

Model Consumer Submission in Response to Productivity Commission Draft Report on Australia's Consumer Policy Framework

March 2008

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1 Introduction

1.1 *About this submission*

A range of consumer groups met in January 2008 to discuss the Productivity Commission's *Draft Report of its Review of Australia's Consumer Policy Framework* (the Draft Report) and its recommendations. This document represents the collective views of those groups on the matters set out. Some groups have more expertise in particular matters, or the consumers for whom they advocate are more interested in or affected by particular issues. Accordingly some of the groups have or will make separate submissions which pick up all or some of the points made in this submission as well as additional matters not addressed in this submission according to their interest and expertise.

This submission has been prepared by the following consumer groups:

- Care Inc. Financial Counselling Service
- CHOICE
- Consumer Action Law Centre
- Public Interest Advocacy Centre
- WACOSS
- Consumers' Telecommunications Network
- Consumer Credit Legal Centre (NSW)
- Australian Federation of Disability Organisations
- Centre for Credit and Consumer Law, Griffith University

1.2 *Consumer groups welcome the Draft Report*

Consumer groups welcome the Draft Report. In general we endorse the analysis of most issues and endorse most specific recommendations. There are a number of important areas where consumers groups would like to see further refinement of the Commissions proposals and a few where we have come to divergent conclusions. These points are addressed in more detail below.

Consumer groups strongly support the following recommendations and believe that they represent the highest priorities for action by government in response to the Draft Report:

- introduce a nationally consistent generic consumer law (Draft Recommendation 4.1)
- establish objectives and principles for consumer policy (DR 3.1 and text)
- transfer regulation and enforcement of consumer credit and product safety to the Commonwealth (DR 5.2 and 4.3) and improve product safety regulation (DR 8.2)
- introduce unfair contract terms legislation (DR 7.1)
- provide new enforcement powers to consumer protection regulators, namely the right to seek civil pecuniary penalties, to apply to a court to ban an individual from specific activities, and to issue substantiation notices to traders, (DR 10.1) and require regulators to report on enforcement problems and their response (DR 10.3).

- increase consumer input into policy development and increase research into consumer markets (DR 11.3)
- improve ways for consumers to access remedies for breaches of consumer law through better external dispute resolution (DR 9.2), improved consumer claims procedures (DR 9.3), powers for regulators to take representative actions (DR 9.5) and increased funding for financial counseling and legal aid in consumer matters (DR 9.6).

Key issues in respect of which we urge the Commission to review its position are

- ways to promote fair contracts and in particular its approach to unfair contract terms legislation
- empowering regulators to conduct market inquiries and to respond to failing markets with tools other than disclosure
- the need to introduce a general provision relating to unfair practices
- the need for a super-complaints procedure.

We are disappointed that the Draft Report does not adequately deal with

- the potential for fair contracts legislation to enhance the efficiency of markets through building consumer confidence
- the potential corruption of markets through conflicts of interest, and the inability of disclosure to deal with that corruption
- the need for overarching legislation in relation to responsible lending (matching credit products to needs and capacity)
- the impact of the shift in focus of markets from goods to service and the impact this has on the capacity for price discrimination.

2 Policy Development

2.1 Objectives

Overarching objective

Neither competition nor consumer policy are ends in themselves but service a broader objective, namely consumer welfare. The objectives of consumer policy should make this clear. This involves essentially a refocusing of the proposed objective so that it focuses on the outcome (consumer welfare) and not the mechanisms by which this may be achieved (effective competition, fair trading and informed consumers).

The reference to competition should be qualified. Given that competition is not an end in itself it is appropriate to require that the object be 'effective competition'. Among other things this will help to direct attention to demand side as well as supply side issues.

For example:

To enhance the wellbeing of all Australian consumers through the promotion of effective competition and fair trading.

Operational objectives

The overarching objective recommended by the Commission in the draft report focuses on the role of confident consumers in the marketplace. So as not to lose this important aspect of consumer policy we recommend incorporating it into the operational objectives. The objectives proposed by the Commission recognise the importance of consumers being well informed so that they can benefit from and stimulate competition. In our view this operational objective should be slightly altered to recognise the importance of consumer confidence. Thus the consumer policy framework should aim to: “ensure that consumers are sufficiently well informed and sufficiently confident to benefit from, and stimulate effective competition.”

While consumer policy will most often deal with the direct interaction between traders and consumers in purchasing products and services, consumer policy must also consider consumers more broadly and the general public interest. As suggested in the Draft Report, there are many instances when the best fix for a problem is outside the consumer protection framework (eg income support), but there are also instances where policy formulation within the context of the consumer protection framework has social and economic ramifications that cannot be resolved simply by looking at “the confident informed consumer” or the impact on the disadvantaged and/or vulnerable consumer.

Credit, for example, is an area where public debate¹ is often about the degree to which the state should interfere in consumer choice to protect those who can’t make, and act upon, informed decisions about their own level of indebtedness, presumably to the detriment of those who can pay but may be needlessly excluded from credit by greater regulation. The far-reaching consequences of systemic unsustainable lending in the US sub-prime housing finance market, however, demonstrates the blinkered nature of that debate. Many decisions made within the consumer protection framework involve weighing up the consequences for:

- average and sophisticated consumers (those who have the potential to drive competition armed with quality information, also the group envisaged to possibly experience detriment when measures to protect group 2 are expensive or poorly targeted);
- disadvantaged and vulnerable consumers; and
- the broader community or public interest (often broader or longer term considerations such as the impact of disconnections from essential services on public health or the current increased cost of credit as a result of poor lending).

¹ As opposed to the debate between consumer representatives and industry representatives, which is less about whether or not they should lend responsibly, and more about whether they are already using best practice, whether they are stretching the boundaries intentionally to capture struggling but “profitable” customers, and whether the costs of additional processes are justified in terms of the outcome.

Obviously there is overlap between these groups and movement between them. Sometimes the interests of all three will point in the same direction, but often two or more of them are in tension. This tension, and the need to resolve it in policy formulation, is not sufficiently recognised in the suggested operating principles. Accordingly, we suggest the operating principle in relation to fairness and good faith be amended as follows: “To prevent practices which are unfair, contrary to good faith, or otherwise against the public interest.”

We also encourage the Commission to include an additional operational objective specifically incorporating the recognition of consumers rights.

Finally, despite devoting considerable discussion in the report to the field of behavioural economics and accepting that this knowledge may have a role to play in the design of consumer policy in particular circumstances, the importance of **evidence about how consumers actually behave** is not to be found in the proposed operational objectives or supporting principles. We think it should be.

2.2 Principles

The report proposes principles for consumer policy development to implement the objectives (but does not explicitly recommend that they be adopted.) In general we support the proposed principles however would suggest some minor changes. The Commission’s principles and our proposed improved principles are set out at Appendix G.

2.3 Strengthen Policy Development and Implementation

The Review makes many positive suggestions to improve consumer policy development including focusing on evidenced based policy, adopting a nationally uniform coherent generic law, and providing funding for consumer advocacy and consumer research. Consumer groups strongly support this approach.

Consumer groups welcome the proposal for a national coherent generic consumer law.

There are obviously some complex issues to be resolved in relation to:

- determining the content of that law where existing State innovations are perceived to be improvements on the Trade Practices Act/ASIC Act
- ensuring all traders are covered in response to constitutional issues
- the ongoing policy development process that will be required in relation to the law.

The discussion below is directed at strengthening the framework for policy development. There are also somewhat separate but also complex issues around the Commission’s tentative proposals in relation to a greater Commonwealth role in enforcement of consumer protection law which we address later in this submission.

States & Territories’ involvement in policy development

A national system of consumer policy will give the Commonwealth a greater role in the development and implementation of policy. The national system will nevertheless benefit from the continued involvement of the States and Territories in the policy development process. The process for this to occur should be clearly established in a Memorandum of Understanding (MoU) between the Commonwealth and States and Territories.

It is generally the practice of the Ministerial Council on Consumer Affairs (MCCA) to establish cross-jurisdictional working parties to develop options and consider responses to policy issues. Under the proposed national system, this practice should be continued. This will ensure that local and State-specific issues are considered in the development of policy options.

The MoU should also address the resourcing of State and Territory Governments involvement in order that cross jurisdictional work does not stall for lack of resources.

Voting arrangements for policy changes are also a key mechanism to ensure the involvement of State and Territory Governments continues in a coherent and systemic fashion.

Voting arrangements

Voting arrangements where policy changes only require the agreement of the Commonwealth and three states or territories will improve MCCA processes substantially but will give the Commonwealth control over the issues included on the MCCA agenda.

Consideration should be given to mechanisms to ensure that the States and Territories can add issues to the MCCA agenda and seek changes to the nationally consistent law in situations where the Commonwealth is opposed. One option might be to provide that policy changes proceed *either* with the agreement of the Commonwealth and three states and territories *or* the agreement of six states and territories. In addition or alternatively the states and territories could be given the right to make supercomplaints to ensure that their policy voice is considered on a particular matter by the appropriate regulator – armed as we recommend with the power to conduct market inquiries.

Implementation and COAG oversight

On 20 December 2007, COAG agreed that the Business Regulation and Competition Working Group's future work program will include analysing appropriate models for future regulation of consumer policy. COAG oversight will be instrumental to achieving reform in this area.

The Productivity Commission has noted that there are widespread concerns about the ability of MCCA to deliver timely and effective outcomes. MCCA is still to reach agreement on a way forward for product safety despite a Productivity Commission review which recommended a national system in March 2006. Strong oversight from COAG will be necessary to ensure the response to the current review does not similarly stall.

It is suggested that the Commonwealth could take the lead by adopting a strict timetable to achieve agreement on the content of the generic national law, its passage through Parliament and agreement on the detailed arrangements for its enforcement.

To this end it is also suggested that a maximum period of three years should be imposed for implementation, with shorter deadlines set for less complex changes such as increased enforcement powers and establishment of a national consumer policy research and advisory body. We suggest that under the auspices of COAG, a group could be tasked to manage implementation of the reform timetable.

It is therefore recommended that the Minister for Competition Policy and Consumer Affairs, following consultation with his State and Territory counterparts, appoint a Task Force to manage the implementation of the agreed recommendations, including negotiation with states and territories, and any necessary consultation with consumer organisations and any relevant business peak bodies.

It is envisaged that the Task Force could be appointed initially for a period of eighteen months. During the life of the Task Force, a proposed consumer research body may come into existence, and it could become involved in the implementation timetable.

Regulatory assessment arrangements

Concerns have been expressed that the Office of Best Practice Regulation (OBPR) and regulatory impact assessment processes have resulted in unwarranted delays to some policy changes. Simply changing the ostensible policy making responsibilities would not necessarily remove the potential for this, particularly if there was tension between state-initiated policy and Commonwealth OPBR or equivalent.

Problems of over focus on some costs and benefits and inadequate attention to measuring cost of non-intervention on the consumer side will also need to be addressed in these processes. A strong base of evidence will assist.

