcome in terms of - - -

MR FITZGERALD: It's too late - - -

MS COX (CCLC): That's right. I mean an outcome in looking at, you know, if someone actually make a complaint and they're in trouble, if you actually look back at the process and go, well, you know, there was something they could have done differently that would have made - and not something unreasonable. They don't need to, you know, go knocking on the door of the person's employer to actually check they're there or anything ridiculous like that. But if you can see in retrospect that the process wasn't somehow deficient, then there should be some sort of response to that, and the ACT does very much focus on process, and not only that, it dictates the physical way in which that process has to take place.

You could actually have something similar that even did look at process, but didn't necessarily say it has to be written, it has to be done this way. A lot of transactions are done over the phone and online, and there are ways that those things could be facilitated. The other thing, though, is that there's this assumption, that to work, you would have to have this apparent increase in default rates. Yes, over a significant period of time, that's probably correct. But we would imagine that in the short term, you could even produce an increase in default rates because a lot of the people we see when they get into trouble, actually just get more credit, which masks that difficulties and actually prevents them from defaulting area and pushes default further down the track.

The other issue I say is that I don't know how many other banks are provided data. I know the ANZ has been reproduced in the report, but I would have thought that the ANZ, at least in recent times, is probably one of the better ones. They've at least introduced some measures to deal with responsible lending. So it would be interesting to see if all the other data actually was the same.

MR FITZGERALD: You didn't refer to the - you know, where does consumer education fit into this?

MS COX (CCLC): Okay. I didn't get to that bit. Look, it's very hard from where we're standing to actually see - I mean, we do consumer education all the time. We were actually drafting fact sheets over the weekend for our web site, to make sure they were up-to-date and current, and we spent a lot of time warning people about sharks and warning people about, particularly, at the moment, the dangers of refinancing once you're already in default on your home loan, because there are a lot of people out there who are trying to basically capitalise on people's distress and make a whole lot of money from whatever equity is left in houses. But it just doesn't seem to work, and it's a drop in the ocean compared to the marketing messages that are saying the contrary. I mean, even some of the financial services players who are active in the financial literary space, their own marketing is completely at odds with those same messages.

MS LANE: Yes, get a holiday, get a car.

MS COX (CCLC): Get it all now. Kill bills, just consolidate and then you'll have money left.

MS LANE (CCLC): Their left hand and their right hand don't even agree.

MS COX (CCLC): And at the very disadvantaged end of the market, we have clients who we have assisted at great length to try and get out of a very predatory loan, and rather than sell the house and actually take back some equity and walk away, we know that they have attempted to refinance yet again in what were probably similar circumstances - - -

MS LANE (CCLC): Another predatory lender.

MS COX (CCLC): - - - because the emotional attachment to that home is such that sense just does not prevail.

MS LANE (CCLC): Desperation and vulnerability. I mean, people over their house are very seriously - - -

MS COX (CCLC): I'd also like to say that I think that this whole thing that, you know, it's irresponsible borrowers that have brought us to this position of perhaps unsustainable debt - yes, there are borrowers who have done some very silly things, but by the same token, there are a whole lot of people who you hear talking daily now who say things like, "You should have seen how much money the bank was going to lend me. I need a lifestyle. I'm not actually going to take that up." There's an argument that we could actually be in a much worse position if it wasn't for the responsible borrowers in the community, of which there are many. The trouble is that there are enough people who are very dependent on lenders to make those assessments and draw those distinctions for them, and allowing them to simply lend - - -

MR FITZGERALD: Is the problem - I mean, you mentioned the House of Representatives Committee Review didn't come up with a recommendation specifically in relation to this, and nor have we.

MS COX (CCLC): Yes.

MR FITZGERALD: I would say that we've been very conscious of the problem, but I have to say the solution does in fact baffle us.

MS LANE (CCLC): But don't we have to grapple with it?

MR FITZGERALD: Yes. I was just going to say in response to this, is, is there a model emerging, internationally or nationally, that gives us some real guidance as to what you could do and that it would work? We're not asking for Rolls-Royce solutions, but given this problem is emerging, particularly in the USA and that, the danger is we'll get a lot of very quick knee jerk reactions to look like we're doing something. I don't know. There's probably half a dozen already happened. But in considering this issue, and also talking to some other people, people do recognise that, as you say, irresponsible lending or borrowing, either way, is and can be a problem.

MS LANE (CCLC): Yes.

MR FITZGERALD: But the solutions seem to be not with us yet. So where are there models emerging that give us a way forward?

MS LANE (CCLC): Can I mention that in some European countries - and I haven't got my predatory lending research with me, I might add - in some European countries, what they do is they just exclude the predatory lenders. Right? So they're not there at all. They have interest rate caps. They have all sorts of ways of doing it. I mean, I haven't been able to drift off across in a junket and work out exactly how they do it. But they definitely have just excluded the predatory lenders, and we follow the USA model, where we've well and truly got the predatory lenders here. We've got the same sorts of problems on a lesser basis because we're smaller, but we've got the same proportions of problems. That's my experience as a case worker, is that I see enough predatory lending to know that it's a significant problem. Even though it's minor, it's significant.

What the USA now is grappling with is exactly what we're talking about here, is the governor of New York said, "Why didn't you put regulations in place to stop these loans, because that's what caused all the tsunami to happen." You know, they've got property prices affected, and you know all this. What I want to say is if they're grappling, we've got to grapple. We can't not grapple, because if we just sit there and let this all happen, then we're going to be in exactly the same position that they are in, but we won't be causing the whole of the world to go into recession because we're only little, but we are going to have people who are going to deeply affected, and our economy will be affected.

So when I read your report, I know it's difficult, but we have to sort this out. We have to find a way to change the behaviour of our lenders. Now, I'm going to put it all on the table and say I think the predatory lending thing has a huge effect on responsible lending, and the reason is this, and the banks freely admit it, is that when the other Subprime group came in and just started doing low doc loans, and doing

those sorts of things, then the banks had to look at competing. So we had the low doc, no doc thing spreading everywhere, and then when you have one lender saying, "Well, I don't look at anything. I just asset lend and nobody is doing anything about it," then other lenders go and do it.

So we've had a ripple effect of having - for not excluding them, some like European countries did, and said, "No, you're not coming in," we let them in, and then they had a ripple effect throughout our entire responsible lending. What we have to do now, which is the tough bit, is we have to say, "Well, we've let them in, but we've got to actually pull back our lending requirements, so that the" - I mean, the banks are under pressure to compete. They have to deliver to shareholders. There's not just the banks. There's all the middle range, like the Aussies and the Rams and - Rams has gone - you know, the Resis, and they're all there, and that's all affecting them. So we have to now have enough credential requirements in place to make sure that we go back to the type of responsible lending that they see in Europe and so forth, instead of the USA model, which we don't want.

