S&C

SPARK AND CANNON

Telephone:

Adelaide	(08) 8110 8999
Hobart	(03) 6220 3000
Melbourne	(03) 9248 5678
Perth	(08) 6210 9999
Sydney	(02) 9217 0999

TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

REVIEW OF AUSTRALIA'S CONSUMER POLICY FRAMEWORKS

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

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON THURSDAY, 21 FEBRUARY 2008, AT 8.35 AM

Continued from 19/2/08 in Sydney

MR FITZGERALD: Good morning everybody. I should just say, we've just moved into this building and I think this is only the second time this room has been used, so we'll get used to it eventually. If I can just start by a couple of formal statements, and that is we reconvene this morning the second round of public hearings into the inquiry in the review Australia's Consumer Policy Framework. We've had second round of hearings in Melbourne and Sydney and this is the third and last set of public hearings in this round in Canberra. Whilst the hearings are informal in nature, participants are required to be truthful in the submissions they make, and the proceedings are recorded and will be made available on the commission's web site.

If anybody wants to make any comments off the record, in confidence, they need to advise us in advance. Otherwise, I'm Robert Fitzgerald, the presiding commissioner, and I'm joined by my fellow commissioners, Gary Potts, and Philip Weickhardt. So that's the formal part done. Now we welcome you, Deirdre. If you can give your full name, the organisation you represent then just some opening comments, and we'll go from there.

MS O'DONNELL (TIO): Thanks very much. My name is Deirdre Anne O'Donnell, and I am the ombudsman of the Telecommunications Industry Ombudsman's Scheme. I will make some general comments and then be very happy to answer any questions. So obviously I'll start with saying the TIO welcomes the inquiry and the opportunity to participate, and a national and coherent policy framework for consumers will represent enormous value. I'm making comments from the perspective of the TIO scheme, an industry ombudsman scheme that operates in accordance with a series of benchmarks, that is national, that is, to my knowledge, the busiest alternative dispute resolution scheme in Australia, which gives a bit of context to what I'm talking about in my past annual report. I noted that we'd helped over 100,000 Australians.

Christmas just gone, saw a 42 per cent rise in complaints to the TIO. So we're doing a lot of business as an ADR scheme. We're also seeing no diminution of demand for our services. So for all of those reasons, it's terrific to be part of a total review of the policy framework for consumer protection. The context of the growth in demand for our services in the ombudsman scheme, we're in a very dynamic marketplace. There is a high level of industry activity. It's always hard to actually pinpoint why the demand is increasing so much, but ombudsmen traditionally say it's industry activity, coupled with consumer awareness; and a third factor that I think is very relevant in today's climate is the pressure with interest rates and the economic issues that consumers are facing. We believe that people are scrutinising their phone bills. They're asking lots of questions and they're not getting answers and they're coming to the TIO.

The Productivity Commission draft report specifically refers to the TIO in draft

recommendation 9.2, and you make a recommendation that the jurisdiction of the TIO be expanded, and you identify a number of specific areas. We particularly note your comments that some functions that consumers expect from the TIO are fulfilled by other bodies, and that boundary problems appear to confuse consumers with the involvement of multiple bodies leading to loss of economies of scope in complaint handling.

As an ombudsman, my perspective is that the experience of the consumer must be central to the development of the appropriate redress mechanism. Complexity in product and service offerings, coupled with the experience of complexity in redress mechanisms can result in an overwhelming consumer experience that's not good for anybody. The issue of a one-stop shop, which seems to underlie the commission's recommendations is one that has been canvassed in the industry from over a long period of time, and, again, speaking as an ombudsman, we've long been a support of this concept, in the interests of providing adequate and efficient consumer protection.

So the commission's recommendations have obviously been informed by a number of key stakeholders in the initial round of consultation, and will be informed by a number of key voices in this next round, and we're just one. So I'll just give you our part of the picture. I'll talk about the specifics in response to any questions that you have, but I think I just want to explain to you that the scheme itself has its policy guidance from the TIO's council. We're a company limited by guarantee. We have a constitution, articles of association.

We're governed by a board of directors and we have a council, and our council is comprised of equal numbers of consumer and industry representatives with an independent chair, and that counsel is the body that gives me, as ombudsman, policy around how the scheme operates, and that council also has a process for considering extension to the jurisdiction of the TIO, and a series of principles which balance the industry, issues around cost and efficiency, and the consumer issues around simplicity and access. So we have a process, and we are very pleased to engage with your process in the interests of better consumer outcomes.

Finally, the last couple of comments I'd make would be in looking at the recommendations that the commission has made, my experience again as ombudsman, is that the consumer needs and wants and is entitled to a seamless process for redress that gives them efficient and effective access to a solution to their grievance. This is clearly a foundation of your report. A particularly important principle for the TIO is accessibility of redress. Because we serve all Australians, and particularly in telecommunications, the needs of the various consumer groups can be so varied, it is absolutely vital that as an ombudsman, we are accessible to all of those groups, particularly the vulnerable groups who may not have any power at all in their relationship with the suppliers they deal with, and ultimately, we must be fair. That's the other side of the equation; we must be fair to the industry and to the

consumer in order to give efficient outcomes.

So we're in a dynamic converging environment. We have a big challenge at the moment in responding to future demands for products and services. So that, again, speaking as the CEO of an organisation, is a great challenge. How are my staff skilled enough to deal with the complexity of product offerings out there, and that's an important consideration in jurisdictional expansion. I think what the commission has done has named some very important issues, and has identified an opportunity for the industry to take the lead to develop appropriate solutions, redress solutions to the problems that stakeholders have identified to you so far, and will identify in this iteration of hearings.

The definition of the problem is vital. Just where does the source of the problem lie? From that, the analysis and then the solutions that are developed for the optimum redresser is the process that you're following and the process that we endorse, and that we want to be part of. So I'll stop there at points of principle, but very happy to answer any questions generally or specifically.

MR FITZGERALD: Good. Thanks very much, Deirdre. Just a couple of quick questions. One is, I note in your statement that the TIO counsel, your governing body, they address these issues of the recommendations in chapter 9, specifically. Can I just ask, to your knowledge, have they forwarded a written submission to us at this stage?

MS O'DONNELL (TIO): Not as yet. It's our intention. We've been undertaking an extensive consultation process over the past month. In the discussions that have been held between council members and myself, we've identified a number of facets of the various problems that have been identified by the key stakeholders and it's my job to bring them together and deliver them to you. I hope that will be acceptable.

MR FITZGERALD: The second thing is, I noticed in the Telstra submission to us they opposed the recommendation that we've made. But I just want to go back before looking at that issue: they say in their paper that:

> The escalating complaints regarding provision of telecommunications premium contents services are already included in the TIO's jurisdiction but not the content elements which are expressly precluded under the Telecommunications (Consumer Protection and Service Standards) Act.

Just reading on:

> When content issues arise they are referred to either ACMA or Telephone Information Service Standards Council to be addressed.

Can you shed any insight into why was - notwithstanding the fact that premium content services are included in your jurisdiction - content specifically excluded? What's the story?

MS O'DONNELL (TIO): It has a legislative basis. So from the inception of the TIO scheme it was a specific exclusion from our jurisdiction.

MR FITZGERALD: Could you shed any light on the rationale for why that occurred?

MS O'DONNELL (TIO): It's before my time so I will hypothesise, because I've been part of an industry where that has been a given and my understanding is that it would have been - I suspect it would have had its genesis in the division in the regulatory environment between broadcasting services and telecommunications carriage services. That's the understanding I've always had, so that the broadcasting regulatory regime had responsibility for content-related matters, and the telecommunications regulatory regime had carriage of service. In the TIO's scheme development the most pressing and continually the most pressing issue for us is around billing - billing for services. That has been our number 1 issue since 1993. It's the number 1 issue for other industry ombudsman, such as the Energy Ombudsman.

We deal with the provision of the service, how that is billed, how that is delivered, whether it's provided on time in accordance with contracts, whether the faults are rectified on time - all of those surrounding issues around the actual transmission of the service. The content of the service historically has been regarded as a conceptually different issue. People talk about it with a censorship overlay. The ACMA regime provides for consideration of content under the broadcasting regime, and I gather that is why ACMA retained the content part of premium services complaints under the Mobile Premium Services Industry Scheme. There seems to be a historical bifurcation, if you like, of content and carriage in our regime.

MR FITZGERALD: Notwithstanding that your governing body hasn't yet put in a submission, are there any practical reasons as to why your scheme could not be extended to include various other complaint handling areas?

MS O'DONNELL (TIO): Well, broadly, no. The short answer is no. The scheme, can adapt as schemes should, to industry activity and broken demand for services, and the considerations that we would always take into account would be the principles already established by the TIO. Do we have the best skill set, operational implications? Is that the best solution? If I could perhaps make a comment: I was previously a statutory ombudsman and that environment had exactly the same principles but obviously dealt in government service delivery rather than telecommunication service delivery.

I found there that naming the problem, analysing the options, could lead to solutions that in this environment, for example, could be virtual solutions. So where I had a very defined jurisdiction it was always critical that if I couldn't actually help somebody in jurisdiction I gave them immediately a pathway to somebody who could, so that it was as seamless as I could possibly make it. I see it incumbent on the redress schemes where they don't have the jurisdiction today to cooperate, to collaborate, to provide resources. It may be that expertise is located in various areas. I think it's really, really important that the consumer experience is one of, as effective redress access as possible.

MR FITZGERALD: I'll come back to some of this in a second.

MR POTTS: I was just going to ask - we're still awaiting the TIO council submission which will throw some light on various issues. But from your perspective are there any things where you think we could have gone further, or perhaps we've gone too far in relation to your own responsibilities? You've said you generally support the direction of the draft report.

MS O'DONNELL (TIO): Yes.

MR POTTS: Is there anything at a more specific level, if you like, where you think we could have perhaps done more or perhaps we might have overreached, for instance?

MS O'DONNELL (TIO): Gary, the point that I'd make again would be the actual nature of the problem. If I might give you an example: in relation to interactive voice response systems, I had some questions myself around where does the problem lie and therefore who is best placed to resolve the problem for us as an ombudsman scheme - if I take that as an example. We will deal with complaints about IVRs if they're a barrier to a consumer getting through, or getting redress, or contributing to a detriment that they suffer. If an IVR was by a large government agency or by a commercial organisation, my question would be how could one resolve that problem, what is the source of that problem.

I have a question about where in fact that might lead and whether we may be the best body to take on IVRs in the absence of that sort of definition of the problem. People will call us and say, "I can't get through to Centrelink." We can't help them unfortunately. There it's a question of the consumer perceiving that the way they get access to the agency is in fact the cause of the problem, rather than the agency's choice of means of access. One of the things that an ombudsman can always spotlight and bring attention to is how important it is for companies in our jurisdiction to have full access to consumers who have a problem. That's one of the ways we try to influence industry behaviour in the interests of better consumer

outcomes. That may be an example where I have reservations or questions about the nature of the problem that's given rise to the commission's recommendation.

Pay TV on the other hand is a matter that the previous ombudsman has said on the record, and the ACCC has said on the record, could be accommodated within the TIO's jurisdiction because the issues are the same types of issues: billing, credit management. The question then arises because of history, if it's a complaint about the content of the service, "I didn't like the content. It wasn't up to scratch." For me, what sort of a practical outcome can I achieve as ombudsman in relation to that sort of a question? I don't think I can. It may be that someone with a content expertise could more appropriately. That's a personal response.

MR POTTS: Thank you.

MR WEICKHARDT: Deirdre, you mentioned that there have been several debates previously about enlarging scope. Pay TV might have been one of them.

MS O'DONNELL (TIO): Yes.

MR WEICKHARDT: Can you explain to us why perhaps, having had the debate, there was a decision not to enlarge your powers? I mean, mobile phone handsets was an area that was raised with us by several people as an issue during the first round of hearings.

MS O'DONNELL (TIO): Yes, and that's certainly one that is high on my radar. We already have the jurisdiction to deal with mobile phone handsets when they're part of a bundled service. How we deal with them then is, "My handset is broken, I'm paying ongoing access for a service," that's clearly not fair. When they're out of warranty they no longer become part of the bundled carriage service and they become a good, and that seems to be the history for why that hasn't been part of our jurisdiction. It's also because the people who would then, I suppose, be responsible for the handsets would be the manufacturers who are not part of the scheme and not part of the jurisdiction. It's also because the people who were then, I suppose, responsible for the handsets would be the manufacturers who are not part of the scheme and not part of the jurisdiction. So the challenge operationally would be if that's the best solution you would need to bring in a separate class of members. The question would be, "Would you include retail channels as part of that? Would you include the multinational handset manufacturers?" if that's the best solution and that's what would happen.

But from a consumer perspective, there is no doubt - if my handset doesn't work I think of it as a telecommunications issue and chances are I'll call the ombudsman. So conceptually it makes sense.

MR WEICKHARDT: In terms of activities that you cover, are there any other areas where consumers continue to express frustration that you're excluded from - you talked about a seamless experience for the consumer, are there any other hot spots where consumers give you feedback that they're frustrated that you can't intervene or act?

MS O'DONNELL (TIO): Where that occurs what I'll generally do is bring that to the attention of the public. An example was last year when, in consultation with the ACCC, we put out a press release about small businesses who entered into bundled finance contracts for telecommunications products and services, where there are two separate leases operating, where the telecommunications side of it may cease, but they are still left with the residual finance lease with an organisation that has nothing to do with the telecommunications company and they may end up cross-subsidising their telecommunications services they no longer get because of this finance lease arrangement.

We highlighted that late last year. The ACCC also highlighted that. There is not as yet an adequate redress mechanism to resolve that problem. So when that occurs we will name those issues and that's where we're in such a good a position because the data that we receive is enormous. We are hearing what consumers are saying. Thousands of consumers every week are calling us. By far the majority of the issues fall clearly within our jurisdiction and they seem to be the same issues over and over again. When I speak to the industry I say, "These are the problems that need to be addressed: complaint handling, customer service billing, credit management, they are the same issues.

MR FITZGERALD: Just sticking in relation to the issues, before I turn back to a structural issue. One of the issues that has arisen consistently throughout this inquiry has been the complexity of telecommunication contracts and the growing length as well as the complexity of those contracts. I wonder in relation to the issues that come to you to what extent do the issues that you deal with arise from a failure to understand the contracts that people enter into as distinct from simply a pure billing issue which is not understanding the nature of the billing? So to what extent are the issues that you're seeing related to the actual contracts themselves.

MS O'DONNELL (TIO): If I could perhaps put another slant on that.

MR FITZGERALD: Sure.

MS O'DONNELL (TIO): We find that really the critical issue is understanding the market end, the representation at point of sale, the consumer's comprehension of the nature of the product they're going to buy. An example that we often give is that from a consumer perspective the device which is a mobile handset from when I've bought mine in 1999 to when I buy it in 2005 is a completely different beast. The

paradigm has shifted. The access that I can get through my new handset is extraordinarily different, incomprehensibly different to what I could get the last time I bought one. I'm on the record as talking about a complaint we received where a consumer had received a bill for over $25,000 for accessing the Internet via his mobile phone handset not having understood the costs. Clearly he didn't understand the costs he was going to incur. It was incomprehensible to him that he could have, through his handset, incurred costs of that magnitude and that seems to me to epitomise the experience so not the content per se because that doesn't really have, in my view, a lot of practical import for the consumer we see. It's what they heard, what they understood from the ads, what they were told at point of sale, how bedazzled they were, what they walked with, what their expectations are.

So the issues that you've named about consumers understanding in the world of complexity is one that is very important from an ombudsman perspective. Whether that can be resolved by simpler contracts, to be honest, I don't think it can. We focus our intention on ensuring and investigations verifying the information provided, the access to follow-up information, the whole marketing experience and point of sale experience because I think that's where the transaction disjunct occurs.

MR FITZGERALD: From your independent perspective where do you think the industry is heading in relation to clarity about that, the initial information, the initial selling practice and what have you in terms of the consumer, given that you've identified there was a key issue and given that we've received lots and lots of feedback to us through this inquiry that telecommunications in particular is an area of great concern to consumer advocacy groups. What do you think is happening in the industry now and should we be confident that in fact these issues can be resolved or not?

MS O'DONNELL (TIO): I wouldn't go along with "can we be confident". I think from my perspective as ombudsman my motto is "constant vigilance". I think we constantly need to feed back to the industry the issues of real consumers with these sorts of transactions. So I see a key role of ombudsman in relation to adding value back to the industry. It is the business intelligence I can provide. Industry may say it's not a representative sample, industry may have a number of concerns about the ombudsman's view, but the fact is consumers are coming to us with these experiences and I talk about that it is a mirror to the industry about the issues that it has to resolve. So my part in that process is to constantly mirror back those problems, to challenge the industry. I have done that most recently in relation to its complaint handling, to lift its game, to lift its standards so that the consumer experience is better.

MR FITZGERALD: Then pushing out a little bit further, given that feeding this back into the industry, do you think the industry is responding with sufficient rigour to the issues that you're raising and if so or if not, how can that be improved?

MS O'DONNELL (TIO): The best test, I suppose - again, speaking independently as an ombudsman - would be to review the consumer experience which is the absolute bedrock of data and we feed that back, but also to review the processes and safeguards put in place by the various players to ensure those sorts of outcomes. To my knowledge that hasn't been done. It seems to me the opportunity for the ombudsman and the regulators is where we can add the greatest value by collectively with our various jurisdictions and our various powers putting the spotlight back on the industry in respect of those areas. So there are examples where the ombudsman and ACMA, the industry regulator, have successfully been able to take - ACMA has taken enforcement action in response to complaints that the ombudsman has highlighted. It's important that I constantly give that feedback to the bodies who have the powers to take action.

The ACCC has also taken on board ombudsman complaints which have identified patterns of behaviour and has followed those through. So I think it's absolutely vital that I continue to provide that intelligence to the ACCC, to ACMA, to relevant bodies with those sorts of enforcement powers where patterns of industry behaviour are evident by complaints to the ombudsman.

MR POTTS: Deirdre, do you get much feedback from consumers about a desire on their part for simpler, no-frills products in this area?

MS O'DONNELL (TIO): Anecdotally, yes.

MR POTTS: Is that increasing over time?

MS O'DONNELL (TIO): Because it's not a statistic I specifically capture because I focus on the problem in relation to my jurisdiction, but I don't think you'd get any disagreement, I really don't. The calls that we receive, particularly from what I call vulnerable consumers, consumers who may not be savvy - so my gen Ys in my office are fantastic and they have a great understanding of the industry and its complexities. I flounder, my father flounders, my neighbour flounders, that's our experience. It's real.

MR POTTS: Do you think that the simpler products, if you like, to use a shorthand expression, are actually available and the consumers don't know about them or is the problem that the industry is not responding to this part of the market that is looking for a more straightforward product?

MS O'DONNELL (TIO): Because I don't hear the good news, I probably can't comment. I just hear what people's problems are. I understand in the public domain we read about marketing of simpler products in response to consumer demand. I can just tell you what people are finding problems with. I can't tell you what they like,

they won't tell me that.

MR WEICKHARDT: Deirdre, you deal with customers nationally and a great number from the sound of it, 100,000 calls. It's been put to us by a number of agencies that our recommendation in terms of the generic law for a one law, one regulator system has some significant disadvantages in terms of local service delivery and local access of people who have complaints. Can you talk about how you manage, if you like, to give local service to people throughout Australia and, I guess, adapt to varying local needs, somebody in an indigenous community in the Northern Territory is in a different circumstances and different situation to somebody in Canberra. How do you handle that as a national body.

MS O'DONNELL (TIO): Yes, it's a very important area and it's one where we can do better, there is no doubt about that. Again, speaking personally as an ombudsman, to be an accessible ombudsman I think is the hallmark of the best ombudsman you can be, accessible to all aspects of the community. The way we approach it presently is that we will focus on specific groups, with the assistance of the council, and develop appropriate complaint handling mechanisms and awareness mechanisms to deal with specific groups. We do not yet adequately serve indigenous people. I was previously an ombudsman in Western Australia and that was a huge issue for me there. So there is a lot more that we want to and need to do.

We do participate collaboratively with other ombudsman. If I may talk about this. This is something that I think is very beneficial and is important in terms of the redress environment. There is actually an Australian and New Zealand Ombudsman Association which brings together industry and statutory ombudsmen which has recognised that for a consumer you need an ombudsman when you've got a problem otherwise you don't that we exist. But when you have a problem, you need to someone to go to and you need someone to go to straightaway. One of the ways that the collective ombudsmen have tried to at least help with this is to have an ANZOA, that's our acronym, a message which says, "If you have a problem an ombudsman can probably help," and that's a postcard campaign. On the back of the postcard it says if it's energy, if it's telecommunications, if it's tax - so we try and do that. I think that's a creative response to all of these jurisdictions that we have.

Personally I find when I do outreach in remote areas or in regional areas to say to a consumer, "If you've got a problem, I'll give you the postcard. If it's phones, give us a call," and they go, "Fantastic," stick it on the fridge and off they go. They don't need reams of literature, they don't need videos, they don't need ads, they just need point of contact for that moment of the problem. So that's something that we've been exploring as ombudsmen. Does that help? From a national perspective we take statistics on where do the complaints come from. If awareness of the TIO is low in a certain region, we will target that region in terms of outreach.

MR WEICKHARDT: Do you have local branches?

MS O'DONNELL (TIO): We don't, no.

MR WEICKHARDT: It's all centralised.

MS O'DONNELL (TIO): It's all centralised because it's basically phone.

MR WEICKHARDT: Do you have a particular, if you like, group of people who take calls from one region or who focus on a particular type of issue?

MS O'DONNELL (TIO): No. The demand is so uniform in terms of the issues that consumers raise with us that we address it across the board. So I have around 40 or so staff who receive complaints. We get between five and seven thousand calls a week at the moment. They will come from all over Australia. Generally they'll fall into our top five or six categories and it won't really depend so much on the region. Nevertheless it is an area that we always want to improve and do better: non-English speaking communities, disadvantaged people. One of the ways I try to do that is by tapping into the key representative bodies.

I found in Western Australia, for example, if there was an indigenous person with a problem they were likely to go to Aboriginal Legal Aid or to the Tenants Advisory Service and so if those groups need the ombudsman and it was there and could assist, they could refer people on. So I tried to use networks in that way so the people would go to the person they first thought of and that person would send them to me.

MR FITZGERALD: I just want to return to a structural issue. We've received a submission from the Telephone Information Services Standards Council - there are many councils in the telecommunication industry I've discovered - who describes itself as an independent regulatory body that handles public complaints about 1900 premium services and, as you would be aware, has not agreed with our recommendation to extend your jurisdiction. You may or may not wish to comment given that it's another body, but I fail to see the rationale, given convergence is now the dominant way forward, that we would need a separate regulator simply for premium content when you actually have ACMA as the overarching regulator. I'm not disputing the fact that it probably does good work in terms of the development of standards, but I just wonder why one would need a particular separate council to deal with that particular aspect, both in terms of standard development and complaint handling when in fact you have a regulator and an ombudsman scheme already available. Whether you wish to comment or not is up to you.

MS O'DONNELL (TIO): I'd rather not comment but I think they are very legitimate questions and I think the solution to that problem needs to be in the

consumer experience and what is the reality of that experience and what is the optimum outcome. But I don't feel it would be proper for me to comment, I'm sorry.

MR FITZGERALD: That's fair enough. They do say:

> Unlike TIO, the TISSC is not an office of last resort. We handle complaints about the messaging content, advertising of 1900 premium services in the first instance. Consumers are not required to have first taken up their complaint with the industry provider or -

and so on and so forth.

MS O'DONNELL (TIO): It's a big difference to an ombudsman which is an office of last resort. The philosophy for that is that - and this is global approach for ombudsmen - you give the agency or the company one more chance to resolve the matter. We find at the TIO that once someone has come to us and they have been given a TIO reference number the power of that number is wonderful and I think that in and of itself is an important power that we. It's not an official power, but a power, if you like, by implication. But we are an office of last resort.

MR FITZGERALD: If I can return to another issue which is related to your relationship with regulators and you've made some comment to that in response to questions from Philip and Gary. Are there instances where you refer a matter to a regulator for their action and if so, as distinct from the general systemic feedback which you referred to earlier, what is your experience of that process at the moment. Does that work satisfactorily? Are you given sufficient information as to what has occurred and are you satisfied that appropriate actions are taken generally? I mean, obviously there will be case by case variances on that.

MS O'DONNELL (TIO): Recently, last week I think it was, there was an example in the public domain where ACMA released a press release about action it had taken about a member and that member was - the statistics are in my annual report for last year - that member generated a high volume of complaints. So I think from the consumer's perspective to definite enforcement action gives confidence that the regulatory regime is working. My side of the equation, what I can control, is it's incumbent on me to ensure that the data I give is as good, as accurate and as timely as it can be so that the regulator can then take the right action. At the moment ACMA and myself are just in the final stages of an MOU. I think it's always critical that we demonstrate that commitment formally, that we have our procedures and our escalation procedures clearly defined. I think that's incumbent on us if the consumers want to be confident that action takes as effectively and efficiently as it can.

I gather that historically there have been concerns. I want to be part of a solution

which is a quicker solution. ACMA has the power to enforce noncompliance with the TIO scheme. That is a very important safeguard in terms of the behaviour of my members, to know that if they do not comply with the rules of the scheme they can be referred to ACMA is a last resort for me, but nevertheless a powerful one and that is one of the critical success factors of the TIO scheme. Members must be members under the act. Other schemes where there is voluntary membership I think they would have a much harder row to hoe, but because our members are required by law to be part of the scheme and comply with the scheme that is a very powerful thing. Then how we operate with the regulator has to be timely, efficient and effective. So it is an area again that I'm targeting that we want to do better in. The ACCC and ACMA are very engaged with us and we have regular meetings and we share data on a regular basis. So that is a very important conduit of information to them so that they can exercise their powers promptly in the consumer interest.

MR FITZGERALD: My last set of questions is in relation to unfair practices and contracts. In the telecommunications area there is already an unfair contract or terms regime in place. As you're aware we've made recommendations in relation to the establishment of a generic unfair terms regime and I note both Optus and Telstra have endorsed that proposal for unfair contract terms. I was just wondering whether you have any view, going back to a question we asked earlier around the nature of the contracts - it's been put to us many times that because of the complexity of the contracts there needs to be a mechanism by which intrinsic and fairness can be dealt with and there are different models, there's the Victorian model, there's the UK model and there's what we've put forward.

To what extent does your office involve itself in what you would regard as intrinsically unfair - the exercise of unfair terms or contracts. You've talked about billing being the main area.

MS O'DONNELL (TIO): Yes.

MR FITZGERALD: Are you able to unpack in your vast array of experiences where there is genuine - the concern is about the application of a contract term either unfairly or that the term itself is inherently unfair?

MS O'DONNELL (TIO): Yes, and it's an area that the office has devoted attention to. It's manifest, if you like, in statistics that are significantly smaller than the ones I've quoted before and perhaps the thing that would best illustrate and that I may forward to the commission are the position statements that the TIO has on, for example, terms, marketing terms like "capped" et cetera and contractual negotiations. What we do then is we respond to a number of complaints or areas that we feel we have concern about, we develop a position statement, we put that on our web site and we use that as a yardstick against which we assess relevant complaints. That means the industry is aware of our concerns, but it is also aware of how we will make a call,

how the investigation is likely to unfold and the position statement relevant to contracts would probably be the best illustration to you of the public approach we have taken in relation to those matters. We also liaise closely with Offices of Fair Trading on specific issues and obviously with the ACCC at the broader level.

MR FITZGERALD: My final follow-up question is: is there evidence since you've had that position statement and your feedback to the various industry players, have you seen clear evidence where contract terms have been changed as a consequence of your intervention or the application of that set of guidelines?

MS O'DONNELL (TIO): I know there's definitely been an influence. Again, my time is too short to make that comment but I could perhaps comment on an example that's real to me where one of our members, aware of our position statements and the role we played in relation to contract terms brought to us the proposal to do a unilateral variation and sought our feedback in advance of going ahead with that and that, to me, was evidence of the fact that we had expertise, that we had a valuable view and that we were able to give, if you like, pre-emptive advice to them before they made that change. I found that a very useful dialogue. It allowed us to educate the member. It also showed that the member was open to the ombudsman's input early in the process rather than having a problem. So that was their initiative based on actions we had taken in the past. I think that's a good thing as an example.

MR FITZGERALD: Any final points you'd like to raise before we conclude?

MS O'DONNELL (TIO): No. Thank you very much for the opportunity to answer your questions but also fabulous work, if you don't mind me saying so.

MR FITZGERALD: Thank you very much.

MS O'DONNELL (TIO): I wish you well.

