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TRANSCRIPT
OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO AUSTRALIA'S CONSUMER POLICY FRAMEWORK

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

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON TUESDAY, 17 APRIL 2007, AT 8.30 AM

Continued from 16/4/07 in Sydney

MR FITZGERALD: Okay, thanks very much. We'll now recommence the second day of the public hearings into the inquiry into Australia's consumer policy framework. This is the final day of public hearings in Sydney and the final day of public hearings for this round.

So if you could give your full name and position and the organisation you represent, that would be terrific.

MS BUCHAN: Jennifer Mary Buchan, and I'm a lecturer at the Faculty of Business in the University of New South Wales. I'm really here on behalf of Kris Patterson, who was a franchisee in a franchise system called Sureslim.

MR FITZGERALD: All right. Jennifer, if you can just lead off with some of the key points and thoughts that you want to make, and then we might raise some questions after that.

MS BUCHAN: Kris is not able to be here today and she has put in reasonably extensive written submissions, which I won't revisit. The crux of her problem or what she wants to raise to the commission's attention, I think, is she purchased a franchise in good faith and reasonably quickly it turned out to be a lemon, and ultimately the franchisor did appoint an administrator.

She and all the other franchisees ended up losing a significant amount of money, and then the problem started because they have realised that access to justice for people who have made a significant investment as a business consumer seems to be very very difficult to achieve satisfactorily. And I guess what she has also realised is that she has very very good records, and given that she has such excellent records it's disappointing to her that having invested in a business where, of course, she's borrowed money and had to fund the business, her own business fell on hard times as a result of the owners - the franchisor's business, she then was really without funds because she had spent all of her funds trying to keep her own business going.

So at that point justice is very very difficult to achieve for a business consumer who has or appears to have a legitimate case, which they could run as a legitimate case. So she has a legitimate case. She's been attempting to run it through the Industrial Relations Tribunal in New South Wales and she's quite fortunate; some of her other franchisee colleagues were in other states and don't have access to the industrial relations legislation that a New South Wales person has.

She gave me an example of one of her colleagues, who was an older man, and he's now, I believe, 72 and he withdrew his super to purchase the franchise. Obviously, he was eligible to withdraw it and he made the decision that he wanted to keep working, but having withdrawn his super he has now not only got no franchise, he's got no super. So he's really fallen on extremely hard times and he's got no industrial relations jurisdiction.

Kris has now reached the point in her litigation where she still has a case. She has a lawyer who has been acting for her, and that lawyer has briefed a barrister who has also been acting. She tells me that she now needs a forensic accountant to prove her figures, however no forensic accountant is going to be in a position of acting for her for nothing. She has run out of money, and she said to her lawyer and her barrister, "It's over to you. I can't pay you any more money. You know I've got a case, I know I've got a case. I haven't got any money, I'll come clean with you. The well is dry."

She tells me that her lawyer has agreed to battle on, on her behalf, on the understanding that if she ever receives any money the lawyer will receive payment for the final proceedings, and that apparently the barrister has also agreed to do the same, which has to be at some point an indication of their belief in her, her records, her validity as a witness and her case, and also, I suppose, a belief that if they are successful it won't be a pyrrhic victory because they're not going to be wanting to act for nothing and nor should they act for nothing.

So she's not here today because I think she's finally hit the wall emotionally and she's really needing to regroup herself. The side-effects for her, which are absolutely common in my understanding of people who's business has failed, is that her family, her husband - and she has seven children, some of her older children who perhaps weren't enthusiastic for her to purchase into the business in the beginning seem to have deserted her. So some of her children and some other members of her immediate siblings have stuck with her.

She's suffered an extreme loss, a crisis of confidence from losing the support of her family because perhaps they never believed in the project from the start. I think this is a fairly - it's not an uncommon scenario. So she's without money, without emotional support, and I suppose in some ways it's regrettable that for her and other people there isn't a more robust - there isn't an advocate. If she was a - I notice in her submission she's talked about, "It's a pity that we're not cast as employees."

Now, it's not appropriate that a franchisee is cast as an employee because of many other facets of being a franchisee, like the financial investment. So in some ways they are more like a venture capitalist, in other ways they are like an employee, but it's such a multi-faceted relationship that it's quite incorrect to uniquely cast them as an employee. But the point that I think could be taken out of that is that it might be valid to provide some avenue - like, the employees have got their unions - some type of advocate.

The franchisors, using the franchise model, have got the Franchise Council of Australia, which is an extremely effective advocate for franchisors. Whilst they have franchisee members, there's a clear conflict of interest. Sureslim, who was the franchise system who Kris had her business with, is still a registered member of the Franchise Council of Australia, under the new ownership of the brand name.

So it's really unlikely that any franchisee is going to get really useful assistance or lobbying or any even commercial weight placed on the former franchisee through the industry body, which is strongly aligned with the franchisors. They themselves have put themselves into a difficult position, and really when the buck stops I don't think they are really in a position to support franchisees, when it's one against the other.

So she's an example. There are many other examples of her out there. There are, of course, the other franchisees in her system. I've been doing some work on the unconscionable conduct provisions and how they have been used by franchisees in an attempt to establish an unconscionable conduct, you know, by the franchisor, and the ACCC has pursued five unconscionable conduct actions relating to franchisees. They've pursued - this is up until the end of last year. They may have others in the pot that I'm not aware of.

In most cases they've been unsuccessful. The initial test case was successful for the franchisees of simply no need. This was the test case that the ACCC ran to test the then brand new legislation, and they ran one case for franchising and one case for retail leasing. The franchising one was successful, and I think probably - I mean, that as good. The franchisor did what seems to be a common strategy and they declared themselves insolvent partway into the litigation, and left one of the directors to carry through with the litigation.

Now, there does seem to be a pattern of the ACCC prosecutes, the franchisor declares itself in financial difficulties, and even if there's a successful outcome for the litigation, the victory is pretty unsatisfactory for the franchisees.

There was two or three of the cases which settled. The ACCC actually didn't run them through to a concluded action. In one of them - and so when you settle, of course, nobody knows. So there's no legal clarity that comes out of what the heck does this particular piece of new legislation mean.

So excuse me if I'm jumping around a little bit, I think probably a very strong benefit to the business consumer community would be if the ACCC were to actually run a case right through to the High Court on unconscionable conduct, be it a land or tenant one or be it a franchise one, and some of them of course involve both. I think that would be of extremely useful strategy. They seem to have either settled - I mean, of course, settling is an extremely legitimate legal strategy and it's extremely desirable for the parties, but in terms of creating legal guidance for franchisors and franchisees it's an absolute waste of time.

It would be very helpful for the community, the business consumer community, if one of these was run all the way. I will be making written submissions and perhaps will be highlighting some of the outcomes of some of these particular cases, if you would find it useful. Some of the strategies that have perhaps been employed seems to have been employed by the parties.

Running out of money. If I can give you an example, yesterday, of the cost of justice. Yesterday, I had in my room somebody who had a case running in the criminal jurisdiction. So nothing to do with consumer, but this is simply an example of the cost of justice. All that was required yesterday was the instructing solicitor and the barrister to go down to the Downing Street Criminal Court and to apply for an adjournment. Not a very complex thing to apply for an adjournment in a criminal matter. The charge for the barrister, and bearing in mind this action was for a fairly petty theft for a number of mobile phones, so naughty, but we're not talking about life sentence. The barrister charged for what was a 15 minute appearance, and granted they had to walk there from their chambers and walk back, $2600.

The lawyer charged $500, and my understanding, although I'm not absolutely certain, but this is what I'm told, is that the lawyer is entitled to seek reimbursement of some of the cost of their appearance from Legal Aid, but that that Legal Aid money is then not credited back to the client. So the criminal, who is currently out on $10,000 bail, has to somehow find more than $3000 to pay for this adjournment. Now, how does a criminal find $3000 when they're doing it for an adjournment?

I think this is the position that the business consumer is finding themselves in. How do we get justice when we can't afford it? How can we pay that amount of money when we've already purchased a business, put up our houses as security, et cetera. So can we put that to one side now. I think I've said all that needs to be said on Kris's behalf, and you can read the rest in her written submissions.

I would just like to make one other brief thought, since I'm here. I think consumers, including business consumers, actually often don't know who they're dealing with. We have entered into a much much more complex world than we used to be in. We used to ring up Telstra, get the telephone connected, and if there was a problem we would ring Telstra and they would fix it. We now get the line installed by somebody, we purchase the telephone from somebody else, and if there's a problem with something we have to phone somebody else. If our listing doesn't appear in the directory, that's another separate person that we have to deal with. I think the business consumer is in exactly the same position as the residential consumer. We don't know who we're dealing with.

I've done some research for my franchising interest, and I will attach these to my written submissions and talk about them more specifically, but, for example, if I could show you this. If you are a franchisee, to use a franchisee as an example, you might be dealing with any of these people. You've got this massive amount of different entities who you might be leasing through. You really may not know who you are actually dealing with. So if the wheels fall off, you may find that you lose all your rights, or that you may not actually have privity of contract with the person who is exercising the right to perhaps evict you or make a requirement on you that you deliver more or don't deliver or whatever. So there's that issue.

Related is that I've done some work on trademark. So intellectual property ownership is, of course, critical to a licensing arrangement or a whole lot of other

arrangements. For example, I've discovered that of the - I've taken the sample of retail franchisors, who's franchisees trade from retail premises in New South Wales; premises under the ambit of the Retail Leases Act. So these franchisees are typically the ones who have paid a reasonable amount to set up a shop and you would think would need a fair amount of security and guarantee that they're going to be able to use the trademark.

I've found that of those franchisors, and there are 337 franchisors in that category in New South Wales, over 13 and a half per cent of the franchisors do not have a registered trademark. 14 per cent of the franchisors it is not possible to work out from the franchisor's web site or from any other publicly available records who the franchisor is. So you look on the web site and it doesn't mention anywhere who the entity, the legal entity who owns the system is. That's not great because then you can't - as a person considering whether you might purchase into a business, you can't do your due diligence because you don't know who you are doing it on.

15.73 per cent of the franchisors have an overseas company as the trademark owner, so you are not typically going to be in a direct franchise relationship with the overseas company; you're going to be in a relationship with their Australian appointee, who will be a separate entity and a completely separate company from the franchisor. So the local entity, you have to rely on the fact that they have got a robust licensing arrangement with the overseas entity, and that that robust licensing arrangement through that they are capable of giving you a useful licence to trade under the trademark.

What else? In 3 and a half per cent of the cases there's more than one owner of a trademark; so the franchisee, for example, or anybody who's been granted a licence, needs to know that they have got the rights from both parties, from all owners. This was amazing; franchising is a business which the franchisor needs to borrow money sometimes in addition to the money that they're getting from licence fees, and the trademark is a very valuable asset. I don't think anybody would say that McDonalds would trade as well if people didn't see the golden arches, you know, simply - your trademark is a very useful asset.

Only 1.19 per cent of the total of the 337 franchisors has got a security interest registered against their trademark, which is astonishing; they seem to not be using that equity or that apparent equity as a source of security for their own businesses. Maybe that's a good thing, I don't know. But maybe it's a terrible loss of an opportunity to use equity. Maybe it's a function - - -

MR WEICKHARDT: Banks don't very often lend on intangible assets, I hate to say.

MS BUCHAN: No, indeed, but these are registrable, you know. Who would sell McDonalds? I mean, if the liquidator put the golden arches and all the McDonalds paraphernalia up for sale, I would be astonished if there wasn't a buyer who would pay quite a lot of money; and they wouldn’t buy it without - if that wasn't part of the

package.

MR FITZGERALD: That's true. Okay. I'm just conscious of the time, and it would be good to be able to raise some questions.

MS BUCHAN: Yes.

MR FITZGERALD: Have you got a couple of final points and then we might just ask a couple of questions.

MS BUCHAN: No, you can - look, I'll make written submissions on these. Fire away.

MR FITZGERALD: Thanks. Jenny, franchising, as you're aware of my background, it's been heavily involved in franchising, and it is an extremely complex commercial and legal arrangement we agreed, and you've identified that it has a number of components which distinguishes it from a normal purchase of a small business; all that is given. But in response to that, we've now set up quite a significant regulatory and co-regulatory regime. We've now got, you know, the Franchising Code of Practice, which requires very significant disclosure prior to purchasing a franchise and so on. So here we - in recognition of the complexity of the arrangements and the difference in power between the franchisor and the franchisee, a regime, a regulatory regime effectively is now in place.

From what you're saying, do you believe that the regulatory regime for a potential purchaser is adequate or not? Now, clearly, franchisees and franchisors do in fact fail; that is true and will continue to be the case. But more importantly, is there any more that the regulator could do over and above that which it is already doing, which is very significant?

MS BUCHAN: When you're talking about the regulator, I presume you're talking about the ACCC?

MR FITZGERALD: ACCC, yes.

MS BUCHAN: I'm not sure, I really think the ACCC has to remember that there is this legislation which has been in place since 1998 and it hasn't had a good run. So this section 51AC, in terms of - - -

MR FITZGERALD: You're talking about the unconscionable conduct provision.

MS BUCHAN: Yes.

MR FITZGERALD: Yes.

MS BUCHAN: In terms of the Franchising Code, they've run 15 cases, and settled many of them. I don't think any - many of those have concerned themselves with, "Is

this operator a franchisee, a franchisor?" and it turns out that the licensor has in fact been the franchisor therefore they should have complied. So I think they're doing that well, and I don't think there's any doubt about their ability to do that well. I think what they're not doing in such a convincing way and what perhaps they could be looking at doing is considering how better they could address the situation of the post purchase arrangement; because it's post purchase when the unconscionableness of the franchisor or the landlord actually becomes apparent.

I think it's that between the lines stuff which nobody knows beforehand; the advisers can't read between the lines because they haven't got the experience of - they're not looking for problems and they don't know where the problems are going to emerge. So it's in between the lines that the problems arise. So typically the franchisor will be complying to the letter with the agreement, but not with the spirit of the agreement or the spirit of the arrangement. So even in cases perhaps where the franchisee may have been an employee, may have thought that they understood very well the general day-to-day nature of the business.

They may find that they're actually now required to remainder their own stock, whereas previously the franchisor might have taken the stock off to a remainder outlet and relieved them of stock which is not moving. Now they've got to find a space for it in their storeroom, and they may not be allowed to discount it. ACCC are not - they're not doing a bad job. I just think that probably the franchisors are receiving a message that they can get away with a lot through the cases. The cases have really either not been run or been settled or brought about some surprising results without ever being appealed. Even the one which was appealed wasn't appealed on 51AC; it was appealed on section 52.

The Franchise Council is actually saying to franchisees, and they actually did say to Kris, they cited the case - was it Lenard's that ran right through to the High Court? They said, "You haven't got any rights" - it was McDonalds. There was a McDonalds franchisee which ran through the Industrial Relations Tribunal and the Industrial Relations Commissioner said, "We can't hear your action." So now the Franchise Council has said to people like Kris, "You can't use the Industrial Relations Commission in New South Wales," which is actually incorrect. Every case is heard on its very specific facts, and that one was heard on its specific facts. So they're not dishing out useful information. The ACCC I think probably needs a bit more backbone sometimes. But it's understandable that they've got a budget and they've got particular priorities.

MR FITZGERALD: Just a second question for me, and then Gary and Philip may - just to clarify this for me, and I should know the answer to this, but I can't remember. If the ACCC runs a case under the unconscionable conduct provisions 51AC and is successful, what happens with the penalties and the damages? The affected party, in this case Kris Patterson, if she were to be successful, if the ACCC ran an action would she be able to recover; or is it if the ACCC runs it, it's simply a penalty and she actually receives nothing? They don't run an action on behalf of the franchisee, they run an action as regulator.

MS BUCHAN: They run it on behalf of themselves.

MR FITZGERALD: And therefore even if ACCC ran the action and the courts were to find the franchisor in breach of that provision of the Trade Practices Act, the actual affected party, the franchisee, receives no benefit from that.

MS BUCHAN: Most of the time the affected party receives no benefit; and I will actually address that in my written submissions, because I've actually got a bit of a summary of who got what as an outcome of the various pieces of litigation.

MR FITZGERALD: Will you be suggesting in your submission that the ACCC should be able to run actions on behalf of individuals, as distinct from actions in and of itself; because in that case the ACCC's action benefits Kris Patterson not at all - just to use her as an example - if they were to run a successful case.

MS BUCHAN: Robert, what I will be suggesting is that the ACCC uses its right to intervene. The ACCC has a right to intervene in private actions, and they have a right to intervene - they've got guidelines about intervening, and their rights to intervene have been increased in the last five or 10 years. So they've actually got quite extensive rights to intervene in an action such as Kris', or there are other actions currently being - and I think that would be a very useful use of their resources, because the other people have already got the case running and they've proved up their case; they've got enough evidence to get into court, and the ACCC can then piggyback in and I think that way the agreed franchisee has a good chance of receiving a damages payment but the ACCC also gets clarity of the law. So I think the intervening processes has been under utilised.

MR FITZGERALD : Thanks for that. That's fine, that's a good suggestion. Gary?

MR POTTS: Are you suggesting the ACCC should only do this in relation to the unconscionable provisions of the Act or more widely. For instance, a misleading - - -

MS BUCHAN: I think the misleading, to be honest, is pretty well explored and I think given their limited funds and given the lack of exploration of the unconscionable conduct provisions, even though they've been around since 1998, I think there's a very good case for putting some of their funds into intervening - in some very targeted unconscionable conduct actions.

MR POTTS: I'm not a lawyer but I understand the principle of unconscionable behaviour is enshrined in other law as well.

MS BUCHAN: It is.

MR POTTS: Not just the TPA, so it is perhaps one of the reasons why the ACCC hasn't done this is because it's been clarified elsewhere?

MS BUCHAN: No, it hasn't really been clarified elsewhere. Retail Leases Act, for instance, in New South Wales drew extensively on the provisions of the TPA in crafting their understanding of unconscionable conduct,. So yes, it's been used widely. I don't think it's actually achieved a really clear definition anywhere that I've look. So there's the industrial relations legislation in New South Wales and unconscionable conduct is one of the things which the commissioners have drawn to look at it. We've got retail leasing here in New South Wales, Contract Review Act in New South Wales. And I think that probably the TPA is - or ASIC Act, one of them is place because that sends a Commonwealth message which the other states outside of New South Wales can't discount nearly as easily as they could discount a judgment that comes out of a New South Wales court or New South Wales pack of laws.

MR WEICKHARDT: I'm not a lawyer either but I must admit having read this morning a paper on unconscionable conduct, I thought that area had been tested fairly extensively and people had decided quite frankly the hurdles were so high that it wasn't worth banging your head against that wall any more, and that the New South Wales Contract Review Act had a lower threshold of at least accepting, you know, sort of, other clauses or other categories of procedural unfairness or substantive unfairness or unjustness. So I guess my question of curiosity is simply why she is not pursuing this action under the Contract Review Act?

MS BUCHAN: That's a perfectly sensible question. Kris is a business consumer and the Contract Review Act is designed for consumers who don't - she's not in the category, so she would not be eligible to pursue her action under the Contract Review Act because she's a business consumer.

MR WEICKHARDT: Okay. Thank you.

MS BUCHAN: So most franchisees would fit that category.

MR FITZGERALD : I notice that time is expired. Are our next participants here? Yes. Is there any final questions or comments? Look, thanks very much for that Jenny. I am interested in your submission and you can reassure Kris that we welcome her submission and her comments as a case illustration. And the point that she raises about business consumers that have invested but then lost the money are having difficulty in being able to access remedies - you know, we've conscious of. What's not clear to me is what is the way forward on that. But certainly, you know, we appreciate her putting in the point so far. Anyway, thanks.

MS BUCHAN: Thank you very much for your time.

MR FITZGERALD : Good morning. We set? If you could give your full names, the organisation and the positions you hold for the record, and then if you want to open up with your key comments on that for the next 15 minutes or 20 minutes or so and then we'll have a discussion about those particular issues. Thanks.

MR ANNING: Thanks very much. John Melville Anning, I'm general manager of the Regulation Directorate with the Insurance Council of Australia.

MR DRISCOLL: John Driscoll. I'm General Manager Policy-Consumer Directorate, Insurance Council of Australia.

MR ANDERSON: Peter Anderson, Policy Adviser, Regulation Directorate, Insurance Council of Australia.

MR ANNING: I'd just like to open up with a few comments about the role of the Insurance Council so you understand the perspective that we're coming from and - sort of, our interest in this inquiry. The Insurance Council is the representative body of the general insurance industry in Australia. Our members represent more than 90 per cent of total premium income written by private sector general insurers. The Insurance Council members provide non-life insurance products ranging from those usually purchased by individuals such as home and contents insurance, travel insurance, motor vehicle insurance, to those purchased by small businesses and large organisations such as product and public liability insurance and workers compensation. Australian general insurers issue more than 42 million insurance policies annually and deal with 3.5 million claims each year. On average, about $70 million in claims is paid each working day so you can see the general insurance industry has great exposure to consumer issues.

The Insurance Council understands that the commission is not undertaking a review of consumer protection in specific sectors, however, in line with the invitation, the issues paper, the council would like to put forward the general insurance industry as an example which illustrates a number of matters which we believe need to be addressed in consumer policy. The Insurance Council has been active for a number of years and arguing for a more effective approach to regulation. The submissions which the council made to the bank's task force review of business regulation raised a number of important issues concerning this issue.

The topics we raised include improving the regulatory process, removing and preventing unnecessary regulatory burden. Resolving overlapping jurisdictional responsibilities and the benefits of allowing industry to develop self regulation. The Insurance Council continues to work for a more effective regulatory framework. It is engaged with the other members of the Finance Industry Council of Australia, FICA, in its work with ASIC to develop an agreed cost benefit-template to enable industry to provide credible input to the evaluation and regulatory initiatives and existing regulation.

