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PRODUCTIVITY COMMISSION

INQUIRY INTO AUSTRALIA'S CONSUMER POLICY FRAMEWORK

MR R. FITZGERALD, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON MONDAY, 26 MARCH 2007, AT 9.17 AM

Continued from 23/3/07 in Perth

MR FITZGERALD: Welcome to the public hearings of this Inquiry into the Consumer Policy Framework. A number of hearings have already been held and there are more to go following the Brisbane hearings, in Canberra and in Sydney. This hearing relates, as I say, to the inquiry into the review of consumer policy framework in Australia. This hearing is conducted under the terms of the Productivity Commission Act. It's informal in nature, although participants are not required to present under oath, they are required to be truthful in their presentation.

As I say, it's a fairly informal arrangement. We've only got a small number of participants here in Queensland, but there will be a second round of public hearings after the draft report is produced in August at which time we would expect slightly larger numbers of participants, particularly responding to any draft recommendations or findings that might be made at that time. So with no further ado, if you could just give your full names and your title and the organisation you represent and if you want to lead off with your opening comments for 15 or 20 minutes and then I can have a chat about those issues. Thanks.

MS HOWELL: My name is Nicola Howell, I'm the director of the Centre for Credit and Consumer Law at Griffith University.

DR BATHGATE: I'm Dr Tenzin Bathgate, I'm a senior research assistant at the Centre for Credit and Consumer Law, Griffith University.

MR FITZGERALD: Okay. Over to you.

MS HOWELL: Thank you for the opportunity to appear at this hearing and to give some of our initial views on what I think is a really important inquiry in Australia. It's a seminal inquiry for consumer policy in Australia and we welcome the consultative process and I suppose also the open mind that's been brought to the inquiry and these issues, in particular to the acknowledgment in the issues paper that there's clearly a role for government in this area of consumer policy.

The Centre for Credit and Consumer Law is a small academic centre based at Griffith Law School at Griffith University. We started just over three years ago with initial funding provided by the Queensland government Consumer Credit Fund and Griffith University. As an academic centre we're involved in research policy and general advocacy in consumer credit issues and general consumer policy issues. We've also been involved in the capacity of building the consumer sector in Queensland through things like regular network meetings, newsletters, seminars, joint submissions between ourselves and other community organisations.

In addition to our core funding we've been successful in attracting small and large project funding, in particular major funding from the National Electricity Consumers Advocacy Panel to support our research and advocacy work in the

electricity sector in Queensland and nationally. Consumer policy and consumer protection in recent years I think has been treated as a poor second cousin to competition policy and regulation and as a result I think that consumer policy and consumer protection regulations are falling behind those in other developed countries, but more importantly they're not meeting the needs of Australian consumers today in the challenging markets that we have.

Consumer policy and consumer protection should have a wide-ranging agenda. It should act to reverse the effects of market failures, such as information asymmetry, and this aspect is what I think a lot of our consumer protection regulation has focused on in recent years. We've had a great emphasis on the importance of disclosure obligations and empowering consumers and activating competition. These are all important goals. But I think that consumer policy should also look to broader questions, such as how to ensure an equitable sharing of the benefits of competition and market mechanisms; how to ensure access to central services; how to ensure that there's fair treatment to those that the market might not be interested in looking after or where the market might take advantage of vulnerabilities, and other efforts to rebalance the relationship between consumers and traders.

Consumer markets are becoming more and more complex and the demands on consumers to look after themselves are increasing steadily. We need to know how consumers behave and make decisions in order to develop an effective consumer framework. In the past our assumptions about how consumers should behave and make decisions has led to reliance on disclosure as a primary consumer protection tool, but if consumers are not able to use this disclosure information in the way that the hypothetical, rational consumer might, then the appropriateness of this tool needs to be questioned, and the circumstances in which it's used needs to be analysed. We need to devote resources to research, something that governments I think in general have lacked in recent years in Australia. We are starting to see some change in this area, for example, the standing committee of Consumer Affairs. Officials of Consumer Affairs is now funding some research on proposed changes to the disclosure requirements in consumer credit and, importantly, they're doing this before implementing the changes.

This I think is an area where behavioural economics can give us some insight but it's not the only type of research that needs to be done. Much is made of the regulatory burdens imposed on business and clearly there are costs and benefits in regulation, and costs and benefits in not regulating as well. We need to know more about the costs and benefits to consumers than we do know now, otherwise issues like the regulatory impact processes I think potentially set consumer protection and social justice legislation up to fail because it's very difficult to assess the costs to consumers of not regulating or to assess the benefits.

In terms of some of the other issues raised in the issues paper, I just wanted to

briefly mention a couple. Firstly, I think there is a need for both industry specific and general legislation; general legislation like the Trade Practices Act sets up framework or principles that are applicable across the economy. Industry specific legislation on the other hand sets out more detailed rules for that industry, and it's difficult to see how these could be adequately encompassed by general legislation without either industry asking for lots of guidance anyway, which then leaves the regulator making rules rather than parliament, and/or consumers having to go to court to develop and apply the general principles to specific individual circumstances.

Just to take one example: it's difficult to see how you could translate the rules in the credit code about repossession and notices that are required to be given before goods can be repossessed into some generic legislation; secondly, I think that the federal state divide on consumer policy is a real challenge in Australia, and again consumer credit is an obvious example of the problems of relying on state based but uniform legislation to deal with national markets. There have been incredible delays in getting amendments and updating the code over the past few years. Recommendations for changes that were made in the 1999 national competition policy review and post-implementation review still largely haven't been implemented. Even in an area such as finance and mortgage broker legislation where the industry is also keen on regulation, we still get to see that draft regulation, draft legislation appear.

Further, I think that access to justice and redress is obviously a key issue for this inquiry. This means that our regulators need to have the resources and the tools to get redress and to ensure that they can get redress, and issues like the problems that the ACCC face in Medibank and Danoz cases in getting redress for individual consumers, need to be addressed. But we also need to ensure that consumers have access to appropriate dispute resolution mechanisms. The rise of the dispute resolution schemes in some industries, particularly the financial services sector is very welcome but there's still a couple of, I suppose, caveats on that. There are still gaps in the implementation, even in the financial services sector, because consumer credit providers are not required to join an EDR scheme.

There has been a tendency for the schemes to be more heavily used by middle and upper-income consumers, so questions about whether they are accessible to lower-income or vulnerable consumers are still quite live, I think, although the schemes have been doing a lot of work to try and change that. I think it's an issue that's going to become more and more prevalent as the schemes become more entrenched in the system. In a situation where we have very little consumer litigation the schemes are effectively interpreting the law where there is no case law, and I think that has some implications that we haven't quite thought through or worked out how to deal with.

Finally I think that adequately resourcing the consumer voice is critical to an effective consumer framework in Australia. Without it there's an empty seat at the policy discussion table, or government agencies are attempting to be the consumer voice. Our practical experience shows that individual consumers are not able to get involved in detailed policy discussions so there does need to be some resource in there. The consumer voice I think is about policy, about advocacy, about representation and research, but again it's an area where we've fallen behind on this, in comparison to some of the other developed economies. We haven't fallen behind everywhere, there are some industries and sectors where there is some adequate resourcing of the consumer voice, but in others it's quite limited. That's all I wanted to say by way of an opening statement but I might just hand over to Tenzin.

MR FITZGERALD: Sure, thanks.

DR BATHGATE: I won't say much because Nicola has covered off on that but I think the electricity sector highlights the need for more specific legislation in respect of essential services, so that there needs to be a distinction between what you could call generalist goods and services and ones that people depend on their lifeline for, like electricity or gas and so forth. So I think that's certainly one of the key issues that's been highlighted for me during this time; the other is capacity building and resourcing. I think to its credit the advocacy panel is attempting to establish a representative consumer voice and it has established the national energy market round table of consumer advocates in order to speak on behalf of consumers about their needs and interests. I think that's an evolving discussion that can be closely watched and I think there will be good things to come out of that.

At the same time there needs to be localised capacity building. You can't just have people turning up to the table who don't have genuine representation of their constituents. So the models that I also think are open to examination and testing and seeing what people will consider are legitimate representative models in that respect. I think the retail market in electricity which has just been established in Queensland, highlights just how rapidly things can change when new markets are opened and whether or not consumers are actually prepared to deal with those changes adequately. In Queensland, for instance, there's been a very short lead time to the introduction of these changes, so I think it remains to be seen whether that's going to be adequate. But I think that highlights the need for - as Nicola has already spoken to - more capacity and resource building in that area so that consumers are in a robust and strengthened position to respond when change comes.

MR FITZGERALD: Good, okay. Thanks very much. I apologise about the background. It is a problem in this hotel but I was hopeful we wouldn't have had the audio-visual soundtrack coming through but anyway, we do. Thanks for that, and you've raised a whole range of issues which I'd like to canvass with you. Perhaps if I could start with the consumer advocacy area itself, which is one of the last points

you've raised. As we've travelled around the states - and we've been to all the states and territories and held numerous consultation meetings, as well as some public hearings - it strikes us that at one level consumer advocacy as a formal activity has in fact reduced in terms of the formal agencies.

Yet on the other hand we've started to see some specific industry based consumer support - and you've just mentioned in the energy area and a few of the other areas. Do you have a view as to what the right model or right framework would be for consumer advocacy in Australia? Now, we're obviously going to look at the National Consumer Council in UK and other models, but we're just trying to get a handle on what should be a reasonable consumer model in the Australian context, because most people would come to the view that there does need to be a strengthening in consumer advocacy. The question is, what's the nature of that, who should fund it obviously and, as you've rightly said, what is the level of representation that should be appropriate on those, but just the general concept of how we strengthen that voice.

MS HOWELL: I think that consumer advocacy has a number of components and they don't necessarily all need to be in the same body, so one is research and policy work and that can be through a National Consumer Council, as in the UK, or it can be through individual organisations that are adequately resourced to do that work. I suppose another component is having a membership-based organisation to facilitate networks and communication between a whole range of organisations across the country that might be involved in consumer policy issues, and that in the past has been the Consumers Federation of Australia which has not received any government funding since 1996. I'm actually deputy chair of the CFA at the moment - disclosing my interest. But I think the CFA or an organisation like that can play a really important role in involving community and consumer organisations for which consumer policy is not their only focus; for example, the Councils of Social Services who I think have some really important information to feed into discussions around consumer policy but they're not necessarily always involved because that's not their core business, and then a whole range of other community organisations across the country.

I think that having some way of communicating and developing that network and facilitating input of community and consumer organisations on consumer policy issues is really important. Then there's obviously the consumer voice in terms of making submissions and being represented on consultative committees in inquiries and things like that. Again that's a role that a peak body could play, a CFA could play, or a network of organisations.

MR FITZGERALD: Why do you think it is that the Commonwealth government has failed to be supportive financially of bodies like the CFA, because in one sense we've got that increasingly competitive marketplace - and there is a high recognition

of the need to take account of consumer aspects of that by most policy makers - and yet at the same time, other than in the specific industry where we have seen a growth of some forms of supported consumer advocacy, what do you think are the barriers to - or the concerns that government seem to have in supporting consumer advocacy bodies?

MS HOWELL: I don't know, I wasn't around - I was working in government at the time - but the CFA and other peak bodies were de-funded by the federal government, but my understanding is that there were a range of peak bodies that were de-funded and in fact what replaced those peak bodies were councils of sort of individuals. So I think in the youth area there was a peak body for youth organisations that was replaced by a council of individual young people in the community. I suppose from an effective policy perspective the issue is, that type of approach is, that you're just getting people together on an irregular basis - - -

MR FITZGERALD: Sure. Yes, I know what you mean. Just in current terms are there any factors or reasons or rationales that would preclude governments from supporting more generic-based consumer advocacy bodies?

MS HOWELL: I think that governments have sometimes been reluctant to fund people and might criticise them.

DR BATHGATE: I think that's raised in a different resourcing in the energy sector, for instance, with the state versus federal funding for consumer advocacy, so that in a state like Victoria it's very, very robust. They have had longstanding consumer advocacy groups and have developed over many years a robust relationship with government, both state and federal, and in many ways they're many years ahead of Queensland in that respect. So I think there needs to be sort of a balancing commitment between state and federal governments in order for consumer advocacy to have stronger muscles, if you like.