MR WEICKHARDT: Can I just clarify, when do you expect the council might get back to you?

MS O'DONNELL (TIO): If not tomorrow, Monday.

MR WEICKHARDT: Thank you.

MR FITZGERALD: Any further information that you might think is relevant following this discussion would be very beneficial.

MS O'DONNELL (TIO): I will, because that's given me a good indication of your areas of interests. Thanks so much.

MR FITZGERALD: The Master Builders Association, if you want to take a seat, that would be great. If you could just give your full name, the organisation you represent and then any of the opening comments you would like to make and then we will have a discussion.

MR HARNISCH (MBA): Thank you. My name is Wilhelm Harnisch. I am the chief executive of Master Builders Australia. I will make some opening remarks but I would also like to introduce my other colleagues who here which is Richard Claver who is our legal counsel, he will introduce himself in a minute. I also have Neil Gower who is our training policy manager and he is available to perhaps ask any questions relating to occupational licensing and I've also got Neil Evans who is my national technical and regulations manager and he may be available to talk to you or answer any questions relating to home warrant insurance and also occupational licensing, Neil is a licensed building practitioner so he certainly has the hands-on experience to perhaps answer any questions you may have in that area.

MR CALVER (MBA): Richard Maurice Calver and as Wilhelm indicated I am legal counsel with Master Builders Australia.

MR FITZGERALD: That's fine. The other two may go on the record later. So if you do, we will get your name at that stage. Can I just ask one question: written submissions, we have an earlier submission which I think largely dealt with unfair contract terms. Is there a subsequent submission to that dealing with the other issues or is that on its way?

MR HARNISCH (MBA): No, we have not put another submission in.

MR FITZGERALD: Okay, fine. I just wanted to make sure I wasn't missing it.

MR HARNISCH (MBA): We thought we use the opportunity at this oral hearing to do that.

MR FITZGERALD: That's fine. I just wanted to make sure I wasn't missing a document. Right, over to you.

MR HARNISCH (MBA): Thank you. We very much appreciate the opportunity to provide an oral briefing to this commission and in that sense we certainly commend the commission for a very in depth analysis and the recommendations that has come through it. It has certainly provided a lot of food for thought. There are three principal areas where Master Builders wishes to provide comment. The first area relates to proposals concerning unfair contract terms and consumer contracts that were raised in chapter 7 and appendix B of the draft report. As you are aware, Master Builders provided a comprehensive written submission on this particular

subject.

We in particular note and support that the Victorian model is rightly rejected by the commission and there are many positive features to the commission's recommended federal scheme as compared to that model. The Victorian model is highly problematic for the building industry in particular and certainly we would reject its adoption as a template across Australia. We also note that the commission in its report on reform of building regulation said that fair and consistent minimum requirements for home building contracts would go some way to addressing potential information asymmetries between consumers and builders in the domestic contract. This we support. Domestic building contract legislation currently, as you know, differs markedly between states and the reform legislation, we believe, is becoming increasingly urgent as one way of addressing the sorts of consumer problems that was identified in the report.

The second area of concern is the whole issue of home warranty insurance in terms of chapter 5. We note the recommendations. In terms of the recommendation we support the guarantee of access for consumers to alternative dispute resolution, and indeed in our own pro forma contracts it is an area that we recommend as a first step rather than court action being taken. As part of recommendation 5.5 it has also been suggested that greater powers to deregister builders who don't meet appropriate performance status are also to be taken, and similarly, the draft recommendation that states also need to revamp or review compulsory builders warranty insurance.

While we sort of agree with those broad principles we would recommend also that these matters be considered in the context of making domestic building contract legislation more uniform because we believe that the issue relating to deregistration and builders warranty insurance should be seen against the broader backdrop of the efficacy of domestic building contracts, and also note, of course, that this is an area of considerable complexity, noting in your own report that the terms of home warranty insurance there's something like 30 inquiries have been had in this particular area. Obviously the issue of, while there may not be currently a so-called crisis in existence, there would seem to be sufficient evidence to suggest that a further review be undertaken about how the current home warranty insurance regime is working, particularly post the HIH collapse, and how that might be working.

Obviously the report also made mention about the 2002 Allen review which I was closely involved in personally. I think those propositions that were contained in the Allen review should be re-examined and retested, like I said, particularly in the context of moving towards a more harmonised domestic building contract regime.

The third area that's of interest to us is occupational licensing. In that regard we certainly support the recommendation that a review be undertaken in terms of reform program for industry-specific consumer legislation. We'd also make the point

that this area has been extensively examined by the COAG working group on mutual recognition on licensing during the 2007 calendar year. Unfortunately I think that working party, while it initially did a lot of good work in terms of examining this issue, has stalled; one reason was obviously for the federal election. But nevertheless there's quite a bit of work in there that we would recommend that should that review into occupational licensing go ahead, obviously have a cross-reference in drawing upon the work. So they are the opening remarks and we obviously welcome questions.

MR FITZGERALD: Thanks very much for that, and we might deal with them, as you put them, in three different categories. If we might go to the beginning in relation to contract terms generally. We've indicated that there is some concern around domestic home building contracts that there is a lack of uniformity across Australia. It seems an odd area that most people would seek the advice of a lawyer and adviser before entering into other contracts, but when it comes to home building contracts nobody seeks advice from anybody. That seems an odd position but nevertheless that's the way we are. Is it possible to achieve uniformity in terms of domestic home building contracts across Australia, or are there impediments that are simply too difficult to overcome? Are there reasons why this is a futile exercise to pursue, or is it an achievable position?

MR HARNISCH (MBA): I think conceptually it's achievable. I think there are some fairly strong arguments why that could occur or should occur but also recognising there are different jurisdictional differences and there are also differences in terms of the Building Code of Australia. Those sorts of differences obviously need to be reflected in perhaps variations to perhaps a harmonised domestic building contract. Of course, in terms of the jurisdictional differences the whole fair trading and consumer legislation obviously is another complexity in terms of why - having the uniform domestic contract may have some sort of immediate practical difficulties in being achieved until those areas are also harmonised. Perhaps Richard, who is obviously far more competent in this area, as a legal counsel - and has also been working in this area - may want to add to those comments.

MR CALVER (MBA): It's our policy that these pieces of legislation should be harmonised. The report that the Productivity Commission undertook in this area that Mr Harnisch has referred to - and we've mentioned this on page 12 of our written submission - did reach the conclusions about the necessary reform, including clear and consistent minimum requirements for home building contracts. In our submission we say that in that report it didn't go on to recommend harmonisation because the net benefits might not be generated given the extent of the diversity. But it's that very diversity which needs to be harmonised, it's that very diversity which has no logical basis. It's merely the evolution of that legislation in the particular state and territory, so at least harmonised rules would assist, and it assists greatly because, for example, there is no uniformity in the legislation about when particular stages of

a building works have been reached.

So what we find is that financial institutions have a program for advancement of funds - if they're lenders in the situation - that are not uniform. Yet the same procedures, because of the centralisation of the banking system, are sought to be introduced in each state and territory and that has caused real confusion in the marketplace. It's a real impetus to get that particular area sorted out. It would not be an easy exercise. Some of this legislation has been remarkably badly drafted and tortuous and unnecessarily so, particularly in Victoria, in Queensland, so that we do believe in harmonised rules and we don't believe that there would not be a net benefit. We believe there would be a very real advantage for consumers, just from that one example that I've mentioned today.

MR FITZGERALD: One of the arguments that the jurisdictions might raise - as they do - is that given that this is a product that is located in only one jurisdiction, the consumer generally only builds one or two homes in their whole life, and often the builders are also location based, but not always - in other words, they're not necessarily national players - then the costs of inconsistency are significantly less than in other areas where there are either very substantial national suppliers or other national factors, such as in product safety and so on. I'm just wondering what your comments might be to that, because harmonisation can be a noble aspirant but at the end of the day people would say, "Well, the costs of trying to achieve that are disproportionate to the actual costs of the inconsistencies themselves."

MR CALVER (MBA): Yes, that is an argument. However, there are many home builders now who operate on a national basis and therefore the costs that relate to housing would be increased, their efficiency would be increased and the costs would decrease if these rules were uniform; if they didn't have so many different structures that they have to confront in each state and territory. Residential builders are generally operating in the location and don't have a wide reach. But the other point I made about the financing arrangements is one that I'd come back to in that context as well, and also across state borders where - the whole Albury-Wodonga issue, the whole issue of Tweed Heads. It's ridiculous that there should be such disparate rules merely because of those borders. It's an issue that has confronted Australia since federation in many areas.

But this is one area where the home warranty insurance issue , Mr Harnisch's point, if there is harmonised rules it would be much easier to have a satisfactory consumer product.

MR HARNISCH (MBA): Can I just add, I think whilst it's true that for - there's numerically quite a large number of builders you could argue that their operations are very localised and perhaps parochial, consideration needs to be given to the fact that increasingly the house building sector does have national companies. You've got

companies that franchise their so-called range of homes. Then there's the whole context of efficiencies that could be derived by the supporting entities in this industry whereby, for instance, financial institutions - that in terms of drafting contractual arrangements have to face the different jurisdictions in terms of the contractual arrangements, in terms of the financial arrangements they need to enter into. There are suppliers that obviously will be subject to different jurisdictional requirements. So the counter argument is that in terms of moving towards more harmonised arrangements - also I think should be noted.

MR FITZGERALD: Well, just in contracts - and then I'll ask Gary and Philip any questions around this area. You've given us a submission in relation to unfair contract terms in your presentation and you've - obviously not in favour of the Victorian model. Can I just ask you to very briefly articulate your current position in relation to unfair contract terms? Are you in favour - are you supportive of the approach we're taking or do you - are you - so if you could just clarify - - -

MR CALVER (MBA): Certainly.

MR FITZGERALD: - - - in brief terms where you stand at the moment in relation to an unfair contract regime?

MR CALVER (MBA): Absolutely. We believe that the model in the domestic building contract legislation which requires disclosure, which requires a cooling-off period, which has all of those characteristics which you have articulated in your written submission, we think that's a better model than having contract terms declared unfair ex post facto.

However, if the commission is not minded to make that a mainstay, a main recommendation, then our alternative position is that if unfair contract terms are going to be introduced it should not be the Victorian model. We have commended the model that you've articulated in the concluding part of our written submission because we believe that the model that you've proposed is far superior to the Victorian model for the reason we've articulated, and because essentially it doesn't allow price to be called into question after the event.

MR FITZGERALD: Is your main concern with the Victorian legislation around their ability to examine price issues or is it beyond that?

MR CALVER (MBA): It's beyond that. Our concerns with the Victorian legislation are the same concerns that you've articulated in appendix D where there's a box, I've forgotten the box number - - -

MR FITZGERALD: Yes.

MR CALVER (MBA): - - - that talks about the problems that have been raised by business groups in the context of the Victorian legislation. That absolutely emulates our view. So the feedback that we provided, I think, prior to the draft report and the feedback that other business groups have provided has been very well summarised by the commission in that index.

MR FITZGERALD: Okay, thanks for that. Questions on these areas?

MR WEICKHARDT: Yes. In your submission on page 4, clause 2.3, at the end of it you have a sentence I'd like you to decode for me, please. It says:

> Similarly, we do not agree there is no distinction between a lack of good faith and, per se, unfairness; a method that needs more exploration in the draft report.

MR CALVER (MBA): Yes.

MR WEICKHARDT: If you could explain to me what it is we should be exploring in words of one syllable - - -

MR CALVER (MBA): Certainly.

MR WEICKHARDT: - - - and then I'd be very grateful.

MR CALVER (MBA): Well, firstly, it's in the context of standard form contracts. We don't believe that standard form contracts automatically indicate a lack of good faith and automatically generate unfairness. We certainly don't believe that just because there is a standard form building contract that connotes a lack of good faith and therefore potential, per se, unfairness; unfairness on the face of it. Certainly we don't believe that with the level of disclosure, with the level of schedules that require the consumer to tick a box that they're aware of a range of issues around the building contract - which had to be in the front piece of that building contract - that just because it's standard form as to the balance of the conditions that that's unfair.

MR WEICKHARDT: Do you believe we implied that in our report, because we certainly - I think there was no intention to do that.

MR HARNISCH (MBA): I think it was more to emphasise the point while the arguments that might have been put in the report that might have applied to other industry sectors where - I think the example I read was that in one of the ticketing agencies you had what, 28 seconds to accept the seats and obviously the conditions that go with it or otherwise the seats would be allocated. Certainly wouldn't apply to this industry because consumers are certainly - I would have thought in the vast majority if not all cases, would take some weeks before they would sign a domestic

building contract. You couldn't argue in that case that they were signing blindly or under duress in terms of that. So the point where we're just emphasising that the same accusation or putting domestic building contracts or standard form of contracts in that same basket, is the point that we're making.

MR CALVER (MBA): Absolutely. I take the point further. In a contract of adhesion, that is, unless you sign the contract you don't get the good or service, then there can be an implied lack of good faith and generally some per se unfairness, as in that sentence. In a domestic building contract or a building contract, there can't be because (1) there is the underlying statutory obligation, the building code of Australia, and (2) there are all of these disclosure mechanisms which we go on to talk about, all these other structural issues; whereas I think that a lot of the initial material in the contractive part of the report seems to lump standard form contracts in together, whereas we believe that that distinction between contracts of adhesion and other standard form contracts could perhaps be given more emphasis in the report. That's all we were seeking to - it's not a - that's a minor point compared with the rest of that, the matter.

MR WEICKHARDT: Sure.

MR CALVER (MBA): But contracts of adhesion, I think, for example, if you go to get a hire car and they say, "But yes, you can take the car at this advertised price but the excess is $4000," as happened to me the other day, you go, "Well, I don't want to pay a $4000 excess," and they say, "Well, you'd have to pay another $50 a day otherwise the car that you thought was waiting there is not available to you; whereas with a domestic building contract there are all those mechanisms in place where the consumer can cool off, where the consumer can seek to change those terms and conditions.

We even go further where we say that - because of the point you mentioned about people not taking legal advice about their most important transaction that they generally enter into in their lives when they're building a house, we would go so far as to say that there should be - for additional protection a certificate saying that they've been given advice about that contract as part of the uniform building contracts regime. That, certainly, is what banks insist on now when they get you to sign mortgage documents. A mechanism of that kind would make the protection regime even more transparent, better than an unfair contracts regime. I go back to that two-tier argument we made in that regard.

MR FITZGERALD: Are you actually going to formally recommend that in your submission?

MR CALVER (MBA): The submission - it's in the submission.

MR FITZGERALD: It's part - in already?

MR CALVER (MBA): Yes, it is in. I'm sorry. I don't recall the paragraph.

MR FITZGERALD: No, that's fine. That's fine. Okay, Gary?

MR POTTS: Just a point of clarification for me, if you could, in terms of you concern about Victorian legislation. As I read your submission the concern is on two fronts. One is that it's with their general unfair contracts legislation that has been incorporated into the Fair Trading Act but also there's a concern that the building legislation itself overreaches and goes too far - - -

MR CALVER (MBA): Yes.

MR POTTS: - - - and that has been followed in other jurisdictions as well. That's a correct reading of what you're saying here?

MR CALVER (MBA): Yes, and particularly the point about price. I think we quote Milton Friedman who perhaps is not the flavour of the month any more, but certainly insofar as economic basics are concerned we certainly do. If I can go back and round out the prior answer. The recommendation is in paragraph 5.1 of our written submission. We say:

> A purchase or transaction of such significance that a further consumer protection may be a requirement to seek independent advice prior to signing a contract.

MR POTTS: Okay. Thanks for that.

MR CALVER (MBA): Box D2, having a list of prohibited terms that can't go into building contracts seems to us to be unwise, whereas that could be useful in terms of proscribing matters that could go into contracts of adhesion. That reinforces the point that we made about the difference between contracts of adhesion and other standard form contracts. It's a roundabout way to answer your question.

MR POTTS: But you do agree with some of the provisions that have been included in the Victorian legislation, I take it, from what you were just saying, I think in response to Robert's latest question. If you look at paragraph 2.6, for instance, in the box you have there about owners familiarising themselves with a contract, wasn't that a point that you were making if you think that's a worthwhile thing?

MR CALVER (MBA): We think that the Victorian domestic building contract legislation is good, but we don't like the Victorian unfair contracts legislation. What we are doing in relation to 2.6 is highlighting what's in the Victorian legislation that

protects consumers. For example, I'll just pick one point, where the owners completed a questionnaire that's bound into the contract to bring your attention to critical components of the contract, and they actually have to physically read that and tick a box and sign that they have read it and are aware of it. I think the Victorian act in that context is the Domestic Building Contracts Act we're talking about. But later on the Victorian model that we criticised is the unfair contracts regime that was inserted in the fair trading legislation.

MR POTTS: But isn't paragraph 2.6 an implied criticism of the Building Contracts Act in Victoria when it says:

> The master builders are strongly of the view that any new legislation not be a costly overlay on the existing law. This has occurred in Victoria under the Victorian model for domestic building legislation -

et cetera et cetera.

MR CALVER (MBA): Yes. The point we're trying to make there, sir, that the domestic building contract legislation there provides the consumers with adequate protection, it's transparent, it's up-front, it enables them to modify the pro forma contract, and what's happened is that an overlay on that current regime of protection - the unfair contracts regime - has come in added to costs, added to confusion. So there the two acts operate and the costs of doing business in that state because of that are higher.

MR POTTS: So your concern is just on the one front then?

MR CALVER (MBA): Just on the one front.

MR POTTS: Okay.

MR CALVER (MBA): Sorry if that's confusing.

MR WEICKHARDT: But I think Mr Harnisch also made the point that the Victorian act - I've forgotten what he said - was complicated, unreadable, incomprehensible or something like that.

MR CALVER (MBA): Well, I believe that the drafting of the domestic building contract legislation does leave a lot to be desired in each of the states and territories because of the way it has developed. However, the basic mechanisms under which it operates, the basic way in which it protects consumers, is what we support. We support full disclosure, we support a cooling-off period, but we do not support the overlay of the unfair contract terms of legislation.

MR FITZGERALD: Okay. Can we now just look at home warranty insurance. You would be familiar with our comments in the draft, and later in the day we have the Housing Industry Association of Australia making some comments. Can I just start by saying at the moment it seems to me that there is a running sore in relation to home warranty insurance that is unresolved despite all the reviews that have taken place. If I'm reading you correctly you're not against a national review of this area.

MR HARNISCH (MBA): No, we're not.

MR FITZGERALD: You can clarify that.

MR HARNISCH (MBA): We support another review - and necessarily can't read anything into that- but obviously the feedback that I'm getting and we are getting is that while as you say in here there doesn't appear to be a "so-called crisis" as you put in quotes, there are still some strong concerns in terms of home warranty insurance and certainly the building industry is not uniform in terms of the views and reaction to the current situation. I think given how the new home warranty insurance system effectively has only been in place now for a reasonably short period of time in terms of the more settled arrangement, if I could put it that way, and was, some would argue, a sort of crisis reaction to the collapse of HIH. While things may have settled there are still some strong concerns about what it's doing, both for consumers and to builders. I think therefore my point is that it would warrant another review.

MR FITZGERALD: Okay. Can I ask a question which has come up, just for clarification: could you explain to me the involvement of Master Builders Association of Australia in relation to the provision of this insurance product. Do you receive commissions and fees, and if so, what are the arrangements in place? A number of participants have made comments in both relation to your own organisation and in relation to the Housing Industry Association of Australia. I just want to clarify your involvement as an association in the provision of this product.

MR HARNISCH (MBA): Master Builders Association of Australia itself does not offer an insurance product; neither do any of our state associations per se. The MBAV - there is a Master Builders Insurance Services organisation that acts as an agent for various insurance companies in retailing home and warranty insurance products.

MR FITZGERALD: Who owns that?

MR HARNISCH (MBA): Well, it's an entity known as Master Builders Insurance Services - MBIS. It's an agent that retails home warranty insurance products. It would be true to say that like all agents they receive a commission for retailing those insurance products, but it retails it under the requirements under the various state legislation.

MR FITZGERALD: Can I go back - who is the owner of Master Builders Insurance Services?

MR HARNISCH (MBA): The owners of Master Builders Insurance Services, as I understand it - we're certainly not an owner - are some of the other master builders associations.

MR FITZGERALD: Who owns them?

MR HARNISCH (MBA): Sorry, who owns - sorry?

MR FITZGERALD: You've got state - - -

MR HARNISCH (MBA): State associations. Other state MBAs.

MR WEICKHARDT: Who owns the state organisations?

MR HARNISCH (MBA): Well, the members do.

MR FITZGERALD: They're not for profit organisations.

MR HARNISCH (MBA): They're not for profit organisations.

MR FITZGERALD: So the Master Builders Insurance Services is owned by some of your state affiliates?

MR HARNISCH (MBA): Yes, they are.

MR FITZGERALD: When you say that you don't offer the insurance product, Master Builders Association of Australia, that entity, isn't an owner of the Master Builders Insurance Service?

MR HARNISCH (MBA): That I don't know in terms of the - - -

MR CALVER (MBA): We're not a shareholder, no.

MR FITZGERALD: So when people say to us the Master Builders Association, it is correct to say that some of the state based associations receive a revenue stream through the Master Builders Insurance Services? That would be correct if they're owners of that service. Well, the service receives agency fees - - -

MR HARNISCH (MBA): Yes, they do.

MR FITZGERALD: - - - and therefore they receive - - -

MR HARNISCH (MBA): My understanding, once again - and like I said, I'm not a director of the company, we have no involvement - is that they do receive a stream of commission, as insurance products are, and those - - -

MR WEICKHARDT: Is that the only insurance they offer?

MR HARNISCH (MBA): That's my understanding. Sorry, I take it back, they do also provide other insurance services, like professional and directors' liability, other business insurances as well, so it does exclusively retail home warranty insurance. It always retails or acted as an agent for other insurers' products for our builder members or for its builder members.

MR FITZGERALD: To access that insurance and the home warranty builders' insurance, to the extent of your knowledge do you have to be a member of the Master Builder's Association or Associations, whichever to obtain that insurance?

MR HARNISCH (MBA): That, I can't answer.

MR FITZGERALD: Okay, all right.

MR WEICKHARDT: Do you know whether or not that organisation or the state-based organisations perform a role on behalf of the insurance companies to, I guess, certify the solvency of builders?

MR HARNISCH (MBA): That, I can't answer either.

MR FITZGERALD: In relation to the insurance itself at face value it's fairly clear that the vast majority of consumers don't actually understand the product for which they're paying, me included. I think all of the commissioners have entered into recent contracts that have these sorts of insurances. In part we've identified it's the name itself. It seems to indicate that it warrants much more than it does. In effect, it's an insolvency insurance package. The second thing is it seems hard to access even if the conditions for its - you know, for its invocation are met, that is, the builder dies, is insolvent or goes bankrupt. The third thing is there is real question as to whether or not - as you rightly said it's hard a very negative and perverse impact on builders themselves, apart from consumers.

So you're right to say that our concerns arise not only from the consumer's aspect, which is clearly our concern given it's a consumer policy inquiry, but also from the impact on those builders that have not been able to obtain the insurance. We had a submission in Sydney only two days ago from such a builder. Could you give me an understanding from your perspective as to why we seem to be in this state

with this particular insurance product? Why is it fraught at the moment with concerns? What do you think is at the central heart of it? I mean given that you support a national inquiry - we welcome that support, but what do you think is actually happening with this particular product that's causing these concerns? Of course as you know Tasmania has now changed its arrangements, New South Wales is changing its arrangements - - -

MR HARNISCH (MBA): I think ACT as well.

MR FITZGERALD: Everyone is changing the arrangements, so there's obviously a movement out there. But you might be able to shed some light on - - -

MR HARNISCH (MBA): Look, I think the - one of the concerns that were expressed certainly very early on following the HIH and the launch of a new suite of products was the allegation that - it was builders' capacity to conduct their business was limited by the value of insurance or the value of work that the insurance companies deemed them to be capable of undertaking.

So the test was not about a builder's technical capability but the perceived financial viability or capability of a builder to complete the work. So there were stories where long-standing builders were limited to only building two or three houses a year where once they had an unlimited capacity to build. So the argument was that the new regime - or it was alleged that the new regime or new set of arrangements acted as a barrier to entry in being able to apply their trade. So I suspect that issue - while it was, as you say, put in here - the crisis, perhaps, has eased those concerns and in some cases anger still remains by builders.

MR FITZGERALD: Can you explain for me why you think governments seek to make this, apart from Tasmania now, a compulsory insurance? Governments don't mandate that people insure their houses and yet - you can suffer a total loss in the case of a house. In terms of the risk that this insurance seems to cover it's unlikely people are going to be exposed to a complete loss of the value of a house. If a builder fails to remedy defects, well, okay, it's unlikely to be the total value of the house. Why do you think governments have intervened to make this a compulsory product apart from in Tasmania now?

MR HARNISCH (MBA): I think you should ask governments that question. I have a view but we'd have to classify it as an uninformed one. I just think it's - obviously it has come about off governments being left with a political challenge following the collapse of HIH. I suppose that's all I'll say. I just think - the point then just brings also in focus the point I made, is that this home warranty insurance should actually also be seen in terms of efficacy of the domestic building contracts. You would have thought that that needs to be examined as well. I mean obviously warranty provisions can't be - you could argue not necessarily totally

covered by the domestic building contracts but - so the relationship between the current home warranty insurance and domestic building contracts certainly we recommend as one area that perhaps should be part of any review that may be set up in this area.

MR FITZGERALD: I think it's fair comment but you have to look at it as part of a package.

MR HARNISCH (MBA): Yes.

MR FITZGERALD: Any review would need to do that. One of the things we're conscious of is this is not an inquiry into home builder warranty insurance and there is some danger as to venturing a little bit but not going far enough. The criticism made by HIA is largely around that. We acknowledge that, so I take that point. Gary?

MR POTTS: I was just going to ask what you think from your perspective are the key elements that would need to be examined in a national review, particularly having regard to what the HIA has said in their public submission. They've put quite a lot of focus on having a workable ADR scheme, for instance. What are the key elements from your perspective?

MR HARNISCH (MBA): Look, we certainly support the concept of ADRs. I think in terms of a dispute resolution that's certainly something in our own contracts that we - domestic contracts - or contracts that we write is a - you know, ADR's the way to go rather than - certainly as a first recourse rather than very costly and complex legal court systems.

I think the issue is about getting greater clarity in terms of what home and warranty insurance actually means. The term "insurance" has different connotations to different people. So that's certainly one issue. So is the degree to which it's intended to so-called protect consumers. It needs to look at whether the additional cost of imposing home warranty insurance is warranted or simply it's just a system that may governments political comfort. Secondly, it's about the degree to which home warranty insurance products and services act as a barrier to entry, which prevent, unfairly, builders the opportunity to conduct their business.

MR FITZGERALD: We heard on Tuesday that - and I don't know whether the figure was nationally or just in New South Wales - that 20,000 builders were precluded from obtaining this form of insurance. Now, I don't know whether that figure was accurate or not and I don't know whether that figure has decreased or otherwise. But on the surface it would seem that it has acted as a very significant barrier to groups of builders continuing in practice, whether or not they should or should not be builders is a very - is not this question. Do you believe that that issue

has eased or continues to be an issue, and if so, your members - to what extent are your members affected by the inability to access insurance?

MR HARNISCH (MBA): I can't give you a definitive answer on that one. It certainly was a controversy that well and truly raged immediately past the HIH and the launch of these new products. That controversy, as you said in there, seemed to have subsided and eased. So one conclusion you can draw from that therefore is that - and certainly in the job I've got the fact that my phone isn't ringing on this particular matter I can only assume that it's no longer an issue of raging concern. So I haven't heard that based on that very simple evidence that it's an issue, but I also keep hearing that it does remain an issue perhaps where some builders have simply come to live with it.

MR FITZGERALD: Can we go to the third area then, occupational licensing, and if any of your other colleagues want to contribute to this. This is an area of concern to us. You've mentioned the COAG working group on occupational reform - that's not what it's called but that's my shorthand. You've also indicated that because of the election it's not quite sure where that's now up to. Can I ask a fairly fundamental question. We've identified a very substantial number of occupations, some of which are in the building industry, which are licensed or registered in only one, or two, or three jurisdictions. Our starting point is that as an assumption where that is the case then licensing and/or registration should disappear. I say this is an assumption because you can rebut the assumption. What is the basis upon which licensing and/or registration should occur in your industry? In other words, what are the principles? Have you got a set of defined principles that aid governments in determining that X occupation should or should not be distinct from another one, because that seems to be a fundamental starting point. We've tried to enunciate some broad principles across the universe, but particularly the building industry. Where's the starting point for this examination?