Policy development should incorporate research about consumer markets and consumers' actual experience in the market. This must be a permanent feature of policy development, not reliant on "ad hoc" or "single issue response" arrangements.

Further, given the increasingly international nature of consumer markets, policy development should also be able to respond proactively to problems apparent in overseas markets without necessarily having to wait for those problems to manifest themselves in Australia.

Role of the Regulators in policy development

While there is clearly a case for the separation of enforcement and policy development, the knowledge of regulators about market activity and the effectiveness or otherwise of various possible regulatory responses must be given a strong voice with policy makers.

In consumer credit, for example, there needs to be greater communication between the consumer protection regulators, the Reserve Bank, APRA and the relevant policy makers (in both the consumer protection arena and broader monetary/economic policy). This has started to happen very recently, largely as a result of the US sub-prime crisis, but it needs to be a permanent part of the policy development landscape.

Another example is credit reporting. The debate about comprehensive reporting is currently taking place in the context of a review of privacy law (because that is where the relevant regulations are located), when clearly there are economic, consumer protection and social justice ramifications.

We recommend that the de facto role of regulators in providing policy advice be explicitly recognised and adequately resourced by the Commonwealth (this is not generally a problem at State level where regulators and policy agencies are normally co-located).

2.4 A National Consumer Policy Research Advisory Body

The Commission's draft report does not support the establishment of a national consumer policy research and advisory body.

In our submission such a body is essential to maximise the benefits of the new consumer policy framework. The Commission's alternative – contestable research funding – does not adequately meet the need.

First, a contestable research model will not meet the need for whole of government and across government advice on consumer policy. Second, a contestable research model will not build up the necessary expertise.

In its discussion of institutional arrangements for funding consumer advocacy and research (11.6) the Commission has considered the issue of the capacity of the non-government consumer movement to contribute to public policy. It has positioned this discussion alongside the issue of the need for a separate consumer policy research and advisory body within government.

In our submission these are quite separate issues. A separate national consumer policy research and advisory (NCPRA) body within government would be expected to fulfill the role of facilitating consumer movement input and producer input, and partly informed by that input and by its own independent, impartially designed research give policy advice to government. An important characteristic of such a body is that it has industry and academic members as well as consumer advocates. It is true to say that it can be difficult to balance differing views from within the consumer movement and between it and producers and other social movements. However, this has to be done at some stage in the policy process. Sometimes it will be appropriate for a consumer policy research and advisory body to present the range of policy perspectives and allow ministers to do the balancing. Sometimes such a body would give its own policy view. The National Consumer Affairs Advisory Council (NCAAC), which operated in the 80s and 90s with

limited resources, operated very successfully in this way, although to a more limited brief than we see as necessary for the NCPRA. Its descendent, the current Commonwealth Consumer Affairs Advisory Council has made some useful contributions, but is too poorly resourced and is insufficiently independent.

There is another major distinction. A research body would have powers to access information held within government and powers to have its advice considered in various policy formulation processes. Such bodies play an “intra-state” research and advocacy role complementary to the “extra-state” role of the consumer movement.

In the UK, the existence of the National Consumer Council does not appear to crowd out the views of other consumer organisations. For example, at least 13 of the submissions made to the UK Government's 2006 consultations on proposals to strengthen and streamline consumer advocacy appear to have come from consumer-focused organisations.²

Similarly, in Australia the National Competition Council does not appear to limit the input on competition policy by producers or consumers. Just as the National Competition Council was established by all Australian governments to act as a policy advisory body to oversee their implementation of National Competition Policy (NCP) a similar body on consumer policy is needed. A statutory and well funded national consumer policy research and advisory body, if well led, would be a great complementary addition to the system and if appointments to it were made with some state/territory involvement could contribute much to more effective utilisation of resources at both levels.

Apart from the National Competition Council there are a number of other bodies with similar roles for different areas of public policy. One such is the Australian National Council on Drugs. While effective drug policy is very important for a significant minority of the population, a similarly charged and resourced and independent body for consumer policy, which affects all citizens, is surely at least as justified.

Suggestions on objectives and powers and other characteristics for a national consumer policy research and advisory body are set out in Appendix B.

2.4.3 Adequate Funding for CFA to respond to issues

We strongly welcome the Commission's recognition of the benefits of, and need for, government funding of a national peak consumer body, and support the tenor of the Commission's draft recommendation 11.3

² See <http://www.berr.gov.uk/files/file34655.pdf>; organisations included: Which?; Welsh Consumer Council; Royal National Institute of the Blind (RNIB); Postwatch; ;Passenger Focus; OFCOM Consumer Panel; National Energy Action; National Consumer Council (NCC); General Consumer Council of Northern Ireland (GCCNI); Financial Services Consumer Panel; energywatch; Consumer Council for Water; Citizens Advice Bureaux.

In the past, CFA and its predecessor Australian Federation of Consumer Organisations (AFCO), have played an important and influential role in networking consumer organisations, and advocating for consumers' interests in policy debates.

In fulfilling its policy role, a peak consumer organisation should have sufficient resources to provide a reasonable balance to the efforts of producer lobbying (the cost of which is ultimately paid for by consumers). Producers invest heavily in lobbying activities in order to advance their interests, and there is a risk that 'modest' funding for consumer policy by the peak body will not be sufficient to provide an effective counterbalance.

This point is underlined when consideration is given to the types of expertise required in order to undertake effective policy advocacy across a range of highly specialised areas. In particular, the peak body will require a degree of industry specialisation, and expertise (or access to expertise) on law, economics, regulation and social policy.

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Thus, funding for the peak body should be sufficient to employ at least one policy officer for each major industry sector - food, energy, water, information/communications, health, pharmaceuticals, transport, financial services and general retailing.

2.5 Market Inquiries

At present, the Trade Practices Act ("the Act") largely locks the regulator into complaints handling and enforcement without any formal tools for doing a more in-depth assessment of a market or requesting another body to do so. The UK provides the leading example of incorporating market analysis mechanisms into its consumer protection laws, by providing for both market studies and market investigations in its *Enterprise Act 2002*.

The Office of Fair Trading (OFT) refers to the market studies and investigations powers under UK competition and consumer protection laws as "diagnostic tools". They complement its preventative tools (such as guidance and consumer education), advocacy tools (such as government advice and encouragement to business and consumers to use private redress mechanisms) and enforcement tools (such as undertakings and court action).³ These tools are used by the OFT when:

market forces cannot overcome...threats to consumer welfare, for example because some sellers are unconcerned about repeat business and reputation, where there are structural or behavioural barriers to free competition, or where consumers and harmed businesses are unable to gain redress themselves[.]⁴

The OFT clearly sees the use of these tools, including market studies and investigations, within an overall framework of promoting markets that work well for consumers by dealing with both the supply and demand side.⁵ Market studies and investigations

³ Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8.

⁴ Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8.

⁵ Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8-9; see especially the diagram at 9.

strengthen the commitment to analysing or “diagnosing” market outcomes from both angles before taking action.

The OFT (and other industry regulators) may also make a market investigation reference to the United Kingdom Competition Commission (UKCC) to investigate any feature of a market that it suspects restricts or distorts competition in connection with the supply or acquisition of any goods or services. Such features may include supply and demand side features of a market

The UKCC has undertaken a number of market investigations following a reference from the OFT, including investigations into extended warranties on domestic electrical goods, store card credit services, Northern Irish personal banking services and a current investigation into payment protection insurance, some of these following market studies by the OFT as noted above.⁶ As an example of remedies resulting from an investigation, the store credit investigation resulted in orders requiring store card credit providers to warn cardholders on monthly statements that cheaper credit may be available elsewhere (where annual percentage rates are 25 per cent or above), offer an option to pay by direct debit and offer payment protection insurance separately from other elements of store card insurance.⁷

The practical experience of the use of market studies and investigations powers in the UK has therefore been of a wide variety of important investigations in areas where consumer detriment has been observed. This has resulted in a large range of different and considered actions to address problems. In its 2003 report comparing the different consumer policy regimes of various countries, including the UK, the US, Canada and Australia, the UK DTI concluded that the UK was amongst the best in terms of investigating markets that are not working well for consumers.⁸

The UK regime also provides for a super-complaints mechanism to feed into the market studies powers. This mechanism is discussed further in section 3.8. We recommend introducing market studies and investigations powers into the Act, based on the model in the UK *Enterprise Act 2002*.

Key features of an appropriate market inquiry power would be:

- that regulators such as the ACCC and ASIC are formally charged with conducting such inquiries
- that those inquiries proceed on a formal basis inviting and publishing public submissions against terms of reference leading to publication of a reasoned report

⁶ Competition Commission, *Market references to the Competition Commission (previously monopoly references): 2000-2007*, webpage, available at: www.competition-commission.org.uk/inquiries/reference_type/market.htm.

⁷ Competition Commission, *Store Cards Market Investigation Order*, 27 July 2006.

⁸ DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 33.

- that regulators be empowered to recommend action by others and within appropriate limits take action themselves.

2.6 Vulnerable, Disadvantaged Consumers

The Productivity Commission has included an excellent discussion of the causes and outcomes of vulnerability and disadvantage in the marketplace. However, the Commission could do much more to incorporate the needs of these consumers in the policy process.

A significant group of vulnerable consumers are those with certain disabilities, particularly intellectual disabilities, cognitive impairments and mental illnesses and those with chronic health problems including perceived health problems. They are open to exploitation. Ignorance, embarrassment, desperation and limitations of medical science may be involved. Such consumers may be less likely to make complaints so a proactive approach to consumer protection is required.

The Draft Report does not adequately come to grips with the reality that people who are disadvantaged or vulnerable may be effectively excluded from markets because the relevant market does not seek to meet their needs. This means that the impact of such exclusion is also not considered. Conversely some markets – for example pay day lending - are structured entirely to exploit a feature of their disadvantage.

Thus, whilst the Draft Report does acknowledge the following market barriers, it does not propose measures to address them:

- That the regulated credit market does not accept people who are disadvantaged and vulnerable, and
- That ‘disclosure may not adequately protect some disadvantaged and vulnerable consumers who face limited choices among riskier products, such as payday lending’. (Draft Report at 206)

A key element of proposing effective solutions requires, amongst other things, acknowledgement that there are two key aspects to disadvantage and vulnerability and their interaction with consumer policy:

- There are issues of access to competitive markets for products and services that are used by consumers generally, for example, credit provision, public transport, utilities, general retailing, etc.
- There are also issues of consumer protection in respect of markets for products and services that are specific to those who are disadvantaged or vulnerable, for example, disability support services, aids and equipment (the disadvantaged groups being those with certain disabilities and those who are aging), funeral services (the vulnerability being grief and often cultural norms), etc.

Both need to be dealt with in an effective consumer policy framework and there needs to be a clear acknowledgement of the impact in the first category of discriminatory conduct.

For example, the method of provision of public transport services to the general population can result in indirect discrimination against people with disabilities, whereby they are either forced into specialist (and generally much more expensive and less well regulated) markets, or completely excluded from accessing the service and, as a result, from participating in the broader life of the community.