Of course I think Nicola's point about criticism is an interesting one. I think if an organisation is functional and doing a good job, then robust criticism is a necessary and an essential part of consumer policy advocacy, and people shouldn't resile from that all, I don't think.

MR FITZGERALD: Related to that is your issue about access to redress and to justice generally. One of the issues we are very concerned about is that whole area of remedies and access; it looms very large, in our view. As we've gone around the states and territories it's very clear that jurisdictions have very different mechanisms in place to deal with access issues. Some have tribunals, some don't; some have fairly substantially supported legal services, others have very weak legal services. Right across the states and territories there are different approaches. Do you have a particular view as to what's the essential elements that need to either be changed or

modified or introduced that would improve the position of access, particularly for low income and disadvantaged, but more generally than that?

MS HOWELL: I think that you can potentially have equivalent access with tribunals and court systems. But I suppose what you need to set out are the principles in terms of speedy resolution; informality of proceedings, so that it's easy for individuals to self-represent; access in terms of costs so that it's not costly, you're not required to have a lawyer. In Queensland there's been some discussion around whether it should move to a tribunal in the case of consumer credit disputes which are heard in the court system at the moment. One of the concerns that's been raised is because Queensland is so dispersed - its population is so dispersed - having a tribunal based in Brisbane is not really going to facilitate access to justice for much of the rest of the state. The advantage of the court system is that there is a Magistrates Court in every locality.

On the flip side of that is that the court system don't necessarily have the specialist expertise. They deal with a hundred different areas, so they don't know the details or are not familiar with the details of the consumer credit regulations. So whatever system is set up it needs to be robust enough so that there is specialist expertise there, and there needs to be again resourcing of legal centres. Duty lawyers - I think in Melbourne, legal aid for a time - I'm not sure if they still are - was running a duty solicitor scheme for debt matters, so that people who had been served with a garnishee notice or an enforcement notice could get some representation there. Again that's an area that Queensland is not well resourced in, because if people can't get to the court system or the tribunal system then disputes are unresolved, and the people who miss out are those who are worst off.

MR FITZGERALD: Just in the Queensland experience, what do you think you would do or you might suggest would need to be done to strengthen access here? What would be the two or three things you might consider changing or improving here in Queensland?

MS HOWELL: I think one of the more important things here is to have some more free legal advice on consumer matters, because at the moment all we have is - Legal Aid has one position as a consumer protection solicitor. It's a job shared by two people. There's no consumer legal centre here providing case work for advice. There's an advice service that's run with students of UQ but that's not quite the same as a dedicated legal centre. That would be one thing; increasing the access to free legal advice and assistance.

I think looking at the question of transferring credit from the court system to a tribunal, a more informal tribunal system - although I'd have to say I haven't looked at that in detail and I don't have a firm view on that, but certainly ensuring that whether it's a tribunal system or the court system that the credit legislation - you

know, there is expertise to deal with the matter. I think they would be the key things.

DR BATHGATE: I'd just like to add that certainly by way of the example in the energy sector - and in the other sectors - that the ombudsman clearly plays a significant role currently as an official kind of advocate but in way a de facto advocate for consumers in the absence of other bodies. Queensland is moving towards an independent energy ombudsman, and that's a very welcome move in Queensland. I think those ombudsman combined in the energy section and the ANZOA one form a very important and significant resource for consumers in terms of their advocacy and identifying material issues there and also, related to that, gathering important statistics on what are significant issues for consumers.

MR FITZGERALD: So we've now got a range of industry specific ombudsman. The energy one I thought had already been established here, but that's going to be established.

DR BATHGATE: It's enacted but it doesn't go live until 1 July.

MR FITZGERALD: Then you've got telecommunications ombudsman, the banking and finance ombudsman and a number of others. The question I've got is, is this the right strategy? Is it the right strategy to go for industry specific ombudsman leaving the Department of Consumer Affairs, or whatever they're called, Fair Trading, to deal with the generic, or is there a more radical model where you could actually create a consumer ombudsman with some specific ombudsman remaining. What I'm trying to get at is, is the current arrangement where the department is involved - both as investigator and, to some degree, dispute resolver and so on - a satisfactory model into the future, given our experiences with the ombudsman; the second part of that is, do we want to continue to see a plethora of industry specific ombudsman, is that an efficient way of dealing with disputes?

Our feedback so far is that most people feel that those ombudsman are working relatively well. I'm sure we'll have points of criticism. But just into the future what would be the model you'd use for effective dispute resolution.

MS HOWELL: One of the advantages of having the industry-based schemes is that you have the buy-in of industry. If you move to a broader consumer ombudsman type scheme, I think there's a risk that you'd lose that and there might be a risk that industry would not be prepared to fund it to the extent that they do now. In the UK they've brought all their financial services - earlier financial services schemes - into a financial services ombudsman with specialist ombudsman operating underneath that. My understanding is that works well, but there have been discussions around trying to do a similar thing in Australia and they have not progressed very far, and I think in part that is because the ownership that the banking industry has, for example, of the banking ombudsman - and there's a bit of

competition between the different schemes - that you might lose. So even in Australia, moving towards a financial services ombudsman, we haven't progressed very far, even though some people have been quite an advocate of it. Moving to a broader ombudsman scheme again I think is going to be even more difficult.

MR FITZGERALD: Just on the financial services and the notion of an overarching ombudsman, it strikes that in relation to financial lending of financial products, consumers don't necessarily differentiate between the type of product that they're actually purchasing. So, for example, in relation to financial lending specifically - which is an area which we're looking at specifically in this inquiry, both in terms of the role of ASIC, the role of the ACCC, the role of the states - what's your view in terms of trying to get a more integrated national approach to the whole of, say, the financial lending area? What are the pros and cons that you see of doing that, and if you were to do that, what would that look like. Again, moving to a financial services ombudsman might be one part of that mosaic.

MS HOWELL: I think we have an anomaly with credit being regulated at the state level and all the other financial services being regulated by the Commonwealth. I mean, it's very hard to explain that to not just individual consumers but also community and consumer organisations in terms of the work that we do with financial counsellors. We're often asked to explain why something is ACCC or ASIC and nobody really quite understands it. It doesn't make a lot of sense to consumer credit regulated at the state level. It's an historic thing that we've managed to get uniform laws or practically uniform, but that whole process of ensuring and maintaining uniformity is fraught with difficulty. Most credit providers are major financial institutions who operate nationally.

So I think there would be a lot of merit in exploring whether we can move consumer credit regulation to the national level potentially through the Corporations Act so that credit providers are regulated like other financial services providers and have similar obligations in relation to licensing and disclosure and dispute resolution.

MR FITZGERALD: Obviously if you do that and you have a sort of common regulatory approach, how do you ensure that there's proportionality so that obviously if you're obtaining a loan for several hundred thousand dollars from a bank or through a mortgage broker, or you're obtaining a few hundred or a few thousand dollars and the security is against, for example, pawnbrokers and so on, one of the fears people would say is, whilst they're the same sort of product - that is the cash, the lending of money - there is an issue about what sort of regulations you would need. But do you think that that can easily be managed within a national scheme?

MS HOWELL: Yes, I don't see why it can't. In some senses the person who is borrowing 3 or 4 hundred dollars from a payday lender requires as much - for them that is a significant a financial outlay as a more wealthy consumer taking out a

mortgage to buy a home. So in terms of the level of protection that's required - and protection against abuse and taking advantage of - that's obviously just as important, the small end of the market as in the top end.

MR FITZGERALD: That raises the whole issue which I want to explore. You mentioned disclosure, and in relation to financial lending and financial services more generally this is a conundrum because what we have seen to have done is responded in a very traditional manner, increasing the amount of information that's available to lenders, but the evidence seems to be that it hasn't increased anyone's understanding of what they're actually obtaining, and there seems to be concerns by all providers, regulators and consumer groups.

So if we're looking at financial lending, just for a moment, just around lending, what is the right approach to this area? Obviously we would take the view that some level of information is critical to enable people to have choice, which is the first criteria; the second is that people need also confidence in the product. What's your approach to dealing with those issues - the ability to choose and the ability to have confidence in the actual product, including the terms and conditions?

MS HOWELL: Yes. I mean, obviously you need to have information available and I think the research that has been done in the UK on credit and financial services disclosure talks about having summary statements and key terms sort of up-front and that's the approach that's been taken - tried to be taken - in the FSR context and has been taken in the credit context in terms of the new proposals there which are going to be tested, so we will in fact see that they make a difference. So having sort of key information up-front in an easy-to-understand format, having information that's comparable, so some way that consumers can compare complex terms and conditions and complex products, and then I think we need to - in terms of choice versus protection - acknowledge that consumers don't read contracts; that even if they do, they take a positive view on how they're going to behave. They never think they're going to default, so they don't necessarily look at the terms around what might happen if they default. So in those circumstances if we can have a process where we determine what is a fair outcome in the case of default or fair terms and conditions, then, I suppose, I'm not averse to those being regulated in some form or another.

MR FITZGERALD: Some jurisdictions have gone - and I want to take about unfairness in a minute - to the point of actually trying to control the contract itself; that is in terms of, for example, some states have now capped interest rates, some have required that over certain amounts you have to have a compulsory assessment of the client's ability to repay and so on and so forth. None of those have been accepted in more than one or two states and there are real concerns about how far you should go in trying to actually determine the key terms of the contract, as distinct from the more general notion of eliminating those aspects which are grossly unfair. What approach do you think we should take in relation to those issues?

MS HOWELL: In relation to interest rate caps issue, I think - and we've done some qualitative research on this which we're just sort of finalising, but we've spoken with industry and consumer and government agencies on this issue and the merits of capping or not capping, and the impacts of capping or not capping. I mean, it's really an issue about how you deal with the very expensive, small loan products in circumstances where the people who take out those loans are often not in the mindset to do any shopping around. They're borrowing money because the electricity is going to be cut off tomorrow or the car has broken down and they've got to get to work, get the kids to school. So they're constrained in their decision-making. They've got an element of urgency about it, and/or they've got a poor credit history and feel that the mainstream lenders are not going to be interested in providing a product to meet their needs.

In those circumstances I think that it's almost - one way to look at it, it's a sort of product safety type approach so that there is an argument that the very high cost loans, particularly whether they're for short term and they're sort of allowed to be rolled over regularly, that those type of loans don't actually help the person who has borrowed the money in the first place. It might provide some short-term relief but when they have got to repay the 3 or 4 hundred dollars in two weeks, they can't, because they didn't have 3 or 4 hundred dollars two weeks earlier and nothing has really changed about their circumstances. Then the potential for spiralling into greater and greater debt and the consequences that that leads to, I think it is helpful - and it has been helpful in my thinking about this - to think about it in terms of product safety. Potentially it's an unsafe product, and if it's an unsafe product then it shouldn't be allowed in the market. In the traditional product safety context there may well be people who would be happy to buy cheap but unsafe products, but we don't let them, because - for the greater good of the community - we think it's more appropriate that those products not be allowed in the market.

MR FITZGERALD: What is the evidence at the moment of outcomes in those states that have done that approach and those that haven't? Have we got solid and reliable research that now gives us some sort of basis for knowing how these policies, these different approaches, have worked?

MS HOWELL: No, except that - really, the cap in Victoria doesn't work because it's a cap only on interest. It doesn't cap the total cost of credit. They can just have a loan of 47 per cent - - -

MR FITZGERALD: That's right.

MS HOWELL: - - - but bump up fees and charges so the overall cost of the loan is still very expensive. So, I suppose, there's no sort of empirical research on that but that's certainly what came through in our interviews. In terms of New South Wales,

the cap on the total cost of credit to short-term loans or small-amount loans has applied I think for about three years, and again this is only qualitative research that we've done, we haven't done any quantitative work. But I suppose we heard two stories: we heard from the consumer advocates in New South Wales that, yes, some lenders have moved to escape the code by using bill facilities or pawnbroking arrangements so that they're not bound by the interest rate cap. One of the lenders in fact we interviewed said that's what they did in New South Wales; they didn't want to but that's what they did.