MR HARNISCH (MBA): In terms of consumer protection and therefore linking it to licensing, our broad principle is that licensing should only be considered - well, to go back, which is a very convoluted way of putting it, is that certainly that builders should be licensed because of the particular responsibilities that they have, particularly as the complexity of the construction project. The other one is that where the entity enters into contractual arrangements and therefore you could argue has some sort of degree of consumer responsibilities, the issue then of course is what do you do with what we call the so-called sub-trades, and I've noted the list there on page 28 in terms of your summary report. Then to extend the argument that although glazier, for instance, may deal directly with the consumer and therefore requires licensing, brings certainly into doubt the rationale for doing so and for instance, you know, kitchen, bathroom and laundry installer, I haven't revisited or examined the rationale why someone like that was a licensed occupation.

MR FITZGERALD: Let me push it just a little bit further. You've indicated that where there are consumer reasons - you used another word - but anyway, where there are issues relating to consumer contact that all of these deal with consumers. So in a sense that doesn't get us very far. If you were looking at this list, if you were to guide the governments as to how they might approach looking at that, do you - I mean, we've started from a very principled but almost simplistic approach and say, "Well, it's only in one or two jurisdictions therefore prima facie it should be knocked off." It's not a very sophisticated way to enter this debate. So if you looked at this list here - and a lot of them are in fact in your industry - how would you give guidance to government if they were saying, "Well, as the peak body in this area, how should we examine this list?" You don't have to answer that now, but it seems to me a vexed question. Our aim is to reduce the number of specific industry regulations over time. Occupational licensing seems to be at the forefront of that ambition. What we haven't done and what we won't do is go through and actually say, "Glaziers shouldn't be licensed," because we don't have that knowledge. But as the peak body you might be able to give guidance to governments as to how that might be approached.

MR HARNISCH (MBA): It's something that we've been closely examining for quite some time, not only in terms of consumer protection but also in the context of occupational qualifications because there's a view that, for instance, all skilled trades should be licensed, which we don't agree with. It just seems to me an overreaction to what could well be some consumer concerns with some of the trades. It would be an unnecessary cost apart from the fact of pure compliance.

MR FITZGERALD: Does one of your colleagues want to make some comments?

MR HARNISCH (MBA): The short answer is we have yet to come to a conclusive position in terms of a framework because of the very vexed nature, which you were saying. I mean, as a principle you could argue that - well, we would argue that builders have a high level of responsibility because of the very complex and structural of the work they're undertaking, and therefore in terms of consumer protection and providing confidence, that's a proposition we could live with. I understand what you're saying. A wall and floor tiler, for instance, could do work for a consumer but we would argue that sure, while they do that for the consumer, their work isn't of such a critical nature that would therefore warrant them to be licensed, and therefore to impose a licence upon that particular skilled trade would be just - - -

MR FITZGERALD: Can I ask you another question then. Is it the nature of the actual occupation itself that would lead us to a view that registration and/or licensing was required, or is it the nature of the relationship that is forged with the consumer that is the issue? For example, if a plumber only did work as a subcontractor to a builder you might say that's fine. But if a plumber does work for Philip and Gary

then that's the issue. So I suppose one of the issues for me is: is it the inherent nature of the occupation itself - and some of them there clearly are, in the medical profession it's clearly the case - or is it the relationship forged with the unsophisticated consumer that creates the issue?

MR HARNISCH (MBA): I think a bit of both but certainly first of all I would have thought was the technical complexity or nature of the job being performed, and therefore the risk that it may present to an uninformed consumer. You can't expect an uninformed consumer or even a half-informed consumer to understand the structural integrity of a 10-storey high-rise apartment to make a judgment about whether that building has been soundly built and designed. There is the assumption that the builder has a duty of care in terms of building it to the Building Code of Australia and therefore structurally safe and meets all the codes, and therefore there's an argument there obviously a builder should be licensed in terms of consumer protection. Of course obviously they intersect with the consumer. Then you've got a wall and floor tiler, you could argue that in terms of structural it's a non-structural matter. Sure, it has an intersection with a consumer but even an uninformed consumer you could argue would have a reasonable understanding of what could be an acceptable standard in terms of laying wall or floor tiles and therefore has a reasonable opportunity to seek any redress that may be required under local fair trading laws that apply to that particular job.

MR WEICKHARDT: Can I ask, if we just come back to the licensing of builders themselves, to what degree is the current system - and it may be different in every state - actually serving the needs of consumers well? What does a builder require to get a licence, to maintain a licence, and to what degree do complaints about the builder's activities or the re-examination of the builder's competence actually help protect consumers today?

MR HARNISCH (MBA): I might defer that perhaps in the first instance to Neil Evans who is - - -

MR FITZGERALD: If you can just give your - - -

MR HARNISCH (MBA): - - - much versed in there.

MR FITZGERALD: If you can just give your full name before starting?

MR EVANS (MBA): Neil Evans.

MR FITZGERALD: Thank you.

MR EVANS (MBA): It does vary from state to state. But take Victoria, for example, I think it's a reasonable model where you have to demonstrate a minimum

qualification and a minimum number of years' experience before you can become a licensed builder.

MR FITZGERALD: But once you've got it?

MR EVANS (MBA): Once you've got it you renew it annually.

MR FITZGERALD: Just send in the paperwork?

MR EVANS (MBA): Send in paperwork, but there are some CPD points starting to get into some states and I think Victoria is bringing in a compulsory professional development scheme where you have to demonstrate training and industry participation in workshops et cetera to keep your registration going on an annual basis.

MR FITZGERALD: Apart from Queensland - where, you know, it has been described to us that there is an ADR scheme and if the builder doesn't actually rectify defects and things like that they can be deregistered - in the other states does any of that sort of - - -

MR EVANS (MBA): That also happens in also states.

MR FITZGERALD: So how many builders get deregistered?

MR EVANS (MBA): Not many, I don't think. I think most go back and fix. I think there have been a handful that have shot through, so to speak, but that's very very few. Generally they will go back, repair, rectify the problem and get on with things.

MR FITZGERALD: It seems that - we've got a number of pretty noisy consumers who are telling us that they're still fairly unhappy in this area, which isn't really consistent with that?

MR EVANS (MBA): I was basing that on my knowledge of the Victorian system. I don't know the other states as well as Victoria but I know they - if they don't go back and fix they'll be suspended, as the practitioners' board will just suspend them.

MR HARNISCH (MBA): I think the point needs to be made that while there are some unfortunate examples of consumers having an unsatisfactory outcome in relationship with the builder, that, numerically, is very small. I think it also should be noted that there are a whole range of avenues whereby the consumer's concerns and complaints can be addressed. So it's not as if the consumers are totally without external support in actioning their claims.

MR FITZGERALD: Okay. Gary? Are there - report. If you've got - suggesting - - -

MR EVANS (MBA): May I just say one - - -

MR FITZGERALD: Yes, please. I was just going to say are there any other comments you'd like to make?

MR EVANS (MBA): It was just on that issue before about what practitioners should be licensed or registered. One starting point may be - it's just something to think about. The Building Code of Australia is structured around principles of health, life and safety. So maybe a starting point for the registration of practitioners might be people that are involved in work that has an impact on health, life and safety of occupants in the building. That gets back to Wilhelm's issue, you know, a tiler, it's not really a health or a life or a safety issue, versus a framer or a glazier that might be putting in a glazed panel in a wall that somebody could walk through and injure themselves or hurt themselves because the glass is not the appropriate size and thickness.

MR FITZGERALD: Well, that's an interesting point. Are there any final questions that - sorry, issues that any of you would like to raise in conclusion that we haven't covered? All right. Well, thank you very much for that. We look forward to receiving a written submission based on this discussion, if that's possible.

MR .....: Thank you.

MR FITZGERALD: Good, thanks very much. We'll now adjourn for 10 minutes, if that's possible.

MR FITZGERALD: Okay.

MR RENOUF (C): Before you start, Robert, I'll just tell you I've got a terrible cold. So if I break into a coughing fit just excuse me.

MR FITZGERALD: That's all right. I won't - that's fine. Okay, we might resume with Choice. If you can give your - both of you give your full names and the positions and organisation you represent. As you know the drill you just can give us some opening comments and thoughts and reflections and then we'll have a little bit of time for questions and discussion.

MR RENOUF (C): Thank you. Gordon Renouf, director of policy and campaigns at Choice.

MS FREEMAN (C): Elissa Freeman, senior policy officer with Choice.

MR FITZGERALD: Okay, over to you.

MR RENOUF (C): Thanks, Robert. We welcome the opportunity to give evidence before the inquiry again. We particularly welcome the draft report, which we think, as we've stated in our submission, makes a significant contribution to advancing consumer policy in Australia.

We have listed a number of the recommendations that are made in the draft report which we strongly endorse in our submission. I won't go through all of those today. I would though, like to mention our strong support for the - let's say gradual and disciplined approach to moving a lot of consumer policy to the national arena, appreciating that there are a number of both practical and political issues to overcome to achieve that. We also strongly recommend the approach to uniform provisions in many areas, in particular to improving and then rolling out in a uniform way the enforcement powers that consumer regulators should have access to such as the commission's recommendations for things like civil penalties.

We've got about seven or eight things that we'd like to cover briefly in terms of areas that we think the report would benefit from further consideration. Elissa is going to do some and I, others. So Elissa can start with the question of objectives.

MS FREEMAN (C): Thanks, Gordon. Well, I guess the natural place to start is the overriding objectives for the, I guess, ongoing policy development and future framework for national consumer policy. On the whole we thought they were quite good. I guess we just made a couple of amendments.

First of all, we suggest an alternative approach to the overarching objective.

We picked up on a comment that the commission itself made in its report stating that its primary benchmark is the wellbeing of the community as a whole. When we reflect on the overarching objective for consumer policy that's something that we really understand to be central. So we suggest an alternative approach to the overarching objective which would be something along the lines of enhancing the wellbeing of Australian consumers through the promotion of effective competition and fair trading.

Now, obviously the overarching objective that is proposed I think really focuses on confident and informed consumers. That's not something at all that we want to see lost. So we would suggest that that concept is perhaps better moved into the operational objectives and ensure that the idea of confident consumers really is strongly expressed there.

We've also pointed to the UK government's approach to competition and consumer affairs and a couple of their objectives that we felt could be usefully considered in our framework. Now, as I said, the operational objectives we thought were excellent in the breadth of issues that they covered and really, this is just adding to an already good list. So we've suggested one additional objective around consumer rights and ensuring that they're proportionate, balanced with the responsibilities and clear and simple enough to be understood.

Then the second one is looking at the consumer's impacts - sorry, that consumers are able to understand the impacts of their own consumption decisions on our shared environment and social wellbeing. This is really something the UK government does quite well in combining social justice, economic and environment goals within its competition and consumer framework.

Just lastly, we thought there was an additional opportunity to incorporate some of the learnings about behavioural economics into the operational objectives. We suggested that actually pulling that out from - pulling all that good work out from the report and combining it into an additional operational objective would be useful. So that's the objectives.

Moving on from that then we also thought it would be useful for the commission to include in that final report some discussion of conflicts of interest. This hasn't really been touched on in the report and obviously it's not something that we see can be, I guess, a solution found in the short space of time that the commission has left to look at consumer policy. But we did feel it would be very useful for the commission to acknowledge the current situation that consumers are facing in complex service markets particularly. I note that the commission, I guess, was able to capture quite well the way that consumer markets have shifted in recent times and the increasing focus on services. An outcome of that, as we see it, is really the complexity and the growth in intermediaries that as a company - and the conflicts

of interest that consumers are required to deal with. We've provided some detailed notes to you and I'll just briefly go over those.

I guess the response to date has really been to rely on disclosure to address conflicts of interest and we see that as something that's problematic, that has limitations, and really a new approach, new understanding, is needed to understand the regulatory solutions to conflicts of interest. We have recommended that the commission make an additional recommendation that looks to review comprehensively conflicts of interest that arise, not just in financial service industries or those that immediately come to mind, but certainly in other areas, for example, in medical services, we also see conflicts of interest, and if it was possible for the commission to undertake some discussion and make an additional recommendation looking at this area as an area that does require future work and does require new solutions.

MR RENOUF (C): Just one little example of conflicts of interest, I think people are well aware of the sorts of conflicts of interest that exist in things like financial advice and mortgage broking, but talking about health policy, in the last couple of days it occurred to me that when you go to the doctor you see the doctor prescribing particular drugs and when you go to the pharmacist, the pharmacist will turn around and say, "You should have the generic version of that drug." There's a whole lot of issues in that area but the conflict of interest issue is that, of course, one particular part of the industry is targeting their efforts towards inducing doctors to prescribe patent drugs and another part of the industry is using financial incentives to pharmacists to prescribe generic drugs, which I think leads to the thing that conflict of interest is an example of an issue which probably needs to be solved at the level of the particular circumstances of the particular issue.

I don't think it would possible for the commission, even if it did have more time, to come up with some broad brush solution to conflicts of interest because they are different in strength, different in nature and a different impact on consumers in the market, which leads into the point that I want to talk about which is, I suppose, a difference of opinion with the commission in relation to the importance of giving Australian regulators power to conduct market inquiries. We think this is a very important issue.

First of all I'd like to say what do we mean by that exactly. We accept, of course, that regulators from time to time are asked by government to conduct inquiries into certain matters and that's obviously useful in certain circumstances. I guess the three features of market inquiries that may differ from what we currently have is that when a regulator is persuaded that there is an issue that deserves inquiry, it would do so in a formal and open process and call for submissions in that sort of way. That's the first thing. It doesn't always happen when a regulator starts doing some research about a policy issue.

The second element, of course, would be that they have the power to deal with the policy conclusions that they come to that in certain very limited circumstances they would have powers to solve the particular problem, so those powers you see - we give some examples in our submission of situations where the UK regulators have intervened in a market following a market inquiry. This is similar to the proposal that we put forward in relation to how to deal with unfair bank penalty fees, which is to give the regulator, in this case ASIC, the power - fairly limited powers, powers respecting the ability of market to set prices - to rule on the appropriateness or otherwise of particular fees or particular levels of fees. That made its way to a bill tabled in parliament and that's something similar to the sorts of things we've been proposing.

That's one way to go but we don't think it's realistic to expect parliament to act in all cases and that's why we think that within appropriate confines, regulators should have the powers to make those sorts of interventions following an appropriate market inquiry.

Moving on to the issue of unfair contracts, we're certainly pleased that the commission has identified that there are situations where it may be appropriate to empower a regulator or a court to look at the fairness of contracts. But we probably see it a little bit differently to the way the commission has expressed it. The commission has, I think, suggested - well, I know in the report suggests - that much of the advocacy in favour of unfair contracts regime is based on fairness, and fairness is certainly an element of that advocacy. But we would prefer to place our support for an unfair contracts regime on issues of effective markets, rather than primarily on the basis of fairness.

In our view there is a role for unfair contracts legislation to assist market players, including consumers, to get better deals more efficiently. We would say that there is a role for unfair contracts to respond to excessive search costs; to respond to shrouded attributes; to respond to other sorts of behavioural biases which are exploited in the way contracts are framed. So we're not looking for unfair contract. The report spends a bit of time talking about the sorts of contract terms which are put in contracts to protect firms in the light of opportunistic consumer behaviour. We're not particularly concerned, I don't think, those in principle. There may be examples of those which we think are unfair but that's not the key point.

A lot of the arguments that are put in the report about why unfair contract legislation might be a problem really are arguments that need to be taken into account in assessing whether a particular term is unfair; whether in the light of the way the market works and any research in different consumer behaviour; in the light of research and the extent of the impacts of particular terms; that all those issues should be taken into account. I mean, yes, you should think about the firm's right to

protect itself from opportunistic behaviour when considering whether something is unfair or not, but not I think use that as an argument against unfair contract per se.

What follows from that is the report's focus on impact on individual consumers seems to me to not be the right way to pursue an unfair contracts rule. We would like to see a market which is more efficient, and more efficient because consumers have greater confidence that the contracts they enter into will be fair and won't have surprises for them if things that they don't expect or don't put sufficient weight on come to pass. We don't think that the limitation to looking at detriment to particular consumers should remain, and nor do we think that the limitation that only particular consumers are affected get a remedy, the last of which I think is impractical and it's inconsistent with other suggestions the commission makes in relation to enforcement in that it rightly suggests that the current provisions in relation to taking action where a large number of consumers are affected, requiring all consumers to sign up, are impractical. We think that would be an equally valid position of the proposal that you've got for that part of your unfair contracts model.

Turning to the question of independent policy advice, there are a number of things wrapped up together here. One of course is the question of the best model for funding and support research into consumer matters; another is the best way to ensure consistent practice across government agencies; another one is simply to get the consumer perspective heard by government in its ongoing policy development and agenda setting. It's those three things that come together which is why we remain of the view that we need some kind of ongoing body which has a government character but which is at arm's length from day-to-day, week-to-week policy development to administer the consumer research program and to be available to develop expertise to comment on proposals and to keep an eye on whether the myriad industry-specific interventions in markets that are made by a wide range of departments in areas, such as telecommunications, food, health and so on, are in conformity with what we know to be good practice in consumer policy.

This is probably something we'll talk about a bit more later, so I won't go much further for the time being. That also covers the point I wanted to make about coordination. We'd like to stress that we really do see different approaches to consumer markets in different line agencies and some of those are better than others. We think that the fact that there are ways in which markets in health, telecommunications, could be dealt with better suggest that there really is a need for coordination of policy thinking across - certainly across the Commonwealth but more broadly than that, probably. So Elissa is going to talk about our perceived need for the commission to identify an ongoing work program.

MS FREEMAN (C): So I guess this was always going to be some tension in this review about which policy issues were actually able to get a look in in the context of the review. We note that the commission has looked at I guess what we'd identified

to be three specific policy issues: energy consumer protections, the telecommunications industry ombudsman scheme and credit issues particularly.

We'd agree that those - all three issues warrant some consideration but I guess in our submissions we have suggested that there are actually a whole range of other issues that at some stage do require consideration. We acknowledge the limitations of time that the commission faced in determining which issues it would look at. I guess we would like to see some acknowledgment that there are a number of other areas of consumer policy that still have some really critical questions being raised by both consumer groups and the marketplace generally.

Our suggestion is that the commission actually look at recommending a future work program in this area. We will be submitting a quite extensive list of the areas that we have identified in our earlier submissions, really just building on those and taking up some of the discussion of behavioural economics as well and making some recommendations about what future work could come out of that. So it's - I guess Gordon is going to talk about a couple of areas that we would identify as, I guess, the priority areas of that work program.

MR RENOUF (C): The first of those is what you might call the deregulation agenda. We think there are a number of areas where there are anti-competitive areas where there are anti-competitive regulations on foot. The commission has identified most of these itself in previous reports. We think these remain very important to consumers and a consideration of consumer policy framework could usefully reiterate the problems concerned: the problems that affect consumers from things such as the rules about international aviation, the pharmacy agreement, the taxi industry. A few things like that that the commission has addressed before seemed to us to be - you know, as I said, the restrictive rules in those industries which inhibit competition are things that harm consumers. They ought to be mentioned in the consumer policy framework.

Turning to a couple of specific issues quickly. We have said to the commission before that we think food is an area where there's a number of consumer issues that need to be addressed. We don't have a great deal of confidence that the review which was on foot last year is sufficiently broad in scope or will even proceed to now warrant the commission completely ignoring the issue of food - well, tending to ignore the issue of food. Things like labelling; the incoherence of the sort of state-federal arrangements around food regulation; the inconsistency between, on one hand, a public health strategy around obesity which doesn't necessarily match with the current approach to food regulation; possibly organic and green labelling status. But there's a range of consumer issues around food which we think we need to - be looked at both in terms of the regulatory structure and also some particular policy positions. So that's one area.

Another thing that slightly surprised me about the report is that in choosing - we obviously strongly agree that the consideration of consumer credit in the report is appropriate. That is one of the highest priorities and it deserves to be there if you can only do a couple; less convinced about the other two. In relation to telecommunications we strongly support what you do say about the TIO but we wonder why another area of concern in the telecommunication industry is the whole process for dealing with industry codes of practice, which is frankly a mess, doesn't have sufficient consumer input, results in - you know, there are some 40 or 50 codes listed, some which apply to individual companies, some which apply to others. That whole process could really be - I mean if you compare it with the banking industry it's light years behind. It could easily be brought up to speed with some minor amendments to the way that's done in Australia.

Another area, I think, of great detriment to both consumers and the taxpayer is the current arrangements for marketing of pharmaceuticals. Without going through why that might be a problem I just want to give one example. Evidence suggests that there's a particular generic drug which is the preferred treatment for hypertension and yet there are only 25,000 scripts for that drug issued in Australia, as opposed to millions of scripts for more expensive drugs. That drug costs between 8 and 17 dollars to the consumer, the other drugs which may be less good for them are costing them $31-something and costing the taxpayer a good sight more. So there's a - and hypertension drugs are one of the two classes of drugs that are most prescribed along with statins for cholesterol. So there is a real negative outcome there about the way that that market is currently working. So that was all we were going to say in relation to an ongoing work program.

MS FREEMAN (C): Yes.

MR RENOUF (C): I mean in our submission we will indicate a number of areas which we think should be on that.

MS FREEMAN (C): Another area that we thought could do with some further consideration is the issue of super complaints. Choice had originally argued that it would be appropriate to adopt the UK model of super complaints in Australia. We still see a role for that. In fact, if anything, I guess we see a greater role for that particular mechanism given the movement towards a national framework and given the acknowledgment that really consumers don't have the sorts of voice in consumer policy that they could have and should have.

So I guess the commission has raised a couple of concerns around super complaints and we'd probably say that some of those concerns can be, I guess, simply addressed. It was suggested that perhaps the size of the UK economy justified it having that complaint mechanism. I guess our view would be that that really shouldn't be seen as a practical limitation to the mechanism itself. In practice

the limitation would be, perhaps, the number of consumer organisations generally that had that power rather than limiting the effectiveness of the mechanism itself.

There was some concern that perhaps, I guess, consumers already had adequate access to complaints mechanisms and that complaints - that there was enough information about complaints and that complaints are appropriately prioritised by the regulatory authorities themselves. I guess we just wanted to make it clear that really super complaints, in our view, don't crowd out the regular generally single-firm conduct complaints that come into regulatory agencies. They really do allow an additional, I guess, market-wide level of complaint to be raised.

In the UK super complaints have been made on matters such as doorstep selling, dentistry services, aged care homes, payment protection insurance and even the Scottish legal profession. So it's really at a much higher level than the standard complaints that have been made. With regards to the prioritisation of a regulator's workload certainly we wouldn't see it as skewing that prioritisation. We would see it, I guess, as adding to the type of information and I guess the information that's usefully needed to construct that prioritisation process, again, rather than skewing it in any way.

MR RENOUF (C): Finally, returning the question of enforcement. As I said before, we welcome the commission's recommendations in broad scope. Particularly, I think that they are supportive of a number of very important new enforcement measures. But one which we think hasn't been given sufficient consideration is that of giving powers to the regulator or to the courts to require disgorgement of funds obtained in breach of the law. That's just one thing we'd - you know, we note that the commission considered the number of potential enforcement powers and came down strongly in favour of some, mildly in favour of one and against others. But I'm not sure that we have a discussion of the disgorgement power in the report. We think you should look at that. We would suggest that you should come down in favour of such a power.

MR FITZGERALD: Good. Thanks very much for those. Obviously there's a large number of issues you've raised and obviously they will be more fully canvassed in your subsequent submission. So I might just ask Gary and Philip to lead off and then we'll try to work our way through some of these. But perhaps Gary might lead off?

MR POTTS: Can we start with the first question of the objectives and principles. You've suggested a reformulation there which seems to me there's two things: it introduces the thought about consumer wellbeing, which I suppose we probably took as a given if you like, but the other thing that it also does is it elevates the importance of the issue of promoting effective competition. Do you have it there? So you've given a fair amount of prominence to the notion of promoting effective competition.

MR RENOUF (C): Certainly we think effective competition is a very important cornerstone of consumer policy, as I'm sure the commission does, and the commission's version of the objective supported the confident and informed participation of consumers in competitive markets. I suppose we see our changes as being essentially around, as you say, enhancing the wellbeing of consumers. I guess what we're saying is we think enhancing the wellbeing of consumers should be the touchstone, and competitive markets are probably the most important thing in achieving that wellbeing, but not the only thing. We read the commission's primary objective as focusing on competitive markets - full stop. So we're saying I think we're putting wellbeing as a kind of - that's the ultimate aim, but what's the aim of competition? It's not competition for its own sake. The aim of competition is to promote consumer welfare, so I guess we think it should say that.

So we're not really trying to - except to this end we put the word "effective" in, we're not trying to have more or less competition than you are. We're just trying to say the purpose of competition is for consumer welfare. So we're putting "effective" in because we see that some competitive markets don't work very well and that we want them to work well.

MR WEICKHARDT: Can I start at the other end just to clarify maybe a couple of quick issues. You mentioned disgorgement. In our draft recommendation 10.1 which is on page 70 of the summary report, the first dot point says:

> Seek the imposition of civil pecuniary penalties including the recovery of profits from illegal conduct for all relevant provisions.

Is there something more that you want in terms of disgorgement?

MR RENOUF (C): I'd have to take that on notice.

MR WEICKHARDT: Thank you. I guess in terms of super complaints, you're saying you don't see super complaints as skewing the priorities of regulators, and yet it seems to me there is absolutely no purpose in having a super complaint mechanism unless it affects the priorities of regulators. I guess therefore the issue that we're sort of debating is the degree to which the priority of regulators might be inappropriately affected by this sort of mechanism. I guess the issue that seemed to us is that the organisations that you might empower with a super complaints right in the Australian context - such as your own organisation - already have a pretty effective mechanism of getting the attention of regulators, and formalising that didn't to us seem to be likely to change behaviour very much. If you make a cogent and effective case it would seem to me to be incredible for the regulator not to listen. If you don't make a good case, why is it appropriate the regulator be, if you like, forced to skew their priorities because you haven't made a good case?

MR RENOUF (C): In the UK model they're only forced to respond and they can say, "You haven't made a case. Go away." I suppose I would like to put it in the context of the recognition of the report of a need for increased consumer advocacy. One response of course is to recommend that resources be made available to that. Another response - and I guess this is what we're talking about here - is to ensure that the voice would be at least given due consideration. I think you're right that when things are running well and when both consumer organisations are effective and regulators are responsive, there would be no need for super complaints. This is more like if things are going wrong, if a regulator starts to neglect an important area of what one might say was its mandate, then in a way it's a backstop.

MR WEICKHARDT: But if the regulator is not listening, why wouldn't the regulator just write a letter saying, "We don't think this is important"?

MR RENOUF (C): They would at least have to justify this. There's a number of areas in the law where we don't require people to be bound by it but we do require them to give serious attention to something, so this is another example of that sort of thing. I think the risk of skewing is - obviously you want this in place so that where there was a problem the regulator would have to pay a little bit more attention than they might otherwise want to. That's true, so to that extent we would want this to impact on their priorities. Skewing implies in a negative way and we would suggest that it's unlikely for two reasons. One is that to make a super complaint requires the empowered organisation to put a serious amount of resources into doing it, so they're obviously going to do it if they really think it's important. Secondly, given that the regulator can - obviously it's going to take some resources but I don't think a huge amount of resources to say, "We've looked at what you're saying. We know this market intimately and there is no cause for concern," or, "We've looked at what you're saying and we don't know the market - we'll go and look at it," and come back and say there's no cause for concern.

I certainly accept that when things are going swimmingly well you wouldn't need a super complaints process. But on the other hand, I think it would be useful if a regulator did get off track and the risk of it causing any great harm in terms of resources or wrong priorities is quite low.

MR POTTS: Can I raise a conflict of interest issue and I think that's a very interesting issue you've raised there. I guess the challenge is how you take it forward and you deal with the issue usefully, if you like, and I think your submissions sort of scope the issue itself without giving us very much information on how it might be taken forward except by way of a review. But are there any observations or comments you could make on what sort of measures you might have in mind or I guess if you have any knowledge of overseas experience in trying to deal with this particular issue.

MR RENOUF (C): Three points - the first is I think that some broader research on mechanisms to respond to conflicts of interest other than the kinds of disclosure which don't work would be justified, and that's what we suggested there. The second point I made before was that it seems to me that each conflict needs to be dealt with in the circumstances of a particular market and that's one of the reasons why we're so strongly supporting the idea of a market inquiry which does give a regulator the power to effectively tweak a market, maybe tweak a market in quite a significant way, by changing the incentives that operate towards people.