While, to some extent, specific anti-discrimination laws may prohibit discrimination in the provision of goods and services, it is important that the consumer policy framework is informed by the key concepts within anti-discrimination law, particularly indirect discrimination. An un- or under-regulated market providing goods or services with widespread consumer appeal or need (general retail, transport and travel, accommodation, banking, utilities) will tend not to design its goods or service provision to meet the needs of all consumers, but rather will seek to target the dominant sectors within the market. This market failure needs to be understood and effectively dealt with in the consumer policy framework, rather than relying on external regulation through, for example, discrimination law.

The Productivity Commission has missed a key opportunity to better incorporate the needs of vulnerable and disadvantaged and marginal consumers in the policy Decision-Making tree it has adapted from the OECD. The Figure 3 correctly identifies 'Consumer characteristics' as a problem facing consumers. We suggest that Vulnerable and Disadvantaged consumer characteristics demand separate consideration from the standard issues that would be explored under the previous heading. Equally, we suggest that the suite of policy responses is missing one aspect, namely measures to support consumers, such as those provided by financial counsellors and legal aid lawyers. We recommend an additional box in Figure 3 to capture the support measures (eg 'legal services, in-service support or assistance, adaptive technologies financial counseling, concessions) that are essential for equitable, inclusive consumer markets.

Appendix C provides a discussion of how the specific needs of vulnerable and disadvantaged consumers could be incorporated into the Commission's final report.

2.7 Policy Work Agenda

The Productivity Commission has made specific recommendations on select areas of consumer policy (including credit, energy and telecommunications). At the same time the Commission has left unaddressed a large number of other consumer policy issues raised throughout the review. We recognise that timeframe and scope of the Productivity Commission review necessarily limited the number of consumer policy issues that could be comprehensively analysed. However, the additional issues raised warrant attention, if not from the Productivity Commission then from the proposed national consumer policy research and advisory (NCPRA) body or the most appropriate other agency, NGO or university centre to undertake the work.

We recommend that the Productivity Commission endorse an agenda for consumer policy work, comprising the policy issues that were raised during the course of the review and still require further analysis. Australia's consumer policy framework will be more robust following a thorough investigation of the identified consumer policy problems.

The issues that need to be addressed are set out in Appendix E.

3 Legislation

3.1 National generic consumer law

The recommendation to nationalise consumer law is welcomed by consumer advocates in principle. Our concern surrounds the strong view that those gains already made in many jurisdictions not be lost in the transfer of jurisdiction to the Commonwealth.

The Commission is urged not to assume that unique laws in Victoria, ACT and NSW are poor or unsound. Rather, it is encouraged to embrace the following gains in consumer protection and ensure that the following laws are incorporated into any national generic law(s):

- Consumer Credit (New South Wales) Act 1995 Section 11 in conjunction with the Consumer Credit (NSW) Special Provisions Regulation 2007, Regulation 6 - Legislation which caps the amount of interest a credit provider can charge (usury rate) inclusive of all fees and charges.
- Unfair Contract Terms (Vic) – Legislation targeting contracts which contain unilateral clauses and other unfair terms. This legislation is particularly important in telecommunications.
- Fair Trading Act (ACT), Section 28A– Legislation which protects consumers against the issue of a credit card or granting a limit increase without assessment of capacity to pay by the credit provider.
- Specific consumer protections which apply to the energy market in Victoria such as the mandatory hardship provisions.

These laws represent the best of consumer protection in the country and are the result of hard fought gains by consumer advocates, through which consumers are benefiting. It is jurisdictions without these protections which should be brought up to the standards achieved in proactive jurisdictions.

For example, in South Australia, consumers are not protected by a usury rate and predatory lenders are able to impose 855% interest rates, while across the border in NSW a maximum of 48% is allowed. Instead of removing such protections in the process of creating a single national consumer law, all consumers in Australia should be able to benefit from gains made. Similarly, a proactive approach should also apply where significant draft legislation has been accomplished as in the case of the NSW-drafted uniform mortgage broker legislation.

3.2 Unfair contract terms and model fair contract terms

We strongly support the Productivity Commission's rationale for action on unfair contract terms, including:

- on principles of ethics and fairness; and
- on the basis that such laws contribute to efficient operation of markets.

However, the Productivity Commission conclusion that unfair terms should be voided only for contracts of those consumers subject to detriment is not in line with the available empirical evidence. This approach would also increase regulatory complexity without resolving the problem (further detail below) and minimise the ability of the laws to contribute to market efficiency.

An effective response to the problem of unfair contract terms should:

- contribute to the efficient operation of markets;
- provide consumers with a remedy should they suffer detriment;
- provide the regulator with the ability to proscribe particular standard terms;
- apply consistently between jurisdictions; and
- apply consistently between industries.

Our preferred system would be that which operates in Victoria and the UK because:

- it contributes to market efficiency;
- it has shown be effective in Victoria and the UK;
- it has been clarified by Victorian and UK case-law; and
- it was recently recommended by the NSW Council Legislative Standing Committee on Law & Justice.

Specific matters raised by the Commission

Patchy evidence of exploitation of unfair terms

The Commission argues that there is patchy evidence of the exploitation of unfair terms. Consumer legal casework experience demonstrates that unfair terms are exploited in a range of situations. The case studies in Appendix F demonstrate this.

The requirement for consumer detriment

The Productivity Commission argues that due to the patchy evidence of exploitation of unfair terms, and because there are costs involved in policy action, the regulator should only be able to take action in an instance where a consumer (or consumers) has already suffered a detriment from an unfair term. The Productivity Commission views this as a more targeted response compared with the regulator having the capacity to ex ante rule out unfair terms that prima facie could cause detriment to consumers.

The whole purpose of the Victorian law is to make it possible for the regulator to easily prescribe terms that are unfair, thereby averting consumer harm and improving contracts throughout an industry. The capacity to proscribe terms as unfair also empowers the regulator to issue guidelines to inform business, and to negotiate the cooperative removal of unfair terms. The proscription powers allow the regulator to take a cohesive consistent

approach to unfair terms. This approach is more efficient and less costly than the arbitrary, ad-hoc removal of unfair terms that would result if actual harm to consumers were required to be demonstrated.

The requirement for 'actual detriment' (ie proven actual unfair exercise of a term) demotes unfair terms legislation to being substantially the same as existing common-law and statutory unconscionability. Following this approach, an unfair term *and* unfair conduct would be required for a successful statutory unconscionability argument and a successful statutory unfair terms argument to succeed. The law already seeks to address unconscionability and this is not sufficient to avert the inefficiency and consumer detriment that unfair contract terms cause.

Requiring actual evidence of harm would render it difficult (costly and time-consuming) for the regulator to bring actions, and thus the law would be less likely to be enforced. The regulator is unlikely to have capacity to consider all consumer contracts in the market and could prioritise its activities according to whether there is evidence of actual detriment, potential for serious detriment, or potential for relatively minor yet significant and widespread consumer detriment.

We also note that in the US, where they deal with unfair terms through a more liberal unconscionability doctrine (than we have in Australia), which theoretically has the potential to deal with substantive unfairness as well as procedural unfairness, there has been 'relatively few instances of successful consumer use due to uncertainty in its application and the lack of impetus for consumers to invoke it. Further, a case by case resolution of substantive unfairness provides no motivation for suppliers to alter the substance of their contracts even in the face of successful litigation.'⁹

The costs of policy action

The Productivity Commission asserts that there will be costs of policy action in relation to unfair contract terms, including enforcement costs for regulators and compliance burdens for industry. The Productivity Commission itself, however, concludes that these costs are unlikely to be large.

The Productivity Commission also states that other costs need to be considered, including the loss of the capacity for business to impose contingent charges on consumers which will result in an upward pressure on prices. This argument relies on the idea that seemingly unfair terms might not be unfair if they result in actual net benefit for consumers. There are both fairness and economic responses to this argument.

From an economic perspective, this argument relies on the assumption of the efficient contractual bargain. However, as Consumer Action Law Centre's supplementary submission to the Productivity Commission's Issues Paper demonstrates, there are real problems with concluding that the cheapest price for the consumer, in the context of a

⁹ James Davidson 'Unfair contract terms and the consumer: a case for proactive regulation?' (2007) 15 Competition and Consumer Law Journal 74, p. 74.

standard form contract, will be when they accept a good or service through the 'contractual bargain'. They note:

- 'The relevant "price" is not simply the "ticket price" but the price that takes into account all of the terms and conditions associated with supply, including any that may come into effect in the future'.
- 'From the perspective of individual buyers, the costs associated with unfair contract terms are not, and indeed cannot, be accurately factored into the price of the product. While the probability of a particular event occurring is relevant for firms when determining their risk exposure and may be objectively available, it is not of much assistance to individuals in relation to consumption decisions – they are unlikely to be aware of the probability of such an event occurring, and even if they are, they cannot know - and are likely to under-estimate - the probability of it occurring in relation to themselves'.
- 'In circumstances where these probabilities and costs are unknown (and unknowable) individuals are likely to discount the likelihood that such an event will occur in relation to their own purchase, especially when it has a low probability of occurring, and so triggering a clause of a contract that may be detrimental to them'.

This analysis demonstrates that the assumption that exchanges that occur in the context of the unregulated 'contractual bargain' are the most efficient may in fact be incorrect. It suggests that unfair contract term laws lead to more efficient overall market outcomes as it corrects over-willingness to buy. While intervention entails some costs, these must be assessed against corrected market outcomes, not simply the current inefficient market situation.

Unfair terms can be socially good so require a 'public benefit' test

The Productivity Commission argues that unfair terms may actually have a social good as they can prevent opportunistic consumers taking advantage by, for example, seeking to extract themselves from contracts that require businesses to commit significant upfront resources. They state that consumers, unlike businesses, do not have a brand name or reputation to lose from such conduct.

This notion, based on analysis by Posner and Bebchuk, that some unfair terms are socially beneficial in narrow parameters relies on the notion that business is a better arbiter of fairness and conscientiousness than courts, tribunals or regulators. This notion is not tenable. Business is financially biased and not capable of objectively determining fairness. Further, business is not accountable in the way courts, tribunals and regulators are and is not subject to the ethical mandates of judicial office. It is not tenable to suggest a business that is inherently biased vis-à-vis itself and the opposing party (the consumer) can better uphold overall contractual fairness than a court, tribunal or regulator (noting that a regulator will be subject to judicial oversight).

For example, in the Victorian case of *Free v Jetstar Airways*¹⁰ contractual terms required a number of charges to be paid if the name of the person flying was changed. A major airline such as Jetstar is archetypical of a business with concern for reputation.¹¹ Nonetheless, in the case Jetstar insisted that Ms Free pay the difference between the cost of the flight on the day she booked it, and the cost of the flight on the day she wished to change the name (so that her niece travelled instead of her sister). Jetstar's argument was that this charge prevented people booking tickets and on-selling them at a higher price. However, Jetstar applied its term universally, not selectively. The Tribunal found the term unfair. Fear of reputational damage did not lead to Jetstar selectively and fairly applying its unfair term. Many unfair terms, such as Jetstar's are applied universally not selectively. The significance of 'reputation' as a restraint on business exercise of unfair terms will vary according to a number of factors, including degree of competition in the market, frequency of consumer purchase of the good/service, size of transaction compared to potential impact of the term, and consumer perception of the likelihood of the circumstances giving rise to the term applying to them.