But we've also heard that some lenders - some payday lenders and micro-lenders - are operating and did change their products to fit within that cap so that they obviously can make enough money to survive. The more recent change in New South Wales has been to extend the total cap on credit to the whole of the credit sector, and that's only been in operation for a year or so. I think it's too early to tell the impact of that, but I understand New South Wales was planning to undertake some research on the impact there.

MR FITZGERALD: Okay. The issue there which it raises is that whole issue about behaviour, and you started off by talking that. One of the things that has become clear to us is that understanding how consumers actually operate is important. Where it seems to be most important is when you're trying to introduce specific provisions around a particular type of activity or a particular industry. So if we're looking at the way in which people make decisions around borrowing - - -

MS HOWELL: Yes.

MR FITZGERALD: - - - or the way in which they make decisions around utilities, you know, in this new retail environment that we have, and so on, what's not clear to me is when you apply it to the general framework. One of our tasks is to look at the Trade Practices Act or the Fair Trading Act or the Sale of Goods Act, the Consumer Credit Act and all those. You might just try and give me your thoughts about it. When we look at the generic law it's not as clear that behavioural economics and those issues would dramatically change the generic law. What it would change or might change or might help you inform is when you look at those specific areas. But I was wondering if you have a view about that because I must say, after now looking at this for a couple of months, that's the sort of view we have. I'm just saying even if you applied a really rigorous behavioural economics approach, what would that change in your generic law? I must say it's not obvious to me. The issue about information I think is a very big issue, but beyond that would you have a different view to that, just thinking about it?

MS HOWELL: I think it's probably true, perhaps with the exception of generic law that we don't have at the moment, so the unfair contracts type law. I think how consumers operate with contracts in terms of - that they don't look at contracts, and

also that traders don't compete on terms, particularly, traders compete on price and quality, and to some extent that can be part of terms, but the detailed terms, traders largely don't compete on. So you have the same type of term in every home mortgage contract in the country. So I think behavioural economics can potentially play some role in informing the need for that type of regulation. But in terms of the general, well-accepted principles about misleading and deceptive conduct and those sort of things, off the top of my head I'm not sure that it can play a huge role there.

MR FITZGERALD: The unfair contracts issue is an issue that we're looking at seriously. There are different models. There's the UK model which applies unfair contract review only to standard form contracts; there's the Victorian model that potentially allows you to look at all contracts, and I'm sure there's variations on the theme. Do you have a particular view, if you came to a view that unfair contract terms was appropriate, what model would be most appropriate?

MS HOWELL: In terms of whether it applies to standard form only - - -

MR FITZGERALD: Standard form contracts. Yes, whether it applies only to - it can go more broadly. Should it be restricted from not looking at price issues, so the price remains outside the gambit, it's only the terms and conditions, like just unilateral variation of contracts, those sorts of issues? Do you have a sense as to what it would look like if you were going to have a national uniform contract sort of review provision?

MS HOWELL: Yes. I think it should be as broad as possible or not restricted in carving off particular types of terms that it can't look at. I mean, the price issue is clearly one that people get concerned about, having the potential to review contracts on the basis of price. But my understanding is that there's a number of jurisdictions in Europe that have that provision and it has not caused the sky to fall in or anything like that and it does give another avenue to deal with unfair contracts. I suppose, for me, the unfair contracts issue is about providing a remedy for substantive issues of substance; the substantive terms of the contract, not the procedural aspects, and that can include the price. There can be unfairness in non-standard form contracts as well, although there might be aspects where there is beyond negotiation, but I suspect in a lot of non-standard form consumer contracts there's not much negotiation happening anyway. That's not something I've looked at in any detail.

MR FITZGERALD: No. The other approach, some people would say, is, "Well, in fact what you should do is not enter into the unfair contract area but look at whether unconscionability can be expanded in its interpretation." But the point you raise is the interesting one; one deals with procedure and process and one deals with substance. They're not completely unrelated but they are conceptually different in approach. I don't know whether you have any view about how effective or ineffective you think the unconscionability provisions are at the moment.

MS HOWELL: I think the unconscionability provisions are effective at dealing with procedural unconscionability and unfairness. They don't deal with substantive issues. That's in part historical and it's in part how the courts make decisions and the role of precedent. So in New South Wales when they introduced the Contracts Review Act, the introductory material for that legislation talks about wanting to use a different term from "unconscionability", so it didn't get bound up in how unconscionability had been interpreted. But when you look at the cases there is that similar focus on procedural issues, rather than the substantive terms of the contract. The difficulty with relying on unconscionability is that it is very much about an individual transaction and the characteristics of the individual parties to that transaction; so whether the Amadios could speak English well or not, and the level of their business experience.

Translating the results of that case more broadly is difficult because the next elderly couple who guarantee their son's business will have different characteristics. So it's harder to get a sort of flow-on effect. I suppose what I'm really attracted to about the unfair contract terms regulation, particularly how it's been implemented in the UK, is that it allows you to have an impact on more than one transaction. So you effectively acknowledge that consumers as a class have a disadvantage in this relationship, and we don't need to look at every individual consumer to see what their level of sophistication is. We can just say, "Well, this term is unfair and let's change it," and I think that that, in terms of being practical outcomes for consumers, or not needing to, I suppose, deal with access to readdress issues - because you've got a government agency who takes on that role and negotiates with the trader and in that negotiation process potentially comes up with a contract that's better for the trader as well, it's clear what their obligations are and where the risks lie.

MR FITZGERALD: Just in terms of the unfairness again are you aware of research that gives a better understanding of how it's now working? I mean, Victoria has got a couple of years and all that, but is there any Australian based research yet that you're aware of?

MS HOWELL: No, I mean, there's a couple of academics who have written some stuff and I've had a look at - the research I did was looking at the case law in terms of how - unconscionability and the unjust contracts provisions substantive unfairness. But apart from that I'm not aware of anything.

MR FITZGERALD: Just a couple of other things before time runs out. The Commonwealth/State issues are also on our agenda obviously. Just your views about the way forward on that - you know, blank sheet of paper sort of stuff - if you were constructing a framework - just to preface that a little bit - it does strike me that there are some elements in the consumer policy area where having one jurisdiction responsible for it would make great sense and the Commission, as you know, in its

product safety report - believes that was an area - trade measurement we understand has already been decided it will go Commonwealth. It may or may not be in financial services, financial lending, credit, that sort of area. On the other hand it seems that a lot of the other areas in relation to general consumer law, there does seem to be a reasonably strong view that the states should continue to have a role. The question is, what is that role. I'm not sure about that view.

The second one is when you come to, say, for example, the essential services or utilities area we are moving to a national framework there. But so just do a general view about moving forward. What is the mix between jurisdictional responsibility, and the second part I want to conclude on is around institutional responsibility, how you see the ACCC performing, ASIC, the departments, to the extent that you want to comment on any of these. But the first one is, the jurisdictional areas.

MS HOWELL: One of the things that works well in consumer policy is having the dual responsibility on the general consumer protection provisions, so having - there are risks in this as well - but having both the ACCC and state fair trading agencies responsible for similar provisions around misleading and deceptive conduct and other things like that can allow the state agencies to focus on local issues that arise in that jurisdiction and the national agencies to take on the cases that have cross-state implications. So I think that that's a useful model as long as you've got appropriate mechanisms to ensure that people don't fall between the gaps or worse, that they get passed back from one agency to the other. I think that that has been an area of concern in the financial services stuff with ASIC took over financial services consumer protection that there was some concern that people went to ASIC and were told it was ACCC and got a different story from ACCC.

You need to have effective processes in making sure that people don't fall between the gaps. I suppose the property investment regulation is another issue that has been passed between Commonwealth and state and that just doesn't work because you don't get an outcome. What was the second part of the question?

MR FITZGERALD: Was there any other aspects that you think need to be realigned between the states and the Commonwealth?

MS HOWELL: I think national markets probably should be regulated in terms of industry-specific legislation at the Commonwealth level and so that would include consumer credit.

MR FITZGERALD: So consumer credit and all the utilities covering the markets. The second part of the question or a separate question really is about how you're finding the institutions and the institutional framework. Any comments you want to make on that?

DR BATHGATE: Just before we move on to that. What's become apparent in the energy sector is that a state like Victoria, from a consumer perspective, has established what we would consider much more robust hardship policies, for instance, in relation to energy advocacy and people who fall through the gap. In terms of price regulation that's obviously a hot potato in terms of who regulates that and that also, I think, has implications for consumer wellbeing in terms of things like that. So I don't want to talk too much about it because it's another area but there's a whole vexed question, I think, about how you apply a market model, again in relation to an essential service.

When you're dealing with things like price regulation and when you're dealing with states who have moved more forward in terms of consumer protection and will offer higher standards in some respects than what the federal government might, like who brings each other up and down and I think in the recent retail competition debate Queensland moved to the South Australian model between it was the most recent model, but also it was very favourable in terms of the retailers too, whereas we felt that the Victorian model was better. We lost that argument. But these are debates that also have application.

MR FITZGERALD: Yes, and of course you're going to experience that in this national energy market reforms because, as I understand it, all of those discussions are now currently under way.

DR BATHGATE: Yes.

MR FITZGERALD: We are looking at utilities markets specifically. How far we go is dependent on what information we receive, but we are looking at electricity, gas, water and telecommunications or by way of simply case studies to show us what's good and not so good or it may be, depending on how far we go, looking at some specific issues in relation to those markets, but we'll just see, so you're aware of those considerations. Just on that, that whole issue about pricing policy which the industry is obviously raising with us fairly strongly does raise some fundamental issues about which is the best way to protect, particularly disadvantaged consumers, and, as you say, there are various approaches being adopted across Australia right at the moment. We will look at those. Did you ever go back to the institutional framework?

MS HOWELL: I'm not sure, I suppose ASIC is the agency that I have most regular contact with in that I'm on the consumer advisory panel and they have, since taking on - I suppose I should also disclose that I worked for ASIC in the past as well. They have, I think, been very effective in a lot of their consumer education work in terms of the cases that they take on, the enforceable undertakings and the ways in which they try and use the enforceable undertaking process to come up with innovative

ways of providing redress or addressing the problem that came up in the first place in terms of consultation and resourcing. They're very active in that area and they fund research on consumer issues. They're very facilitative of consumer input in terms of making their video-conferencing facilities and others available to those sort of discussions. The other agencies I haven't had much to deal with, the ACCC, in the last few years because of the focus that we've got on financial services.

MR FITZGERALD: Are there any other comments you want to make before we conclude?

MS HOWELL: I would like to say - you've asked a couple of times about research and evidence and at the National Consumer Congress last week or the week before there was a lot of conversation about the need for evidence based policy making. The evidence isn't going to be there if nobody puts any resources into the research. It's just not going to happen. I'm not necessarily putting the centre's hand up to be the receiver of all those funds but if we want to have effective consumer policy in this country, governments and industry need to be putting money into research that can inform those policy decisions. Whoever does that research is a separate question but the commitment to providing those resources I think is really key.

DR BATHGATE: Just a minor point in relation to small business, it's not clear certainly in the energy sector, how energy advocates' interests are represented because they seem to fall between the cracks. The energy advocate roundtable is representing essentially residential users, and small business in a way has similar indicators that are put closer to residential users in terms of the amount of power they use, they're represented by often large business groups who favour often the larger end of town. I think they need to be capacity built in their own right and how that happens currently is through local chambers of commerce and so forth. Certainly in our small amount of research we did with them, they just don't have an engagement with this area and certainly not in energy.

MR FITZGERALD: Part of the terms of reference is to look at the small business area, so your comments there are quite helpful. I hadn't picked up that they're effectively not represented in that energy discussion.

DR BATHGATE: They're not big business who are well represented by Energy Users Association. They are obviously represented by the retail and traders association and Commerce Queensland, but in discussions with those bodies it's not really clear to me that they are able to engage with the issues on the ground, because they are small businesses.

MR FITZGERALD: I take your point. There is another issue unrelated to that about how should small businesses be treated within consumer policy framework as consumers and there are different approaches to that. We seem to have on some

occasions included them specifically as consumers, and on other occasions they're excluded, and across the world they're treated differently.