So I think I've got the financial planning industry in mind and there's obviously debate in that industry about fee for service versus commission based models; the latter giving rise to conflicts of interest which can get out of hand. So an inquiry which may perhaps through a step process over time look at ways and try things such as codes of practice around, disclosing, and there's kinds of conflicts. I mean, one of the responses we've had to conflicts of interest in the financial planning industry of course is that the industry association has taken some of the concerns on board and they've put out a code of practice which basically says certain kinds of conflict of interest are inappropriate. I mean certain kinds of commission payments are inappropriate and so they've left some and not others. We would like to see them go further, but that's the kind of response.

It may well be that a market inquiry outcome is that there is an agreement within the industry body to develop a code. It may be that a market inquiry outcome is that the regulator has power to say, "Well, that particular kind of commission payment, or that particular kind of conflict of interest just shouldn't be allowed at all." I guess the strong case we're making is that you should empower - and I think one of the important points is here, you could do it for a relatively short period of time. One of the problems of doing it in legislation is it's there forever and you don't come back to it. You could do it for three years or five years and say, "Has this worked? Has it had any consequences?" and you could roll it back much more easily than you could if you put it in a statute. There was a third point which was - - -

MR POTTS: Overseas experience, was it?

MR RENOUF (C): Yes, I don't think I can help you a great deal. I will take that on notice as well, with my note. Do you want to read that?

MS FREEMAN (C): Look, I guess - just to support Gordon's point then it does need to be looked at, I think at a very specific level - industry-specific issue. Like I know that there is a lot of talk at the moment about the financial advice industry and how to address the types of conflict there and really moving away from disclosure and looking more at separating advice and sales and, you know, things as simple as-the names that are given to certain operations. So I don't think there's a

one-size-fits-all solution in any way but I think there is a lot of discussion in particular industries about understanding, acknowledging conflicts and finding some really different ways to deal with them.

MR FITZGERALD: Just on - in relation to the market studies part, as I understand it, there's nothing that precludes ASIC, in the case of the financial services industry, from actually looking at that issue as a marketplace issue, nor the ACCC nor ACMA or any of the others.

MR RENOUF (C): Yes.

MR FITZGERALD: So when you put this proposition - and I certainly think from time to time regulators should look at market-wide issues, to some extent they would say, "Well, we already do that" - the difference here seems to me that in the UK, one, it is linked to the super complaints - - -

MR RENOUF (C): Yes.

MR FITZGERALD: So there seems to be - most super complaints look at an industry-wide or a market-wide issue; not always, but sometimes. Secondly, there seems to be a cultural difference in the regulators there where they actually see this as an essential part of their armoury. But I'm not quite sure that - the third point is is it necessary - does it require a legislative change? In other words, do you need to change any of the legislation to achieve this or is it a change in the way in which the regulators perceive their role, because they're different in character?

MR WEICKHARDT: If I can add to that - - -

MR RENOUF (C): Yes.

MR WEICKHARDT: - - - I heard you go on - and the market inquiry bit sounds quite, you know, sort of straightforward and sensible. As you say, you wonder what's stopping that now. But you seem to be going on to say, "and the regulator in that environment would have some power to change the rules of the game". That sounds a little bit more problematic than the issue of simply having an inquiry.

MR RENOUF (C): Okay. So I think there were four distinctions, but you mentioned three. One is - I think you're right, and I haven't previously mentioned that there's an expectation that the role of the regulator includes conducting market-based inquiries. I think you're right to say that the current regulators have, from time to time, done that or done research on a particular market. I mean ASIC has done recent research on reverse mortgages as an emerging market, for example.

However, there are tensions about their expectations. I mean I believe the

chairman of ASIC has recently been saying things like, "We're an enforcement body, not a policy body". So, you know, that needs to be clarified. I guess we'd be pushing towards the solution that's saying that well, regulators do have their finger on the pulse. It is appropriate that they give some thought to policy issues, particularly emerging ones and reverse mortgages research is probably a good example. So role and expectations I agree is important.

Secondly, there probably could be some expectations about process which could be just tightened up a little bit. Again, that probably could be done with that legislation. I mean you could say that - you could say we think it's really part of the role of the regulators that they conduct the inquiry without sufficient evidence if they think it's warranted; that when they do so they should adopt a bit more of a formal inquiry process. The third thing that you mentioned - well, you mentioned first was the super complaints thing. I mean I think market inquiries stand on their own with or without super complaints. It's true that there is a useful interaction between them in the UK system but it's not an essential element of market inquiries.

The third thing is powers. At the very least you would want the market inquiry to be entitled to say, "We think the rules should be changed". I mean you would want to change the expectations of the regulator so that everybody was comfortable with the idea of the regulator saying, "We've conducted this market inquiry. We've done it in an open, transparent way and we've given everybody a chance to submit. We've conducted our own research," if we have, "and we now think, having done that work that legislation X should be changed in Y way." That, I think, would be the minimum. What, I think - my understanding of the UK system is that there are some ways in which the relevant regulators are empowered to make changes.

MR FITZGERALD: Which we don't have here. We don't have the regulators, as a rule - - -

MR RENOUF (C): Yes. For me - I mean I agree with you it's a bigger call and I think it would have to be sufficiently constrained. But the advantage that I've suggested before is that you could do things on a trial basis, you could do things for short terms. You would certainly get them happy more quickly than if you have to wait for the legislative program. I mean, you know, there's a number of areas we can point to - we have in our first submission to the inquiry - where things that everybody agreed should happen just haven't happened: mortgage brokers - blah blah blah. I could go on.

MR FITZGERALD: I'm conscious of the time. We've got still six or seven minutes to go. But I just want to make sure we cover a couple of issues. One is you mentioned the notion of both an implementation plan and an ongoing work program. I'd be very keen to see your ongoing work program suggestions. A number of the ones you've mentioned are dear to the hearts of the commission and don't pose a

problem. But the one that is plaguing us, I have to say, a little bit is an implementation plan we - in fact, had a private discussion yesterday about this. This seems to be a fraught area. One, you've got to - it's based on what you think the governments are actually going to decide. Secondly, the danger is if - you know, it's all about trade-offs, both in terms of resources and commitment and so on and so forth.

So whilst I by nature believe that implementation plans greatly enforce what you've recommended, this seems to me to be a very difficult area where there are so many areas that need attention at the same time. So I'm just wondering whether you have a sense of prioritisation that you think the governments should be examining? You don't have to do that now but it's easy to say an implementation plan - and I'm pleased that you've put it in. In this area it seems to us to be much more difficult in working out what that might be, in advance of knowing the decisions that the governments will make on the recommendations.

MR RENOUF (C): Yes. Well, I think - think very quickly. Yes, I think in broad terms it would take all those but the - the implementation plan probably has three levels, and you've probably thought this through more than I. But I would say that there's quite a complex and difficult negotiation that needs to go through COAG about some of the recommendations that you've made - at the hardest. The middle bit is there's some which will require Commonwealth legislative change.

The hopefully easier bit is a bunch of recommendations - we've already written to the treasurer saying, "The Productivity Commission has recommended these" - you know, half a dozen things which are quite straightforward and in some cases relatively uncontroversial - "you should set about thinking about how you're going to respond to them right now," the enforcement things, the funding and advocacy, a couple of things like that - the funding of financial counselling. So I mean I think the implementation plan there's some things that you could expect the government to do, if they were supported, within a year, others which require a little bit more policy development and others which require - I think it's a relatively complex process with COAG to transfer powers.

MR FITZGERALD: Well, if any - if you have any those sort of prioritisation either principles or details, we'd be grateful to receive them. It just seems to be - us, a complex. Can I just go to the research and advice area. This is plaguing us at the moment a little bit. It seems to me a number of the consumer bodies have indicated to us that whilst they're not opposed to contestable research funding arrangements there's a lack of capacity in the both academic and general sector to be able to deliver high quality sustained research. I think we acknowledge that to some degree.

So the question is whether or not you need to take that quantum leap to the establishment of effectively a statutory or government body or whether or not there is

another way by which you can - at least in the first few years establish research capacity without actually putting it under government control in terms of an actual body, and later on becoming more contestable as capacity grows both in the university and other sectors. So I suppose I'd just like you to flesh that out a little bit.

MR RENOUF (C): Well, the first point is that our vision of a policy and advocacy body is one where there's a standing home of expertise which has credence within government. If you're not prepared to - if the government is not prepared to establishment a new body then it could enhance the existing Commonwealth consumer affairs advisory body. It does have an advisory body. It has a relatively limited role. It needs to have the way in which its membership is constituted looked at and it clearly needs a great deal more resources and the role to take on matters of its own motion.

So that would be - I mean I keep coming back to this idea that I think there's a lot to be gained by promulgating best practice across government and having similar rules in different markets. I don't see how that's going to be achieved, given the way individual departments do their own policy development, without somebody having the role - I mean, arguably it could be treasury but I think it could be better done separately - of saying, "Guys, that's not really working. These guys are doing it better in this market. Why don't you have a look at it."

But if you don't accept that and you want to think about the research body that would be a better system than a contestable research system at the moment, because I do think we need to develop a centre of excellence. My concern about that is it just won't have the same policy wave within government that a statutory or non-statutory enhancement of CCAP or some order of CCAP would have.

MR FITZGERALD: Philip, anything on that?

MR WEICKHARDT: Not on that issue. You've endorsed our recommendation, I believe, about one generic law and one regulator, one national regulator. A number of the states and territories have put it to us that they see great risks of one national regulator not having the capacity to take on the myriad of small local issues, and indeed the ACCC in their submission have said they don't really want to do that either, that they think they're better off focusing on big national issues and leaving the states to focus on the person selling a boomerang at the local market that won't come back. Do you have any comment and view as to the degree of difficulty that would be involved in having a national regulator covering both the big and the small issues and indeed the degree of trade-off or compromise that might be involved in that?

MR RENOUF (C): We have certainly strongly endorsed the national generic law proposal and my reading of the report is that it's less - it sees that as an easier thing to

do than a national regulator, that you made two separate recommendations and they are worded in different ways. I guess what I'm seeing is that a number of issues have come to be accepted as better belonging - nationally than state. Credit and product safety - I think that nearly everybody would agree that credit should be regulated nationally. Some states clearly don't agree that product safety should be regulated nationally, but a lot of people do think that. I guess if you can get product safety regulated nationally correct then most other things would flow.

There are probably a number of ways of doing it. Obviously for the ACCC to have that role it would have to be a lot bigger than it is now. I mean, it gets the most telecommunications complaints, I think, but it doesn't get the most of any other kind of complaint. Much higher volumes of complaints are dealt with by Victoria and New South Wales fair trading departments than the ACCC at the moment. So obviously they're going to need a much greater resourcing and a much greater presence on the ground in different states and regional areas. We're not talking about the ACCC as it is now. To do this, obviously it would need indeed the sorts of resources that are the sum of the existing resources in all the states.

One of the issues here - it's true of product safety and I think it's probably true of other things - is that some states do it a lot better than others. Those states probably think, "We're doing a fine job," but the other states are probably keeping silent. I mean, Northern Territory, it's probably unfair to pick on, they have a poorly resourced Consumer Affairs organisation. In some ways ASIC and ACCC have actually done a better job on some particular issues in their missions, if you like, to places in remote South Australia and remote Northern Territory than their state bodies have. I'm thinking of work they've done on insurance which of course is an ASIC specific issue. ASIC's work on mis-selling insurance I think demonstrates that a national regulator can get down to the local level if they're so minded.

MR FITZGERALD: Thank you. Just two final ones from me: one is unfair contracts - I think we're pretty clear about your view on that, both in your submissions but I just want to clarify one thing. There seems to be a bit of a view taken that the recommendation we've put is only in relation to a one-off incident, that is the regulator would only be able to take action in respect of one aggrieved consumer. We will make it very clear that in fact it does allow for representative actions, and the other recommendation we've made previously is that representative actions will not require the naming - you will be able to represent parties that are not named. Just in terms of one of the paragraphs there, it is broader than simply a one-off transaction.

MR RENOUF (C): There is a statement here that the remedy would have to apply to the individual consumer's identified loss. So that is consistent with what you just said.

MR FITZGERALD: Yes. I just want to make the point that it wasn't intended to not allow for representative actions, and we've taken on board that comment. As you rightly point out in this submission is the Victorian and UK approach was a proactive model, a model that is able to identify problems in advance of detriment, and our model which requires detriment to take place, together with a whole range of other constraints.

MR RENOUF (C): There's an area where we might be able to get closer together which is building on what you say about a safe harbour - and we mentioned this in our first submission in a not very detailed way - I personally have some interest in the ability of firms to have discussions with regulators before launching a product saying, "This is how we think you've got to structure it. We're a little bit worried about this," and having some sort of discussion on negotiation.

For me the touchstone is the consumer confidence that they're going to be entering into a fair contract. You've called it a safe harbour provision but the Dutch model seems to be a negotiation advance kind of approach, so obviously you wouldn't require that but you would give firms the opportunity to do that. It's very similar to your safe harbour provision.

MR WEICKHARDT: Well, you might want to look at the ACCC's submission because they made the point that they would be strongly opposed to that sort of concept. They're not opposed to issuing guidelines but they believe, as in competition policy, when individual firms came to clear certain circumstances it deluged them with individual case-by-case situations, and they think they ought to operate by issuing guidelines and allow individual firms then to decide whether they're in compliance with the law and the guidelines.

MR FITZGERALD: We're just having a look at that at the moment. I would ask you, as Philip has, to have a look at the ACCC's submission in relation to that.

MR RENOUF (C): Yes.

MR POTTS: The Tax Office has the same issue.

MR FITZGERALD: My final comment is a small one. Home building protection, as you know, we've had the Master Builders Association of Australia appearing this morning and we've got the Housing Industry Association this afternoon. We've had several consumers and builders provide evidence of this. You've supported our approach of actually trying to deal with it, but one of the things we're contemplating at the moment is looking at a national review of this whole area because in this inquiry it's not critical for us to actually identify the scope of the problem, all we can really say is that there seems to be an ongoing sore that's emerged. This morning the Master Builders Association have endorsed such an approach.

In very short detail, I know Choice has been involved in highlighting this issue. I wonder if you could make a comment about the size of this issue from your point of view or the significance of the issue is probably a more appropriate term.

MR RENOUF (C): I'll get back to you.

MR FITZGERALD: That's fine. Philip, Gary - no. Thank you very much for that. We appreciate and look forward to the further submission that you're going to make.

MR RENOUF (C): Thanks very much.

MR FITZGERALD: All right. Sorry about - David, if you could give your full name, the organisation you represent and then your opening comments, that would be helpful.

MR TENNANT (AFCCRA): Sure. David Tennant, I'm the immediate previous chair of the Australian Financial Counselling and Credit Reform Association, the director of Care Financial Counselling Service and acting principal of the Consumer Law Centre at the ACT.

MR FITZGERALD: Good, okay.

MR TENNANT (AFCCRA): Thank you very much for the opportunity to appear again at another hearing in this important review. We have put in some brief written comments making some observations about the draft report. Gordon would have no doubt provided a description of an institutional submission that has been coordinated by Choice but engages a number of consumer agencies. We're involved in that development process and so we'll largely defer those sort of broader institutional comments to that submission.

I would be focusing more today on the issues that are of relevance to financial counsellors and their clients at the moment. In that context we are largely supportive and welcome the draft report and recommendations. It won't be a surprise to the commission we are particularly supportive of draft recommendation 9.6 which specifically makes mention of resourcing for our sector. But the second issue I would like to touch on today and in these opening comments are some of the significant landscape changes that have taken place in the work that we're doing and the people that we're providing assistance for, not just in the last few years but indeed since this review commenced and since the last time we had the opportunity to engage with the commission in the review process. Finally, what that need for support in the financial counselling sector is and the immediacy of that need.

The second of those two issues is perhaps the one that requires a little more explanation in the opening statement. We have, in our written and oral submissions today, made mention of AFCCRA's view that how consumers in Australia are carrying debt and who is feeling financial stress is undergoing dramatic change. As a sector we have been saying for the better part of the last decade there has been a dramatic escalation in how much debt is being carried and no good will come of that unless there is some planning and understanding of the implications. It now appears that much of that sort of forewarning and pessimism is coming true. It's certainly evident in the type of demand that financial counselling agencies are responding to now.

In our written - brief written comments before today we have referred to the

changing type of client who is presenting for assistance at financial counselling agencies. In my own agency here in Canberra we started alerting governments to shifts up income demographics of people who were feeling financial stress about two years ago. In our 05-06 annual report we note that the proportion of people who were reporting incomes over 45,000 had hit 10 per cent. The following annual report, 06-07, noted that it had risen to 15 per cent. In the last six months of the last year nearly one in five of the clients making contact with our service reported an income over 45,000.

I don't know whether those are precisely the same as the experiences of other financial counselling agencies largely because of the disparity in how information is collected and reported to the various funding bodies. But it is clear that more middle income households are feeling the effects of having taken on more debt than they are now able to manage. There's no doubt that some of the increasing costs of carrying that debt is part of the problem. But in my view there is also a significant underpinning in the way debt has been sold in Australia over the last 10 years and a departure in the credit provision industry from responsible lending practices so that you properly match the credit that's provided to consumers with their actual capacity to pay for that credit.

There is a specific or indeed several specific references in the draft report to legislation enacted in the ACT that deals specifically with the credit card market. The insertion of section 28A into the ACT Fair Trading Act in 2002 required credit providers to undertake an updated assessment of a consumer's capacity to repay before they offer increased credit on an existing card or indeed before they offer new credit on a new facility. That particular provision has come in for consistent criticism from the banking industry in particular.

The submission that the commission received from the Australian Bankers' Association described it as having delivered poor outcomes and specifically mentioned that after the 2003 bushfires in Canberra that certain consumers were unable to obtain increases on their credit cards. My own agency takes exception to that description of what occurred in Canberra in 2003. We think it is a departure from the commission's normal practice of requiring an evidence base to make policy comment to assume that that is a correct representation of what occurred. Indeed, we disagree entirely that it led to that type of, as described, perverse outcome.

Our agency was involved, as were very many community agencies here in Canberra the day after the bushfires in providing resources and materials to people who were impacted. I brought for the commission today, if you're interested, copies of various fact sheets that our agency prepared on how people would respond to incidents of financial hardship, how they might make claims against the insurance policies that they had. We produced a booklet called, "Don't blow your dough," for people who were going to be receiving lump sum payments or compensation

amounts.

We endeavoured to engage with the finance industry on making sure that their responses were actually meeting consumer needs. The one area where we were unable to reach agreement with the Bankers' Association was in the credit card market because specifically bank comments at the time precluded or made no mention of the fact that additional credit on cards would not attract fees or interest in the way that other specific references to say personal loans and fixed rate products did at the time in those bank responses. So we asked the ABA to preclude the possibility that that might be unfair or inappropriate profiteering in the response to the fliers. We didn't get that response and so - moved about that situation that we put out a media release asking for the ABA to clarify its position.

I'm not going to suggest that there was anything involved in the submissions that is harking back to that unfortunate interaction but I do think it entirely misrepresents the situation to say that somehow people were disadvantaged in the territory because they couldn't get extra money on credit cards as a result of the bushfires. People wanted to make application for credit cards - they still could have. They still could have been assessed as whether it was appropriate or not for them to borrow. What was important that they were actually - was that they were getting access to assistance that met their need in the wake of the bushfires, not the opportunity to borrow more money for which they were going to pay at the time the highest cost in the market. That's what credit cards were. So again, I have that material here. I'm happy to leave it with the commission if it's useful to you.

MR FITZGERALD: Thanks, David.

MR TENNANT (AFCCRA): It's a useful example though of the discussion that needs to happen in consumer credit more broadly about responsible lending. There are many other groups than community agencies and financial counsellors now recognising the problems we have in debt generally. Indeed, I understand you will be speaking to the Housing Industry Association this afternoon. They have been one of the most vocal and informed advocates for a better understanding of how credit is sold to consumers, and linking that to problems with housing affordability.

Indeed, in their submission to the economics committee's inquiry into home lending practices, the Housing Industry Association advocated very strongly for a concept of a mortgage assistance plan which in effect was saying counselling in relation to debt issues, appropriate and affordable credit should be for more than simply crisis situations and should, as the commission already alluded to in our last discussions, take account of the potential to head off problems before they're delivered through the market. The credit industry, or more properly some segments of the credit industry, has shown itself incapable of doing that alone and the answers therefore are either to insert other safety mechanisms in the market, or deliver some

regulation that makes them do the things that would prevent the harm we are now dealing with.

MR FITZGERALD: That's your opening comments? Okay, thanks, David. Firstly, we would welcome the information because if our report relies on a piece of information that is not entirely correct then we'd be very keen to see the alternative view of that. Can we just start off with a couple of things then. As you said, you're participating in a broader submission, so we'll take that on board. I do want to go right to the heart of this issue around responsible lending. We had the New South Wales - is it consumer credit legal centre - present the other day and they were in broad agreement with many of our recommendations, as I know you are. But they took us to task in not actually dealing with the most important issue which is responsible lending per se.

When we looked at 28A, albeit based on submissions and what have you, nobody was able to demonstrate to us, for example, if that initiative had made a significant difference. Even when we've met with the ACT government it wasn't clear to us that they themselves could provide evidence that it had made a significant difference. They were certainly not indicating that they wished it to be repealed. So I suppose the question is, given that this was a direct attempt by a government to deal with responsible lending head-on, and they have come up with a package which was done with all good intent, I suppose we sit back and say when you look at responsible lending interventions it's very important that we evaluate those that have been put into the marketplace before we then suddenly move and extend those. So I was just wondering what your evaluation of that or other measures that jurisdictions have put in place or are contemplating and to what extent can we really know that they'll make the difference that you and many other groups have indicated needs to be made.

MR TENNANT (AFCCRA): I read with interest the observations about the lack of proper assessment of the impact of that legislation and would largely agree that there has been no investigation of that. The fact that there has been no investigation of it though, is not the same as concluding that if you did properly investigate it that you wouldn't find it had been effective. It depends from our perspective on the questions you're asking and what you would envisage as being effective. From the perspective of the main advocacy agency in the ACT that has had reference to and made use of that legislation, our experience of it has been that it has produced some very effective outcomes for our clients. I've been at Care for 13 years so I had considerable experience delivering direct services before and since the legislation commenced.

The key difference in matters where section 28A has been raised since 2002 is that when it is raised on a consumer's behalf the conversation switches from one around the worthiness of the consumer to seek some relief at the discretion of the

credit provider, to whether or not the credit provider did what the legislation required it to do. So there's a very different dynamic in the way that that discussion takes place. We have seen many occasions where the legislation has been breached both at an individual consumer level and at a systemic level, both as an agency and I've been directly involved in a number of those matters personally representing the consumers involved.

There was one matter that was concluded just in the last six months which involved an 82-year-old pensioner who had almost $40,000 worth of credit on a variety of cards where the person's family only became aware of that level of debt after the person's wife had died and they were providing assistance in resolving other financial issues in the family. The main credit provider was a major bank and two of those cards were with that single institution and they amounted to some $25,000 at the total debt. The negotiations that we were able to have in the investigations that followed showed that although there had been some attention paid to 28A, in our view that had not actually met the standards required of the assessment and we were quickly able to negotiate a fair and reasonable outcome in paying a reduced sum on the total amount.

I'm not suggesting that the outcome might have been entirely different to that had we gone through a convoluted process of referring to the banking ombudsman, or made application to the ACT credit tribunal, indeed we might have ended up with exactly the same outcome. But the conversation started in a different place and it was premised on the basis that, "There's a law in the territory that requires you to do certain things and you may not have done them entirely as the law required," and so we were able to move quickly to talking about solutions than spending an awful lot of time talking about whether the person was entitled to receive some relief, or indeed on looking at some unconscionability action based on one of a number of criteria under section 70 of the Consumer Credit Code.

MR WEICKHARDT: David, you started off saying - and I understand the intent behind it - that the desirable thing is to head off problems before they occur. You're now referring to, if you like, dealing with problems after they've occurred. In terms of evidence, the only evidence that we've seen in this area is some evidence the ANZ Bank have presented, which you might like to comment on, which suggests that default rates in the ACT are no lower than default rates in any other state where this legislation is not in place. So I don't know whether you're saying that you don't think that the banks are complying with the legislation and therefore it's a compliance issue but the banks, I guess, are saying, "We go through the steps that are involved here and those steps are not delivering any better result in terms of default rates than the steps we take in other states." I guess their point is, "We're as interested as anyone in avoiding defaults," ultimately probably they end up wearing them. So I guess the issue is: why do you believe that this ACT legislation is actually doing what it's supposed to do and heading off problems at the pass?

MR TENNANT (AFCCRA): I've seen the ANZ's research and I've had a number of communications with the bank about what that research does and what it doesn't do. Default rates are an item that you might want to include in any broader research of the impact of section 28A, but they're not necessarily the most important question that you would ask, nor are they something that you would want to look at in isolation. My experience having worked with consumers dealing with debt problems over a long period of time is that people will carry debt that is unaffordable to them and causing them great financial stress for long periods of time without defaulting. Many of the people who make contact with our agencies are not in default when they make contact. So within simply default numbers or people who are paying minimum monthly balances, you may have a class of consumers who are genuinely struggling routinely with the debt that they're carrying, but are meeting their payments and apparently to the credit provider having no difficulty in meeting those payments.

A better and broader inquiry might be, "How have you responded since that legislation commenced in the ACT to tackle these sorts of issues differently?" and the ANZ in that respect is a particularly good example because they have since the legislation commenced produced what they call a responsible lending guideline where they've done certain things within their processing systems that previous to section 28A the banking industry broadly said it could not do. So for example, they've been able to segment out of their customer lists those who are pension recipients and they don't send them automatic increase letters any more. So within the list of people that the ANZ points to who are in default in the ACT, there are fewer people who are pensioner recipients who would not have received offers from the ANZ since the ANZ introduced its responsible lending guideline. Indeed, if other members of the industry had seen fit to develop guidelines of that type, perhaps there would have been no need to go down the path of section 28A. But there hasn't exactly been any great rush to the start line in others developing similar proactive and public statements about how they respond to consumers who are already self-evidently on low fixed incomes.

MR POTTS: Did the ANZ only do that in the ACT?

MR TENNANT (AFCCRA): No, that's a national process.

MR POTTS: It wasn't brought about by the ACT legislation?

MR TENNANT (AFCCRA): It's a question that you could put to the ANZ. In my view, the ACT legislation has been a significant trigger in escalating those discussions within national institutions, and you point out on a number of occasions through the report that we, in effect, work in national and now increasingly, internationalised markets. Credit provision from the banking industry is in many ways borderless in Australia.

So if you need to comply with legislation like section 28A in the ACT, then by designing a system that accommodates that, you might also have to have regard in your own systems to what you do in other jurisdictions. You might make a good business case internally, but compliance in the ACT might well mean that you'd be better off complying with the ACT standard across your business, nation wide. I don't know whether other providers have had that conversation internally.

MR FITZGERALD: Without knowing that, that is an argument that is often put with some validity in relation to a whole range of consumer policy areas, where a particular jurisdiction acts and it's easier, therefore, to simply invent that into a national regime; a consumer product being the most classic illustration of that. So you really do believe that that particular approach by the ACT government has led to potentially behavioural change on the part of at least one bank, and potentially has had an impact, which is not able to be measured in the terms that you'd often look at. Can I just ask this? If you had your druthers, what is the single most important initiative that governments could or should take in relation to responsible lending? I know that's a difficult question, but notwithstanding all of our concerns about what's happening in the credit markets.

Even at the end of this inquiry, or this stage of the inquiry, much we're sure about the mechanisms that one should introduce, that would have a positive impact on the problem area of that market without disadvantaging the rest of the market. So whilst I think a number of the changes to the uniform credit code are desirable, whilst I think that there's a lot of worthwhile suggestions been made, I'm still lost as to what would be the single or one or two most important things you would need to do to achieve the goals.

MR TENNANT (AFCCRA): My own response to that might be seen by some as overly simplistic, but in my view, the principle behind section 28A in the ACT is in fact that most important issue. The idea that a credit provider in any market, regardless of the type and style of credit provision or fair corporate structure, when they're lending to consumers should have regard to the consumers' capacity to pay, and many of the problems that we have in the housing market now, in my view, have been delivered by new credit market entrants who've designed increasingly convoluted ways to separate the consumer's actual capacity to repay to the amount being loaned, and it's a key principle that's picked up in the suggestion for the new broker's legislation.

I think that the single biggest and single-most important question that should be raised in the first interaction between credit provider and borrower is how can you afford to pay the credit we're going to be lending you? The credit provision industry has said on a number of occasions, "Well, we sometimes can't believe what we're told, and sometimes people actively mislead us." But if you don't put your mind to

the question, then that won't arise in the first instance. So to me, that's the big ticket item in responsible lending.