MR FITZGERALD: Do you have any concern that in the attempt to stamp out that predatory lending that you're concerned about that you might have some significant influence on the competitiveness of the lending market overall that disadvantaged consumers, because some of this sort of competition are these fringe lenders - probably did cut margin out of the banks, because they had to respond.

MS LANE (CCLC): Yes. I read a report in the New York - no, not the New York Times, the New Yorker, and it had a one - you know, there's a financial page and there was a one page on a person defending subprime mortgages. This was months and months before it got really bad. He just said, "Well, you know, people should be able to take the risk on their house to do these sorts of things, right," to go out and gamble it or whatever it is and put it in a business or so forth.

But I think what the point they're all missing is that there's an enormous difference between taking your house and risking it on business - because that's not what we're talking about. We've got people who just go to get a home loan or to refinance a home loan and they're not assessed for their ability to repay.

MS COX (CCLC): Can I - - -

MR WEICKHARDT: There seems to be - sorry.

MS COX (CCLC): No, well, I was actually just going to continue to respond.

MR WEICKHARDT: Please, go on.

MS COX (CCLC): I think some of the things that are already in train, particularly the regulation of brokers and some of the - and ADR, for instance, would actually be of enormous benefit to us in attacking the extreme of the fringe. Where I think you will see a problem remaining though is in the mainstream, because of that stuff that's now entrenched. I think it's going to be harder to wind back the clock than it was to just kind of let it go in the first place. It's also stuff like credit card lending that wasn't really created by - that's very much a bank problem. It's been the banks that have been involved from the start. That also needs to be addressed. The other thing is that whereas you're asking whether interest rates might be affected by stamping out the fringe, well, we're not talking about stamping out people like Resi and some of the other better known non-bank lenders who actually have provided probably the best competition on rates. What we're talking about are people who charge higher than the bank rates, significantly higher than the bank rates in some cases.

MR WEICKHARDT: But you - are you confident that you can sort of come up with some sort of surgical rifle that targets them and doesn't affect competition more generally?

MS COX (CCLC): Well, like I said, I think some of the changes that have been contemplated through the most recent packages of reforms, both the broker stuff and the fringe lending, will actually be fair, I hope - be fairly effective, particularly if there is that good enforcement, at the fringe. I don't think there is a lot of danger that that stuff will - I don't know whether - do you disagree with that?

MS LANE (CCLC): No, I agree. I think we can - - -

MS COX (CCLC): I think the bigger problem will be that having done that there will be a remaining responsible lending issue in the mainstream that may have been brought on by the competition but is not going to go away because once people have found a way to make money they don't usually undo that. Clearly, it's profitable enough overall that people are continuing to operate in that market.

MS LANE (CCLC): Putting something in consumer credit code that would deal with responsible lending as a stand-alone provision as a principle based with remedies and penalties would, I think, force behaviour change across the board and would - and more importantly, what my biggest problem at the moment is, is if you go to a dispute resolution scheme it's an enormous argument about what the law is in responsible lending to responsible lending. It's very unclear. We need some law to deal with this and so that at least the dispute resolution schemes can do their work and also do their work in terms of trying to get some behaviour changed. Then hopefully that will also mean with the dispute resolution schemes being compulsory and finance broker legislation that we'd exclude the peripheral as well. So I think it's possible to do it without affecting competition.

MR WEICKHARDT: Is there an example anywhere around the world where they've done that?

MS COX (CCLC): Look, I'm not aware that's effective. There is the reckless lending provisions in South Africa. They're fairly drastic. I don't know - I know when they were coming in but I don't know enough about what the result of that was.

MR WEICKHARDT: Right.

MS COX (CCLC): I guess - we have actually attempted to negotiate directly with industry and their associations about what such provision would look like. But unless there are of the opinion that they will have no choice but to do something - because someone's going to bring in something - they're not going to even enter that negotiation. Individual credit providers will talk to you but as soon as it gets to the industry association level there is a wall put up and they will do anything but actually introduce the provision.

Now, my impression is that if the government were to come in and say, "Look, we're doing it whether you like it or not," and just throw something on the table all of a sudden you would actually get a debate where you might come to a compromise where there actually was a provision where you could listen to the legitimate objections of credit providers as to what impact something might have but have the distinct intention that it will go forward regardless.

MR FITZGERALD: It strikes me from a long away that in America there was - there was the issue about whether or not the borrower could in fact afford to repay the loan but there seemed to be a number of other components - and you would know it better than me - you know, the whole structure of the loans themselves, so you started off with almost no interest and it ramped straight up; the fact that commissions were based on the level of interest that could be achieved over time rather than just the - there seemed to be a number of components in America which accelerated the speed of and deepened the crisis, together with a whole lot of other stuff in terms of securitisation of loans and all that sort of stuff, which is playing out.

To some extent regulating those sorts of practices - so you've got one where you simply say you have to assess; a bit like the ACT, you have to assess the capacity to pay. The other approach is to actually prohibit, control - whatever term you want to use, you know, practices that can be deleterious. I'm just wondering which approach is - not which approach is better but there seems to be two ways you can enter this problem, you know, attack the practices or go to the assessment end and then - - -

MS LANE (CCLC): Can I mention something about the - - -

MR FITZGERALD: Sure.

MS LANE (CCLC): - - - American issue that I think is - I mean a lot of people say, "Oh yeah, they started off with a low interest and then it went up and that."

MR FITZGERALD: Yes.

MS LANE (CCLC): But in Australia our predatory loans are actually more - - -

MS COX (CCLC): Insidious.

MS LANE (CCLC): More insidious and actually worse, because what the American one is they had the 25 year loan. All of our predatory loans are 12 months and then they get refinanced again with a huge amount of fees. So our people fall over much quicker than in America. They have to wait for the interest rate to go up.

MR FITZGERALD: Sure.

MS LANE (CCLC): So our predatory loans are pretty awful. But going on to what your question was, I just wanted to say that - - -

MR FITZGERALD: Yes. No, look, I think you - - -

MS LANE (CCLC): - - - I know a lot of commentators - I've listened to Radio National - say, "Oh, well, Australia doesn't have the same predatory - - -"

MR FITZGERALD: Sure.

MS LANE (CCLC): Well, we've got - our predatory loans are pretty awful.

MR FITZGERALD: Yes.

MS LANE (CCLC): Going to the approach . I don't like the ACT approach. I speak for myself and - - -

MR FITZGERALD: Yes.

MS LANE (CCLC): We've both spoken about this. I prefer a principles-based approach where you try and - you say what the standard is supposed to be and you try and get the behaviour change from it. So that's the way I think is the way to go. But what I think is a real risk is if we do nothing. If we don't do anything, low-doc

and no-doc and irresponsible lending are going to get worse, and we're seeing it all the time. So what I'm most worried about at night is if we do - this commission comes through and we say, "Oh, it's hard but - and we don't know whether it will affect competition," or whatever, and we don't do anything, then the predatory loan market and the irresponsible lending I think will continue to worsen and we'll get more and more clients. That would be a terrible outcome for me and for all my clients and for consumers generally.