FICA is also working with ASIC in our conference later in the year designed to look at important aspects of the regulation making process. Members have not raised it as major issues with the generic protection provided to consumers by the Trade Practices Act and the equivalents in the ASIC and Corporations Act. There is potential for duplication and inconsistency with state fair trading provisions, but at least in the consumer protection area, jurisdictional overlap has not in practice presented a major problem for general insurers. Rather the issue for general insurance, is the provisions of the Corporations Act which resulted from the Financial Services Reform Act.

While the licensing provisions can be seen as warranted in order to enable the consumers to have confidence that those providing financial products and services meet other standards, the disclosure provisions intended to address information asymmetry between product service providers and the consumer were applied generally across the financial services sector. In theory, uniformity regulation had its appeal, given the convergence which had been predicted for the financial services industry. However, it assumed a level of consumer need for documented information disclosure that did and does not apply for the purchase of general insurance by retail clients. The Insurance Council contends that a rigorous cost-benefit analysis of the impact of applying FSRA to general insurance would not have supported the case for this level of regulation. The result has been considerable expense and effort by general insurers to comply with unnecessary disclosure provisions, and the cost, inconvenience and potential confusion to consumers who receive documentation far beyond their requirements.

Industry and government, ministers, Treasury and ASIC have worked to wind back the excesses of the regulatory regime. The first round of FSR refinements, for example, resulted in an exemption from having to provide statements of advice when selling a general insurance product apart from sickness and accident. Discussions are now taking place on a number of proposals in the second FSR refinements package. This finetuning would not have been necessary some four years later after the act came into full force if the need for specific consumer protection provisions had been more closely looked at when the legislation was being framed.

The Insurance Council is keen to see the application of cost-benefit analysis to deal effectively with the questions raised in the issues paper, such as intermediaries, the impact of IT developments, and whether specific unfair contracts legislation is needed. The extent of a problem needs to be clearly identified before a solution is designed. I'd like to make it very clear that the Insurance Council is not against regulation as such, but sort of what we really are working for here is effective regulation.

With the need for cost-benefit analysis now being commonly raised to improve the evaluation of regulation, the Insurance Council advocates the development of consistent methodology, certainly at least across one industry such as financial services. This is a major reason for the council's work with FICA and ASIC on the cost-benefit template. With a less proscriptive, more flexible approach to regulation

by legislation, there would be greater scope for industry self-regulation. The Insurance Council is already active in this area with its general insurance code of practice, and we'd be happy to take questions or explain a bit more about that.

The council is also active in addressing some of the issues I understand has been raised with the commission in its hearings in terms of financial literacy and consumer awareness. The council's executive director is on the board of the Financial Literacy Foundation. He is working seriously to address the extensive problem of under and non-insurance in Australia; and we're also exploring the potential for initiatives in the microinsurance in this area. Thank you.

MR FITZGERALD: Good, thanks very much. We will receive a submission from you in full - - -

MR ANNING: Yes.

MR FITZGERALD: - - - dealing with some of those issues. So we might just have some questions and discussion. Gary, do you want to lead off?

MR POTTS: Sure. Just from your comments, I take it that you're broadly happy with the institutional framework that's in place now for consumer regulation and other regulation of the insurance industry which came out of the Wallace report some years back, which gave a broader role to ASIC as you know and created APRA. But we have had some comments in other submissions about the institutional framework; but listening to your presentation here, it's not the institutional framework that is of concern to you, but it's the extent of regulation that applies to the industry that's of fundamental concern?

MR ANNING: That's right. So the members haven't raised with us concerns about the institutional framework in this area.

MR POTTS: Right, good. You said that there's a process in train at the moment for looking at the existing regulation. Are you confident that process will yield the results that you're looking for, particularly bearing in mind that the Commonwealth of course has taken steps to establish a more objective system for assessing new regulation through an agency attached to the Productivity Commission, the Office of Best Practice Regulation. So that there is a more objective and rigorous approach to testing proposed new regulation. So what you're proposing conceptually is consistent with policy direction. Are you confident in the processes that you're involved in at the moment, you know, within the Commonwealth government, that you will get the sort of outcome that you're seeking to achieve?

MR ANNING: I think we'd sort of described it more as hopeful rather than confident, and that's sort of not to cast any doubts on the goodwill and determination of the people involved in these initiatives. It's just that, as I alluded to, there's a number of cost-benefit sort of templates, methodologies, being developed. The government has made available on I think the Industry Partners web site sort of a

methodology for calculating the impact of regulation of business.

We'd like clarity and consistency around these methodologies, and then another issue - and I don't think our members are backing away from this - is that really to help in the evaluation of existing regulation and regulatory initiatives businesses also have got to be able to provide credible data on the impact and, you know, projecting out the likely impact of new initiatives. It only takes you so far sort of to go on a gut feel that the new regulatory initiative is going to cost you a lot to comply with it. Certainly the Insurance Council members feel that if business is going to argue convincingly on regulatory initiatives, then we're going to have to have the data from our members, the practical data from our members, to back up those arguments.

That's why the Insurance Council board has approved with the work that we're doing on the cost-benefit template, and while we're pursuing that with the other members of the Finance Industry Council; and also interested to - we are working with ASIC, which is doing some work in this area as well - we're looking to do a survey of industry and cost-benefit of regulation. We want to make sure that everyone is working from a common base so we have no arguments about the figures later on because of different methodologies.

MR POTTS: And you'll set this information out for us in your submission?

MR ANNING: Yes.

MR POTTS: In a previous life of course I was directly involved in the FSR legislation. So in one way you might say I'm conflicted. But that wasn't the point I was going to raise. But look, I guess the point I was going to raise is that you're making an interesting observation about the problems of over-regulation; and in a way regulation can go through a cycle, and when you get an event which directly affects an industry like it did the insurance industry, HIH, which I was very closely involved in when it happened, the natural response of government is to tighten regulation.

So I raise the issue - and we're now in the cycle where the industry is performing well, its profitability is good, there don't appear to be any problems in the industry, so the pressure comes for less regulation, and then another event occurs and the pressure increases for more regulation. But I raise the issue in the context of your comment about an increasing role for self-regulation, and in the context of the situation that I was mentioning, I'd just be interested in your observations of how you think as an industry you can make self-regulation work in a way that's going to avoid the sort of problems that I mentioned.

MR ANNING: Would you like me to start off and then you - - -

MR DRISCOLL: Yes.

MR ANNING: I suppose it comes down to sort of how you view regulation. I

think there is greater scope for using principles based regulation to set out the essential framework, and then using self-regulatory instruments developed by companies themselves or most commonly by industry associations to sort of flesh out how those principles operate in practice. I mean, there's examples in terms of the Corporations Act where the general principle is that consumers deserve the information they need to make informed decisions on their product choices.

But we find with FSRA that information was being required on the costs to consumers in a particular document that had been traditionally put into the policy schedule. That level of detail caused problems, and arguably it shouldn't have actually ever sort of crept its way into sort of black letter regulation; whereas an industry code could have drawn on the experience of the companies and where consumers required - where and when consumers required that information - and sorry, the codes aren't simply developed just by industry itself. To sort of work effectively they need to be also developed with consumer input as well. So you get actually practical input on how disclosure is required rather than from a theoretical point of view, sort of generalising assumptions. John, your experience of the code.

MR DRISCOLL: Thanks, John. Just very briefly, I'm not sure how familiar you are with the code. I'd be more than happy to leave a couple of copies with you. But of course, it will be presented as part of our full submission. The General Insurance Code of Practice came into operation 18 July 2006. It was a long process; it involved meeting with key stakeholders, including, very importantly, various consumer groups, obviously government, and so as the industry was able to present in fairly easily digestible and understandable language for the benefit of both insurers and customers, the various matters that go into actually from start to finish, from actually taking out a policy, issues relating to dispute resolution, settlement of disputes, payment of claims, et cetera.

Our members have wholeheartedly embraced the code. We work very closely with the Insurance Ombudsman's service in terms of monitoring performance of the code. We regularly liaise with consumer groups from a number of areas, from those groups that are looking at - their constituents have a particular interest for lower socio-economic groups through to, for example, Choice, the Council for the Ageing, the National Farmers Federation - and they're just to name a few. We're constantly liaising with these groups to ensure that the code continues to meet their requirements as consumers. We consult of course with our members that they feel comfortable with the provisions of the code and also with the Insurance Ombudsman, we work very closely.

We have welcomed comment from government, from the federal government about the successful operation of the code. That's not to say that it will remain in its current form forever. I mean, obviously as new trends develop we will continue to monitor it in conjunction with government regulators, consumers and the industry to make sure that it's relevant at all times. But I think that our experience has been that since it came into operation in mid 2006, that in fact not only have our members wholeheartedly embraced it, we've had a lot of inquiries from people who are not

members of the Insurance Council, and indeed members who are not insurers, who wish to sign up to the code because they see it as a very positive marketing tool for their own businesses.

So on the whole, I think the first phase has been very successful. That's not to say that we're not very conscious of keeping a watching brief on how things develop, and look closely at the interests of all stakeholders in the ongoing operation of the code of practice. Thank you.

MR WEICKHARDT: You talked about perhaps an unintended consequence being that disclosure provisions applied to general insurance and gave consumers documentation beyond their requirements. I think probably most consumers as they are polled say that in all regards they get documentation beyond their requirements or beyond their ability to sort of - ability or interest to read. I mean, we've been talking to a number of people who have appeared at these hearings about ways in which perhaps documentation could be stratified so that you can get, you know, some basic high-level messages, and if you want to drill down you get more information. I'm interested in how you have established what level of documentation consumers - really does meet the consumers' requirements and whether you've done any testing of consumers' ability to understand or interest to get levels of detail that meet their requirements. Can you talk a little bit about that?

MR ANNING: A little - sorry, I've just recently joined the Insurance Council so I'm not talking from direct experience. But the positions we adopted were developed in sort of feedback from the links we have with consumers as I think - directly to the council as well as through our feedback from members; and for example, the winding back which occurred in the first round of FSR refinements was done with the agreement of the consumers that (indistinct) advice in most situations were unnecessary for general insurance products. But a key feature of what we're proposing in terms of effective regulation certainly is a consultation with consumers and sort of testing of disclosure documents for effectiveness with consumers. For us, that's an essential part of the evaluation process.

MR FITZGERALD: Can I just, to test that a little bit further, I mean, one of the things that we've heard is that, two things, and they seem to be in conflict. One is that the disclosure regimes were put in place - the disclosure regimes, I think, were put in place with good intent, and that was a desire to be able to both empower the consumer with additional information, and also to provide information about their rights and entitlements under the contract, and all of us would not say that the information regimes that we have are in desperate need of an overhaul, not only in your industry but across the board. Now as Philip says, is which way forward.

But the conflict that I see is twofold. On one level we seem too be that the - that where there is an attempt to wind it back, industry itself is saying, "No, we don't want to do it," because lawyers and risk adverse management is basically saying, "Well, if we wind it back we may be at risk." So on one hand - and we've seen that that seems to be a driver in some industries, that industry itself is reluctant to in fact

reduce the amount of information, because it's been driven by others. We've seen an example where in one particular industry they tried to introduce a comprehensibility test, and industry rejected that for the same reasons.

So it's very hard at the moment to understand what's driving what. Consumers do need information. Industry does need to be protected. But we seem to be in a difficult space. I was just wondering, in the insurance area, how do we reconcile these sorts of - this conundrum that we now have between what seems to be a legitimate aim of informing the consumer, and a legitimate aim of protecting industry, but what we've got is an instrument that probably does neither well. It certainly doesn't seem to be working in favour of a consumer having greater understanding. But just from the insurance point of view, what's actually driving the current disclosure regime? Is it regulation, is it the industry itself, is it something else?

MR WEICKHARDT: Just adding there, I think it was put to us in this case - wind back. It was both the industry and the regulator that was reluctant to do what was in the - you know, the consumer wanted. So it's both the industry and the regulator being risk adverse, to sort of try to in one case meet what was seen to be in the consumer's best interest.

MR ANNING: It's actually a very complex issue, as I'm sure you're aware. I mean industry is being risk-averse on the advice of their lawyers about leaving themselves exposed by not putting enough information to the PDS or whatever disclosure document they're looking at. But I don't think it can be laid totally at the feet of the lawyers. I mean, it's also, I think, an issue with how ASIC is enforcing or encouraging compliance with the regulatory regime, in that for better or worse ASIC - sorry, I'm speaking very broad brush here, but ASIC to inspire compliance seemed to have taken - its public pronouncements are very tough, and they inspire fear in the industry in that, if they don't follow the direct - down to each letter of ASIC's guidance, then they're leaving themselves open to prosecution.

So ASIC's guidance, which is intended to lay out for industry ways of complying with the Corporations Act, is actually being taken as law, which was never the intention, and ASIC itself will say they're only the - policy statements that are only guidance. But the public pronouncements ASIC makes about compliance has created this view within industry that they're leaving themselves exposed if they don't actually comply with that guidance as if it was black letter law. So I think it's a compounding issue here, and you can certainly understand why ASIC takes the approach it does, to maximise the effect of its limited resources, but it is stymieing the operation of what was meant to be principle-based legislation allowing flexibility for it - in implementation by industry.

MR WEICKHARDT: So what's the way forward here? Have you reached some sort of understanding? You said that in the case of general insurance you'd reached an understanding of winding back disclosure. How has that taken place?

MR ANNING: In terms of the formal winding-back, it's occurred through policy proposals being developed and discussed with ASIC, but we've got very good working relationships with ASIC where we discuss issues as they come up, and sort of hopefully by adopting a joint approach we can achieve more realistic levels of - - -

MR WEICKHARDT: What was the guiding principle here? Was it around comprehensibility, meeting the needs of the consumer? What was driving the winding-back? You talked about the fact that there's another pressure, of protecting the industry and protecting the regulator. The countervailing force is the needs of the consumer. Why has it been successful in this case of general insurance?

MR ANNING: Where the regulatory requirements have been wound back, the issues that we've been pushing because of the impact on the consumer in terms of cost and there's a potential for confusion is the compliance burden has lifted the costs of these products unnecessarily because most general insurance products are sold rather than recommend with advice, and they don't require comprehensive disclosure. So the issues are basically to maintain the accessibility of general insurance products, given that there is such a problem of non-insurance in Australia.

MR FITZGERALD: Can I - it's related to that topic but slightly different in one sense. If I can put it in this way, and there are many different ways to approach consumer policy, but just take a rights base, just for one moment. There seems to be two rights that consumers seem to have. One is the right to know - a general right to know about the product or service that they're purchasing. The second is, some have put it to us as "a right to assume"; in other words, they have a certain right to assume that the product will meet a minimum level of safety; they have a right to assume that the contract which they enter into will, in fact, be of some nature, but, you know, it won't be manifestly unfair or unjust, or what have you.

Disclosure was meant to be able to say, "Well, you, the consumer, can judge that." What seems to be emerging at the moment is the consumer wants a basic amount of information so that they can determine whether or not they want to purchase one product vis-à-vis another product, and whether that product meets their most basic needs, in the case of general insurance.

But then the rest of it - all of that that sits behind that, the complex contract terms - there seems to be a general merging that the consumer neither wants to understand it nor could possibly understand it, and that's where you need to have some sort of regulatory oversighting, whether it be by mandated codes, whether it be by black-letter law, or so on; so that the consumer no longer needs to be concerned about all of that. They have an assumption that someone else has looked at it or is capable of looking at it, and all they have to be is the front-end portion. So that disclosure really should just be about the front end, and the rest somebody else takes care of, unless they want to look at it - unless they're an adviser or a lawyer.

That may not be a very articulate way of putting the case but it's one way of putting the case. So in the case of insurance products generally, how do we deal with

that? What should the consumer be entitled to know? What should the consumer entitled to assume, and what's the method? Is it through codes of practice - and just on that, self-regulation obviously is an important part of our terms of reference, but one of the dangers with self-regulation, where it's industry-based and association-based, is - it's the issue of coverage. How do you in fact insure all the players? The preferred model by many of the participants is a co-regulatory model where everybody in the industry has to abide , but the actual code is developed by industry. But, anyway, that's a second part of it.

So can you just help me through, in the insurance area, this conundrum - or not the conundrum, but what do you think consumers have a right to know and what do they have a right to assume, if you think that's a valid way of looking at it, and, as I say, there's many different ways you can enter this discussion?

MR ANNING: In some ways, I'd like to take that question on notice because we'll develop it further in the submission, but - I go back to basic principles of what we're looking for in terms of effective regulation that we'd want to talk to consumers to identify what they want to know and the most effective way of realising that.

But, in terms of the regulatory framework of the consumer protection, as it exists today, I think we'd be arguing that a fair proportion of the rights which consumers would want in relation to insurance contracts would be provided to them by the generic consumer protection provisions, supplemented as necessary by sector-specific regulation in the Corporations Act. We're certainly not saying that consumers don't have rights in this area - - -

MR FITZGERALD: No, no.

MR ANNING: - - - but I think we need to look closely at the protections that they enjoy generically.

MR FITZGERALD: I'd be grateful in your submission if you could look at it, because what we're trying to do is find a basis of principles that guide this disclosure information area, given that there is universal concern about it. So we'd be grateful for that. Can I just talk about the code of practice - - -

MR POTTS: Just moving on, in doing that could you address another issue, and that is, there's an assumption that all consumers are the same, and I think they're not all the same. Some people want a lot more information than others. One approach, for instance, is to have the more layered approach to the disclosure of information. So you have, for instance, up front - or one page for the key elements of what the product reflects, and with some provisions saying that this information isn't comprehensive; that if you want to understand the product in full, you need to look at the full details, but there's something up front that allows the consumer, very easily, to understand the basic characteristics of the product, and then that is complemented by other more detailed information on the product.

So depending on the consumer question, if they only want the basic information, it's there and very easily accessible. If you want more detailed information, then you've got something else to go to. So could you, in your submission, address that approach as well - - -

MR ANNING: Yes. I'll take that - yes.

MR POTTS: - - - and to what extent that would be a viable approach, in trying to deal with consumer needs on the basis that it's wrong to assume that all consumers are the same in terms of the information requirements they have.

MR DRISCOLL: If I might add, I couldn't agree more. Certainly, one size doesn't fit all. I've been going around talking to, as I think I mentioned earlier, a number of consumer groups about a number of issues not solely limited to the code of practice, but also issues particularly under-insurance and non-insurance and there are - it's impossible to, from my experience, I'm just speaking personally, to categorise a consumer because you have people who are very sophisticated and have a very acute knowledge of their legal rights and obligations, down to people who really struggle with coming to terms with what their rights and obligations might be.

And it ties in, to some extent, with a process that we are undertaking at the moment and that is going around and if you like educating people. That is another issue. We're looking at extremely high levels of non-insurance in this country at the moment. You may have noticed a report in today's press which indicates that there are dangerously high levels of people in this state alone with no home and contents insurance at all. We are actively addressing this issue. I'm looking at it more from a consumer, if you like, educative-type of focus but also working closely with my colleagues, John and Peter, in the Regulation Directorate. So I certainly agree wholeheartedly with your comment that there is no one consumer, there are a number of consumers and we're in the process of actually trying to isolate what the needs of the various consumer groups are.

MR FITZGERALD: Look, we don't underestimate the challenge for industry groups trying to do that and, as Gary said, what we're trying to find is what is an effective way forward, and that's obviously what you're doing.

But can I just ask a question on your comment then about under-insurance. Do you have a strong understanding of why that under-insurance is occurring? Is it occurring simply because of affordability or is it occurring because as some behavioural economists would say that people underestimate risk or are over-optimistic about risk and therefore assume that nothing will ever bad happen to them. So do we have an understanding of what's - or there may be several other factors. But what's driving that under-insurance from a consumer's point of view, affordability, wrong assumptions about risk or other factors or do we - not quite sure.

MR DRISCOLL: It's a complex issue again. I don't think there is any one reason. The issue of under-insurance is one that the industry has been working on for some

time now and you're probably aware that ASIC released a report, I think, John, it was late last year or early this year.

MR ANNING: Early this year.

MR DRISCOLL: Which recognised significant efforts that have been made by the industry to assist people who currently have insurance but are in that position of being under-insured. I think generally speaking, and I defer to John on this, that the report was quite positive about steps the industry has taken to assist people. It appears in the case of under-insurance, anecdotally at least, that a lot of it simply is the fact that people didn't have appropriate, if you like - they needed guidance as to issues such as your insurance doesn't always remain the same as you acquire extra assets, obviously, with inflation and other types of issues. So that is something that we have been working extremely hard with - with the consumer directorate at ASIC and I feel as though we are making a lot of progress.

A great challenge for us now is this area of non-insurance which, as I say, in today's media, gets quite a lot of attention. We're looking at some of the reasons for that. A general lack of knowledge of general insurance among many groups. What we're finding is that there are - intuitively some of your expectations are met when you see some of the data that there is a great incidence of non-insurance among people on low incomes, young people. But interestingly, it's not quite as simple because you see people who are in higher socio-economic groups who make it would appear a decision not to insure, to self-insure effectively. I assume on the basis of the principle of, "Well, it's not going to happen to me." This is something we're currently investigating with some of the groups that I mentioned to you earlier because it becomes something of an equity argument because you have people on limited incomes who are taking out insurance, you have people who are earning very substantial incomes who are not paying insurance and, you know, when your house starts to burn down, the fire brigade does not come and say, "Please show me your insurance policy." So there's an equity issue there which we're looking at.