MR FITZGERALD: Can I ask this question? I grew up in an era where in fact they spent endless amounts of time trying to work out whether or not you were capable of getting a loan, and if you were a woman, of course, the hurdle for that was much greater, and of course, as you said, we've moved from that position to where we are today. What is the cost to the finance industry of introducing a uniform measure that requires providers to take account of the capacity to repay? It wasn't industry practice. It ceased to be an industry practice to some degree.

MR WEICKHARDT: One would have thought the financial provider has still got a self interest in ensuring that a loan they issued to somebody is repaid. I mean, surely, at the end of the day, any for profit organisation that lends money, expecting it not to be repaid, is going to go out the back door very quickly.

MR POTTS: Unless they can transfer the risk, which has been happening.

MR WEICKHARDT: Unless they can transfer - - -

MR TENNANT (AFCCRA): I don't want to dodge the question, but you might want to put that to the finance industry at the end of this year. I mean, there are many players in that industry who are already facing the very scenario that you've put there, and if you work on very fine margins, based on multiples that are all about risk shifting, rather than actually addressing and properly responding to risk, then you may indeed have a very profitable business in the short term, but one that will burn out quickly, and I suspect that many providers who entered the mortgage market, with everybody celebrating what competition was bringing in that market, may indeed not be with us at the end of this year, and for some of them, my own response to that would be, "Well, good riddance. You've done not much good along the way."

MR FITZGERALD: Do we see other approaches being taken both here or overseas that beyond just that issue are moderating the issues of concern to the clients that you have or not? I know that every country is grappling in different ways with these issues, but are there anything that's emerging, either from the US, which is probably a bad one, because it's reacting to a crisis, or from Europe, that guides us in this area?

MR TENNANT (AFCCRA): In an odd way, the US is not such a bad example. We do not have the crisis of the size or the type or the quality that has unfolded in the US in recent months, but we do have a significant problem, and I've noted the change in the type of clients who are making contact with financial counselling agencies. There are still low income consumers who are struggling routinely with their

household budgets, and being able to have meaningful interactions with a variety of markets.

The great danger, if we're increasingly becoming a port of call for middle income consumers who cannot pay their mortgages any more, is that those who are on lower incomes who just have the same and ongoing problems are being crowded out in that process, and have nowhere from which they can seek assistance. It's also the case that when you're responding to mortgage foreclosure matters, it takes a considerable period of time and additional resources to move on those matters, and you usually don't have the luxury of time in doing it.

It's not unusual for our service to be hearing from people at the point in which they're about to lose their property, and you need to be able to drop everything immediately to file the necessary documents to try and stop that happening, if there's a point to doing that. That will mean that others are not able to get access to your service while you're doing it. So in many ways, we can learn from the US modelling that's going on now in the delivery of community services to work out degrees of escalated problems, and work out appropriate models for dealing with them, depending on that degree.

So for matters of immediate mortgage foreclosure, you might want to have those going directly to some sort of crisis type service that can respond quickly and in the manner that those clients need, but without at the same time, sacrificing the access of other lower income consumers from getting access to the normal services financial counselling agencies are providing.

MR FITZGERALD: Are there any other questions around that particular issue, responsible lending? Just in some of the other areas, we've made recommendations obviously about the transference of the uniform credit code to the national area. One issue has arisen - which you may or may not have a view about - is transitional arrangements in relation to that. A number of the states are ready to move on some issues, such as financial brokers. Others are much less advanced. Whether or not we can tackle this in the report is yet to be decided, but I was just wondering whether you have a view about if there is agreement in principle to transfer the uniform credit code, and to establish a national regime for financial intermediaries. Is there a preferred way to achieve that? Should the states implement the changes that are under way and then transfer, or should the transfer take place to the national and the changes be made? There probably is no right or wrong answer to that, but I must say at the moment I'd be keen to hear your practical views on what might be the most appropriate way to go if the government were to agree to the central recommendation.

MR TENNANT (AFCCRA): Given the length of time that it has taken some of those changes that appear to be afoot at the moment to get to where they are, I would

not support any step that slowed that unnecessarily, and there does seem to be renewed vigour and endeavour amongst the states and territories to see some of those processes through to conclusion. I wouldn't want to see any activity that placed any disincentive for those who currently have carriage of that reform process to see it through to conclusion, and in any event I imagine the transfer would take a number of months, even if it were to all go entirely smoothly.

There was a conversation you had with Gordon in relation to where sensitivities may arise between the states and territories and the Commonwealth in the transfer, and in particular in relation to enforcement roles. I don't think I share entirely the commission's view that enforcement roles must follow and be devolved also to the Commonwealth. I think there is a genuine need for local cops on the beat. That's what by and large the states and territories do well. Even in those examples that Gordon referred to in very remote places, the Northern Territory and South Australia, even though ASIC and the ACCC may have been highly proactive in the steps that they took and directly engaged in the solutions, they did so also with the knowledge and support of the local enforcement agencies and they facilitated many of the contacts that ASIC and the ACCC were able to use to start those processes.

I think a model that encourages and develops that cooperative arrangement is the right one, rather than simply a discussion of, "Well, your powers are no longer yours, they're being transferred to somewhere else." A good example of where that has worked very well in practice is the development of, I think the acronym is ACPET, where you have a cooperative and regular forum for those who have those enforcement functions to meet and share market intelligence and decide who's best placed to take the carriage of particular issues at any particular time. It's not an approach that seems to have been modelled as well in the policy development area.

MR FITZGERALD: Okay.

MR WEICKHARDT: On page 3 of your submission in the footnote, you take some exception to the fact that we commented in relation to funding additional resources for financial counselling and suggesting that that extra funding choice must take account of many other competing claims of tax support. I don't want to argue and debate with you the issue of whether or not such funding has a potential return by heading off problems, indeed that was the reason we were supportive of it, but you've gone on to say that there are other funding models, such as hypothecating penalties for poor conduct or from levies. I mean, ultimately the consumer pays somehow for this.

Penalties that go under general revenue, the money has gone in there somewhere and the money comes out whether it's hypothecated or not, or a levy is a cost that's passed on to the taxpayer or the consumer somehow. So I don't think that our observation that governments have got to be mindful about how much money is

devoted here, cognisant of the sort of return they're getting, it is one that I retract on anyway.

MR TENNANT (AFCCRA): Sure. If I might invite you though to consider that framework as it exists at present, and the quality of that framework and the arrangements for commitments that are made to the sector, you'll see my frustration perhaps a little better at why the current arrangements are so insufficient and require the sort of urgency of attention that they do. The Commonwealth financial counselling program is perhaps the best example. At a national level the Commonwealth funds financial counselling to the sum of around $2.7 million per annum; in Commonwealth terms, not really photocopy money and yet that funds 42 agencies. The agreements are year to year. For some of those agencies they are single person services or services that are supporting a team of volunteers. In the last three years those agencies that receive money - and the one I work in is one of those that does - has not received notification that the funding will be rolled over for the following year until either immediately before the current funding expires or, in some instances, just after it has expired. How on earth can you do planning for the sorts of activities we provide with that level of feedback or input from the funding agencies.

Yes, they are important expenditures of taxpayer money, but as a taxpayer I expect them to be done better than they have been, and I think the commission could make some useful observations about what the sector is required to do already on paper, and the fact that we are left to guess where governments might be going next. In many instances you are literally living year to year and not knowing whether your service will be continued post-30 June.

MR FITZGERALD: Good. Any other comments you'd like to make, David, before we conclude?

MR TENNANT (AFCCRA): No.

MR FITZGERALD: Thanks very much for that and we look forward to receiving the joint submission which will deal with a whole lot of the other issues. We're very grateful for both the submissions and also your participation throughout the inquiry, and we're very happy to receive the document that you'd like to leave with us.

MR TENNANT (AFCCRA): Thank you.

MR FITZGERALD: We might now take a break and adjourn, and resume at 1.45. That's in an hour's time.

(Luncheon adjournment)

MR FITZGERALD: Peter, if you could give your full name and the organisation you represent.

MR SUTHERLAND (ACTESCC): Peter Sutherland, Essential Services Consumer Council of the ACT.

MR FITZGERALD: Thank you. We've received a submission from you, I believe.

MR SUTHERLAND (ACTESCC): There's preliminary notes because I may revise it out of today if there's any issues you want to address, but certainly that includes some of the points I wanted to raise.

MR FITZGERALD: All right. If you would like to give us some opening comments and then we can have a discussion.

MR SUTHERLAND (ACTESCC): Yes. The ESCC has the responsibility of the Energy and Water Ombudsman in the Territory but it's done by a statutory model which is different from either the industry or the statutory ombudsman, so interstate. The ESCC actually precedes interstate models by about eight years because we were established in 1992 in a predecessor role, specifically to address the hardship caused by disconnection. In 2001 when the council itself was established, our role was broadened to gas, not just electricity and water, and we were also given the role of addressing utility complaints and systemic consumer protection in the energy and water areas. It's a different model in the Territory which is historical - is why it's different.

The first thing I suppose I want to say is that the council which is a group of people - there's about 12 members all up - of which I'm the chair, has looked at the submission by the national consumers roundtable and we would endorse that in broad terms. There may be differences of emphasis and things like that but certainly we would endorse that and commend that to the commission, and obviously the organisations involved would be the ones to speak to the points made there. What I'd want to do is address some specific ACT issues which illustrate possibly national issues around energy and water.

I don't really have a lot to say about some of the broader consumer issues you raised except I would be happy to take up a couple of issues that have emerged this morning: one being the unfair contract issue; one being the objective and one being recommendation 9.6 about funding for - - -

MR FITZGERALD: All right.

MR SUTHERLAND (ACTESCC): So getting to start with those or I could move to some of the issues - - -

MR FITZGERALD: It's up to you, Peter, whichever you'd like to proceed.

MR SUTHERLAND (ACTESCC): Okay. I'll start with the objective. The submission of the round table raises much the same point. It was raised also by Choice that the objectives, as you have drafted it, is about a process, a process called competition, not about the outcome. The same problem exists in the national energy law. The objective there is about creating a competitive market, which is not, in the end, the point of the exercise. The point of the exercise is consumer welfare and - well, that was - Choice talked in terms of consumer welfare. I think the ultimate objective is a little bit more than that. I think it's consumer welfare but I think it's also the maintenance of viable innovative and productive businesses, because it's the consumer and industry in a partnership.

Then third, and equally importantly, that the objective has to embrace generational sustainability, because our markets do not necessarily address generational sustainability. In fact, they're usually ignored unless there's a regulatory framework that forces it to be addressed. The best illustrations of that are the fact that markets ignore the long time life span of nuclear waste, the fact that there is no - at this stage, no carbon pricing relating to the next generation and the following generation.

So that the overall objective of consumer protection needs to recognise that markets must also operate within a framework that protects and enhances or at least recognises generational issues, whether they relate to things like waste and pollution or whether they relate to things like the massive demographic changes that are happening in societies, you know, whether it's the ageing population or the expansion of our indigenous population, long-term migration trends and so on. So I think that's what the objective has to be. Then what you have identified as the principal objective is really one of those really strong underpinning elements of the primary objective. So I don't think there's much more to say there. It's the point more or less made by Care.

The recommendation in relation to funding, increased funding, for Legal Aid for financial counselling services. In our organisation we find the role of financial counsellors extremely valuable because people often present not just with utility debt, you know, our business is utility debt, really. But a lot of people in utility debt are really not able to address that issue in isolation either because they have a whole range of debt and simply aren't able to afford those or often they will present with a psychological incapacity to address their financial circumstances. People just point where the bills - everything goes under the bed because it's too hard to even psychologically wake up in the morning and confront their debts.

It's difficult for a single purpose agency like ours, you know, an energy hardship organisation, to address that wider psychological issue or the wider issue of inadequate income. That's where financial counsellors are really useful because they actually work with the person at a direct level and they can propose solutions, whatever they may be, sometimes very hard solutions. In my experience of financial counsellors - which is mostly Care and the Salvation Army, they're the two main providers in Canberra - they generally are non-prescriptive.

In the end their clients are left with choices about whether they go bankrupt, whether they sell the house. But often the most important thing is to bring them to the reality of how they manage the spread of debts. Along the way that also helps us to address utility debt because we get a very good feeling about what's possible, the counsellors will include us in their overall management of the debt and also we have a unique, pretty unique, capacity in our particular agency to discharge debt. So we can use that as part of the - discharge utility debt. So we can also use that as part of the package of getting the person out of their overall predicament. So very supportive of a increase in funding, both Commonwealth and other levels, for financial counselling.

The recommendation to increase funding for Legal Aid is a little bit more problematic because - you know, I have quite a lot of experience with the Legal Aid system. I work at the Legal Aid office in a part-time capacity. The Australian legal aid system, namely the government system - the Legal Aid Office of the ACT, the Legal Aid Commission of Queensland - is under tremendous strain from the demands of the criminal law system and the family law system. The commissions generally have very little capacity to do any other work than those areas, the identified priority areas. The only - funding, additional funding to Legal Aid would only be effective if it were special purpose funding.

The other thing is that Legal Aid's offices - and this varies across Australia, some offices are different from others - they tend to be reactive in their casework rather than proactive in their front-end work. So again, if you're going to increase funding for Legal Aid you'd be wanting to encourage that into proactive work, which can include systemic litigation, rather than simply mopping up case work. So any money going to Legal Aid would need to be fairly specifically targeted to achieve the outcomes you want for consumer benefit. Things are a little bit different, in that recommendation, if you talked about community legal centres, because there are a range of community legal centres where you only have to give the funding to them and that systemic work will necessarily happen, like, you know, the consumer law centres in various places. So that's a very safe funding environment, but Legal Aid would have to be special purpose funding. So I would suggest you just expand that recommendation a little bit. Finally, in relation to unfair contracts, I hadn't addressed that in my remarks here, but it is important to have a capacity to deal with unfair

contracts.

In my experience of complaint - we deal with utility complaints - and the complaints generally have one of three elements in them. Underlying the complaint might actually be a breach of the law. In our case, generally, a contravention of the Consumer Protection Code, if a utility has done something in breach of a regulatory requirement. Now, that's common, but sometimes, a little bit less common but nevertheless, frequent, is, the utility has not contravened a specific element of the regulatory framework, but what has happened is unethical or unfair, and that can be contract terms of sometimes it can be activities. That's why you, in a sense, need a generic capacity to deal with unfair and unethical conduct separate from simply regulatory breach. In the ACT that's cheap because our code has a requirement utilities act in a fair and ethical manner towards consumers.

In seven years, I have not actually used that provision to the point where I've made an adjudication or made an order to a utility, "You've breached the requirement of fairness and ethicality. Therefore, I am awarding compensation to consumer X." But the existence of that particular provision has enabled the council or me to negotiate with strength with a utility, rather than - and it's just exactly what, I think it was, David said, that having the provision there in itself gives you strength in your negotiation with the utility because they can't simply say, "Prove the contravention of the law or piss off." They actually have to address with you the fact that while they may have stayed inside the regulatory framework, they've actually breached what the council, or us being a sort of a de facto for the community, say its unfair. I can illustrate an example of a current case where the unfair provision is very relevant, if you're interested.

MR FITZGERALD: Please.

MR SUTHERLAND (ACTESCC): We have an interstate utility, which has a contract which locks in a customer for several years, an electricity contract. The contract allows them in plain terms to pass through price rises simply be notifying the consumer, and takes effect. They have an opportunity to leave the contract if they don't like the price rise, but they pay the cancellation fee. When I saw this particular problem - it came to me as a complaint by the person who was charged the fee - we raised it with the energy company involved and they immediately retracted the fee.

So in a sense, the complainant's problem was solved, but I've taken it on as a systemic problem because I believe that contract is intrinsically unfair. It seems to me that if you have a unilateral right to raise prices, then the client needs to have a unilateral right to not accept those price rises without penalty, and therefore, to leave the contract, barring, I think that it's reasonable for the utility company to be able to pass through distribution prices which they have no control over, because when a

distribution pass-through happens, all retailers have to pass it through so there's no disadvantage to the consumer. That's where we're up to. In my investigation of it I discovered that the regulator in Victoria has already taken the utility to task on this particular contract and the utility is no longer relying on term in Victoria. I hope to achieve the same outcome in the Territory.

I've given the matter to our regulators so we are jointly now considering the position and we'll shortly go direct to the utility, and I imagine the utility will agree no longer to rely on that course in the Territory. That's my preferred outcome. If they don't, then I imagine I will then go to the next step which will be to raise a breach of the Consumer Protection Code for unethical conduct or unfair conduct.

MR FITZGERALD: We might just pause there on those three issues. Are there any queries, Philip or Gary on those three issues that Peter has raised before we move to the substantive part?

MR WEICKHARDT: Just on the last one I'm sort of struggling in my mind to think how you would encode some sort of provision that differentiated between the utility raising its prices for what you saw as a legitimate cost increase versus raising its prices for some other reason.

MR SUTHERLAND (ACTESCC): In our industry pass-throughs are well known because you can identify what the pass-through events are, and the pass-through event is an increase in the distribution charge. There's not a problem.

MR WEICKHARDT: What about the wholesale price of electricity?

MR SUTHERLAND (ACTESCC): No, that's why they raise the price, and the customer needs to have an opportunity to leave that contract without penalty and shop around. That's competition - shop around and see if another supplier will give him a better price.

MR WEICKHARDT: Why is the distribution component any different from the wholesale price of the electricity?

MR SUTHERLAND (ACTESCC): It's different because the distribution component is a regulated monopoly which is applied equally to all retailers. You could say that should give the consumer an opportunity to leave the contract as well, but in fairness I wouldn't mind the contract that allowed that type of statutory pass-through to occur. What I had problems with is that the company unilaterally decides to improve its profit margin after they have locked the client in for three years.

MR WEICKHARDT: I understand that but costs go up and down for a whole

variety of reasons.

MR SUTHERLAND (ACTESCC): But if you made the contract for a price then why don't you have the electricity for that price for three years?

MR WEICKHARDT: I'm just trying to differentiate between what you see as a legitimate pass-through. If the ACT government increased their rates, for example, is that a legitimate pass-through?

MR SUTHERLAND (ACTESCC): If it was in the contract. It's not uncommon to see taxes being put through as pass-throughs, particularly if the tax impacts on the distributor, yes, of course. The point I'd make is that in our industry we actually do have a monopoly regulated distribution price and therefore there's no element of unfairness in that being passed through to the consumer; no relative unfairness as between one company and another. We could have a situation in utility contracts where you sign up for electricity for three years and the price is the price. I probably would regard that contract as okay as well, as long as it was made with informed parties on both sides. The retailer is taking a chance on generation of costs and the punter is buying certainty. People do that in home loans by fixing the interest rate.

What I object to - the fairness - is where is the unilateral capacity to change price yet lock the customer in. I said there were three types of matters: the contravention, the unfairness, and the third is simply poor communication. At least half of our business in the complaints area, the utility hasn't breached the code, the utility hasn't been unfair but they have communicated poorly with the client. The customer makes a complaint which the customer sees is justified. The utility has its own response to that but along the way the communication of that utility position of the client is completely mucked up, either by delay, defensiveness, offensiveness. There are all sorts of ways. Communication is the only problem. We resolve those by saying, "Listen to the utility, hear the client, explain to the client what the utility position is in a way that they can understand," and everybody goes away. They're not necessarily happy because they're still angry with the utility for having mucked them around for the last three weeks but at least they understand that the utility hasn't acted wrongly, it's just communication. At least half of our complaints would be fundamentally about poor communication rather than any actual problem or misdoing of the utility itself.

MR FITZGERALD: Okay. We want to move on to the other issues and I'll come back to all of them.

MR SUTHERLAND (ACTESCC): Okay. As I said we endorse that submission. The council certainly sees there is a need for energy specific consumer protection mechanisms. It arises primarily out of the essential service nature of the commodity. Because of the monopoly nature of transmission and distribution you end up with a

comprehensive regulation framework anyway. The worst nonsense would be competing transmission lines. We did have that with Optus and Telstra for a while. You need to regulate that.

The other thing is that apart from the essential nature of it and the hardship that's caused by disconnection, we're seeing an increasing level of what is really de facto duopolies or monopolies emerging where the large generators are buying up the large retailers and creating what are vertically indicated companies just missing out that monopoly bit in the middle. That's the trend for the future for sure, because those retailers - the generators can, through their own progress, they can actually underpin the hedging that the retail companies are doing. It leaves pretty vulnerable those companies' retailers that don't actually have a generator sitting underneath them. There's very special stuff about the energy market.

The other thing is that while the energy market is moving towards a national framework, it's not there yet. We're not going to see the retailer regulatory framework start till 1 January 2010 and even then there will continue to be state-territory differences for a period of time after that. We're not in a market like telecommunications where it's Commonwealth legislation in a single legislative scheme. We are very different state territory from state territory. Victoria is different because of the Kennett privatisation experience and the subsequent rollback headed by a very active set of consumer groups.

Queensland is very different because it has been a government monopoly until recent changes which only affect the south-east corner. The country of Queensland remains a fully-regulated monopoly. New South Wales is about to privatise which will create its own dynamics. The ACT has an amazingly different usage profile for energy from the rest of Australia - somewhat similar to Tasmania but more extreme - in that our energy bills in Canberra for low income, for certain groups of low income people, can move up to around about $1000 a quarter mark because of heating, and typically interstate, low income people will rarely have bills more than about three or four hundred dollars a quarter.

In the ACT we face a quite different challenge, and that's a regional difference which can't be ignored, in a sense, and has to be dealt with with a Territory specific approach; not that we shouldn't be in the national framework - the national framework will work - but there needs to be that level of recognition of state-territory issues. We don't have rural remote issues here which is quite different from Queensland.

If you look at telecommunications, for example, the real issue in telecommunications is urban versus regional, not state territory based really. Energy is still very much state territory, and water is even more than that. I think it's rather unlikely we'll ever move to a common national regulatory framework for urban

water, which leads me into the energy hardship. Hardship varies from state to state in different ways. The trouble with energy in Canberra is that there are some people who will die if they are disconnected - not die, you know, if you're on a life support, of course you die straightaway. All states and territories recognise that. But disconnection for an elderly or disabled person in Canberra in winter can in fact mean death. It usually only occurs with disability or age or in the case of very young children, but the reality is there. That can sometimes possibly happen through heat stroke in the equivalent alternate situation of the summer peaking in New South Wales and South Australia, but probably less immediate than in ACT. I think that's partly why the ACT developed a unique approach to the hardship issue back in 1992 whereby a statutory authority can order a utility not to disconnect and order it to maintain supply indefinitely.

So that's why it's different here. The rest of Australia has started to catch up, particularly Victoria, now that - that placing the responsibility hardship on the utilities and the utilities must not disconnect if there's an incapacity to pay, so they've got to do that assessment of capacity to pay, and that's the right direction for hardship - starting right there with the utility responsibility. But I think it helps to have some sort of backup to that particular framework, particularly in Canberra, where we have people, some families who simply have to consume more than they can afford to pay.

When you're paying something like about 120, $140 a fortnight for energy, annualised over the whole year, so it's more like about 180 during winter, that's essentially not very affordable for a sole parent, particularly if they're in private rental, where rental is already 50 of 60 per cent of their income. You get to points where there was simply an unaffordability of electricity. I think it happens probably here in Canberra a little bit more than interstate, just because of the size of our bills. That's the impression. They haven't done the overall work. It's true that by and large our low income people are lower consumers of energy than next quintile, next quintile, next quintile, but in the very low income group, there is a particular group that is stuck in very bad housing, and with little capacity to actually do anything about heating, and that's why they have such high bills. It's a group of a couple of thousand in our population.

MR POTTS: Can I ask you, Peter, in Tasmania, as I understand it, they have a sort of a pay as you go system option for low income people which - - -

MR SUTHERLAND: Yes. It's not for low income people. It's a prepaid system generally available. I definitely oppose that system. I think if you regulate prepaid correctly, then that's okay, but the problem with prepaid for low income people is that it leads essentially to self-disconnection. All you're doing is shifting the odium of disconnection away from the company to the individuals who self-disconnect, just like people who run out of pension don't eat on Wednesday until payday happens the next day. So they self-disconnect from electricity. To get that electricity in

Tasmania, you pay a much higher price. You pay a much higher supply fee to have that thing there in the house, and you pay a much higher usage fee. So you're paying more for a product that only works for you because you self-disconnect.

The proper answer for low income people is to have sophisticated fortnightly payment arrangements which are aligned with their pension days. It's much better than prepaid. It's a think called C-Pay, where the cost of the utility comes straight from the Centrelink pension with the agreement of the person, and often they do that for their rent as well, and you work out what they use annually, $80 a fortnight, annually. You take it out every fortnight from their pension, $80, and their bills are met, and they're paying the same price as the rest of the consumers, not something like 50 per cent more that prepayment involves.

MR FITZGERALD: The arrangement is done directly with the company itself, the service provider?

MR SUTHERLAND: No. The way C-Pay, Centrepay works, is it's administered by Centrelink, and the utility pays a certain amount to Centrelink for using that service. The utilities are generally very happy to engage in this system because it gives reliability of payment.

MR FITZGERALD: Just on that, that's an available service now?

MR SUTHERLAND: Everywhere in Australia. I'm not sure that Aurora uses it in Tasmania, because they prefer the prepay option. Aurora is in monopoly - - -

MR FITZGERALD: The people that you see, is there an increasing usage of that service here in the ACT?

MR SUTHERLAND: It came in about eight years ago, with the capacity to pay utilities on it, and it's made - 95 per cent of our clients prefer that. Sorry, our clients on a statutory income prefer it. There's a small group who don't want to do it that way, and we respect that, and they are supposed to pay at the post office. The trouble is, the fortnightly alternative is direct debit, and direct debit is extremely risky for low income people because you end up with a $50 fee from the bank and a $20 fee from the utility each default, and defaults happen because they race down to the bank and beat the Centrelink payment into the auto-teller. When people are juggling money, behaviours become aberrant.

So Centrepay is a great system. For those people who don't want to do it, and usually it's people who detest Centrelink and don't want them to have any further say over their money, then we just respect that and obviously usually their payment record is not as good as if they were on C-Pay. The key to successful hardship management is of course for the utilities to be doing it in an intelligent way, making

real assessments of capacity to pay. If people are using a lot of power, wires, can we help with a refit? Insulation, what's the problem with the house? Those sorts of really intelligent breakers of usage.

MR WEICKHARDT: But do you see that the utility ought to effectively become the person that meets all those hardship payments?

MR SUTHERLAND: Well, ultimately, this of course is spread across the community through a tariff. The experience of well-managed hardship tends, I believe - and the data is not fantastic on this - but the experience of well-managed hardship programs tends to suggest that it actually pays for itself. There was a study of one of the water companies, which demonstrated that. We've never actually done the hard data on it, but I think that's the experience of utility in Canberra, that once our system came in, they were actually saving money, because there's much better debt recovery through this fortnightly - you know, rather than having people run up big debts and then go bankrupt or skip, which is the old system, if they're meeting it fortnightly - and when prices go up, we force them to address that pricing increase by bringing it in. I think in the end the debt recovery actually improves. The only study I know in Australia that has found that was a water board study, so whether it carries through to electricity would have to be questioned.

MR FITZGERALD: I'm just conscious of the time. You've got two or three other issues you just wanted to touch base on?

MR SUTHERLAND: Yes. With the National Ombudsman Scheme, I don't think we're ready for it. I think we need to stay with the state and territory schemes at least until the national framework is well and truly embedded. There's too many regional differences. We need to have accessibility at a local level. So I wouldn't be going down that road at this stage. However, it is important that each of the schemes in each state and territory communicates very closely - in particular, I think one of the areas for communication is data collection, so that everybody is collecting data in the same way, which is not happening at present, so that we can actually, when we move to a national scheme, if it happens, then the data history is there.

Also, that once we do have national regulatory instruments and we'll have a Consumer Protection Code, enact a consumer protection framework after 1 January 2010, I think it's quite important that the state territory bodies actually work together to ensure consistency of the application of that framework. That's not a challenge for now. It's a challenge for going ahead. This sort of stuff is happening, but not in a full-blown way, in a sense. The discussions about data are definitely happening. Finally, the last issue is the issue of price regulation. In your report, the commissioner talks about price caps. I'm not really aware of - most of the markets in Australia no longer have price caps. I can't talk for the Northern Territory, but I don't think there are price caps. What there is in every market still is a price which is

regulated or approved in some way. It's not a cap.