MS COX (CCLC): Well, the alternative is that the lenders all get burnt and then they turn around and tighten things up for everybody, rather than actually addressing those who have a problem.

MR FITZGERALD: I mean given your comments that you're seeing the number of defaults accelerating, there must be some sort of impact on the lenders themselves now surely.

MS COX (CCLC): Look, I would have thought that some of them are actually addressing their criteria. Certainly some of the major banks I think are questioning some of the processes they have allowed to develop over time in terms of the networks of both valuers, brokers, introducers et cetera that they have come to rely on, some of which have no proven to be very reliable. But for the people at the very fringe that we're talking about none of that has any effect on them because it's all about getting equity out of property. It's not about actually people being able to service loans. So they're two quite separate issues.

I think in terms of setting the standard going forward it would be good to get lenders involved but we'd have to say, "Yes, we're just going to set the standard regardless." In some ways I think we need to set the standard because it needs to apply across the board. At the moment we're reliant on people like the ANZ Bank coming in and going, "Oh, we've got a responsible lending code," and then someone else throwing something. But really they're playing a game where they're going, "How far can we go without it losing too much market share?" What we need is for them all to be going at once, so that it's actually competition neutral.

MR FITZGERALD: Well, the question then is if you're starting to see so-called responsible lending codes develop, are there things in those codes that give us a way forward? In other words, quite often codes, if they're well developed, become very - have very good, you know, principles from which it became legislative later on. You know, we often see codes develop and those concepts get accepted within industry. It's not so far down that you actually see some of that being, you know, into new acts. So we'll be starting to see stuff coming from the industry itself that gives us a way forward. At the moment it's obviously voluntary and it's case by case and all that sort of stuff. But I mean are we starting to see something where you can

look at it and say, "That, in essence, is what you want to get to"?

MS COX (CCLC): Look, the codes - I mean you've got two extremes. On the one hand you've got the code of banking practice which takes a very sort of view principled approach to responsible lending and in fact it's a circular one that more or less goes, "So long as I'm doing what the other bank down the road is doing then we're all okay," because it talks about the prudent banker. So I think you've got to go a bit further than that because that doesn't get you terribly far at all, although it is useful on an individual basis and there is some law developed the ombudsman scheme as well - not law but, you know, guidelines and things that are quite useful in filling in some of the detail about what responsible lending looks like. The problem is that those things are not having a big enough impact. All that happens is, you know, a case here and there gets undone and some interest forfeited. Often those people have no money anyway. The alternative was probably bankruptcy, so it hasn't had any ongoing impact on the lender apart from the impact they would have always had for a bad debt. So I think that some of the principles developed by the ombudsman schemes could be useful if you could find a way of codifying them, but you'd need to have some stiffer penalty attached to make the banks change their behaviour, or to make other lenders change their behaviour.

At the other end you've got things like the ANZ code which talks about very specific measures. One that springs to mind is about flagging social security recipients because we see cases where someone who is clearly a social security recipient, they may even have their social security being paid into the same bank, is at the same time being saying, "Here, have another five grand, have another 10 grand, have another five grand," and their credit limit is going up and up and up. Often if you complain they say, "This hand is not talking to that hand. We don't necessarily know that you're a social security recipient," and we'll say, "But they wrote it on their application," but their application went into archives 10 years ago and they've been a good payer so we haven't looked back at that." So they've said, "No, every time we know someone is a social security recipient we will flag it until we know otherwise and that way we won't offer them additional credit."

I see that as getting down to the nitty-gritty, just like the ACT legislation is actually telling them exactly what you have to do. What you want is somewhere in the middle. For instance, I would think responsible lending looked something like you've got to ask someone what their income and liabilities are; you have to have some kind of verification process, whether or not it be for every borrower, at least for a significant statistical sample so people know it's a possibility that you might be going to check; you need to look at a credit report; and you need to look at their other accounts with the same bank; and you need to do things like record the information they write on their application somewhere useful on your computer so you can refer back to it in making decisions to extend further credit down the track. I don't think

any of that is that controversial.

MR FITZGERALD: But as you know and as is evident, it's often not on the original application the problem emerges - - -

MS COX (CCLC): But that's what I'm saying. It's about recording and retaining the institutional information about a person so that is available when further lending decisions are made. A lot of their objections around the cost and the automated processes, but if things were built properly you could build some of this into your automated processes. The ANZ is obviously trying to do exactly that.

MR FITZGERALD: Just linked to that, do have any research or informed knowledge that now tells us as to the nature of the bulk of the problem clients? You say low-income clients, but just taking your point about social security recipients, and of course that's now three-quarters of the Australian population, I know what you mean in that end, often what we do is, you know, only 20 per cent of what we do has 80 per cent impact, and the other 80 per cent bugger-all impact. So I was wondering here, are we getting a clearer picture of the target group to which we need to be especially concerned? So we're not going to pick up a hundred per cent of those that get themselves into trouble now, but is it that 80 per cent of the clients that are in difficulty are social security recipients? In other words, or is not, is there no pattern emerging?

MS LANE (CCLC): No, it's across the board.

MS COX (CCLC): Yes, the people that we would take on to assist intensively would be social security recipients because we would pick them out of the thousands who call in and say, "That's someone that we're going to help." In terms of the people who call us, yes, they're still around 30 or 40 per cent low income.

MS LANE (CCLC): I'm getting lots of high-income earners. I'm getting people from Double Bay ringing up.

MR FITZGERALD: I appreciate that, but sometimes when you look at it, whilst you get this spread, the concentration is at some point and you might be able to deal with the concentration if you can't deal with everybody. I'm just putting this up.

MS LANE (CCLC): I think it's the middle now.

MS COX (CCLC): I think there are three groups. In terms of the most extreme predatory lending and things like that, you've got a lot of social security recipients involved. You've also got a lot of social security recipients with large credit card debt, and older people that's the other group we're seeing increasingly is people over

60, both with home loan problems and with credit card problems. When we say credit cards, we include things like store cards, credit line, you know, any of the revolving credit options that are out there.

Then you've got a group of people who work but they don't have permanent jobs. They have very erratic income and our impression I think is that a lot of them are the ones who have home loans who perhaps wouldn't have got them before and a lot of them are the ones who are now in trouble because their income is not consistent. They may be now contract workers. There's a whole lot of people who are in that category there who are having difficulty maintaining payments on their home loan. But then you've got another group of probably your traditional middle-income people who both have the credit card and the home loan problem. The credit card problem is probably partly due to just consumer over-reliance, but also partly due to assessment processes, particularly where people have been given multiple increases. The home loan problem, I think that is partly due just to a relaxation of standards.