In addition to Posner and Bebachuck's argument being based on an untenable premise, that untenable premise is only applicable within narrow parameters. As Posner and Bebachuck acknowledge, consumers may not have information of businesses conduct, in which case there is no risk of reputational damage.

Excluding terms dealing with 'non-contingent' or upfront standard contract prices

We think the Productivity Commission's arguments regarding exclusion of 'non-contingent' or upfront standard contract prices from the scope of unfair contract term laws have some validity. Up-front price is often an obvious term upon which businesses compete – it is archetypical of the kind of term the consumer is aware of and considers. Despite this, we note that in Victoria where such terms are not excluded from the law's coverage, the law has not become 'inefficient price regulation' as postulated by the Productivity Commission. We also think there are circumstances in which we think some up-front price terms do not neatly fit this generalisation – for instance, if payment is by instalments. In the case of payment by instalments, some consumers will not fully consider the total cost of the product. For this reason, while we agree the Productivity Commission's view of up-front price terms is reasonable, we think price terms that are not paid up-front in one instalment are different and should be treated differently.

Exclusion of non standard-form contracts

While the Productivity Commission's suggestion that any law be limited to standard form (non-negotiated) contracts has merit, as the provisions could be better targeted to the real problem of unfair terms in standard form contracts, there is a practical problem with the Productivity Commission's suggestion. Some players in business will seek to avoid regulation, and they are likely to argue that their contracts are not standard-form (when in fact they are in substance). This exception is likely to be used as a loophole. Perhaps a better approach is for the regulator to use its discretion to accept a non-standard terms as fair where it has been 'brought to the consumer's attention in a clear, simple and

¹⁰ [2007] VCAT 1405 (27 July 2007)

¹¹ Most passengers make more than one flight in their lifetime etc.

comprehensible way.’¹² The key test is whether there has been genuine negotiation about the term. Regulatory discretion rather than legislative exclusion averts the risk of the exclusion being used as a loophole.

3.3 General prohibition on unfair trading

The UK Department of Trade and Industry (DTI) undertook a detailed comparative study of consumer policy regimes in various leading EU and OECD countries in 2003. The study was part of the DTI’s efforts to collect evidence against which to compare the UK regime, in order to help bring the UK regime up to the level of the best. Its report found that a general duty to trade fairly was useful and concluded that the UK was behind best practice in its legal framework for consumer protection due to its lack of a similar wide-reaching provision.

One of the key current strengths of the Trade Practices Act’s consumer protection provisions is the inclusion of two flexible, market-wide provisions in the prohibitions on misleading and deceptive conduct and unconscionable conduct. Nevertheless neither constitutes a general prohibition on unfair trading. Some forms of clearly unfair conduct are not prohibited by these provisions, for example aggressive sales and marketing practices short of coercion, poor quality services and exploitative pricing. These practices tend particularly to target disadvantaged or vulnerable groups of consumers and the introduction of a general prohibition on unfair conduct in Australia could be expected to bring an improved ability to identify and address such unfair practices.

The general prohibition on unfair practices is also the only provision that evinces a modern understanding of how certain trading practices can be economically harmful as well as unfair, given its focus on conduct that unjustifiably distorts consumers’ decisions. It allows for new information and behavioural insights to inform its application, given they help to determine how consumers may be unfairly influenced in their market choices. This distinguishes it from the current prohibition in the Act on unconscionable conduct in consumer transactions, which has remained limited in its application to conduct in an individual transaction context, and has a more limited ability to address market-wide unfair practices.

It is also noted that it appears that the introduction of the UCPD will also help to simplify the UK’s consumer protection regime. For example, the regulations provide for the repeal of a large number of provisions in current UK laws, particularly industry-specific laws. The UK government’s partial Regulatory Impact Assessment for the draft regulations also notes the potential for significant overall benefits to businesses as well as consumers from the implementation of the regulations, as well as a competition-enhancing effect.

The longer that Australia waits to introduce a general prohibition on unfair conduct, the longer the Act remains behind best practice in this area and the greater the time it will take for Australia to build up useful case law and guidance on our own provisions. If

¹² Consumer Affairs Victoria *Unfair Contract terms in Victoria: Research into their extent, nature, cost and implications* Research Paper No. 12 October 2007.

Australia is serious about meeting both economic and social goals with consumer protection laws, it must begin considering how to incorporate a general unfair conduct prohibition into the Act.

This submission recommends introducing a general, market-wide prohibition on unfair conduct or practices towards consumers into the Act.

The prohibition should incorporate the concept that conduct or practices are unfair if they unreasonably or unfairly distort consumer decisions, based on the models provided by the US, the EU and the UK.

The prohibition should also provide for unfairness to take into account the typical consumer to whom the conduct or practices are directed at, not only the average consumer in the market.

The general prohibition may be supported by examples of specific unfair practices. Other consumer protection regulation that overlaps with the general prohibition, particularly industry specific regulation, could then be repealed.

3.4 Enforcement powers

The draft report recommends that government provide new enforcement powers to consumer protection regulators, namely the right to seek civil pecuniary penalties, to apply to a court to ban an individual from specific activities, and to issue substantiation notices to traders, (DR 10.1) and require regulators to report on enforcement problems and their response (DR 10.3).

Consumer organisations strongly support these recommendations for the reasons given by the Commission and in consumer groups' original submissions.

The Draft Report does not, however, recommend provision for cy pres orders. Such powers provide capacity for the courts to send strong price signals regarding the costs of non-compliance with the law as well as providing innovative options for consumer redress.

3.5 Enforcement of the national generic law

Consumer groups are also concerned that the Draft Report contains sparse information about how any new national consumer law will be enforced.

Obviously the generic law will need some machinery to empower enforcement, whether by a single national enforcement agency or cooperatively by existing agencies. Similarly there will need to be machinery to allow individuals and corporations to have access to courts or tribunals to resolve disputes where necessary.

Given constitutional limitations we imagine that a generic law will need to be adopted by each jurisdiction to ensure it applies to unincorporated traders. Each jurisdiction will then need to empower a regulator or regulators to take required enforcement action.

The detailed mechanisms must be in place and on the ground when any new generic laws commence. A significant issue will be putting in place appropriate arrangements for cooperative functions with State and Territory based agencies regarding complaint handling and information sharing. It is apparent to consumer groups that some local matters will be ill suited to a nationalisation approach, such as disputes with local auto repairers. These problems will continue to require local solution. The ability of a national regulator to respond will be compromised without local offices in cities, regional and remote areas, such as currently exist in many jurisdictions.

3.6 *Standing for 3rd parties to take action on post sale consumer protection remedies*

The Productivity Commission rightly raises concerns about the inconsistency of coverage of the post-sale consumer protection provisions of the TPA in State and Territory legislation. Reform in this area was mooted with the release of a discussion paper by the then named Standing Committee of Consumer Affairs Ministers (SCOCAM) in 1990.

This paper, *Review of post-sale consumer protection: discussion paper: "proposals for reform"*, canvassed a number of reforms, including that consumer organisations – not just regulators – should be given third party standing to sue in circumstances where breaches of guarantees or warranties were evident. There are many instances where suppliers try and refuse warranty or guarantee claims for low to middle price goods (in the range of \$20 to \$400). Typically this may include electronic goods, watches, and toys. It is too expensive for individuals to pursue such claims, and it is an ideal area where consumer organisations could act on behalf of consumers.

Such a reform would complement the proposals contained in the Commission's Draft Recommendation 8.1.

3.7 *Class actions*

We welcome the draft recommendation to remove barriers to class actions.

3.8 *Supercomplaints*

One other matter of note is the place of 'super-complaints' in the UK's overall market studies and investigations legal scheme. The OFT has included responding to super-complaints as one of the diagnostic tools available to it to address market failures and help make the market work well for consumers.¹³

Section 11 of the UK *Enterprise Act* creates the super-complaints mechanism. Consumer bodies that are designated by the UK Secretary of State under this section can make a complaint to the OFT that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of

¹³ Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8.

consumers’.¹⁴ The important feature of these provisions is that the making of a super-complaint triggers a statutory obligation for the OFT to respond to the super-complaint within 90 days. The OFT must state how it proposes to deal with the complaint, for example what action (if any) it proposes to take and the reasons for its decision.¹⁵ Such actions might include:

- enforcement action by the OFT’s competition or consumer regulation divisions;
- launching a market study into the issue;
- making a market investigation reference to the UKCC if there is a competition problem;
- referral to or action by a relevant sectoral (industry) regulator; and/or
- finding the complaint requires no action or is unfounded.¹⁶

As the OFT has explained, the super-complaint mechanism is not intended for complaints about matters that can be handled directly by existing enforcement powers, particularly single-firm conduct. It instead provides a ‘fast-track’ system for certain consumer bodies to bring market features harming the interests of end consumers to the OFT’s attention.¹⁷ The super-complaints mechanism is therefore another means of ensuring that analysis of demand side or consumer problems takes place as part of an effective competition regime.

For example, UK Secretary of State for Trade and Industry, Patricia Hewitt, said during the second reading on the Enterprise Bill:

As strong competition is the best form of consumer protection, all our competition reforms are good news for consumers. In particular, we are putting consumer interests at the heart of the new system with our new super-complaints, where the OFT must make a considered response within 90 days to properly investigated complaints from designated consumer bodies.¹⁸

The super-complaints mechanism is also recognition that organisations that represent consumer interests can provide valuable information and intelligence to regulators about potential concerns. Sylvan has noted that:

¹⁴ *Enterprise Act 2002* (UK) s.11(1). Note that the grounds for a super-complaint dovetail with the grounds on which the OFT may make a market investigation reference to the UKCC: *Enterprise Act 2002* (UK) s.131, see text above.

¹⁵ *Enterprise Act 2002* (UK) s.11(2),(3).

¹⁶ Office of Fair Trading, *Super-complaints: Guidance for designated consumer bodies*, July 2003, at 9.

¹⁷ Office of Fair Trading, *Super-complaints: Guidance for designated consumer bodies*, July 2003, at 4.

¹⁸ Secretary of State for Trade and Industry, Ms Patricia Hewitt, *Enterprise Bill: Second reading*, Hansard Commons Debates (UK), 10 April 2002, Volume No. 383, Part No. 125, Column 48.

