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

INQUIRY INTO AUSTRALIA'S CONSUMER POLICY FRAMEWORK

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

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON TUESDAY, 20 MARCH 2007, AT 9.03 AM

MR FITZGERALD: Welcome to the first public hearings into the review of Australia's consumer policy framework. These public hearings are held pursuant to the Productivity Commission Act. Participants who are providing evidence to the inquiry are not required to enter into an oath, but they are required to provide information that is truthful.

The inquiry has been requested by the Australian government and will be conducted over a 12-month period. The draft report will be released in August of this year and the final report will be provided to the government in December of this year. This is the first of the public hearings that we'll be holding. Public hearings will be held in all states and territories subject to participants wishing to appear prior to the draft, and there will be a second round of public hearings subsequent to the draft report's release. The procedures are reasonably informal. Participants will be asked to give a short presentation of the key aspects of their submissions.

We're aware that these hearings are taking place prior to the submissions being received by the commission. It's reasonably early in the life of the inquiry, but we did so in order to try to get a sense of the key issues that were of concern to interested parties. So without any further ado I'd like to welcome our first participants. If you can give your name and your occupation and the organisation that you represent.

MS LOWE: Thank you and good morning, commissioners and staff of the Productivity Commission. Thank you very much for the opportunity to appear here this morning. My name is Catriona Lowe and I'm CEO of the Consumer Action Law Centre, and here with me is Nicole Rich, director policy and campaigns, also from the Consumer Action Law Centre. Consumer Action, it's worth noting, is one of Australia's largest consumer case work organisations and also undertakes policy and campaign work directed at advancing the consumer interest.

I note that a couple of the commissioners have already had the benefit of hearing some of the views of Consumer Action at last week's National Consumer Congress in relation to the issues raised by this current inquiry, so rather than recanvass some of the more general matters, we thought we would begin by focusing on a couple of the key areas and issues that we can perhaps describe as trends and developments in the marketplace since the inception of the Trade Practices Act and subsequent substantial reviews of consumer protection.

The first area that we'd like to focus in on, then, is the issue of intermediaries. We raise this issue in the broader context of the contention that, whilst the market can obviously deliver enormous benefit to consumers, it can also create problems for consumers through its operation. Intermediaries is a very interesting example of that. We see positive examples where intermediaries can, of course, assist consumers to

negotiate complex products and complex aspects of the market, but we also see instances where those interventions are not successful. The most often touted reason for that is the conflict of interest that can be set up where an intermediary who purports to act as agent for a consumer in fact receives commission from a seller or indeed another intermediary.

But we would also like to draw the commission's attention to a number of other issues and problems that can result from the intermediaries model, and we have with us a case study of one of the matters we've dealt with through our case work practice which we believe illustrates a number of the issues quite successfully. I'll just hand those up to you now. One of the particular issues that this case study illustrates is the fact that often we're not simply talking about one intermediary standing between the seller and the consumer - we may be talking about two or three or even more - and this can create a number of difficulties for consumers in the event that things go wrong during the transaction. It can make it more difficult to enforce rights, because the ultimate lender, the person to whom a consumer owes a debt, if we're talking about a financial product situation, may rightly claim a lack of knowledge of the particular circumstances that may render a contract, or the circumstances into which it was entered, unjust.

Equally, it can make the issue of proof of wrongdoing more difficult. If you have three, four or five parties to a transaction - and that was the case in the case study we have provided to you - it's a matter of significant difficulty for a consumer to understand what happened and, even if they do understand what happened, to correctly identify the party who may have been at fault in the transaction and also to identify correctly the role that that party may have taken in the transaction. You'll see in the case study that we've provided to you we list the various intermediaries to the transaction and describe the range of descriptions that was provided, both within documentation and orally, as to the role those various intermediaries took in that transaction.

We'd also like to touch on the issue of Standards Australia and the role of standards in the marketplace. This is an example of a solution which perhaps on its face appears to be self-regulatory but we would submit is in fact a co-regulatory model. The Consumers Federation of Australia undertakes a project on behalf of Standards Australia which provides consumer representatives to standard-setting bodies, and it's certainly our experience that, whilst they are developed in a self-regulatory environment, the practical reality of how they work in the marketplace is that they are referenced in a range of codes and other regulatory instruments, building standards being a good example, but in addition to that they are often a de facto standard on the part of the courts when they're measuring what are community standards vis-a-vis questions of negligence and so forth.

So, whilst participants in the standard-setting process are certainly there voluntarily and there's a whole process around which standards will be set, the reality of how those standards work once they arrive in the marketplace is that there are various ways in which they're effectively brought within other regulatory environments, and it's for that reason that we suggest that they are in fact co-regulatory measures. In that context, it is therefore all the more important that there is balance in the development of those standard-setting processes.

Whilst we have the project which we administer, which provides consumer representatives to some standards committees, and we have 30 representatives active on 60 committees, there are 750 groups that have been formed across Standards' 43 areas of activity, and we have, for example, representatives on only 17 of the 85 consumer-related standards. That means that the remaining standards are developed in the absence generally of participants specifically there to represent the consumer interest. Again, we have some more detailed information available to the commission that simply sets out some of the sorts of committees in which we participate and also some of the challenges faced by representatives.

It's important to note before we move on from this point that representatives provide their services on an entirely voluntary basis. These are people generally highly expert in their field, and our project simply enables reimbursement of out-of-pocket expenses to attend the standard-setting committees. The actual attendance and any preparation is undertaken entirely on a voluntary basis by the representatives. We would finally note your own review of Standards Australia, which of course recommended improving the balance of interests represented on the committees.

Another issue which we have already raised in our discussions of these issues which we'd like to expand on somewhat is the increasing attention to the role of consumers in markets and the importance of consumer behaviour in activating markets. In particular we wish to draw your attention to work that's been done out of the OECD consumer policy committee. You'd be aware that they've held now two roundtables discussing the implications of some of these developing lines of thinking for consumer policy and indeed competition policy. They have more recently developed a tool kit, and it's important to note that this in a draft stage and it may certainly be anticipated to change as it works its way through the committee processes. Nevertheless, we believe it provides some very interesting examples of ways that issues such as consumer behaviour and consumers' actual experience in markets, and indeed issues particularly relevant to disadvantaged and vulnerable consumers, can be taken into account in a policy-making framework.

We have a further handout, and we've placed the draft OECD decision-making framework beside the QuickStart Guide to Regulatory Impact Analysis produced by

the Office of Best Practice Regulation. We suggest that there are some significant differences in the approach that the two diagrams illustrate, and we certainly suggest some very strong reasons to look closely at the sort of, we would suggest, more sophisticated analysis that is enabled by the OECD-type model as compared to the current model here in Australia.

In that context we draw your attention to firstly a number of matters illustrated by the OECD chart. Firstly, it recognises that there are two relevant questions, not just one, in terms of failure on the consumer or demand side of the market. There is of course the traditional question regarding information failure, and I should note that the OECD uses that in its very broadest sense, to encompass not only information asymmetries but also issues caused by transaction and switching costs. We indeed believe that those latter issues that I've mentioned could benefit from further emphasis on the diagram that you see before you.

They also, however, have a process that enables consideration of behavioural biases on the part of consumers that may impact on the problem that is emerging in the marketplace, and indeed the appropriate regulatory solution to that problem. They also provide some frameworks to consider the various tools, and, of course, informational instruments are one of those tools but indeed there are a range of others. Examples might be redress systems such as ombudsman schemes or tribunals which enable easy access for consumers to obtain redress. They may include mandated standards or they may encompass other sorts of mechanisms, for example, unfair contract terms regulation. So it enables consideration of the full gamut of responses.

Then there's the third category there, which is the behavioural instruments, which is not in a sense a separate category from the two previous ones, we'd suggest, but rather enables fresh consideration of whether, in view of a particular behavioural bias on the part of consumers, there is a tool that may be more appropriate as suggested by that.

We would equally draw your attention to the fact that it clearly encompasses a cost-benefit analysis component on the far right of the diagram there, and certainly we would agree that that's appropriate. However, it also provides a framework even where in general terms the benefit may not outweigh the cost of intervening. It provides a specific framework then to consider whether perhaps a more targeted intervention may be appropriate if there are issues impacting on disadvantaged and vulnerable groups.

We suggest that there are a number of contrasts that can be drawn with the step-by-step guide produced by the Office of Best Practice Regulation. We just draw attention to a couple of those aspects. For example - and this relates to another point

that we make in relation to these issues - the diagram very clearly suggests that there are a whole range of steps that must be gone through if a regulatory solution is being considered, but that no further regulatory analysis is required if it's a non-regulatory solution. In our view in either case there must be consideration, because the end aim of the game is effective regulation, and in order to achieve the most effective result consideration must be given to the likely effectiveness of the non-regulatory response versus a regulatory response.

Carolyn Bond, my co-CEO, spoke on the importance of effective regulation because, of course, to take disclosure in the financial services industry as an example, we are seeing that that has not worked as an aim to consumers understanding the market, and it has imposed further costs on business, despite on its face being a lighter-touch solution than perhaps regulation directed at addressing issues around conflict of interest. So, whilst on its face it may appear to be a lighter-touch solution, if it's not effective all it does is impose costs on business without fixing the problem for consumers.

We also consider it significant and unfortunate that at step 4 in the OBPR diagram we are looking at competition impacts, we are looking at compliance costs; we are not looking at consumer impact, we are not looking at benefit as factors that need to be taken into account as part of that assessment process. Of course competition impacts and compliance costs must be considered, but we submit there are other equally significant, equally important, considerations in determining what is an effective and appropriate regulatory solution to a problem.

We'd also like to touch on the roles of consumer protection. It is clear from what we've said that we see one of the roles of consumer protection as improving and bolstering consumers' ability to activate competitive markets. That's clearly a very important role of consumer protection, but we suggest that there are other roles and that those roles are appropriate, and they include matters such as distributing benefits of competition, particularly to consumers who may not otherwise receive benefit, albeit there are benefits accruing to consumers in general terms, and disadvantaged and vulnerable consumers are often cited in that context.

It is also a reflection of our broader societal goals, and we don't seek in any way to step away from that as an important and desirable role of consumer protection. Indeed, we of course see it reflected in many, many laws which we have and which I think all parties would agree are a necessary and appropriate part of our regulatory framework. Product safety laws are a perfect example of laws which do exclude certain markets. There's potentially a market for cheap, shoddy second-hand goods, but we have made a decision that certain safety risks for us as a society are not risks that we consider it appropriate for consumers to bear, and our framework reflects that.

In contrast, we have a problem festering in our marketplace at the moment, and that is fringe credit, and in particular discussion has occurred around payday lending. Much of the discussion expresses great concern around the issue, but there is a market - consumers are using these products - therefore should we intervene? We submit that it is okay to draw a line in the sand in relation to some of these issues, and indeed we need to ask the flip side question: are we prepared to accept that we have a residual financial market for the poor because we can't find a way of making our mainstream market work? The residual market is one we know to be exploitative, not least in the exorbitant levels of interest and fees and charges that are levied against consumers least able to bear them.

It is also important to note from a market perspective that the money that's being paid on those exorbitant interest rates and charges could be better directed to products and services which consumers need in order to live their lives and participate effectively in society.

MS RICH: Can I just jump in and add one more example. I know that the commissioners are interested in practical case studies of these sorts of things, and those are two excellent ones. Another good issue to have a look at is prepayment meters and whether they should be introduced or not. This is certainly a live issue, and different state and territory jurisdictions have taken different approaches to this issue. The issue is whether a roll-out of what are called prepayment meters - you could also call them pay-as-you-go meters - should be allowed where you don't use energy consumption in advance and then pay your bill later; you actually basically pay as you go, and the old-fashioned ones in the UK you literally put the coins in.

The issue, of course, is that there probably are many consumers that would actually welcome a roll-out of prepayment meters. They'd see it as a useful tool to know exactly how much they're spending and control their usage and how much they're spending on that. But, of course, there is a small group of consumers who would be significantly disadvantaged by having a prepayment meter or a pay-as-you-go meter installed at their property, because it effectively allows self-disconnection. If you can't afford to pay, your meter will just switch off and you won't have any energy.

At the moment in Victoria, for example, we have some fairly good frameworks to deal with issues around capacity to pay and financial hardship, and because you pay later, the companies buy into that issue and effectively have to address financial hardship, as does the government, and there are some good processes involving government, industry and consumer stakeholders. But where, for example, in Tasmania, prepayment meters have been rolled out in some places, you do have the issue of some people self-disconnecting and, while rates are still low, they're much

higher than disconnection rates in Victoria.

So while overall it's not affecting a huge group of people, you can see a difference in approach. In Tasmania they've taken the approach that, "Because it's only a small group of people, we'll allow it because most people in the market will benefit," but they haven't actually come up with a way of addressing the problems. In Victoria the government has decided to draw a line in the sand and say, "We know that overall there might be some costs imposed on the market by now allowing this new mechanism. However, it's not acceptable to allow extremely vulnerable people in our community to self-disconnect." We have an opinion about which approach should be taken, but at this point I'd just suggest that it's an interesting example to have a look at as to in what cases we acknowledge that there will be costs from implementing consumer protection; however, we think that for societal goals we should draw a line in the sand and do it anyway.

MS LOWE: This discussion obviously also raises the issue of disadvantaged and vulnerable consumers, and there are a number of points to make about this group of consumers. We draw your attention to some work that has been done to expand on some of these topics, and we'd commend it to you.

The first point to make, of course, is that if we're talking about disadvantaged and vulnerable consumers, we're not talking about small group of people; we're potentially talking about all consumers, because everyone can be vulnerable at a particular time in their life or in relation to a particular issue. Conversely, we take the view that disadvantage is a less-transient state of being, if I can put it that way, and it tends to involve characteristics that attach to the individual, whether that be a physical or intellectual disability, whether it be that English is a second language. There is a whole range of characteristics that can be fairly readily identified.

Consumer Affairs Victoria has produced a discussion paper on the issue of disadvantaged and vulnerable consumers and makes a number of excellent points around both the potential breadth of the group and the fact that problems that are experienced, or are visibly experienced, by disadvantaged and vulnerable consumers can be a pointer to a problem that's being experienced by a much broader range of consumers, but of course disadvantaged and vulnerable consumers are much less able to absorb the loss and it therefore becomes more visible. That signposting is very important, and again we would draw your attention to the CAV report on consumer detriment, which makes some very interesting points about the hidden costs of consumer detriment but also does what has so rarely been done - to go through the exercise of seeking to quantify the cost of unactioned consumer detriment in the marketplace - and comes up with some significant numbers.