MR WEICKHARDT: Can I change tack a little bit. Towards the end of your presentation you started to talk about our objectives and I'm afraid I didn't follow all of that, although I have some training at home listening to somebody who speaks rapidly, but you were speaking very rapidly at that stage.

MS COX (CCLC): I'm sorry, I do that.

MR WEICKHARDT: You'd be surprised, this wasn't the first draft of the objectives.

MS COX (CCLC): No, I realise that.

MR WEICKHARDT: Do you have some suggestion of how it might be improved, because you'd be in good company if you gave us some suggestions in that area.

MS COX (CCLC): I would just like to see consumer welfare as more of a focus in that opening statement. Whereas I'm happy for competition to be in there, I think it needs to be very clear that the whole point we want competition is to promote consumer welfare. It's not competition for competition's sake. The reason I'm so concerned about that is that there are times where competition ceases to be healthy and I think that the whole policy framework has to be able to recognise that. The other thing is that I am very concerned about being able to take into account the broader public interest, not just sort of - - -

MR WEICKHARDT: Over and above consumer welfare?

MS COX (CCLC): I guess it comes down to how you interpret consumer welfare. My problem was that reading the language that's used in consumer policy generally is you're actually talking about the particular person purchasing a particular product at a particular time, and I would agree that 95 per cent of the time that's the person we're concerned about in consumer policy. All I'm saying is I think there are situations, and the whole credit mess is an example, where certain consumer policy decisions actually have the possibility of having ramifications for other consumers, not just that consumer, and you've also given your own example which is if you do something to protect a particular group and it drives up prices for everyone else. So it's about that balancing process of looking at both the individual consumers involved and the broader public interest.

MR FITZGERALD: Other people have made similar suggestions, so we're interested to see how that pans out.

MS COX (CCLC): I think another example of that is, for instance, in credit reporting. There is a debate you're probably very well aware of at the moment about comprehensive reporting versus the negative reporting system we have at the moment. I've completely forgotten where I was going with that.

MR FITZGERALD: That's all right.

MR WEICKHARDT: About the broader public interest and - - -

MS COX (CCLC): Yes, it was about the broader public interest. It's about risk based pricing. So one of the arguments is that if you get a whole lot of credit reporting information you can offer some people lower interest credit. But the flip side of that is of course there are other people who are being offered higher interest credit and the natural process is that those who are being offered the higher interest credit are probably those least able to afford more expensive credit. So there's a public kind of interest decision that has to be taken, or a social justice decision, whatever you want to say, to say as a community would we rather have some people not being able to get credit quite as cheaply as they would perhaps like and broader access to credit, because as soon as you broaden access to credit by making credit more expensive, as is what happens in the subprime market, then you've got a real danger of what's happened in the US happening. Those are the very people who can't afford it. They're being penalised for actually being poorer and having less certain income.

MR FITZGERALD: My last question is around ombudsman schemes for two reasons. One is we've made some recommendations in relation to the fact that all credit providers would be required to be part of an approved ADR scheme. Then we've made some specific recommendations in relation to the current ombudsman

schemes. Can I get your views, if you wish to give them, on the credit ombudsman service. You might have to declare your interest.

MS LANE (CCLC): I have to declare my interest.

MR FITZGERALD: I should just say that they are presenting at 4.30 and they've also given us a written submission, and also you might more broadly - the other financial service ombudsman arrangements have also put in a submission as well. I was particularly interested in credit because we're actually making some sort of new moves on that.

MS LANE (CCLC): Before I go on, though, to declare my interest, I just wanted to make a point. When I read the report, you were concentrating on credit providers and finance brokers, but there's a whole heap of mortgage managers and intermediaries so that needs to be added in. You've got to have the lot. So right from broker to credit provider, everybody who's in between must be in a dispute resolution - - -

MS COX (CCLC): We don't want anyone jumping out - - -

MR FITZGERALD: Is there any generic term that captures them all?

MS LANE (CCLC): Well, you just call them the intermediaries. You need to capture them, though, because - - -

MS COX (CCLC): Credit intermediaries, I think will cover it.

MR FITZGERALD: Okay, thank you.

MS LANE (CCLC): For example, if you go to Resi, Resi is not the lender, and therefore, you're all dealing with Resi, but actually the lender is somebody else. So you want Resi in, you want the lender in.

MR FITZGERALD: I don't want to deviate, but one of the issues there that ASIC is providing guidance on at the moment through their submission and otherwise is this issue about registration. One of the things they're saying is that you can only effectively get alternative dispute resolution through registration and/or licensing. So I presume - are you saying that not only do you want the intermediaries all to be part of the ADR schemes, but by - - -

MS LANE (CCLC): Well, it's going to happen with the broker legislation. That's one of the things we tried. In your report - you can either say, "Look, the broker legislation is going to cover all the intermediaries as well as - - -"

MR FITZGERALD: All right. So it's already going to happen.

MS LANE (CCLC): Yes.

MR FITZGERALD: It's just the way we described it.

MS LANE (CCLC): We don't like loop holes.

MR FITZGERALD: All right. So it's just the way we've described it, rather than - - -

MS LANE (CCLC): Yes.

MR FITZGERALD: Okay.

MS LANE (CCLC): I was just making a tiny little point.

MR FITZGERALD: That's fine. Thanks for that. That's exactly what it's about. So back to the credit ombudsman, back to your declaration, first of all.

MS LANE (CCLC): I'm a consumer director of the Credit Ombudsman Service. So I've declared my interests. So you might want to answer.

MR FITZGERALD: I'm not asking for an evaluation, whether you think it's good or bad. I presume at the moment it has a limited application, and we're about to say we need - - -

MS LANE (CCLC): Well, the biggest problem with the Credit Ombudsman Service at the moment is because it's only voluntary to be a member. So the banking ombudsman, the credit union, dispute resolution scheme, the financial - all those, the membership is compulsory, but the credit ombudsman has to grapple with an enormous problem with the members not having to be a member of the scheme. The only reason they have members of the scheme is because the Mortgage and Finance Association of Australia, as a condition of their membership, made it so that you had to be a member of the dispute resolution scheme. In contrast, the other industry body, which is the Finance Brokers Association of Australia, does not require membership of a dispute resolution scheme. They say they've got about 8000 members. They say they've got their own dispute resolution scheme, which is terrible. I've been to it. It's appalling.

So that's the kind of schisms we've got in that area, and the first thing that has to be done - because there's the whole issue of the Financial Ombudsman Service is

the whole merging of entities, and your report talks about that, and the consumer movement, of course, is almost completely supportive of the one access place. It just makes a huge difference to access if there's only one place to go to, and you go in there - my own view is that you just want to go to one big scheme.

MS COX (CCLC): It makes it a lot easier to write a fact sheet too.