DR BATHGATE: Yes, in the energy sector they're included because they're under 100 megawatt hours, so they fit within the small end user definition, but their needs are different to residential users as well.

MR FITZGERALD: That's a good point, okay, thanks for that.

MS HOWELL: I suppose just to follow on, in terms of trying to work out where small business fits in the consumer policy framework, I think that's a really important fit. They are like residential consumers, they suffer a lack of bargaining power in relation to big business. But their needs aren't necessarily the same as residential consumers, so I don't know that you can necessarily always stick them in the same box.

DR BATHGATE: They face similar choice issues about working out in a retail sense what their best choices might be, for instance, in relation to energy so they are similar in that way.

MR FITZGERALD: Thank you very much for that. That's been helpful and we look forward to receiving your full submission. It's due in the middle of May, I think. As I was saying outside, these hearings are quite early, but that's because we've had the consultation rounds. We wanted to get the hearings; then we've got the submissions, then we may have some roundtables; and then we've got the draft report. So we're aware that these hearings are quite early, but now you can go away and work out the submissions. Thanks very much, I appreciate it.

MR FITZGERALD: Peter, if you could just give your name and the organisation you're representing, if there is one, and then you can give us your key points, and then we'll have a chat.

PROF EARL: I'm Peter Earl. I'm associate professor of economics at the University of Queensland. I've been a behavioural economist for about 30 years and the recent interest in behavioural economics in economic policy making I view with a bit of mixed feelings because the version of behavioural economics that we're getting is not necessarily the version that I would subscribe to. I also work with institutional economics and that, I think, has relevance to this inquiry. In that area we see institutions not merely as legal ones, but things that people take for granted as facilitating mutually beneficial exchanges in everyday life. So something like Yellow Pages would be a market institution; a particular business known for doing something in a sense is a market institution. It's something that can be taken for granted as doing a particular kind of work by consumers. Some of the things in my submission are very much reflecting that institutional economics framework.

Essentially where I'm coming from is that there's no easy answers here, and the mainstream economics approach historically perhaps has pointed us in the wrong direction by saying essentially the consumer's problem is one of getting adequate information. You assume consumers can take rational decisions if armed with adequate information. So the problem is ensuring that information will be available. Whereas from a behavioural standpoint, essentially one has got the conundrum of how the consumers actually cope with the world out there. Within the recent literature there has been a focus on particular contradictions in observed consumer behaviour, compared with the rational and economic man model. So for example many biases in heuristics identified back in the 1970s and even earlier in some cases, have been highlighted. Particular attention given to things like framing effects where saying something is 75 per cent fat-free looks different from saying it's got 25 per cent fat, if you see what I mean, how you present something to the consumer and make that their choice.

Where I come from is from a much earlier tradition of behavioural economics which essentially is saying the world is too complex to model as a consumer or any kind of decision-maker. There is just in many cases far too much information to handle. We can deal with about 10 bits per second is what the cognitive psychology suggests, which isn't much in order to the complexity of modern products and the great variety we're presented with. Also our memory spans are quite limited, so it's easy to forget things along the way when you're a consumer if you can keep in mind about seven things at a time. If you trying buying a house, an estate agent who is working with you will start getting exasperated as you lose track of the houses where you've gone beyond that sort of magic number seven thereabouts. So unless a consumer starts taking notes and is really monitoring what they're seeing, the chances

of being inconsistent in their decision-making is fairly acute.

The traditional earlier behavioural economics from the 1950s is really saying that people cope with everyday life by developing decision rules, proxies for things, rules for acting in particular situations. Where you might say consumer policy has got a big role to play is in helping the consumer develop better decision rules. In relation to that my big conundrum is: how much is the policy aimed at protecting consumers from the market on the one hand and how much is it aimed at protecting consumers from themselves on the other? I think that is what we need to bring into the policy discussion.

As regards to the need to protect consumers from the market, I find it quite difficult to figure out what is the ideal perspective to come up with here. We've had the idea in policy in the past decade or so that more choice is good for the consumer; freeing up markets; allowing more entry into the marketplace; hotting up competition; you make the firms raise their game; improve productivity; innovate; cut costs and prices. From the monetary example one can see that, but if we're talking the view that the consumers have got limited information processing capabilities, then they could simply be overwhelmed by the range of choice that they're facing. In the revised version of the paper I sent in earlier which I've now formally submitted, I give an example of Telstra at the end of that, in that instead of presenting consumers with a huge range of broadband and mobile phone service providers, and lots of contracts in fine print which are very hard to compare with one another, an alternative approach would have been to say, okay, if a consumer needs protecting from monopoly, one regulates Telstra according to international benchmarking standards and leave it at that, rather than allowing lots of entries that results in lots of scope for the consumer to be confused.

In terms of which markets the consumer is likely to be vulnerable in, I've got a kind of bifurcated view of this. On the one hand, markets where there is chronic excess demand, where supply is simply not caught up with the growth in demand - so things like housing renovation products, getting a good tradesperson is one area where if that's a common situation then there may be temptation for some tradespeople to succumb to dubious practices. That's the kind of context where the consumer could easily be vulnerable. Once you've had your bathroom ripped out you're in a position for the tradesperson to say, "I now think you need to do this. I didn't realise this at the time I gave the estimate, but this is extra work that you really need to have down now." It may be hard to fire the tradesperson in the middle of all the work if you know it's going to be hard to get another one. That high-intensity shortage situation is one way the consumer may be vulnerable, rather like the consumer was in the communist era in eastern Europe. The Economics of Shortage work of Janos Kornai is very illustrative of what life can be like for the consumer there.

At the other end of the spectrum I think the consumer is vulnerable in markets where competition is very hot indeed, and that's where I think that the deregulators may have somewhat missed the point. This is an argument that's made in the emerging behavioural economics law literature, a paper by Hansell and Kaiser I refer to in my submission, is very strong saying that if competition is very strong, it's very hard to make money by legitimate means and therefore firms started coming up with devious practices to try and enable themselves to stay in business. So if you had totally free entry into the taxi market, for example, they would be worried about the kind of quality of taxi service that might arise. Used car dealing, you don't need much expertise to be a used car dealer - so the argument would go - it is that that causes the dodgy practices to emerge because you need a plot of land and a shed to have your office in and some capital to finance working capital. After that it's every man for themselves, so you get this kind of dog-eat-dog behaviour in which if the consumer has got a problem of identifying quality, the consumer may be the victim within that.

But having raised that issue of the two ends of demand intensity at which the consumer might be vulnerable, I also keep coming back to the question of whether market institutions can sort out these problems by providing ways in which the consumer can get hold of good decision rules, or providing ready-made decision rules for the consumer. So things such as the presence of trade associations which will register businesses in terms of whether they are okay suppliers or not - I noticed advertising on TV the other day, trustytradesman.com. I'm not sure how this one works, but you can imagine an institution where, if you want to find a reliable tradesperson who will actually come and do the job and not let you down, you would log onto that web site and, rather as with eBay, you may see reports of the quality of the service provided. Clearly, the tradesperson who's not up to it will find it not worth subscribing to that service after not very long, because their reputation will be in tatters.

In the submission I'm mindful that the Internet does present lots of opportunities for the consumer to be doing better in many ways, but of course that does rather raise the question of the consumer who's not Internet-active. Also, are we simply in a state of transition where there may be problems with market failure on the Internet? That's an issue that I think is important to recognise. Here I'm mindful of what happened in the transition from full service retailing to discount warehousing and so on in the days when there were arguments about resale price maintenance and whether firms could enforce that. Many manufacturers wanted to control their resale prices, partly to ensure that full service retailers could stay in business.

But when in many countries that legislation was changed, the marketing institutions changed. Consumers' magazines appeared in a big way and they filled in the gap that was caused by the full service retailers being driven out of business by

the discount warehouses.

Part of the problem in that story I think is one we should keep in mind today, and that is the issue of who's actually paying for the information. It's what I call a free browsing problem, a variation of Kenneth Arrow's information economic paradox, where one is saying that once you've got hold of information by some other means you may not be inclined to pay for it. So if I browse at a magazine in a newsagent's and get the information I want, I don't buy the magazine, so the magazine ultimately, if everybody does that, can't provide the service to us.

Increasingly with magazines putting their databases on webs, newspaper reviews turning up on web sites, marketplaces such as carguide.com.au or whatever, the need to be a paying customer to buy these information service products is falling away. We may find that everything is working okay at the moment, but there will be perhaps a period within which the Internet system of gathering information will need to evolve further so that we go back to paying for information, because otherwise, if you're not being forced to pay for the service through a download, once the consumer magazines have collapsed due to problems of competing with what's on the Internet - the consumers know that they can find stuff on Internet so why bother to read magazines from time to time to keep up to date - we could be in trouble there.

So it's quite complex. I'm particularly aware that it's partly from having PhD students who are working, in one case, on the housing renovation sector and the other students working on the superannuation sector. The superannuation one was trying to choose which sector to go for, and essentially what he wanted was what we could call a "confusopoly". You may have come across this term in these proceedings. For him it was either mobile phone contracts or superannuation contracts as being ones where taking the rational decision, because of the fine print or the complexities of the numerical calculations, is a nightmare. From his experimental work, it does seem to be indeed the case that it's very difficult for consumers to work out what the best strategy is, even if they're got a clear idea of what the yields would be on the superannuation product. Perhaps I should stop there, though.

MR FITZGERALD: Firstly, thanks for those comments. We do have your submission, so that's helpful. Our team is looking at a lot of these issues, and they're much more knowledgeable than I am about some of this stuff. But just in a practical sense, you mentioned say motor vehicles - complex choices for a largely ignorant consumer group, including myself. If you look at that, what we haven't tried to do is to reduce the number of competitors, but we have introduced a range of measures to try to assist in this complex task. So if you look at that, we've got regulations that talk about the level of information that you have to be provided with, and it sits on the front of the car; you have the ability to get motor vehicle inspected by, say, by the roads services, the NRMA or whatever it's called; and then there's underpinning

regulation; and then in some places there are in fact schemes that allow you to be compensated if the deal has gone bust and all those sorts of things.

I got the impression right at the beginning that increasing the number of competitors does in fact increase the level of complexity and may increase the level of confusion and therefore reduce the consumer's ability to some degree, but are there not other mechanisms which you can put in place that don't try to limit the range of competition or competitors that are available? Motor vehicles is one. We have a plethora of motor vehicle dealers, both new and used. Nobody has tried to reduce the numbers. What we have tried to do is to say, "We'll give them this. These are the mechanisms." Isn't that the approach one needs to take rather than to say, "In fact we need to be looking at whether or not there are too many competitors in the marketplace"?

PROF EARL: Yes. The matters you've described I would include under my heading of market institutions: you're putting in place things that protect the consumer's access to information. What we've run into, though, in terms of the measures you can put into place is limits when one gets to the consumer in the actual face-to-face environment with the salesperson - the salesperson's patter, if you like. If you're an economist looking at what a salesperson is up to and know what they're doing, you can confound them by pushing them into a corner which their patter doesn't lead them out of, but by and large they have answers which they've been trained to give, and the second thing is that they're well-trained salespeople, which will ultimately lead you to the question of, "Under what terms are we going to close this deal?"

Along the way there may be various untruths being told. If the salesperson says, "This is the only two-litre car in its class," and you haven't thought, "Hang on, there's this one and also the" - and you're faced with this massive array of information around you, trying to test-drive a motor vehicle with the salesperson next to you. All these kinds of atmosphere issues that affect the rationality are difficult to deal with by these market institutions.

But, of course, what the customer can do is actually go back to other market institutions such as the motoring magazines and such like and the web sites, which give, one hopes, independent comparison tests and such like. You can do that in a cool, reflective environment. So ultimately the consumer is then shopping while largely trying to ignore the salesperson and there is just the issue of skilful bargaining at the end of the day, which of course you could use a car broker to do on your behalf.