So it's a complex issue. One of the issues on affordability is certainly an issue. One thing that is reported in today's press is the substantial amount of state taxes and levies that apply to insurance products. When you look at things such as fire services levies and other imposts they take up a substantial proportion. It's certainly a concern for all consumers. Particularly, we're getting a lot of feedback from people in regional Australia about - sometimes, you know, it could be more than 50 per cent of their total amount payable is referable to government impost and levies. So there are issues there that we are investigating.

MR WEICKHARDT: Can I ask a question which may or may not be relevant, but, in Victoria, they now have the unfair contracts legislation and I guess we've heard examples of this being used to strike out terms in contracts, and standard form contracts, and hire cars, and mobile phones and other things. Don't take offence, but has the insurance industry in Victoria received visitations from Consumer Affairs Victoria suggesting that there are any clauses in insurance contracts that are unfair?

MR ANNING: I think we'll need to take that one on notice as well, I mean, to actually give you an accurate response, I mean, I think, but we're unaware of any members of raising these issues. I mean there is, if you like, theoretical concern about whether there is actually need for unfair contracts legislation but, I mean, that would just go back to the basic principles of, "Show us the problem and we'll look at how you need to address it." But, as for the actual experience of our members with that piece of legislation, we'll sort of get back to you on that.

MR WEICKHARDT: Okay. Thank you.

MR FITZGERALD: But related to that does your code of conduct actually talk about unfairness in contract terms or does it seek to define it? Just to put that in perspective, while some industries have been critical of an unfair contract review term, what we find is in their codes of conduct, it's almost the opening line that they talk about unfair contracts and then go on to define it. So it seems to me that people aren't objecting to the notion of looking at unfairness, they who want to be the determiners of what that is, what industry basis, or want some surety that government doesn't become overly interventionist about it but could you just enlighten me as to your approach on the code?

MR DRISCOLL: On the code, my understanding is that, as I say, there was consultation with all stakeholders and obviously consumers were a key group there. The code does talk about issues of unfairness. It talks about - it lays down some fairly tight obligations upon insurers in terms of their obligations when a claim is made, when a claim is declined, and in fact although all of our members, or certainly to the best of my knowledge all of our members and many other parties are signatories or have adopted the code. There are issues from time to time that come up which would indicate that the code strikes a reasonable balance between the demands of the consumer and exactly what the insurer can deliver.

There are some quite restrictive timeframes et cetera that are required. Indeed the other aspect of course is the interaction between the insurance companies, the code of practice, and the insurance ombudsman, which is the watchdog. And whilst we have a very good relationship with the insurance ombudsman - the insurance ombudsman is an independent body whose role is to enforce compliance by insurers with the code - so we would like to think that the code strikes a balance between the interests of consumers and the ability of insurers to meet some fairly tight timeframes, deadlines and obligations that were felt at the time of compiling the code were necessary to show the good faith of the insurance industry.

MR FITZGERALD: Can I ask for clarification? The ombudsman is an industry-based scheme. Are all the insurers that provide general insurance required by any regulation to in fact be part of that ombudsman's scheme or is that purely voluntary?

MR DRISCOLL: The general insurance code of practice is not compulsory. But

as a matter of fact, all of our members except some who are specifically excluded for some reasons, and even some who are explicitly - and I'm talking for example about some of our major reinsurers, I believe - are excluded, have voluntarily signed up to the code. The reason that this has happened is because it is both a protective element in terms of, from the insurer's point of view, it is something that consumers find comforting, from our experience. And therefore I guess if you look at it in that sense, it is a positive message that the insurance industry is setting out.

MR FITZGERALD: But can you be an insurer and issue general insurance, and not be a member of your organisation and therefore neither be a willing participant to the code of practice and a participant in the ombudsman's scheme? Are there insurers that sit outside of all of that or do you have almost 100 per cent coverage?

MR DRISCOLL: Sorry, I think we almost have about 90 per cent coverage of the general insurance industry but it is a requirement for holders of financial services licences to actually belong to an approved dispute resolution scheme.

MR FITZGERALD: So an insurer, irrespective of whether they're a member, would have to sign up to some form of dispute resolution but obviously not your code because that's - Is there, in some of the other industries the regulator requires as a matter of the licence, that they be a part of a specific scheme, for example in telecommunications, do you think there is any merit in the regulator being more involved in the dispute resolution scheme? Or do you think it works effectively that an insurer could choose which dispute resolution scheme they should be part of? I mean, put more simply, should the insurance industry ombudsman have full coverage and that be mandated by a regulator, for example?

MR ANNING: I think it's a question we sort of need to look at and if there's actually been problems experienced. Now, I think the regulation at the moment requires membership of an ASIC-approved scheme, so it isn't specific. I'm unaware of any particular issues about which scheme they belong to. Naturally, I - - -

MR WEICKHARDT: Have ASIC approved any other schemes apart from the Insurance Ombudsman for insurers?

MR ANNING: I need to take that on notice. I don't know if it's a matter of practice, whether insurers have ever tried to sort of to send their disputes to the Banking and Financial Services Ombudsman. I don't think it's ever risen.

MR WEICKHARDT: It seems a bit bizarre.

MR FITZGERALD: Well, we'd be grateful if you'd take it on board. I suppose what's driving that is, there's been very clear and very strong support from all areas for the various ombudsman schemes that operate, without being specific about the insurance, but there is also a very large number of them and from the consumer's point of view increasingly difficult to navigate which one you should go to and so on. So within some areas, not necessarily insurance, we're just trying to look at, you

know, how those schemes are working, whether they could in fact be modified in any way, shape or form, and insurance is one that you might give consideration to.

MR DRISCOLL: Just one point on that is that there is of course a middle, if you stop, before reaching that, and that is the internal dispute resolution mechanism within each insurance company itself and speaking from my directorate's point of view, which is the consumer directorate, we're finding increasingly, you know, things being settled at that stage before - they don't reach the ombudsman.

MR FITZGERALD: Gary.

MR POTTS: I mean, our interests of course again, in the consumers, our interest is essentially the retail consumers. There's a lot of your business will be done - you'll be writing insurance for big business, for instance. They can look after themselves as far as understanding insurance contracts and dispute resolution and all that. What we're essentially talking about, household insurance, people - householders getting insurance and you know and possibly expanding into small business because they're coming under the TPA. So again, I think you have to differentiate in terms, what consumers you're thinking about and looking at this question.

MR FITZGERALD: Just a final question from me. You mentioned about the states and I hear your comment about fees and charges levies, but beyond that are you finding that the states are posing a problem for insurers in relation to their exercise of their fair trading powers or sale of goods and services powers generally? Obviously, you're regulated predominantly through ASIC but I suspect you're also regulated through the general fair trading and consumer protection provisions at state level. Have you got any views about what's happening at state and territory level?

MR ANNING: We'll try and get a clearer idea for you in the submission on the actual level of issues that have been raised but in practice, no. I mean, sort of at jurisdiction level, life is crazy with difficulties for us in other areas but in terms of exercising the fair trading provisions, I'm unaware that it's a major issue for (indistinct).

MR ANDERSON: I think as a matter of principle, we would prefer that there be one regulator and that applies also to the APRA type regulation as well. Now that the states have got all their own insurance commissioners and their own requirements but as a matter of principle, I'd prefer that there just be one.

MR FITZGERALD: Do the prudential - just as this stage, it's not our intention to look at the prudential oversight arrangements for the financial products or insurance products, I think. We're trying to avoid that for obvious reasons. Are there any reasons why we should look at that in terms of consumer protection aspects, or not really? Otherwise - well, just taking your last point, it wouldn't be our intention to look at the prudential arrangements.

MR ANDERSON: No. Appreciate that.

MR DRISCOLL: No, I don't think so.

MR FITZGERALD: Any other final questions? Good. Thank you very much.

MR ANNING: If I can just - - -

MR FITZGERALD: Yes, John? Yes.

MR ANNING: - - - make a supplementary remark about sort of unfairness in insurance contracts. We'd like to point out that the principle of utmost good faith is actually inferred on both parties in terms of insurance contracts, and it's a central part of the Insurance Contracts Act. So in terms of fairness, unfairness, that's something that needs to be taken into account, that both parties are expected to behave with utmost good faith.

MR FITZGERALD: That's under the Insurance Act?

MR ANNING: It's at common law; but also in the Insurance Contracts Act, it's a central principle of the legislation.

MR FITZGERALD: Which I must say is different. In the general law, that principle doesn't apply. In the Trade Practices Act or the Fair Trading Act, that principle of good faith is missing. It largely only exists in America, and in specific acts, but it's not a principle at general law. Thanks for that.

MR ANNING: Yes, thank you very much.

MR POTTS: Good. Thanks for that.

MR ANNING: Thank you.

MR POTTS: Good, and I do look forward to seeing the code. We've got a keen interest in codes.

MR FITZGERALD: If you could give your full name and the organisation and position for the record, and then it's over to you for some key points and we'll have a discussion after that..

MS BANKS: Robin Banks. I'm the chief executive officer of the Public Interest Advocacy Centre and also the director of the Public Interest Law Clearing House, and I'm representing both of the organisations here today. I want to apologise on behalf of one of my colleagues from our utilities program who was supposed to be coming but had a last-minute emergency. Melissa Freeman heads up that program at the moment. Thank you for the opportunity to, I guess, outline our preliminary thoughts on the inquiry.

Just by way of background, the Public Interest Advocacy Centre is a consumer and public interest law and policy centre based in Sydney. We work across a range of areas and we have a couple of areas where we're doing quite a lot of work around consumer issues specifically. Some of our other work has a consumer element to it but that's not the key focus. The main area in which PIAC works in consumer protection is utilities: electricity, gas, and water, and also, as an adjunct to that, sometimes things like ticket pricing for public transport and some of the peripheral but essential services.

The Public Interest Law Clearing House is a centre that coordinates the private legal profession to delivery pro bono legal services to the community sector and to individuals with public interest matters. It does that both through individual referral work but also increasingly through coordinating what we term as pro bono projects where we identify an issue that seems to be impacting on our client group or on the community sector in a particularly negative way, and developing a coordinated approach with the private sector, and with other organisations.

The key area of work that is relevant to your inquiry is the work we're doing around predatory lending, and that is a project that we are doing with the Legal Aid Commission, who approached us, having identified a significant problem, and the Consumer Credit Legal Centre in Sydney.

In terms of the issues, I wanted to just briefly highlight as the ones that come to mind from your inquiry, is - in the area of utilities, there's a few things happening and the move to a national energy market is certainly, from our perspective, having an impact, and there are also moves at the state level in the regulation of pricing that we're concerned about. One in particular is a move - for the first time ever, the Independent Pricing and Regulatory Tribunal didn't have as one of its terms of reference for the pricing decision it's just released the issue of consumer protection. So in the past, consumer needs and issues were one of the terms of reference. For the first time ever, that wasn't the case, in its recent determination, and it certainly, we think, has had an impact. The prices are intended to increase significantly.

Our understanding is that reflects a view by government that there's a need to, I

guess, force the market to work better, to operate as a market. Our concern about that is that many of the consumers we deal with don't tend to think about themselves as consumers. They're users of essential services. They certainly don't see themselves as having market choice in any meaningful way. And the experience we also have is that people are quite intimidated by the complexity of what's on offer, particularly with the new contracting arrangements whereby you have your natural provider but, if you contract out of the provider to somebody else - and we're aware of people being targeted to take on these new contracts, that you lose some of the protections that you have from your natural energy provider, and that then makes the consumer more vulnerable. In the longer term it's harder for them to deal with their provider as a vulnerable consumer.

We're concerned about that. We're concerned that, while those contracts do have some core protections in them, they're so complex - and some of the other provisions that aren't core to them can effectively change the nature of the relationship significantly, even though those core protections are there; and it's not clear to the consumer what the core protections are and what the provisions that the provider has added, and I guess, in that way, it's interesting to compare it to what's happened traditionally in the area of, say, residential tenancies where there's a standard form contract that's used by real estate agents for residential tenants, and then, if they want to add contractual terms, it's clear what those added terms are because you've got a form contract that is released by the institute, and then the add-ons are simply appended to it; whereas with what we're seeing with the energy contracts is that it becomes the provider's contract and it's all in together. It's hard to identify what the different terms are what the add-ons are.

I guess our concern generally in that area is that there seems to be a pretty clear presumption that people will choose what's best for them and will understand all of the different elements of the contract arrangement; not simply the tariff, but if it's got a multiple-tariff arrangement - so inclining block tariffs or anything else - there's a presumption that people will understand that, and, for me, coming into my job and trying to understand the nature of all the different tariff arrangements that potentially exist, I certainly found it difficult, and I'm a fairly sophisticated consumer. I also - I mean, I think there's also a presumption that people will be active consumers, and I don't think that's a reasonable presumption of - particularly around things like utilities. But, certainly, our experience is that many consumers that we deal with don't have a very clear understanding of their rights. They don't - as I said, they don't necessarily see themselves in that sort of light as a consumer with some protections available through either the ombudsman or fair trading or the ACCC arrangement.

So certainly with our target client group - vulnerable and disadvantaged consumers - I think it's fair to say we think presumption is about **active** consumerism, and sort of awareness, are the wrong presumptions to make. People tend to not be active. They end up getting themselves into quite difficult situations. We're also concerned in the work that we're doing with the predatory lending project, we're very concerned about these sort of intermediaries, and we are to some extent with the utilities as work as well, because often electricity companies

will use sales people, door to door sales people, who don't really understand the nature of the contracts or their obligations fully to disclose the terms.

While that might be seen in some areas to be a useful intermediary role, in the era of predatory lending - and I don't want to repeat what you may already have heard but the experience that we have is that the schemes to get people into predatory lending or fringe arrangements tend to use intermediaries to buff up the lender from legal or consumer protection type - legal liabilities or consumer protection laws.

What we're seeing is, and the most striking example of this is the use of lawyers as third parties to give advice to borrowers about their obligations and the nature of the loans, and what the brokers are doing is asking the borrowers to sign business-purpose declarations, despite the fact that it's pretty clear on the face of it that the reason the person is seeking the loan is to save a home loan mortgage that they've got into trouble with.

So the broker, through the lawyer, or broker, requires the borrower to sign one of these business-purpose declarations in the form of a statutory declaration, and that then puts the borrower in a position where if they later try and assert protection of the consumer code that they're effectively admitting to a false statutory declaration, for which they're liable for prosecution. When we raised this issue, the role of lawyers in these schemes with the Legal Services Commissioner at New South Wales, one of his concerns was that they - while they're very aware of the schemes and they're trying to do what they can to identify and deal with the lawyers who may be acting outside of their professional obligations, the difficulty they have is if a complainant comes to them and discloses a false stat dec, they have to report it to the Director of Public Prosecutions, so the person becomes immediately vulnerable to prosecution.

And they are concerned that that means they're not getting the level of complaints they might otherwise get. So it's one of those places where the use of intermediaries is effectively protecting the mortgage brokers from, I guess, the full extent of the consumer code. It's enabling a process to avoid the consumer code and very effectively, as far as we're concerned. So we're concerned about that issue. We certainly are also - those schemes also use accountants to give advice, as independent advisers and we're also looking at what obligations may be breached by accountants who don't fully consider and advise independently.

As we understand it, the intermediaries in this case, while they're not being paid by the brokers, they certainly are getting a flow of work from the brokers that they probably don't want to put a stop to, and if they weren't willing to assist through the swearing of statutory declarations or providing the supportive advice then that flow of work would probably stop and so the use of intermediaries, certainly in predatory lending seems to be problematic and creating a buffer zone for the lenders.

Predatory lending is a good example of the next point and that is that under-resourced regulators don't necessarily act on all of the matters and so with the predatory lending we've raised it; it's been raised with ASIC. It's been raised with the

Legal Services Commissioner and it's been raised with Fair Trading, and all of them are in a position - well, for various reasons that they haven't taken action.

The Legal Services Commissioner has the difficulty of getting behind the process and as we understand it, in relation to the others, some of it is about the difficulty of the schemes and how complex they are but some of them it seems to be simply an under-resourcing issue, that they don't have the capacity to take action, and our clients certainly don't have the capacity to assert their rights actively at the outset. They're in vulnerable positions.

The other thing I guess I was interested in raising, and just to test the waters on is the question of where other laws effectively have a potential to provide some consumer protection in a non-traditional way, and the example I was going to use is the access to services provision of anti-discrimination law, which effectively say a person can't be treated less favourably in service delivery because of a characteristic they have. We're quite interested in that in term of, at the moment, the airline industry, which is generally regulated by CASA, as an industry, which doesn't look at consumer issues at all.

What we have is a number of cases involving people with disabilities who seek access to that market on equal terms and as we view it, because of their lack of market power, are very vulnerable consumers. They're having conditions imposed on them that effectively exclude them from participating in that market on equal terms. So it's an interesting way, I guess, of looking at consumer protection outside of the scope of fair trading laws that exist already.

Whether or not it's an effective mechanism is, I guess, one of the things we're looking at at the moment, but that highlights the issue about relying on markets to protect consumers, where you've got consumers who the market has no interest in, and certainly that's our experience with people with disabilities in the airline industry. They're not seen as a valuable sector of the market to target for, for purchasing.

The other thing I'd say is that I noticed in the discussion paper a view that there's a lot of consumer action goes on without any reliance on regulators, that many consumer problems are resolved between the consumer and the provider. That's in the first instance. I think that's probably true for more sophisticated consumers but it's certainly doesn't reflect our experience with vulnerable and disadvantaged consumers. Our sense is that they do have to rely on the regulators or on the potential for legal action and their likelihood of using legal action as a mechanism is equally, you know, it's just not available to them because of their buying capacity in the legal services market.

So while we think there is some truth that a lot of consumer problems get resolved in that way, it's certainly not enough to rely on, the consumer as a person with capacity, to resolve their own issues. So our overall view is that regulation is certainly very important in terms of consumer protection. We probably think that in

some areas industry-specific regulation is the appropriate mechanism, particularly things like our experience with utilities. It's been important to have specific protections in place.

We've looked a little at the notion of unfair terms provisions and certainly what we've seen from Victoria tends to suggest it's a good protection for consumers, the kind of consumers we're concerned about, but we don't have sufficient expertise on that to really comment beyond just, it looks like what's going on in Victoria is benefiting consumers.

MR FITZGERALD: Good. Thanks very much, Robin. There's a number of questions there and you've covered a couple of fields. If I can just start on utilities. Clearly, PIAC has made a number of submissions to commission inquiries in the past in relation to these matters and we're well aware that the commission would disappoint PIAC in relation to its view about full cost recovery in relation to utility charging.

If we are to embark on a situation where we don't use pricing as a consumer policy measure; just assume that for one moment, clearly we do recognise absolutely that there will be consumers that are disadvantaged, as there have been as we've shifted from regulated markets to competitive markets, there's been significant increases in energy pricing in a number of the states, and we're well aware of that. So in the absence of pricing being a tool by which you can protect low income and disadvantaged people, what do you believe are the other relevants that are absolutely essential, because that seems to be the pattern, or to some degree, where we're headed?

MS BANKS: Certainly we think pricing is probably the core of it so it's a bit hard to talk outside of it

MR FITZGERALD: Sure.

MS BANKS: And we're aware of the work that's going on around trying to - and we're involved in work around ensuring that utility companies have effective backstops for people or safety nets for people who have difficulty with the current pricing structures. But they're always that, I guess, a safety net, a backstop, rather than an effective mechanism to ensure consumers aren't vulnerable in the first place in that market. I'm probably not the best person to answer this question, because it's not my area of expertise, and I'm happy to take that on notice as a question. It's just, I don't want to - - -

MR FITZGERALD: Well, let me add a little bit. You've mentioned, under the national energy considerations at the moment, there is consideration being given to a standard form contract or almost a default contract.

MS BANKS: Yes.

MR FITZGERALD: Linked or unlinked pricing. So let's put that aside for a moment. So one could say what will ensue is that there's a default contract, similar to what you've said in relation to retail tenancy leasing, which applies. Therefore, consumers of whatever nature can in fact always opt for that contract.

MS BANKS: Yes, yes.

MR FITZGERALD: And the fairness or otherwise is built into that. Therefore, one doesn't have to worry about the other contracts in a sense. If you wish to use other contracts, no matter how complex they are, then that's an approach. The second or the alternative approach is to say, "Now, the regulator, the national regulator will in fact ensure that minimum terms are in all contracts." Now, they're not necessarily mutually exclusive, but I'm wondering do you have a general census in the utilities area or more broadly? Is there a better or preferred way, one that sort of affects all contracts or one that says, "We will provide a standard contract"?

MS BANKS: I guess just sort of my initial response is, probably a standard contract rather than a sort of minimum terms and - I mean, we do have some minimum terms in existing contracts. But, as I say, they get lost in the other terms often, and so a consumer can't necessarily see where there may be a term and then a variation that takes them away from that. So certainly, I think a standard contract is probably the preferable approach.

The difficulty that I see with that is that if you say, "Well, you can choose the standard contract or you can choose this other contract over here," whether or not people understand what the differences are, and are sophisticated enough buyers to make that choice, and as long as people do feel they can opt for the standard and it's not going to disadvantage them.

I think - I mean, energy, I think, is an extraordinarily complicated area, because people don't really understand, and I guess it's becoming more complex with things like green power and various other add-ons that we see, and I think a standard contract is probably the preference to keep at least a solid core that people can understand, "Well, I can go for that," you know, and hopefully those who opt for other contracts will do so on advice or seek to understand the terms of those other contracts.

MR POTTS: I guess that gets to my question of whether you're really dealing with the core problem with that sort of approach, because the core problem, it seems to me, for the disadvantaged group is that they can't understand the product. If you can't understand the product, then one way of dealing with it is to, in certain industries, require that a product be made available that people can understand, so they have a choice. They can take a no-frills product, for instance. But if they want something more complex then they can take something more complex, and carry the risks in doing that. But at least they have a choice of taking a straightforward no-frills product, and it avoids a lot of the problems that you're trying to deal with in the second-best way, it seems to me. Do you react to that?