MS LANE (CCLC): It does, and so you can just say, "Off you go." So the reason the Credit Ombudsman Service hasn't gone across is because - and I'm speaking as a consumer person, not as a consumer director - is that the membership is voluntary. So the industry association doesn't support it at this stage. One of the big problems is, is that - and this is true for any - whether you had a credit ombudsman or any other dispute resolution scheme, where the membership is voluntary, it's absolutely essential to make the membership mandatory, which is one of the recommendations of your report. So we need that to get the proper access going for the whole Financial Ombudsman Service.

MS COX (CCLC): There's a lot of people who've actually joined up, partly because they want their MFAA membership, but I think there are a few non-MFAA members.

MS LANE (CCLC): Not that many.

MS COX (CCLC): They do it because it looks good, because people like us, saying, "Check your lenders in EDR, check your brokers in EDR," but at the end of the day, if they don't like what the ombudsman is doing, they just leave and just drop out if there's an adverse decision.

MS LANE (CCLC): We've had one where we ran a case all the way through, and of course, when we got the determination, they left, and it was not paid. So we need it to be mandatory, absolutely essential, because the brokers just say, "I don't want to pay $8000," and go.

MR FITZGERALD: In relation to the recommendation, where we've tried to come up with an umbrella scheme within a common entry point, even though you have independent operations, you're supportive of that - - -

MS LANE (CCLC): I'm actually further than that. I just want a financial ombudsman service, but, you know, anything that improves access for consumers is a huge plus as far as I'm concerned. Just even getting the common number helps, because every time anybody rings me up, I just say, "Ring 1300 780 808 and you will find a place to go," because the credit ombudsman is in that. The financial - they're all in that now. It just makes it so easy to do it. Plus, I think in terms of

economies of scale, I think there's a lots to be gained.

MS COX (CCLC): I know we realised there are issues with managing the membership of the different types of industry provider, and I think there are ways of doing that. I guess the only thing I would add to that is that it's similar to the Commonwealth takeover, where everyone wanted to see a single dispute resolution scheme that had the worst aspects of those that are there at the moment - - -

MR FITZGERALD: No, and we'd be - - -

MS COX (CCLC): - - - of course, we would want the best.

MR FITZGERALD: Our approach has been cautionary on that. We've not said combine it and merge it, or we've just said - - -

MS LANE (CCLC): I think it will happen. I think that compulsory EDR is a big step in trying to get that to happen, but I think it will happen, but it'll happen naturally. I mean, I think that's all for the good of consumers, as long as we maintain very high standards, because how good a dispute resolution scheme is, you know, is completely linked to the outcome for the consumer, and in fact, maintaining a relationship with their lender. It's huge. Dispute resolution schemes can actually get a situation where they're actually happy to stay, whereas if it goes to court, I mean they leave always.

MS COX (CCLC): Forever.

MR FITZGERALD: No, we agree with that. Any other finals?

MR WEICKHARDT: No.

MR FITZGERALD: I think we're out of time. Thank you very much for that, and I look forward to seeing the submission as part of - - -

MR WEICKHARDT: What title will it come under, or what grouping will it come under?

MS COX (CCLC): Goodness me. I've got it here, the drafts.

MS LANE (CCLC): Model consumer submission.

MS COX (CCLC): Submission response to Productivity Commission draft report and consumer policy. I don't know if that's going to be its eventual title. That can just be a working title.

MR FITZGERALD: Sort of from whom will we receive it?

MS COX (CCLC): The people who have been involved to date. There's quite a number of them, but they include Choice, Consumer Action Law Centre, Consumer Law Centre, ACT, ourselves.

MR FITZGERALD: It'll list all their names, will it?

MS COX (CCLC): It will list everybody.

MS LANE (CCLC): Yes.

MR FITZGERALD: Okay. So we'll know you were party to it.

MS COX (CCLC): Yes. I think we had a fairly small part, though. It looks a lot at the non-credit issues.

MR FITZGERALD: Okay, thank you very much. That's terrific..

MR WEICKHARDT: Thank you for you continued passion and interest in the area.

MR FITZGERALD: We'll break for afternoon tea and resume at about 10 minutes time, if our participants are here. Grab a chair and we'll get underway. Other participants are not here yet? We've just changed the order for this one. You're okay? Thanks for appearing a little bit earlier. Our other participants are not yet here. So if you could give your full name and the organisation that you're representing, and then any opening comments you'd like and then we can have a discussion about those.

MR VENGA (COSL): Wonderful. Raj Venga, chief executive officer and ombudsman of the Credit Ombudsman Serviced Limited. Thank you for the opportunity commissioners to address the commission. As with our previous submission to the commission, I'll confine myself to the draft recommendation 9.2, which recommends that existing EDR schemes should be consolidated into a single umbrella dispute resolution scheme for consumers, but with the option of each scheme returning to independence within that new entity. There are really two points I'd like to make first up. At first it's difficult to see where the inquiry found support for its call for a consolidated umbrella scheme.

Of the 127 submissions received by the commission, about 19 referred to EDR schemes generally. Of those, only two, ASIC and BFSO, specifically called for a single dispute resolution scheme for financial services. Secondly, all eight ASIC approved EDR schemes already participate and pay for the FOS common call centre. FOS, is, of course the central telephone contact point for consumers wanting to approach financial services EDR schemes. When a consumer calls a 1300 number to discuss the complaint, the FOS operator transfers the call to the appropriate EDR scheme. All ASIC approved schemes are also active participants in the promotional, educational and training aspects of FOS. Therefore, FOS is, for all intents and purposes, already the single umbrella dispute resolution scheme for consumers.

We note that the joint submission to the commission from the BFSO, FICS and IOS, which is merging on 1 July this year, also acknowledges that FOS "will form the basis of the proposed umbrella organisation for all ASIC approved schemes." ASIC, in its supplemental submission states that the umbrella scheme is an extension of the proposed convergence of BFSO, FICS and IOS. ASIC goes on to say that it supports the convergence process but says nothing about whether it also supports the extension of the convergence process. If I may, I'd like to make a few points. (1) COSL has 8000 members and covers about 16,000 loan writers. 95 per cent of these operate as single operators, husband and wife teams and groups of no more than five operators. In other words, COSL's membership comprises small players in the financial services area. COSL does not have as members large institutions such as banks and insurers, and this sets us apart from other ASIC-approved EDR schemes.

Secondly, while convergence may be capable of providing efficiency gains, there is presently no overlap of membership between COSL and the other EDR schemes. This can be compared with the overlap of membership between for example FCDRS and CUDRC. Both have credit union members and bank members of BFSO directly or indirectly owning the overwhelming majority of financial planners who are members of FICS. The rationale for convergence is therefore not applicable to COSL as our members are not generally members of other EDR schemes. Conversely, members of other EDR schemes are not members of COSL generally.

Thirdly, a consolidation of EDR schemes is likely to result in a one-size-fits-all approach being adopted. One can reasonably expect that there will be a great deal of effort put into standardising processes and procedures as well as jurisdictional limits, and I'm not talking about monetary limits but I am talking about the jurisdiction to hear different types of complaints. While this may suit a merged scheme with predominantly large members, it is not appropriate for a mixed scheme of large and small members.