So if there's money to be made from helping the consumer, the free market economist would expect market-making firms to come into existence, such as these magazines, car brokers and such like. The question is whether the consumer is smart

enough to realise this, and this is where the social setting is quite important. If you're not a socially isolated consumer and you're aware of people who know how to take decisions or who've used car brokers and so on, it's much easier to end up with a good deal than if you're isolated.

MR FITZGERALD: Yes, but you've highlighted the other thing: even if you have a highly competitive environment with high levels of complexity, some would say that the market responds in exactly the same way as you've just indicated; that is, you create the intermediary - the broker, the adviser and what have you and financial services products, a whole range of things. We now have that level. Yes, it adds to the cost at one level, but is that not a reasonable sort of market response? That's what we're also going to see with the Internet. The information broker is emerging as a significant player in the information transaction on the Internet and you'll see that. Some would say that goes to show that ultimately the market does in fact provide a means by which the consumer can deal with this complexity.

PROF EARL: I do see this a lot in the case of housing renovations, for example. Essentially the consumer who's nervous about being let down by people and is worried about having to get redress can reduce risks by going for a one-stop shop project management company to get the kitchen done. They are then the coordinator of the tradespeople and so on, and it's their reputation that's on the line, and it's easier to sue one person than sue a whole lot of others and so on. So once again we see the market responding by coming up with these devices, and that's entirely reasonable, to pay more for a guaranteed service. I don't look at these as being at all problematic. It's just, you know, in the same way you buy a Sony television to guarantee quality compared with one made by an unknown Chinese manufacturer who has not yet established their reputation.

The reputation thing is actually crucial. As long as the consumer has got rules for judging what a reputation is or somehow the signalling quality issue, and that's where the examples in the submission about the problem of finding a good lawyer I think are worth thinking about. You know, how do you choose a lawyer? If I was trying to choose a surgeon for a hip replacement, these days you can normally get hold of statistics on the mortality rate and so on from particular hospitals or surgeons, as I gather from colleagues who have been through this sort of process. Gaining information on a lawyer is much more problematic because in the nature of the product it's far less standardised. You know, a slip and fall kind of case can be very different from someone else's slip and fall kind of case.

As a consumer then from the standpoint of a behavioural kind of thing, you're going to be likely to try and deal with this by using proxies to judge quality by one means or another. Some kind of signal may or may not be a good one in the absence of a clear-cut lead table which says, "Okay, well, a kind of average net payout after fees for these sorts of cases are as follows." Clearly the legislation could start

imposing that, but if it doesn't, then the consumer is going to be having to use proxies and if they're in new territory, if you've never consented to legal services before of that kind, where do you start? The examples I've given in the paper of how it can be problematic to make a good judgement - - -

MR FITZGERALD: We'll just tell you - you mention mobile phones. One of the areas that we are looking at in this study is telecommunications and again, as I said to the previous people, to what extent we work through, depends on the information we receive. But there we have a highly competitive market, the contracts are exceptionally long. In fact mobile phone contracts can be up to 500 pages long when you actually go to the contract. Most people don't see that. They only see the summary they get. What is the approach one would take in that particular market? It seems to be highly competitive but as we bundle products, the complexity of both the product and contract of course is getting greater.

Just using your own thinking, what is the right way forward? One response has been, for example, the Victorians have introduced the Unfair Contracts Law so they can have a look at the contract to determine whether it is unfair and remove those terms that are grossly unfair; that's one way. Yet a lot of the states haven't adopted that sort of approach. So how would you, in that area - or what's the approach that we would be looking at, given the sorts of thinking that you have presented in your submission?

PROF EARL: This is very tricky. One of the things I'm worried about from the UK experience and Michael Waterson's paper, that I referred to, sums up is that you regulate in one area to try and simplify things for the consumer and then complexity comes in another area, so that the mobile phone companies, if forced to compete with simpler contracts, they just offer more contracts. So it gets harder to feel your way through the web of which is the best deal. The crucial thing seems to be to try and provide consumers with a kind of pro forma that enables them to compare one firm with another if they want a particular kind of contract.

You can see that this sort of thing is happening with the broadband market where there are web sites which will try and point you in the right direction if you are a particular kind of needer of download capacity and speed and so on. So market institutions may once again come to our rescue. They don't seem to have done in the superannuation products market; it's puzzling as to why this never seems to have happened.

But, you know, if you think about the problem, there are economies of scale in deciphering these 500-page codes, if you like. As long as you can then judge between a good deciphering agent, which is a good broker, is the usual kind of problem in these sorts of concepts, then it may be worth paying for someone to go through that process for you. But I think it's just very difficult to try and imagine

something where the product is intrinsically complex or could be made more complex, where it's not going to be problematic for the policymaker. So perhaps some of the kinds of legislation that you've talked about may be the way to go.

MR FITZGERALD: Yes. Well, it's obviously going to be a mix of responses. It's just trying to work out the balancing of those policy responses. Some of them are just simply the market itself and allowing enough time and enough space to be able to develop some - and obviously some of it, in this case it's going to be regulatory and there's no question about that.

PROF EARL: Yes.

MR FITZGERALD: It's a mix of policies. But just, I mean, telecommunications is a very interesting one at the moment where more and more information is not achieving the outcome that people seem to want.

PROF EARL: No.

MR FITZGERALD: It seems to be imposing high costs to business and in the end people are saying, "Well, is there another way forward?" as the complexity of product becomes even greater and therefore the terms and conditions that sit behind those are becoming even more extensive, not less so. So that's an area where this really is now significant.

PROF EARL: The companies in principle can say, "Okay, a simple product, \$30 a month," or whatever the per month figure - whatever you do kind of product. That may not be a product that is particularly profitable for them if other consumers are prepared to go to the web sites and find one which is actually more suited to their profile. I think what we will probably start having happen more often is consumers posting their profiles on a web site template with a broker and saying, "Find me this," and there will be a lot more profiling where essentially the complexity is being handled by a lot of computing input and it then runs a decision rule through that the consumer hasn't yet got, rather than saying to the consumer, "Well, the current decision rule, you need to wade through this as it follows."

All the time though, once we've got this kind of work where it's being done on the Internet, what is worrying me - I haven't actually written much about this yet - is that Internet economics look very different from regular economics. We've basically got a natural monopoly tendency with businesses which are purely web site types of operation. It's rather like the Microsoft situation, you know, the Microsoft program that comes on your CD or DVD that costs a few dollars to make. You're paying hundreds of dollars for it because of all the software programming that's gone into it, and a web site is basically the same kind of product.

So there are potential risks of natural monopoly web site service providers coming in and establishing themselves as being the place you go because they've done the investment up-front and then after that it's kind of zero margin cost for every customer that they get hold of, and I haven't seen any kind of grappling with that and where it takes us for protection purposes, if the potential protective agents, these third party web sites, themselves have got monopoly potential. They actually look quite tricky there.

MR FITZGERALD: Yes, all right. But just on the broader concept, one that comes up is in all of these markets there is a view, as you know, that the so-called marginal consumer and the role of the marginal consumer - so as you know better than I do, that if 5 per cent of the market is active and, you know, keenly interested in every aspect of the product, they do the work for the vast majority of the 95 that do nothing, or are overwhelmed by complexity so they do nothing. So at the end of the day, so long as you've got an active component within the market, they almost serve the interests of the rest of the market.

What's your view on that, because that's a very often stated position in relation to, say, utility contracts where the switching rates have been very low between providers. Their switching rate between products has changed but that - - -

PROF EARL: Yes. No, I've known about this point for years. It comes from Heterodox Industrial Economics writings. It's the maiden work of Phillip Andrews, On Competition in Economic Theory in 1964. It's very old.

MR FITZGERALD: It's very old, I know.

PROF EARL: It's made by one of his students in a tutorial at Oxford I think recently and the figure they use is 10 per cent and Andrews was essentially arguing that if 10 per cent of customers are irrational then there's room for - entry in the marketplace to pick up those customers. Where his work was somewhat weak - I mean, it's very strong on the idea of consumers building relationships and goodwill and so on with suppliers, and that is kind of gradually coming into the more mainstream literature these days - was on the problems of consumers actually seeing their way through the fog of potential suppliers. The problem is compounded by the existing suppliers having an incentive to make things remain as foggy as possible. Within the information economics literature you get the notion of sales coming about as a way of clouding things so that you can't be sure whether a particular supplier will be the cheapest or an expensive one if you just happen to show up with the money on a particular day because they have sales from time to time. It's hard to know who to shop with without doing a lot of your research up-front.

Again the Internet is coming in though. It's on its way. You know, trying to find a good Ford Falcon or something in Brisbane - many car retailers, but you go

onto a car retailing web site, you do your search and you may be able to compare them. That's quite different from the days when you would have to, you know, drive for an hour or two to go across town. The pressure of dealing with the people who are much more careful shoppers is evidently much more there for the firms.

However, one can still find major pricing dispersions. I remember an example we used in the recent business economics book I've done was finding a global positioning system pricing in the UK. In terms of what you could find on the Internet in 10 minutes, the prices were all over the place. When we first drafted this, our conclusion was that perhaps this is to do with the market being in a state of transition because a new product model has just come out - a further generation. When we came to do the final version of the book we went back to those web sites and tried it again, and the prices were still all over the place.

You know, so your 10-minute search still resulted in huge payoffs. If you went to a yacht chandler's you were going to be paying much more than if you went to a four-wheel drive specialist's for them. There were systematic differences that were persisting through time even though it was very, very easy to find the information on the Internet. One could kind of draw inferences about what was systematically going on between the different time periods between the firms. There was a kind of cluster of firms in the middle and then extreme outliers. The yacht chandler's, he stayed there, but perhaps the yachters are too busy to use the Internet or whatever or they've got so much money they don't care anyway. You know, it's the price discrimination sort of issue rearing its head.

I can see a lot of sense in the marginal consumer driving the thing but there are still big risks for the, if you like - there's scope for taking the 10 per cent who are very shoddy shoppers for a big ride, if you like, because you know, if they're only getting a couple of quotations, the chances of them hitting on the bargains maybe probabilistically are rather limited if there are several dozen suppliers in the market. I think it's that that we need to keep in mind.

MR FITZGERALD: Just concluding, given all of that, in the current consumer policy framework which is what we're looking at, as broad as that, what do you think are the significant changes that are required? I mean, you've obviously challenged us with a different way of seeing the issues but in a practical sense, which is at the end of the day where we end up, are there elements, particularly in the generic framework or the broad framework, that you think need fundamental change or is it really being much more conscious of some of these issues when you're looking at specific measures around, as we saw before, finance or superannuation or motor vehicles or whatever the issue is? Is that where its real value of real importance becomes significant?

DR EARL: I think it's very important that the consumer is told what the ultimate

cost of the product is going to be because the consumer is not great at doing the calculations. All the literature says, you know, "What do you believe a price" - you are taken in by 29,995-pricing which you don't see as 30,000. You would see it as 29,000 rather. You know, this is what all the research is indicating. You will forget about the fine print about the delivery charges on the vehicle and so on. Clearly the manufacturers, they went through a phase of being a bit more transparent last year sometime when the ACCC started getting a bit more active - but in Brisbane it's gone back to the approach of using much finer print rather than a drive-away price on motor vehicles.

About Harvey Norman, I'm not making clear what the ultimate cost of the credit is when providing in-store credit and so on. I think if one were showing the consumer what it's going to cost you to buy this product up-front rather than the consumer eventually being confronted at the time of saying yes or no when if the extra - in the case of a car or whatever - hundreds or thousands of dollars is something which the dealer can sort out the problem with by dealer finance, then we've got a problem there if the consumer is not being presented with information up-front. There's scope for being talked into it because of the psychological difficulties of backing out of the deal and so on, these sorts of things that the mainstream economists would not pick up on, but the behavioural economist is concerned with the psychological context of the purchasing decision.

Likewise, the complete kind of bottom line - what this credit deal is going to cost you, which says, you know, "No interest for 18 months, no repayments until 2009" or whatever. There should be some statement there of what the cost of the product really is. Broadly speaking though, aside from things such as that, I'm much more moving in the direction of a context-based approach to policy. You know, transparency up-front in terms of what it's going to cost you, whether it meets particular standards if there are standards in that sector as one can pin down, such as motor vehicles - what the safety rating is, if there exists one, fuel economy and things like that.