The issue that disadvantaged and vulnerable consumers can be a small,

identifiable group or a wide, more difficult to identify group obviously raises some challenges in relation to appropriate policy responses, and again - and this is I suppose something of a theme that runs through the submissions that we'll be making to you - there's a broad church of appropriate responses. It may be that we want a mainstream response because it avoids the residual market of which payday lending is an example, and it also requires the mainstream market, as Nicole has mentioned, to be cognisant of and respond to the issues that are impacting on a targeted group of consumers.

There's also an argument to say you can have targeted initiatives that sit within a mainstream market response, so you don't say, "Well, that's a social welfare problem. We'll take it right out of this marketplace and put it somewhere else." Some of the energy hardship initiatives that have happened are a very, very good example of that. We see a requirement on the mainstream service providers to have hardship policies in place to address the needs of a small constituency amongst their customer groups. Interestingly, we have also seen, because they are within the mainstream industry and the mainstream framework, much more attention paid to counting some of the costs and benefits that flow from those initiatives. To use the water market as an example, we now have water businesses which are discovering that having targeted hardship policies in place for a small grouping of their customer base is having a positive impact on their bottom line. So it is not simply a response which we would consider appropriate as a just society; it is also having a pay-off in the market at economic terms for those businesses.

MR FITZGERALD: Catriona, what I'd like to do is you could wrap up a couple of last points and then we'd like about 15 minutes to be able to raise questions and that. So just a couple of minutes and then we'll have some discussion.

MS LOWE: All right. I'll be very quick, then, about some of the next points we wish to make. Just quickly on industry-specific and general regulation, we first want to make the point that we agree industry self-regulation is not always a good thing. We see some examples of markets where that's not working for consumers, and we would cite, for example, the telecommunications industry at a federal level and the building industry here in Victoria. We contrast that with two other areas where we do have successful industry self-regulation, and that is the energy market, here in Victoria in particular but nationally more generally, and the motor car trading market here in Victoria, which again has a specific regulatory treatment, and it works very well for consumers. Of course, there are still problems in those markets, but there are mechanisms to deal with those problems.

We suggest that the significant difference between those two markets is the enforceability of some of the self or co-regulatory mechanisms that sit around the two markets but also, in the case of telcos, build in the presence of an

industry-specific regulator in combination with the industry-specific regulation. In contrast, in energy and motor car trading, the regulator is not a market-wide regulator but it regulates across a range of markets. In our experience that makes a very significant difference to the outcomes that are achieved in the markets.

MR FITZGERALD: Sorry, can I just clarify. You're saying that in the second case that is a better model?

MS LOWE: Yes, in energy and motor car trading we've got - - -

MR FITZGERALD: It's a better model because we've got - - -

MS LOWE: Yes, we've got the industry-specific regulation, which has important feedback loops within it which are absent from the telco and the building example, and, further, in the energy and the motor car trading example we have a more generalist regulator in place.

MR WEICKHARDT: Sorry, can you clarify that? In energy, to the best of my knowledge and understanding, the regulator is very specific to the energy market.

MS LOWE: That's evolving at a national level, but at the moment here in Victoria they cover electricity, gas, water, rail, ports, so they do have a range of disciplines.

MR WEICKHARDT: But we're moving to a national energy regulator.

MS LOWE: Yes, though again, whilst there are issues around that, it's still broader than a single market. There are some parallels and some efficiencies from putting electricity and gas together, but they are nevertheless two separate markets.

MR FITZGERALD: Any final comments?

MS LOWE: I'd like to talk a little bit about what we see as some solutions to these issues, but then that may be the subject of questions that you're going to ask us, so I'm happy to do it as part of the discussion. But it's certainly a point we'd obviously like to touch on.

MR FITZGERALD: What I might do - I should have done this at the beginning - is firstly introduce myself. I'm Robert Fitzgerald. I'm the presiding commissioner, and the fellow commissioners are Philip Weickhardt and Gary Potts. Gary and Philip might want to raise some questions, then just in conclusion you can come back to that if we haven't touched it.

MS LOWE: Certainly.

MR WEICKHARDT: An issue you've touched on today and you also touched on in your address last week is this issue of what is the objective of consumer policy. I guess I'd be interested if you feel there is somewhere a well-articulated overall framework of what the objectives of consumer policy should be, but one issue that you alluded to I'd like you to comment on, because I've seen a number of references which say that consumer policy basically ought to be about trying to ensure overall community welfare is maximised and that separate instruments should then address the issue of distribution of wealth. So one issue is maximising overall community wealth and the other is then distributing it in an equitable way. You've suggested I think twice - once today and once last week - that consumer policy should have social justice issues in its foundation. Would you like to comment on those two different approaches, please.

MS LOWE: Sure. In relation to the first point you raise, there are plenty of bits of material around that talk about what the roles are of consumer protection. I don't think I could point you to one, though, which everyone agrees is the source document, but of course there are, as you're now asking me about, in a sense two views around out there, and these are reflected in various ways in the literature that discusses them. There is a view that says the role of consumer protection is a market role; it's to ensure that consumers can effectively function in markets and the market will take care of the rest and, to the extent that it doesn't, that's for something else outside the framework. That's one view.

There's another view which I guess at its heart says it's a bit more complicated than that, and we are certainly of that view, because there are interactions between these goals and achievement of these goals. That's something we'll expand on in our submission, but I suppose we see there are three roles for consumer protection and that they interact with each other. So to, say, take two of them away, we would suggest impacts on the ability to achieve the third. We say that the three roles are, yes, to facilitate effective consumer participation in markets and the effective functioning of markets; secondly, that it is to take a role - it's not the sole repository of this role but it has a role - in distribution of benefits of markets; and it also has a role as a reflection of our goals as a society in terms of what are and are not acceptable risks or outcomes for consumers in our marketplace.

Part of the reason that we will be drawing your attention to examples such as hardship policies within specific markets such as exist in reflections of the fact that we're not just saying, "Let the market take care of it," as a standard-setting tool is that we see that those three goals are complementary - not always, of course, but well focused they are complementary, and this comes back to a range of tools, a range of responses, different approaches to fit the problem at hand. We see examples where a mechanism that is directed, for example, at addressing distribution of benefits or a

societal goal that says people need access to essential services is also having a positive effect in terms of the functioning of that market.

So it's not as simple as to say it's one or the other. As is so often the case with these questions, there are complex interactions, and that's why we're very interested in some of these tools which allow us to bring in and effectively assess that range of complex interactions in the development of policy.

MR POTTS: I guess a somewhat related question, again a general one, as to what are the respective roles of generic or general-type regulation and specific regulation. I think you've touched on that in your comments to Phil, but listening to you this morning, I was left very much with the impression that you think that specific regulation is a far more effective way of achieving what you see as the goals of consumer policy. I'd like your observation on that, and I suppose also reinforcing that is I think the third area that you identified here as this framework you have for assessing regulation and the role that consumer behavioural biases might play in that. If you think that that is an issue in relation to that, does that point you in the direction of again favouring specific legislation? Do you think that it's possible for generic legislation, for instance, to take account of behavioural issues in framing that policy, or do you think that it's only relevant to a specific-type regulation, industry regulation?

MS LOWE: Firstly, let me say we're not here to say that we think industry-specific regulation is preferable to generic, nor indeed do we say the opposite. We don't think that generic is necessarily preferable to industry-specific. We see them as both having a complementary role. Generic levels of protection and generic principles are extremely important. They are obviously flexible, and they obviously allow action in relation to a broad range of conducts and a broad range of manifestations of that conduct. So they have an extremely important role to play. The Trade Practices Act sets some extremely important fundamental standards for consumer protection, and we certainly are very strong supporters of those.

MS RICH: Can I jump in and give a practical example of one where we've said that actually generic regulation has been much more effective than industry-specific regulation. Catriona mentioned the telecommunications industry-specific regulation at the federal level. We've seen a lot of problems with consumer contracts in that industry, and unfair contract terms. At the same time that they had been grappling with that issue in that, industry-specifically, Victoria passed general laws that prohibited unfair contract terms. That has been very successful in eliminating many unfair contract terms from telecommunications consumer contracts very quickly - much more successful than any industry-specific regulation, specific codes under that regulation, dealing with consumer contracts ever were. That's a very good example of where we'd be very supportive of general-type regulation that covers broader

issues that relate to more than one industry as much more effective than specific regulation.

MS LOWE: We'll certainly expand on this in our submission, but essentially our view is that there are certain circumstances in which industry-specific regulation will be necessary and/or more desirable, and then generally will be as an overlay to general law. Some of the sorts of circumstances where that be appropriate are where you have essential services markets where potentially there are new markets in which consumers are not using to functioning or making choices in relation to the products or services delivered by those markets. It might be where there are particular issues of complexity of where the risk to consumers of making the wrong choice is extremely high. We would say it is better to address some of those issues in an industry-specific treatment rather than potentially increase general regulation to address problems that may actually only need to be dealt with in relation to a particular industry.

Furthermore, it can obviously play a role in making clear the application of more general principles to a specific industry, and again there are certain circumstances in which that may be desirable which would not apply to the market as a whole. Those are again the sorts of factors I guess that we see as impacting on whether you might want to simply have a general treatment or whether there may be a role for an industry-specific treatment.

In relation to the behavioural biases issue, we would see that as relevant to an assessment of any regulation, because we see it as a tool that helps assess whether a regulatory response of some kind - and I mean regulation in the very broadest sense of that word, co-regulatory or black letter law or in between - will be effective in dealing with the problem. I think one of the great interests in some of this behavioural economic work is it provides a framework to consider actual consumer behaviour in markets - what actually happens out there - and tailor our responses accordingly.

MR FITZGERALD: Just on that, it seems to me in these two charts there's room for both of these, isn't there - not completely, but basically the OECD tool kit or decision tree is really trying to determine whether there should be intervention at all of any nature and what that should be, and the step-by-step guide is where you're looking at specifically regulatory approaches. So notwithstanding that there are some differences of approach, they're not completely inconsistent, because one is really saying, "Do you need to introduce regulation?" If you do, you go through this regulatory impact analysis. So they're not completely opposed to each other.

But having said that, taking your last comment, it seems to me that the behavioural biases become quite relevant when you're looking at a specific area, for

example, the way in which people make decisions around financial products or financial lending, or the way in which they use information or disclosure information in relation to that area. What I'm not so sure about is whether or not it has a dramatic impact in terms of the generic position . So I suppose in my mind at the moment is that I do think behavioural biases should be examined, but where they become very relevant is when you're looking at a particular area, the way in which people make decisions around motor vehicles or the way in which they make decisions around financial products, rather than its impact say on how you would shape the Trade Practices Act or the Fair Trading Acts. Do you have a view about that?

MS LOWE: I think that's right. Probably where it becomes relevant in a generic framework, though, is then responding to a particular issue that may arise in the marketplace. Of course, regulators themselves, in working out their range of available responses under a generic or an industry-specific law, engage in a process of assessment about whether they need an information tool, whether there's enforcement or whether a solution in the middle is appropriate, or indeed a combination of tools. Again, we would suggest that an understanding of behavioural biases - generalised behavioural biases, I should emphasise - can obviously be very helpful in selecting the right tool to address a problem within that generic framework.

MR WEICKHARDT: Just a quick one from me. You mentioned when we met informally in December that you were doing some research work on Part V and how it compared with international best practice. When do you expect that might be available?

MS LOWE: The project is due to be completed at the end of May, which is obviously after the first round of your submissions closes. We ought to be in a position in putting our submission in to the inquiry to at least flag some of the key areas that will come from that piece of work, but it won't be in its final form until after submissions close. But we'll certainly, as soon as we are able to do so, make it available to the commission.

MR POTTS: Can I just ask you a question about disadvantaged and vulnerable groups. You put quite a bit of emphasis on those, quite rightly so, but I guess at a very general level there's always a trade-off that you have in a sense: to the extent that you apply more and more regulation to these areas to avoid the sort of social outcomes that are considered undesirable, it's possible that you have an end result where you deny access to certain people to particular services. Financial credit is an obvious area. If you regulate this fringe credit area, the result may be that the very people you're trying to protect actually are denied access in the end. Do you have any comments on that observation? Do you think that's just a theoretical concept which in practice has no real relevance, or do you think it's real issue?

MS LOWE: It's certainly an issue, and it's an issue I would suggest ought to help frame the broader set of responses. There are certain regulatory changes that could be made that would certainly get rid of a large percentage, we would imagine, of the payday lending market, for example, and in the absence of anything else, yes, there would be a whole lot of people that weren't able to access short-term credit because they can't access it from mainstream financial services providers.

However, the work that's been done in this area - and our centre has done some research in this area - suggests that the reasons people are accessing these sorts of services are not for one-off purchases or one-off crises, that then they move on and go on healthily to manage their finances. Very often people are accessing these sorts of services to pay the rent, to pay electricity bills and other what are recurrent expenses. The problem that that illustrates is of course a complex one, because it simply means they can't afford to pay for all the things they need to pay for to maintain a basic standard of living. But a solution which then makes them pay equivalent interest of 1040 per cent per annum is not going to fix that problem; it's going to make the problem worse.

As to a solution that says there ought to be alternatives such as hardship programs, again these are difficult, complex questions, but saying that you can't then access someone that will give you credit at 1040 per cent is an outcome. But the answer is not, "It's okay for you to access credit on that basis." The answer is that we need to find some other solutions to those problems.

MR POTTS: I guess that's my point in a way: whether you're trying to achieve social goals through consumer policy instruments; in other words, you're not selecting the right instrument to achieve the goal that you've identified. Taking that particular case you mention, the problem there is the financial hardship that that particular group faces in meeting essential services, and in a way it's not a consumer policy issue; it's a social distribution issue. Yet if you try and use consumer policy goals to achieve that goal, the theory will tell you you'll get it wrong, that there will be costs to society as a whole which are greater than if you did it in the most effective way.

MS LOWE: This is where we see the great benefit in those targeted solutions that I was talking about. To use energy affordability as an example, within the mainstream regulatory framework in electricity there is provision for businesses to have hardship policies in place, which ought to effectively operate to prevent the need for the consumer to go to the payday lender to get the loan to pay the energy bill. It incorporates within its framework things that help the consumers pay in the short term, but also incorporates aspects such as, for example, energy audits, which reduce the overall cost of the bill, in some cases by hundreds of dollars per annum. Those

sorts of targeted solutions that sit within the mainstream problem do give attention to the problem that requires it, but they don't generalise then across the entirety of that marketplace. So the cost is targeted and, as we say in relation to the water businesses, sometimes there's a financial benefit to the organisation in putting those programs in place.

MR FITZGERALD: We're going to have to wrap it up in a few moments. Can I just ask: as we've indicated, we are looking at financial lending as a particular area, and obviously you've raised that. One of the things we are interested in is what's the right framework within which consumer policy relating to financial lending should be constructed. Are you able to say your general views about how this should be integrated or how we improve it - obviously that will be in your submission - and then if you can conclude with any of the key points that you haven't had the opportunity to raise. We'll finish up in about five minutes, if we can.