For example, the governing rules of each scheme have evolved, given their particular responses to consumer credit issues and industry-specific practices, but an umbrella model is likely to make, so far as possible, the governing rules of each scheme as consistent and standardised as possible. Indeed a discussion paper circulated by the Banking Ombudsman before the meeting of the EDR scheme chairman to discuss convergence last year noted that some large institutions, presumably the big banks, deal with more than one scheme and would find it advantageous if there was greater standardisation of process and procedures.

It follows that an umbrella model is at risk of being substantially less flexible or capable of responding quickly to changes in the relevant markets. COSL's ability to quickly respond to changes in industry is illustrated by the fact that we have changed both our constitution and our rules no less than three times in the last 15 months just to expand both our jurisdiction and coverage of the credit sector. Can I say also that COSL's membership does not support being in a single consolidated EDR scheme which may be geared towards institutional members, who they view, rightly or wrongly, as their competitors. I believe the submission from the Mortgage and Finance Association of Australia makes this point very strongly.

There is also no evidence that consumers are confused about which scheme they should direct their complaint to, particularly since all ASIC-approved schemes now subscribe to the FOS common call centre. Significantly, COSL board members are mindful of their duties as directors. For example, the duty to act for the benefit of the company as a whole will mean considering what is the benefit of the general body COSL members. Also, directors must not fetter the future exercise of the

discretions or delegate or abrogate the responsibilities in favour of another body.

Convergence may put them in a position where they are unable to assert adequate influence over the affairs of COSL. Having regard to this, we ask that the commission to either reconsider its draft recommendation 92 in terms of seeking a single consolidated EDR scheme or else acknowledge in its final report that FOS already performs the role of a single umbrella dispute resolution scheme referred to in the draft recommendation and that further consolidation of the EDR schemes is not necessary. I am happy to take any questions.

MR FITZGERALD: Good. Thanks very much for that, and thanks for the clarity of the submission you have put in to us. Can I ask just a couple of questions about the scheme itself. You say there's 8000 members. We understand from the previous participants, the Consumer Credit Legal Centre that members of the mortgage brokers association are required to be part of your scheme - - -

MR VENGA (COSL): Most categories are.

MR FITZGERALD: - - - But in relation to one of the other financial associations, that's not the case.

MR VENGA (COSL): FBA, yes.

MR FITZGERALD: FBA. So can I ask this question. Where do FBA members go for dispute resolution at the moment?

MR VENGA (COSL): Presently there's no requirement at law for them to be members of any EDR scheme. I have to say that our scheme would be the logical choice for them because of our expertise in the area. Because we represent small brokers, it makes sense. One person has one vote. We are not beholden to any large members, et cetera. We had discussions with them as to them recommending their members to join us when the legislation takes effect, which we think might be by early next year. But they're holding their cards close to their chests.

MR FITZGERALD: Sure.

MR VENGA (COSL): If I may - can I speak off the record, or something? No, actually I can say it on the record. I think there's a perception that we are closely aligned to the MFAA because (1) we were created by them some years ago, before we became independent, and because the MFAA requires most categories of their membership to be members of COSL or another EDR scheme, and they feel that as a different industry body they don't particularly want to buy into that, they feel that we may not be independent in some way. So it takes a bit of getting used to, and I'm

certainly trying to win them over in every way I can.

MR FITZGERALD: Can I just clarify, your members are brokers - or, are they actually credit providers?

MR VENGA (COSL): 95 per cent of them are brokers.

MR FITZGERALD: Right.

MR VENGA (COSL): We also have aggregators, mortgage managers, non-bank lenders, securitisation trust managers. So it's basically the non-bank sector.

MR FITZGERALD: So when we talk about in our report that we want to bring consumer credit providers under ASIC and either through a form of licensing and/or registration they would be required to go to ADR, that would bring in a whole range of credit providers that are not your members, because you have picked up the intermediaries but not the actual providers - - -

MR VENGA (COSL): No, we do have non-bank lenders. We have - - -

MR FITZGERALD: You do.

MR VENGA (COSL): We have the Bluestones and the - we had the RAMS, we have got Libertys and people like that, along with Perpetual Trustees that act for the - - -

MR FITZGERALD: But 95 per cent are actually intermediaries, not actually providers.

MR VENGA (COSL): That's right. But with 8000 members, 5 per cent is quite a lot.

MR FITZGERALD: Okay.

MR WEICKHARDT: But Katherine, who appeared just before you, was saying that she didn't feel we had been inclusive enough in including all intermediaries - - -

MR VENGA (COSL): Oh, only because some effort - - -

MR WEICKHARDT: In the language we'd use.

MR VENGA (COSL): That's all right.

MR WEICKHARDT: Do your members include all intermediaries?

MR VENGA (COSL): Well, except - sorry. The two groups of people we don't have are brokers who are not members of our scheme and not members of any other scheme, and very few brokers are members of other schemes. These are - they may be members of the FBAA, for example; although we do have some of their members. The other lot of non-banks are the finance companies, for example. Most of them have avoided EDR membership. Victoria is passing legislation to require all lenders to join an ASIC-approved EDR scheme, and already we're receiving a number of inquiries about membership with our scheme. That will be a template legislation for all the states.

So we think we will receive all non-bank lenders, finance companies, and of course, importantly, micro lenders; you know, the Cash Converters of the world, and people like that who are not in any scheme presently, who are not really regulated in any way apart from the ACCC. So we think membership will increase, probably double with this legislation - at least.

MR WEICKHARDT: In relation to the scheme itself, we appreciate that each of the schemes operate differently and have different membership bases. But when we were looking at this, we were looking at in a UK model which is, as you know, a single statutory scheme or, on the other hand, what you might call a free-market approach which is everybody can have approved ADR scheme and that's it. It did strike us that there were some reasonable gains to be made from putting an umbrella scheme, which still allowed the organisations some independence, clearly you're of the view that those gains are either not there or very minimal.

MR VENGA (COSL): I think they've already been achieved by way of the forced call centre. Essentially that takes care of any confusion. The consumer calls up, is not sure what scheme he should go to, call up the call centre, totally transparent, they get redirected to the relevant scheme.

MR WEICKHARDT: But if we put ourselves as a consumer, consumer entry point, the arrangements in the UK came about because of a consumer centric approach, that is, what would be the best scheme for us as a consumer. Ours have derived from the industries themselves, so they take on different forms of operating, largely not based on the consumer, but based on the industry of its members.

MR VENGA (COSL): Sure.

MR WEICKHARDT: I would have thought that in designing the schemes going forward you would want a number of common elements that are common in order that the consumer has confidence that irrespective of the scheme, not chosen by him

or her but chosen by the provider, then in fact they're going to get both a reasonable process and a reasonable outcome. So there are two ways to see it, one is the industry focus, or I think what we've tried to do is also try to take a consumer focus.