You can go further and say okay, service costs over the first five years, what are they scheduled to be and so on. Obviously there are more and more things you could put into the information that's required to be put in front of a consumer, but broadly, in terms of areas where the consumer stands to get a poor deal, I think one needs to look much more at it in terms of a context-based approach: what is the consumer's information problem and why is the information problem particularly acute? Does the market have incentives to tell the truth and so on?

You know, take the case of the funeral sector for example. There you've got a case where many people have not got a lot of experience. They're not in a great situation of taking rational decisions. They may not be in their familiar locality if they've had to go back to, you know, bury a parent who lives many miles away and

so on, and yet they've got to take a choice. To some extent the market is doing that in exactly the way that information economics would predict. You're seeing mergers taking place in a big way in the funeral sector so that there are brands that may be familiar. There may be other ways of the consumer getting some insight into whether the firm is any good or not. You know, how long has it been established? There may be local connections and so on. So the problem isn't as acute as it seems initially despite the consumer being not emotionally in a great sort of decision-making condition.

MR FITZGERALD: But there's an interesting example, because in some of the states now they're going to mandate standard funerals. This is the default funeral that everybody has to offer on exactly the same terms and conditions, and if you don't choose any of the other options, that's the default position.

DR EARL: Yes.

MR FITZGERALD: The funeral industry in New South Wales said, "That's all very well, except only 5 per cent of the consumers ever take that option and so how can you call it standard?" But of course it's not standard, it's actually default. But that's an approach there that says it's all too much. At the end of the day there's a product which the government has prescribed, but do we need to go down to that level? Do we need to go into industries and say, "We'll prescribe a default product"? People have said that's what's needed in superannuation: that there's a default product.

DR EARL: Yes.

MR FITZGERALD: So if you choose not to or are incapable of making a choice because of all those other factors, then the state has mandated a default position and therefore you've solved the problem, but do you actually need to go to a default position?

DR EARL: I'm not sure I'm happy with the New South Wales policy as you've outlined it because the funeral sector would be a classic case where you've got a safely consumed experience because you don't want to get - you're going to get - at the time you're signing up. But you're conscious of the social context in which you're doing this. You know, the funeral is inherently a social product. If it's a social product, the issue of symbolic consumption, status symbols and so on, these things from the behavioural economics sector start coming in. What may well happen is that the next product up from the default becomes the default because the consumer does not want to be seen to be going for the bottom end because, you know, that would reflect badly on them as the person arranging the funeral on behalf of the deceased and so on. So in that sort of case a default product may not be such a good idea.

MR FITZGERALD: But on the other hand you've got consumers that are vulnerable.

DR EARL: Yes.

MR FITZGERALD: They're in difficult circumstances. Even if they were capable of taking information in, they're probably less capable at that moment than taking it in normally. There is a highly competitive environment. What is wrong with offering the default? I'm not advocating it but I'm just saying - - -

DR EARL: What is wrong from the behavioural standpoint is that in many cases we'll get talked up to the next grade of product which is less comparable with the other firm's suppliers. Indeed they may not even be making comparisons under the situation because here we've got a classic case of the consumer's decision-making process probably not being like it is normally assumed to be. You know, you normally assume that consumers trade off one characteristic against another.

MR FITZGERALD: Sure, but they won't in this.

DR EARL: In this case it's basically "Are you available to do the service?" would be the first thing on the checklist.

MR FITZGERALD: Yes.

DR EARL: It's much more of a checklist-based approach to decision-making, and when you've got that going on, one may not be seeing the comparative search. The consumer may simply be trying to latch on to someone who can do the job for them, but that's a very different context from any others, and that's why I would go to the context-based approach, and that's maybe why you would need these industry-based groups.

MR FITZGERALD: Industry-based stuff - good. All right, thanks Peter.

DR EARL: Right.

MR FITZGERALD: That's fine. Thanks very much for the submission. We'll come back. Our staff will go through all of these, and we are looking at the whole issue around broadly behavioural economics and what have you and so your contribution has been very helpful.

DR EARL: I would certainly recommend the pages by Hansell and Kaiser because they - - -

MR FITZGERALD: No, we'll do that.

DR EARL: - - - have been very important in the states.

MR FITZGERALD: At the end of the day, what we're trying to do is to find - looking at the theory of it, but what does it mean in practice, how would you apply this to the generic, to the industry-specific, and that's where the crunch really comes with this. Thanks for that.

MR FITZGERALD: If you want to introduce yourself, your name and position and organisation that you represent, that would be terrific.

MR BLUMS: My name is Aivars Blums, that's A-i-v-a-r-s B-l-u-m-s. I'm the chief executive of the Motor Trades Association of Queensland.

MR FITZGERALD: Good, if you want to give us your key points for the next 15 or 20 minutes and then we can have a discussion about those issues.

MR BLUMS: The Motor Trades Association of Queensland considers that the architecture of consumer policy framework is of critical importance to it as an industry. It does have impact on the economic outcomes for the industry and on the future development of the industry. Further, the industry is impacted by both specific legislation and by generic elements of the generic legislation as such.

In our situation there are two broad issues that we would like to bring to bear on the discussions and the considerations that the commission may have in relation to this issue. They are the fact that we think that supply-side issues have not been adequately dealt with by frameworks in the past, and we draw these to the attention of the commission. The second issue we would draw to the attention of the commission is that we consider that the legislation should have equal impact and incidence on the public sector as well as the private sector. We think that distortions are brought into industrial behaviour and to government behaviour as a result of the differential impacts of these issues.

In general can we make the points that we support the concept of a harmonised framework that would bring all jurisdictions under generally and effectively the same sets of legislations, regulations, and administrative rules. We would say we find it incongruous that there would be a differentiation in the way legislation is operated or considered when the intention of the framework would be to provide an adequate, or efficient, or basic level of consumer protection across the Commonwealth of Australia. Some of the issues that we draw to the commission's attention are that the state fair trading legislation and the contemporary legislation results in some fairly interesting situations where the administration and the administration costs in some jurisdictions are far greater than in others. For instance, in Western Australia you can sell a motor vehicle legally as a trader with documentation that runs to three A4 pages. In Queensland the equivalent is somewhere in the order of 11 presently and was 16 before. We would be surprised that there would be four times more consumer protection as a result of this voluminous documentation, commissioner, or that in fact the length of documentation was in some way correlated to the level of consumer protection. It would seem sensible that if in one jurisdiction we can achieve consumer protection with an expeditious contemporary document, that similar documentation could be used across the Commonwealth, et cetera.

We think that the issue of supply side issues is particularly relevant and it is very relevant in those areas where you have an intermediary or a third party transaction. We would draw the attention of the commission to issues such as the motor vehicle insurance industry. In this industry it's very interesting that we in fact have one contract with the consumer, which is called an insurance policy, and that is fairly well regulated and behaviour in relation to that relationship is usually well regulated. There is a second contract if the first contract is ever to be performed and that is then a contract between the insurance company and the repairer. Inevitably can I suggest that that contract is not well regulated. The behaviour in relation to that particular contract is not well documented or set out.

There have been recent attempts by the Commonwealth in what's called the code of conduct to try and regulate that particular aspect of it, but it means that we can have a situation where the repairer and the ultimate consumer never in fact exchange views or perceptions on what their aspirations are and what their views are on what is going to happen. There's a product statement on one side - a product disclosure statement in the policy - but very, very few consumers would be aware that if their car is old that in fact you can have non-branded parts; you can have second-hand parts; there can be instructions to the repairer by the insurance company that are totally unbeknown to the consumer.

Perhaps more interestingly is a situation where we introduce the public sector into the supply side situation, and that is if the Queensland government goes down and buys 800 Ford Fairlanes from Ford and insists on a discount of 32 per cent and Ford says, "Yes, we must undertake this transaction because it's 800 and we don't want our competitors to supply this quantity," they accede to the market power of the government which has assembled all its agencies and other entities. Then the interesting thing is that to offset that, inevitably there has to be a price adjustment to the dealers. In other words the dealer then sells a Ford Fairlane to his customers and he has to sell it with a price that can't be anywhere that offered by the government. In fact you finish up with what I think economists call a transfer of consumer surplus from the consumer to the government. If I'm being very, very brutal in these four walls, let me say that my dealers cannot even sell a second-hand Ford Fairlane for the price at which the government can buy a Ford Fairlane with its buying power in that market.

Jurisdictions such as Europe, the UK, and some of the states in the United States of America have looked at this particular issue with a view to preventing this sort of transfer of private sector surplus to the public sector. They've usually addressed it by, or there have been attempts to address this by introducing a situation of - it's equivalent to - I used to be a trade commissioner and we used to have most favoured nation status, in other words what benefit you give out to one you must give out to those with whom you've created composition. So in these states in the United

States you've had this situation where they've given dealers this status where if a benefit is given to the government then a commensurate benefit must be extended to the dealer, which means that the government's price can never become as attractive as one would see, and then the supplier has to in fact balance the opportunity costs across these transactions and have a look at it that way.

I suppose that in relation to the issue of the impact of legislation equally on private and public sectors, again we can introduce a situation where the government in Queensland is the largest motor vehicle dealer in the state by a long way. However, it is not fully subject to the same constraints and restraints as motor vehicle dealers in the private sector. This gives some advantage and certainly puts the private sector operators in a less advantageous position as a result of the consumer policy framework as such. So we suggest that the commission look at this particular aspect to make sure that there is an equity across the sectors that isn't imposed or undermined by it.

Having said that, we support the need for a consumer policy framework. We also support the fact that in certain cases there should be specific legislation. However, we are concerned that in some cases, as in the Queensland case, the legislation become duplex or multiplex. For instance, we have a circumstance where you have the Property Agents and Motor Dealers legislation, which then runs into rigidities because to open up the legislation you have to open up both sides of the legislation, and governments are sometimes reluctant. So you don't have as greater flexibility as you would normally have. I'd also suggest and request the commission's attention to the fact that consumer legislation probably operates in one of the most volatile situations with very active markets; with highly sensitive political issues; with the private sector reacting to seek to prevent anyone's advantage as such.

Let me tell you, the imagination to get advantage in the market appears to have very few limits as such. I just made a submission to the ACCC in fact in relation to a notification from an insurance company where the intention was to use third-line forcing to have compulsory third party policies written in favour of the insurance company quid pro quo for the registration of those dealers as preferred suppliers of parts to the repair industry where their vehicles were concerned. So in this volatile situation, I think that reviews of the legislation and regulations have to be fairly regular, and I think that it is worthwhile for consultations and mechanisms for consultations to be part of the legislation so that we can have legislation which doesn't have unintended consequences at the end of the day and I think that some of the legislation does.

The final issue before any questions is that in the legislation, the provisions for deterrents and penalties are usually fairly modest as far as I can see where the motor vehicle is concerned. They certainly couldn't be a deterrent. I don't think that the

government sector appreciates the enormous profits, for instance that are made from backyard automotive trading. It would not be unusual for a trader to be able to make 35, 40, 50 thousand on a weekend as such trading without any of the restrictions that pertain to a licensed dealer, can compete very unfairly in this market, make a profit, and face a penalty of \$10,000 which he would pay very, very easily from the takings of a morning's trading in this situation.

I just say one other thing, that legislation where it is industry specific has to be very careful that that doesn't create distortions that the market reacts to fairly strongly. In the Queensland case can I instance a circumstance where if it's sold by a licensed dealer, a requirement for a statutory warranty on motor vehicles 15 years old. This has resulted in 15-year-old vehicles not being accepted as trade-ins, not being accepted in the commercial sector, and inevitably they have to be traded by backyarders who only have to provide a roadworthy certificate on it and no warranty as such. So I think amongst other things, we have to get to where consumer legislation does take account of the realities of the marketplace. It's quite obvious that if a vehicle is worth \$17,000, by the time you put it on your yard, you clean it up, you've got maybe 12,000 in there, and in real terms you're going to make 10 per cent on that which is \$1200. If someone buys a motor vehicle and takes it around the block three times with a view to damage its drivetrain, you're up for \$700, it's clearly an unacceptable calculation in actuarial terms that just means that these motor vehicles aren't in any way traded in any great numbers in the legitimate market and therefore have to be destined for the illegitimate market as such.