MS BANKS: Yes. I mean, I think you're right that people don't - and I wouldn't say this is limited to our key consumer group, which is sort of vulnerable and disadvantaged for other reasons, that people don't understand the product. Certainly, in my conversations with people who are, you know, professionals they don't understand the product either. They don't really understand what they're buying. They certainly don't understand the way that energy and industry is divided up amongst transmission and retail and distribution, and they don't understand necessarily how - and particularly around green power, how green power is calculated, what that all means. They make a presumption, they act to a great extent on a sense of, "Oh, well, you know, the provider is saying X, then that must be what it is."

So you know, there's a trust in the market that they're being told what they need to know, and so I think it's not just vulnerable consumers who don't understand the complexity of what they're buying. Another example, I guess, is the whole area of mobile phone contracts, and those are extraordinarily complex things. And, again, I'd be surprised if very many consumers, no matter how sophisticated, really understand, you know, what the whole package looks like, and how it's priced.

MR POTTS: So do you deal with some of these problems if you do require them to make available a no-frills product? Take mobile phones, for instance.

MS BANKS: Yes.

MR POTTS: You know, you just go to the newsagent and top it up as you require to use it. Very straightforward. With electricity metre charging, for instance, could be very straightforward. So there's something available for people who don't want to have to deal with this complexity, understandably, and they mightn't be disadvantaged groups as we would traditionally view them. They could be the sort of people you've mentioned. It could be me, for instance. If find - - -

MS BANKS: Yes, people who haven't got the time.

MR POTTS: I find it annoying if you're trying to deal with all this complexity. I'm just wondering whether, in a way, you might deal more effectively with the problem than, you know, trying to come at it in another way.

MS BANKS: But isn't that in some ways just another way of saying a standard form contract, a standard product with - - -

MR POTTS: With a standard contract.

MS BANKS: - - - a standard contract attached to it?

MR POTTS: Well, maybe it is. But what I thought a standard contract was, you still have a complex product, but somehow you have a standard contract attached to

it.

MS BANKS: I would - I may be wrong about this, but I'd - - -

MR POTTS: I don't know. I'm not sure what it is exactly.

MR FITZGERALD: Well, no, I think there are several elements. I mean, certainly a standard form contract could apply to a standard form product, and it may or may not be linked to default pricing arrangements, so it's the variation. But it gets to the same end. It's trying to actually provide a package that is simple, relatively easy to understand, which all providers must compulsorily provide.

MS BANKS: And meets a basic need.

MR FITZGERALD: Yes, meets a basic need. Yes, you can package that. I'm not quite sure, from the discussions we've had with the providers, their views on that, and I think when we asked - we've asked previously, and they said, "Look, this is part of the consideration of the national energy reform. So I'm not understanding quite where that's going to end up. But it is a bit of a conundrum where you have complex products, and the question is, as Gary says, is do you put in the default product, do you put in a default standard contract, and on third parties do you put in a default price. Well, we have probably different views about that. Are there other things, Phil?

MS BANKS: Before we move on, I just - one of the issues we raised recently around energy regulation was, even if you have a standard form or a standard - or a basic product, that the way in which things are marketed may not identify that as obviously to the consumer, and one of the areas we've certainly seen this is around green energy, and the fact that there may be a compliant product, a sustainable energy compliant product available from a provider, and one that's not compliant in the government regulation terms, but are a more attractive product from the provider's point of view, and they'll direct people to that rather than talking about the compliant product, because it's better for the provider.

And, certainly, if you're going to go down the track of saying a standard form contract and/or a, you know, basic service it has to be - I guess there would have to be something in there that says - and it's got to be drawn to the attention of the consumer.

MR FITZGERALD: Sure.

MS BANKS: I know it's an obvious point. But, you know, our experience is it doesn't always happen that way before you - - -

MR WEICKHARDT: You made a comment about the unfair contracts legislation in Victoria, and you said that you thought it was a good thing, and it was giving benefit to consumers. What's your measure of it giving benefit to consumers? We've

heard of various actions taken by CAV Victoria to modify contracts, but the evidence of benefit to the consumer seems to be largely anecdotal. Do you have any actual measures of benefit?

MS BANKS: As I said, I mean, our experience is really from observing it from afar. But from discussing with organisations like Communications Law Centre, their experience with the impact it's had in telecommunications, they talk about, I guess, contracts becoming compliant not just in Victoria but nationally. So it's an interesting flow-on effect that, you know, because it's a national market that we've had the benefit of that as well, and that, you know, their views as consumer representative organisations seem to be that it has helped in terms of providing some pretty poor protection for the consumers. As I say, we don't operate in that jurisdiction to any great extent, so it's difficult to comment other than on the basis of talking to others who do operate to say, "Well, you know, what's working, what's not working?"

MR FITZGERALD: The predatory lending; yesterday we had a presentation by the National Financial Services Federation, which membership is lenders of loans less than $15,000, and they describe that as microlending, can you just explain to me what you mean by predatory lending? And is it in fact definable or is it just simply a sense or a view?

MS BANKS: No, we define loans or cases that fall within the project through a number of criteria. And the key criteria - and I'm working from my head at the minute - are that they are asset based. It's asset lending rather than any assessment of capacity to repay from income. They tend to be short-term loans, 12 months, that sort of period. They have extremely high start-up fees, 30 per cent sometimes, that kind of establishment fee. They often have the characteristic where an attempt has been made successfully or otherwise to avoid the consumer code and they tend to be related to home - originally a home loan where the person has got into a situation where they're unable for some reason to repay it. And rather than going back to their prime lender, which you'd hope people would feel capable of doing, they, through whatever reason, end up out of the prime market in subprimal, in the end predatory or fringe market.

MR WEICKHARDT: Do you equate subprime and predatory as one and the same?

MS BANKS: No. No. Certainly predatory we would say is a subset of subprime. It's not all of the subprime market by any stretch of the - - -

MR FITZGERALD: And it's not micro because that's - - -

MS BANKS: No. No. It's not micro. It's not micro. And some, you know, it's generally used - the ones we're looking at are all to do with home loans where, as I say, for either reasons of say the income earner in the household has lost their job or there's a major illness in a family where all of a sudden they've got medical and other

expenses and they can't continue to generate income in the way they could before. One of the simple things that we think the banks and the prime lenders should probably be doing is making it much more obvious to borrowers that they can come back and seek some sort of renegotiation of the terms to give them some space. And while the banks will do that, they're not necessarily putting that out to the market, to consumers.

And so our experience is it tends to be people who don't necessarily see themselves as having any market power, any consumer power. So they don't feel comfortable or confident to go back and renegotiate a loan with their prime lender. And they may not end up in the predatory market immediately. They may go to a subprime initially, and then get into trouble with that and end up. You know, 3 o'clock in the morning you're watching the telly, you see an ad for one of these mortgage brokers that say low doc or no doc loans and you know then they're caught in a cycle that seems to have a very high incidence of people then defaulting and losing their home.

MR FITZGERALD: Can you explain to me why are they not caught by anything? Why do they fall outside of the jurisdiction of ASIC and outside, as you've indicated they try or attempt to be outside, Consumer Credit Code? Given that these are substantial loans, as you say, asset-based, I don't understand how they're able to avoid just the - - -

MR WEICKHARDT: - - - business purpose.

MR FITZGERALD: - - - business purpose declaration?

MS BANKS: They use a business purpose declaration. And if they did it as a standard form rather than using a statutory declaration, it would be much easier to challenge that but the use of a stat dec - - -

MR FITZGERALD: So it's really that exemption under the Consumer Credit Code which we have heard about that gets them outside the system?

MS BANKS: Yeah. Yeah.

MR WEICKHARDT: You were suggesting that an intermediary, a lawyer, is involved in this process. Are you suggesting that the lawyers or the accountants in these situations are sort of illegally or mischievously misrepresenting the information? Or is the client at this stage so desperate that having had all the facts explained, they're willing to simply say, "Well, yes, I know I'm forgoing all my rights. I agree to all this but I'm now so desperate I'll sign anything"?

MS BANKS: I think there's probably a mix of conduct going on. Some of it is probably people, the brokers say you have to sign this business purpose declaration if you want this line. And the person is so desperate that they hold back information that might otherwise be relevant to signing the business purpose declaration. Or

there's a bit of deliberate, "Don't tell me that." You know, "If you tell me that then I can't witness you doing this," swearing the stat dec. So it appears to be both from our experience with the cases we've seen. Certainly there's a potential that there are lawyers are aware, at least broadly aware of the purpose of the line, who are witnessing stat decs that are false and they should know they're false. Whether they do or not is, I guess, is a harder thing to prove but on the face of it they should know.

MR FITZGERALD: Yes, well the technique is not to ask the question to which you know the answer is not the - - -

MS BANKS: Yes. Precisely. To which you know the answer is not the - - -

MR POTTS: Is everyone operating in this market using this particular mechanism? Some are and some aren't?

MS BANKS: There are a group, a cluster of organisations, brokers who are operating this way. As I say though, there's a lot - the subprime market's quite a large market but the predatory aspects of it are - it's a small but seemingly potentially growing market. We've been trying to get some details from the Supreme Court about the level of possessions actions and to analyse it in terms of - there was a very big increase last year, a 50 per cent growth in possessions matters in the Supreme Court. And we're interested to see whether those are attributable to any particular part of the market. And unless we get those stats, it's a bit hard to know how much of the market, you know, is doing it. But certainly there are, I guess from our experience, about half a dozen brokers who seem to be using the same sorts of techniques.

MR POTTS: If I as a potential borrower go to one broker who's operating this system and I go to another broker who's not operating this system, will I be paying the same price for the finance that I obtain from the two sources? Even though in one case I've got less consumer protection.

MS BANKS: You probably won't be but you'd be less likely. My sense is you'd be less likely to get it from a subprime who wasn't predatory because you're at that stage where the line is a non-viable line.

MR POTTS: So in a way the borrower is getting something more cheaply or getting something which they wouldn't otherwise get?

MS BANKS: Certainly they're probably getting something they wouldn't otherwise get. They're not getting it cheap, more cheaply. It's that they wouldn't get it. There are certainly some of the cases that involve people having a predatory loan refinance. So adding to their costs through the establishment fees again. And so there are cases where a really significant chunk of what is owed at the end is in fact the brokers' fees.

MR POTTS: But isn't that a conundrum for you? Because if you tighten up the

system as you're suggesting, there will be some people who no longer will be able to get access to finance even though if they could have got access to the finance they'll be able to repay it and they won't get into any problems. So you'll actually be denying some consumers access to finance which currently they can get.

MS BANKS: I think that's right but it's on the basis that there's a very strong argument, I think, that they'd be better to have got out of the market earlier with some equity intact than to have lost any equity at all that they had in the property. And people tend to not want to lose their home and so they get more and more desperate and so you end up with people who have nothing left so they can't even move into something that they can afford because they haven't got any asset left to use.

MR WEICKHARDT: That's a bit of a conundrum from my point of view because if these fringe lenders are regularly having these loans end up in defaults, and are having to repossess the house and sell the house under, you know, a sort of mortgagee sale, that suggests that the asset they've got the security over is sufficient to secure the loan. If that's the case, why wouldn't a prime lender be happy to lend in those circumstances?

MS BANKS: I think we think they probably would but people don't go to them. People, when they're in trouble, tend not to, as I said, feel they have any bargaining power to go back to their prime lender to ask for a change of terms. I think that's that thing where we expect consumers to act in their best interest but they don't necessarily do so and they don't necessarily go back to their prime lender to say, "I'm in trouble. Can you give me more time? Or can we renegotiate the terms?"

MR WEICKHARDT: It's a bit bizarre because if there is a very high default rate these subprime lenders would be going out backwards unless they were actually recovering their assets through - - -

MS BANKS: And they are. They are recovering the asset. There's no - yeah.

MR WEICKHARDT: In that case the main banks are really closing out loans that they might actually otherwise be able to recover.

MS BANKS: And our understanding is that the banks are concerned about this issue. That they're losing market share to these people or to these organisations. And there's a bit of a question for them about whether they try and compete with that or, you know, as I said one of the obvious things would be for the banks to be much more open with their customers about, look, if you're in trouble, come back to us. We'd rather renegotiate than you re-mortgage with somebody else.

MR FITZGERALD: Just a way forward on this, there's several approaches, one of which is to actually say that the consumer credit codes exemptions, and there's a number of exemptions, need to in fact be changed.

MS BANKS: Yes.

MR FITZGERALD: On that, if you were to remove the business exemption, the business requirement, would that solve a significant number of these problems and the second part of that, is it likely to impose significant burdens on business if you did that? I mean, I don't know the answer to that but one is - so that's one aspect. The second aspect, somebody from yesterday has put to us that there needs to be an anti-avoidance provision in the contract, the same as in the tax. Now superficially there's an attractiveness in that, except for one factor which you've raised today and that is that the people that you would require to in fact be witnesses have in fact themselves breached the law.

MS BANKS: Seem in fact to be (indistinct)

MR FITZGERALD: So the question is whether you would be able to find sufficient proof, but I just - getting forward, what is the way forward then, if taking in Philip and Gary's right point, we're not in the business of wanting to close down financial options to people generally, although there may be cases where it isn't in their best interest to continue this course but clearly the current situation seems to be unsatisfactory so what is the way forward?

MR WEICKHARDT: If you could just answer that by - we also heard of people going through, you know, sort of getting around the consumer credit code using promissory notes and bills of exchange so if you close off business purpose tests, the people just you know, sort of use one of these other techniques.

MS BANKS: In terms of whether or not excluding the option of business-purpose declarations, I don't have, and we haven't yet reached a solid view on that but we've looked at what other countries have done around predatory lending and the approach seems to be often a mix of different things including basically having regulations that say if a loan has the following characteristics, and you know, it will be the kinds of things we've identified, above a percentage start-up fees, asset-based lending, home loan lending and a couple of others, and the loan goes into default, that the lender won't necessarily be able to recover all of their - you know, what they've lent, on the basis that you've identified it as a predatory loan.

Certainly in the States that's the way they've regulated some of it. They've basically said you can't do X, Y and Z in the lending market; you can't, and you can't have high-penalty interest rates for default - those sorts of things. The other approach that we're looking at at the moment is the approach taken in the UK, which is a licensing approach that says you've got to be a fit and proper person to be involved in the market and there are certain things that will preclude you from meeting that test.

I have hesitance around that approach because my sense in Australia is that licensing bodies, including professional licensing bodies like the one I'm regulated by as a lawyer, are very reluctant to take away a person's right to do business and I

understand that. I think that's an important thing to get right. You don't want to be saying well, you can't participate in your professional capacity or in the area that you have skills in. So I guess I'm more interested in what places like Japan and the US are doing, where they say, within consumer protection law or in finance laws, there are certain ways in which you can't structure loans. There are certain things you can't do.

MR FITZGERALD: A broader question for us is consideration as to whether or not between the Commonwealth and the states what we should do in terms of financial lending generally, and there is a view that the time has come from some participants to put all lending back up at Commonwealth level and with ASIC, and at least there you have one regulator. There may be different laws, different conditions, but you start from that base and then a common ombudsman and those sorts of things. Do you have any particular view? The contrary view to that is you continue the separation but improve each element of it including the consumer credit code.

MS BANKS: Certainly, I guess where we're tending towards in that project area of saying that it would be better to have a single approach that regulates everybody who participates in that market, so - and a single regulator.

MR FITZGERALD: I think we're almost out of time but Gary, questions? Philip, any? Well, thanks very much for that, Robin, and we do look forward to the submission. That will be very insightful. Good, thanks. We'll break for just 15 minutes and resume at 11 o'clock.

MR FITZGERALD: Good. If you could give your full name and the organisation and the position within that organisation, for the record, and then open up with whatever comments or thoughts you might wish to do so, and then we'll have a discussion about those.

DR PRAGNELL: Dr Bradley John Pragnell, Director of Policy and Best Practice, the Association of Superannuation Funds of Australia Ltd.

MR HODGE: Robert Hodge, Principal Policy Adviser, the Association of Superannuation Funds of Australia Ltd.

MR FITZGERALD: Good, over to you.

DR PRAGNELL: Thank you. Just briefly about the Association of Superannuation Funds. ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members, which include corporate, public sector, industry and retail superannuation funds account for more than 5.7 million member accounts and over 80 per cent of superannuation savings. ASFA, over recent years, has taken a very keen interest in our consumer protection regime for superannuation.

Superannuation assets from any individuals constitute the second-largest asset after the family home. Importantly, in terms of ASFA's thinking about consumer protection of superannuation, there are a number of special features of superannuation that need to be taken into account. First is the compulsory nature of superannuation. The superannuation guarantee requires employers to pay 9 per cent for most employees to a superannuation fund. The compulsory nature of superannuation and its role as a second pillar in a retirement income system is critical in terms of thinking about how consumers need to be protected.

The lack of financial sophistication of many of these members also need to be taken into account. For many superannuation fund members their superannuation fund membership is the only sophisticated financial product that they actually hold and probably ever will hold during their working lives. On the flip side there are other special features of superannuation that need to be taken into account. First and foremost is the requirement placed on trustees to act in the best interests of members and the membership as a whole. This is derived from statutory obligations in the Superannuation Industry Supervision Act as well as through trust law.

The trust law and statutory obligations on superannuation fund trustees do place a higher obligation on trustees to act in members' best interests. It goes well beyond merely contractual arrangement; it actually goes to the heart of trust law obligations and those trustees acting in members' best interests. In terms of specific issues in respect of consumer policy, ASFA does wish to make a few brief comments. First of all, we believe that the consumer protection policy development

needs to be grounded in how consumers actually make decisions. This can be achieved through many means, such as the use of consumer testing.

ASFA has over recent years conducted its own consumer testing of model disclosure statements and from that we actually found some very interesting results in terms of how consumers make decisions about superannuation. We believe that grounding consumer policy in the real world of how consumers make decisions rather than abstract notions based on economics or law will result in a better consumer protection framework.

It is also important that the consumer protection outcomes are both efficient for industry and effective for consumers. Case in point; ASFA has been quite concerned about the growing length and complexity of product disclosure statements. These are the main documents given to new members of superannuation funds and unfortunately, they have become increasingly lengthy and complex, and probably do little to assist members in terms of making decisions about whether or not to join a fund or not.

We are firmly of the view that there needs to be shorter and more consumer-friendly product disclosure statements. These documents need to be based on the principle of being a consumer guide rather than being a prospectus that protects the legal position of the product issuer. Those are just a few brief comments that we'd like to make and are happy to answer any questions from the commission members.

MR FITZGERALD: Thanks very much, Brad. We've had the opportunity obviously of meeting previously and reflecting on some of the thoughts that you've put. I've got some questions but, Gary, do you want to - - -

MR POTTS: Sure. You mentioned PDS, product disclosure statements, and the desirability of making it more straightforward and simpler for consumers and superannuation fund members. Are there any suggestions outside of that that you'd make in relation to improving the framework as it currently operates in terms of looking after consumer interests?

DR PRAGNELL: I guess that would probably be our main - both the product disclosure statements and I think more generally the disclosure documentation that is provided to superannuation fund members needs to be very much focused on how do consumers actually make decisions. I think we've ended up with regulatory overload where we've got longer, more complex documents, not just PDS's but periodic statements which are member statements provided to members and so forth that it just becomes so complex, so difficult for ordinary consumers to work through that it's actually, we believe, inhibiting good consumer decision-making.

I guess the other thing that we've discussed is about coming up with a more appropriate definition of financial product advice as well, and it's something that we previously raised. We feel that the current definition of financial product advice in

the Corporations Act is very broadly cast. It ends up inhibiting the ability of superannuation funds and as well in some instances employers in terms of providing some basic information to their members or their employees on superannuation, and that as well we believe inhibits consumers getting the right kind of information that they need to actually make decisions.

When everything is classified as advice and everything requires that person to be licensed with ASIC and to provide a statement of advice and a financial services guide and so forth we actually think you're choking off certain areas where consumers can get some very useful information.

MR POTTS: On the question of the product disclosure statement, you can make the assumption that all consumers are the same, but I guess a more realistic approach is to say, well, not all consumers are the same, some consumers want more information than others. So in your approach of making the PDS more straightforward and simple, how do you deal with that issue that not all consumers want the same amount of information? Are you suggesting that it should just be pared back to what is the minimum required for consumers or - - -

DR PRAGNELL: I think you need at least some sort of basic guide up-front, something which is short, simple, easy to understand, preferably, you know, under 50 pages. I think in terms of our previous consumer testing we found a document around 12 pages would be something that sufficed. I think then what you would then require would be an ability for people to request and for the product disclosure to give them further information or to make that information available on the web site. I really do think you need to have some kind of basic document that probably you give everyone and then you build in, I guess, legal rights to request further information or to have that information made available for people who may have greater needs or demands.

MR POTTS: So are you saying - when you talk about a 50-page statement at present you think that that's the minimum that a fund would need to do in order to meet the regulatory obligations or do you think that it's a matter of choice on the part of funds that they produce statements of that length?

MR HODGE: I don't think they're issuing 50-page documents out of choice, but what is happening is that because you're in a regime where you have requirements which set out exactly what must be disclosed, that superannuation fund trustees are very fearful about not meeting their disclosure obligations, and as a result of that what you end up with is probably over disclosure and overly legalistic disclosure, so that if push came to shove, right, they could point to the words and say, "We did disclose. We did disclosure accurately."