MR VENGA (COSL): As you should.

MR FITZGERALD: And therefore it's doubtful as to whether or not different approaches, radically different approaches is in fact warranted.

MR VENGA (COSL): One of the things - I was appointed in October 2006 and one of the things that I set out doing is to reinvigorate COSL We found, for example, there were complaints that we could hear or could consider that other schemes may not go for, for example, financial hardship. That's something we're getting many, many complaints about, financial hardship. There's a lot of mortgage stress around and people are generally suffering, consumers. We're finding that we're getting these complaints.

Now, we could take the view that if it was a credit code regulated loan that there's no compulsion on the part of a lender under that provision to do anything about it. So section 66 says if you're suffering some sort of financial hardship because of illness, unemployment or other reasonable cause you can make an application to a credit provider to vary your payments in a certain way. That's all it says. It doesn't say that the credit provider has to show good faith. It doesn't say the credit provider has to even get back to the consumer. It doesn't say anything, and we think this is - some schemes have taken the view that if it's not premised on a breach, because there is no positive obligation to do that, then they can't handle it.

We feel yes we can. We look at procedural fairness issues. For example, looking at section 66 we don't think a credit provider is entitled to take into consideration extraneous considerations, for example, requiring the consumer to seek the early release of superannuation, requiring the consumer to seek help from family members and friends, which they do. We think that's not a requirement of 66. You can't ask them to do that. We say there is an assumption that you will get back to the consumer within a reasonable time, because the clock is ticking. They've got 30 days from the day they get a notice of default, 30 days and they can be sold up. So they have to do the right thing, and we have been negotiating with our lenders to do the right thing by the consumers. Sometimes it does mean that the consumers are better off selling the property, there's no doubt about it, especially when it's been in arrears for a long, long time.

But the fact of the matter is securitisation programs are such that they require the mortgage manager or the security trustee to call up the default reasonably soon and sell the property if nothing is done. In those circumstances our industry is faced

with quite sift recovery action, and if it wasn't for our stand on this I think a lot of other people would have been sold up or not been able to negotiate fairly with their credit providers to come up with a payment arrangement. Very often it's that, people just lose their jobs for a short time. If there's no chance of ever paying back the money we can't help. But if there is a chance they should give it a go, and that's what we say. I've got to say we've never had a determination on this matter because we've always managed to negotiate it. If we didn't take that view we wouldn't have even bothered going down that track. So we've saved a lot of people a lot of grief, and I think that's important.

The issue of penalties, that's another thing we distinguish ourselves on, not deliberately but only because we think it's fair. There is a view, for example - and I'm not talking about common law penalties where it's more or less dependent on breach of contract. I'm talking about penalties such as if your direct debit gets dishonoured, for example, a financial institution tends to ping them for $50 or something like that. Other schemes will take the view that that's a commercial decision, it's not predicated on the breach because the actual term of the loan contract does not say, "You cannot dishonour payment." It says instead, "If you dishonour payment then we will charge you $50 for a dishonour fee," et cetera. Because it's not premises on a breach they say we have no jurisdiction.

We look at section 62L of the credit code, which says basically they should be able to break down their cost in doing so, and it is reviewable by a tribunal or court. So we say, well, we're not a court, we're not a tribunal, and we don't want to usurp the position of these institutions, but having said that, we are entitled under our rules to consider relevant law, and the relevant law is that it should be a genuine estimate of the loss.

MR FITZGERALD: Just going forward, and then Philip might have some questions, if our recommendations are adopted in relation to consumer credit we will have a situation where a very large percentage of the consumer credit market is provided by organisations that are already licensed under ASIC, banks and other institutions, and then there will be a whole lot of other providers that are currently not licensed or registered, and they will come into the mix. It strikes me just as a fundamental principle that you wouldn't want those consumers where, there's considerable concern at the moment as to how they're being handled, being dealt with significantly differently just because the provider is of a different character.

So if the provider of their consumer credit happens to be a bank or happens to be a mid-tier financial institution or it happens to be a small provider, I just want to press the point a bit, why should the consumer, who to be really frank doesn't care who they deal with, be treated in a different way, either more fairly or less fairly, because I'm not in any way indicating your scheme hasn't got real benefits. But it

just strikes me as a slight problem. Although I should say our recommendation doesn't say we want everyone to be the same. I mean, we haven't pushed that. But I am just pushing this point just a little bit further, if I can.

MR VENGA (COSL): Commissioner, I think that if you accept that people should be treated the same way then you buy into the argument that procedures and standards should be standardised and consistent as far as possible, it has to be. Is the lowest common denominator going to prevail? That's the question we have. We think that if we were to consolidate, for example, with a scheme that doesn't take into account things like financial hardship or penalties then we are in fact giving up something that is very, very important to consumers for the sake of toing the line or following the course of the larger entity. I don't know if that's necessarily the right think to do.

MR FITZGERALD: My last question, has there been any research done by anybody or any industry evaluation of how the schemes differ that you could refer us to? Is there a particular piece of work that would now say, "These schemes operate in this particular way," in a succinct form? I haven't seen it, I'm wondering if it exists.

MR VENGA (COSL): No. I mean, we can have one looked at.

MR FITZGERALD: I wouldn't go to the extra trouble.

MR VENGA (COSL): You have various publications here that pick up inconsistencies, but there's nothing in one particular document, for example.

MR FITZGERALD: If you find any you might let me know. It would be helpful, I would have thought.

MR WEICKHARDT: I guess my questions are in a similar area. You express in fairly colourful language your concern about a merged entity, huge converged polyglot, bank-dominated umbrella entity.

MR VENGA (COSL): Yes. Got to have a bit of dramatics.

MR WEICKHARDT: We certainly didn't have that in mind but we did see certain synergies from the point of view of the consumer in there being an umbrella entity and maybe FOS does achieve most of that. But based on some comments - and you seem to as an aside assume that our reports are sort of a mix of all the submissions added together and we just reproduce those.

MR VENGA (COSL): No, I don't. I'm sorry if it came over that way.

MR WEICKHARDT: There is some judgment, maybe some bias, but there's some judgment by the commissioners too as to how to weight all that. Our last people appearing before us made the point that there were a lot of common issues in t his whole finance area.

MR VENGA (COSL): There are.

MR WEICKHARDT: I would have thought that there would have been real value in these organisations sharing, learning: what are the common issues, where are the common pressure points? If responsible lending, as was asserted by the last people presenting to us, is a key issue, responsible lending surely is something that the banks - - -

MR VENGA (COSL): It should concern everyone.

MR WEICKHARDT: - - - as well as your intermediaries and brokers would be concerned about and developing some sort of code or practice, must have some sort of common learning associated with it. So how do you see those synergies being developed without your fear of this being a bank-dominated bureaucracy?