There is nothing that says that a retailer can't charge more than that price, but what is required is that certain retailers - and in the ACT, it's only the incumbent distributor who has a retail arm - is required to offer a price that is approved by the regulator. It's a transitional phase in the move towards full competition. From my point of view, the transitional phase is in fact the most desirable outcome. The full competition, I think, is an undesirable outcome or an undesirable end result. The situation of a competitive market, whether is in fact also a tariff, a set tariff, which consumers can stick to is in fact a very good outcome for competition, because it actually provides a reference point for comparison of offers, or comparisons of competition.

Most of the competition in the ACT, and it's true interstate, is actually framed about that tariff price, what we call the franchise price, and the competition is essentially about beating that price. In other words, the competition is generally, "We'll give you X per cent discount off that price." Without some sort of franchise price to operate as a reference point, what will happen, guaranteed, is that each retailer will construct their tariff offering in such a way that it can't be properly compared with anybody else so that then they will compete, not on price - which is really where we want the good effect, we really want the lowest possible average price for the community. What they will do is they will compete on non-price issues and they will also compete only at the very edge. They will offer discounts but only for a small group of their customers, and the majority of the customers they will try to lock in at much higher prices than necessary.

The average price is much higher than you'd get through having the franchise sitting there because they leave the average price up there and there will be a bit of competition at the bottom end which is called price competition. They will also be concentrating on non-price competition. In our case we've seen, for example, the 3DVD player that you tune and lock in for three years. It makes it impossible to really quantify the benefits of this lock-in because you get the DVD but the price you've locked into for three years is really uncompetitive. Other ones: there's been a bit of competition about Green Energy offering superior products and things like that but in fact they're not price comparative.

I just say that we actually have quite a good situation by having competitors in the market but a price to beat which is what the franchise provides us with. We have a completely unregulated price situation in gas in Canberra and no competition. There's no price competition whatsoever, except that people - there are bundled offers where, "If you bundle your gas with your electricity and with your telecommunications, then we'll give you a discount," but we haven't actually got people in the market competing on the price of gas, even though it's a completely unregulated market. It's just a fungible commodity. It's other stuff that you compete

over.

MR FITZGERALD: Thanks very much for that. We've already asked a number of questions but I might open it up for some questions. On the national Energy Ombudsman scheme, from your comments - and you've taken a very considered approach to this - you think at the moment for a whole range of reasons you've articulated we're not in the position to go to a national Energy Ombudsman scheme. But if I read you correctly, Peter, you're not ruling that out as a longer-term objective.

MR SUTHERLAND (ACTESCC): I don't think anybody is ruling it out, I just think with the current state-territory fragmented nature of the regulation and the massive differences in the markets that it's not advisable. Of course, any sort of national scheme we have, if we were to introduce now, would I think absolutely have to have local offices in each jurisdiction, so it would probably come at a fairly high price.

MR FITZGERALD: Sure.

MR SUTHERLAND (ACTESCC): We'd need that both for accessibility and also local knowledge of the specialities of each market. They're very different at present.

MR FITZGERALD: Okay. You say in your submission that your scheme is set up as a statutory tribunal.

MR SUTHERLAND (ACTESCC): That's the model, yes, but in fact it operates very similar to the other schemes.

MR FITZGERALD: You've mentioned that but that notion of a statutory tribunal is different from that which exists in the other states.

MR SUTHERLAND (ACTESCC): They're ombudsman schemes, yes. They're ombudsman schemes that actually have the power to award compensation which is essentially a tribunal function.

MR FITZGERALD: I know, but slightly different in character. Questions - Philip?

MR WEICKHARDT: Yes, I'm sort of intrigued by your assertion that you'll never get a competitive market in the electricity area unless you have this sort of reference price. Not many other markets that we regard as being competitive operate that way. What is it that's special about electricity that requires that to be maintained in the long run? If I go and buy a DVD player I can't say to the government, "Where's your reference price on a DVD player?" I rely on the fact that Dick Smith and Harvey

Norman and a few other people will offer various bundles. They might be different but they compete amongst each other.

MR SUTHERLAND (ACTESCC): There are some arguments about how competitive really - there's an example in the petrol market now with what is essentially a duopoly. It's very hard to keep markets competitive. Electricity is an indistinguishable product. It comes down the line - the only way you can distinguish it really is to distinguish you as a supplier, "I have a more colourful account, I'll give you a DVD player," or you can try to distinguish on price, "I'm cheaper than X, Y, Z." But it's very hard to compare the price of electricity because it depends entirely on how you structure tariffs. In the market there is a deliberate intention to structure tariffs so they can't be compared. It's the balance between supply fee, your time of use charge - you know, it will get more complex if we actually do move to time of use charge.

If you have a reference price it is conceivable - and this is what Victoria is now exploring - to have a reference price which is not a government directed price but simply a price that each utility is required to set that price and to stick to it for a period of time. That won't work unless there is an element of regulation: one is that you offer the price; that you offer it on a basis that is comparable with other offers and on which you've got to dictate the tariff structure of the offer, whether it's off-peak or whether it's so much - it's a block or two blocks - you've got to specify the structure of the tariff, and of course you've got to require the utility to honour that price for a period of time. It's no use then publishing it and discovering one day that it's 10 cents more the next and it changes. So there's discussion about actually requiring companies to do a blind tender of their price for the next year and then being stuck with that against a particular tariff structure.

That's not government setting the price, it's simply requiring them to offer a price that can be compared and is their best price. Then of course they can undercut that as much as they like in a market competitive situation. It's a movement which is quite interesting. But the natural inherent thing is for companies to move to the point where prices are currently genuinely compared because then you can say, "I'm cheaper."

MR FITZGERALD: Certainly government is seen at the moment to not be convinced by the fact that there are fully competitive markets operating and there's a reluctance to remove - whether they're caps or price-to-beat arrangements at the present time.

MR SUTHERLAND (ACTESCC): Price-to-beat I think is fairer than caps.

MR FITZGERALD: I noted that in your submission. Just in relation to the hardships - and thanks for your illustration about the ACT problems. The regional

variations you've identified are important. I mean, I suppose the commission in its report made two points: one was at a very broad level, government transfer arrangements to the social security system, and what have you, should be the key way to deal with low income disadvantage, but it also acknowledged that there needed to be specific hardship arrangements with the utilities. I suppose the issue is, do you think we're getting a clearer understanding of which of those hardship programs around Australia are really delivering cost-effective outcomes, because there are variations now, both regionally and between utilities and so on. We're in favour of those being retained. The question is, are we getting a better understanding which is, as I say, the most cost-effective arrangements?

MR SUTHERLAND (ACTESCC): I couldn't answer about cost-effective because that's going to be hidden inside utilities but we had a very good experience of AGL - AGL was doing hardship very well up till about two or three years ago. It's not doing it quite as well because they changed their structure of the hardship programs. Energy Australia is doing very well at the moment. Their hardship program is well structured, well considered. I think they're ahead of the pack from the ones that we deal with at the moment. Good hardship programs, the essential element of it is an assessment of capacity to pay and then an intervention that actually works for the customer and preferably, if you can, an intervention that reduces long-term consumption because that helps everybody really. That's why retrofit programs down in Victoria have been showing some success. The energy companies are actually paying Kildonan to do it. There's no one hardship model and I think that's recognised in the evolving regulatory framework which will require all companies to have a hardship policy but allowing some flexibility as to how they do it. But the outcome measure - obviously one of the outcome measures - is greater disconnection.

MR FITZGERALD: Yes. Okay. We've hit the button in terms of time. Thank you very much for your contribution in a number of areas. Unless there are any further questions or comments - any final comments, Peter? No? Good, thank you very much for that.

MR SUTHERLAND (ACTESCC): Sorry, there was one final comment which related to your recommendation 5.4 where you mention about removing price caps, but then the second paragraph simply goes on to say, "Ensuring that disadvantaged consumers continue to have sufficient" - whose responsibility? That's the key. It's not enough to simply say, "Let's ensure it." I think you need to pin down that responsibility. Is that responsibility the Australian government? Is it state-territory governments? Is it retailers - because retailers won't do it. You actually need to be quite specific because otherwise everybody will be looking, "Why aren't they doing it?"

MR FITZGERALD: Who do you think should be responsible?

MR SUTHERLAND (ACTESCC): In the current devolved regulatory framework it's obviously ultimately a state-territory government. Possibly, I think, though as we move towards an integrated - it definitely becomes the Australian government responsibility. It may be done through a state-territory delivery, or both.

MR FITZGERALD: Let me be a bit pedantic just for one moment. Is it the role of the governments, or is it the role of the Australian Energy Regulator that's emerging? You may not know the answer to that because there are definitely governance arrangements in place.

MR SUTHERLAND (ACTESCC): I don't think regulators are in the best position to deliver CSOs. In fact they're not the people to deliver equity programs. It needs to be done at a government level. It also can't be delivered by the utilities. Utilities can be part of the whole picture. They can sometimes be delivery front-ends for it. Certainly they've got to be how you contact customers, but in the end the financial responsibility probably has to come back from government and of course it will be through the taxation system or the distribution price.

MR FITZGERALD: Thank you very much for that.

MR FITZGERALD: Housing Industry Association, are we here? If you want to take seat, that would be great. Thanks very much. If you could give your full names and the organisation you represent, and then just some opening comments, and then we'll have a discussion after that.

MR CHAMBERLAIN (HIA): Certainly, Scott Chamberlain, I'm the executive director of workplace relations and small business policy at the Housing Industry Association.

MR SIMPSON (HIA): I'm Glen Simpson, legal counsel for HIA.

MR FITZGERALD: Great, over to you.

MR CHAMBERLAIN (HIA): The substance of our submission is reasonably limited. It's not directed to the whole report. It's to recommendation 5.5 where you make specific recommendations about regulation of consumer relationships in the housing industry. Our concern in particular was around recommendations for an ADR process and, secondly, a recommendation for revamp of homeowners warranty. We want to contribute our voice to the debate in two ways: firstly, to indicate that in our view it's a bit simplistic to simply call for a revamp of homeowners warranty. We're aware of these issues with the way current schemes operate. The tenor of some of the commentary in your report indicates a favouring of the Queensland state-run scheme which we don't think is a good model. Beyond that, homeowners warranty insurance is simply one way of managing risk and we think that there are other potential ways of managing some of the risks that homeowners warranty has been called upon to bear.

It really involves not a revamp of homeowners warranty, but a relook at how you regulate the entire consumer-builder relationship within the industry. The Productivity Commission has recognised that in previous reports in its investigation into the building industry. There is this inter-relationship between if you manage the risks in terms of the quality of the people that enter the market, if you are rigorous about excluding people who demonstrably fail in their duties to consumers, if you make sure that the people in it are properly capitalised, et cetera - all of that is one way of managing risks that at the end of the day makes homeowners warranty a lot more affordable.

The big point from our point of view, we've been working on a policy and we've been talking to state governments about bringing forward the trigger for warranty insurance so that it's triggered before a builder is bankrupt. The key to that is a better dispute resolution process. At the moment the reason homeowners warranty is a problem is largely because it's being expected to cover the costs of defective work before defective work is even defined, so just the allegation that work is defective. If you try and move it to be first resort, then what you're protecting the consumer against is the unwieldy nature of the legal system. It becomes legal fees

insurance, not bankruptcy insurance. It's a completely different class of risk. It's an unmanageable class of risk. What we need is a better dispute resolution process that very quickly and cheaply is able to have someone come out on site and say, "That's a defect. That is not a defect. You've got two months to fix this defect and if you don't fix that defect there's consequences." That's largely what is absent in the system and we have disputes over that.

It is a two-way street. The problem is not just the consumer fighting the builder. There are laws in most states that limit the amount a builder can charge for deposit and equally limit when they can make progress payments. So you can't charge for work that's not done. That means by the end of the job the builder is always behind. He's relying on that last 10 per cent, 15 per cent, final payment for his profit. It's economic hold-up. The consumer just says, "No, I'm not paying because there's this defect, that defect," et cetera, and we have members who are concerned that maybe the money doesn't exist for actually that payment. It's not just consumers, the way the industry works, it needs that dispute process to make the cash flow around the industry a lot better. We would like to see recommendations that are more targeted.

Again, ADR means lots of different things to different people. Mediation is a form of ADR. It doesn't necessarily work. We'd say it's an entitative relationship in our industry because you're on site all the time and they come around, the clients look and ask for changes, et cetera. There's just too much of if there isn't that ability to make an arbitrated decision nice and quickly, the mediation can tend not to work because the time you've got a dispute if that process of site meetings has fallen down then you have a problem there anyway. We're looking for something that is much more about independent experts coming out on site, something that can be finished in days, not weeks or months, and doesn't involve replicated court type hearings. We're suggesting that for disputes about defect, factual disputes about, "Is this a defect or is it not?" we don't think you can have such a dispute where there's contractual issues such as, "Look, I thought that this contract covered the driveway." "No, the difficulty is landscaping. It doesn't cover landscaping." "You misled me." That's a court claim. You can't have an independent building expert determine whether the consumer has been misled. Equally, we don't think that you should have a non-court tribunal hear those types of issues.

So we would encourage you to recraft the recommendations to more closely define what you mean by ADR. In our paper we've suggested what we think is a mechanism, it's the one that the Tasmanian government is looking at in its revamp of homeowners warranty. It has moved to voluntary homeowners warranty down there but significantly, it didn't just make homeowners warranty voluntary. It is relooking at the structure of its regulation and a key part of its reforms is a better dispute resolution process along these lines. If we do get that good dispute process, our discussions with insurers indicate they are willing to bring forward the trigger for homeowners warranty so that it would be triggered not just when a builder is

bankrupt, but when a builder loses their licence. If we get a good disputes process, then if you go through the dispute process and you don't rectify work, then that should not naturally lead to either a cancellation of licence or at least a hearing to show cause. If as a result of that hearing the licence is cancelled then the insurance would be triggered, and we think that would be a better way of dealing with this issue.

It has to happen after the defect has been declared because otherwise the insurer is insuring the consumer against the general uncertainty of the legal system. There is no widely accepted definition of "defects", particularly in cosmetic work. We're working on, particularly in Victoria, a standard guide of tolerances so that there's a much more rigorous definition about when work is defective, and that arises from working with leaving materials in an open environment. When is a crack in floorboards, et cetera, a defect or when is it within accepted tolerances. Definitions such as that and disputes over that can lead to problems. It needs someone to come out to the site and say, "That is not a defect; that is, and you should fix it." That's the overall substance of our submission.

MR FITZGERALD: Good, thanks for that. If we can break this up into a couple of components. Putting the home builders warranty insurance aside just for one second, just dealing with the ADR in relation to defects, just that aspect, which is not currently part of the insurance arrangements, why is it in your mind, given that these issues of defective workmanship in buildings is a very longstanding issue - it goes back, I'm sure, since the first time bricks were laid - we still don't have, even in your terms, an effective mechanism to deal with defects early in the disputed transaction's history. Why is it? It seems to me inconceivable that in 2008 this self-evident problem is still unresolved. What are the impediments to getting it resolved?

MR CHAMBERLAIN (HIA): I honestly don't know the answer to that question. I'm recently new in this role. I keep suggesting solutions that people say, "We tried that in the 70s," and we're back again where we are.

MR SIMPSON (HIA): If I can make a couple of comments on that, Robert.

MR FITZGERALD: Sure.

MR SIMPSON (HIA): There in the past has been a lot of fluctuation in the remedies to address these issues. To a certain extent this is followed. The political complexion of the governments have introduced these measures, but also to a certain extent it's cost. There have been states that have had a dedicated building industry tribunal, for example, that was staffed by expert assessors that was able to deal with these sorts of issues. In all states now these have been rolled up into general alternative dispute resolution type tribunals, and in one case the Victorian Civil and Administrative Tribunal with the status of a district court.

So the mechanisms are there but they are of varying utility from state to state. In many cases what is a defect is, as Scott was saying, very much a matter of opinion. It's clear that a leaking shower is a defect; it's clear that a leaking roof is a defect. It's not at all clear that a stained timber floor which develops cracks after being in the sun is necessarily defective; it depends on where the cracks are, how big they are. As Scott mentioned we've been working on an updated standards and tolerance guide that will help give some guidance, but in many cases it's still a matter of opinion, and opinions will differ.

So there needs to be an expert assessor who can look at the matter from an impartial point of view and make some sort of decision or recommendation to a decision-maker that's independent of the parties, because parties simply will differ.

MR FITZGERALD: Is there a scheme around Australia that currently - or in the recent past - adequately deals with that issue, that issue of a quick assessment of whether or not there is a defect, and a resolution of the issues between the two parties?

MR SIMPSON (HIA): Not around Australia. It varies from state to state.

MR FITZGERALD: Yes, but I mean is there any model in any jurisdiction that you as an association would think gets closer to achieving that objective than others?

MR CHAMBERLAIN (HIA): I think the one that Tasmania is now proposing is the best example. Unfortunately they're looking at models where there will be employees within Consumer Affairs who have the ability to go out on site and determine something to be a defect. That doesn't work from our point of view simply because the dispute resolution process has to be independent and seen to be independent. Too often the states tend to put these disputes under Consumer Affairs, rather than under the judicial or regulatory arm of their infrastructure. So we run into the risk that the guy going out on site is not an independent expert, he's sort of a consumer advocate. Equally the process can't be initiated by a builder. It's really quite weird for a builder to go to Consumer Affairs to complain about the behaviour of the consumer. So that independence is what tends to be lacking everywhere. These tribunals end up being - not everywhere, but there's a tendency to make these Consumer Affairs driven vehicles rather than not.

My impression from talking to people is that previously building inspectorates and those sorts of roles where it used to come out on site and the mandatory inspections et cetera, that role used to exist, it used to be funded by states and by government. That role has been cut up, devolved, transferred elsewhere. The burden has been put on homeowners warranty insurance to overcome that sort of stuff. We don't need to run this vast infrastructure because the insurers will take care of it. We

don't need to vet, we don't need to discipline as much because they just won't get insurance, that sort of issue. There's this ebb and flow between it. I'm not aware of anywhere where the model - - -

MR SIMPSON (HIA): If you're looking for a model, one place you could look is in the subcontractors payments legislation where there's a dispute between a builder and a subcontractor over payment which typically involves allegations that the work wasn't of sufficient quality. There's now a procedure in all states which allows a very highly structured way of dealing with it - an adjudicator, a quick, simple adjudication. It involves a final determination which if not appealed - usually a very short appeal period is open - then you can take that away and register it as a judgment in a court and collect your money. From our point of view that's very effective, as we represent both builders and subcontractors, we see both sides of it.

There's no doubt at all that it resolves many of these disputes very, very quickly indeed. The only defect with it is that it doesn't apply to consumers. So if you're a builder or a contractor, for example, who's put up a pergola and you haven't been paid you can't take a homeowner through this process, you can only take another commercial person. We argued very strongly that it ought be even-handed, that it ought to be available to everybody, and if you're dealing directly with a consumer you should be able to have an adjudication against a consumer. That was explicitly rejected by New South Wales and Queensland governments at the time.

MR FITZGERALD: On what basis?

MR SIMPSON (HIA): I don't think it would be fair for me to say on what basis because it was simply a government decision. I spoke personally to Judy Spencer who was then a Queensland minister and she expressed some personal views that it would be distressing for little old ladies living in Paddington to have these legal documents appear in the mail requiring them to adjudication when all they've done is to have a dispute about whether their pergola was straight or not. I think it was a populous measure, if I could put it that way.

MR FITZGERALD: In that arrangement who pays the costs of the adjudication?

MR SIMPSON (HIA): The person who goes to the adjudicator.

MR FITZGERALD: Who initiates it.

MR SIMPSON (HIA): Anybody can initiate it.

MR FITZGERALD: No, but - - -

MR SIMPSON (HIA): Either the builder or the subcontractor.

MR FITZGERALD: - - - the initiator - - -

MR SIMPSON (HIA): Has to pay, yes.

MR FITZGERALD: Irrespective of the adjudication?

MR SIMPSON (HIA): Irrespective of the adjudication. But the fees are not high, they're a couple of hundred dollars for a quick adjudication.

MR CHAMBERLAIN (HIA): In our scheme there has to be some sort of fee paid just to prevent the whole "having a dispute, having a dispute, having a dispute".

MR SIMPSON (HIA): If you go to Small Claims you'll have to pay a fee to get on.

MR CHAMBERLAIN (HIA): A similar good model is the mediation process in Victoria under the Small Business Commissioner. I think it's about $50 per person for the mediation, so per party, which is just enough to make you - it just prevents you from - - -

MR FITZGERALD: But if there's a shortfall in either the adjudication scheme under the subcontractor or the small business arrangements, I presume the governments pick up the tab because they're both government schemes?

MR SIMPSON (HIA): Well, they're both legislated schemes - I'm sorry, I don't know about the Victorian Small Business Commissioner.

MR CHAMBERLAIN (HIA): Yes, there's government subsidies.

MR SIMPSON (HIA): Under the security of payment legislation in all states it's a government scheme but the adjudicators are nominated by industry parties. They are in business as adjudicators - - -

MR FITZGERALD: Sure, but the overall cost of the scheme - - -

MR SIMPSON (HIA): If they don't get paid, they don't get paid. The overall cost of the scheme is the serving of the payment claims which the parties meet; the adjudication which the parties pay for, and if they don't pay for it the adjudicator doesn't release their decision; and the enforcement of that decision which is back in the courts. So there is no cost to the government.

MR FITZGERALD: Right.

MR WEICKHARDT: In this process if the person who is ruled should pay, fails to

pay, becomes insolvent, there's no back-up warranty or anything like that?

MR SIMPSON (HIA): Well, not as between a builder and a subcontractor, no, there isn't. You would have seen in recent times in the newspaper the number of building companies in various states have gone into liquidation and then your subcontractors will be unpaid. That brings in the GEERS approach and various other issues about securing payment for workers.

MR CHAMBERLAIN (HIA): There is insurance subbies can take out to cover that risk if they so wish. Whether they do or not - - -

MR SIMPSON (HIA): It is expensive and I don't think it's widely used.

MR WEICKHARDT: In terms of the whole concept - I mean you talked about the fact that you quite liked some of the directions the Tasmanian government have gone in, which is to make it voluntary, and if this insurance is genuinely of value to the industry and consumers in particular, you'd expect that if it were voluntary, people would be happy to pay.

I guess any scheme that is compulsory people feel genuinely, I guess, aggrieved that they are forced to pay something. But there are a lot of people who would believe that the current insurance is very expensive for the risks you're insured against. I think at the first round of hearings we had people say that the actuarial value of this insurance is way below the current premiums. There were various assertions that agents, HIA among them, rake out huge commissions out of this and that's the reason it's expensive. Can you comment on any or all of that, please?

MR CHAMBERLAIN (HIA): The point of view in New South Wales, for instance, competition is driving the average overall premium down. It's on a downward trend, so in terms of what you're arguing about the issue is, is it overpriced in the sense that obviously people make a profit out of it otherwise we wouldn't be in the business? Is it overpriced that in New South Wales the insurers are bound by legislation to give over the information about their premiums and their operations? So that's being monitored. There's no evidence that there's any rorting of that particular system. As I said, competition is bringing it down. In contrast, in Queensland where it's a state-run scheme premiums are going up and they're now almost 30 per cent higher than in New South Wales.

MR SIMPSON (HIA): It ought to be observed that HIA is neither an insurer nor a broker. HIA has in the past entered into commercial relationships with particular insurers and particular brokers but we're not in any sense associated with a monopoly supplier. The problems that have arisen have arisen because of the collapse, if I may say so, of HIH Insurance Services. The scheme that was operating before the collapse of HIH drew no complaints from none of the individuals who gave evidence

at earlier hearings, the Builders Collective of Australia, in particular. The only thing that changed to give rise to these complaints was the collapse of HIH and therefore the disappearance of competition from the market. HIA has done its best to get competition back into the market.

It was a matter of perhaps not just coincidence but a matter of happenstance that the insurer who collapsed, HIH, had a commercial arrangement with the Master Builders Association. Had the insurer who had an arrangement with HIA collapsed then we would have been in the position of having a single monopoly insurer with whom we had no commercial arrangement. It was, as I say, purely happenstance that it worked that way. But because there was only one insurer in the market we've copped a lot of flak, particularly from the Builders Collective, which to my mind is completely unjustified.

MR WEICKHARDT: You say you're neither an insurer nor a broker, but do you receive any form of commissions - - -

MR SIMPSON (HIA): We receive licence fees for the use of our name. That's what we receive.

MR WEICKHARDT: So that's the only benefit you gain from - - -

MR CHAMBERLAIN (HIA): There's a joint venture entity called HIA Insurance Services that offers a whole range of insurance relating to the housing industry, including a trade contractor's package et cetera, tailored products.

MR WEICKHARDT: That's a subsidiary of HIA?

MR SIMPSON (HIA): No, it's a separate company.

MR CHAMBERLAIN (HIA): No, no, it's separate.

MR SIMPSON (HIA): We're a minority interest in that company.

MR WEICKHARDT: You have a minority shareholding?

MR SIMPSON (HIA): Yes, well, we certainly have a minority directorship. I think it might be a company limited. I don't know. If I might just make a mention as someone who has given evidence on this issue before. In a hearing before a senate committee in Brisbane some years ago I was ambushed by a question about insurance. At the time I knew very little about it and I did say that HIA received licence fees. That wasn't really strictly true - sorry, I think I said we received commissions, and that wasn't true, we received licence fees. But it has been a bit of a movable feast because we set up a joint venture but that only came into operation -

last year or the year before?

MR CHAMBERLAIN (HIA): I'm not sure.

MR SIMPSON (HIA): So when a lot of this was happening there was no such entity. so things do change. But my understanding is that HIA's commercial interest in this is simply that we are the holder of a trade mark and we licence that trade mark. Now, the people to whom we licence that trade mark are not the sole source of supply, they're in competition with other insurers and the competitive rates in those states where competition does apply, is less than those states - or that state, Queensland - where there is no competition.

MR POTTS: What proportion of your members take up insurance through this particular company?

MR CHAMBERLAIN (HIA): Don't know.

MR SIMPSON (HIA): I couldn't say.

MR FITZGERALD: I mean you would not be surprised, given that this is a running sore, that the view of participants to this and other inquiries has been that both HIA and the Master Builders Association of Australia are conflicted in their positions in relation to this product. Both of you own or your member organisations own the insurance service companies, Master Builders Insurance Services or HIA Insurance Services. So part of your revenue streams, either yourself or your state associations, are received through the sale of this particular product.

Now, in a sense that clearly indicates to the world outside that they are aggrieved that both peak bodies are in a compromised position. You undoubtedly would say that's not so but there is that sort of element around this as well. So you've got the issue as to whether or not the product itself delivers what people think it does, and clearly there's a misunderstanding. Then they've got the two peak bodies that have an indirect or direct interest in the sale of that particular product, so you've got all the components for unhappiness, and that's been so in just about every inquiry in this area. We raised the same sort of issues this morning with the Master Builders Association but you might want to comment.

MR CHAMBERLAIN (HIA): We understand the running sore about - for the record, our formal policy is that homeowners warranty insurance should be voluntary. We don't like compulsory. That's why we support the position in Tasmania. Having gone to voluntary though they've realised that they need to revamp some of their other mechanisms in order - because when this homeowners warranty first came out was simply about bankruptcy - - -

MR FITZGERALD: Yes.

MR CHAMBERLAIN (HIA): - - - because builders would go broke, that was it, "Fantastic, here's a product, it's voluntary, it will cover you if your builder went bankrupt." Now, regulators said, "That's fantastic. Let's load it up with other things and other things," and suddenly, "Let's make it compulsory. Let's make it a thing you've got to have in order to get a licence."

MR FITZGERALD: Increase the premium for it.

MR CHAMBERLAIN (HIA): But now it's bearing the burden for the whole system. That's not our desire. But if we come back to it our efforts are around trying to revamp that policy as it now stands. Now, whether it offers value for money or not, in a competitive market the price is what the price is for the risk that it is. If you took the current product and made it first resort, the price would be astronomical. It would have to be because it's covering a whole new range of risk.

If you want to revamp it you've got to bring the trigger forward, you can't have it based on bankruptcy. We understand that. But that's only because they are now seeking for it to be the protection against defective work. Instead of defective work being managed by on-site inspections and that sort of thing, and withholding of payment, it's now managing statutory warranties that apply not only to the current purchaser who may even think, "That's fine. I'm happy with that," then future purchasers can come in and say, "I'm not happy with that. That's a defect. I'm going to sue you on your insurance." So there's this added issue. If you want to revamp it you bring the trigger forward. The earliest point in time we could bring the trigger forward and still have insurers interested in offering a product is if the builder's licence is cancelled.

MR FITZGERALD: The licence would be cancelled largely because of - well, not exclusively but largely because there could have been defective work which hasn't been rectified over a period of time, would be one of the causes for de-licensing, together with any other number of reasons there might be?