Again, I repeat that we do favour an effective policy framework. We think the framework if implemented correctly, can contribute to better outcomes and a consumer dividend at the end of the day, certainly in some areas such as automotive repair, et cetera. I think that we would support this commission in the issues that it's brought up as being germane to review.

MR FITZGERALD: Good, thanks very much, Aivars. A number of issues, I just should say that I was the commissioner on the inquiry into smash repairers and the insurance industry some years ago, so I'll come back to some of your issues there. But a couple of things, just taking your last point first - - -

MR BLUMS: Let me just say that I've had this job for eight months. So I speak with very recent experience.

MR FITZGERALD: It's fine. Don't worry, it's perfectly fine. Licensed dealers. One of the issues that's confronting us in this inquiry is the extensive use of licensing by governments, primarily on a consumer protection basis, and so we have seen both a substantial use of industry-specific regulation but a substantial use of licensing. Now, in your case you have indicated there is a significant market through the unlicensed dealers and they don't have the same conditions imposed on them as you

do. Just talk me through, is there still a case for licensing in motor vehicle dealership. If there is, is the problem that the licensing regime is not extensive enough in its coverage?

Clearly you believe that there's a problem in what is happening between licensed and unlicensed, but I've got a fundamental - earlier question. It is, do we actually need licensing in your industry, and if so, what value does it have to the consumer, given that the consumer seems to be willing to also deal with unlicensed dealers? Is there a better approach or is the approach to maintain licensed dealerships but extend its coverage to pick up currently unlicensed dealers? So what is the right approach, given the experience, if you have a view on that?

MR BLUMS: Look, I've got to say that I face the same sort of issue. You look at it, "Could we get away without licensing? Could we get away with less regulation? What would be the minimum regulation that you could get away with?" I think it's a valid issue in this industry. However, I think there are expectations and perceptions where the people that you want participating in this industry have to have certain qualifications as far as financial capacities, capabilities and other situations.

I was once advised that the reason why real estate and automotive transactions are specifically dealt with is that they have such a major consequence for the consumer in his overall PDI and his overall spending patterns. If this is the case, then certainly we'd want to regulate the type of people who will be allowed to deal in this so they do have some obligations in relation to the dealings they have with the public. Then it comes down to the best way of performing that regulation.

The real issue then comes down to perhaps, "Do you license the person or do you license the actual operation?" and that again was a great question to ask, right. So in Queensland they now do both. This is the other thing I should have mentioned, that in fact in addition to the overt consumer legislation there is also covert consumer legislation - for instance, the Queensland Transport Act and other acts. As you've pointed out in your document, that ASIC has issues, and there are other things which have elements of consumer protection in them.

Basically, I think that licensing is probably still warranted, but I would look at the way that licensing is in fact conducted and I would look at whether you license the person or the entity and what the responsibilities are, and I think it's important that the licensing and the administration take account of small businesses also, where you have a situation where you say that the principal must be at all times present; now, if you have a small business and there is one person who is the principal, they don't have holidays, they can't go down to do the banking or whatever, and things like this, these are issues.

The way in which licensing is undertaken and the way it's regulated and administered

is important. The impact and incidence of licensing, where it falls and how it falls I think are important issues to look at to promote the best outcomes for the consumers and the best outcomes for industry. So I really think that the whole issue of licensing and how we do it needs review and consideration.

MR FITZGERALD: Going back if I can, what should guide public policy in relation to when you decide to license a dealer and when you should allow the dealer to remain unlicensed? I presume in your example that you gave to us that we're talking about a range, a number of dealers, unlicensed, who are trading in multiple vehicles, not the one-off sale of a vehicle.

MR BLUMS: That's it.

MR FITZGERALD: Why do you think they remain unlicensed? Why do you think governments have allowed them to remain unlicensed? In other words, has the market so changed over recent years, particularly with Internet trading and other trading, that in fact the licensing regime is no longer appropriate for the current market? Again, my comment is clearly you're in favour of maintaining the licensed dealerships and also reviewing the way in which they are administered, but my question is, "In consumer protection, is there much difference now for the consumer if I buy a \$20,000 car from one of your licensed dealers or a \$20,000 car from an unlicensed dealers? Should I not be afforded the same protection?" or it begs the question, "Because I know it's not licensed, therefore it's a bit more 'buyer beware'," although there are requirements in relation to roadworthiness. Do you think that there is a fundamental need to re-look at who should be allowed to be a dealer and whether or not they should be licensed?

MR BLUMS: The answer to your first question is that compliance costs and the rigours of the system in Queensland mean that there are economic advantages to be had in not being licensed. You can avoid all sorts of things like statutory warranties, probably you don't fill in a BAS statement as well at the end of the day - if there's any tax people listening here, we shouldn't say it too loudly - but these sorts of issues. Then they don't have to comply with premise requirements, they just drive all their cars to the thing or put them as ads in the paper and you can see them - - -

MR FITZGERALD: Sure.

MR BLUMS: So they don't need licensed premises, and circumstances like this. I think there's probably also a correlation between the level of consumer legislation that's needed and protection and the education of the consumer.

MR FITZGERALD: Sure.

MR BLUMS: So the better-educated the consumer the less rigorous and the less

restrictive and the less prescriptive the legislation and regulation has to be. Now, inevitably - I don't want to sound biased or bigoted in any way - - -

MR FITZGERALD: You're a trade association, of course you'll be biased and bigoted, that's what trade associations are.

MR BLUMS: Well, we try to portray this thing of being equal-handed - - -

MR FITZGERALD: Yes. All right.

MR BLUMS: - - - and reasonable in our approach. So basically we find that the unlicensed people deal in the cheap end of the market. At the cheap end of the market usually the buyers are less well informed than at the expensive. They actually need more protection and they're getting less protection. Caveat emptor doesn't apply that well in those particular areas. This is why we finish up with statutory warranties for 15-year-old cars and things like that when it's patently unreasonable to have statutory warranties on cars that old, because you don't know what has happened to them, et cetera.

The other thing is that a lot of the unlicensed dealers are highly mobile. It's difficult to have recourse on them in any form whatsoever as such. Most of the transactions take place in cash because they don't have finance facilities and other things, they go around the finance acts and other such things. So I do think that there are concerns that are reasonable there. Let me tell you one of the interesting incongruities of all this.

We spend so much time worrying about the sale of motor vehicles and things like that and what dealers do there, yet I've got to draw your attention to the fact that in the boat area boat dealers are totally unlicensed and can take out transactions of this sort without any of the statutory requirements, and I was told that that's because if anyone can afford a boat they really don't need protection, and I thought that was a fairly spurious statement at the time.

MR FITZGERALD: Well, it is an interesting juxtaposed position you've put there between boat dealers and car dealers.

MR BLUMS: That's why I meant, you know - - -

MR FITZGERALD: Yes, it's - - -

MR BLUMS: But even biased and bigoted people would draw it to your attention, right?

MR FITZGERALD: No, it's a very interesting one. But the question - again, just

to push it a little bit further, is an unlicensed - you mentioned before that you have in Queensland contracts that are of more than 10 pages long compared to - - -

MR BLUMS: A second-hand car is even more onerous than a new one.

MR FITZGERALD: Is an unlicensed dealer required to use those same contracts?

MR BLUMS: No.

MR FITZGERALD: So these contracts only apply to licensees.

MR BLUMS: Can I suggest that the unlicensed dealer signs the back of the registration document, hands it over - - -

MR FITZGERALD: And that's it.

MR BLUMS: - - - in exchange for cash and it's a handshake deal, and you've just had the only recourse you've got on him. If you can hang onto his hand you've got recourse. Once you let go of the hand, it's all over.

MR FITZGERALD: Okay. So as an industry, in your negotiations with the Queensland government have you put forward a set of changes that you would like to see in the licensing arrangements in the last couple of years or publicly made submissions that would be available to us?

MR BLUMS: No. We have made a number of verbal submissions and we can certainly reiterate those to you, and we've actually awaited the review of the Fair Trade Act to seek these changes.

MR FITZGERALD: When is that due?

MR BLUMS: It's imminent, I think that's what we've been told.

MR FITZGERALD: Okay.

MR BLUMS: That it's imminent, and we're hoping that it will take place this year. As such, we would make representations at that stage on a number of issues. We've also made representations that we think the Duplex Act should be split very succinctly into individual industries.

MR FITZGERALD: Yes, and you've made those comments to us.

MR BLUMS: Yes.

MR FITZGERALD: I would be interested in your comments because it illustrates very clearly the issues we've got. We've got a market in the trade of new or used cars. We've got a very significant competitive market, both in terms of the licensed and the unlicensed. We've got a situation where governments have introduced a licence regime for some but not all. The terms and conditions that are associated with the licence are far more extensive than those that exist for others. There's real consumer detriment that could be had by purchasing from either of those groups. Then you've raised the interesting one: and in a similar product, motorboats or boats, we don't have anything.

So they are interesting and any comments you might have would be helpful around that. If I could just move back, a couple of things. The public sector versus when they enter - well, they enter the demand side and you're concerned that because it is such a high-volume purchaser of vehicles, it distorts the market in the way that you've described. But you also mentioned that the public sector enters the supply side. I presume you're talking about there on the resale of vehicles.

MR BLUMS: That's correct.

MR FITZGERALD: As in second-hand vehicles.

MR BLUMS: Correct. That's correct. It is in fact the largest trader of automotive vehicles in Queensland, in the State of Queensland.

MR FITZGERALD: Actually I'll ask this: is it a direct trader? In other words, does it sell directly to the public or - - -

MR BLUMS: Yes, it does.

MR FITZGERALD: Okay.

MR BLUMS: So we can expect dealers to be there buying, but the public can to in and buy and sell directly to dealers.

MR FITZGERALD: You said, if I'm correct, that they don't have the same obligations as licensed dealers in the resale of those vehicles, was that your point, and therefore there was an advantage being received by the - - -

MR BLUMS: There are a number of advantages. There are economic advantages as well as administrative advantages. A licensed dealer has to have premises. Usually these would be high-rent premises or high-value real estate that are in prominent positions et cetera. They have to finance their vehicles. They have to comply with certain capacities and capabilities and a businessman to carry on business as such, and they're subject to regular scrutiny.

Let me tell you how ridiculous this scrutiny can be. This is a great story I tell, that when Cyclone Larry went through Innisfail, amongst other things it blew down a motor vehicle dealership and the guy worked very hard and had just got up the office again. The walls were still wet with paint and he'd just had new glass put in when the regulators arrived and said that he didn't have his establishment number and all the other requirements that are needed to deal in automotive vehicles on the front door. He said, "Well, it is on one front door," and they said, "Where's that?" He said, "Probably about 14 kilometres up the hill somewhere. If you can find it, bring it back for me. I'll put it up again but," he said, "it'll take a little while to get all the names and details on."

So the regulators can at times be very, very rigorous in their application of these issues. The same rigour doesn't apply to the public sector because they're considered to be, by definition, to comply with all the requirements because they don't try to be as entrepreneurial, can we say, as those people in the private sector. Then there are situations where probably the licensing in other situations are given out as a right rather than a check because they are the government.

MR FITZGERALD: Yes.

MR BLUMS: I think that those issues - in fact I've got to provide full disclosure here, commissioner, and that is that chiefly as such, a minister has - I understand I'm to see them on Thursday to appear, to provide information that the whole situation is being reviewed as such, as we speak, because I think that they became aware of the issues that it's done and - - -

MR FITZGERALD: Well, one of the issues - - -

MR BLUMS: One of the things, let's be honest, there was always this enormous attraction in the old days because the government would buy the vehicles without sales tax on them and therefore it had a 23 and a half per cent advantage. That advantage now has probably been evaporated to a great deal as such and probably the distortion is less now because they are subject to GST and implicit tax payments as such. But there still are advantages.