MS LOWE: Certainly. In relation to the more general question of how financial services and products in the broad are best regulated, those are some of the issues that we are still thinking about quite carefully, but there are certainly some examples within the market where we see there are some very clear and obvious things to be done. The area of finance brokers, which is again an issue I mentioned in my address last week, is one area where everyone agrees that there needs to be a regulatory solution; it's just taking its sweet time in coming. So that is one area of urgent need for fixing.

Another area that we consider particularly important is consistent access to redress for consumers. The financial services and products market is one particularly characterised by inconsistency insofar as if you've got a loan from a bank, a building society or a credit union, there is an alternative dispute resolution scheme approved by ASIC for you to go to, but if you have obtained your credit from a lender other than one of those parties I have mentioned, you have to enforce those rights through the court and tribunal system, because there isn't access to that dispute resolution for you. There are some glaring inconsistencies in treatment for products that a consumer would see as essentially the same. So there are some of those sorts of issues that we see as being big ticket items, if you like, for addressing. There are obviously some broader questions around how the regulatory framework itself is best structured, and we will certainly be addressing those issues more fully in our submission.

Keeping an eye on the clock, I'd just like to touch very quickly on a couple of way forward issues, if I can put it that way. We see a number of key elements in moving forward with our consumer protection framework. One is what we've been calling world class consumer protection, and that includes some specific reform elements which are the sorts of things that are starting to come through our project

looking at Part V of the Trade Practices Act. There is a list of initiatives that have occurred in other jurisdictions that appear to be successfully improving consumer outcomes - issues such as unfair contract terms legislation. The general unfair trading test is an interesting one which Dr Cousins mentioned in his address prior to the congress which we'll be looking closely at, but we'll look also at some market-type mechanisms as well. There are examples of proactive ability on the part of regulators to look at markets based on either complaints from consumer organisations or indeed of their own volition. We see some real value in those general market investigation powers.

So there is a range of specific issues which we will be flagging as worthy reforms, but there is also some I guess refreshing of general approaches. We're not recommending wholesale amendment of our general framework by any stretch. There are elements of it that work very well, but what we will be talking about is looking at some of these problems with fresh eyes and fresh perspectives, taking into account some of the research work we're seeing what impacts on a consumer's ability to drive markets and some of the learnings that we're seeing come through from behavioural economics.

We also see that a strong consumer voice is a very important element of a successful consumer framework. That not only encompasses adequate funding for organisations to advocate the consumer perspective, but it also picks up issues such as recognising that where debates impact on the consumer interest, the consumer interest should be represented at the table. It also is around issues such as consultation frameworks and processes that genuinely allow and facilitate input to processes that impact on those interests.

We also see that there are some things that need to happen with our existing law. As I say, many elements of it are very, very good. One of the things we need, though, is much more enforcement of our existing law, and that involves not only adequate resourcing of regulators, but also a framework which allows, and indeed encourages, taking hard cases - a framework which acknowledges that there is benefit in establishing the boundaries of the law. That will obviously involve losses on the part of regulators as well as wins, and we need to be accepting that that will occur and that those things are necessary.

Also, as we move properly to processes which enable us to consider whether regulation is the proper response and an effective response, within that framework we must be properly able to undertake that analysis. We need not only information about compliance costs; we need information about costs to consumer of the absence of regulation and the benefits that flow from effective regulation, and those are elements of our framework that we are not getting right at the moment.

MR FITZGERALD: Thanks very much, Catriona and Nicole. That's fine.

MS RICH: Thank you.

MR FITZGERALD: If we can have our next participants, which is Telstra, I think. Good morning, I'm Robert Fitzgerald - Gary Potts and Philip Weickhardt. If you could give your name and position and organisation, and then we'll be under way.

MR PIANKO: My name is Gary Pianko. I'm the group regulatory manager for Telstra's consumer division. I'm also the regulatory manager responsible for social policy issues.

MR HILL: Trevor Hill, the group manager for consumer compliance for Telstra.

MR SILBERMAN: Mendel Silberman, regulatory analyst.

MR FITZGERALD: Okay. If we could just have 20 minutes or so of just introduction and then an equal time for questions or discussion, if that's okay with you.

MR PIANKO: Sure, that would be great. Thanks very much for the opportunity to present today and to talk on this important issue. Just quickly, prior to outlining our comments with regard to the inquiry, I'd like to make it clear that Telstra regards the issues being addressed as of great importance. I would like to stress, however, that Telstra believes that the key reforms for consumers and for the telecommunications industry more generally relate to the need for reform to Parts XIB and XIC of the Trade Practices Act, matters I know the Productivity Commission has commented on previously.

The most important thing for consumers and consumer policy is an environment which encourages a dynamic industry, and an industry where participants are given incentives to invest. Without reform to XIB and XIC, investment in new and innovative technologies will be held back, to the detriment of consumer welfare. The comments that follow relate specifically to the PC terms of reference and don't address those XIB and XIC issues in any greater detail.

What I'd like to focus on from Telstra's perspective is the detriment to consumers and Telstra that result from the unfair funding arrangements that apply to social policy settings in Australia in the telecommunications industry. The industry was opened to full competition in 1997. However, the regulatory settings associated with consumer policy were not addressed as part of that industry deregulation. The result is that there is an anachronistic monopoly overhang associated with consumer policy. Telstra believes that this is leading to distortions and suboptimal market

outcomes for consumers.

I should preface this by saying that Telstra is not seeking to remove any form of social policy whatsoever. It is Telstra's position that what is good and bad social policy really is a matter for government, and Telstra firmly believes that that question must be addressed by government. In my discussion today Telstra really just wants to concern itself with the way government mandated programs are funded. On the issue of coverage, there are numerous telecommunications consumer policies that apply to Telstra and no other telecommunications provider. This is poor policy for a number of reasons.

Consumers who choose providers other than Telstra are detrimentally affected because they receive none of the consumer policy coverage that applies to customers of Telstra. Consumer choice is limited as Telstra becomes the only option for customers seeking to benefit from the consumer policy in question, particularly those vulnerable and disadvantaged that the commission has highlighted. These customers are therefore not deriving the full benefits of open competition. It leaves one player in the market, Telstra, with a regulated, higher cost structure than its competitors. This runs absolutely counter to all federal government policy in relation to competition issues. Telstra starts at a competitive disadvantage in the marketplace, and there is no doubt that this acts as an investment disincentive that all consumers pay for.

On the issue of funding, the requirement for Telstra to fund many government mandated consumer programs creates a major distortion in the market. Telstra incurs all costs associated with providing these services and in most cases receives no compensation from government or industry. Welfare should be the domain of the state and not private organisations. This is reflected in the fact that in all other equivalent industries the state and territory governments compensate private companies for the delivery of government-mandated policy.

The federal government recognises that CSOs are often established to meet government social policies. The federal government's national competition policy recognises that Australia's consumer policy should not reduce efficiency that contributes to healthy competition, particularly with regard to the funding mechanism of CSOs. It directs CSOs to be funded by government in order to achieve the goals of assisting the vulnerable consumers and encouraging efficient production and delivery of products and services.

So the question really is: what does Telstra want in this sphere? The answer is reasonably simple: we want one fair rule for the industry and we want the removal of monopoly overhang, reform that probably should have happened in 1997 and is now 10 years overdue.

The social obligation settings that most concern Telstra are those which provide no coverage to consumers using telecommunications providers other than Telstra. Again, Telstra would like to stress that Telstra does not object to the nature of the social policies in place. Telstra's concern is only with the way they are applied to the telecommunications industry and the way they are funded. If government believes a particular benefit is required, that should be for government to determine. What is not valid is for government to require a commercial entity to pay for their decisions. Simply, this runs counter to the government's own policy and basic free market principles.

With competition now intense in the industry, all government impositions do is discourage investment and unfairly disadvantage Telstra relative to its competitors. They also distort consumer choice and efficient market operations. Telecommunications competition has brought great benefits to all Australian customers through lower prices, more choice and new services. It is obvious that Telstra should be on a level playing field with foreign-owned international competitors operating in this market. Consumers should have the benefit of that competition without distortion of choice through asymmetric regulation. This can't happen while only Telstra continues to be mandated by government to pay for the government's social policies.

While Telstra has modernised and commercialised, obligations which hark back to its public sector past remain. Telstra is only seeking the same treatment that applies to all others in the industry. Telstra stands ready to be a distribution channel for government policy and is open and willing to discuss all possible methods for distributing government-funded policies. Of course, all industry participants should be able to do the same, and Telstra should derive no advantage over other industry participants in the distribution of government policies. We want to see a marketplace where consumer choice is not distorted.

So what are our key concerns with government policy obligations? Telstra currently expends $92 million per annum in delivering the community service obligations which government has legally applied to Telstra and no other telecommunications provider. The composition of these key obligations is as follows. These are the obligations that I'll refer to as our key asymmetric obligations: firstly, the low income measures, excluding pensioner concessions, obligations such as our in-contact service, which provides phone services for incoming and emergency service calls only, sponsored access, the assistance program and a range of other programs, which totals approximately $35 million per annum; and the requirement to provide free directory assistance to residential customers, which equates to approximately $23 million per annum. Telstra made a submission to government last year, which was rejected, to phase that out.

Another obligation is the production and delivery of the White Pages to all premises in Australia. This is the requirement to deliver the White Pages material even where it's not economic to do so. That comes at a cost of $17 million per annum. Responsibility for all the costs and management associated with 000 service comes at a cost to the company of $13 million per annum; and providing below-cost disability equipment costs Telstra $4 million per annum. We have not included pensioner concession discounts as a CSO, as Telstra has proactively decided to absorb these discounts, worth approximately $200 million per annum, as part of our corporate social responsibility measures.

For completeness it should be mentioned that there are a range of other regulated consumer protections that are difficult to put a dollar value on. These include the retail price caps, the customer service guarantee, the rural presence plan, operational separation, accounting separation, et cetera. But one thing we do know: they come at a cost, and it's a cost to the industry and it's a drag on industry.

In regard to vulnerable and disadvantaged consumers, which the commission has specifically highlighted in the issues paper, such consumers must choose Telstra in order to gain access to range of products and services that provide concessions and/or emergency relief assistance, and/or disability equipment, for their communications services. Telstra is the only service provider required to offer such concessional services through its Access for Everyone program, the value of which is approximately $35 million, which we spoke about, and a program which touches over 1.5 million customers.

It's not Telstra's view that assistance should be withdrawn, and I do want to make that very clear. Rather, the consumer policy framework underpinning such assistance needs to be widened to include all service providers and funding needs to be provided in a way that ensures competitive neutrality and allows maximum consumer choice. The Commission may wish to make a finding that in the telecommunications industry we do not even have an industry-wide basis for consumer policy. We still have one player only carrying the obligations, with consequent market distortions.

Another example of distortion in consumer choice is directory assistance. Telstra is required to provide free residential directory assistance, at a cost of $23 million per annum. This is anachronistic in the extreme, given the changes in competition and demand for such services. However, it remains as a market distorting feature of the current consumer framework. A further example is the emergency service, or 000 service. Telstra runs the service without recompense, and yet a third party is responsible for the 106 service - that's the text messaging emergency service number - which is used by the deaf, and the provider of that

service is recompensed.

With new forms of new communications coming down the line, such as video calling for the deaf or the hearing impaired, it is possible that the consumer policy framework in this instance will become fragmented. It is better to have one suitably resourced national emergency service call handling centre, able to deal with customers no matter what their communications preferences, centrally funded and competitively neutral. The National Emergency Communications Working Group and the Emergency Services Advisory Committee both support Telstra's proposal to migrate this service to a more suitable manager.

The issue of non-targeted CSOs: the Treasurer also stated in the terms of reference that the commission is to report on ways to improve the consumer policy framework so as to assist and empower consumers, including disadvantaged and vulnerable consumers, to meet current and future challenges, including the information and other challenges posed by an increasing variety of more complex product offerings and methods of transacting. Many of the asymmetric social policies are broad based and therefore not necessarily benefit vulnerable customers any more than they benefit non-vulnerable customers. Free residential directory assistance is an excellent example of this. If government believes that such measure are appropriate, Telstra essentially is agnostic on the issue. As stated earlier, the issue of targeting is one which Telstra would prefer to leave entirely to government.

We do believe government is defying its own policies on many of these issues. In principle the Australian government itself does not believe that private industry should fund government policy and programs. A number of government commissions and coordinating bodies have set out the rules for funding community service obligations from public funds. In early 2005 the federal government restated earlier descriptions of community service obligations:

> A community service obligation arises when government specifically requires a business to carry out an activity or process that the organisation would not elect to do on a commercial basis, or that it would only do commercially at higher prices, and the government does not or would not require other organisations in the public or private sectors to fund.

That's a Department of Treasury statement, and it comes out of the Australian government National Competition Policy Annual Report 2004-05. The report goes on to say that there should be transparency in how the obligations are set, costed and paid for, and that they should be paid for by government. The set of government principles regarding the funding of community service obligations has been repeated many times in a number of reports and forums, including previous Productivity

Commission reports. We'll submit this document publicly, and we've got references to those statements.

In practice these rules have been implemented in virtually all industries but telecommunications. This is a situation that should be addressed as a national priority. The federal government has recognised that, in the current competitive environment, it is ultimately the shareholder who bears the cost, as internal cross-subsidies of CSOs are not possible in competitive markets such as the telecommunications industry. In its Socioeconomic Consequences of the National Competition Policy November 1998 report, the government position was articulated as follows:

> In the past there has been a tendency for the business sector to subsidise household consumers in the provision of public-operated utility services, while urban residents have tended to subsidise rural residents. However, charging some consumers at a higher rate to subsidise others becomes untenable where there is access to alternative suppliers who do not contribute to funding the CSO and whose prices more closely reflect the cost of providing the service.

It is even more important today, as the ACCC has required Telstra to de-average wholesale access prices. The government prevents Telstra from recovering costs in the high-cost area through retail price controls and other mechanisms. This regulatory pincer encourages and enables Telstra's foreign-owned competitors to cherry-pick Telstra's most profitable and lowest-cost customers. This disadvantages Telstra and reduces Telstra's ability to compete and therefore invest in new and innovative services that would benefit all consumers and customers.

On the universal service obligation front, or the USO front, Telstra has the legal obligation to make a standard telephone service reasonable available to any Australian, regardless of where they live or work. In general, rural services are more expensive to install and maintain than metropolitan services. The mechanism that was put in place prior to privatisation and open competition to fund and provide national service commitments is called the USO. The ideal funding mechanism would be for government to pay for the cost of the USO in line with stated policy. A properly funded USO would be a competitively neutral arrangement.