DR PRAGNELL: No-one has ever received an enforceable undertaking from ASIC on the basis of providing too much disclosure, so on that basis in terms of where ASIC is coming from, or legal opinion is currently at in the industry, it's about more is safer; more may not be better, but more is safer. So give them big fat

documents that has everything in it and you've protected yourself and you won't get prosecuted.

MR HODGE: Simple, concise, effective is what ASIC would prefer. One of the problems with lengthy documents becomes a matter of how you structure a document and where you place the information. Do you put a summary of all the information up the front where someone could briefly read the first four or five pages and find out the basic information about what investment options are available, what the fees and charges are, what insurance options are available, who the underlying investment managers are?

Do you incorporate all that up the front or do you structure your document where you say this is the information on investments, this is the information on fees and charges, and the brief stuff which people need to - the basic stuff people need to see to understand is actually not gathered in the one place, it's spread throughout the document, and this is a real issue for consumers trying to understand things is that they will not wade through a lengthy document.

What typically happens is that if you go to a financial adviser, a financial adviser will sit there and probably explain the basic features of a product and then will say here is disclosure documentation which contains everything, and we suspect that for the majority of people they actually never open the document. They rely purely on the basic disclosure which was given by the financial adviser.

MR POTTS: But there's nothing to stop a super fund taking out those key features and presenting them up-front - - -

DR PRAGNELL: Yes, I mean I think some funds - and I think if you actually look at a number of funds I think that funds have tried to work within the regime. I think the regime does allow you scope in terms of the clear, concise and effective requirements of the Corporations Act to come up with a shorter, simpler document. I think there is some scope to do that, but I think that the problem has been that a principle base regulation in this area actually requires a - it has to have an opportunity to breathe, I think. I can't remember who coined that term.

It requires both the industry in terms of its - industry decision-makers and the legal profession who are providing advice and the regulator to both kind of back off a bit and to let industry develop what it thinks is an appropriate way of disclosing. So there's not necessarily one true way. There may be a multiplicity of pathways of actually meeting your statutory obligations. It's easy to say that but once the regulator starts to undertake certain types of enforcement action then you end up with this downward spiral, I think, in a principle based regime where ASIC does something.

They say that we think that you should have had more information about acts and product disclosure statements, and next week everyone ends up adding on an extra two or three pages in a product disclosure statement, and then the lawyers come

back and say, well, ASIC pinged everyone on this so you should probably have more on this, this and this, and then, you know, they get fatter and fatter, then ASIC does something else, and then we end up in this downward spiral. I think ASIC realises now and they've - I mean obviously you should discuss it with them rather than me putting words in their mouth, but a principle based approach has to be allowed to breathe. It has to be given an opportunity for - you know, I think both sides to kind of step back a bit, let it develop, and then, yes, you can end up with better disclosure, I think.

MR WEICKHARDT: But what stops them today, a superannuation provider, putting your 12-page thing at the front of their product disclosure statement with all the detail behind it? I would have thought as a pure marketing advantage most of the consumers would say that's fantastic.

DR PRAGNELL: I think some funds are doing that, so I think if you look at some of the better PDS's that is happening; funds are doing that. They are providing shorter guides up-front. They are providing good summaries. There's some excellent documents out there at the moment, I think, and we're very encouraging of that. We have an annual sort of communication awards where we acknowledge where funds have really made good efforts in trying to work within the regime. So, yes, there are good examples and that is happening, but I think generally the problem is that, yes, you can end up - you can provide the summary but you're still producing - you can have the summary up-front but you still are producing, you know, the 50, 80, 120-page document anyway, and you still have to provide the consumer with that.

MR WEICKHARDT: Well, the question I guess is, can you then move with ASIC's compliance and agreement to having that as a sort of a supplementary appendix which is available on request rather than having to automatically owe people.

DR PRAGNELL: Well, I think a lot of this is under way anyway. I mean, we've got the current set of corporations amendment regulations, draft regulations that were released a couple of weeks ago, where treasury are exploring an incorporation by reference provision in the Corporations Act which would allow you to refer to other documents within your PDS, which might reduce the scale. I think as well, too, in some recent, you know, communications we've had with ASIC, I think they agree. I think they agree that the regime is - you know, the documents have gotten too long, they've gotten too complex, and I think they do want to work with industry.

What actually happens at the end of all these processes, I think we have to wait and see. I think there's a lot of goodwill, both on the industry and the ASIC side to try to fix this. But, you know, maybe we do need to look a little bit at the law. Maybe we all need to take a step back and let the regime breath a little bit. Maybe there is scope for ASIC and/or industry providing additional guidance in terms of shorter and easier documents. Again, I think that going back to one of my earlier points, there is a role there for consumer testing as well, I think.

I think sometimes when you get, you know, sort of a small group of interested stakeholders or a small group of people from the legal profession gathered together into a room saying, "Well, let's crack this disclosure thing," you're not going to end up with the best outcome. You do need to reach out to real consumers, and that involves consumer testing, that actually - and that can be a laborious and frustrating process. But we actually think that that has the opportunity or the potential to provide better outcomes for consumers, because you're basing it in how they make decisions rather than how we think they make decisions, which sometimes can be a little bit different.

MR FITZGERALD: Sure, and we're aware of your testing process which was, as you say, extensive.

DR PRAGNELL: Yes.

MR FITZGERALD: And I think there were three iterations of your model disclosure document before you got to the one that had a high acceptance rate.

DR PRAGNELL: Yes.

MR FITZGERALD: But, again, the question here is to what extent it is the law, because the legislation talks about clear, concise, whatever, in it. Is the problem genuinely more with the regulator in a sense that nothing would preclude the regular, other than courage, of producing a model disclosure document? The problem would be that the regulator would then be somewhat committed to that.

DR PRAGNELL: Yes.

MR FITZGERALD: And there is a reluctance on regulators to commit. But is that, in part, not the problem that the regulator has failed to be responsive, sufficiently responsive in providing guidance or is it actually the regulation itself that's at stake, or is it not the role of the regulator to do that?

DR PRAGNELL: I think the regulator can play an important role in this process. But I think it has to be very careful about it proceeds. I think that the regulator could be involved in providing additional guidance and assisting industry in terms of coming up with simpler, more consumer-friendly documents, and working very closely with industry to develop that. I think ASIC can have a role in that, and I think they have indicated, at least informally, to us that they are interested in exploring these areas. So I think there may have been - and again I think you need to discuss that with ASIC - I think there may have been some reluctance in certain areas for ASIC to provide guidance.

I think they have provided guidance in certain areas where it's been very effective and useful, and I think that hopefully in the coming months that they'll find the commitment to push ahead on these kinds of projects. I think it's all very much

in a - you know, we're sort of in a very pre-pre-planning stage at the moment, but I think if you talk to ASIC I think they would say they're interested in working with industry in terms of trying to come up with some kind of solution to this issue.

MR FITZGERALD: When you say industry, in telecommunications industry and the utilities industry, there's been a formalisation of consumer representation into that decision-making process.

DR PRAGNELL: Yes.

MR FITZGERALD: Does that exist in the superannuation industry?

DR PRAGNELL: Well, ASIC has its own - again, you'd have to discuss it with ASIC. I believe they have their own consumer advisory panel as well, so they do have their own. I think we would be very supportive of, you know, having all the stakeholders in on this type of decision making. Again, you're going to get more buy-in, you're going to get better outcomes as well. So I think it's at two levels. One, it's about involving, I agree, the formal representatives of the consumer - of consumer representative bodies, but also, I think, secondly, it's about getting engaged in that consumer testing process as well too, because I think that actually means that you can get down to the grass roots, it can provide you with the kind of information and data so that we can all make better decisions. Otherwise, it's a big - we can be - I don't say grasping at straws, but sometimes we might be making decisions on less than adequate data.

MR WEICKHARDT: Can you point us towards or give an example of a PDS that comes closest to meeting your sort of 12-page up-front version that meets consumer testability requirements?

DR PRAGNELL: Could I take that on notice, and provide you something later on? That's easy, yes.

MR WEICKHARDT: Sure. No, that would be useful.

DR PRAGNELL: Yes, we can definitely provide you some examples.

MR HODGE: I think one of the challenges that ASIC actually faced is that this produce disclosure for superannuation used to be the province of APRA, and superannuation funds used to issue a key feature statement which was a fairly basic document which in plain English explained features as set out. And that disclosure regime was moved over to ASIC, and ASIC with their culture of actually doing the more complex financial products, right, just lumped that in and treated it the same. I think it has taken ASIC a while to actually sort of formulate some internal processes where they can start to actually maybe look at these things different and say, "Well, superannuation products are different, because people are automatically enrolled in it, it's not a voluntary choice to get in there and, therefore, the disclosure."

So I think that's one thing we need to sort of take on board when we think about the role that ASIC currently plays, that it was a completely new type of financial product they were looking after insofar as how people obtained the interest in the product.

MR FITZGERALD: Brad, you articulated that when you said that it needed to be, just paraphrasing, less like a prospectus, more like a consumer guide.

DR PRAGNELL: Correct, yes.

MR FITZGERALD: And what you've just said, Robert, would indicate that's the case, that - am I right in saying that you believed ASIC took it as almost a prospectus based approach rather than a consumer guide, and that we're seeing the shift back to that?

MR HODGE: Yes.

DR PRAGNELL: I think that's right, and I think maybe there was a - I think it was actually unclear when Corporations Act was actually conceived, the current SFR changes within the Corporations Act. It was never clearly articulated what the PDS was supposed to be. It was both consumer guide and prospectus. But I'm not sure whether it can be both, and I don't think that at the time the drafters - I think they had a series of - they had sort of content requirements, they also had prospectus-like tests about, you know, "Include all the information that a consumer might need to make the decision," plus they had clear, concise and effective. So they kind of pushed together specific content requirements, prospectus-like tests, and then this sort of consumer guide test about clear concise and effective, all within a single document.

And I think that's where a lot of the problems may have come about that we were never - none of us were probably ever clear exactly what the thing was supposed to be, and I think there was a bit of, you know, cross-fingers and knock on wood, that it would like of evolve into this nice short consumer-friendly document, where it actually, I think, has veered off in the other direction, primarily because of, again, probably how ASIC interpreted and enforced, and how the industry, and particularly legal advice, has responded.

MR POTTS: I guess a complication, to be fair to them, is that in this case consumers are also investors.

DR PRAGNELL: Correct. That's right. Yes, and that's - - -

MR POTTS: They have a dual function, if you like.

DR PRAGNELL: Yes, that's exactly right. I mean, I agree. I mean, I think that you have to - it's difficult in the superannuation regime because they can be investors**.** They can quite often, you know, show up at the front door of a planner with a big pot of money, about to make a very important decision and you want them

to get as much information as possible. But, you know, on the other hand, yeah, sometimes you end up with say, you know, you've got that person at one end where at the other end I guess you've got, you know, the 16-year old who's starting work. They're confronted with - they're given choice of fund by their employer, for instance.

You know, that person's ability to make a decision, you know, and to wade through complex material, is probably very very difficult. But still, given their obligation, their employer says you've got choice of fund now, decide where you want me to pay your super. And they scratch their head and they say, "I don't know." You know, they end up going into the default half, you know, probably the majority of the time.

So you've got everything from very very financially unsophisticated individuals, and it's still and important decision for them. I mean, it's going to be their first fund. You know, the magic of compound interest means that eventually that could end up being a significant pot of money at the end of the day, and so forth. So it's still important that we meet the needs of the 16-year old. But at the other end you've got say a person nearing retirement with a substantial lump sum who probably has a different level of financial sophistication, maybe so, maybe not. But also, you know, have different set of information requirements I would think. So maybe there is a challenge a bit with the one size fits all approach in super.

MR WEICKHARDT: Well it does point you in the direction of having a sort of tiered or a layered approach, I think.

DR PRAGNELL: I think a tiered approach. You know, I'm just - intuitively does make a bit of sense I think given the various levels at which people make decisions about superannuation. I mean they make decisions at a few key points. They make decisions when starting employment. They make decisions when changing employment. They may make a decision during an important life event such as divorce or retirement. So there are sort of key trigger points for people to make decisions and sometimes they're very different types of decisions. And you know, I think we recognise that and I think maybe that needs to be part of this response, this kind of more real world response of how we look at consumer decision making in superannuation.

MR WEICKHARDT: We had Choice here yesterday and they had as one of their sort of significant issues, their estimate that the barriers to consolidating superannuation accounts are costing consumers between one and two billion each year. Is that something that's on your radar screen as a concern?

DR PRAGNELL: The issue generally is a concern. We have put out our own research that puts forward numbers that are significantly less than that put forward by Choice. I believe it's around 400?

MR HODGE: Yeah, but still a significant number.

DR PRAGNELL: Still a significant number but - - -

MR HODGE: But less than half than what Choice has said because of identified flaws in their methodology of calculating the actual costs.

DR PRAGNELL: I might turn over to Rob because he's very good on this issue. But I think a lot of the budget changes that we're seeing starting 1 July, the likelihood that a significant number of superannuation accounts will have tax file numbers associated with them. You know, very vigorous campaign by the tax office to try to deal with lost members and so forth. Hopefully that will assist in terms of trying to deal with the consolidating. Rob, did you want to?

MR HODGE: Just to start off on the Choice numbers. When Choice did their calculations they included both the cost of administration and the investment costs associated with the funds. Whereas when our principal policy researcher, Ross Clare, looked at those numbers, the investment costs are incurred irrespective of which fund, whether it's in multiple funds or in the one fund. You still have the same investment costs in relation to those same dollars. So the only true cost which could be deemed an unnecessary cost is the actual pure administration cost which is applied like weekly fees.

But there's a range of issues around consolidation and whilst it might be nice in an ideal world to force people to amalgamate accounts or to make it easier for people to amalgamate accounts - and basically it is pretty easy for people to amalgamate accounts now - a lot of the problem occurs from just an inactivity by the members themselves. Members know they've got multiple accounts but they don't consider it worth the effort to actually consolidate them. If a person has four different funds and, you know, they might have one fund might be their main employment fund when they get a permanent job, the other one might be related to sort of years ago when they worked at McDonalds or worked at Coles while they were at school. So you might have small amounts in each of those. And they would look at that amount and say, "Well, it's only a couple of hundred dollars so I won't worry about it."

Now they're still incurring fees because what they can't see is the great advantage of actually moving that money across into another fund, particularly if that fund is incurring member protection which means they're protected from the erosion of the account balance from fees by legislation.

MR WEICKHARDT: So do you have any suggested action for policy makers in this area or do you think it's all happening?

MR HODGE: Well basically it is happening. One thing which the government, you know, it's reducing the permitted time to rollover an account on request from 90 days to 30 days. And ASFA has put out a best practice guide on this. And we've actually said that when you receive a request to rollover money from one account to another, the fund actually has three choices it can make. One, it prohibits the

rollover. Just cannot do it. The second one, it needs more information to do it. Or thirdly, all right, there is no problem and the account can be rolled over.

And what ASFA has said, whichever one of those decisions you make, that decision should be made and acted on within ten days of receiving the request. And we look at the internal processing standards of funds and where a request comes in and it is a complete request, most of those funds are rolling over that money within five working days. So the responses are there. Where there are delays it's generally because of lack of information or an inability to correctly identify the person making the request is actually the owner of the money. In these circumstances they will go out and seek identification documents from the member. And in most instances, people always say this is a problem with industry funds, well it may be an issue with industry funds because with industry funds, the general situation is the member is enrolled by the employer and the fund itself has never received any identification or any communications from the actual member.

Whereas if you're joining a retail fund, you will sign an application form which will have your home address and all your information. You'll be providing that. And you'll provide it accurately because it's your money you're requesting be put in there. And that's why there tends to be a sort of slight difference in the approach of industry funds and retail funds towards rolling over money, because generally the identification of members at enrolment is better in retail funds because provided by the member themselves, as against being provided by the employer when they're enrolled in an industry fund.

DR PRAGNELL: But I think generally overall yeah, there's a lot happening. I think in terms of the portability reforms, anti-money laundering as well, we're looking at probably greater standardisation of identification requirements across the board which will make it easier for consumers. So regardless of whether you go to fund A, B or C, there'll be similar expectation in terms of what kind of identification you need to provide. What kind of forms you need to complete. You know, greater TFN quotation rates as a result of the budget changes. Very active process by the tax office to try to deal with lost members and small amounts. So, you know, there are numerous things in train and I think actually that, you know, all of these combined will help reduce the number of multiple accounts.

And I think Rob as well made the really good point as well too. Quite often, you know, the obligation falls back on the individual so they can't be bothered for whatever reason. I mean I think you want to make it as easy as possible but at the same time you don't want money being sent off to the wrong person and that has, you know, there have been a few unfortunate incidences where, you know, corrupt advisers have, you know, forged documents to try and get moneys paid into their personal accounts. And you don't want that to happen. You want to make sure that you're paying it out to the right person.

MR HODGE: There are an interesting range of situations in the industry. You can have the situation where a person might have five accounts and four of those might

be under $1000. And they look at taking action to move those across from where they are to a new fund and they might be faced with say an $80 administration fee for doing it, and they look, and they say, "I've got $400 sitting in there now. It's $400 every year because I'm protected from administration fees so why would I pay $80 to move it from a place and lose the $80?" So that's a bit of a shortsighted attitude, and also people; there are a lot of people out there who have multiple accounts, and for very good reasons.

You know, people talk about spreading investment risks. Well, you can do that by spreading your investment risk through different superannuation funds. Some people may have an account in a fund where they've got a preserved benefit so they have that as one fund and current contributions go to another fund. So there are these multiple - so I don't think you'd ever get to the situation where everyone in Australia would have one account.

I notice one of the things which Choice have been suggesting is that maybe all of the superannuation contributions should be paid to the ATO and the ATO then distribute those to another fund. That is something which Choice and others have suggested in the past, and once again, that would be just a hugely unwieldy system to actually channel the money around.

MR POTTS: What about personal superannuation funds - which I know they're outside of your ambit in terms of your membership?

MR HODGE: By personal, do you mean self-managed superannuation funds?

MR POTTS: Self-managed.

DR PRAGNELL: Self-managed, yes, we deal with self-managed funds.

MR POTTS: You do, do you? I noticed in the newspaper this morning that the opposition is to planning to strengthen regulation in that area. Do you have any observations to make in relation to consumer protection as far as that area is concerned?

DR PRAGNELL: Well, again, I think that things are moving in that area as well too. Under the budget changes, the fee that self-managed fund trustees pay to the ATO is being boosted considerably, which will give the ATO greater resources to be able to conduct the necessary surveillance and enforcement activities. Consumer protection in that area is a bit interesting because if you are a trustee and you are also a member then you can't really protect yourself from yourself, but whereas there probably is a need for protection is actually in terms of professional advisers.

So in a sense you kind of fall back into the ASIC area in that respect, so in terms of lawyers, accountants, financial planners giving advice to individuals as both trustees and members of superannuation funds, we would agree that there needs to be really sort of strong supervision in that area as well. That's really important. It is,

you know, in some ways you want to protect those people from making decisions but as trustees, you know, they're basically managing their own money. So I don't know if Bob wants to add anything.

MR HODGE: When you talk about the notion of consumer protection in self-managed superannuation funds, superannuation funds are not an investment in their own right. They collect money and they then make subsequent investments of that money, so with a self-managed superannuation fund, the member is the trustee. They place their own money within that fund or their employer contributes money into that fund and then the member, all right, being the trustee, makes investment decisions in accordance with an investment mandate which they have and they may or may not do that through an investment adviser, or they're going out and purchasing another financial product which will have its own - you know, some of which will have their own disclosure rules.

DR PRAGNELL: And it's those kinds of products again, I think, where you want to make sure that you - probably that's where you do really need strong prospectus protection there, I think. You know, I mean, I think there is the example of Westpoint and I don't want to get into specifics of Westpoint. Again, where yes, the investors are self-managed fund trustees but it wasn't that vehicle that was at fault, it was that they were actually investing in a specific product where there probably wasn't the level of disclosures being made so that they can make good decisions and also as well probably that there was some sort of operational issues as well too.

So in those areas you probably do need, where there is probably a greater exposure, where it's basically me as a trustee member looking at, you know, do I put my money into a specific investment vehicle. You want to make sure - I mean, on the one hand you've empowered these people to manage their money as trustees but at the same time they're potentially vulnerable to you know, making poor decisions. I mean, at the end of the day they only impact themselves, I guess, but you know, they're still going to be very upset if they feel ASIC hasn't done a good job of enforcing the requirements.

MR HODGE: Yes, I mean, a self-managed superannuation fund investing money in say Westpoint, is no different to an individual investor investing money. It's just another investor investing in an advertised consumer product. It's not a self-managed superannuation fund issue per se.

DR PRAGNELL: Yes, it's a managed investment vehicle.

MR FITZGERALD: However, I agree with all that absolutely, but one has a sense, if there were substantial losses incurred by those involved in self-management arrangements, then the political momentum works in exactly the same way as it always does, where you can talk about this in relation to a previous thing, that you've almost got a sense that notwithstanding the person made their own decisions and they're affected; if that problem started to emerge as a significant problem, you have this sixth sense that somebody would be calling for greater regulation or greater

oversight and what have you.

The question is, as I understand it - I'll ask the question, do we have any knowledge, robust knowledge, as to how the self-managed fund sector is actually performing? I mean, the ATO would be the best and you may not have the information, but it strikes me at the moment, we don't know.

DR PRAGNELL: No.

MR FITZGERALD: We're assuming, because the equity markets are doing well and all that that everybody is happy, but that's not what causes regulation; it's when things go down.