Consumer complaints are a particularly rich source of information about market failure as well as a window onto the way in which firms are behaving: when and how they are engaging in attempts at lock in to prevent switching, whether they are disabling consumer search through, for example, highly complex price structures, and so on. This demand side intelligence is especially powerful when combined with behavioural research on how consumers actually do act in markets and provide a compelling insight into what remediation might be needed and might be effective.¹⁹

In practice the super-complaints mechanism has proved to be an important addition to the UK's competition and consumer laws and plays a central role in initiating market studies and investigations. Several consumer groups have been designated for the purposes of super-complaints, including Which? – the UK Consumers' Association, Citizens Advice – the National Association of Citizens Advice Bureaux (the umbrella organisation for all Citizens Advice Bureaux in England, Wales and Northern Ireland), and the National Consumer Council. They have made super-complaints to the OFT on matters such as doorstep selling, aged care homes, payment protection insurance and most recently the Scottish legal profession.

The OFT's doorstep selling market study, which as discussed above has led to an OFT education campaign and imminent legislative amendments, began as a super-complaint from Citizens Advice. The UKCC's current market investigation into payment protection insurance also began life as a super-complaint from Citizens Advice, which led to an OFT market study and subsequently a reference to the UKCC for a market investigation. While the UKCC is currently continuing its investigation into payment protection insurance, its emerging thinking has indicated some potential competition issues at the retail level of the market when consumers are buying payment protection insurance together with the attached credit product.²⁰

We recommend that the Commission recommend the introduction of a supercomplaint procedure based on that in place in the UK.

¹⁹ Louise Sylvan, 'Activating competition: The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1, at 17; cf Productivity Commission, which has noted that an important role for consumer advocates in the competition reform context is to provide 'a counterbalance to producer groups seeking to maintain anti-competitive arrangements that lead to higher prices, reduced service quality or less market innovation': *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, Box 12.4, at 386.

²⁰ Competition Commission, *News Release: PPI Market Investigation—Emerging Thinking*, 6 November 2007, at 1, available at: www.competition-commission.org.uk/inquiries/ref2007/ppi/index.htm.

3.9 Responsible Lending

The draft report singled out credit as one of the few specific policy areas that received detailed attention. From this we imply that the Commission has accepted that there is a level of importance or urgency in relation to credit related issues within the consumer protection framework. However, it is disappointing that the Draft Report has reviewed and commented on the reforms that are already on the table as part of single state or MCCA processes but failed to grapple with the biggest single issue – responsible lending, or in other words, matching credit products to consumers’ needs and capacity.

Financial counsellors and public consumer assistance agencies (including legal aid commissions and specialist community legal centres) are well aware of an increasing crisis in consumer lending and the number of consumers facing hardship and default. There is also considerable additional evidence emerging that the size and makeup of the minority unable to keep pace with debt commitments is changing. Industry commentators and analysts have dramatically reviewed upwards their estimations of households in or likely to experience financial stress²¹. Financial counsellors have noted continued shifts in their client intake²².

The Draft Report considers the nation’s historically high debt levels, but unfortunately concludes: “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.” (Draft Report p388) While we certainly concede a vital role for monetary policy and prudential arrangements, we cannot accept that there is no role for consumer policy and the consumer protection framework. It is consumer advisers from the abovementioned agencies who first began sounding the alarm about serious and systemic mismatching of consumer loan products 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 at least one vital part of the solution to this problem would best sit.

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.” Unfortunately, many of those borrowers are now our clients because the finance they were able to access was completely inappropriate to their circumstances. For home loan borrowers this is likely to entail devastating disappointment and upheaval, as they are forced to give up the home they have tried so hard to purchase.

²¹ There are a variety of industry commentators that have made similar observations, including credit reporting and debt collection agencies (Veda Advantage; Dun and Bradstreet); financial services analysts (Fujitsu and JP Morgan) and industry groups (the Housing Industry Association).

²² For example in its 05/06 Annual Report Care Inc Financial Counselling Service noted 10 per cent of its new client intake reported incomes over \$45,000. In the following Annual Report for 06/07 the proportion of clients reporting incomes over \$45,000 had risen to 15 per cent. In the last 6 months of 2007, the proportion of clients reporting incomes over \$45,000 to Care’s general services had reached 19 per cent.

Deregulation and increased competition in both the credit card market and the home loan market have arguably brought down prices and created a variety of new options for borrowers. They have also spawned a plethora of risky, expensive, and, in some cases predatory, lending practices. Further, the presence of these competitors has had a negative influence on mainstream lending standards and masked the consequences of that deterioration by providing a ready source of refinance credit as a short-term solution for mainstream borrowers in financial difficulty. Some of the more positive aspects of the aforementioned developments may have been achieved without the downward pressure on lending standards if there had been clear legal obligations on lenders and advisers/intermediaries to actively assess borrowers' ability to pay and for credit advice, where it is given, to take into account a realistic account of both the potential borrowers financial situation and known aspects of consumer behaviour.

We understand that the Commission's current review is largely concerned with landscape issues, however the diminution in responsible lending standards and over-confidence in market forces to deliver suitable outcomes provides an excellent example of when consumer policy intervention was required but not forthcoming. Further, responsible lending for new borrowers and those seeking to refinance and extend existing credit facilities, and hardship processes for consumers already in debt-related difficulty, are arguably the most pressing consumer issues for the consumer protection framework to grapple with going forward.

Finally we draw the Commission's attention to the extensive analysis of the US sub prime failings by Engel and McCoy²³. They show definitively that in those US states where limitations on reckless lending applied (to assignees as well as lenders) much less damage was done. We also note our comments at 4 below disputing the Commission's conclusions about the extent of the sub prime market in Australia.

4 Other Issues

4.1 Factual Errors

Finally there are five factual errors in the Draft Report which have or may have affected the analysis and lead the Commission into error.

1. The Draft Report makes the false suggestion that consumer groups have not sought to advance consumer interests in tariff debates (see page 225, volume 2)

Consumer groups were first involved in at least 1962 and have actively campaigned in each subsequent decade.

²³ See for example Kathleen c. Engel and Patricia A. McCoy "Turning a blind eye: Wall Street Finance of Predatory Lending" 75 *Fordham Law Review* 2039 (March, 2007).

2. The Draft Report perpetuates the myth that the ACT Credit Card Legislation produced perverse outcomes for consumers at the time of the Canberra bushfires (see page 406, volume 2)

The main financial counselling provider in the ACT, Care Inc, has refuted claims that credit card legislation in that jurisdiction lead to perverse outcomes in the wake of the 2003 Canberra bushfires. On the contrary, the agency felt compelled to issue a media release at the time seeking assurances that the tragedy would not lead to inappropriate over-selling in the credit card market, when what consumers were overwhelmingly likely to require was assistance and understanding. A copy of CARE's media release at the time is at Appendix A. This is an issue that Care and other credit advocates are likely to take further in written and oral submissions on the draft report.

Further, the Australian Bankers Association has not offered appropriate evidence that the changes made in the ACT have not been of benefit to ACT consumers. Their repeated use of statistics in relation to default rates is not an accurate reflection of reality. For example, it fails to take into account whether the cards in question were issued before of after the commencement of the amendment and the data does not seem to support their proposition in any event when the data is projected into the future. Furthermore, the ABA has not considered the level of non-compliance among credit providers. ACT Consumer Law Centre and Care Inc have made numerous reports of breaches of s28A to the ACT Commissioner of Fair Trading. To date, despite clear breaches, no enforcement action has been taken. We also note the BFSO reference to a systemic breach of s28A in 2006 as reported in its Annual Report.

In summary, the ABA's assessment of this consumer protection measure is inaccurate and should not be a basis upon which to undermine the law.

3. The Draft Report makes the assumption that utility price caps exist to protect vulnerable and disadvantaged consumers

The PC draft report's discussion of energy retail price regulation proceeds on the basis that its primary aim is to address energy hardship, and in particular, provide a 'safety net' for disadvantaged consumers (see page 426 of the report).

The Commission argues that price regulation is a blunt tool for helping vulnerable and disadvantaged consumers, and therefore there is little rationale to preserve it. Whilst we generally agree that in this regard pricing is a blunt tool, we believe that safety-net tariffs do more than simply protect certain groups of consumers.

Safety-net tariffs are commonly misconstrued as being price caps, as has been done in this case by the Commission. A safety-net tariff is more accurately defined as a default option. Retailers can and do price above the regulated price (for example, premiums are incurred by consumers wishing to purchase green power). Concurrently, rather than distorting price signals, safety-net tariffs also allow consumers who are less able to exercise rational and informed choice in the competitive market to still access an energy supply at a fair price. In this way, it has a broader role in promoting competition, by

encouraging effective demand side responses through the provision of default options and does not only exist to protect low-income and vulnerable consumers.

Furthermore, widespread mis-selling practices by direct marketers,²⁴ direct obfuscation by retailers' presentation of tariffs in varying, often indecipherable forms, as well as the inherent complexities of understanding how tariff structures and prices impact on consumption and the final bill, all represent barriers to effective demand side participation in the energy market.

In the complex energy market, where poor information about market offers causes consumers to be unable to identify their optimum options, safety-net tariffs aid a consumer's ability to make informed and rational choices. Recent research suggests that only 5% of Victorian residential consumers actually compared market offers with their current contract when switching energy contracts²⁵ indicating the particularly poor demand side participation in energy markets. In our view, removal of a standing offer may actually reduce competition by eliminating a benchmark against which consumers can judge the value of a market offer.

Finally, safety net tariffs are also beneficial for consumers who don't want to choose. A consumer might make a 'rational' decision that the potential minor benefits of choosing the best deal are outweighed by the time and energy factor to wade through all the different offers.

4. The Draft Report takes the view that the value of sub prime impact in Australia is insignificant

The Draft Report makes reference (at page 386) to RBA claims that the value of the sub-prime home loan market in Australia is very small. This claim is not supported based upon currently available (and imperfect) data or what is known about the home loan market. 2007 data from Standard & Poors indicates that sub-prime lenders' portion of the home loan market is approximately **5.35%**, with a total of **\$41 billion** originating from these providers.²⁶ The figures represent a dramatic increase from about eleven years ago when the total value of sub-prime home loans was reportedly nil.

Our analysis, set out in Appendix E, suggests the figures are likely to be higher and also that default rates vary dramatically between providers – ranging from 7- 23%.

5. The Draft Report suggests that the Consumers' Federation of Australia is represented on the Commonwealth Consumer Affairs Advisory Council (see page 23, volume 2).

²⁴ Consumer Action Law Centre and Financial & Consumer Rights Council, *Coercion and harassment at the door: Consumer experiences with energy direct marketers*, November 2007.

²⁵ Australian Energy Market Commission, *Review into the effectiveness of competition in Victorian retail electricity and gas markets – First Draft Report*, October 2007, p 99.

²⁶ Standard & Poor's Australian Securitisation News, Issue 281, 18 May 2007 at http://www2.standardandpoors.com/spf/pdf/fixedincome/Issue281_SecuritisationNews.pdf, pg. 3.

CCAAC is comprised of individuals appointed on the basis of expertise and/or experience. Appointments are not representative appointments. No current office bearer of CFA holds a place on CCAAC.