The USO, however, is grossly underfunded. All telecommunications service providers are supposed to contribute to the levy in proportion to the industry revenues. However, the total fund is set by the communications minister and is unrelated to cost. The fact that the fund amount is set by ministerial discretion means that there is pressure from Telstra's competitors to ensure that the fund is as small as possible. As a result, contributions by other carriers represent a very small

proportion of total USO cost, leaving Telstra to fund the remainder.

Even if we go back to the last costing that was done for USO, the ACA at the time costed it at $548 million, and even if you said that there has been no change to that cost in the past 10 years despite rising fuel, copper, other input costs, when you compare that to competitor contributions of just under $60 million, you can see that there's a gap of about $489 million as a minimum, and Telstra funds that. So Telstra is essentially funding just over 90 per cent of the USO, despite representing approximately 60 per cent of industry revenues.

This is not only unfair on Telstra shareholders; it is not in the best interests of rural and regional customers, because Telstra is being dissuaded from investing in new technologies that would benefit these customers. A new, more realistic, costing is required. Now that the telco market is so competitive, it is simply unfair and un-Australian to expect only Telstra to incur these substantial regulated costs while the shareholders Telstra's foreign-owned competitors bear no such burden. The federal government should apply to itself its own policies on funding of community service obligations and pay for the real cost of the USO. If the government is not prepared to hold itself to its own policy settings, then the burden should at least by equitably borne by all participants in the telecommunications industry.

The last issue I want to speak on briefly is price caps. Telstra believes that retail price controls are an excellent example of regulation which is now anachronistic. Price controls were introduced as a temporary measure in 1989 within the context of an absence of network and retail competition, and to ensure that productivity gains flowed through to consumers. The efficiency grounds for retail price controls may have made economic and social policy sense at that time. The telecommunications market has become so competitive since that time that the rationale for price controls has evaporated. Telstra should now have the same flexibility to respond to customer demands and compete in the market as every other carrier and provider in the Australian market has. The price controls create unnecessary compliance hurdles and costs. They stifle pricing innovation. The very complicated nature of them is holding Telstra back from delivering pricing arrangements which would benefit hundreds of thousands of consumers and customers.

In all other equivalent jurisdictions the presence of wholesale regulation has led to the phasing out of retail price controls. The EU regulatory framework which came into force in July 2003 states that regulatory controls on retail services should only be imposed when national regulatory authorities consider the relevant wholesale measures, or measures regarding carrier selection or carrier preselection, would fail to achieve the objective of ensuring effective competition and public interest. While the ACCC has overseen the rapid expansion of declared and regulated wholesale

access arrangements, the government has at the same time tightened price controls and made them more prescriptive. As a result Australia is out of step with the rest of the OECD. Quite simply, it makes no economic sense to regulate both wholesale and retail services. Regulatory error is inevitable.

MR FITZGERALD: Thank you very much. We'll now open for questions for about 20 minutes or so. Do Philip or Gary want to start off:

MR POTTS: Could I ask you a question about something you didn't touch on. I can understand why you focused on the issues that you did focus on, and I imagine in your submission we'll get chapter and verse on that. They're issues that have been gone over at some length, of course, publicly, so they're not new. I was interested to seek some comments from you on more general issues, if you like. You're focusing on the question of by and large community service obligations, how they're identified and paid for, and being treated fairly, but if you look at your market more generally, which is far more significant than the market that's affected by CSOs, in the area of dispute resolution we have the telecommunications industry ombudsman. Could you just provide us with some general observations on how you think that particular framework operates in terms of protecting consumer interests in your industry and in relation to Telstra particularly?

MR PIANKO: Do you mind if I just ask Trevor to comment on that?

MR POTTS: Sure.

MR HILL: I'll try to make some observation on that. Clearly the need for alternative dispute resolution, a body like the ombudsman, is accepted, and I think any sort of objective assessment would say that he's delivering real benefits to consumers. I think the challenge for our industry and for that particular scheme is to ensure that it's able to move with the times in terms of the issues facing it. By way of example, over the last decade the number of complaints has obviously grown as the market has grown, but what's also interesting is that the number of issues per individual complaint has also started to grown. By that I mean that individual customers are now raising two issues per complaint, or one and a half issues in a statistical sense. What that says is the industry itself is getting more complex. So it's very important that the ombudsman is able to have the right skills, resourcing and capability to meet the needs of people who rely upon the services of that scheme.

I think at this stage the funding model is based upon a mechanism where members of the scheme who generate the most complaints sort of fund that scheme. I think that's reasonable sort of proposition, but, as I said before, as a basic proposition the ombudsman scheme is a valuable and worthwhile instrument within the industry.

MR WEICKHARDT: Can I just piggyback specifically on that issue. When we met with the ombudsman, they raised a couple of examples of things that sort of fall between the cracks. The first of two of the examples that I noted is that they said if you've got a pay TV problem the ombudsman can deal with the line issue, but if it's deemed that the line isn't the problem, then you've got to go to the Office of Fair Trading. The consumer probably doesn't know what their problem is; they just know they've got a problem with not being able to receive pay TV.

The other example they raises is that if you have a mobile phone contract and the handset is kaput after 15 months but you have a two-year contract with a phone carrier, the ombudsman deals with the contract with the phone carrier but can't deal with the contract on the handset. It seems to me from a consumer's point of view this doesn't sound as if it's particularly user-friendly in those two examples. I don't know whether there are others, either, but you might like to comment on that.

MR HILL: I don't have the detail of all those examples to respond to today, and we'll obviously try to address that in our formal response, but I think in a broad sense what the ombudsman is saying is that one of the issue put before him is that there's an issue about whether or not his organisation or scheme should become a one-stop shop for consumer complaints. I think in the broad sense that's not something that we would object to. I think it gets back to the various elements and, as I said, I can't talk about the particular items you've referred to because I haven't really thought through the detail. But there is a broad discussion about a range of issues. Another example might be finance leasing associated with telecommunications equipment and who should be the body.

The broad issue in a theoretical sense of the one-stop shop is attractive, but I think in a practical sense what's important is that there is a danger that the scheme itself will become too big and too unwieldy. A more targeted, more skilled sort of focus of an ombudsman scheme in our sector is important rather than getting involved, for example, in the finance sector. There's a banking industry ombudsman, and I think there's a need to have separate processes for that particular nature of complaints.

I think what it says in broad terms is that there's probably a need for the various schemes that handle complaints to have a mechanism where they can actually have some efficiencies. For example, the ombudsman would have an arrangement with the Privacy Commission to handle privacy-related complaints on behalf of the commissioner. That works quite well. So I think there is an issue for mechanisms within the various schemes to manage the customer concern about where they go to.

That raises the prospect and the requirement for good information, and I think

that's a broad issue within the consumer policy framework that needs to be addressed quite substantially, particularly in our industry, where my friend, Mr Pinnock, the ombudsman would say to me on numerous occasions that a right unknown is a right denied. I think in that sense the information of consumers' rights and entitlements in the telco sector is something that needs to be addressed in a broader sense, because we have done a lot of work in Telstra but also within the industry association, the Communications Alliance, about getting more streamlined information flows about the various elements of the consumer protection framework, of which the ombudsman is clearly one.

So I think those sorts of issues that you highlight can be addressed through those mechanisms rather than trying to grow one scheme to fit all particular eventualities. There will be other examples. We talk about pay TV and mobile handset now: there will be another range of options in three to five years' time, and it's very hard to produce solutions today. I think really the best way is having a good, efficient mechanism between the various complaint handling schemes that aren't necessarily visible to consumers but whereby it doesn't matter where a consumer goes to, the ombudsman scheme itself can make an informed choice as to who's best to handle a particular complaint.

MR WEICKHARDT: In a way that touches on another issue I wanted to raise with you, if I could, and just get your observations on. You're operating in an industry that is becoming increasingly complex technically, I think, for consumers.

MR HILL: Yes.

MR WEICKHARDT: Perhaps not for those in the industry, but those who are using the products and services of the industry it's becoming increasingly complex, I think, yet it's recognised that if markets are to operate properly and efficiently the consumers have to be well informed. So there's this sort of ongoing, and I suspect growing, challenge to make sure that consumers are not only well informed, but they can actually use the information to make proper choices, if you like.

Could I get your observations on that issue from a Telstra perspective, and what you see will be necessary for Telstra as the company with roughly two-thirds of market share - how Telstra will meet this challenge as we go forward and how it's meeting it at the moment. It's related to dispute resolution in a way, because I think when we saw the ombudsman he said to us that something like 90 per cent of matters that are raised with him he settles in the first day or so, which almost suggests that it's an information problem between the provider and the consumer. He's able to bring the parties together, understand the issue and then it's resolved. The numbers that he really has to deal with on an ongoing basis are relatively small compared with the number of issues which consumers raise, which suggests that perhaps there's

another issue, which is related to the question I'm trying to ask.

MR PIANKO: I appreciate that comment. I would like to say a couple of things just quickly, because Trevor is better qualified than I am to speak on this. Firstly, I think it's worth saying that Telstra goes out of its way to go to extremes to provide information to customers. Hopefully we do it in as efficient a manner as we possibly can and in as helpful a manner. We are very transparent. We have all information that relates to our products and services and arrangements available on our web site, and you can go into a Telstra shop and get access to as much information. We'd like to think we apply the privacy principles in the strictest and most disciplined manner.

I'm not saying nothing can ever go wrong, but I'm just saying there is enormous attention given to all these issues at the highest levels in Telstra, and Telstra is working as hard as possible make sure that consumers are informed and understand the products and services that they're signing up for or taking advantage of. It is drummed in as a key issue that must be worked through as part of any sales program or any telephone conversation, or any interaction that we have customers. I just want to put that on the table.

The other issue is that there are literally hundreds of millions of transactions that occur between Telstra - and probably other telecommunications providers but I can only speak for Telstra - and our customers, and the proportion of them that do get to the TIO is still incredibly small. We would like to have none that go to the TIO. I'm sure that's right, isn't it, Trevor? We'd like to create an environment where all our interactions were so transparent and easy to understand, and so unlikely to create miscommunication that there was no need for the TIO. But I do want to highlight that it is an incredibly small proportion relative to the hundreds of millions of transactions that occur.

MR HILL: I'll just follow up on Gary's comment and try to tackle the issue. I think, as Gary said, the customer is really at the centre of everything we do. You'd be well aware we're going through an internal transformation to improve our processes and systems designed to deliver better outcomes for out customer, but even as we go through that process today, our performance in terms of complaint handling I think is good compared to the rest of the industry. As a percentage of the overall total complaints going to the ombudsman, we run at about 30 per cent of the volume of complaints going to his office. As a percentage of our market share I think that's a pretty good outcome. That's not good enough, but we want to improve that and we're focused on that.

But you are right about the issue of information. The regulatory regime per se is very complicated. As one of the by-products of any regulatory regime, the consumer protection and the consumer policy regime requires information to be

communicated to consumers of the existence of that regime, and that burden falls not only on regulators; it also falls upon the policy-makers and the industry participants. You find the I think inefficient and somewhat crazy situation where we have regulators, policy-makers and industry participants communicating with customers and the community generally on the same issue. There is I think an inherent inefficiency in the way we communicate the existence of the consumer policy regime.

As I said before, we have done work with the Communications Alliance, trying to capture some of those information obligations, and they go to about 10 pages when you actually list them across the whole regulatory regime. Some of them are asymmetric on Telstra, given the presentation that Gary has given you, but they are broadly across all of industry. So the breadth of obligations to communicate to consumers is quite overwhelming just from an industry participant's point of view. What's not done then is whether or not those communication methods are effective and efficient. A lot of them were written back in 1997; you've got to provide paper based communications. Some customers don't want that. With the take-up of online access, consumers do want - - -

MR PIANKO: Even when you have a phone interaction with an agent on the telephone, there will usually be a long verbal presentation to outline to the customer, "This is what we're doing, this is what you're signing up for." I'm not saying that's wrong, but it does add a lot of complexity for customers as well, and a lot of customers would be happy to make the communication quicker and speedier and maybe sacrifice some of that information. I'm not suggesting that's the right thing; it's just hard to get that balance right is what I'm really trying to say.

MR FITZGERALD: But doesn't this complexity lead to the notion that in fact regulators now need to intervene to ensure that, given the complexity of the contract and given the complexity of information, they now need to go beyond that to actually look at the fairness of the contract itself? You've heard this morning the Consumer Law Action Centre here in Victoria has indicated that, in relation to telecommunications specifically, one of the great advances they see is the unfair contract terms regulations being introduced into Victoria. There is a view that the complexity itself of the standard form contracts now raises the stakes for regulators to take more active intervention in relation to the contract itself.

In talking to one of your competitors, we were made aware that a contract is 500 pages long, 200 pages about the terms and conditions, 300 pages in relation to the various product plans. Even your own industry in the consumer contract code now talks about unfairness as a standard concept and tries to articulate it. So leading from Gary's point, do you get to a point where, yes, you need to improve the quality and the nature of the information, but at the end of the day the complexity itself says

that that's going to be insufficient for consumers and we need to look at a different way of addressing these issues? Just your response to that.

MR HILL: I think the complexity issue we did talk about in the broader context of information flow. I think government itself is looking at its online capability to deliver its information in a broader sense, and from our sector we think there is scope to ensure that there is a more centralised, coordinated information flow about consumers' rights and obligations. That would address the concern about differing complaint handling processes.

Going to the contract issue, I think that's an issue that's been highlighted and discussed. I think the concept of contracts is one that throws up a number of issues. We're a national industry, and therefore the efficiencies of having common national guidelines and processes are important vis-a-vis the state based sort of regime. So there's a balance between having state based sort of rules versus national requirements.

MR PIANKO: We'd always advocate the national arrangement rather than state based arrangements.

MR HILL: In that sense what has happened post the Victorian legislation is that the telecommunications industry has come together and developed that code. I think that code from a Telstra point of view has driven the right behaviour by having our contracts reviewed against the terms of that code. That code is registered with the regulator, so it actually is enforceable, and I think in that sense the effectiveness of that code is tested by the range of complaints that the ombudsman is seeing. I think I'm right in saying the nature and number of those complaints of contract breaches has diminished over time.

The other important issue in the contracting area is about not so much the term of the contract, because that's in one sense fixable by having good legal drafting; it's the communication and the awareness at the point of sale. That has always been the issue about consumer discussion and that awareness, and that is important from a behaviour sense. From a compliance point of view, we want to make sure that our staff and our processes ensure that our customers are fully informed of their rights and entitlements. So it's about making sure we've got the right skills, the right training, the right resources, having things embedded in the systems and processes, as well having good contracts and fair contracts.

MR FITZGERALD: Can I just lead on from that. What would Telstra's view be in relation to a nationally consistent unfair contracts law, then? Given that Victoria has a version of it and other states are looking at it and you've now incorporated the notion of unfairness into your own contract, what would be your position , if you

have one, in relation to a uniform unfair - - -

MR HILL: I think as a basic principle the uniform approach is much better than the fragmented state approach. If that was the choice, we would definitely go for the uniform approach. But at this stage there's also the test of how you would tackle that across the various different industries and whether or not there's an efficiency in effecting this - getting the right rules and arrangements.