DR PRAGNELL: I think that's part of what - I mean, the ATO does collect data and does obviously undertake its own surveillance activities and they would be the best source for information about how self-managed fund trustees make decisions. I think partially the higher fee as well, that self-managed fund trustees will give the ATO probably additional resources so they can probably be a bit more active, both in terms of data collection but also in terms of surveillance and enforcement activities.

It is such a huge and sort of disparate population out there; I mean, over 300,000 funds now. You know, lots of money, and probably an amazing continuum of trustees from the very, very sophisticated to probably the somewhat less sophisticated. So you've got a real spectrum there, I think, of individuals who, you know, some are probably better at managing their money and maybe a few others who maybe aren't as good.

MR HODGE: Self-managed superannuation funds are regulated by the ATO, right, so that the ATO has responsibilities of looking at what they're doing. They're also governed by the SIS Act. The SIS Act specifies a range of things which they must be doing. One of those is, they must have an investment strategy, a written investment strategy and they must invest in accordance with that investment strategy. Now, the primary point of regulation of SMSS is that - as with all funds, they are required to have an audit each year, and the audit isn't a purely financial audit; it's also a compliance audit, in other words to check that they are complying with the requirements of the act.

Where there are breaches, there is a requirement on the auditor to notify those breaches to the Australian Taxation Office. Now, under the simpler super reforms, there have been some changes which have been mooted and I note there is draft legislation there at the moment, and one of those actually gives the ATO the power to specify different audit requirements for different funds and for different years, and one of the things the HO has indicated - this is by Raelene Vivien, who is the Deputy Commissioner of Superannuation, in a recent speech, is that what they will be saying to the auditors is that in the first year of operation, those auditors in respect of a self-managed superannuation fund, must report every single breach of a SIS rule by the fund.

Also from 1 July, as part of becoming a trustee of a self-managed superannuation fund, the trustee is required to sign a declaration that they are aware of their responsibilities under the SIS Act and what is required of them. So in that way the regulation is actually moving to address what is probably the prime problem with self-managed superannuation funds, which is a lack of awareness by the trustees and trustee members as to what exactly being a member of an SMSF and being a trustee of a fund actually entails. So regulation is moving in that direction to actually make things stronger.

MR FITZGERALD: Thanks for that. Are there any final questions? Look, thanks very much for that, and we look forward to the submission, and also any illustrations of these preferred disclosure documents would be gratefully accepted.

MR HODGE: That's fine. Thank you very much.

MR FITZGERALD: Frank, if you could give your full name and the organisation that you're from, and then as with previous participants to open for 15 or 20 minutes and then we'll have a discussion.

PROF ZUMBO: Thank you, Robert. Full name is Frank Zumbo, Z-U-M-B-O. I'm associate professor in business law at the University of New South Wales. I thank the commission, the inquiry, to invite me and to have this opportunity to speak to the inquiry. It's a very important inquiry. We haven't had a major review of consumer law in the past. We've had a number of competition law reviews but never a thorough consumer law review so it's a unique opportunity to look at some new directions in consumer law, review some existing sections of the Trade Practices Act, for example, and other provisions dealing with consumer law.

In the 45 minutes allocated obviously I can't do justice to the many issues that I'd like to raise, and I hope to put in subsequent submissions. I've already provided the secretariat copy of two articles that I've written in relation to unfair contract terms. That will be the primary thrust of my appearance today, unfair contract terms and issues related to that. It's very hard to summarise almost 20 years of experience in this area in 45 minutes or even in a submission, but given the value of key issues such as unfair contract terms as a new direction for consumer law I thought it would be useful to focus on that almost entirely and then any other issues I would pursue in a submission.

A couple of things I'd like to emphasise and the approach I'd like to take today is to emphasise certain themes that may need some further exploration, and I'm happy to give some thoughts and take questions on those. In relation to unfair contract terms a couple of things need to be understood from the outset. One is it's not a new idea. It's been operating in the United Kingdom for about 13, 14 years, and it's worked very successfully in the United Kingdom for that period of time. In fact, I can count on one hand the number of cases - in fact, it's less than one hand the number of cases that I'm aware of that have reached the courts in relation to unfair contract terms in the United Kingdom.

There was one very early on, and I referred to it in my articles, involving a bank I recall and there was some issue there that needed clarification. It went to the House of Lords and we got the clarification, and since then the overwhelming experience with unfair contract terms in the United Kingdom is through a cooperative approach between the regulator and businesses, and in many cases businesses themselves have seen the value of fairer contracts, and that's a theme I'd like to explore. So you've two or three cases over a period of 13 years so it's not an area that's been litigated, and there's a number of reasons for that which I'll canvass in my talk today.

In Victoria we've had it running for two, three, four years now; only one case that the regulator has pursued, and I'm aware of one case recently involving a consumer that's taken action. I'm happy to provide the secretariat with all those details. So it's not an area which attracts a lot of litigation. That's the first thing that

needs to be understood. The second thing that needs to be understood obviously is that it can be resolved. All these issues can be generally - in almost all cases be resolved through cooperation, consultation and dialogue with the regulator.

Not all terms in a contract will be subject to this sort of legislation. In fact, many terms probably won't even have a second glance under this legislation. The time where a clause of a contract will be considered is where there is a significant imbalance between the rights and obligation of the parties and even then you don't look at a term in isolation. In fact, the United Kingdom legislation is very clear that you need to look at all the terms of the contract because obviously one term that may seem to be encapsulating a significant imbalance does so because there's a trade-off somewhere else in the contract.

So another thing that needs to be emphasised is you simply don't use unfair contract term legislation to pick and choose the terms that you target. You look at the contract in its entirety. Obviously there are certain terms that may show up a red flag, and you look at those, and you then look to see whether there's a trade-off that justifies that. In some instances, you know, the consumer is well aware that if they terminate early that there will be a fee and that fee may be justifiable given the costs that the actual provider is locked into.

Another thing I'd hope to do today and through subsequent submissions is to clarify some misapprehensions, misunderstandings about how unfair contract term legislation works, but from the outset I'd like to emphasise something that's very fundamental to consumer policy, I believe, and fundamental to unfair contract term legislation. In fact, it's probably better to say promoting fairer contracts rather than looking at the negative and looking at ways that we can promote fairer consumer contracts. Central to promoting fairer contracts but also central to consumers understanding what laws are all about and businesses understanding what laws are all about in this area is that we need clear laws. We need clear laws. We need clear contracts.

Fundamental to this premise is that we need laws and contracts to be written in plain language, and I think all too often that's forgotten, that fundamental premise. Consumers, if they don't understand the law, they don't understand what rights they have under the law. If they don't understand the terms of the contract, they don't understand what rights and obligations they have under the contract. So in terms of clarity, providing that contracts and laws are written in plain English will go a long way to having consumers understand what their rights and obligations are, what protections are available to them, but clear laws and contracts also is helpful to businesses because there is a compliance cost with complex laws. People need to get advice. So drafting laws in plain English would go a long way to minimising compliance costs.

Drafting contracts in plain English would also go a long way to minimising compliance costs that a consumer may have in terms of the need to seek legal advice at some stage. Too often laws are written in dense legalese, contracts are written in

dense legalese and the notion of fine print sort of entered popular culture, where you've got this very fine, very small print and occasionally that's made fun of, even in movies, where the print is so small that you need a magnifying glass. We'd like to think that we've progressed from that but perhaps we haven't progressed far enough to promoting - you get contracts that are written in clear language, that's written in language that can be read, that can be seen without the need of a magnifying glass.

Dense legalese, dense drafting, they all add complexity and cost. Writing laws and contracts in plain language benefits consumers and businesses. It also has the benefit of boosting compliance rates. If people understand what the law is, businesses are more likely to comply, and ultimately I think clear laws and contracts minimise disputes because often disputes arise because there's a misunderstanding as to the operation of a law or the operation of a contract. So if people understand up front, it's more likely to minimise the chance of disputation.

Now, at the end of the day I think there's a further benefit. If you have plain English drafting of laws and contracts, consumers then are empowered through the ability then to become law enforcers themselves. If they understand what the law is, if they understand what the contract is, they can stand up for their rights. So you empower consumers through knowledge and they themselves become law enforcers or contractual enforcers, as the case may be. So empowerment requires consumers to be able to comprehend laws and contracts in a time-efficient manner.

Now, the language to be used in laws and contracts needs to be plain and comprehensible. Redundant and repetitive provisions in laws and contracts should be removed. Redundancy, repetitiveness, repetition; they all add cost and complexity and I picked two particular examples from my experiences. Firstly, do we need three unconscionable conduct provisions in the Trade Practices Act? We have 51AB, we have 51AB and we have 51AC. So we have three provisions dealing with unconscionable conduct. Why not have one provision that simply prohibits in trade or commerce conduct that is in all the circumstances unconscionable.

Sure, you can have your list of factors and you can modify it to the certain situation but we have three provisions and that has led to confusion, misunderstanding as to the nature of unconscionable conduct because the expression unconscionable conduct is used differently in those provisions. It's used in one way in 51AA, and it's used in another way in AB and AC. One would like to think that the view of unconscionable conduct in AB and AC are the same and there's no reason why it wouldn't be, but once again we have three provisions.

Also, we have a variety of provisions dealing with faults and misleading representations or conduct. We've got section 52. We've got section 53 that deals with specific false representations. Now, I know why we have 52 and 53, and it's a historical reason and that is, originally when the Trade Practices Act was enacted, we had a situation where we had specific criminal law provisions which were 53 and beyond, to about 64, and then a catch-all provision, being a civil provision, section 52 was included and I don't need to tell you the history, but over time what

has happened is the criminal side has been replicated in part 5C, so all the criminal provisions dealing with 53 onwards have been replicated in part 5C, and now we have a situation with 52, 53 onwards are basically civil provisions.

Now, if they're civil provisions you don't need five provisions dealing with misleading conduct. You can have section 52 and if you really want to you can provide examples underneath 52, but if you look at 53 and 52, they are certainly in overlap and traditionally when the ACCC took these cases, if they took a criminal case under 53 they would also throw in 52, and I'm not aware of any case where there was a brief found of say 53, or an element of 53, and there wasn't also a breach found in section 52.

So repetition and redundancy can be looked at and there may be other examples. I'm certain there are; I've just picked two examples there and I think two of the biggest examples because misleading and unconscionable conduct are seen as two key weapons in the armoury of consumer law. The other aspect of plain drafting is that it does promote or help promote fairer contracts. I mean, I think the fundamental premise of a fairer contract is a contract that can be understood - that's clear, it's able to be read by a consumer.

Now, there are precedents in the promotion of plain English drafting. For example, regulation 7 of the UK legislation on fair terms in consumer contracts regulations requires a written term of a contract to be expressed in plain, intelligible language. We have section 163 of the Fair Trading Act in Victoria that requires consumer documents to be clear. They must be easily legible, use a minimum of 10-point font, and must be clearly expressed.

Interestingly, we also see it in industry codes; telecommunication contracts need to be written in plain language, under clause 7.1 of industry code ACIF, C620-2005 consumer contracts and the drafting of that code, doing consumer contracts and telecommunications was a direct result of the Victorian unfair contract term legislation and I see earlier one of the question was what are the benefits, how can we show the benefits, and I'm happy to explore that question further in terms of unfair contract terms, but a clear benefit has been a rewriting of telecommunication contracts with an emphasis on plain English and dealing with unfair contracts terms and I commend the commissioners to look at that consumer contract code, Australian communications industry forum code.

Then we just get to the issue of the nature of fairer consumer contracts. Why does this issue arise? Well, it arises because we have standard form contracts. We have the advent of pre-prepared contracts that are offered typically on a take it or leave it basis. Now, I have to hasten to add that it's not the standard form contracts in themselves that's the problem. Standard form contracts do reduce transaction costs. They are an efficient way of doing business. So standard form contracts have got a lot of advantages and we have to accept that. The fact that it is a standard form contract is not necessarily the problem.

The problem is where there are attempts within that standard form contract environment to shift contractual rights and obligations disproportionably onto the consumer. So an analogy is with a gun; it's not the gun that's the problem, it's the way the gun is used. So with a standard form contract, it's like a gun. That's not the problem, it's the way the standard form contract is used. Many standard form contracts I would imagine are written in plain language and do seek to balance out the rights and obligations.

Unfortunately, the reality appears to be that the greater inequality of bargaining power between the business and the consumer, the greater the temptation - I'm using the word carefully, the temptation of the business to use pre-prepared or standard form contracts in a manner that shifts the contractual risks and obligations disproportionably onto the consumer. So if the parties are equally balanced in terms of bargaining power, then the parties are more able to sort of negotiate one on one and what have you and maybe even in a standard form contract there may be some scope in that one on one instance of equal bargaining power to seek renegotiation.

In an environment where you've got the big powerful corporations dealing with thousands of products on a daily basis like mobile phones, hundreds of products per day may be sold and what have you, the reality is the standard form contract is there to stay but the problem is that the bigger the organisation, the more bargaining power, the more inclined, they simply shift the rights and obligations more against the consumer than would ordinarily be the case if there was equal bargaining power.

Now, there's the question of what is the nature of unfairness. Is this an issue that will lead to the inspection of every single term and micro managing of contracts and the answer is no, and the United Kingdom experience provides ample evidence that it's not about micro managing contracts, but it's about looking at those terms that go beyond what is reasonably necessary to protect the legitimate interest of the business.

No-one would dispute the fact that a business has legitimate commercial interests in selling a good or service or in providing their product. Those interests need to be protected, of course. They take the risk of providing the service, and they need to be paid et cetera et cetera. But the problem is there is a line at some point. Now, it may not be so clear as I can say exactly where it is, but I can say in general terms that there's a line where a term goes beyond what is reasonably necessary to protect a legitimate interest of the business.

And a good test, a good immediate test, and the test used in the legislation, is to look at the provision and look whether there is a significant imbalance between the rights and obligations. So it's not any mere imbalance, it's a significant imbalance, and beyond that it's not only just a significant imbalance, but having regard to the whole nature of the contract and the terms of the contract to see whether what may appear to be a significant balance is not really a significant balance overall. A significant balance in one term may not be a significant balance overall, because there are legitimate interests and trade-offs between the rights and obligation of the

parties.

"Can't consumers simply renegotiate or walk away from the standard form contract?" Do we often get that; if consumers don't like it they can walk away? Well, first, standard form contracts don't easily lend themselves to renegotiation. You go in to buy a mobile phone. Firstly, you may not have time to read the contract. Let's assume an environment where you can read the contract. You say to the sales person, "I don't like this particular term. This termination clause is a bit onus." Well, they'll walk out. You'll say, "Well, you might have a point there," or say nothing. They might be under instruction, and then if you seek to renegotiate, "Oh, well, talk to my manager or ring the company," and the reality is there's no ready mechanism for renegotiation, and the reality is, if you do allow renegotiation there's a cost, it's bogged down, and ultimately the value of the goods and services may be nominal or small compared to the legal cost, the time and effort that goes into renegotiation. So renegotiation of a standard form contract, except in unusual situations, is just unrealistic and just - the cost is just disproportionate typically to the costs of the goods and services.

Can consumers walk away? Yes, they can walk away, but they might be denying themselves those goods or services, because the reality is these contracts, these standard form contracts will typically be standard across an industry. So, you know, once one person does it everyone sort of looks at it and, "Okay, let's all have it." So everything gets added on, all these new provisions, additional provisions, and sometimes provisions are added on, and people really forget why those contract clauses were originally added. It's just, "Someone else had it, we've had it, let's all put it in," and so you do get very long contracts unnecessarily, and that's where I go back to the point of redundancy and repetition.

So what is the problem, ultimately? Well, you know, using standard form contracts in a take it or leave it environment where there's a possibility the contracts are excessively one-sides, where consumers may be forced to carry risks over which they have no control, where their rights are severely limited to their detriment without any offsetting benefit in the contract, or perhaps even worse that, over the course of the contract, they may be - consumers may be exposed to what I describe as a disadvantageous realignment of the contracts rights and risks, because a business usually has the ability to unilaterally vary the contract.

So, assuming all goes well up-front, you may be happy with something up-front, because the business is able to unilaterally vary the contract or reserves rights onto itself that the consumer doesn't have. You know, the rights and obligations between the parties could shift dramatically against the consumer during the course of the contract.

So what I do emphasise is that unfair contract term legislations, this approach to promoting a fairer consumer contract, has been tried and tested, it's been working very well in the United Kingdom. The United Kingdom publishes bulletins every quarter or so, every few months, where they list the contract terms that have been

rewritten or withdrawn. That's all, as I said, with one or two acceptations been done through consultation, and these bulletins are available on-line, and similarly in Victoria we have had the fact that telecommunication contracts have been written as a direct result of that legislation, and ultimately there are clear benefits to consumers.

Now, of course, the issue of cost to business is something that I'm happy to explore with you. I would have thought that businesses operating nationally would certain may have already considered the impact of Victorian legislation, and national businesses I would imagine would have possibly rewritten those contracts if there was a need to rewrite contracts. There's no assumption. There cannot be an assumption that if you have unfair contract term legislation that that will lead to a rewriting of all contracts or all contractual terms.

There may be many many contracts out there already that are fairly balanced and clearly stated. It's only in those instances where contracts or contractual terms have a significant imbalance, where there may need to be a look at - a need to look at that. But those costs have already been incurred for those national businesses.

MR FITZGERALD: Well, what I might do is just open up questions. There is the threshold issue as to whether or not we need to - unfair contracts. And I'm sure that Gary and Phil will raise some of that.

PROF ZUMBO: Sure.

MR FITZGERALD: But one of the issues about the Victorian legislation is that it differs from the UK, as I understand it, in a couple of respects.

PROF ZUMBO: Yes.

MR FITZGERALD: One is that it goes beyond standard form contracts, which I think the case in favour of some improvements around standard form contracts is very strong. But Victoria went to all contracts, and that seems to me to be a significant difference, say, from the UK model. So you might want to comment on that.

PROF ZUMBO: Absolutely. Certainly.

MR FITZGERALD: The second aspect is that one of the concerns that people have raised, if you were to introduce unfair contract terms, is should it be able to review price, a price, a price of components? Now, I'm not familiar enough with the UK to know whether that's exempted or how that's dealt with. But two recurring themes is, should it apply to all contracts and should it apply to all terms. Now, in your opening you said it's not likely to apply to all terms, and in the UK it is restricted.

PROF ZUMBO: In it's application.

MR FITZGERALD: So just a couple of comments those, if you would.

PROF ZUMBO: Sure. Sure. The standard form versus individually negotiated, the difference between the UK and Victoria, can be dealt with fairly simply by saying, yes, the UK legislation does focus on standard form contracts. But it does make the point that the onus is then on a person who's claiming that a contract has been individually negotiated, for example, to discharge that obligation. So, for example, the relevant regulations, regulation 5, you're right in saying that it only deals with contracts not individually negotiated; that's summarised as a standard form. But, clause 2 of that regulation say, "A term shall always be regarded as not having been individually negotiated when it has been drafted in advance, and the consumer has, therefore, not been able to influence the substance of the term."

So you actually have to look at that carefully. "It shall be for the seller or supplier who claims the term was individually negotiated to show that it was." So there is an onus on the seller to show that it's not been individually - - -

MR FITZGERALD: But you would - - -

PROF ZUMBO: Okay.

MR FITZGERALD: But you would say that Victoria does go beyond the UK?

PROF ZUMBO: Yes, but it's subject to one very important proviso, that in assessing unfair terms under the Victorian legislation it says that, "The court or tribunal, in determining whether a term is unfair, shall take into account whether the term was individually negotiated."

MR FITZGERALD: Yes, they take it into account, but it's not a factor. Okay?

PROF ZUMBO: Yes.

MR FITZGERALD: But just in public policy terms, what would be your preference? One that could potentially extent to all contracts or one that is more circumscribed in its coverage?

PROF ZUMBO: I would prefer the Victorian model, because I think there are sufficient safeguards for terms that are individually negotiated, because at the end of the day you can't assume all standard form contracts are bad, and you can't assume that all individually negotiated contracts are good. There's obviously a middle ground, and the middle ground, I believe, is dealt with in the Victorian legislation. If you go with the UK model then immediately there's inconsistency with the Victorian model, and in terms of promoting consistency around Australia you'd have a preference for the Victorian model. Secondly, if you go for the UK model, then you've got these additional provisions to show that's been individually negotiated, it adds complexity and what have you. At the end of the day I would think it would be preferable to look at the contract, look at the terms, see if there are particulars terms

if there's a significant balance**,** review those, having regard to the other terms of the contract and then as part of the mix consider whether they've been individually negotiated.

MR FITZGERALD: The second part of that, price.

PROF ZUMBO: Price is automatically excluded in the UK, as I understand.

MR FITZGERALD: That's my understanding too, and in Victoria - I could be wrong, but I don't think it is.

PROF ZUMBO: No.

MR FITZGERALD: Again, on public policy terms, what's your view about that?

PROF ZUMBO: Well, the question has always been that the price is or tends to be transparent, that you know up front what the price is. You can shop around on the price. The problem with introducing price is that people might think, I've bought this product at one price, I see it at a cheaper price over there, that's unfair. So I think you avoid those issues because you're dealing with - you're trying to remedy a market failure and the market failure you're trying to remedy with unfair contract terms is where there's a lack of competition on terms. There typically is very vigorous competition on price in consumer transactions.

However, there is very little, if any, competition on the other terms of the contract and that's the market failure. That is the problem, the fact that there is no competition between suppliers, based on all these other terms but there will be keen competition on particular aspects, maybe duration of the contract and what have you. So in fact, the UK model goes further and says the adequacy of price and remuneration is not to be considered but there is an important proviso, that insofar it is in plain, intelligible language, so the UK says, so long as you understand, it's clear, price can't be reviewed, nor can the main subject matter of the contract. So that goes a bit beyond, yes.