MR CHAMBERLAIN (HIA): That's right. So two types of disputes: contractual, factual. Contractual, "You've misled me. You haven't met the contract." You have to take that to a court. Factual, "This is a defect. I'm not paying you." We think those disputes can be resolved very quickly. We think your failure as a builder to address defective work - we can tie that to a more rigorous termination of your licence. We think that's an appropriate form of regulation. So your licence is granted on the basis that you meet minimum education, and now I think we're stuck with having some sort of capitalised requirement, that the builder is reasonably capitalised. That's a reasonably wide funnel, but a rigorous sieve that if you demonstrably fail, despite your education and despite your capital, to discharge your

duties to the consumer then you do lose your licence. We have been opposed to licensing for many years.

At the end of the day what makes a licence worth anything is the rigorous enforcement of its conditions. If you're not going to rigorously enforce, for instance, this Real Property group collapse in Queensland, the guy's licence was suspended and not terminated. He was required to finish existing work and was told he couldn't take on new work. He took on new work, got deposits for contracts when he was suspended. That's enforcement, that's not anything else.

So there are other ways of managing this risk. What we're saying is we think that overall that product, if you're going to require insurance we can come up with a system that will resolve these issues and still allow the insurance to bear some of the additional burden that regulators are asking it to bear, which is around defective work, not just bankruptcy.

MR FITZGERALD: Even in your scenario, if you bring the trigger forward to when a builder loses its licence, it doesn't actually pick up defective work any more than the current system does, does it?

MR CHAMBERLAIN (HIA): We say it would pick up the defective work because the licence has been cancelled and so the guy can't come back to finish the defective work and so the insurance would cover it.

MR FITZGERALD: I see what you're saying.

MR CHAMBERLAIN (HIA): What the insurers won't do is insure somebody simply because they've been alleged to have done defective work. If it's only alleged then the insurers are going to say, "Well, prove it," which means a court process, which means on your home that's when the value starts to decline. So some sort of dispute process that is days, not weeks or months, and is reasonably effective would address a lot of these issues. We've set out what we think are the criteria for that kind of mechanism to actually work. Again, from the insurer's perspective, if it's too much of just a creature of a Consumers Affairs department, the insurers will factor in a risk premium on the basis that there will be defect creep, if I can put it in that sense. Already our members report instances of the consumer complaints about two defects - particularly in Queensland - the BSA would come out and have a look at the two defects and say, "That's also a defect, that's also a defect, and you probably didn't realise that's also a defect too. So you'd better fix those two defects otherwise we'll do you for the whole lot." We need to avoid that kind of outcome.

MR FITZGERALD: Can I just ask one question before asking Gary and Philip. You say in your submission that you don't want it overseen by Consumer Affairs - this is the dispute resolution - but would it not be logical that it is overseen by the

authority in each state that is the licensing authority for the builders, building commission or equivalent.

MR CHAMBERLAIN (HIA): It should be. Our overall point is that a lot of this regulation is not about the consumer licensing and the building industry is protecting the industry, consumers, the community, and the industry from the consequences of shonky work. The basis for that is you're protecting not just the current consumer, but future purchasers. You're protecting not just the person that is taking out the contract, but the family who lives in it. You're protecting not just the consumer, but the reputation of the other licence-holders who are doing good work and don't want their name dragged through the mud.

MR POTTS: Just points of clarification on how the existing scheme operates: just in reading your submission and listening to you now, I just want to make clear that the existing warranty insurance scheme only applies when the builder either becomes insolvent, bankrupt, or dies. That's the case, is it? There's not any other way in which defective work can be covered under a policy?

MR CHAMBERLAIN (HIA): No, it used to only ever be about bankruptcy or liquidation. That's all it used to cover, then because we had some significant - it started in South Australia and made its way to ACT - voluntary scheme.

MR WEICKHARDT: Sorry, can you just explain, it used to be about bankruptcy but, what, in connection with the builder completing the job, or in connection with the builder remedying a defect in the job?

MR CHAMBERLAIN (HIA): Both, so completion of the contract. So if there's defective work, you haven't completed the contract basically.

MR POTTS: So how is it different now then? It's still bankruptcy?

MR CHAMBERLAIN (HIA): It's still bankruptcy. All it is at the end of the day is the insurers require that consumers go through the process of enforcing their contractual rights before they will hand over the money for insurance. So I get an order, I have to enforce that order, if you don't do it I'll have to pursue the builder to the grave.

MR SIMPSON (HIA): Because it's not insurance against defects, it's insurance against the builder failing to meet their obligations for one reason or another. Either they can't be found, they're dead, they're not in a position to do it because the company is in liquidation.

MR CHAMBERLAIN (HIA): You end up with a moral hazard where I don't have to finish that work because you can get an insurer to come in and do it. You can end

up with moral hazard where you get underquoting of work.

MR POTTS: So it would have to go through a court process.

MR SIMPSON (HIA): Or a tribunal. In New South Wales you've got the CTTT, Consumer, Trader and Tenancy Tribunal which can make orders. The insurers are setting premiums on the basis of the solvency of the builder, not on the basis of their workmanship. This was a very big cause of complaint when a few years ago insurance became more expensive and harder to get, because a lot of small builders among our members could not get policies of builders warranty insurance, even though they had never had any sort of action against them for failure to remedy defects. It was simply that they didn't have the financial information about their company that the insurers wanted. So the insurers didn't care what sort of work they did. All they were worried about was: are they a sound company, do they have capital back to any liabilities that they may have imposed on them by this other part of the system, the judicial part of the system, which insurers really weren't concerned about. That was one of the prime drivers of the complaints from the building industry about the builders warranty insurance system, which you've heard on earlier occasions.

MR POTTS: So the scheme in a way is a sort of a builders financial warranty.

MR SIMPSON (HIA): That's all it is.

MR CHAMBERLAIN (HIA): That's what builders warranty insurance means, you're warranting that the builder will exist.

MR SIMPSON (HIA): You're warranting the builder, not the building work.

MR POTTS: Just again some facts: can you help us at all in giving us some information on what the scale of the issue is. We've heard a lot about builders warranty insurance but we don't have much of a feel for how significant it is in terms of the number of claims that are made vis-a-vis the number of building episodes that there are, if you like.

MR CHAMBERLAIN (HIA): In terms of the percentage of actual claims against, I don't have the figures with me or off the top of my head, but we can provide them I think.

MR POTTS: If you could give us some information it would be useful so we can put it in perspective.

MR CHAMBERLAIN (HIA): In respect of New South Wales they're actually probably available from the - - -

MR SIMPSON (HIA): It's fair to say that it's not a large percentage by value of the work that's done in the industry every year, but for the individuals concerned they're catastrophic.

MR CHAMBERLAIN (HIA): The other issue is when there does tend to be a claim, sometimes it can be large. You can go for years with nothing and then you have a major builder go under. This happened a couple of times I understand in Victoria and such a large claim that you end up with a specified new levy on top of the existing insurance to cover it, so it can be lumpy in that sense.

MR WEICKHARDT: Can you clarify why the claim in those circumstances is high, because you were making the point before that the payment by the customer is typically in arrears of the work the builder has done. So if the builder dies, or becomes insolvent halfway through the project, if a deposit has been taken and nothing has happened then you've lost your deposit, but the deposit is limited in terms of size.

MR CHAMBERLAIN (HIA): It can be for two reasons. One is simply the size of the builder, so there are just that many other sites that are ongoing and, secondly, builders that go bankrupt tend to be builders that have underquoted for the work and so the work that you've got to go through. So the consumer is only paying for this amount, but the insurer has to fund a percentage higher than that in order to get the work finished.

MR SIMPSON (HIA): It's always more expensive to restart building work. Just to take an example, the current problems in Queensland where the BSA estimates they will be out of pocket about $11 million on restarting all these sites, all the sites were closed down. The contracts and the subcontracts will all fall away. So new subcontracts will have to be let for some of the work. Typically, in some cases, the work is in advance of the payments; in other cases it's in arrears. It will vary but it will always be more expensive to sign a new contract today rather than the contract that was signed last year which was going to be an in globo amount for the whole process.

MR FITZGERALD: Can I switchers to the builders' side. We have a representation earlier this week that there's been a significant number of builders who were not able to obtain home builders warranty insurance and still can't. The figure was quoted at 20,000 or so. But without worrying about the actual number, to what extent is that problem still an existing and current problem in the industry? I presume many of those people were members of your association or may still be. There was a huge outcry when HIH went down, but still five years on - or whatever number of years on - there's seems to be significant concern about what's happened to those builders.

MR SIMPSON (HIA): The concern is not so much that you can't get any insurance but you can only get a limited amount of insurance and only for limited value projects. You can't take on more than this amount, and that relates to the proportion of the value of your work as compared to your financial resources. A lot of builders are not comfortable with being told that they cannot expand their business by an insurance company, but that's the net effect.

HIA has been doing its best to get more competition into the market on the basis that the more competition there is, the lower the premiums and the more relaxation there will be. We've also been working directly with insurers to try and get a light touch assessment process, so that rather than having put your financials in and then wait, you can simply - if you fall into certain defined categories you can automatically get insurance. But, yes, it is still irksome to be dependent - - -

MR WEICKHARDT: Can you just explain, while you're on that point, who does the insolvency testing?

MR SIMPSON (HIA): The insurers.

MR WEICKHARDT: The insurers. HIA aren't involved in that?

MR SIMPSON (HIA): They're not, no. I explained before, we do not have any direct involvement. We have minority control of the joint venture company, but the day-to-day operation of that is as an insurance broker, and that insurance broker buys insurance, whichever insurance company can be supplied most cheaply. It's the insurance company that actually does the assessment.

MR WEICKHARDT: They do it independently. They don't sort of pool their resources to use an external - - -

MR SIMPSON (HIA): No, they've all got their own indicators.

MR CHAMBERLAIN (HIA): They've all got their own view. The better they can assess that risk, the better off - - -

MR SIMPSON (HIA): The more data they have - - -

MR CHAMBERLAIN (HIA): Then they will have their own different views of what is the - I mean, this capitalisation, this is another area where, from the context of your review, it's all about consumer protection. So the reason why insurers are insisting on capitalisation requirements is to manage their risk and the consumers' risk. Ours is an industry made up of small operators. If you start imposing - they can't charge a certain amount for deposit; they are always paying for materials;

they're always paying for contractors before they get the money from the consumer. The consumer always has the option to say, "I'm not paying you because that's a defect and you can go whistle. Sue me, that's fine." A lot more work needs to be done to understand the capital structure of the industry: is it properly capitalised; what are the profit margins that builders are factoring in when they're doing their estimating and their charging - all that sort of stuff.

The capital requirements of insurers, therefore, are all risk management, and it's a risk management insurers use in order that they can offer a product, homeowners warranty insurance, that doesn't protect the builder, it protects the consumer. If the capital requirements are reduced, the cost of that product goes up because the risk is there. If there's reasonable competition and the price of that risk is fair then you have to start asking, is that a risk that needs to be insured against in the first place. Assuming the markets are competitive - and we think now that we're back to that stage - then it offers value for money. That is the commercial price of that risk. If you're complaining about that you need to unpackage that risk and try and manage it in different and better ways.

If you're worried about too many small builders who are undercapitalised, who are running off the seat of their pants, if you're worried about the fact that they can't enter the market then you need to revamp your product and your risk and try and manage differently. At the moment we're simply saying, from a market point of view, undercapitalised builders are a risk to the consumer and we don't want to take that on, and the regulators by saying it's a compulsory insurance, you can't do it, you can't enter the market.

Now, Tassie, they've gone through a different process, it will be voluntary. Our policy is for voluntary insurance. There's a good reason in Tassie, the prices there are much higher than they are on the mainland for whatever reason.

MR SIMPSON (HIA): Something that HIA did do was to negotiate a discount for its members from at least one insurer on the basis that HIA members have to pass a fitness test to get into the association and once in they have to comply with an expressly stated code of conduct. We took the view that our members were a bit better than the average of the industry and we were able to persuade an insurer on the basis of hard financial information that that was actually true. We were able to get something for our members. Again that then turned into a source of complaint against us because people were saying, "Well, you have to be a member of HIA in order to get insurance," which was certainly not true. You had to be a member of HIA to get this particular discount, but MBA went off and rearranged discounts with another insurer when they came into the market.

That has more or less evened out now and I would have thought there would be very little competitive advantage, very little discounting going on in that area. We

haven't simply just taken the market and said, "Well, it's a market problem, the market will sort it out," we have actively intervened, both to persuade insurers to enter the market and to persuade insurers that our membership - and MBA has done the same - is a better risk. But from the insurance point of view it's risk management.

MR WEICKHARDT: Can I go to the issue you raised about licensing and de-licensing of builders. I guess it will vary in each state so give me, say, Victoria or New South Wales, but what does a builder have to do to get licensed and de-licensed and how many do get de-licensed at the moment?

MR CHAMBERLAIN (HIA): I'm not aware of how many get de-licensed. There's an argument at the moment about whether it's builders or trade contractors who should also be licensed. In New South Wales, in many cases, the contractor has to be licensed as well as the builder.

MR SIMPSON (HIA): Queensland is talking about licensing supervisors who have no direct contact with the public. But assuming you're just talking about builders you've got a competency standard, they must have actually had some qualifications in the technical side of building; they must be of good fame and character; they must have adequate financial resources to enable them to meet their obligations under the act. De-licensing - I'm not too sure how other states operate but I live in Queensland, and the Queensland system is that you have points dinged off your licence, very much like a driving licence, and it's actually enforced through the same mechanism. If the Building Services Authority thinks you've breached one of their requirements they'll ding you two points and fine you, and if you don't pay the fine then you lose your licence. It's a very effective enforcement mechanism.

MR WEICKHARDT: Do you think that's a good model?

MR SIMPSON (HIA): I think that's an effective enforcement mechanism for every state penalty. If you don't pay your judgment against you in a Small Claims Court you'll lose your driving licence. That's just a standard enforcement mechanism. I don't want to comment on enforcement mechanisms but the idea of a points system where you have 20 points and you will lose points for minor infractions, and then every 1 January you get a few back, is a good way to manage an industry disciplinary system, we think.

MR CHAMBERLAIN (HIA): There is that problem of licensing, you're dealing with someone's livelihood, so you've got your various legal requirements to overcome which is again what we paid attention to in trying to come up with a disputes mechanism that would bring forward - in the context of this it's all about trying to find a way to make homeowners warranty insurance trigger earlier than bankruptcy, without making the product unaffordable and leading to moral hazards.

MR SIMPSON (HIA): So if you fail to comply with an order of the Consumer, Trader and Tenancy Tribunal in New South Wales then the first thing that will happen is your licence will be suspended and then it will be vacated. But it's really up to the builder to decide. If they want to keep their licence they have to pay.

MR POTTS: I mean, the points system is not just a matter of having a disciplinary system, but actually having a system that in some way grades accreditation for builders so that the consumer knows when they're selecting a builder, what the builder's record is, because at the moment you're either licensed or you're not licensed. There's nothing else.

MR SIMPSON (HIA): That's true - well, not quite true, because those penalties are in fact available on the Department of Fair Trading web site in New South Wales.

MR POTTS: But there must be a whole lot of builders who have never been penalised.

MR SIMPSON (HIA): Yes, that's true.

MR POTTS: So what you're interested in doing is trying to get consumers to make the right decisions at the beginning because if you make the right decisions at the beginning you avoid these problems down the track.

MR CHAMBERLAIN (HIA): There is - - -

MR SIMPSON (HIA): Well, with respect though, that's not really true. Can I just mention that one. Without wishing to go too far into particular cases we've just seen an enormous amount of inclement weather in Australia. This has had a terrible effect on builders' cash flows. If we'd had a dry summer many builders would be just fine. We've had a very wet summer, they haven't been able to do their work, they've got an overhead, their companies have been very severely affected. Now, it's not a matter of when you signed your building contract back last October or choosing the right builder, you should have chosen the right weather.

MR WEICKHARDT: Yes.

MR SIMPSON (HIA): You can't in advance know that a builder is going to go into liquidation and another one isn't. It's in many cases a much more complicated process. It has many outside factors. It's not just a case of builders being undercapitalised and taking on too much work and doing poor quality work.

MR WEICKHARDT: Sure. But if a builder has got form in doing, you know, sort of repetitive poor quality work then the consumer gains benefit by knowing that in

advance.

MR SIMPSON (HIA): We kick them out of our association.

MR POTTS: Yes, but I mean the reality is the careful consumer with a contract in the hundreds of thousands will research the builders fairly carefully.

MR SIMPSON (HIA): Yes.

MR POTTS: But obviously there's another group of consumers who don't, despite the fact that - - -

MR CHAMBERLAIN (HIA): There is this problem, you know, you've got two quotes, one is for 400,000, the other is for 200,000. You think, "Fantastic, I'll get the $400,000 price for 200,000" without asking and not wonder why you got that. So there's issues there. The other issue with points - we've kicked around internally the concept of points systems and that sort of thing. There is the problem that builders are all different: some build three times a year, some build 300. So how are you going to work your points system if you're going to get a larger percentage of complaints. If there is a complaint what does it matter if it has been addressed? The real issue is that you've got a dispute, you've been told this is defective work and for some unknown reason you have refused or failed to rectify that work. We think that is a reasonably good process for saying, "Hey, maybe you shouldn't be in this industry."

So the idea isn't to have information but let the consumer know - I mean you'd be worried if the regulator was keeping information that said, "This builder has got 10 - the last 10 contracts the consumer complained about the quality of the work," and the bloke is still licensed. That's not what you want. You want it flushed out but you want a reward system for having met the consumers' expectations.

MR FITZGERALD: All right. I think we're about out of time. Are there any final comments or questions? One of the things that we raised with the Master Builders this morning is the development of a national review in this area as distinct from the multitude of small jurisdictional reviews in order to try to deal with some of the issues you've raised, I suppose, that is, not just the insurance itself but the interrelationship between the whole consumer transaction. Now, there have been a myriad of reviews but most of them seem to be jurisdictionally based. The Master Builders Association this morning were supportive of a national review. I'm sure that would depend on the terms of reference and who did it but those things aside I just throw that on the table for your comment.

MR SIMPSON (HIA): The review in 2004 was done by Victoria and New South Wales. There were two reviews but they had a great deal of interrelationship, so that

was, in many ways, one review. They were the two largest states. They did the vast majority of building work and they wrote the vast majority of insurance polices in those states. I do make the point that we've had already a fairly well coordinated review of a majority of value written - in terms of insurance, of the industry.

MR CHAMBERLAIN (HIA): But your question was not just about insurance but about the industry as a whole?

MR FITZGERALD: Not the industry as a whole. Sorry, it's about that continuum between defective work through to the last-resort insurance, not more broadly.

MR CHAMBERLAIN (HIA): Some sort of national review of this policy, I suppose, I think we would welcome in the sense that all states are progressively reviewing, in terms of their legislation in this area. We think that there is a need to do it in a much more comprehensive way, not revamp homeowners warranty, not revamp licensing, but see it as a whole.

MR SIMPSON (HIA): It needs to also look at the ability of licensees to work in other states. You can still have a silo mentality. If you're licensed in New South Wales you can't do building work in Wodonga. You can try and get a licence there but the licence classes don't line up and in spite of a COAG commitment to fix that, it hasn't been fixed.

MR CHAMBERLAIN (HIA): Then again, it's not just the licensing, it's the regulation, the obligations that go with the licence - - -

MR FITZGERALD: The classes of licence - - -

MR CHAMBERLAIN (HIA): - - - the statutory warranties - - -

MR FITZGERALD: Yes.

MR CHAMBERLAIN (HIA): - - - and whatever else. So there's definitely a need to have a look at it. My experience with this is that it's quite - we're a national organisation, we're not a series of state based organisations. So our policy positions have to coalesce a whole Australia view. We are currently undertaking that in this policy's face, that's my job. I have that wonderful task. The issue with that is the state based differences. It is surprising, the state based differences, and it is surprising some of the integrity in the arguments for some of those differences.

MR FITZGERALD: Sure. Well, I think the learning we have from the NCP reviews is that whilst a whole lot of licensing areas were in fact reviewed by the individual states in a number of areas the outcomes of those reviews were so divergent and what was really missing was a national review; only in some areas, not

all areas, but just in some areas, but this one may lend itself to that. Anyway, you would be generally supportive, but I'm sure that's - - -

MR CHAMBERLAIN (HIA): Very much so.

MR FITZGERALD: Wait and see what we say. All right, well, thank you very much for that. I appreciate your participation. We might break for just about five or so minutes because our next participants are here. I think that's the last for the day. So we'll just have a five-minute break and then resume.

MR FITZGERALD: Right. Welcome. Philip will have to leave just after - - -

MR WEICKHARDT: I've just explained all that.

MR FITZGERALD: You've done all that?

MR WEICKHARDT: Yes.

MR FITZGERALD: Good. I don't have to do any of that. Okay, if you give your full names and any organisations you represent and then just give us the key points of the submission and we can have a discussion about that.

MR BROWN (FEMG): Well, my full name is Robin Michael Gwyn Brown and Foundation for Effective Markets and Governance. It is a little bit complicated because I want to speak to a submission that I don't think you've got yet but it's a joint consumer group submission that FEMG participated in.

MR McAULEY (FEMG): Ian Alexander McAuley. University of Canberra but at this stage also part of the FEMG delegation but not the other.

MR FITZGERALD: Yes.

MR WOOD (FEMG): John Thompson Dalrymple Wood, FEMG.

MR FITZGERALD: Okay. If you'd like to just give us an opening comment that would be terrific.

MR BROWN (FEMG): First of all, I don't think you've got this submission yet. This is a submission that came about - I convened a meeting of a bunch of consumer organisations, sort of leading consumer organisations, and consumer policy workers in January. This submission is the result of that. If you haven't got it it's on its way but I want to make reference to it in a couple of points, but you have the FEMG submission?

MR FITZGERALD: We do.

MR BROWN (FEMG): Ian will talk, I think, to some points in the FEMG submission and John is going to follow up with a couple of points at the end that relate to some of the things in this other submission. First of all, I think there's a general view around the consumer movement and people working on consumer policy that there's a fantastic amount of very impressive work that the commission has achieved, so there's a lot to work on. I'd just like to open by saying that certainly in my view there are five things that you need to think about, five categories of things. You deal extensively with issues of market failure. You deal with issues

about making consumers able to make markets work for them and you deal with issues to do with making markets work better for consumers. I think more attention perhaps needs to be given to issues of consumption of public services, both those delivered directly and those contracted by the public sector.

I was talking to Alan Asher - and I think you'll get a submission which will touch on this - and perhaps there's not quite enough emphasis in your thinking on the point that a lot of consumer policy is not so much about fixing market failures and things like that, but it's actually about dealing with crooks, dealing with people who are thieving consumers' money. I think maybe a bit more emphasis on that could be useful.

I think also I raised at the initial hearings the issue of the breadth of consumer policy - Ian is going to talk about a couple of aspects of that - and the need for an agency with an unlimited remit to deal with a full range of consumer issues. I illustrate that with the issue of therapeutic goods - in my view and the view of many of my colleagues - the inadequacy of administration of consumer protection in that area over the last decade or so. I think in part it's to do with a sort of triage problem that the Therapeutic Goods Administration has, matters that are life-threatening; matters that are limb or health threatening, and matters that are pocket threatening. I think understandably they have a priority placed on life-threatening matters, and the other two - certainly the pocket threatening matters - don't get adequate attention.

They need to be, I guess, pushed by a consumer agency with a broad remit to tackle some of those other issues that aren't getting tackled within, of course, the limits of resources. The pocket issues, when it comes to therapeutic goods, are not insignificant. The growth in the market for complementary medicines over the last decade has been huge and I certainly - and many of my colleagues - doubt that that actually reflects a need for all of those products, but rather some exploitation of consumers.

I want to refer to the issue of vulnerable consumers in this context. You've got a good discussion of vulnerable consumers but you don't mention consumers that are vulnerable because of maybe certain health kinds of conditions, particularly those that they may consider to be embarrassing health conditions. I'd certainly like to see some reference to that. I'd also make the point there that those sorts of consumers simply can't be relied upon to bring issues to agencies by way of complaints because of their vulnerability or because maybe of embarrassment and so on. I could give you specific examples that I've come across in various bodies that I've been involved with but I won't at this point.

There is the need for a proactive agency that can go out and hunt down those sorts of problems and deal with them, and certainly in my experience, state agencies haven't done that job quite adequately. The ACCC hasn't done that job quite

adequately. It sees some of these issues as being not of sufficient national importance. But if you add up the cost to consumers generally I say that they may well be of some significance.

I mentioned in my original submission that perhaps a solution with the ACCC is the appointment of a special commissioner with special powers in relation to Part V of the act. In our FEMG submission we do give a note of caution in relation to a wholesale shift of the function to the federal arena in terms of getting resources on the ground, markets on the ground, around the country to deal with consumer issues. I just want to very briefly mention that there's a significant international aspect to consumer policy and I don't think you've got a reference to that - I haven't found it - you may have. If we're not as a nation involved in international processes we're going to continue to be very much a rule-taker, for example, Codex Alimentarius is the national body that sets rules for food standards. Australia's participation in that body has been pretty limited over recent times and very limited in terms of the capacity of consumer organisations to participate in its activities.

Those meetings always have masses of industry people at them as part of national delegations or hanging onto national delegations. As I say, we're going to continue to be rule-takers which may be to the detriment of our consumers but maybe to our economic detriment in other aspects too. It's very much an international activity that we need to be involved in more as a nation. We need to be, in my view, more involved in technical assistance, particularly in our region, in consumer policy issues - there are self-interest reasons for that - consumer empowerment in countries in our region.

There's a reference in the draft report to a comment from Laurie Malone on page 223 that consumer groups were in part taken over by zealots and that's what led to the withdrawal of the funding of AFCO. I can't really let that go. I was director of AFCO for a few years. I wasn't the director of the organisation when it ceased to be funded by the federal government but I would criticise that comment. I mean, there may have been a bit of a shift of emphasis on some issues but I really don't think AFCO, as it then was - its name changed to the Consumers Federation - could be characterised as an organisation of zealots. I think that's off the mark. In part maybe that's a reference to a shift in emphasis from economic issues to some other sorts of consumer protection issues, but I think elsewhere you have had the mistake corrected that the consumer movement, and AFCO included, was not active in relation to economic issues like tariff protection. I just use that as an illustration.

Now, maybe the biggest issue is the question of the need for a national consumer council. You have run the discussion of that together with the issue of funding consumer organisations and I think that's wrongly headed. They are two different things. I won't go into great detail because part of my contribution to this submission that you're getting deals with this, but a statutory body similar to the UK

body just does different things from consumer advocacy organisations. It does that balancing of consumer and producer interests. That balancing has to be done somewhere. You point to that, that the balancing has to be done somewhere. Maybe it's better that it be done in the Cabinet room on some issues but I suggest that a body of that nature can be useful in that process. A body of that nature would have consumer background people, consumer advocate people on it, but also business people and academics and so on.

Another key characteristic of that kind of body is that it would have powers to access information held within government that a funded consumer organisation wouldn't have, and it would have powers to have its advice considered in various policy formulation policies, so it plays as I said previously, an intrastate research and advocacy role, complementary to the extrastate role of the consumer movement.

You questioned whether the consumer movement's views would be crowded out by such a body. Provided that the consumer movement is adequately funded then I think that it is not the case. My experience when we had the National Consumer Affairs Advisory Council was that there was no crowding out of the consumer movement's views. Admittedly that was not a hugely funded body. I don't see that business views are crowded out by the existence and operations of the National Competition Council and I certainly see a national consumer council as a complementary body to the National Competition Council.

I just draw attention to, this submission talks about the adequacy of funding to the consumer movement but I won't go into the details of that. I think I will leave it there. Just one last thing: I am flattered that my diagram, my pyramid that I gave you, was in the discussion paper but you left out two important lines that go like so to indicate that consumers and consumer organisations, and business and business organisations are significant players in broadening the base of that pyramid and making the whole regulatory compliance process more effective. So if you could put in those lines in the final draft - - -

MR WEICKHARDT: They were consciously deleted.

MR FITZGERALD: They were deleted. This was a very big moment. We had to decide whether they'd stay or they'd go. You might be able to tell us why it's imperative they go back in, because they were in in the draft and they disappeared. But I don't want to take up time on other issues, but you might be able to explain.

MR BROWN (FEMG): I mean, there's the one addition that I actually made to this kind of diagram which has been around for a few years. I didn't originate this diagram. My big addition is these two lines and I really - - -

MR FITZGERALD: I think I'll put you in touch with the author of the chapter and

you can have a discussion with them. Thanks very much. Ian.