MR FITZGERALD: For all industry?

MR HILL: That's right, and in that sense it may not be easy to do for every industry.

MR WEICKHARDT: What happens in practice in Telstra? There's Victorian legislation, so you have to comply with that. Contracts that are written in Victoria have to comply with that. Would you have different contracts for other states or just a single contract?

MR PIANKO: No, what we have to do is take the most conservative approach on all of the legislation that applies in the states and then we apply it across the country. We have no choice, basically.

MR HILL: That's what's happened. The Comms Alliance code has had regard to the Victorian state legislation, incorporated it in the code. The code is now registered with a regulator and we now comply with the code. So in effect we're complying - - -

MR PIANKO: We make sure we capture everything.

MR HILL: Just quickly, one other thing on the issue of whether we move to this notion of unfairness. One thing I think we have to be careful of is to look to regulation as the answer all the time. I think we have to be so careful there. We need to look at behaviours as well, because what can happen in an industry is that if there are rogue elements the rest of the industry can be captured and have all that cost burden imposed upon it simply to solve something for 5 per cent of the industry. Probably that 5 per cent of the industry is not the part of the industry that's going to pay careful attention to, if you like, the rules or the laws that operate anyway. So just that word of caution there.

MR FITZGERALD: Sure. Can I ask a couple of questions then. One is, in relation to these codes of conduct that you have, this is a co-regulatory model, isn't it, where you have black letter law that dictates the sorts of areas that the code should cover, and then the industry itself, together with input from consumers and others,

develops those codes. To what extent do you think that's a satisfactory model? On the one hand, many of the telcos say that they're overregulated; on the other hand, consumer groups tell us that this is an area where there is weak regulation. It's very hard for us to get an assessment, but generally is this co-regulatory model that you've got working satisfactory or not?

MR HILL: I think as a general principle it's the preferred. However, it's always capable of improvement. I think that's what's happening at the moment. We have a code process that's developed over the last four or five years in a range of consumer areas. Those codes, through the nature of their development, being done by a committee process, have developed their own degree of complexity and detail. The reason that happened is quite simply because they were in fact industry codes of practice. They were designed to drive behaviour within industry, so they were focused on the industry. Consumer advocates argue that really they're not effective and, secondly, they're not easily understand by consumers, and that's probably right. But, as I said, that's a product of what they were designed to do.

What's happening now is that the industry itself is now reviewing those codes and trying to come up with a high-level principle base of rules designed to address the obligations that industry must comply with. That's designed to do two things: make the actual rules and obligations more easily accessible by consumers, but also to provide that degree of flexibility that the industry can comply with those rules subject to the different sort of operational practices. A good sort of template might be the banking industry code of practice, which has the same sort of approach. In that sense we as an industry are trying to move down that path. We've actually been taken down that path by the consumer movement and we're responding to that.

MR FITZGERALD: Can I just clarify that. Basically you're saying the structure is okay; it's simply reviewing the actual codes themselves. Is that your basic position?

MR HILL: That's basically it, yes.

MR FITZGERALD: That basic structure, okay. Can I ask a final question, then Gary and Philip might have others. You mentioned price caps and so on and so forth. Obviously the price caps have been in place because of a concern to moderate price increases in the industry and so on and so forth. Is that driven by a desire to simply protect the whole population, do you think that's driven by a desire to protect a particular group of disadvantaged consumers, or what drives it?

The second thing is, if you were to remove those caps, what would be your approach to dealing with disadvantaged consumers if those sorts of mechanisms that are currently in place weren't there? What's your general approach to hardship and

disadvantage?

MR PIANKO: As to the first part, I don't believe that the price caps hold down prices any longer. There's a thing called the market that does that, and we're in one of the most dynamic telco markets anywhere in the world. Obviously, if you had a CPI of minus 20, yes, price caps would hold down price, there's no doubt about that. But even in their current form, even though we have probably the strictest price caps anywhere in the OECD - in fact I'd say that's without doubt - they probably don't hold down price. Market forces do that. We also have the most comprehensive wholesale access regime probably anywhere in the OECD. You have unconditional local loop freely available, a line sharing service. You have originating and terminating access, you have mobile terminating access, you have wholesale line rental. This is incredibly comprehensive wholesale regulation - declaration and regulation. Does that address the first part?

MR FITZGERALD: What I was trying to get at - do you think the price cap regime that we currently have is, as I said, targeted just generally, or do you believe it has a purpose, rightly or wrongly, in trying to protect those that are most disadvantaged?

MR PIANKO: It certainly started off as economic regulation. To be honest, I'm not really privy to what the government thinks about what is objectives for it are now. I find them hard to understand. Possibly it has some consumer aspects to it. There are aspects written into the price control determination that, for example, require us to have a low income program. So I suppose you would have to say that that aspect of the controls refers more to social policy than economic policy.

Per se Telstra doesn't necessarily think that that's a bad thing. We think that that more targeted approach is the right way to address hardship, for want of a better word, and issues of hardship, and we're very comfortable with the kind of arrangement we have now, which is what's called the low income marketing plan. We work with a group called the Low Income Marketing Committee. In fact, the marketing program is called the Access for Everyone marketing program. We have I think a very good working relationship with that committee, and that committee provides excellent input into Telstra to help us determine how we craft our products and offerings. We regard that as a good model.

What we object to is the asymmetric nature of it. To us, where we're around 60 per cent of the industry, we don't want it to fall, but if it was to fall further, that would leave a large proportion of the population uncovered. We think the time for asymmetric regulation in this industry is over and we need to go to uniform telecommunications regulation. I hope that addresses - - -

MR HILL: It's also linked back and directed back to the basic access service. Clearly with mobiles and broadband taking up, the policy setting has changed, and the government policy needs to change to pick up that change.

MR FITZGERALD: So at the moment you have no objection to a requirement that you provide, for example, a low income plan - - -

MR PIANKO: Program, yes.

MR FITZGERALD: - - - provided all other competitive telcos were also required to do so?

MR PIANKO: That's right.

MR FITZGERALD: Thank you very much. That's terrific.

MR PIANKO: Thanks very much.

MR FITZGERALD: We'll have our next participants, Reproductive Choice Australia. We're running well on time, so that's terrific.

MR FITZGERALD: Thanks very much. I'm Robert Fitzgerald, with Gary Potts and Philip Weickhardt. If you can just give your name and the organisation you represent, and then whatever you want, 10 or 15 minutes or whatever, in terms of just presenting the key points. Then we'll raise some questions and you can be off at half past. Thanks.

DR CANNOLD: Sure. I'm Dr Leslie Cannold and I'm the president of Reproductive Choice Australia. Reproductive Choice Australia is a national coalition of over 20 organisations, including Children by Choice, the Public Health Association of Australia, the Australian Women's Health Network, the Women's Electoral Lobby and all the state based pro-choice groups. If you had to sum up what we do, the organisation is dedicated to ensuring that Australian women's reproductive rights are protected and enhanced.

MS VICK: I'm Lesley Vick. I'm an academic legal researcher and my area of specialisation is medical ethics and the law and the law applicable to health professionals, and I'm a committee member of Reproductive Choice Australia.

MR FITZGERALD: Okay, over to you.

DR CANNOLD: You have in front of you hopefully a submission from us and also a couple of pages of what we are going to argue is deceptive and misleading advertising which is not at the moment being caught up in the existing consumer framework.

MR FITZGERALD: Yes.

DR CANNOLD: In terms of our understanding, I realise we're probably griding the gears a little bit and changing pace a little bit in terms of what you've been listening to, but we did read the issues paper quite carefully, and it seemed to us that what you were looking into was very relevant to the concerns of our organisation. It seems that what you were wanting to understand a bit whether or not there are some gaps in consumer policy coverage at the moment and to have people suggest some improvements in the existing framework that would assist and empower consumers, including disadvantaged and vulnerable consumers, to operate effectively in increasingly complex markets. We hope that we'll be able to do that and explain what the gaps are, because we do believe there are some gaps.

As you probably know better than anybody else, the Trade Practices Act tries to protect from deceptive and misleading advertising, and I was interested to note in the issues paper that it's the most commonly used part of the act. I hadn't known that. I suppose if you summarise it, it's about protecting the rights of citizens to make

informed choices about the goods they accept or the services that they engage. The issues paper also notes that well-informed consumers spur efficient provisions of goods and services and that policies that exclude rogue traders increase consumer confidence to the benefit of legitimate business operators. These are things we would agree with.

In terms of trying to think through the moral underpinnings of section 52 - and this something that I do a lot because I'm a medical ethicist, so autonomy is one of the areas in which I research and write about lot - it seemed worth unpacking that a little bit, because one of the key questions we have about it is why, if this matters, it matters in some instances but seems not to matter in others. So I thought it would be worth just trying to unpack it quickly.

Our view would be that in liberal, pluralist democratic societies when you have diverse populations, there is an acceptance that citizens may, and have a right to, disagree about what's in their own best interests and what's in the best interests of society, and that as long as the decisions people make don't do any harm to other people, it's consistently argued by governments of all persuasions that the role of the state is not to take sides but to enable citizens to make choices based on their own needs and values, even if others are offended by those choices or see them as mistaken.

Informed decision-making, which is really what section 52 is about, is accepted very, very widely across a range of disciplines, including medical ethics, as a well-accepted mechanism for the protection of an individual's capacity to exercise autonomy through making choices. So informed choice is about making sure that decision-makers has these two components that people consider to be absolutely vital for a decision to be autonomous, and an autonomous decision is a decision that reflects self-governance - your own view of what you think is right and how you ought to be able to live a good life. Those two things are that the decision is voluntary and the decision is substantially informed, and the notions about deceptive and misleading advertising are really going to this notion about informed decision-making.

Deceptive and misleading advertising subverts the capacity of decision-makers to make informed decisions, and basically that means it's robbing them of their autonomy. Deceptive and misleading advertising, through its promotion of ill-informed decision, denies the decision-maker the freedom to make choices with his or her own values and preferences by tricking them into making choices that are consistent with the preferences and the values of the false advertiser.

Some decision-makers may be particularly vulnerable to autonomy theft. That's how I'm going to refer to it from now on: that what deceptive and misleading

advertising is doing is stealing autonomy. We would argue that the young, those from non-English speaking backgrounds, the poorly educated, the time poor and/or those at a time of crisis, may be less critical in their reading of deceptive and misleading advertising and as a consequence may be more likely to make decisions reflective of the values and preferences of the false advertiser rather than their own values and preferences.

There can be no more serious charge, in our view, in a liberal pluralist democracy, than the charge that someone is stealing the autonomy of someone else. It seems important to point out, given what we see as one of the gaps in the existing consumer framework around this and the limits of section 52, is that greed for money is not the only human motive for individuals or organisations to engage in autonomy theft. There are other reasons that people may try to steal the autonomy of others, and that might be the old-fashioned power motive or it might be the desire to satisfy the requirements of one's religious or political ideology. These are also things that can motivate people to try to deceive and mislead others and steal their autonomy.

So our view is that the existing policy framework does not protect non-fee paying consumers from deceptive and misleading advertising. Section 52 of the Trade Practices Act prohibits a corporation in trade or commerce from engaging in "conduct that is misleading or deceptive or is likely to mislead or deceive". Section 52 offers no protection to Australian citizens who procure goods or services without paying a fee. That's how we understand it, anyway. It enables non-corporate entities, or corporate entities not involved in trade or commerce, to engage in deceptive and misleading advertising free from any legal consequence.

The law as it stands allows the following acts of autonomy theft - and we've tried to provide you with a concrete example of this first one, which is basically the marketing of pregnancy counselling services by pro-life organisations to women who are in a crisis, the crisis of an unplanned pregnancy, in ways that suggest that those services will support and refer for all three options. The three options when you have an unplanned pregnancy are adoption, abortion and parenting. If you look at the advertising that we've given, we feel that it very strongly suggests that, but in fact it is an advertisement which was put in every GP's surgery in Australia and it's actually by a group called Pregnancy Counselling Australia, which shares a mailing address with Right to Life Australia.

But there's no place on that advertisement where you will find that this was put out by Right to Life, and nowhere, unless you read extremely, extremely carefully between the lines, where you can even get a sense that the sort of counselling that's being offered is not going to be what many of us would conceive of as legitimate counselling. It's not going to refer for all three options; in fact constitutionally many of these organisations cannot refer to any organisation that provides abortion. That

seems to us to be a relevant thing that should be included in advertising.

We also, for instance, could imagine church groups that might advertise free meals but when the hungry arrive to claim them they find they must attend a service or a Bible class. This is also something that my understanding is, from living in St Kilda, often will happen. This sort of advertising again, because no fee for service is charged and/or the organisation doing it is not a corporate entity, is beyond the reach of the law. The final thing, which is something that affects me as the mother of two boys, is that in a lot of instances where sporting clubs will advertise try-outs at specific times and places for children's sporting teams, it turns out they really aren't try-outs at all and the children can easily join at a later date without having to go through the stress of these sorts of try-outs. Again, there's no ramifications for this kind of advertising.

Of all these three things, for me the most serious one and the one that's really within the remit of our organisation is the deceptive and misleading advertising around pregnancy support agencies, but it seemed to us when we started thinking about it more broadly that there are obviously some gaps here in terms of what organisations can do. It seems to us that these examples show that the motives for autonomy theft are not always fiscal, but they may ideological or religious and/or status orientated, and that both corporate and non-corporate entities can and do take advantage of gaps in the law to gain advantage in relation to disadvantaged or vulnerable citizens. In this case we're talking about women who are facing the crisis of an unplanned pregnancy, the poor or children. It seems to us that such vulnerable groups are poorly served with regard to autonomy theft by the current consumer protection framework.

So what are we to do about it? We wanted to stress that we're not constitutional lawyers and this particular area, what we know about it, is where this gap is - because it's affecting an area we do know about - but we are not going to the experts and being able to say, "This is how you ought to fix it." We're assuming that you folks have the expertise to try to work that out. So we've thrown a few things out there. The obvious one is amending section 52, and there seemed also to be in the issues paper a discussion about the fact that we don't have at the moment an overarching consumer advocacy body which would have the power to make findings and provide remedies in relation to deceptive and misleading conduct without regard to whether a fee for that service is being paid. But we really just threw those out there as, having read the issues paper, what seemed plausible but we would hope that you have the capacity to work out how to fix the problem.

MS VICK: That's the important point. We're trying to identify a problem and draw your attention to that. If I could just reinforce what Leslie is saying about this, as we make the point in our submission, we believe most Australians would think that they

were adequately protected by the law with respect to deceptive and misleading advertising and would not realise that the gaps we've identified exist.