So the reality is to look at market failure, where there's a lack of competition, the market has failed and that gives rise to a temptation on the part of businesses to sort of push the envelope a little bit. Now, what's stopping them from pushing the envelope? Well, I respectfully say, very little. People will say - those who oppose unfair contract term legislation will say we have unconscionable conduct provisions. Apart from the fact that, you know, there's three provisions and there's issues surrounding that.

I would take the view and the first paper that I did where I told - dealing with unfair terms of consumer contracts, is Australia falling behind - I look at the inadequacy of unconscionable conduct provisions, the equitable doctrine, the statutory doctrines under 51AB and AC, and it's clear to me that the courts have adopted a very high threshold where they really do want to see a lot of procedural

unconscionability. For the non lawyers, procedural unconscionability is in the lead up to the contract, that the parties didn't understand when given the opportunity, in terms of they were under some special disadvantage.

So although there's a statutory concept there, and it has been under 51AB, 51AC, that's been given some latitude, the courts do tend to revert to those narrow categories of special disadvantage and don't go very far beyond that. The other point about the unconscionable conduct is that they're fact specific. The cases under those provisions are fact specific. So they're precedent value is very minimal. The fact is that if conduct is found to be unconscionable in one case, the relevance of that to other scenarios may be very little or none at all, even in the same industry because different fact scenarios, factors come into play in a positive finding of unconscionable conduct and there have been very few of them.

MR WEICKHARDT: Can I jump in there and I stress at the start that I'm not a lawyer nor am I an economist but I have read your article, and I note you say several times that the fact that unconscionable conduct cases have little precedent value and that the courts have stressed several times that you have to look at the entirety of the contract to say whether it's unconscionable or that the conduct was unconscionable. In that situation it strikes me as being a bit curious that there's such certainty that you can define what's unfair by looking at individual clauses and saying that individual clause is unfair, without looking at the entirety and if there's- - -

PROF ZUMBO: Of what, the authority of what?

MR WEICKHARDT: Of the contract. If there is limited precedent value and unconscionability, I struggle to understand why there should be precedent value in unfairness and you make the point several times that a standard form contract seeks to impose additional detriment on the consumer without any offsetting reward. May I be so bold as saying, how do you know?

The price might be the offsetting reward and so if I go to hire my car, I accept the fact that the contracts might all be in your terms, unfair, but that level of unfairness may give me a certain price and there are - and if I go to another instance in the travel industry; there are some tickets that I could buy that are non-refundable, non-cancellable, non-alterable, nothing changes. That's all visible to me as a consumer. It might sound unfair - it's unreasonable, that if I get sick that I can't cancel it, can't refund it, but I get that at a certain price.

So how do you know that these contracts are unfair based on the fact that there may be an offsetting price advantage to the consumer and if you rewrite the contract to make it fair, you may actually impose an added cost on the consumer? It's not very visible.

PROF ZUMBO: Okay, taking the last question first, this is not about rewriting en masse consumer contracts. This is a very targeted response, unfair contract terminology is a targeted response to a particular evil, and the particular evil is in a

circumstance where you have a term or terms that impose a significant imbalance between the rights and obligations of the parties, without any offsetting compensation or value to the consumer so it's a targeted response to particular contract terms.

MR WEICKHARDT: The offsetting advantage might be the price.

PROF ZUMBO: Yes, in which case it won't be unfair, as I made clear in my evidence, that if there is an offsetting factor in the totality of the contract that justifies that particular term then it's not unfair.

MR WEICKHARDT: Who is making this judgement whether the price, in terms of the standard form contract for your mobile phone or your car, is actually a compensation for the unfairness of the contract? Who is sitting in judgement of that?

PROF ZUMBO: Well, okay. One thing that distinguishes unfair contract term legislation from the unconscionable conduct provisions is that there's considerable guidance given in terms of examples of terms that may be unfair. When I say may be unfair, it's simply to raise a red flag for further investigation. There is no presumption that these will automatically in every instance be unfair and you have to make that clear from the outset. This is simply examples of terms that raise a red flag and in raising that red flag you do make an assessment viz a viz other contract terms.

Who makes that assessment? Well, the regulator is central to making that assessment in terms of unfair contract terms. The experience in relation to the United Kingdom and Victoria has been not that there has been a wholesale en masse rewriting of consumer contracts but rather a review of contracts to look at whether specific terms are justifiable, having regard to what else the consumer gets in that contract. Okay?

MR WEICKHARDT: I'm trying to probe as to how - who can try and make that judgement against the price of the product?

PROF ZUMBO: Well, depending on whether price is within the model. I suspect because of the various issues that go with price and the fact that it's transparent, it's highly visible. The consumers know; it has been excluded from the United Kingdom legislation.

MR WEICKHARDT: No, no, you're missing my point. You've said that rewriting the - you said the UK legislation is working very well.

PROF ZUMBO: Yes.

MR WEICKHARDT: And you say there are regular lists of contracts that have been rewritten. If you discovered over time that actually consumers were paying now 1.25 per cent - I've picked the figure out of the air - more as a result of these

contracts being rewritten, would you say that was a good deal for consumers, and how would you reach that decision?

PROF ZUMBO: What I would say is it probably doesn't get to that for the simple reason that if there's an issue of 1.2 per cent being extra, that will be an issue that a bank, when dealing with the regulator will make very clear. You'd have to talk to the regulators but my understanding from talking to people at the UK Office of Fair Trading is, these negotiations can be very robust between the business and the regulator, where the business says, well, if you believe that's the way it should be written, then this is going to be the consequence to the consumer, and I'm not aware of any instance where the business has come out and suggested that whatever term they have rewritten is going to lead to a higher cost to consumers because that is implicit and very central to the negotiation between the regulator and the business in that case. Don't think that the regulator comes in and says this is a term you have to include in your contract and the business says, "Yes, sir. I will accept that." Don't assume that for a moment.

There will be some very robust discussion and at the end of the day there will be a common understanding because there are examples of what's an unfair term. There is a test in terms of significant balance. There's a need to look at the contract overall. If the business comes along and says, "Well, this term is drafted in a particular way," it may seem to be unfair but have regard to this other issue there where the consumer does get an offsetting benefit. Then it's not unfair in the totality of the contract.

So in the totality of the contract, the contract is not unfair. And that particular term, while raising the red flag under the legislation, is not unfair in the scheme of the contract. So it's not about rewriting contracts. It's not about disadvantaging anyone. It's about trying to draw a line as clearly as you can and give as much guidance as you can as to when a term raises a red flag. Simple as that.

MR WEICKHARDT: Can I just ask that - because I don't want to prolong this discussion much longer but - - -

PROF ZUMBO: It's an important discussion.

MR WEICKHARDT: But when you make your submission, could you read the transcript of the Perth hearings and look at Chris Field's submission where he has done what he describes himself as a backflip around this very issue where he said he used to be a supporter of unfair contracts legislation, he now no longer is a supporter because of concerns around this very area.

PROF ZUMBO: Funnily enough, I have read Chris's submission and I've got a lot of respect for Chris but I respectfully disagree with that proposition. And it's no coincidence that I've been emphasising the point about looking at the totality of the contract because there appears to be a misunderstanding there. It may be his experience in talking to the regulator in Victoria. But my experience in talking to the

regulator in the UK and I remember distinctly when I spent some time there on a sabbatical a number of years ago, where I spoke to the director of the Unfair Terms Unit. And I said this very question you've asked. If there's a specific term, do you look at it in isolation? He said, "No, Frank. You look at the entirety of contract and you balance it." And you discuss with the business and you come to a common understanding. You do look at the contract and its entirety. You don't pick and choose particular terms and say that's unfair and then forget about the fact that there's another term that compensates or there's some reason to justify it.

MR FITZGERALD: Just to clarify, in the Victorian legislation and in the UK, that's a requirement in the legislation, that the courts regard it in its entirety. It's expressed in the UK legislation. In the Victorian legislation it would be another factor that would be taken into account. I would not imagine any court or tribunal simply picking a term in isolation.

PROF ZUMBO: But just also the process. Just to answer Philip's - at the end of the day the matter can in fact go to the court and the court will actually determine the benefits. So the ultimate arbiter of that is ultimately the court. But what the experience you're saying is that very few go to court. So you end up with a negotiated arrangement with the regulator or you end up with it in court in which case the courts do what they always do and they determine on the facts. The one time, the one case I'm closely familiar with because it was running at the time, was at the Office of Fair Trading in the UK. I think, as I said, it involved the bank and there was very robust discussion there about how it would affect the interest rate and other terms and it went to court and I think it was the House of Lords in that case made it clear that it would seem to be unfair and what have you.

But let me just say, in terms of the impact on consumers, there's a case of Braithwaite v G H Operations. It was a very recent case in the Victorian Civil and District Tribunal, 19 February, where a consumer did pursue an action under the unfair contract legislation in Victoria. And the point that was made in the end was saying there was not an unfair term there by the tribunal member was that the term was proportionate and appropriate in the circumstances. So that's the converse to significant imbalance where there's no offsetting balance in the contract that the term in that case is proportionate, appropriate having regard to the entirety of the contract. So once again, it's a proportionate and appropriate approach to a particular issue, a particular issue.

There was one aspect in terms of unconscionable conduct. The provisions there, the problem there is - and I have to hasten to add that the unconscionable conduct provisions have dealt with some of the more excessive, reprehensible behaviour. So I cannot say that the unconscionable conduct provisions have not had any benefit, they have. And I've been a strong supporter of those provisions over many many years. And a lot of work I did led to 51AC. But at the end of the day, the lack of precedent value is that you have to look at the surrounding circumstances, the conduct leading up, discussions between that party and the bank or the supplier and what have you, and it's only then, if that mix of procedural factors is

unconscionable, that you then go to the contract. Whereas often people are given a contract, take it or leave it. You sign it. You know, there's no procedure on conscionability, but rather the problem is with the substantive unconscionability. The substance of the contract. And there's no ability today under those unconscionable conduct provisions to hone in simply on those terms.

In fact there's referred to in my article a case where under 51AD and 51AC, it was clearly stated by the full court, full Federal Court, that you need something more than the term to be unconscionable. A term on itself is not going to be unconscionable.

MR FITZGERALD: I think we appreciate the distinction. Gary?

MR POTTS: You put a lot of emphasis in your comments on the importance of giving clarity in the laws. I would certainly agree with that but I wasn't sure of the connection between that particular point and unfair contracts. Whether you saw the unfair contracts approach, which Victoria has adopted and the UK has done, would make and is making a significant contribution to making the regulations and in particular contracts clearer for consumers. I haven't looked at a contract in Victoria, for instance, which now have to comply with the unfair contract laws, to see whether in the light of that legislation a contract has changed in a significant way to the extent that it's made it easier for the consumer to understand the contract rather than trying to balance the rights and responsibilities of the two parties. Could you comment on that particular issue for me?

PROF ZUMBO: Okay. And I go back to the point I made about the clearest evidence we have that the Victorian legislation has led to fairer consumer contracts is in the telecommunication area. In fact that code, Consumer Contracts Code 620-2005, there's a very interesting subheading "Why current regulatory arrangements are inadequate". It says with the exception of Victorian legislation, federal state laws do not identify or provide guidance on contract terms which may be unfair, nor provide guidance on structure formats of contracts to ensure that consumers can easily understand. While other codes require provision of accurate and accessible information, require appropriate behaviour of the service provider sales staff in dealing with consumers, those other codes do not expressly deal with fairness of the contract terms or the actual format. So as a result, a lot of effort went into developing this consumer code which everyone in the industry agrees and has supported as being fair.

MR POTTS: But with respect, that's not quite my question, I guess. My question is has the contract become easier for the consumer to understand now that this unfair contracts law is in place in Victoria? In other words, if I'm a consumer in - I want to buy, let's say, a mobile phone or something. And I go into a Harvey Norman store in Sydney. And then I go into a Harvey Norman store in Victoria. Now it may be that the store in New South Wales has decided to use the same approach as in Victoria to get a national approach. But I guess what I'm trying to understand is what difference will I see in the contract that now prevails in Victoria compared with what it would

have been before. Would it be easier for me now, as a consumer, to understand the provisions in that particular contract?

MR WEICKHARDT: Well, could I flip that just around another way and say; is there any provision in the Victorian law to rule a contract unfair only on the grounds that it's not easy to understand for a mere mortal, only on those grounds?

PROF ZUMBO: Not expressly.

MR WEICKHARDT: Okay.

PROF ZUMBO: But it would be a factor that could be taken into account by the court of tribunal. It's not expressed, but in the UK it is.

MR WEICKHARDT: Yes, but it's not listed in the Victorian legislation as a specific issue?

PROF ZUMBO: No, no.

MR WEICKHARDT: In your summary, anyway.

PROF ZUMBO: In the UK it is.

MR WEICKHARDT: Okay.

PROF ZUMBO: In the UK, whether it's legible and clearly understandable, is a factor in unfairness. Now, Gary, going to your question. That would require a major study of getting hold of the contracts before the legislation came into effect, contracts after they came into effect, and see how that changed. Then the problem with that is controlling for other variables. Business do redraft contracts over time, they revamp them, they rework them. In terms of clear drafting, that should be a principle quite apart from unfair contract term legislation, and makes good business sense to write in plain language, so your staff understands, reduces training costs, consumers under or are better able to understand. So writing in plain language should be a fundamental premise in all drafting of contracts and legislation.

Now, in terms of has it led to fairer contracts, I keep coming back to the telecommunication example, because we have a very comprehensive document that details how that Victorian legislation has benefited consumers in the telecommunication area. Now, the other thing is that I sense is that businesses are concerned about uncertainty surrounding unfair contract term legislation. I have to say, that's an argument that's used every time this sort of legislation or comparable legislation. I heard it every time unconscionable conduct provisions were added, that the world would, you know, come apart, the sky would fall in. And 20 years later the unconscionable conduct provisions are still there, and it hasn't brought contracts to a standstill. It's been in the UK for 13 years, and it hasn't brought contracts to a standstill in the UK.

At the end of the day it's about what makes business sense. It's not just about preventing unfair contracts. Fairer contracts minimise disputes. Fairer contracts means consumers have more confidence. Fairer contracts, clearer contracts reduce compliance costs. So this business of uncertainty argument, one has to deal with very cautiously, because there are ways to remove business uncertainty. You can provide safe harbours in the unfair contract term legislation. So you could say, in relation to this consumer contract, if the contract complied with this code it will not be subject to the unfair contract term legislation, you can provide safe harbours, you can provide mechanisms for advanced opinions. So businesses, if they're not entirely sure, they can go. There's another mechanism where, to draw on the authorisation procedure of the Trade Practices Act, you can allow businesses to submit their contracts and seek authorisation.

MR FITZGERALD: We are over time, and I'm very grateful for the presentation. Obviously you're going to make some submissions.

PROF ZUMBO: Yes.

MR FITZGERALD: And, clearly, this particular issue is front and centre of the inquiry, it's one of a number of the key issues which we flagged in the issues paper, and they'll be in the draft report, and undoubtedly we'll have other opportunities. Just one thing, in the submission, it is important to us. When we were looking at the general product safety provisions, which is a bit similar to unfair contracts in its scope, one of the questions that we ask participants who were promoting that to sort of indicate whether or not it would have an impact on future legislation. In other words, in that case more and more very specific regulation around product. In this particular case the question of unfair contracts, if you were to introduce it in either form, the UK or the Victorian form, would it over time reduce the need for industry-specific regulation at the rate we're seeing it, or would it have any impact on that at all?

PROF ZUMBO: If I had a minute I could give you my preliminary thoughts, yes.

MR FITZGERALD: You've got a minute. You've got one minute, and then we're off.

PROF ZUMBO: Yes and no. In terms of the safe harbour issue, you can have specific industry codes developed to provide comfort and certainty to businesses. Overall, it would lead to a reduction, because you've got these basic principles of fairness identified with particular examples of unfair terms. That would remove the need for a very specific legislation dealing with particular evils, because you've got general legislation dealing with that evil in a general way, rather than a proliferation of unconscionable conduct provisions, for example. I'll certainly address that.

MR FITZGERALD: Okay. Good, thanks very much, Frank, that's terrific.

PROF ZUMBO: Thank you.

MR FITZGERALD: Okay, we'll resume at 1.30. Good. Thanks very much.

(Luncheon adjournment)

MR FITZGERALD: If you could give your full name and the organisation and your position within the organisation for the record, and then if we open it up for 15 or 20 minutes of points or consideration, then we'll have a discussion for about the same amount of time.

MR BLAIR: I'm Colin Blair. I'm the deputy chief executive of Standards Australia.

MR O'CONNELL: Adrian O'Connell, general manager, relationships and partnering Standards Australia.

MR HARPER: My name is Andrew Harper. I'm government and stakeholder relations adviser to Standards Australia in a consultancy capacity.

MR BLAIR: Maybe if I could just first of all apologise for John Tucker who's overseas at the moment so unfortunately he can't be here today. I think in terms of our discussions today I'm going to just give you - so, first of all, just thanks very much for the opportunity to come and present here today, and I think in terms of where Standards Australia - we'll certainly be making a formal submission to this Productivity Commission review, but we think in terms of today's meeting there were three points that we were wanting to touch on, and first of all that Australian Standards can underpin consumer policy by providing a national approach integrated with New Zealand and aligned internationally.

So I think the important points there are the national approach. We obviously - not obviously but we do do joint standards with New Zealand, joint Australia-New Zealand standards so we can bring in the New Zealand part of it and also we're the Australian member of ISO and IEC so once again we tap into the international standard scene as well. The second dot point is that we're flexible and adaptable and can work effectively in responding to the needs of the consumer policy framework, so whatever framework is, we believe, put in place at the end of this Productivity Commission review we have the ability within our system to work with that group that's put in place, and Standards Australia can provide an effective alternative to regulation and can provide different pathways to addressing current and future challenges.

So we see that as a standards body, particularly when we had reports on red tape review and alternatives to regulation we see that Standards Australia can play a role as an alternative to regulation. I think just some other points is that the question coming out of the Australian Consumer Product Safety Review System or Safety System, the previous Productivity Commission report on that, just in terms of giving an update of what we've done in response to some comments or some recommendations in that, first of all, we've put in place our consumer standing forum which is a horizontal group that we wanted to put in place to interact with the consumer movement and interestingly enough this morning we actually were meeting with them as one of our - we're into our third meeting with that group now so we believe that's going very well.

With regard to the question of hazard based approach to consumer issues we've actually now put out to public comment a whole suite of documents which in fact address this issue of the hazard based approach so that we're doing that, and that's out there at the moment, and we think once again that's in response to the recommendations that were contained in that report. I think with regard to the current Productivity Commission report which was finished on standard setting in laboratory accreditation we've submitted our response to the Federal government on that one, and they've set up an interdepartmental consultative committee and we'll be meeting with them in I think it's about May to actually go through our responses to the Productivity Commission recommendations.

But certainly a number of issues, recommendations within that group with regard to Standards Australia going forward we've actually implemented. We've certainly strengthened up the Standards Accreditation Board. We've brought independence to that. We're now quite well advanced with regard to the Standards Accreditation Board and also we've put in place what we call our transformation program to have more effective project management of our standards development process so that's - we've now just done a restructure of the organisation in that regard.

It's interesting with regard to issues that were raised in the recommendations from the Productivity Commission with regard to participation on ISO/COPOLCO, which is the consumer policy group, which was one of the recommendations in there, and we've just made note to the Federal government that in fact we provide funding to the Consumers' Federation of Australia to the tune of $75,000 to assist with participation. We've been involved with COPOLCO now for some 10 years and the Consumer Federation of Australia does participate on COPOLCO through Robin Easton and also through Bill Dee and, as I say, the third part of it is that we've set up that consumer standing forum.

So we have been working quite diligently in terms of our involvement with consumers, but moving forward obviously it talks in here about increased participation from the consumer group within our standards development process, and this is one of the things that we discussed at length with them this morning, and funding keeps coming up as the issue in terms of their major issue with participation. I do believe in terms of their involvement with standards development - it's interesting, when I looked at the 20 mandatory standards under the Trade Practices Act they sit on 16 out of the 20 committees that are involved with developing those standards.

In terms of our consumer committees, they would sit on approximately about 50 per cent of those active committees that are involved in the consumer area, and across the broad range of standards development they would sit on about 20 per cent of our active committees, and in fact in terms of where we have our nominating organisations, and we have some 1,000 nominating organisations sitting across all our committees, they are the tenth largest in terms of participation, so they are quite a significant participant in our process. So it's really just giving you some background.

I don't know, Adrian, whether you've got any comments to add.

MR O'CONNELL: No, I think you've covered the three key points that form the basis of what we say in our written submission.

MR FITZGERALD: Good, thanks. I suppose just trying to broaden it a tad one of the challenges, as you know, in this inquiry is also to look at unnecessary regulation as well as trying to establish a framework into the future, and it strikes us I suppose that whilst you may have less regulation, what you tend to do is to have an equal amount of prescription but it's through the standards, either voluntary or mandatory, and I suppose - I would ask this question. Do you think we're kidding ourselves in terms of the red tape reviews and what have you when in fact what might be happening is we're replacing one form of regulation for another form of regulation?

Are we actually seeing that we reduce black letter law but in fact simply replace it in a way that industry has no real option but to comply with that, or is the nature of the standards significantly and substantially different from the black letter law regulation such that it's delivering better outcomes? It's just a question - I mean - - -

MR BLAIR: No, it's a good question. I think there's two parts to the response. First of all, in terms of the standards we developed, having broadly based committees of all the participants I would hope that the final outcome is something that, you know, is suitable for the industry and the community so it has a role to play, and I think the second thing which we are strengthening up at the moment is our project initiation process and our preliminary impact assessment work to make sure that we're only undertaking projects that you can demonstrate a benefit to the community and to the industry and to government. So I think with those sort of two planks in place I believe that the outcomes are providing what the community needs without unnecessary restrictions on them.