Appendices

A. Finance industry response to Canberra bushfires

The main financial counselling provider in the ACT, Care Inc, has refuted claims that credit card legislation in that jurisdiction led to perverse outcomes in the wake of the 2003 Canberra bushfires. On the contrary, the agency felt compelled to issue a media release at the time seeking assurances that the tragedy would not lead to inappropriate over-selling in the credit card market, when what consumers were overwhelmingly likely to require was assistance and understanding. It is an issue that Care and other credit advocates are likely to take further in written and oral submissions on the draft report.

CARE INC.FINANCIAL COUNSELLING SERVICE

And the

CONSUMER LAW CENTRE OF THE ACT

Media Release – Embargo 7am 24 January 2003

“Finance Industry responses to bush-fire crisis encouraging but must discount the possibility of profiteering”

Care Financial Counselling Service and the Consumer Law Centre have generally welcomed financial services industry responses to Canberra’s fire disaster. Adding a note of caution, both groups have requested clearer commitments to prevent profiteering.

David Tennant, Care’s Director noted: “The fires in Canberra have been an extraordinary local disaster. For many ACT residents they will result in extreme financial hardship for months and years to come. We welcome announcements by many industry bodies and service providers that they will respond sympathetically to the needs of those affected.”

Tim Gough, Solicitor, of the Consumer Law Centre advised that “Under consumer credit legislation most consumers are entitled to vary the terms of their credit contracts, to take account of hardship – such as hardship arising as a result of the bush-fires.” According to Gough some financial services providers have made this clear in their public statements. “Some institutions have gone further, committing to reductions in interest rates, waivers of fees, provision of grants and so on.”

“Unfortunately” Gough claims, “a number of providers, in particular several major banks have at the same time said they will look at offering increased credit, particularly on credit cards. Without great care this type of ‘relief’ could make things worse for struggling victims of the fires.” Mr Gough has called on all financial services providers to fulfill their legal obligations to respond to consumers in need, but to also demonstrate their commitment to the local community. “Any extensions to credit, for example, should be fee free and low or no interest. We have specifically raised this issue with the Banker’s Association, but have received no firm details.”

David Tennant supported Mr Gough’s comments, noting “Credit providers should not set out to profit from this disaster. If banks, or any other financial service providers intend that to be clear in their response, they should say so.”

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B. National Consumer Policy Research and Advisory Body

Objects

- To contribute to public consumer policy in Australia and internationally in order to achieve the supply of goods and services to consumers (especially disadvantaged consumers) that is equitable, efficient and sustainable,
- To assist citizens to contribute to public consumer policy, and
- To contribute to the capacity of consumers to make choices that serve best their interests and the public interest.

Powers

- To undertake or commission research/analysis of markets and public sector and community sector supply of goods and services and provide policy advice to all Australian governments and where appropriate contribute to public discussion of policy
- To collaborate with the many organisations with relevant research/analysis resources to contribute to the objects of the Council
- To oversee non-statutory industry regulatory schemes and approve membership of their governing bodies
- To co-ordinate consumer education/information activities across the states/territories and design and/or deliver national education/information programs as appropriate
- To facilitate the participation of consumers in public policy formulation and regulatory processes including by providing grants in aid to consumer organisations
- To provide advice to the Minister on matters referred for consultation or inquiry

Reporting

- To Ministers for Environment, Consumer Affairs and all other ministers with any role in consumer policy and publicly as appropriate.

Budget

- About \$7m:
 - \$4m for Council and secretariat including policy analysts
 - \$1m for commissioning research
 - \$2m for grants in aid

Establishment

- By statute

Council Members

- About ten with backgrounds in consumer, social justice and environment organisations, in business, in academia and in government.
- Appointed by the Minister for Consumer Affairs in consultation with the Minister for the Environment and relevant state/territory ministers

C. Vulnerable, Disadvantaged and Marginal consumers: Opportunities for the Commission's Report

Examples of issues arising from the Draft Report

Credit and debt

The Report recommends the strengthening of credit market regulation (draft recommendation 5.2) and the requirement for all financial brokers and other credit providers to be members of an approved alternative dispute resolution scheme.

The report notes that the regulated credit market does not accept people who are disadvantaged and vulnerable. It also states that vulnerable people feel more accepted by those people dealing in the unregulated market because those people accept them and give them the required credit.

While this tends to suggest that there are less barriers for those who are marginalised and disadvantaged, it may more accurately reflect that those consumers are forced into the unregulated market and are, as a result, more vulnerable to inappropriate market conduct, such as predatory lending.

Unfair Contract prohibition (7.5 and Rec 7.1)

The inclusion of a provision in the generic consumer law addressing unfair contract terms (draft recommendation 7.1) would be more favourable to vulnerable and disadvantaged people.

Consumer Representation (9.6 and Rec 9.6)

Draft Recommendation 9.6 is for the Australian Government to increase support for consumer legal aid and financial counselling services. The report also quotes from a Qld Legal Aid report that clients with vulnerabilities, eg, 'psychological problems', face difficulties if a case is determined solely on their credibility as a witness. People with disabilities especially people with mental illness, do not fare well in the legal system.

While this recommendation is supported, even with additional funding, the extent to which the court is utilised as the primary and initial form of redress for disadvantaged and vulnerable consumers will be limited. This should be reflected in the extent of funding for this specific purpose and the future guidelines that dictate specific legal aid organisations in case selection and management.

As acknowledged by the Productivity Commission, disadvantaged consumers are typically seeking assistance at a difficult time of their lives and as such are less likely to engage in the daunting task of obtaining legal representation for arbitration through the Courts unless significant amounts of money are at stake.

For smaller to medium levels of detriment, it will be more appropriate to empower existing agencies that disadvantaged consumers are likely to come into contact with, such as Financial Counsellors as suggested on page 176 of the Draft Report, and other group specific services, such as disability legal rights services, disability advocacy groups, specialist legal and advocacy services for Indigenous Australians, youth advocacy services, etc. If empowered with additional resources and access to appropriate training, already existing organisations may better be able to assist disadvantaged consumers with smaller claims. Such services already have an in-depth working knowledge of the various and complicated issues associated with social disadvantage and relative vulnerability and may be in the best position to work with this group of consumers with smaller to medium claims or levels of consumer detriment.

Disclosure issues (11.2 and Rec 11.1)

Information on products and services should have greater consumer testing and layering of disclosure requirements (draft recommendation 11.1). This requirement is based on poor literacy and numeracy skills of disadvantaged and vulnerable people and not on their needs to have information provided in other formats eg. Braille, spoken word etc. or simple English. Much consumer testing of information and product does not include the provision for features to assist people with disabilities.

Consumer Testing (210)

Where consumer testing is utilised for the purposes of improving product disclosure, consumer information and public information regarding consumer issues, disadvantaged consumers should be a part of this process. It may be suggested that some changes to disclosure that result from the participation of disadvantaged consumers may actually result in a reduction in search costs for many other consumer cohorts and so should receive an increased level of focus.

Consumer information and education initiatives (11.3 and Rec 11.2)

The Commissions has proposed a cross jurisdictional review of the effectiveness of a sample of consumer information and education measures (draft recommendation 11.2). If such a review were to be conducted it would be necessary to have input into the terms of reference from people with disabilities because too often their particular needs are not known by people conducting reviews.

Consumer input into policy making (11.4 and Rec 11.3)

The Commission has proposed that additional funding be provided for an advocacy group for networking and policy functions and specified research on consumer policy issues. (Draft recommendation 11.3). Once again any specified research would need the inclusion of the perspective of people with disabilities. Any advocacy groups that exist for people with disabilities are always under-resourced.

In Draft Recommendation 11.3 there needs to be a distinction between research and advice on the one hand, and advocacy on the other.

It is true that vulnerable and disadvantaged consumers are particularly reliant on advocacy groups for assistance in cases of claimed consumer detriment. In addition to the Commission's draft recommendation (11.3 – funding for a representative peak body) additional work needs to be done regarding the capacity of government agencies and departments to appropriately refer disadvantaged consumers to appropriate agencies that will be able to provide advocacy and assistance.

Industry specific regulation – national regimes (Ch 5 and Rec 5.4)

The Productivity Commission mentions two examples where jurisdiction-specific regulation may be appropriate. Differing industry-specific regulation within a jurisdiction may be justified where there are differences in the level and quality of consumer information and education across jurisdictions or other significant variations in circumstances. This issue is particularly important in markets that have recently or over time undergone a process of deregulation. Examples of this can be seen in the energy and water retail industries where different states and territories (especially Western Australia and the Northern Territory, which are not a part of the National Energy Market) are at very different stages of market development.

This issue is of particular concern in relation to consumers experiencing vulnerability and disadvantage given their proven, reduced capacity to effectively utilise market information at the time of disadvantage or vulnerability. The extent to which prior historical knowledge of the market exists amongst the general public may dictate differential strategies and regulation across jurisdictions regarding the level of consumer protection provided within a market.

Essential services

In relation to essential services such as electricity, gas and water there is relatively little incentive for businesses to totally self-regulate in ways to fully respond to the particular needs of those who are vulnerable and disadvantaged given that the vulnerable and disadvantaged consumers who are likely to experience the most significant detriment are a relatively small component of the market. Where self-regulatory mechanisms are likely to be most successful is where there is an external backstop in the form of mandated reporting of customer data and outcomes to a regulator. This data, if unacceptable, is then likely to increase negative public exposure for the business, affecting prospects in other sections of the market and thus providing an incentive for positive behaviour change that will meet the needs of vulnerable and disadvantaged customers.

Draft Recommendation 5.4 is important to ensure that disadvantaged consumers continue to have sufficient access to utility services at affordable prices. It should

be pursued through transparent community service obligations, supplier-provider hardship programs, or other targeted mechanisms that are monitored regularly for effectiveness. The move to a national approach to generic consumer law should not overrule existing state consumer protections, eg, mandatory hardship policies for disadvantaged consumers in Victoria.

Hardship policies for disadvantaged consumers should be made mandatory as a part of any future consumer protection code covering National Energy Market Participants. It should not just be mandatory that energy and water retailers have a hardship policy, but minimum content inclusion definitions should be required.

Regulatory Assessment (81)

Regulatory assessment should deal directly with the question of whether specific consumer regulation meets the needs and protects the interest of specific cohorts that have been previously identified as experiencing difficulty in effectively participating in the market. These consumers may include people with a disability or ongoing health concerns, or people experiencing either short or longer-term financial hardship and disadvantage.

Pre-payment plans (96)

The report seems to indicate that the Productivity Commission views pre-payment electricity meters (PPM) as an appropriate market response to consumer disadvantage. There is significant evidence, however, to suggest that pre-payment meters as a mechanism for ensuring consumer wellbeing through the accumulation of debt and subsequent disconnection from services are highly inappropriate for disadvantaged consumers.

It has been demonstrated in at least two states that have implemented PPM technology that having a PPM actually increases the frequency of disconnection from services and deprives vulnerable consumers of the capacity to negotiate continued supply with the energy retailer.