In the case that we're turning our attention to, a woman experiencing a crisis in relation to a pregnancy, as consumers, which is what this is about - protection of consumers - the consequences could in fact be quite serious as a result of reading an advertisement such as the one we've exemplified and put before you today. For example, a woman could be coming from the country and she may have contacted an organisation like this believing that she will receive information about all three of the options with respect to her pregnancy - adoption, termination or parenting.

DR CANNOLD: So what she's seeing is that.

MS VICK: Having found herself in the wrong place, if she wanted to contemplate - or indeed if she'd already decided - that termination was her choice, she might then have to completely rejig her situation and find another agency. She may only have allowed a couple of days and expense in coming from her place in the country. So I'm just wanting to point out that this is not a light matter. It is not just a matter of a woman perhaps realising she's made a mistake and going down the street to a different agency. For some women, the sort of vulnerable citizens to whom Leslie referred, the consequences could be quite serious in terms of cost. It might also be serious in terms of delay if termination is the choice the woman wishes to exercise, if she finds herself having responded incorrectly, having read this ad, and thinking that she would get counselling, advice or information, all of which are part of the counselling package from the agency concerned.

DR CANNOLD: She might end up in a position, for instance, where she no longer has the option of termination because she's been delayed.

MS VICK: Exactly, or can't afford to make the trip to a city again or something like that.

DR CANNOLD: That's right. So it is quite significant. I agree with all of that. Just to sum up, what we really struggle with is trying to understand why, if it's so vital and clearly such a used provision and so important to protect consumers from people who are paying a fee from deceptive and misleading advertising, it becomes unimportant the minute a fee isn't exchanged. What is it about a fee that somehow transfers someone who deserves this sort of protection to someone who doesn't? We have been unable to come up with any sort of satisfying answer to that question, and it seems to us that, if there is no satisfying answer, we have an obligation to fix this gap.

MR FITZGERALD: Thank you very much. We'll just have questions. Philip?

MR WEICKHARDT: I first of all should say that I'm not a lawyer and therefore I guess this is just an amateur's opinion but, looking at this, there are two important issues. You raised a generic issue that I wasn't aware of, this issue about whether there is a hole for consumers to be significantly misled and deceived by activities where there is no service involved for a fee or a payment. But when I look at the advertisement you raise, I'm wondering whether or not a lawyer - and I stress again I'm not a lawyer - would say the advertisement is misleading and deceptive, and therefore whether or not the problem is more the service and what actually takes place, and once the person, if you like, is involved in the service, whether they're adequately informed about the background of the organisation and the service they're about to receive.

If I maybe take a long bow to a financial planner, if a financial planner advertises, "I offer financial planning services," it's only when the person actually goes in the door that they are by law obliged to disclose, "I get a commission from the following people" or "I have the following conflicts of interest," and you now are informed at that point in time. I'm just not sure, even if section 52 of the Trade Practices Act did cover this sort of area, whether or not a court would find that advertisement is misleading and deceptive.

DR CANNOLD: That's a really good question, actually. There's a few pieces of data we can kind of insert into that. One is that these organisations don't disclose when women do ring or come in. So in terms of whether it is later rectified - is the advertisement itself not a problem because the disclosure is made at a later time and then at that juncture it's adequate for women to be making a decision about whether or not they want to continue - the information is never disclosed.

MS VICK: Even if it were, they wouldn't address the issue that I raised earlier about delay if, for instance, a woman had come from the country and didn't realise. One of the things it seems to us, however it's done - and we're not purporting, as we said before, to find the solution; you have access to expertise, obviously, in that area - why should it not be required of such agencies to disclose on their advertising that termination is not one of the options that they counsel or refer for? They don't, and they won't.

DR CANNOLD: Yes. I guess there's something unusual about an ad like this. You can see who does the ad at the bottom. It's Pregnancy Counselling Australia, but of course this is not telling us what the old names of these organisations used to tell us, which were Right to Life something or Pro-Life something. Now, if you ask women - and we do, when we come into contact with women who've been quite distressed by winding up at one of these agencies when that's not what they would have chosen to do had they known - they will say, "It doesn't say on it that it's Right

to Life, it doesn't say Pro-Life." So there are words which they're looking for which mean something to them, and this advertisement of course is just one example. These organisations also advertise under Abortion in the phone book, so if a woman is actually going to look for an abortion she will ring into an agency - - -

MS VICK: They'd clearly imagine that that would be something they'd receive information about by going to the agency.

DR CANNOLD: Why else would they list under Abortion? Yet they do, and they're allowed to and yet they will not refer for abortion. It's in their constitution; they can't. So I think there's something about the broader sort of strategy of trying to adopt names and trying to eliminate from the processes, whether it be at the point at which you see the ad, or the later stage when you actually make the call, that the things that women are listening for to work out, "Is this the agency that I really want to be speaking to?" have been subtracted from the engagement, so that they are not learning that information and they are getting further and further involved in the engagement before what they'll describe as - - -

MS VICK: They realise.

DR CANNOLD: Yes, something sort of stops feeling right. There will be a mention of guilt or God or going to hell.

MS VICK: Punishment, all those sorts of things.

DR CANNOLD: We had one woman - and this was reported on ABC TV - who was a very young girl who'd been sexually assaulted and her father, because men also ring these lines, had actually rung this line because that ad was in the police station in a country town and he had believed, because it was in the police station, that it meant it was a legitimate service. He had wanted a whole range of different advice, including information about abortion, and it took him quite a while into the conversation to realise that he was speaking to a pro-life organisation. They were telling him that his daughter would go to hell if she had a termination. This entire conversation took place and he went back to the police and said, "Do you realise that this organisation is a pro-life organisation?" and then went, "No, we didn't know that."

You look at it and you kind of go, "No, we had no idea." Once they knew, they took it down and they put up something which was advertising a service which would support preferable options.

MS VICK: Our concern is that there be some transparency in the advertisement itself to make it clear to anybody who is looking for advice, information, whatever

with respect to a crisis in pregnancy, that at least in the case of this organisation termination is not one of the options about which they will convey information or refer or counsel in favour of.

DR CANNOLD: Given that all of them belong to an umbrella organisation called the Australian Federation of Pregnancy Support Services and that says in its constitution, "We do not refer for abortion," this seems like a disclosure that they all should be able to make.

MR POTTS: I'm not a lawyer either, but I guess my observation would be that the Trade Practices Act is about commerce basically, and I think what you're talking about here is not really commerce, it's a different issue. It's not to say it's not an issue, and it's an issue governments need to address, but I suspect the answer would lie elsewhere in terms of how this ought to be regulated to ensure that - - -

MS VICK: As we acknowledged before, it's possible that another solution has to be found. Nevertheless, in terms of the terms of reference of your inquiry and the issues that arise under section 52, it still seems reasonable to us to draw your attention to this. You might in turn draw another more appropriate - - -

MR POTTS: I'm not saying it's not a consumer issue. It's a consumer issue but - - -

MS VICK: No, I'm just saying this is why we came here: because it seemed to us it's reasonable to bring it up.

MR POTTS: In terms of the answer you see to it, I suspect it's not in that area.

MS VICK: That may well be.

DR CANNOLD: Yes, and I guess I'm a little confused about that, because if what the terms of the inquiry are about the consumer framework and whether there are gaps in the consumer framework, why do we have to then immediately assume that this is only something that affects people who pay for services? That seems to me to be the operative question here.

MR FITZGERALD: What you've done is raise a number of very significant issues. One is the whole definition of "consumer". As Gary indicated, traditionally "consumer" has generally meant somebody that's involved in a transaction for a fee or price, although you're absolutely right: in the whole of the non-profit area more and more people are referred to as "consumers" or "clients" or what have you.

The second this is, you've opened up this issue that: why should there be a difference between that which is traded and that which is not traded in terms of

misleading advertising, and that's a very interesting question. But, if I can just look at this, for example, in relation to the particular area you're talking about, most of these services receive some form of government funding. Some don't, but most do. Another policy response would be, instead of bringing into the net of consumer policy all non-profit activity - just let me use that expression for a amount; of course, some non-profits are in trade and commerce, but just put it aside - to say, "This is a public policy issue which should be part of the funding terms of conditions," so that misleading and deceptive advertising or conduct would be prohibited in the funding agreements rather than changing the law. I don't know what your view would be on that, but that is another way rather than introducing a new concept into the law, which we would be doing.

MS VICK: As we said before, we hadn't formed a concluded view about the appropriate solution. We're very confident that we have identified a problem.

DR CANNOLD: But I would have a view about that as a solution, and I think the problem there would be that, if you put it into funding agreements, you are very much subject to the vagaries of the government of the day in terms of whether or not they see that.

MS VICK: Yes, I was about to say I can see flaws in that true. But it's still nevertheless true that we hadn't formed a view about the appropriate solution. But, like Leslie, I think there would be some deficiencies in adopting the funding solution as a way of dealing with the problem.

MR FITZGERALD: Sure. Let me ask another question. I fully appreciate the vulnerability of the client group we're talking about in relation to these matters and in a whole range of other areas. I suppose the question would be: but there is an obligation on the person to ask those questions when they enter into a service. I think I know your answer to this, but to what extent do you say the person does have an obligation to ask the right questions - and I appreciate the vulnerability makes that difficult - as well as the organisation not misrepresenting their position? In this whole area there's issue around where risk and burden lie, and the question would be the same in this case: where does the responsibility lie?

MS VICK: There's an element of caveat emptor, no doubt, but in a sense you've answered your own question, haven't you? At least some segments of the consumer group we're discussing here would be very vulnerable indeed. I would go back to our original contention, in any event: I think people do believe they're protected by the law with respect to disclosure in advertising. We hear endless stuff about manufacturers having to list ingredients. More and more people are of the understanding that any advertisements they see are regulated in some way, and would have no idea that this sort of ad was not, for starters, and would I think be

entitled to believe, having read the example we've given you - and it's one of many - they did know what the service was providing and they didn't really need to ask some additional question.

DR CANNOLD: I would have thought it would be the case that, whatever the decision would be about fee-paying consumers in terms of what they do and don't need to know, it would apply similarly here. So presumably, if it were the case that the entire obligation was on the consumer to ask relevant questions, and this is of course presuming that they will get honest answers - and we'll just leave that open for the moment and assume that this is the case - this is not entirely the view that we take or else we wouldn't have this legislation at all, because we would take the complete view that it's caveat emptor and let the buyer beware. So we do obviously take some kind of view that the obligation is on the advertiser to take some care not to deceive and mislead. So whatever the extent and range of that obligation is, our argument would simply be that it needs to also be applied to this group of people, who at the moment are completely unprotected.

MR WEICKHARDT: In a generic sense, again you've raised a whole range of questions in my mind that I don't have answers to. I'm trying to think of other advertisements in areas where people are not paying for a service. If the Gold Coast advertises, "Come to the Gold Coast and swim at our lovely beaches," and I get there and find there's just mud and lagoons, do I have any action against anyone? Is there any constraint on anyone advertising where there isn't, if you like, a service paid? I don't know the answer to this question, but I would have thought that the advertising industry itself had some sort of code of practice. Maybe that's something we should look into, but I don't know whether you're aware whether there is any code of practice or industry co-regulation around misleading advertising in a general sense.

MS VICK: They do, as I understand it, but one would have to conclude that it doesn't address this because the problem exists.

MR WEICKHARDT: But has this particular issue been drawn to their attention, do you know?

MS VICK: No, we haven't; let me answer that way.

DR CANNOLD: Actually, very early on we did poke around there - very, very early on.

MS VICK: Yes, that's right. We couldn't find anything that applied.

DR CANNOLD: Yes, and couldn't seem again to raise the issue as being seen to be relevant, because again there was this mindset that, :We only deal with

advertisements that are advertising services for which people pay," and again this kind of presumption that the only thing that would motivate somebody to deceive and mislead someone else - - -

MS VICK: Is money.

DR CANNOLD: - - - would be the prospect of financial gain.

MR POTTS: If I can just say there, though, you're focusing on the Commonwealth legislation, and the Commonwealth - - -

DR CANNOLD: Only because - - -

MR POTTS: Yes, but the Commonwealth legislation has to derive from a constitutional power, and the constitutional power is a trade and commerce power. I'm not sure what the situation is in relation to the states. They'd be drawing on other powers, of course, with their generic-type legislation. Not being a lawyer, I don't know the answer to it but - - -

MS VICK: No, we do want to stress we're not suggesting this is - - -

MR FITZGERALD: Gary's point is right: as to who would have jurisdiction in this area, it's more likely than not that the states have jurisdiction over the Commonwealth. But, as you're saying, you're not putting forward a particular solution.

MS VICK: We're focused on the problem, yes.

MR POTTS: I suppose what I'm saying is that it's not clear to me that, in relation to the states' powers, money would need to change hands for the legislation to apply. It does in the Commonwealth case, I would imagine, as a non-lawyer, because it's based on the trade and commerce power.

MS VICK: Yes, right.

MR POTTS: But the states' power is not based on that; it's based on something else. Is that correct?

MR FITZGERALD: We'd have to look at it, but I think it would be possible for the states to legislate. The current legislation in relation to fair trading would probably define "consumer" as requiring some sort of commercial aspect to it, as it's currently defined. But states are able to legislate in relation to individuals and corporations around a whole range of matters, irrespective of whether there's trade or

commerce involved.

But can I ask this question: in your research on this have you seen examples overseas where the consumer policy net has been extended to non-trade and commerce activities? Have you seen or heard of any evidence from overseas where what you're proposing has occurred?

DR CANNOLD: They're attempting to do it in the United States at the moment, for exactly similar reasons.

MS VICK: It's not happened yet.

DR CANNOLD: It's not happened yet, and we've been led to understand that there are similar impediments, a lot of which is political will, to managing it. So I suspect that eventually we will not be the only jurisdiction that attempts to deal with this problem, because I think it falls under what the issues paper was discussing as this increasingly complex kind of environment in which people are operating. But at the moment this particular issue is only arising in places where this is a strategy of those who are opposed to abortion, and that's largely restricted to western countries.

MR FITZGERALD: Sure. Of course, the issue is much larger than the particular case that you're talking about. You're basically, fundamentally saying there is a gap in relation to a whole area, which is vast in its scope.

MS VICK: That's right.

MR FITZGERALD: There's something like 700,000 non-profit organisations out there, many of whom are in trade in commerce but many who aren't, so it's a vast area of activity. But you mention here that following the lead of the UK - you're talking about an overarching consumer advocacy body. Is that a reference to the National Consumer Council or is that something else?