MR FITZGERALD: And the gatekeeping arrangements which we referred to in our report we indicated needed to be strengthened and the cost benefit analysis at the beginning of the process of developing standards needs to be improved. As we have said the same with the black letter regulation, those changes, will they make a significant difference to the number or - yes, the number of standards, do you think? I mean I think South Australia's view was that it was reasonably robust previously. Our view was that it could have even been made more so.

MR BLAIR: I think in terms of - it most probably will in terms of the number of new standards, but I think in terms of the existing standards you've got to look at the relationship between standards as well. In a lot of cases we will have a high level document and if I take the building area, because that's where my background is, you'll have a concrete structures code and then sitting under that you'll have a whole lot of interrelated standards which relate to the reinforcing steel and the concrete and the cement and things like that.

So in terms of those needing to be there to underpin the main document, they're still going to be fundamental, but I think in terms of making sure that when you're revising or having a new standard that it is robust, that you're going to need it, and one of the things we look at is what are the alternatives to a standard, and that's one of the things under the preliminary impact assessment work, you know, do you need a standard or is there something - other way that the industry can sort of look after itself or government can be involved.

MR POTTS: Could you give me some examples? I guess touching on what Robert was saying, you know, areas where your work could replace regulation, and that's your third point here I think, but could you give me some examples of areas where you think that could happen and would be an improvement on the current regulatory arrangements.

MR BLAIR: I think in terms of - at the moment we're sort of underpinning, I suppose, regulation with our mandatory standards, but I think this hazard based approach to things could - where it's more performance based could give a better outcome and thus not needing to have restriction through regulation in terms of that, but in terms of specific examples I'm thinking at the moment in terms of the straight consumer product area, I suppose, standards to a fair degree have covered the field. I know you've got the cots and the babies' dummies and, you know, all the fundamental ones and then we've got this broader policy framework that we're talking about, but I can't think of a specific example going forward that I could say, look, if this came to be, then a standard would most probably give a better solution than regulation. Can you think of any ones where we would have - I'm just trying to sort of predict - - -

MR POTTS: I mean you make the point here validly but I'm just wondering what sort of practical effect it has or it's just in a sense an indication from you that if we see something that could be done through your arrangements, then you'd be happy to consider that.

MR BLAIR: That's right, and I would hope that with having a broadly based group that participates on the committees that you will get an outcome, you know, which is acceptable to all parties and thus give an efficient outcome, I suppose you might say.

MR WEICKHARDT: This might be raising an old chestnut and I don't want to sort of get the 10-minute answer to this if it is, but yesterday we had somebody appearing before the hearings who was bemoaning the fact that in terms of consumers understanding their rights and obligations they sometimes opened some legislation and then find that that legislation cites an Australian standard and they then have to go off and buy the Australian standard, and they were saying, well, in terms of accessibility the standard ought to be provided along with the legislation if it is prescribed in the legislation.

MR BLAIR: All right, we can answer that one quite simply because it's covered in the Productivity Commission report where it's actually put it back on government,

but I also need to add that in New South Wales you can go to any public library in New South Wales and access standards for free, there's an arrangement between us and the public libraries, and I've got to add the caveat if they choose to do it because some public libraries, while they can do it, for whatever reasons they sometimes don't choose to make it available to the public.

So in New South Wales you can go to the New South Wales Library or any public library in New South Wales, walk in off the street, and you can access the standards for free, and in a lot of cases they will allow you to download a page at a time for the normal photocopying charges, and also interstate for the other state capitals in Australia it's just the state library that does it. Unfortunately they don't seem to have an arrangement in place between their state library and their public libraries, but certainly the issue about free or low cost access to standards is covered in the Productivity Commission report, and that's one of the things that we will be taking up with government.

MR POTTS: So with this New South Wales arrangement, does the New South Wales government in some way pay for that service?

MR BLAIR: I think you'll find that the New South Wales State Library - there's a payment made. The details of the payment I don't know.

MR POTTS: It's not made to you at all?

MR BLAIR: It would be made to SAI Global I would say as the publisher, and then that gives them the rights to have it available, and it then spreads out to all the local council libraries.

MR FITZGERALD: Just in relation to your first point, we're off to New Zealand this evening, Phil and I and the team. I just want to explore this. Of the Australian standards that we have, how many or what percentage now apply to both Australia and New Zealand and what do you believe over the next, say, half decade or decade will be the position in relation to trans Tasman standards?

MR BLAIR: Right, so at the moment I think it's 32 per cent of our stock of Australian standards are joint. From the other side of the Tasman 75 per cent of the New Zealand stock of standards are joint. In terms of going forward, the extent to which that's going to expand I wouldn't like to put an absolute number on it because I think there's just going to be certain areas where there are differences. I mean the timber framing code is an example and there are situations where they won't necessarily want to take on our standards on testing of soils or testing of aggregates or things like that. For whatever reason they won't want to take them on, and I think they also have a different funding model in terms of how standards development occurs.

They require up-front funding for people to participate in the standards development process so that obviously is quite a different issue to what we've been

traditionally working on, which is that if there's a need, then we will develop the standard whereas they're saying we need some funding up-front to enable that standard to be developed from a New Zealand perspective because as an organisation they operate under a different model.

MR FITZGERALD: What mechanism is in place to ensure that New Zealand and Australia don't start the development of a standard separately rather than coming together to say can we jointly develop a standard because one of our concerns is - well, as you're aware in the terms of reference we are looking at New Zealand as well as the Australia consumer policy framework and there is an underpinning assumption that greater integration over time is desirable. But it strikes me it's right at the starting point whereas New Zealand decides to go one way and we go the other, what's the official mechanism or way by which that occurs or is it an informal - - -

MR BLAIR: No, we have a mechanism within the organisation that all new projects are considered by both parties. So at the stage when they're looking at a new project, if someone has raised it from our side or if they're looking at it, then we both consider it to see whether it can be done as a joint standard, so that's always our sort of first port of call: can we have a joint standard?

MR WEICKHARDT: The numbers you quoted before, the 32 and the 75 per cent, does that include cases where both countries have adopted an ISO standard?

MR BLAIR: Yes, that would have included option of international standards, yes.

MR WEICKHARDT: So what percentage roughly do you know of that 32 and 75 are just common international standards that have been adopted? Would it be sort of - - -

MR BLAIR: That's a good question. I couldn't answer that off the top of my head in terms of just that subset, no, I couldn't give you - - -

MR WEICKHARDT: Of our Australian stock of standards, how many are - - -

MR BLAIR: ISO - internationally we should say.

MR WEICKHARDT: Yes.

MR BLAIR: 44 per cent, but that's - in a lot of cases there are - you know, you think, gee, 44, that's not a very high number, but there are lots of sectors where there just are not international standards. So it's not an issue of, you know, 44 per cent in its own right, it's the fact that there are not a lot of international standards in some sectors, and I think the classic sector is the building sector where there just aren't international standards.

MR POTTS: So each country does their own thing, is that what you mean, or other countries don't bother to have standards?

MR BLAIR: They basically do their own thing, yes, but we always - we all look to - I mean our policy is look to an international standard first and then look to another national standard, you know, in terms of developing standards in any areas.

MR FITZGERALD: Your second point here is about being flexible and adaptable in relation to the consumer policy framework. One of the issues for us at the moment is this issue between generic and industry specific. It's sort of a threshold issue in this inquiry as to trying to work out whether there are guiding principles as to when you should use generic and when you should or might need to move to industry specific. In relation to the industry specific, we're again looking at models of co-regulation and self-regulation and so on. You may not have a view about this, but so far in the inquiry the vast majority of participants that have commented have been fairly scathing of self-regulation but much more favourable to the notion of co-regulation. In most of those regimes standards appear somewhere or another in that.

I was just wondering - and again you may not have a view - as to whether or not self-regulation is in fact an appropriate way forward when we're looking at consumer policy issues in industries and a better approach may be to acknowledge right up-front that co-regulation is the way to go. Some people say, well, what you've got to do is you've got to go through self-regulation first, you then find out what works and what doesn't, eventually it gets into co-regulation, and if it doesn't work it gets into total black letter law regulation. But you are operating within all of those schemes - - -

MR BLAIR: Yes, we operate the whole - - -

MR FITZGERALD: As a more objective observer, have you got a view about it?

MR BLAIR: I suppose it depends on the extent of the issue. I mean if you've got an issue where there's a very burning issue and there's a need for some solution I mean you might have sort of a market failure type situation and so you need something in place, then one of the solutions there is to get a standard, have the standard basically referenced by legislation and so you get to that side of things. If there's a need for improving part of an industry but they're not really at a stage where there's sort of been a market failure, well then, I think you can have self-regulation, so it's a matter of looking where the issues are as to what you need, and I suppose we're saying we can fit in with any of those areas, and we've done that historically.

We have lots of standards that are just straight voluntary standards. We have a lot of standards that are referenced by regulators and, you know, it works quite well in terms of what we're able to achieve to provide technical solutions with the regulator, particularly where they've got performance based regulation, and so I think you've got to look at it in terms of the regulatory model as well. And then you've got the other situation where you might have a single national performance based regulation and then you can have standards which fit under that as to other ones

where each of the states have their own regulation that they can potentially reference one standard to provide the solution to the needs of all these eight states and territories. So I think we have a role across the board, but it depends on the issues of the day and how you're trying to resolve matters.

MR POTTS: You mentioned you've got a fair amount of consumer representation in your groups - I can't remember the percentages now, but do you find that there's a fairly consistent approach among the consumer groups to the particular issues as you move from one area to another or is there a problem for you in that the consumer tend not to have a reasonably uniform approach to the issue in terms of what they're trying to achieve from the process.

MR BLAIR: I know what you mean, yes. I don't know that I could sort of answer that one sort of completely truthfully, but I think they do have - the fact that they've got the Consumers Federation of Australia which is a, you know, a strong group, so they can get consistency of their representatives. You've got Choice, the old Australian Consumers Association, and then you've got to realise then there is also end use consumers that go outside that area. I mean if you've taken, you know, the Boat Owners Association or Kidsafe, I mean they're other examples of consumer groups, they would have a consistency of approach because they're not on a broad range of committees. But if you looked across Kidsafe, Boat Owners, Consumers Federation and Choice, you most probably might get a consistency of approach, but you'd get more of a consistency approach within each of those nominating organisations themselves.

MR POTTS: What's the governance arrangements in terms of making decisions. If a consumer group doesn't agree for instance with the position that's put by manufacturer's representatives or whatever - I mean what's the process for reconciling those differences.

MR BLAIR: At the end of the day we get down to what's called the postal ballot stages, when you formally vote on the document for publication and what we've got is quite strict requirements with what we define as consensus. And one of those - there's three hurdles they have to jump and one of the hurdles is that is no major sector interest maintains a negative vote. So in terms of that you've got the consumers as a major sector and you may only have one representative, but as a sector interest there are major sector interests so we then have to - if they maintain a negative vote then we have to just work through to try and resolve their issues, which we - you know we find that we do resolve issues at the end of the day. But we can't just sort of in a point in time saying, "Well, sorry, you've got a negative vote." The other rules is a minimum of 80 per cent of those that are eligible to vote, vote positive, that have voted, and then 67 per cent of those that are eligible to vote. So there's these three hurdles, so you could jump two of them and say, "Well, sorry, even though you've got a negative vote you're only one of 20, we won't take any notice of you."

But it's the third hurdle that we find is the one that, you know, that when we're

trying to resolve issues at the end of the process that's always the big one we find.

MR POTTS: Is that right.

MR BLAIR: And we just have to work through it. So there are - you know, there's protection in there to look after sector groups.

MR POTTS: Do you have any situations evolve where the business groups, for instance, feel that the consumer groups are taking it too far and imposing unnecessary costs on - - -

MR BLAIR: Most probably during the process you do. But you generally find, rightly or wrongly - we manage to get people around the table, they all tend to act in a professional way in the end and we tend to get solutions. So I suppose I like to think because we're just neutral facilitators - - -

MR POTTS: Sure, I understand.

MR BLAIR: - - -people see that they come to our table knowing that all we're wanting to do is facilitate a process, we don't have any axe to grind and we find invariably they - we reach a solution at the end of the day.

MR FITZGERALD: Can I ask a broader issue. Were would you like to see Standards Australia and standards generally, it's role or place in the general public policy arena related to consumer policy. Are you happy where you are at the moment as an organisation and the products you produce, are you satisfied that what you're able to deliver and where you sit in influencing the policy arena is satisfactory or do you believe that there are roles or - yes, I suppose roles or functions that the organisation itself and the products you produce should be playing.

MR BLAIR: I think in terms of the products, certainly where we sit at the moment I think we traditionally have what I call these vertical products, you know, there's one for a pram and one for a cot and one for a dummy and they all sit like that, and they're out there and they're part of the scene. Now we've got this new system of having the horizontal standards, we believe that that's a step forward to move away to a new approach there. And then I think the other - so that's one. And then number 2, I think there's most probably also a need for guidance material, point of sale material - and matters like that. I mean, to give you an example of - the CCA treated timber, you know, that people buy for their logs, for the retaining walls and their cubbies and all those sorts of things. It's - the need for point of sale guidance material, the typical hardware store where people can read it and say, "Well, look, there are some issues with this. I'm not a technical person. I don't really want to buy the standard", but if there's a point of sale document, you know, a one-pager written in easy to read form - I think that's a role that we have to play as well.

So I think we need to just move away from that role of just being a developer of what I call vertical standards to look at horizontal standards, but also look at

guidance material to assist the end use consumer. So I think that's where we need to broaden our role out.

MR FITZGERALD: And in relation to that generally, one of the issues that crops up in this inquiry is this issue about information and disclosure, and lot of your standards deal with that there. But I wonder whether you have any view about what's been put to us is this emerging view of consumer's right to know. Not necessarily right to know because of a particular reason but an inherent right to know what's in the product, the component parts and all of those sorts of issues. Now it's particularly strong in food labelling where it use to be you have a right to know because, you know, you might want to know where the product is produced or you have a right to know because it has some sort of direct health impact, for example, it has peanuts or something - to a new notion that seems to be emerging with affluence which is a simple right to know .

But I wondering in your standard development is any of that coming through in your information standards in particular, or not? Again, you may have no view but it's - - -

MR BLAIR: Yes, I don't think that I've sort of seen it come through as such. But it's interesting that one of the things coming out of our meeting this morning with the Consumers Federation is that they want to - they're looking at the issue of a consumer impact statement that goes with standards, so that I thought was an interesting new notion and maybe they're the sorts of things that we need - you know, we're going to need to address that issue going forward and see whether that's got acceptance from our broader stakeholders. But I think we certainly haven't had that sort of coming through in a big way in terms of a right to know issue.

MR POTTS: Does that affect the price as well when you talk about a consumer impact statement?

MR BLAIR: I would think that would be part of it because that's - you know, in terms of cost benefit work as well I mean obviously price is a fundamental issue as well. Affordability.

MR POTTS: It can be a tendency to think that these things would costless though.

MR BLAIR: Yes.

MR POTTS: You can put new requirements in place and the consumer doesn't pay for it.

MR BLAIR: Yes, well, that's right. I think everything has a price to it somewhere along the line, hasn't it - - -

MR POTTS: And the manufacturer by and large doesn't bear the cost of it, finally.

MR BLAIR: Yes. But still, once again as I say, if we have a broadly-based group all of those sorts of things - - -

MR POTTS: Sure.

MR BLAIR: - - - can be put on the table and all the parties can come to a sensible solution with regard to balancing out those sorts of issues.

MR POTTS: Well, yes, as long as the consumer groups are representing consumers as a whole, I suppose.

MR BLAIR: Then you've got, you know, your public comment phase for your standards which is meant to be picking up those sorts of things as well, to make sure that it's not sort of out of kilter.

MR WEICKHARDT: This might be an unfair question but your three dot points are really related to the fact that you can support the consumer policy framework and it's needs. And if hypothetically, knowing everything you know, you were parachuted into a position of absolutely power and control over the country, what would you want to change about the consumer policy framework to make it work more effectively for the country and for consumers?

MR BLAIR: Well, it think the main thing is just the question about duplication of conflict and a national approach. I think at the end of the day it's a national approach. I mean, I look at what's happening say, if you take the electrical area where you have eight states and territories. We all reference our wiring rules as opposed to say the building area, where you have one national performance-based regulation which each of the states and territories adopt and thus you have a national approach and I think that's the big thing, is that national approach, but also the issue about the international links as well. I mean, such that when people are wanting to export products or services that, by not being international standards, they can do it and I think that's the other important point, is the national and the international and WTA issues.

MR FITZGERALD: Can I ask, there seems to me to be a slight problem which I've never quite got to grips with on this consistency. Clearly, our report indicated we wanted either or one regulator in relation to consumer product safety and in relation to standards. We've been consistent about getting national consistency and so on, but if you take the electrical area, the missing factor in this is business. I don't understand why business hasn't been able to exert greater pressure on governments to get consistency in an area where they're the main player.

It is not evident to me, for example, that consumers are standing in the way of getting consistency because all the consumer groups say the same thing. You talk to peak business groups and they all say the same thing, and yet it doesn't happen in certain areas like electrical products, which you would have thought would happen. The normal lobbying approach should by now actually have delivered that, and yet it

hasn't. So I was wondering what is occurring? Is it just simply the obstinateness of eight regulators or is it simply the political reality in those areas or is there something not quite right in the processes.

There just seem to be some areas, electrical standards being one, which, it's a no brainer that we should have had national consistency and there is no logic not to have it and yet we don't have it. Again, having done the inquiry, I'm better informed but I'm still no closer to the answer to that dilemma or that problem.

MR BLAIR: Well, I suppose as a standards body, we sort of say look, the eight states and territories are most probably comfortable because we're giving them a technical situation that they all participate in and they can all reference. So they're all comfortable with it. So maybe the drive is not there because we're, you know, we're enabling them to get something that they've all got ownership of and that they can all adopt in their way. Unfortunately they all sort of can be adopted at different levels, referenced at different times and not at one point in time.

Maybe the fact that it works, and if you look at the electrical area, you could say from a safety point of view, you know, we're not having a lot of problems with people being killed in Tasmania relative to Queensland or in WA relative to NSW. So maybe, you know, people are comfortable with it.

MR POTTS: Perhaps one of the reasons is not many contractors operate outside of individual states. So if you're a contractor in Queensland, you're only going to work in Queensland. You don't really mind that the regulations are different in Western Australia or New South Wales.

MR BLAIR: At the end of the day, if the regulations are referencing a lead wire and the rule is ASNZS3000, then you can move around, you know, Australia and you can use your one document to be wiring houses, whether it's in Queensland or Tasmania. Maybe we've done the states a disservice by having this national approach and they might have had to work a bit harder to get it if we didn't have these national standards in place and as I say, the key to it is they all participate on the committees so they're part of the outcome and then they reference it. So maybe the drivers aren't there and then the extent to which business says, well, how important is the electrical to us.

I mean, the electrical area is the one area, except for say the wiring - the wiring is to a degree, but everything else is very much internationally focused. We adopt IEC documents, so if you looked at our area of standards development, the electrical area is the highest area of adoption of international standards of all our areas, so the states can most probably sit back and say, well, we know that there's not only a national approach, there's an international approach, so as long we keep referencing it.

MR FITZGERALD: I think it poses a conundrum in our sense because you can come to all of these issues from two angles. One is to simply say, well, are there

sufficient problems in the system that warrant a change and if the core is working the answer might be no, so you can have eight slightly divergent states without that consistency, but at the end of the day it's okay, or you can come to it and say, if you were designing a system for the next 20 years, which is what we're trying to do, you wouldn't want that inconsistency and therefore you should spend the energy of getting consistency even though the net gains or the net benefits are modest at the moment. So I suppose it's just a different way of how you approach it.

MR BLAIR: If you look at all those states as well, in terms of where they have that state-based approach you will see that they generally have a group that meets, which are the officials from each of the states. So they are sort of communicating with one another. So I suppose it is then taking that - well, in my experience, from the technical side.

MR WEICKHARDT: Communicating, but maybe not doing very much.

MR BLAIR: Well, true, but at least - so from my experience, you know, the next thing is to take it to the next approach, to get that one national thing and I think that's where you know, you've got to give it to the building people and the plumbing people as well. They've got a plumbing code of Australia which is a national document and the states are slowly adopting that. It's a model document at the moment. So they've gone down that path as well. So I suppose it's the extent to which you sort of make it happen within what timeframe is always the big issue.

MR FITZGERALD: Or how much energy you put into it relative to the benefit. Just a final question from my point of view. One of the issues we've been looking at in this inquiry is access to justice or access to remedies and what have you, and the ombudsman offices and dispute resolution has loomed large as an incredibly important element particularly for vulnerable consumers or consumers of low-cost products. You've done work in that area as well. The question is, do you have standards in relation to dispute resolution? I thought you did.

MR BLAIR: Yes, we do. Yes, to the extent to which I suppose those documents, voluntary documents are used out there is questionable and I don't even think you could say they're grey letter law. I just think they are a voluntary document, that if people see value in it, that they would use it. It's not as if it's a product or a standard for which compliance is sort of fundamental, whereas, you know, I think grey letter law is that issue about if you haven't complied with a standard and something has happened, then grey letter law comes into place but I would think with dispute resolution it's quite different, but yes, we do have a standard on dispute resolution.

MR FITZGERALD: I thought you did. Any other questions at all? Good. Thanks very much for that. That's terrific and that brings to a conclusion our public hearings.

AT 2.14 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY

INDEX