Additionally, where there were previously regimes to mandate the reporting of indicators of consumer welfare such as rates of disconnection, 'self-disconnection' through non-payment of a PPM may hide real and widespread consumer detriment from regulators and the public. Many of the PPM technologies that have been suggested for implementation have been of the simplest type that do not record the frequency of disconnection, the time spent disconnected or detailed information regarding energy usage. The implementation of these simplistic technologies would result in the masking of a significant measure of disadvantage in the market.

Price Constraints under Contestability – Energy (97)

Effective participation in any market is contingent on the appropriate and effective use of market information. Many people experiencing different types of

vulnerability or disadvantage may, for a variety of reasons, not be in a situation where they can effectively use this information.

While not necessarily delivering the 'best' price available, price caps in effectively contestable retail energy markets at least protect those who are unable to make an informed decision from making the 'worst' choice. To ensure that price caps are used for this purpose, it may be appropriate that they 'move' over time to reflect the average outcomes that would result from product choice in this area. On page 98, the Commission indicates that the issues faced by disadvantaged and vulnerable consumers with utility bills are to do with the 'entire cost of the service' and not just the 'small margin' affected by a price cap. Even though the margin is relatively small when compared to the total cost of service, evidence from the contestable UK market has indicated that this can be over \$100 AU, which may be a lot for someone facing financial hardship.

One of the criticisms of price caps is that they are poorly targeted in assisting people facing financial hardship who may not switch to the most appropriate deal – contestability is said to solve this problem, however, this does not assist those people who still pay their bill but in doing so go without other essential services due to not being identified as requiring assistance. People will inevitably 'fall through the gaps' of targeted assistance. Because of this, some sort of broad-based approach (which may be achievable through tariff structures such as a default tariff) is required.

Emotional and psychological impacts (278-9)

We suggest that the emotional and psychological aspect of consumer detriment for people who are vulnerable or disadvantaged may be far greater than those for other consumers. This is because consumer detriment of this type may compound existing problems and the likelihood that many people experiencing this sort of vulnerability will be less likely to be able to absorb the financial cost of detriment. Psychological and emotional impacts may also result from the absence of positive resolution of an instance of detriment that flow from a reduced capacity to access the different forms of consumer redress. These factors should be incorporated into any future study regarding the extent of consumer detriment experienced by this cohort.

Issues not effectively addressed

The current policy decision-making tree does not reference disadvantaged and vulnerable consumers and arguably excludes all but the most widespread and egregious conduct given its focus on the net community benefits. The consumer policy framework and consumer agencies and organisations need to recognise the Disability Discrimination Act 1992 Cth and use the Act as appropriate to protect the consumer rights of people with disabilities.

The use of the Internet by people with physical disabilities for e-commerce because of the lack of physical access to premises is an area for consideration.

There are specific consumer issues and vulnerabilities in the area of e-commerce and these need to be factored into the development of an effective consumer policy framework. We also note the recent discussion paper released by the Human Rights and Equal Opportunity Commission, *The Overlooked Consumers*, that examines the particular issues of access, challenges and emerging possibilities for consumer electronics and home appliances in respect of people with disabilities.

Advertising and marketing conduct targeting vulnerability or disadvantage

There are many examples of advertising that particularly targets (or has the very real potential to target) people with particular disadvantage or vulnerability. For example, the lack of effective regulation of advertising targeting children, advertising that targets those facing a credit crisis, and door-to-door sales (and similar) direct marketing approaches that have a differential impact on those who have limited mobility (including those who are ageing) or particular vulnerabilities (direct marketing of funeral funds in rural and remote Aboriginal communities).

Behavioural responses

The Productivity Commission Draft Report does not take into account the extent to which some of the behavioural biases may be more persistent amongst vulnerable and disadvantaged consumers. Their capacity to learn from previous instances of consumer detriment is further reduced by the dynamics of a market with complex product offering that make previous mistakes difficult to compare with a present situation.

We support the implied need within the Draft Report for additional research into the behavioural responses of people experiencing vulnerability and disadvantage. In addition to research focusing behavioural factors that influence consumer behaviour of people experiencing hardship and vulnerability, research should also examine the other significant barriers that vulnerable consumers face in fully participating in the market. These barriers should then be examined in light of the extent to which they may be ameliorated by changes to consumer protection regulation/frameworks.

D. Extent of sub-prime lending in Australia

The draft report makes reference at page 386 to RBA claims that the value of the sub-prime home loan market in Australia is very small. This claim cannot be supported based upon current information gathering capacity and on what is known about the home loan market.

The predominate theme in consumer research²⁷ about the home loan market is the prevalence of lenders taking action for possession who are not traditional home loan providers like banks, building societies or credit unions. This other class of lenders have been referred to under various labels, including sub-prime, non-bank or non-conforming lenders. The Australian Bureau of Statistics categorises these lenders as “wholesale lenders” in reference to the manner in which they source credit to fund loans. The essential distinguishing feature of these lenders is that they do not offer deposit facilities (savings accounts) for consumers. They raise money through funding deeds with third party investors via complex multi-layered funding structures.

The labels sub-prime and non-conforming given to non-bank lenders also refers to the class of borrower they are willing to lend to, making the label more about the borrower than the lenders. Issues which may result in a borrower not being categorised as a “prime” customer can include poor credit history, having insecure sources of income or having incomplete taxation records. Traditionally, such issues would have limited a potential borrower’s ability to obtain credit from a bank, building society or credit union.

Indeed, many sub-prime lenders have marketed themselves as the lenders of choice for self-employed consumers, those with a variety of limitations to their credit worthiness, often including those with low or insecure sources of income. However, the reality is that that sub-prime lenders provide credit to “prime” borrowers as well as to those self-employed with good taxation records. Increasingly, sub-prime lenders have also marketed themselves as providing credit for borrowers thinking about debt consolidation.

Thus the existence and rapid expansion of this type of lender has undeniably increased the number of potential home buyers in the market in a short period of time. This has impacted upon the cost of homes and increased risk in that sector. What is not known at present is the value of the sector.

In mid 2007, the US sub-prime market collapsed leading to a global shrinking of credit availability as lenders and investors became concerned about exposure to the collapse. This led to a great deal of commentary on the exposure of the Australian market to the collapse and the value of our own sub-prime market. Perhaps as a means of calming concern, many commentators claimed throughout 2007 that the sub-prime industry in Australia is very small and that default rates in the sector are too low to be of concern. Even the former Federal Treasurer Peter Costello claimed in Parliament on 8 August

²⁷ A Kilpatrick, “They Want to Take Our House: An Investigation into Actions for House Repossession in the ACT Supreme Court” Consumer Law Centre of the ACT 2006; A Kilpatrick “They Still Want to Take Our House” Consumer Law Centre of the ACT 2007.

2007 that sub-prime lending in Australia was only 1% of the market and that defaults within the sector were “only” at about 6.5%.²⁸

The former Treasurer’s statement about default rates were contrary to figures reported by Standard & Poors only two days prior on 6 August 2007. On that day, Standard & Poors stated the best default rates in sub-prime lending were held by Pepper at 7% and the worst by Mobius at 23%. This would make the 6.5% figure quoted by the Treasurer impossible to achieve. Further data from Standard & Poors for 2007 indicates that sub-prime lenders’ portion of the home loan market to be approximately 5.35%, with a total of \$41 billion originating from these providers.²⁹ The figures represent a dramatic increase from about eleven years ago when the total value of sub-prime home loans was reportedly nil.

So why would the Treasurer’s figures be so different from the agency which actually assesses the credit-worthiness of the sub-prime sector? The answer lies in two factors:

1. The definition of sub-prime lending is being too narrowly construed by the RBA as it does not seem to be encompassing all non-bank/non-conforming/wholesale lenders.
2. No single or combined agency knows how big or small this market is in Australia because no one has been tasked with finding out.

Therefore, the real figures can only be “guestimated”. This is a clear failure of the former Government’s policy which requires urgent remedy.

Some data about the value of non-conforming lending in Australia is kept by the ABS, who advised the ACT Consumer Law Centre it only collects information about lenders who write more than \$50 million worth of loans each year. As a result the ABS estimated only 70% of the sub-prime market is reported in its Housing and Finance data. A recommendation made by the House of Representatives Committee inquiry into Home Lending Standards in late 2007 is that the ABS collect data on house reposessions. A recommendation which the Committee also ought to have made, was to task the ABS with gathering complete information about the value of all non-bank lending so that the market, consumers and policy makers can be adequately and accurately informed.

Even on the incomplete information available from ABS data, it is clear that the non-conforming market in Australia is by no means small in terms of dollar value or the number of loans approved. In its Housing Finance Figures released on 10 July 2007, the ABS reported that the number of loans approved³⁰ by sub-prime lenders in May 2007 alone was 9,072 and the dollar value was over \$2.3 billion. In the first 5 months of 2007 the total approved was approximately \$9.5 billion (approximately \$253,527 per loan).³¹ Meanwhile the same figures for approved bank loans in the first five months of 2007

²⁸ Hansard, House of Representatives, 8 August 2007. This is in contrast to bank default rates which are at about 0.6%.

²⁹ Standard & Poor’s Australian Securitisation News, Issue 281, 18 May 2007 at http://www2.standardandpoors.com/spf/pdf/fixedincome/Issue281_SecuritisationNews.pdf, pg. 3.

³⁰ The ABS notes that not all loans approved are completed. It is unknown what the total value of completed loans are.

³¹ ‘Low-do lender triples profit’, Lisa Murray, *Sydney Morning Herald*, Tuesday 5 October 2004.

were 58,366 and \$13.69 billion respectively (approximately \$234,725 per loan).³² The number of loans approved by all other lenders (ie building societies and credit unions) in May 2007 was 6,306 and were worth \$1.2 billion.

In summary, what is known about the first five months of 2007 is that non-conforming lenders approved more loans by volume and by value than credit unions or building societies and 12.3% of all loans approved during that time. Contrary to those voices working to minimise Australia's home grown exposure to non-conforming lending, the value of the sub-prime market in Australia is significant and deserving of attention as the numbers of repossessions increase and the share market damage diversifies.

³² ABS Housing Finance Figures 5609.0 released 10 July 2007.