DR CANNOLD: That was on your issues paper, generic. Yes, we do discuss that. I wonder, just in reference to what Mr Potts was saying, is it in your remit to make recommendations with regard to this problem and say, "This is not something that can be managed" - let's just say for argument's sake the constitution would limit the capacity of section 52 to be changed - - -

MR POTTS: We're looking at consumer policy generally. It's just that the focus of your submission was on section 52 of Commonwealth legislation in trade and commerce and therefore a presumption that money needs to change hands. The point I'm making is that the Commonwealth legislation needs to be based on a constitutional head of power is trade and commerce, whereas when you go to the

states' legislation, which can also apply in consumer policy, their legislation would be based on a different head of power.

DR CANNOLD: Is that something that's within the boundaries of what you were going to be talking about, where you can say, "This is where it ought to be addressed?"

MR FITZGERALD: One of the things we're keen to do is to identify gaps, and you've identified a gap which I must say we hadn't given any thought to. So we're very grateful for your highlighting a significant gap in it. As to what our response would be, it's early days yet. I'm conscious that you have to get away at this time. Are there any final comments or questions, Gary and Philip?

MR WEICKHARDT: No, thank you.

MR FITZGERALD: Thanks very much for that. It's a very interesting issue you've raised and we're genuinely interested.

MS VICK: Thank you.

DR CANNOLD: Yes. We would be extremely grateful if you could try to address it.

MR FITZGERALD: Good, thank you very much. We'll now adjourn and resume for the Communications Law Centre at 12 o'clock.

MR FITZGERALD: I'm Robert Fitzgerald, and my fellow commissioners are Gary Potts and Philip Weickhardt. If you can just give your name and position and the organisation that you're representing, then what we might do is take 20 minutes or so, if you can give us some key points and issues, and then we can have a discussion about some of those. So over to you.

MR MOUSTAKAS: My name is Nick Moustakas. I'm the legal officer at the Communications Law Centre. The Communications Law Centre is a public interest organisation specialising in media, telecommunications and broadcasting law. It's been around since 1988 and engages in several areas, one being law reform research teaching and public education. We operate also a community legal centre called Ausnet Law, which specialises in Internet legal issues. We'd like to thank you for giving me the opportunity to attend today and give you my input into this inquiry. Ben is here as a volunteer.

MR STRONG: My name is Ben Strong. I'm a volunteer at the Communications Law Centre. I'm just here in an observational role.

MR FITZGERALD: That's fine, thanks.

MR MOUSTAKAS: Having looked at the terms of reference, it's quite clear that it's very broad in what it's covering, so I thought I'd just cover some key points first but hopefully get some guidance from the commission as to issues it wanted to cover and then give you further feedback, given the broad nature of the inquiry.

One issue that obviously is being dealt with in this review is looking at whether there's a need for industry-specific regulation or whether it can be better covered by general regulation. In the telecommunications area, I think no-one would argue that you need telecommunications-specific regulation for various reasons, one being technical issues, like number portability, that are specific to the telecommunications industry; issues like the universal service obligation that again are specific to the telecommunications industry.

I think also important in terms of this review, where they may be some claims of duplication in regulation, is the self-regulatory aspect of the scheme and the Telecommunications Industry Ombudsman. Although it may cover some issues that are also are dealt with under the Trade Practices Act, such as misleading and deceptive conduct and unconscionable conduct, in a more prescriptive manner in the industry codes, I think the ability of consumers to be able to go to a free dispute resolution mechanism like the Telecommunications Industry Ombudsman justifies having that approach, because the reality is with telecommunications-type issues and disputes, you deal with a really high volume of complaints, often for very low value.

The complaint may involve something like $50 or $100, and for consumers to have a free dispute resolution mechanism offers access to justice in that regard, because if it wasn't there, often they wouldn't be filing a complaint with, say, VCAT, because the filing fee alone might be worth more than the complaint itself. So an industry like that requires that kind of dispute resolution scheme.

I think the self-regulatory aspect of it, combined with the general regulation, works well in some areas and as a general framework is okay, but there are problems that have been previously highlighted and raised about especially the self-regulatory aspect of the telecommunications regulations regarding consumer protection. There have been a number of issues raised in previous inquiries, such as the 2005 inquiry by the Senate Environment, Communications, Information Technology and the Arts Committee, and its report the Performance of the Australian Telecommunications Regulatory Regime I think captures a lot of the problems, especially chapters 5 and 6, of the self-regulatory aspect.

In this inquiry I think a lot of those issues are relevant because you look at issues such as where there is an unnecessary regulatory burden on telecommunications companies. If you look at a lot of the criticisms, a major theme running through those criticisms is that there's too much emphasis on self-regulation and not enough compliance and enforcement by industry of its own codes, and this is often to the detriment of consumers. There aren't enough enforcement requirements through ACMA, the key regulatory agency that enforces the self-regulatory instruments in this area.

Similar issues have also been raised in the Australian Communications Authority, which has now obviously been replaced by ACMA, in the report Consumer-Driven Communications: Strategies for Better Representation. A lot of the criticisms there involve the problems with consumers and their participation in the telecommunications self-regulatory scheme, in particular how they participate in the co-development process and the problems in the lack of participation and the strong influence that industry has over the direction that these self-regulatory instruments take.

Finally, in terms of the problems, again, with the self-regulatory scheme, some issues have been raised in another inquiry by the same Senate committee that I referred to earlier, in the report A Lost Opportunity: Inquiry into the Provisions of the ACMA Bill. In that report a lot of the issues raised are about it being a regulatory agency, the inefficiencies of some of aspects of its enforcing regulation and the direction it should take, particularly with the new focus on convergence and the philosophy of having broadcasting regulation and telecommunications regulation merge, and how these things should overlap because a lot of the consumer issues now overlap. So I'd like to point the commission to those three reports to obtain

guidance on the problems with the current regime in terms of the telecommunications-specific regulations.

The second point that I wanted to raise was in relation to unfair terms in consumer contracts in a broader sense. I have been with the Communications Law Centre for approximately four years, and in telecommunications in particular, for example, I'm on what's now called the Communications Alliance, which was preciously ACIF, the Consumer Council. I'm a member of that committee. I've also been involved in the Australian Communications and Media Authority and participated in its Consumer Consultative Forum, and I've also made several submissions to these past inquiries.

In relation to the unfair terms issues, I have been involved in several projects involving the review of consumer contracts in the telecommunications area, and when I say "telecommunications" I include contracts with Internet service, mobile phone and fixed line service providers. These are projects which we have done a significant amount of work on and which actually began before Part IIB was introduced in Victoria, in the Victorian legislation, in 2003. The Communications Law Centre did a report commissioned by what was then named the Australian Communications Authority to review the guideline put in place by the industry for unfair terms, where we looked at all the contracts by the major carriers and found that there was generally major noncompliance with its own guideline at the time.

Subsequently we've been commissioned also by Consumer Affairs Victoria and have done several projects. Just counting them all, there would be at least five or six reviews that we've done of consumer contracts in the telecommunications area, the latest one being in September 2006. So from 2003 and 2006 we've done five or six reviews and have found, mainly because of the Victorian Part IIB provisions, which have also ended up part of the consumer contracts code that the industry has specifically on this issue, there's been a significant improvement in the area, which has provided significant benefits to consumers.

A major problem that was faced by consumers in telecommunications consumer contracts was the ability of companies to unilaterally vary their contracts. This was a major problem which I understand the ACCC had been focusing on for while a while, but there were views that the unconscionable conduct provisions of the Trade Practices Act may not have adequately dealt with the issue, and I think mainly because of the Part IIB provisions of the Fair Trading Act in Victoria, there has been a huge improvement in this area. The code that was developed by the industry itself I think largely in my view was driven by the fact that Victoria introduced this legislation. Had that not occurred, there are serious doubts about whether the code would have actually been developed. So I think it was a major driver.

Again, there have been benefits from having a national code in addition to the Victorian-specific legislation. Even if the Part IIB sections were in the Trade Practices Act and it was on a national level, this access to justice issue and the ability of consumers to go to the TIO for a free complaints dispute resolution system has been quite beneficial, especially if you look at the statistics. The TIO since the implementation of the code has received a significant number of complaints regarding the consumer contracts code and, although Part IIB in the Fair Trading act has had the same prohibition in a general sense and there are some differences, only one case has been brought to VCAT, and that's been by Consumer Affairs Victoria itself. No consumer has to my knowledge brought any claim against a carrier in VCAT. That clearly demonstrates the benefits of having the TIO scheme there.

Finally I'd like to raise the issue of funding concerns that I think exist regarding consumer organisations in the communications sector more broadly, not just the telecommunications area. Firstly there's the telecommunications consumer representation grant, which has been in place I think for nine years now. In that nine-year there has not been a change, an increase, in the funding of that scheme. I think it's been $3.4 million over four-year periods, which translates to under $1 million each year. It's been the same for nine years and will be the same for another three years. So in a 12-year period the funding for consumer organisations has been the same.

There have been repeated criticisms of the lack of resources for consumer organisations in the area by ACMA itself and by consumer organisations. It's a real problem, because the self-regulatory framework requires consumer organisations to participate in code development and the development of self-regulatory instruments like the determinations by ACMA. It's a serious problem that even our organisation has been affected by significantly. For example, we used to have two offices, one in Sydney and one in Melbourne. Now we only have the Melbourne office, even though we've been around since 1988, and if you look at the industry as a whole, the issues have only expanded. The telecommunications industry has exploded - it's become huge - and the issues that consumers face are much greater now than ever, especially because the products and services are much more complex. I think this justifies an increase in consumer funding rather than keeping it the same, which in effect is a decrease, because of inflation and cost of living increases over time. This is a problem.

So where we used to have two offices, now we only have one. We used to have eight staff; now we only have two and a half, two full-time and one part-time. I think this is relevant to not just telecommunications but also in terms of consumer participation in areas like Internet regulation and media and broadcasting, which now, through convergence, is a real issue. Since the time I've been here there really

hasn't been any funding for the Communications Law Centre to participate in areas like Internet regulation and submit to the codes being developed by, say, the Internet Industry Association. I think this is a real concern. There shouldn't be a focus on telecommunications-specific only; you need to have a more general focus on communications, because a lot of the issues repeat themselves, especially with this new focus on convergence and the convergence issue.

Just a final point: in the Internet regulation area, the Communications Law Centre in mid-2006 released a report entitled Going, Going Gone: Online Auctions, Consumers and the Law, which I worked on myself. It was a significant research project where we conducted surveys and focus groups of online auction users. Approximately 500 people participated in the survey, and we found there were significant problems in the area, a lot of fraud and problems being faced by Australian consumers, and this was consistent with overseas data and overseas research as well. This report will be approaching a year now and there hasn't been a response to this kind of research in the area. There are a number of reasons for that, one being that there isn't really a key way for consumers to participate in those other areas of self-regulation, like the Internet industry. So we have this research that shows there's a problem and there's been no response by a regulator or industry. Those were the issues that I wanted to raise.

MR FITZGERALD: Thank you, that's terrific. Can I start with the very last bit about the consumer advocacy stuff. Firstly, why has there been a decline in funded consumer advocacy in this area, given the growth of the industry? The second thing is, what's the right model going forward in relation to it? In other words, what would be your model for consumer advocacy and who should fund it into the future? But firstly why have we seen a decline when this particular part of commerce has increased so dramatically?

MR MOUSTAKAS: I couldn't tell you why. I know that there have been recommendations even by DCITA itself, but the government hasn't accepted those recommendations from consumers, so when the government decides what funding it should provide it hasn't really decided to increase that. I don't know what the reasons are. In terms of funding, my understanding is that in the past it's actually been funded by the industry through things like the spectrum licensing and the licensing of carriers and things like that. If you look at how the industry has expanded significantly since 1997, when the industry was liberalised, there's clearly a lot more funds available to the government to increase the funding for consumer involvement, because the more licensing of carriers or spectrum licensing or other forms of funding they receive from the industry means they have more funds to fund consumer participation. But for some reason this hasn't occurred.

MR FITZGERALD: And going forward? What do you think should happen in

this area?

MR MOUSTAKAS: Going forward, my view is that there should obviously be increased funding, but also funding for organisations to participate in communications law and policy development in relation to issues consumers face in the communication area generally. As I said, the convergence aspect of this means that, broadcasting regulations come relevant now to telecommunications regulations because of the technological investments, so a lot of the issues are becoming quite relevant to consumers in these other areas. You need that kind of level of involvement of consumers in the issues raised there.

MR WEICKHARDT: Just continuing on that theme, if the industry can fund an ombudsman, for example, for dispute resolution, why can't the industry fund enough money to provide consumer advocacy groups or consumer groups that will give input into this area? Why do you need the government?

MR MOUSTAKAS: The way the scheme is set up is the telecommunications consumer representation grant is actually controlled by the government, even though the funds originate from the industry. So the government decides on how much money will go to consumers, and it's probably a question of not having industry control or influence over who obtains the funding, because every consumer organisation puts an application forward to the Department of Communications, Information Technology and the Arts, and it decides on how much money it should give to each organisation subject to the total funds that it has. I think the problem is the total funds that it has, not the way the applications work, and the second problem is its focus is only on telecommunications but not on communications more generally.

But I think there is a benefit in having it go through that way so that industry doesn't influence the applications and go against organisations that might raise issues that it doesn't want raised, for example.

MR POTTS: I think just a general observation - not just in relation to telecommunications but more generally - there seems to have been a downward trend in government funding of consumer bodies, whether it's Commonwealth or state governments, in recent years, regardless of what their political complexion may be. Can you put any reasons behind that move, in terms of the way government thinks about it, from your point of view?

MR MOUSTAKAS: I honestly couldn't say. I don't know why it is. All I know is it's a really big problem because it affects even our organisation attending today and preparing to raise these issues. I mean, organisations like ours and other key organisations in the communications sector are really struggling for resources to deal

with raising issues that need to be raised. I am myself now on a committee of the Communications Alliance where we're trying to merge all the existing consumer codes into one code. There are three supplier representatives and three consumer representatives, and all three of us from the consumer side are struggling just to keep and deal with all the issues. It's quite easy for industry to push us around because they impose these rigid time frames. They know that we have very few resources but don't support us in our job and just say, "Do this by then."

The way that the codes can be registered means that it doesn't matter if the consumer participation wasn't adequate, because all you need under the current scheme is one consumer organisation or public interest organisation to sign off on it - it could be any - and then ACMA to sign off on it. That means you can have a scenario where it's quite easy for industry to get its way without adequate consumer consultation, and a lot of these issues are raised in the Consumer-Driven Communications report which I referred to earlier.

MR FITZGERALD: Just the role of ACMA then in all of this: how do you view it as a regulator generally?

MR MOUSTAKAS: I think the main problem has been that it hasn't really stepped in when there has been major noncompliance with industry self-regulatory instruments, like the codes and the determinations. My understanding is there's only been one occasion where, for example, it has directed a supplier to comply with a determination. In a 10-year history I think that's amazing, considering there's ample evidence that there's been a lot of noncompliance by industry with its own codes and with determinations. The civil penalty provisions that ACMA can rely on to take someone to court and impose fines have never been relied on, in my understanding, and that's again remarkable considering the 10-year history and the nature of the industry, particularly some rogue types of traders in, say, the ISP field. There are so many, and so many that don't comply with their requirements, it's remarkable.