MR McAULEY (FEMG): Thank you, Robert, another zealot here. Just to assure you of course that the consumer movement has been an ally of the Productivity Commission because - and of the Tariff Board even - I certainly remember myself participating in inquiries on motor vehicles, textiles, clothing, footwear, those big inquiries and the consumer movement has always been on the side of liberalisation of markets, but also recognising the limited markets. It's been a very big inquiry and I appreciate that you had to put a boundary around it somewhere. Initially, I thought it was going to be simply about framework, but of course you have gone into quite substantial non-framework areas such as unfair contracts so I thought, well, if you're going there, there are probably about six economic issues that I thought the commission could at least flag even though most of them are far too large probably in the scope of a research project themselves. If I can just run through the six very quickly.

The first is price discrimination. What's been happening in consumer markets, particularly as you move from goods to services, is the scope for price discrimination has got much higher. Services are often individualised and therefore we do not shop in an emporium with posted prices so we can't assume the presence of market protecting agents. Also of course many goods and services - I suppose a classic example would be things like software, entertainment, travel - are produced in industries with very high fixed costs, low variable cost, which means almost inevitably those industries have to use price discrimination as a means to cover their fixed costs. The economics literature has championed Ramsay pricing for many years, not that that's necessarily a just or equitable situation, but that does lead to a couple of other points.

One is what I see in Australia and in some other countries, particularly the UK, an obsession with switching as a sign of healthy market. I agree if there's no switching the market is quite unhealthy. But in some of those industries, particularly when there's a regulator stopping any economic profit, switching can only be a zero sum gain. I do see this obsession, particularly coming after the ACCC, that we're all driving around town trying to find the cheapest gasoline and somehow the market is healthy. Ultimately I think we're just contributing to the traffic congestion and greenhouse. Switching is in many cases zero sum. I don't think there's enough acknowledgment of that fundamental change in the production function. I know that the economic detects do pick it up, but there's always the assumption that somehow there is a point where all consumers will be served at marginal cost. In reality in these industries some consumers will be served at marginal cost, some at more than marginal cost, and there are all sorts of cases where probably we think by some standard that price discrimination is fine, if I'm sitting at the back of the airplane and someone else is sitting up the front I think that's fine, but if I'm paying 30 per cent more for a Ford Falcon than the fleet buyer I think that's unjust. So I think there could be some examination of that.

Also of course in relation to complaints I think the commission says, "Look, most

complaints are handled very well within corporations," and that's fine. But what about the corporations who simply attend to the squeaky wheel and let others suffer in silence, because certainly what's been happening in banking is those who complain about unreasonable fees, "Oh, yes, of course, Mr McAuley, we'll sort that out for you very quickly," but the others who are less assertive, less able to stand up for their rights, still pay the higher fees.

The second point - and Robin has mentioned this - is consumer issues in health and education. I think what's been happening, to take a metaview over the years, issues such as tariff protection, retail price maintenance in goods, it was terribly important. What's happened over the years, the unit price of goods has fallen and competition policy has got a lot to commend itself for that. Quality of goods has risen and what we call hedonic property of goods has really converged, rich and poor alike. My Toyota Corolla and Robin's Mercedes 500 provide much the same hedonic qualities. We cannot say the same about health, education in particular, which are generally provided within the government. Their inequities have been growing. Choice has been constrained simply by people's lack of income and I think these are areas where the competition regulators have done a very good job in a narrow area, but I think we're getting to the point of diminishing returns and they really should be looking at these other areas and not saying, "Well, that's health policy, that's education policy, whereas we're concerned only with consumer policy." Health and education, as you would well know, are taking up more and more of consumers' budgets and there are important issues of equity there.

The third one is structurally corrupt markets where firms either out of their own attention or more often the action of intermediaries have an incentive to sell rather than to profit maximise. Institutional economics would say that profit maximisation is an economic assumption which provides a fairly robust macromodel, but there are certainly many, many industries - particularly in the financial services sector - which are not highly production constrained where the objective of growth maximisation to the benefit of particularly managerial elites can take over from profit maximisation. This leads to overselling in particular of things like insurance, superannuation - I know that goes against Paul Keating's view that we oversell superannuation. Certainly there is very heavy selling of financial products often because of the way in which agents - and of course within banks I know they're reforming the practices; even staff are remunerated on the basis of commissions.

Bundling of unrelated products, again very strange things are happening there in bundling. I noticed the ACCC on gasoline sort of said, "Well, bundling obviously isn't a cost. We can't trace these so we won't bother looking at them." But certainly it has its costs. I mean, sometimes bundling is fine if they're very closely related products. There might be economies in billing, for instance, in bundling utilities, gas and electricity, say, but bundling unrelated products - and I mean you can draw it up in a set of indifference terms but it certainly is a big distortion to consumer choice. I think there's a Chaser program where Chaser is going around with black pepper saying, "Do you want black

pepper with that?" and just about every purchase I make I get offered frequent flier points and I don't necessarily want to go anywhere, particularly not in Qantas.

Producer exploitation of consumer prices is the next point I raise. This is a very, very big question. I know the commission has been grappling with it for a long time and I congratulate the commission on having had the conference on behavioural economics. You will know that I have a personal association with the commission in this regard because you did contract me to look at or to brief you on behavioural biases and I did that job, which is one of the reasons I did not make a submission at the original inquiry.

I think the commission has fairly said, "Well, we don't quite know where all this is going," and certainly some of the laboratory studies are much easier to do than the studies in the real world of consumer behaviour, "but we are getting an accumulation of evidence particularly in the financial markets", and it isn't evidence based which extends what I would say is the axiomatic or assumption base of economics, that we will treat economic regulation and markets as if consumers are rational. Now, I'm not going to say that you say consumers are irrational but you say that was a reasonably robust model.

I think we are adding to that model. I won't go into the reasons for that. I would suggest that behavioural economics does give a fair bit of guidance as to when we may or may not use defaults, when we may or may not use cooling-off periods. I think it is worth mentioning, it's a difficult normative question, what happens in relation to behaviour which is misleading, as opposed to false conduct, which is much clearer. I know what is misleading to me is not necessarily misleading to you but I think there needs to be a lot more consideration about that: things like anchor point pricing, cash-back offers, exploitation of consumers' ignorance of statistics, of the expected value of insurance products et cetera. In fact, if you look at our levels of numeracy and literacy in Australia they're quite frightening. To what extent should the regulator be involved in that? I think this is an inquiry in its own right but I do think more weight should be given to - the commission has tended to be subject to what we might call its own confirmation bias.

Being an academic I know the confirmation bias rule, I practise it all the time. We fall in love with our pet hypothesis and go out and seek data, research which confirms our hypothesis and then publish that somewhere and get brownie points for it. Academics do it. I don't think the commission is exempt from it because I suspect the commission has had a starting point, "Perhaps behavioural economics isn't all that relevant," looked for the evidence. I'm not saying this is sloppy or anything else. I say we all get involved in that confirmation bias. But I think the whole field is much much more open.

Finally, I would say that something that needs looking at - and here you might

say I'm an old left-wing zealot. I'm very concerned that the benefits of privatisation, or I should say of competition, and in utilities that means - often when we start breaking up all vertically integrated monopolies or privatisation, and breaking up those monopolies and their component contestable bits - have been claimed but they have never really been tested. I don't know of any Australian study which says, "Here are all the costs - the transaction costs, the finance costs, the search costs, the regulatory costs of privatisation versus what would have happened if we haven't privatised. We would have lowered those costs. Okay, we might have still have some featherbedding," that's one of the costs you would compare it against - because one of the big things that has happened in consumer markets over the last 30 years or so - I can almost see this in demand-supply functions - our demand for shopping hasn't increased. In fact, we have more time pressure than ever, particularly with more people participating in the workforce, longer working hours, other commitments. Our demand has fallen. The supply of shopping opportunities has just risen tremendously.

I might get quite a lot of fun out of searching for a CD of the Grateful Dead or looking for new ski-wear or whatever. I will allocate my shopping time to that. I don't want to allocate that scarce shopping time looking around for the cheapest utility. That's a function, particularly for a fungible commodity where there's no product choice, which I might be quite happy to leave to an agent, and the agent I would want to appoint would be a responsible government. I think that needs examining ex-post because privatisation I see as having been a quick and dirty way of belting the unions around - which probably did deserve belting around - but was it the best path and should we perhaps be re-nationalising some of these utility industries?

MR FITZGERALD: Okay. John.

MR WOOD (FEMG): I'll be nowhere as deep as Ian's comments. I just wanted to touch on a couple of things. One was to acknowledge and recognise a very useful recommendation, draft recommendation 8.1 relating to post-sale consumer protection. I just wanted to add to that a suggestion that you might consider, one that came up back in 1990-1991 through the then standing consumer committee of consumer affairs ministers; that is that consumer organisations should be given power to take representative actions on behalf of consumers in this field, largely because very often the kind of the price of goods involved in these warranties, guarantees, transactions, are fairly small. This gives an opportunity but the number of items kind of involved can be quite large and it's the kind of area where if a consumer affairs agency is not interested in doing so - and they will make those decisions on other grounds, mainly about resources that are available to them - consumer organisations may well do so.

I recall a time when there was a particularly pernicious kind of one around

where if you bought a watch, particularly the kind of first battery-style watches, the warranty was said to cover the watch and its workings but not the case and the band; a most extraordinary kind of decision. It was totally contrary to the provisions of the Trade Practices Act but nobody knew it, including the suppliers, very often. That was an example where Choice did a bit of work in that area at the time; estimated the kind of potential loss to consumers, which was really quite considerable in that their only option really was to kind of throw the thing away if something went wrong with it.

Anyhow, in passing it gives me an opportunity to offer you a copy of the discussion paper on proposals for a form of post-sale consumer protection which the said predecessor to the ministerial council published in December 1990 and which I believe I have now only the second extant copy of it; this one courtesy of the law library at Monash University. It has disappeared from the annals of government and anywhere else. So if you'd like to copy it - - -

MR FITZGERALD: Yes.

MR WOOD (FEMG): - - - and send this one back to me I'd be very happy for it because there's some quite good discussion there on other aspects, including the Vienna International Sale of Goods Convention and so forth. There's some quite good stuff there but it has been totally lost by MCCA in the process. The second one I just wanted to touch on was your comment in the paper about external dispute resolution schemes and potential extra ombudsman taking on those kinds of roles. I think you suggested there may be some role for a non-industry specific ombudsman to cover other areas where this exists. Now, that's one of those things which without kind of saying maybe there should be a non-generic ombudsman or external dispute resolution scheme, I certainly think that's the kind of area which a body like a national consumer council could well look at because there are some existing industries which are crying out for that type of external dispute resolution scheme. One of them I will particularly refer to is the airline industry, notwithstanding Ian's comments about not liking Qantas. Perhaps part of the reasons are that his complaints with Qantas have not been dealt with effectively.

But it is an area where unfortunately government has been very fearful to tread because its predominant focus over 40, 50 years has been over the economics of the industry and over the allocation of routes and over international airline trading, if you like, so that the consumer perspective in that area is just totally lost. Yet it's an area where I know from people who I've dealt with in the airline industry itself there are many, many unresolved issues that people, at the end of the day , simply have nowhere to take those kinds of matters. That's an example of one where indeed a body like a national consumer council could do a bit of research and perhaps come up with some suggestions about an external disputes system which might be effective in that industry.

MR BROWN (FEMG): Were you going to mention implementation task force?

MR WOOD (FEMG): Yes, sorry, that was just one other thing - and this is something which will also appear in the consumer submission. Perhaps it would be evident from the kind of comments that I've made today and in the past about bodies like ministerial councils and, indeed - as others have commented on - COAG being responsible for implementation of anything. I would be making a suggestion here that to put in place the kinds of recommendations and reforms that you're suggesting, in fact there ought to be an implementation task force specifically charged with that task of oversighting it, rather than leaving it to the vagaries of COAG.

MR FITZGERALD: That's a helpful suggestion. Choice, this morning, also raised the issue that they would like an implementation plan or program put in place, together with a work agenda - both helpful suggestions. But I did raise with them the difficulty of coming to grips with an implementation plan: one is in relation to the fact that we don't actually know what the governments will decide; the second thing is - you've just raised it - the mechanism to achieve that. Our report is pretty clear that we have concerns in relation to the ministerial council and how it operates. Any suggestion along that line would be helpful.

MR WOOD (FEMG): I have no problems with it being done under the auspices of COAG but what I would suggest is that one could put some words in their mouth and say that COAG should kind of ensure that there is an implementation task-force.

MR FITZGERALD: That wouldn't be inconsistent with what we want to achieve. I'm sure Gary has got some questions - and you've touched on a very large number of issues but we'll only get through a couple in the next little while. Can I go back to one you raised right at the beginning, and that was the consumer issues in relation to goods or public services. You've highlighted a couple of times health and education. It is true that the focus - and even Choice's submission today talked about effective competition being a central tenet of enhancing consumer wellbeing. They have suggested that our object is to be changed accordingly which puts effective competition and fair trading at the centre of enhancing consumer wellbeing.

However, I would have hoped that we're not excluding the fact that good consumer policy also exists where there is in fact non-competition, such in the case of some of the public services. So the point you raise - and maybe we'll need to be explicit about this, we're not excluding good consumer policy from where competition is absent. But there certainly will be a bit of attention about that, that on first glance you might say, "Well, the only way you get consumer wellbeing is through competition," yet in a whole lot of those other areas that's not yet the case and not likely to be the case for some time, so I'm just intrigued in that point.

MR POTTS: I think they did a couple of them as fair trading.

MR FITZGERALD: Yes, so that picks that up.

MR BROWN (FEMG): Sorry, I can't quite see, is there a question there?

MR FITZGERALD: No, not really, it was really a comment to say that I've taken on board your comment in relation to that, and my other comment was that we certainly don't want a situation where we're excluding good consumer policy from operating where there isn't an effective competitive market in place.

MR BROWN (FEMG): Things like customer charters and so on, those sort of services we have to live up to.

MR FITZGERALD: Yes.

MR McAULEY (FEMG): I mean, in all public policy you do tend to get means end displacement, and competition I think has come to be seen in some circles as an end in itself and I absolutely agree, Robert, that it's completing the outcomes which should be the ends. Often we get very strange forms of competition. I see that some US states still allow you to choose your form of execution - electric chair or hanging or whatever - and to an extent some of the competition in health insurance is like that, choose your health insurer, whereas they all have look-alike products. Once you have made a choice, of course, your onward choice is severely constrained, but not only that when we have flight of the elites from the shared health or shared education system, the choice remaining to the remainder is often constrained because we do not have those elites who ensure quality and diversity within the public system.

MR BROWN (FEMG): The central point for me is that the agency that is responsible for consumer policy should see itself as being responsible for ensuring that there is adequate consumer protection in those areas. It doesn't mean to say that it would be the lead agency in terms of ensuring that private schools are doing the right thing or whatever, but it shouldn't be excluded from that area and it should be in a position to be able to say to a lead agency, "Well, you know, you haven't thought about this angle or that angle."

MR FITZGERALD: Is that a matter of policy? I mean, we have said, assuming for the moment that consumer policy remains with treasury and there is now a minister dedicated to both competition and consumer policy, that we've been clear both in our documents and other places that that needs to be an extended role, a whole of government approach to consumer policy, taking up some of what you said. But we haven't gone so far as to say there should be a new and separate consumer body which I know you have favoured in the past and favour now. I wonder do we

get there by trying to ensure that the policy is more encompassing and more concerned about whole of government, rather than just those things that sit traditionally within treasury or competition policy in the past? Do you actually need another agency to achieve that end?

MR BROWN (FEMG): Well, I guess our argument is that a quasi-independent agency does something in addition to what a line department policy outfit does, wherever it's located, that isn't required to respond day to day to whatever a minister or a parliamentary committee is wanting and can engage in some longer-term research and policy analysis, we don't see having happened at the national level, not adequately at all in this country in the last few years. I think we have made it pretty clear - we and others - that there's a whole lot of things that we think need to be researched and analysed. There is this big agenda.

MR FITZGERALD: That's good to continue doing it.

MR WOOD (FEMG): I'll give you a good example which occurred in the United Kingdom with the public-private finance initiatives. Those were very much advocated by the then chancellor Gordon Brown. One of the reasons for having very strong advocacy for it is because you could take them off the books effectively, the cost of infrastructure went off the ledger, and he was very concerned about that. Now, there are a whole lot of really critical issues involved, and consumer issues, relating to those public-private financing issues which frankly, in my view - and those I've spoken to in the UK in the Office of Fair Trading and elsewhere - would never have got on the agenda of consumer policy being in the equivalent of treasury. They, as an independent department, were able to argue them and have them built into the kind of contracts that were being let - hospitals and schools and so forth.

There are important reasons why there needs to be that kind of independence. I'm sure when Gary was general manager in the treasury he would have ensured that those views would have been encompassed in the thinking and in the proposals and contracts ultimately that were let but, you know, you may not always have a Gary Potts there doing it. You may have somebody who had a more pure line.

MR FITZGERALD: All I can say is thank God for that.

MR POTTS: Flattery will get you nowhere.

MR FITZGERALD: Fine. Gary.

MR POTTS: Can I just get views on some of the recommendations and some elaboration. We have the written submission and we have your comments as well which have gone beyond what's in the submission, but in the submission you comment specifically on two recommendations, and one of those which is the

question of whether there should be a single regulator for generic law, and you've explained your position there. But with the other one, which is in relation to draft recommendation 4.2 on page 3 of the submission, you say you don't support exemption from misleading or deceptive conduct but you don't actually explain why you don't support it. Could you elaborate on your position there so we understand it?

MR BROWN (FEMG): I think that was actually Hank that was involved in that bit, wasn't it?

MR WOOD (FEMG): Yes.

MR BROWN (FEMG): We might have to take that on notice because Hank Spier - - -

MR POTTS: Right, okay.

MR BROWN (FEMG): - - - was involved in preparing this as well. I might have to get back to you, you know, ask him to elaborate.

MR POTTS: Right. On the national regulator is there anything to add to what you've got here? I guess the question is, is it a transition issue in a way that - there clearly would be significant change, there'd be cultural issues for the organisation. But beyond that do you see reasons also as to why a single regulator wouldn't be appropriate? You can look at some other areas like - let's take taxation, for instance, where many, many years ago income tax was administered at the state level. It has become something that's been done nationally. No-one ever suggests now that it wasn't the right thing to do. That's quite a long transition period but is it a question of principle that concerns you or it's a question of ongoing practicalities?

MR BROWN (FEMG): Well, I don't think it's a question of principle. I think it's - - -

MR WOOD (FEMG): Practicality.

MR BROWN (FEMG): - - - practicalities. For my part I wouldn't want to say that it couldn't be done. It's just that it wouldn't happen satisfactorily if we did it tomorrow. I think there's significant, lengthy transition issues and resource issues.

MR WOOD (FEMG): I just question the likelihood ever of a national regulator having the resources necessary to dedicate itself to some small-scale issues that will come up from individual consumers around the country. I just don't think that's ever going to happen. I basically think a better arrangement is that which has occurred in other areas, and that is to develop through memorandums of understanding and conferring of powers, national powers, on people - the Northern Territory level that

exists already - to be able to undertake that further on behalf of the Commonwealth.

MR BROWN (FEMG): ASIC has this regional commissioner arrangement which I suppose tries to deal with that - - -

MR POTTS: It does operate in the financial area. I think there has been a transition. You can go back many years when building societies were regulated at the state level and that's - - -

MR WOOD (FEMG): You're dealing with a very different level though of financial interest in the ASIC sphere, much greater than you're going to be dealing with in quite a lot of the everyday consumer protection matters that come before fair trading agencies today; just as there is with investigation surveillance of the marketplace in relation to product safety issues; the ACCC sending people out to look at markets in the Adelaide Hills or such, it's beyond my view that they'll ever have the resources to do that but South Australian Department of Fair Trading may well do it - - -

MR McAULEY (FEMG): I may be showing my age, if I go back to the Coombs Commission which found there is this in-built centralisation of authority in Commonwealth agencies, a failure to delegate much authority to state offices and often a failure of career paths which means that you get the more competent bureaucrats heading towards the central agency now. I'm not aware, and in fact the evidence is pointing the other way, that the Commonwealth has really improved in that regard. There's still Canberra where the decisions are made and there's still inadequate delegation to state offices - - -

MR POTTS: But you're talking about administration - - -

MR McAULEY (FEMG): Yes.

MR POTTS: - - - here and regulation. You have to draw a line with policy making, I think, in relation to that. I mean there's a lot of administration of Commonwealth programs done at a state level. You only have to look at the tax office to see that.

MR McAULEY (FEMG): Yes. I think the Coombs point was that the best staff don't hang around in the state offices. They tend to gravitate to the centre and you're left with the residual in the state offices; with all respect to those who do work in state offices.

MR FITZGERALD: Just in relation to the issue of behavioural attributes or characteristics, in the decision-making tree which we've modified using the work that has been done in the OECD, one of the things we've got in here is in fact the capacity

for policy-makers to now look at consumer characteristics.

MR McAULEY (FEMG): Yes.

MR FITZGERALD: What we've tried to do here is to acknowledge, both in that chart but more importantly in the context, that behavioural issues - behavioural economics and understanding of behavioural attributes - are becoming more important. I think we've moved considerably as a commission on that. But what became very clear in the inquiry was that in terms of the generic framework it's very hard to see how the generic framework needs to change, based on those. But when you come to industry-specific issues or specific policies they become very relevant; for example, financial disclosure and so on. I note you've raised the issue, that it's an area that I think you say that we haven't fully addressed.

But I'm a bit lost to know how you would better address it in the absence of specific circumstances, which we haven't gone to. So now we've got a mechanism by which they can be taken into account. They may or may not be relevant depending on the particular policy issue you're looking at. But right through this inquiry when we've said, "Would it change the way in which the Fair Trading Acts operate? Would it change the way in which the Trade Practices Act operates?" most people have said, "No, but the way in which you design specific policy, yes." I'm just wondering about your comments in relation to that because I think we have gone as far as we think we can in acknowledging their importance but without trying to say, "This particular characteristic leads to this particular policy response."

MR McAULEY (FEMG): Robert, thanks. I think a matter of perspective. I mean I would take a perspective and say there has been a fairly high degree of scepticism on the part of the commission, but that's a debatable point. I think you're absolutely correct in that what we find in behavioural research is that it is very much specific, not just, of course, to industries but specific to particular markets; some may be quite rational in one market, quite irrational in another market.

But there are certain characteristics in markets such as the shrouded attributes, which David Laibson identifies, which happen in an almost non-connected set of markets ranging from printer cartridges through to hotel mini-bars through to credit cards - the shrouded attributes problem where when we buy something up-front we're not aware of the costs down the line. It's very hard to find any underlying things that characterise these other than the behavioural - you see the shrouded attributes.

I think there are a couple of very general points. One is the extent to which we say it is a good or a bad thing - it's quite a normative judgment - for suppliers to exploit consumers' biases. I mean some would say, "Well, let them exploit them. The people will eventually become sophisticated and learn their way around these markets." There is evidence of learning. There is also evidence that marketing

practices get ahead of learning. That's one possible stance, if you let the market sort itself out. Some markets do sort themselves out fairly quickly. For instance, Kodak has now introduced higher-cost printers with lower-cost ink. That is getting some market traction.

Some markets tend not to sort themselves out very quickly. I mean over-insurance is as old as the hills. People that need insurance the least purchase most of it; people who need it the most purchase less of it. That's a market that is not sorting itself out. To that extent perhaps it is difficult to come up with some general framework. But I do think we need to examine this whole question of what is misleading conduct. To what extent do we tolerate the exploitation - without putting too strong a normative construct in that word - the exploitation of consumer biases by marketers?

MR FITZGERALD: Well, just on that, given that we've got these very general powers and provisions in relation to misleading or deceptive conduct and representations, over time both regulators and the courts have constantly redefined what that might be. So we've got the broadest of all powers. IIt's basically a principles based legislation - - -

MR McAULEY (FEMG): Yes.

MR FITZGERALD: - - - which many people have supported. Would you not agree that over time we will start to be able to take account of those issues? Things that we would not have previously regarded as misleading may well into the future be regarded by regulators and courts as misleading. So it's an evolution of which behavioural economics is an informing contributor.

MR McAULEY (FEMG): It certainly is. In fact, there's a heap of research on behavioural biases; not much research on de-biasing. But what little research there is says it goes right back to early childhood education, early conditioning, learning benefits, deferred gratification - and this is not something which is minimal - just straight financial education. Perhaps we need mechanisms, and this is a whole question of Canberra's regulation, to conserve, protect. Can we find mechanisms to protect the gullible or the unsophisticated - I think is a more correct term - while not imposing costs on others; a parochial approach.

But I would also add in that evolution, of course - and this is another point which I think has to be covered a little bit more - many of our transactions are going to be on the realm of national regulators. The clearest ones of course are Internet transactions. Do we need to expose consumers to learning through experience in small transactions, so that they learn that way, to prepare them for a world where - certainly in our parents' generation, there was no way in which individuals would get involved in overseas transactions other than a few transactions while

they're travelling on holiday. But now I can go online and buy a house in Abu Dhabi, if I want to. I'm not too sure what the Abu Dhabi consumer protection regime is.

MR FITZGERALD: No, neither am I.

MR McAULEY (FEMG): You know, do I need to - - -

MR WOOD (FEMG): Don't spend your time looking.

MR McAULEY (FEMG): Do I need to have a lot more scepticism built into me right through from my early childhood education through to my middle age?

MR BROWN (FEMG): That's one thing: making consumers and ensuring consumers are less prone to these biases. But I do question whether we want to wait for this evolutionary process that you're talking about to occur. I mean you have got, in this diagram, fairness provisions. Well, my understanding - I'm not a lawyer - is that the Trade Practices Act doesn't go that far. Unconscionability isn't the same as fairness. I draw your attention to - - -

MR WOOD (FEMG): I was just going on the Radio Rentals case which proves just exactly that.

MR BROWN (FEMG): Yes. But we are using fairness in our EDR schemes, the banking ombudsman is able to go to - - -

MR FITZGERALD: But this particular chart doesn't say that it all has to be built in legislatively. I mean this is a policy framework. So it's quite legitimate that in one particular industry the fairness and ethical considerations are taken up in codes of conduct or ADR procedures. In others it may be that there needs to be specific legislative intervention. What this chart doesn't do is say, "These are all legislative interventions," So the concept of fairness and ethical considerations may eventually lead to a decision that they should be legislated or it may lead to a different approach. What we're trying to say is you shouldn't be prescriptive from the beginning. I hope what we're trying to do is say, "and not all interventions are legislative in character". I think you'd agree with that?

MR WOOD (FEMG): Indeed, the fairness - - -

MR BROWN (FEMG): Yes, yes. But I suppose I do wonder whether unfairness is acceptable anyway.

MR McAULEY (FEMG): The fairness criterion I see in that diagram - and you'll see that diagram again shortly, we keep plagiarising - - -

MR FITZGERALD: We acknowledge we're at - - -

MR McAULEY (FEMG): Yes, and I'll acknowledge where it came from. But what we see as fairness - when I say "we" I'm referring now to the work I'm doing with the ACD which very much sees fairness as a guide to the policy-maker. It's all very well to say, "This procedure will serve consumer interests," but if consumers don't think something is fair they will walk away from it and I think business will too.

Fairness - we seek deals which are fair. There is evidence that I will drive across town not to deal with the garage who is overcharging me for gasoline. I will go out of my way to avoid dealing with an unfair merchant even if it's going to be at personal cost. In public policy we've seen extraordinary things such as - the best-documented one of course is the Sydney cross-city tunnel. Well, by a stretch it is a consumer matter. People won't use it because they think the charge is unfair regardless of the fact that it's much lower than vehicle operating costs. So the regulator has to think not just, "Will this produce good objective outcomes?" but, "Will it be seen to be fair?"

MR FITZGERALD: Or it could say the market will determine that position. Anyway, we're going to run out of time. But Gary - final comments? Well, thanks very much for that. I'm very grateful for the submissions. Clearly we're going to get the larger combined submission which will take into account a number of these other issues. As I said right at the beginning we weren't going to be able to cover all the points you raised in the time. But is there any final comments that you'd like to make before we conclude?

MR BROWN (FEMG): Good luck.

MR FITZGERALD: That brings to an end the formal participants but because this is the last day of the public hearings we just invite anyone else who would like to make a formal statement on the record - you're able to do so at this stage. If no-one is interested - anyone interested? Okay, then I'd like to bring to a conclusion the public hearings in relation to the review of Australia's consumer policy framework and thank those that have participated and been here as observers. Thanks very much.

AT 4.39 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY

INDEX