E. Agenda for Further Consumer Policy Work

<i>Current Problem</i>	<i>Proposed response</i>
Intermediaries (such as mortgage brokers, commission-based financial advisors) whose remuneration relies not so much on the profitability of their transactions, but on the volume of their transactions have an inbuilt incentive to oversell.	Investigate how consumer understanding of the principal/agency relationships can improve. Explore regulatory action against mis-selling by intermediaries. Improve accountability structures of intermediaries.
Bundling increases information asymmetry as it makes it difficult for consumers to determine the value of the deal as a whole compared to its component parts. Bundling of unrelated products has high transaction costs and leads to many consumers having to pay for goods they do not want, it locks consumers into particular suppliers, reduces consumers' access to remedies and it leads to costly and complex disputes.	Review anti-competitive demand-side practices, including loyalty programs, a form of bundling.
The Productivity Commission identifies irrational over-insurance, the influence of "shrouded attributes" and suboptimal risk appraisal. It reports on four biases (overconfidence, endowment effect, choice overload and present bias) that may have "particular policy interest" but does not develop these or their implication for consumer policy. For example, producers exploit consumer biases in many advertising practices are designed to lead consumers away from welfare-improving decisions.	Review practical implications of behavioural economics on consumer and competition policies, for example marketing practices that deliberately lead consumers to make less than optimal decisions
Firms often practice price discrimination between different buyers, particularly in services, but also more generally in industries with high fixed costs. A related problem is that many firms persist with poor practices, rectifying them only for consumers who complain. (e.g. high bank fees). In many cases price discrimination aggravates the situation of vulnerable and disadvantaged consumers.	Examine price discrimination, with a view to recommending how it may be regulated to avoid exploitation of vulnerable and disadvantaged consumers
The notion that there have been consumer benefits from competitive "reforms" in utilities needs empirical testing. These "reforms" include including breaking up vertically integrated monopolies, introducing contestability and privatization, all involving high finance costs and transaction costs.	Undertake benefit-cost studies of utility "reforms", particularly for the fungible utilities of electricity, gas and water.

Not all consumer codes have been developed with adequate consumer input. Insufficient rules around consumer codes have seen some industries, for example the Mobile Premium service industry, 'game' processes for their own advantage.	Develop a generic set of principles and procedural requirements for Codes that affect consumer contracts or conduct in consumer markets.
Labeling and marketing claims by suppliers about the environmental impact of products & services can be inaccurate, unverifiable or fail to disclose the full impact of the product or service.	Improve the standard of environmental labeling schemes and better enforce misleading and deceptive green claims
Consumers seeking to make sustainable consumption choices in energy intensive and/or environmentally damaging industries struggle to differentiate products & services.	Explore consumer information needed in critical markets to make more informed environmentally conscious consumption decisions
Penalty fees charged by financial institutions on transaction and credit accounts have inflated above underlying costs.	Grant ASIC/ACCC power to abolish unfair or inappropriate exit fees and penalty fees.
Consumers are struggling to understand and compare riskiness of retail investment products.	Introduce a risk rating system for investments targeted at retail consumers.
Banking customers have limited protection of their deposits in the event of a major crisis.	Explore a depositor protection scheme for prudentially regulated Authorised Deposit-taking Institutions.
Consumers who suffer financial loss from a disqualified or bankrupt or retired financial advisor to not have the benefit of professional indemnity insurance.	Introduce a compensation scheme for financial services to protect consumers where professional indemnity insurance will not.
Unhealthy food advertising to children influences their food preferences and food choices. Unhealthy food marketing makes parents' jobs hard by tempting children with salty, fatty or sugary foods.	Introduce regulations to prevent marketing of unhealthy food to children.
Health claims assist manufacturers to market their products on the basis of nutrient content or a potential health benefit. In particular health claims are most likely to be used on processed foods rather than the fresh foods we should all be eating more of.	Extend regulation and enforcement powers of health claims to the Commonwealth
Nutrition information required by governments and claims made by manufacturers to increase product sales compete for label space and the consumer's attention.	Develop and introduce a simplified food labeling system that includes some evaluation of the contribution of the food to a healthy diet.
Sophisticated and potentially misleading marketing strategies to increase drug sales can lead to leakage (drugs approved for one purpose being commonly used for another) and an increase in the cost of the Pharmaceutical Benefits Scheme (PBS).	Undertake an independent inquiry into all aspects of pharmaceutical marketing in Australia, its impact on medical practice and its contribution to cost pressures on the health system.

Complementary medicines make a range of claims about their effectiveness, but these claims are not always backed up with sound evidence. In some cases complementary medicines can harm consumers' health. Current regulatory action does not do enough to protect consumers.	Amend the Health Act to require pre-market evaluations of the efficacy and safety of complementary health products.
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F. Case Studies in Unfair Contracts

Unfair termination fee in educational course contract

Our client entered into a contract with a private college to undertake a course to obtain a Certificate IV in Nursing. She entered into a fee-for-service arrangement, whereby she would pay \$8,503 for the course. This was to be paid as a \$1,400 deposit and 51 consecutive weekly payments of \$136 and one final payment of \$157. The \$8,503 fee was described as a total fee of \$7,730 plus 10 per cent interest for allowing payment over time.

One month after beginning the course, our client was accepted into the Bachelor of Nursing course at RMIT University. This obviously was a better option for her career goals and she sought to cancel the course with the private college. The private college's contract included the following term:

"if a student withdraws, by written notice, from a fee for service program at any time after commencement of classes in that course, fees will be required to be paid in full".

The college relied on this term to demand all outstanding fees. We challenged this claim, arguing that the term was in breach of Part 2B of the *Fair Trading Act 1999* (Vic). In particular, we argued that the term was in breach of Consumer Affairs Victoria guidelines which said that the following were unfair:

terms that allow the supplier to impose unexpected financial burdens on the consumer; and terms that require a consumer who fails to fulfil their contractual obligations to pay a disproportionately high sum in compensation or in cancellation penalties or charges.

We argued that a contract term requiring the full payment on termination of all amounts arising under the Contract, irrespective of how early in the term the contract is terminated, clearly amounts to a disproportionately high cancellation penalty and an unexpected financial burden on our client. Subsequently, the business did not attempt to rely on the term to require full payment of the contract.

Unfair termination fee in gym contract

Our client, a student, entered into a 12 month contract with Fernwood Fitness Centre. The contract provided that she pay \$64.23 per month to use the centre. She entered into a direct debit agreement to make these payments.

Not long after entering into the agreement, our client's casual employment ceased. She became unable to make the required payments. On a number of occasions, our client's bank account was direct debited into an overdraft balance. Consequently, she was charged overdraft reference fees by her bank.

Realising that she could not afford to continue her membership, our client approached Fernwood to inquire about cancelling the contract. Our client was informed that she would need to provide one month's notice and would be immediately charged 30 per cent of outstanding fees in respect of her Membership Agreement. This amounts to \$475.30.

Fernwood sought to rely on the following terms:

"22. ... if you cancel your membership after the cooling-off period but prior to the expiration of the Term of your membership, or your membership is terminated ... :

(1) if your membership fees are pre-paid in full, you forfeit the membership fees for the remainder of the Term of your membership;

(2) if your membership fees are paid by direct debit, you must provide 30 days written notice (such notice period to be charged at your regular monthly membership cost) and pay 30% of the total amount due for the remainder of the Term of your membership ("Cancellation Fee").

23. If the Cancellation Fee referred to in clause 22(2) is not paid to your Home Club within 14 days, you acknowledge that the Cancellation Fee will be directly debited from the account from which your membership fees are being debited on the next debit date."

Relying on these clause, Fernwood attempted to direct debit our client's account a number of times, causing her to incur further bank fees.

We wrote to Fernwood and argued that clauses 22 and 23 have the effect or object of penalising our client (the consumer) but not the supplier (Fernwood) on breach of the contract, and thus breached Part 2B of the *Fair Trading Act 1999* (Vic). These clauses operate to penalise our client because the amount due acts as a disincentive to cancellation by imposing an exorbitant fee for cancellation. Subsequently, Fernwood did not seek further payment.

Unfair contract term in a credit agreement

In an Amazing Loans contract sighted by Consumer Action, the amount of credit advanced was \$750, the interest rate was 45.5%, and fees of \$750 were also charged. Further, despite the fact that early payout would not entitle the borrower to any rebate of this fee, the contract terms include an early termination fee.

Early Termination Fee.....the fee is equal to 10% of the Amount of Credit.....

While we could not challenge this term as being unfair (as credit contracts are excluded from the unfair contract terms prohibition in the *Fair Trading Act 1999* (Vic)), we believe that an early termination fee that relates to the amount of credit, not considering when or why the contract is terminated, would be unfair.

The contract also contained the following term (common terms are similar in many standard form contracts):

11.4 Any part of any legislation having the effect of limiting our rights or powers, or requiring it to give notices or to take away any other action does not apply, unless we are prevented by law from excluding its application. Any part of any legislation that gives rights or protection to us, or imposes obligations on you, will apply except to the extent that it is inconsistent with any part of this contract.

It is our view that such terms that attempt to exclude liability without clearly highlighting statutory rights and entitlements are unfair, as they result in a significant imbalance in the rights and obligations of consumers and suppliers.

G. Revised Principles for Consumer Policy Development

Commentary from consumer groups	Draft Report Approach (Vol 1, p14)
Within this framework consumer policy should: • support and complement the role of competition policy in improving consumer welfare through: – preserving and promoting incentives for consumers to improve their purchasing capabilities; and – reinforcing market incentives for suppliers to meet consumers' needs effectively. • engender the flexibility required for timely and appropriate adjustment of policies to meet changing market circumstances, new technologies and consumer and business requirements; and • enable soundly-based intervention by: – addressing shortcomings in market outcomes in ways which ensure the benefits of any intervention (or decision not to intervene) outweigh the costs of intervention, with due attention paid to the risks of unintended or perverse consequences; – paying particular attention to the needs of vulnerable and disadvantaged consumers; – ensuring both consumers and producers are satisfied with the legitimacy of regulatory processes and outcomes; – providing for cost-effective enforcement, through a layered regulatory response according to the extent of the problem, the risks involved, and ensuring that consumers have reasonable access to low-cost dispute resolution; and – fostering sound regulatory and administrative process, including periodic review of all policy measures, and avoiding regulatory inconsistencies. At the operational level, whenever a new policy initiative is contemplated, or an existing measure is reviewed, where there may be problems for consumers, there should be: • clear identification of the nature and source of the underlying and problems; • quantification, to the extent reasonably	At the broad level, implementation of the consumer policy framework should: • support and complement the role of competition in improving consumer welfare through: – preserving and promoting incentives for consumers to enhance their purchasing capabilities; and – reinforcing market incentives for suppliers to effectively meet consumers' needs. • engender the flexibility required for timely and appropriate adjustment of policies to meet changing market circumstances and consumer and business requirements; and • facilitate soundly-based intervention by: – focusing on addressing material shortcomings in market outcomes at the lowest possible cost to business and regulators, and with minimum risk of unintended or perverse consequences; – providing for cost-effective enforcement, through a layered regulatory response according to the risk/severity of the problem, and ensuring that consumers have reasonable access to alternative low cost dispute resolution; and – fostering good regulatory and administrative process, including through periodic review of all policy measures, and avoiding regulatory inconsistencies. At the operational level, whenever a new policy initiative is contemplated, or an existing measure reviewed, there should be: • clear identification of the nature and source of the underlying problem; • quantification, to the extent reasonably possible, of the associated detriment, or prospective detriment, for consumers, or groups of consumers; and • a comparison of the benefits and costs of all feasible options for dealing with the problem, including relying on market solutions, or employing approaches from outside 'consumer' policy.

possible, of the associated detriment, or prospective detriment, for consumers, or groups of consumers; and • a comparison of the benefits and costs of all feasible options for dealing with the problem, including relying on market solutions, or employing approaches from outside “consumer” policy.	
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