MR FITZGERALD: Well, the question I've got is, as I understand it, under the National Competition Policy we introduced this notion of competitive neutrality, as you know, between the private and the public sector, and it's within the capacity of the private sector to raise complaints in relation to competitive neutrality. Indeed one arm of the Productivity Commission actually deals with competitive neutrality. Has that been explored in this case or does it not fit within the criteria?

MR BLUMS: It does fit within the criteria and I want to see what comes out of the

review. If we're not satisfied with the review as such, then we'll certainly make a submission in terms of competitive neutrality.

MR FITZGERALD: Okay. But to date you've not explored that avenue?

MR BLUMS: No, we've had discussions with the government suggesting that they take action before we discuss the case.

MR FITZGERALD: Just a couple of the other ones, you mentioned the contract, as I have also mentioned, between WA and yourself. I mean, one of the terms of reference of this inquiry is to make recommendations in relation to unnecessary legislation and I must say to date we've had very few examples of that presented to us. Undoubtedly in the submissions people will do that. But here, just in terms of the contract and that, clearly, implicit in what you're saying is that some of the burden that has been imposed on the industry in Queensland would have to be excessive relative to that which is imposed on WA, if the contract reflects those burdens.

So either in your subsequent submissions or now would there be some very clear regulatory impulses that you think should be abandoned, that don't serve the consumer, or alternatively the costs of compliance outweigh that benefits that would be derived by the consumer. You may not want to put that on the record now but part of our task is to look at that.

MR BLUMS: I'll certainly make a submission because we have looked at that and we have presented that to the Queensland government, and can I just put this to you, commissioner: recently there was a review of the documentation. Now, the interesting thing about the automotive industry is that it's a dichotomy. At one end I have AP Eagers' publicly listed companies, big dealers, and we get down to SMEs, small operators and people like this. So we have to provide documentation across this very broad range of the constituency. Some of the documentation can be done electronically, et cetera, but a lot of it is still done manually. In fact it's interesting, even the big dealers like to take out - as it's a big document and fill it in in front of - because the "Consumers Affairs, look at the protection I'm getting" evidence. So perception becomes reality.

The issue is that at the last iteration of this sales document the cost of printing it - and we the MTAQ supply all our people and we supply others and it's a business that we do in supplying documentation. The cost of printing the documentation was such that it was prohibitive and we had to go back to the government and actually ask could we actually change the cost of the documentation and streamline it and things like this. I think there is a case for streamlining the documentation. I think that somewhere between the Western Australian model and the Queensland model there is a situation and we'd like to make a submission.

Can I go further and perhaps suggest that when we were talking about overt and covert, that there are also supplementary documentations that are required that are surplus, that if a licensed dealer runs one databank of information on all the motor vehicles he's got, that that should be sufficient for all purposes for the government. Because as we stand now, there is the one that's required under the Fair Trading Act; there is one that's required by Queensland Transport; and there is one required by the police as a police register as well. This sort of triplication of information, the police register is probably the most interesting of all, commissioner, because it has to be written in hand and it has to be written on yellow paper. I've told my people to write it on white paper and leave it in the sun for a while and I'm sure that we'll get to the right shade of yellow. But it seems ludicrous that we have this replication at high cost - and it is at high cost because in some cases my dealers - and it's not only dealers, car repairers have to run the same thing, they run an inventory because of indemnity and warrants and claims, and then they have to run a police register as well, and often they have to hire someone to come in and run it out and have it available. If it's not done then there's a penalty of \$75 for not having their required police register. Computer records are not accepted at this stage, or electronic records are not accepted.

MR FITZGERALD: It's all the same information but collected for different purposes obviously.

MR BLUMS: That's right, and it's the same information, and there's claims that perhaps on a computer it can in fact be adulterated, which is doubtful. I mean, you want to keep details of your car. In fact most of the repairers go further; they actually take photos of the repairs with cameras and file them in their computers to have a record of what side of the car they repaired and what happened, in case there is recourse and someone wants to do a rework. Particularly with panel beaters, this is particularly important that they do a record and usually they take photographic records of just what they've done.

MR FITZGERALD: Okay, that's fine. Talking about smash repairers, I note your comments in relation to smash repair insurers. The Commonwealth government has in fact embarked on this code of conduct which you've referred to. I'm intimately familiar with the issues between insurers and repairers because of the work that we've done. But just on that, one of the interesting dilemmas there is that the consumer of the smash repair is of course the insurance company and that's an unusual environment, so you've actually got the owner of the vehicle who is not the consumer of the product, which is the smash repairer, and legally that's going to change and that is the way it is. So we've got an interesting conundrum, that you've got this issue of provision to effectively the owner of the vehicle who is a third party to the arrangements and that poses its own sorts of issues. But you would acknowledge and I think it was acknowledged by most of the motor trade

associations around Australia that a very large percentage of the Australian population that owns cars does have the view that they don't want to get too involved in the details about the actual repair or the repairers and therefore they are quite happy for the insurer to take control of that process, whilst again there are other consumers that do want an involvement, they do want to have a right to select the repairer and have a much greater active involvement.

What we discovered when we did that was that there was need for improvement and hence a recommendation to be made, but fundamentally the question was: here there are sufficient products in the marketplace to enable consumers to either choose an insurer who would in fact control the process, or choose an insurer that would allow them to have choice of repairer, and any other variations on the theme. So to one extent, trying to meet the consumer's expectation is by ensuring that within the market there's a range of products and a range of providers. If of course you only had one provider, or if you had all providers only providing the one product, then you'd have to revisit that. But isn't it true that provided the market does have enough product differentiation and enough providers, then the consumer can in fact have reasonable choice. I do understand there are issues around the contracts and the disclosure and the code actually takes care of some of that, but is that not a fair proposition say in this area? It may change, but just at this moment in time we do seem to have diversity of product and diversity of providers that allows the consumer a reasonable range.

MR BLUMS: Can I make two prefacing comments.

MR FITZGERALD: Sure.

MR BLUMS: Firstly, the code in most states is voluntary, and only in New South Wales is it mandatory, and therefore it depends on the goodwill, the way in which the insurance companies and the repairers in fact approach this issue of voluntary codification of their industry. Some are doing well, some aren't. I just suggest that the dispute resolution issues are very, very difficult to overcome in it as such. The second issue that I preface my comments with are that I think that the consumers buying insurance products are probably not as well informed as they should be. They buy this product on the basis that all insurance policies are substantially the same, and clearly they're not.

MR FITZGERALD: Can I just challenge you on that a little bit. Some of the companies, for example Allianz seeks to have a competitive advantage by explicitly talking about choice of repairer and they advertise accordingly. So do you think that that is actually right, or do you think that now given that insurance companies have tried to differentiate themselves through very active marketing campaigns - I mean AAMI has a different approach and - - -

MR BLUMS: Well, AAMI is now part of Suncorp.

MR FITZGERALD: Yes, well, only just recently. But again, do you think that that's actually true that the consumers really don't understand the differences in the product, or was that a past problem? I don't want to take a position on it, but it just strikes me that here we've got a situation where the insurance companies have specifically tried to differentiate themselves on the basis of either, "You know, it's simpler by dealing with us because we'll manage it for you," or, "We're going to give you choice." So right at the moment if you look at that, would it be fair to say that consumers do in fact have a reasonable range which they understand? Clearly you don't have that view, but I would have thought looking at it objectively - - -

MR BLUMS: My view is that the consumer still buys on price and let me go further: I think that there is some very, very important dynamics in the smash repair industry that are occurring as a result of buying on price. The insurance companies have decided to compete on the basis of premium discounting for market share, and they've gone as far as they can virtually go on that, and so they're now looking to do some competition on product differentiation, as you pointed out. But they're still desperate in their discounting. It's amazing that in a situation where the cost of motor vehicles has gone up by X that premiums have gone up by less than X. The sophistication of motor vehicles have gone so far.

I still remain breathless that premiums can be kept where they are, when we've got cars such as the new VE Commodore that's just come out, that has sophisticated adhesives to glue the front that need a whole new set of welding equipment, inverter welders, to weld it because the metallurgy is so sophisticated and things like this. So basically they've been able to compete by driving down the lower and average cost curve of the repair industry.

This has been achieved in a number of ways. One is to bring in imported components that are much cheaper, that have all the appearance that you have with - for instance, windscreens now, O'Briens are bringing them in from China. The windscreen does meet Australian Standards specification but it doesn't probably meet manufacturer's specification. It's not the same windscreen as the windscreen that came out of the car. Some manufacturers have actually said, "If this windscreen is not replaced by this type of windscreen, all warranties, all bets are off," because it's one of the few compression plans left in the motor vehicle as such.

So we've got this situation where I think it's important that - I don't know how we do it - some form of education is undertaken at the end of the day on automotive repairs. I think there is a range of products out there now. I think that there is, if the consumer's well enough educated, the ability to pick what he wants from the range of products. But inevitably when they go to buy third party insurance you buy a new car and the dealer says, "Now, you'll need third party insurance. We suggest that."

80 per cent of all third party insurances are written by the dealers and they recommend. The big battle now is who's going to recommend what.

So at the end of the day the broker comes along - let me tell you another great story. The mechanical repair people, there was one outfit that does very good insurance but the mechanical guy said, "In our public indemnity insurances our premiums are very high now," and they just had a new broker come along who wanted to reduce all the business. He said, "Look, I can reduce your premium by 25 per cent but let's take out clause 8." Well, let me tell you, with clause 8 there wasn't much left of public indemnity risk management in that policy as such. So I think a lot of it is how it's sold and why it's sold at the end of the day. But I think the products are available, they're out there.

But again, a lot of it's bought on price and I think the product disclosure statements are not as good as they should be. One of the things that I think should happen is that the product disclosure statement should be there and I think the product disclosure statement should not only be from the insurance company to the consumer but there should be a product disclosure statement at the time of repair of your motor vehicle on exactly what's going to happen at the end of the day so they know what's going to happen and what's available.

We saw that classic situation a month or two ago, when a young lady went to one of the so-called current affairs programs and complained, "Look, my car, this, that and the other," and of course the program made a big thing out of it until her insurance company pointed out, "Look, her insurance policy in fact specifically excludes - - -" and they had to apologise publicly. She had an expectation that the product had the capacity to deliver this, but at the end of the day, clearly the policy wasn't intended to do that and she had bought a product at the price that didn't have the capacity to deliver - - -

MR FITZGERALD: Well, we've certainly seen - in the previous inquiry we certainly saw and heard from a very large number of motor vehicle owners and repairers on some of those issues.

MR BLUMS: But as you said, you've been close to it. The point I was going to point out, the industry is now going through a terrible situation where it has problems attracting skilled workers, it has problems retaining its capacity. In fact, in Mackay in Queensland they have to transport the motor vehicles out of there because most of the people involved have gone to the mines where they can secure far - - -

MR FITZGERALD: That's right.

MR BLUMS: And to effect a collision repair you'd probably have to take the vehicle to either Townsville or to Rockhampton and the industry is under some threat

as a result of difficulties in skills retention and things like that.

MR FITZGERALD: Sure, and we identified that in the report, that that was a significant issue and is a significant issue .

MR BLUMS: Some of the issues they're facing is repairers are making between 1 and 3 per cent return on capital.

MR FITZGERALD: Yes, I know. At some stage, however, I suppose the contra to that, just to - the insurance industry would say that it's not in their interests to see smash repairers go out of business because at the end of the day they need them to repair the cars that they have insured. So you might say that there is a transitional problem at the moment which will rectify over time, or you may take the very pessimistic approach that this is a terminal problem in the current arrangements. Time will probably tell us on that, but there are a few things - - -

MR BLUMS: I think there will be a restructuring of the industry. I think it will go to hubs and spokes. I think we'll have speed shops and things like that, that can do the small repairs very quickly and effectively, and we'll have a lesser number of those that do the very - and I think that there will be a response, but I don't think that the industry will be eliminated. It will just be in a totally different form to the industry we see now.

MR FITZGERALD: Yes, all right. Thank you very much for that. That has been really very helpful. Thank you. I'm not sure whether our fourth participant is going to show. Do we need to ring or we'll just wait a few moment and see?

AT 12.02 PM THE INQUIRY WAS ADJOURNED
UNTIL THURSDAY, 29 MARCH 2007

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