Some of the problems also exist because ACMA doesn't have enough resources, and there isn't really a requirement on industry to report on its level of compliance to ACMA. So it's a problem with the scheme as a whole, the regulatory framework as a whole. There should be stricter requirements in terms of industry reporting on its level of compliance, and there isn't really any monitoring of compliance either.

MR WEICKHARDT: You raised the issue of enforcement in your general remarks. You said there's too much reliance on self-regulation and a lack of enforcement, yet in the generic area lots of people are saying that there's lack of enforcement. It appears that right across the consumer policy area most people point a finger at lack of enforcement. So what makes you think that if it wasn't industry

self-regulation, the situation on enforcement would be any better?

MR MOUSTAKAS: I don't know the reasons why people are raising the enforcement issues in the more general sense, say under the Trade Practices Act, but there are actually specific reasons why in the telecommunications area there is a problem with enforcement, one of which is that the industry is not required to report on its compliance. There aren't time frames, for example, on an annual basis for reporting on the level of compliance by industry. I think that in itself would change a lot in this area. Whether that would change the willingness of ACMA to then get more involved - I think you can't ignore statistics that are brought from the industry, for example. If it's showing that there is a problem in terms of compliance, I think that would obligate it to do something.

MR FITZGERALD: Does ACMA have a consumer consultative committee or council?

MR MOUSTAKAS: Forum, yes. Consumer Consultative Forum, it's called.

MR FITZGERALD: How effective is that in influencing ACMA?

MR MOUSTAKAS: Referring again to the problems in the industry that I've personally experienced, for example, we were a part of that until recently. There's been a change and we were not invited back to it because they reduced the number of participants. I don't understand why there is a need to reduce the number of participants. My understanding is it has only an advisory role, so it doesn't have to really do anything that that forum advises, and it meets only once or twice a year. It is important because if focuses on problems faced from a regulatory point of view, so I think it has some benefit, but I think there are problems with two things that have occurred recently, one being reducing the number of members. The second thing is that they've also now encouraged industry to participate in an annual conference, I think it is. I think that also is a way where consumers have less of an opportunity to contribute, because now you're getting the industry input.

Another problem has been with the Consumer Council of the Communications Alliance. Again, the numbers of members have been reduced by the Communications Alliance, and also the number of meetings has been reduced. I don't understand why. I think that's also been a serious problem. In my time since I've been on the Consumer Council - it's approaching two years now - there hasn't been a significant focus on consumer issues. For the first year there was a huge emphasis on reducing the number of consumers and the processes they should undertake and how people should be selected, so there were a lot of procedural aspects to it; and, in the second year, the fact that we now meet only half the time that we used to and there are few people, from organisations that already have

limited funds, has made us much less effective. Again, we only have an advisory role anyway. So these are the kinds of problems that have been undermining consumer participation in the telecommunications area.

MR POTTS: Information disclosure: you touched on the increasing complexity of the telecommunications industry. Do you have any suggestions about how that issue can be dealt with in a constructive way going forward in terms of helping consumers understand the products and services that are on offer?

MR MOUSTAKAS: One issue that I think is important, especially because the review makes reference to vulnerable and disadvantaged consumers - the Communications Law Centre recently conducted a public awareness campaign for consumers who wished to choose a mobile, fixed line or Internet service. This was triggered by a fund developed by the ACCC called the TPA Consumer Trust, where the ACCC took regulatory action against two telecommunications companies for a practice known as slamming, which pretty much involves door-to-door salespeople going to a consumer's house and misleading them or tricking them into switching from one carrier to an another. An example might be that they'll say, "Can you just sign this. It's just to show that I came here and told you about this product," and then on the next bill they'll see that they're actually with another carrier. That's just one example, but I refer to misleading in a more general sense, from one carrier to another, about consumers' rights and obligations.

This fund was developed, and in those cases when the ACCC took regulatory action against those two telecommunications companies, it found that it was mostly vulnerable consumers who were subject to this kind of scam. This included seniors and people from cultural and linguistically diverse backgrounds.

As part of this public education awareness campaign we conducted research into what consumer information is currently out there and wanted to target in particular vulnerable consumers because of the problems we saw from the ACCC's regulatory action. In doing that research we found that one of the big problems - there were a number of problems - was that there was too much information for consumers, and often too lengthy, too complex and very difficult to find. A lot of consumers, for example, don't know about the Australian Communications and Media Authority, which is the main provider of consumer information in this area.

Another main problem is that a lot of people don't know about the Telecommunications Industry Ombudsman, which is a big problem. There's a very low level of awareness about the TIO. But one thing that struck me in particular was the very small amount of information in other languages. This was a serious problem in my view, because the only information that we were able to find in our research was by the TIO about its service, which was just explaining what the TIO is about

and the service that it offers. Other than that there wasn't really consumer information in other languages, and we know from the type of regulatory action the ACCC took and from other research that people from non-English speaking backgrounds in particular tend to be vulnerable. We know that even if you have a good grasp of English, for example, it's very hard sometimes to figure out what your rights and obligations are under a contract, so it's hard for someone to even explain it to them.

I think there is an urgency in trying to get information to people from non-English speaking backgrounds. If you look at the statistics - I don't have them with me at the moment - in the 2001 Census almost 450,000 people, or something like that, had indicated that they spoke English not very well or not at all. That to me is a very conservative number, because most people tend to be reluctant to indicate that they don't speak well. I think it's remarkable that in the whole 10-year period where all these new services and products have existed, with the importance of telecommunications services through the community, that regulators like ACMA or even the ACCC haven't provided at least some basic information about people's rights and obligations in the telecommunications area in the key languages, in other languages. I think that is remarkable, and that is in my view a big problem in terms of consumer education. I think that should be a priority.

MR FITZGERALD: You mentioned unfair terms and the impact that the Victorian legislation has had, and the code that's been developed. Obviously it's a major issue for this inquiry to have a look at whether or not the unfair contract term legislation is appropriate and so on, but what do you think have been the main gains to consumers from both the impact of the Victorian law and the consumer code, which embeds unfairness into it?

MR MOUSTAKAS: I think it's provided huge benefits in the telecommunications area, in two main areas, one being the unilateral variation and the other being the termination fees. I think both stem from locking people into their contracts. It's clearly led to major changes in the industry. Companies like Vodafone now, and even AAPT, in their advertising say, "No contracts" or "No lock-in contracts." These are companies that before would lock you into two-year contracts. They've had a major shift, and I think it's a direct result of Part IIB, which also led to the unfair contracts terms code. Being a person who's actually reviewed the contracts before and after the legislation and the code, I've seen huge changes in the contracts.

There are still areas of improvement to be made, but a lot of benefits that have been gained for consumers. I think ultimately that encourages competition. If consumers are more free to leave one company and go to another because they're not happy with the service, and they're not afraid of any termination fees, it puts more onus on the companies to then provide better services so they don't lose their

customers. So think ultimately it's provided major gains for consumers.

MR FITZGERALD: People would say in relation to unfair contracts that the problem is what us unfair, that notion. So when we're introducing a new concept into law there's always, rightfully, this concern about what it is, how it will work out in practice. We have a couple of years of experience in Victoria and several more years in the UK, but how do you answer those that are concerned about this introduction who say "unfairness" is such a vague term that really it could become a significant impost on business, given that at the end of the day most consumers still don't understand the contracts they enter into because they're complex? How do you deal with that issue?

MR MOUSTAKAS: In my experience from actually having to conduct these kinds of compliance audits - in a way they have been - where we've applied the code or the legislation to the contracts, we haven't had a problem in terms of interpreting what is an unfair term and applying it to the contracts. The major reason has been because the way the legislation is drafted, and also the experience from Europe, not just the UK, gives sufficient guidance to understand how those provisions operate. I don't think it's such a vague term. It's a similar type of standard to unconscionable conduct. It's a general type of provision, a general standard, but it has enough guidance through the indicative list that it provides, which Part IIB also has, to give you sufficient certainty in how the law will be applied.

The examples of the types of factors to take into account - whether a supplier can terminate a contract but the consumer cannot, those kinds of indicative factors - clearly illustrate what will be an unfair term and what will not. The factors that you have to take into account about whether the contract was individually negotiated or not again I think give a clear indication, give clear principles, as to how to apply the law.

MR WEICKHARDT: Can I just clarify that. I understand that the UK law only applies to standard form contracts and does not apply to individually negotiated contracts, but my understanding is the Victorian law does extend to individually negotiated contracts.

MR MOUSTAKAS: It does extend to them, but it's a factor to take into account. So if it wasn't individually negotiated, that is something to take into account. In my experience I haven't seen one instance where in an individually negotiated contract an unfair term has been found. It is broader than the UK experience, but I don't think it has created a problem because it's just a factor to take into account. It is broader, though, in its scope, that's correct.

MR WEICKHARDT: Various people have raised with us the question whether the

Victorian legislation might go as far - and again, as you say, only case has been brought before any form of legal process - as "unfairness" including somebody saying, "Well, the price was unfair." Do you have a view on whether or not - - -

MR MOUSTAKAS: The Victorian legislation clearly allows for that. I think that in practical terms these issues aren't really a problem. I think the types of instances where it will apply will be covered under sections like those dealing with unconscionable conduct, where someone just takes advantage of a situation and either charges way too much for something or purchases something way too cheaply. But, looking at the UK experience, the number of cases that have gone to court and the guidance notes that are produced by the regulator indicate that this hasn't been a problem. There hasn't been uncertainty in how the law is to be applied, and I think there is sufficient guidance from both the UK experience and Europe in general. I don't think it has created uncertainty in the law, because there's nothing to indicate that from the European experience, and it doesn't appear to have placed any unnecessary burden on businesses because, again, we have the European experience to be guided by.

MR WEICKHARDT: But, with respect, might there be a time bomb ticking here? You say the European legislation doesn't go as far as prices, doesn't go as far as individually negotiated contracts, so in terms of uncertainty, surely so far as business is concerned, there is the potential for somebody down the track to take action in those areas, which must create uncertainty.

MR MOUSTAKAS: Those specific points of difference and whether that will create uncertainty probably needs a bit more examination. I couldn't tell you off the top of my head. They are significant points, and I do understand that the Victorian legislation is wider than the European provisions. Obviously you're absolutely right: you don't have anything to go by in terms of what will occur in the future in terms of uncertainty, but we do have a few years of operation of the Victorian provisions to at least be guided by that, and the fact that there has only been once case. So to some extent we know that it hasn't fundamentally changed people's right to enter into their own terms and conditions and the freedom of contract type of principle.

MR FITZGERALD: I don't want to get bogged down here, but can I just ask: another approach people have put to us rather than introducing the new concept of unfairness is to look at whether or not unconscionable conduct provisions can be somehow or other expanded or changed so that the courts interpret it a bit differently. Others have said to us that that's a dangerous course and one would be better not to do that. Do you have a view as to whether or not the unconscionability provisions can or should be amended and whether that would make any difference, rather than unfairness? I understand one is about conduct and one is about contractual terms but, just generally, is there value to be gained for consumers in trying to reshape the way

in which the unconscionability provisions work?

MR MOUSTAKAS: The principle of unconscionable conduct gains a lot of guidance from the general law as well. If you change it sufficiently, that might affect how the law is applied. I would have to see what kind of change people are proposing to make an informed decision about that. I just don't see how you would, because the whole principle is about taking unfair advantage of someone, and it focuses a lot on procedural unfairness, as you stated, whereas unfair contract terms are really focusing on substantive unfairness. It doesn't really matter if the process in which the negotiation or contract entered into was unfair; if the terms themselves are unfair it's irrelevant. It's hard to see how that would be incorporated into a principle that we've had for such a long time, which focuses so much on taking unfair advantage of someone and the procedural aspects of that. It might be possible, but it would be a major shift away from what we know as unconscionable conduct.

MR FITZGERALD: Other questions, Gary, Philip? Just one final question: the ACCC still has concurrent jurisdiction in relation to all of this area, as I understand it, notwithstanding that ACMA is the specific regulator. Are there any observations you'd want to make about the role of the ACCC and ACMA or any of those issues?

MR MOUSTAKAS: My understanding is that, generally speaking, in the area of telecommunications-specific regulation, the ACCC's role is mainly in relation to competition law issues. It's clearly the right regulator to deal with competition issues, not ACMA, so I don't see any problems with that - and obviously the Trade Practices Act is its area as well. So I think that works well, having a regulator with the appropriate expertise dealing with these issues.

MR FITZGERALD: The current ombudsman is the Telecommunications Industry Ombudsman, but this issue of convergence - is there something that needs to happen in the ombudsman to change it? Does its jurisdiction need to be expanded to take in the broader notion, or is that already happening? I'm not familiar - - -

MR MOUSTAKAS: Not really. It's something that has been raised on a number of occasions. I think also the reports that I referred you to deal with this issue. It's probably the second one that I referred to, about the inquiry into the provisions of the ACMA Bill. It's probably referred to in all three, though. But for a long time consumers have been asking for a communications ombudsman rather than a telecommunications industry ombudsman, because of this issue of convergence.

MR FITZGERALD: Is there a reason why that hasn't happened?

MR MOUSTAKAS: I think so far the main reason has been that, the way the scheme operates from a legal point of view, you need amendments to the

Telecommunications Act and, say, the Broadcasting Services Act. I think there are jurisdictional issues stemming from that legislation. So you can't do that unless there is change to the law. If the industry wanted to, it would operate very different from how the scheme operates now. At the moment it is compulsory to sign up with the TIO because of the Telecommunications Act or the relevant laws in that area, but if you created a communications industry ombudsman that was just industry without any ties to the law, no-one would be required to sign up. So that's why it hasn't merged yet.

MR FITZGERALD: But under the Broadcasting Services Act and under the Telecommunications Act could you not make amendments so that the participants do have to in fact sign up to that scheme?

MR MOUSTAKAS: Yes, that's what I'm saying.

MR FITZGERALD: You could do that?

MR MOUSTAKAS: Yes. I'm sure you can amend the laws to create a communications industry ombudsman.

MR FITZGERALD: So it's possible to do it, but to do that requires a public policy decision, and that hasn't yet been made?

MR MOUSTAKAS: That's right. There will be a major review, my understanding is, in 2009 of the telecommunications regulatory framework, and that might be one of the issues that is addressed.

MR FITZGERALD: Okay, good. Anything else? Thank you very much for that, Nick. That concludes the hearings for today. We'll adjourn the hearings until 9 am tomorrow morning.

AT 12.45 PM THE INQUIRY WAS ADJOURNED UNTIL
WEDNESDAY, 21 MARCH 2007

INDEX