MR VENGA (COSL): Our rules quite closely reflect that of the terms and conditions of the banking ombudsman, there's no doubt about it. Most of the rules come from the same thing. But over time we have taken it a step further, and we think there are particular aspects in our membership that may be different from banks, for example. As I said, securitisation programs do impose certain obligations on the lenders to call up defaults faster than a bank would, or a credit union or building society for that matter. Whether you could have members coming from totally different industries sitting around - well, not literally sitting around a table, but having different views and seeing each other's competitors, I don't know if it's going to be good for industry. How does it make a decision? I mean, if you look at the - -

MR FITZGERALD: I'm not suggesting anything. You're suggesting that - - -

MR VENGA (COSL): No, I'm exploring the possibility.

MR FITZGERALD: - - - if you like, some proximity, some common discussions, some sharing of learning must surely have some benefits.

MR VENGA (COSL): I think we do do that though.

MR FITZGERALD: So umbrella is a fairly diffuse term. It means being housed

under the one structure perhaps in a way that at least facilitates communication between these groups.

MR VENGA (COSL): We do meet up at a roundtable with ASIC. We are cognisant of BFSO's bulletins. In fact the first port of call is always to make sure that we're as consistent as possible.

MR FITZGERALD: Okay.

MR VENGA (COSL): We don't believe in being inconsistent for the sake of it, I have to tell you. I only do it where I feel there's a need to be fulfilled from consumers, otherwise I'm happy with the BFSO's terms of reference, apart from certain things which I think, for example - only non-bank lenders, for example, have no voting rights whatsoever on a board, and the other peculiar thing about the rules is that only a bank can seek a determination from the ombudsman, not a consumer. The fear is that once you get into a position where you're putting people under an umbrella, the next step is then to standardise rules, standardise terms of reference. Even the constitution of the merged entity is now being - I don't know if it has been registered or whether it's been brought into existence, but it's meant to basically follow the BFSOs.

Now, these are three different organisations - let's be honest: one is stockbroking, financial planning, the other one is dealing with insurance. The common theme, of course, is that the banks have their fingers in all of these pies. I think it's likely that the banks will dominate the merged group because they basically own all the rest. On that basis I think if that non-bank lenders were to join a scheme like that under a more formalised umbrella, you may well have decisions being made or procedures being taken that may not be in their interest. If I may point out an illustration - I know we're looking at it from a consumer point of view, but at the end of the day I think everyone keeps forgetting that each of the ADR schemes are actually owned by its members. That's the bottom line. It's a company, it has to be considered as being owned by the members.

There are cases we know of, for example, where you have a broker who has been the subject of a complaint from a consumer. The consumer lodges the complaint, it is sheeted to the BFSO as opposed to us. What happens - and this is a case in question - is the bank in question had pressure put on it to solve this complaint, they paid out the complainant and then they turned to the broker and said, "Well, you pay us X dollars," and the broker said, "Well, I didn't get a chance to make my point," and they said, "Well, if you want to do business, that's what you'll do." I suppose that's the worry, you're talking about very, very disparate groups of people. On one hand you have the banks who would spend 30, 40, 50 thousand dollars on legal advice to put something to the BFSO to show that it's not a systemic

breach or whatever; on the other hand, you have Joe Bloggs out there who could only got to a suburban lawyer and spend maybe two hours at $150 an hour to get advice which is probably totally wrong. How can a broker ever get his concerns fairly treated in that environment? I think it's very hard. He's always going to be outnumbered.

MR FITZGERALD: No, I understand that point. We'll try to find some nuance language which preserves the best and yet allows some of those synergies to develop.

MR VENGA (COSL): My personal view is that the umbrella scheme is working very well, as it is now with FOS. We certainly participate in the educational and promotional aspects of it.

MR FITZGERALD: Sure. As you're aware the Banking and Financial Services Ombudsman, the Financial Industry Complaints Service and the Insurance Ombudsman Service - to give them their full names - intend to merge from 1 July this year. They say in their submission that it's envisaged that the new scheme will provide dispute resolution services for over 90 per cent of disputes that arise in relation to the provision of financial services . I presume that means non-consumer credit services because they're not in yet. How do you think that merger is likely to affect the smaller schemes, or do you see it as having no effect - it looks like you've got the giant and you've got the rest - if it is true that 90 per cent of disputes would be handled now by one single merged scheme?

MR WEICKHARDT: An even bigger giant.

MR VENGA (COSL): But not all disputes relate to credit so they could be in terms of deposit-taking, stockbroking, financial planning, I'm not sure in what proportion, but there's no doubt that they handle the large chunk of credit. Obviously the five banks, five majors, you're going to expect that most of the transactions will be dealt with by them. But having said that, something like 38 per cent of all loans written in Australia are written by mortgage brokers - written by them - but the banks may be supplying the money. You can look at it that way too. It's not just where the money comes from but who's actually dealing with it, who's actually introducing the consumers to the money.

MR FITZGERALD: Okay. Can I just ask the question, would it be the view of mortgage brokers, finance brokers, that if they were incorporated into a scheme in which the banks, for example, were participants, they would somehow or another be disadvantaged by that?

MR VENGA (COSL): I think they would, for the reasons I gave here.

MR FITZGERALD: Okay. Are there any other queries you've got, Phil?

MR WEICKHARDT: Maybe outside your sort of area that you want to comment on but in terms of making sure that all these intermediaries are members of an approved ADR scheme, we talked about registration in some cases and licensing in other cases. Do you have a view about the appropriateness of those two methods?

MR VENGA (COSL): No, I probably don't have much comment to make on that, only to say that we would love to see all of it being licensed for the simple reason you have a lot of shonky operators out there and this is one way of getting rid of them because licensing would always involve probity checks and criminal checks and educational qualifications and all that. The worst loans written out there are really not by my members, I've got to say. For every call we receive, every complaint received, at least two, we think, is about a person who's not a member of COSL or any other ADR scheme.

These are the people we have to get on board. Members of COSL generally do - if they're members of MFAA they would have done the educational requirements and probity checks. They're capable of being expelled and all that, so there are some sanctions there. Then you've got a lot of private money coming out. You have operators out there who would get their friends or associates to pool money together and they lend it. Now, is this legislation ever going to cover people like that, I don't know? But there are bigger problems there.

MR FITZGERALD: Thank you very much for that. We appreciate that.

MR VENGA (COSL): Thank you.

MR FITZGERALD: If you have any further comments or information that might be helpful we're happy to receive it.

MR VENGA (COSL): Wonderful. Thank you very much.

MR FITZGERALD: Do we have Nicholas Campbell. We haven't been able to make contact with them. In the absence of our other participant we might now adjourn today's hearing and reconvene tomorrow at 9 am.

AT 4.31 PM THE INQUIRY WAS ADJOURNED UNTIL
TUESDAY, 19 FEBRUARY 2008

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