

Productivity Commission's Inquiry Into Australia's Consumer Policy Framework.

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**Submission to the Productivity Commission
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Background

Kildonan Child and Family Services (Kildonan), has provided services to people experiencing hardship for 126 years. The focus of our work is to empower and resource children, young people families and individuals to make decisions about their lives and provide strategic services to address needs and strengthen communities. Kildonan is committed to the development of innovative, soundly researched and proactive services.

Kildonan's involvement with consumer issues

Kildonan is situated in the City of Whittlesea an outer northern Melbourne municipality at the end of the metropolitan train line and where rural Victoria begins. The municipality has large pockets of people on low income and a large population of people born overseas. Detailed demographics can be found on City of Whittlesea website¹. Kildonan is uniquely placed as a welfare agency with a team of financial counsellors² who work directly with consumers experiencing hardship. This experience has given Kildonan considerable understanding of consumer issues as they affect low income consumers. Kildonan has built on this understanding to develop cutting edge programs in partnership with business and has developed a model that offers business an opportunity to form a relationship with consumers experiencing hardship that produce positive outcomes for both for consumers and business. (refer to Appendix A)

Introduction

Kildonan welcomes the Productivity Commission's Inquiry into Australia's consumer policy framework and thanks the Productivity Commission for the opportunity it offers Kildonan and the wider community to participate in this inquiry. This document provides a brief response to the questions raised by the Productivity Commission based on Kildonan's work in the financial counselling sector.

In Australia the Fair Trading Act 1999 (FTA)³ and Trade Practices Act 1974 (TPA)⁴, offer general protections to consumers against exploitative practices. Industry regulators, codes and other instruments offer more targeted protections. There are a range of Alternative Dispute Resolution schemes, and limited community advocates to offer consumers redress and minimise consumer detriment. Legislation, regulation advocacy and alternative dispute resolution schemes currently provide the current safety net for consumers across state and commonwealth jurisdictions however there are gaps in the safety net and few bodies deal effectively with systemic issues. Funding of advocacy is inadequate and inconsistent. Research informing behaviourist economics is questioning the widely held belief that consumers make decisions that will maximise their self interest. This has implications on a competitive market. Existing consumer protections should be maintained and bolstered by drawing on such research. Recommendations addressing gaps in existing consumer protection are outlined in Appendix B.

¹ City of whittlesea available at www.whittlesea.vic.gov.au

² Reference to financial counselors their experience and views in this document is restricted to financial counselors employed by Kildonan. Kildonan financial counsellors do not represent the views of all financial counselors in Victoria or the views of the peak body Financial and Consumer Rights Council.

³ Fair Trading act 1999 (Vic).

⁴ Trade practices Act 1974 (cth)

The Rationale for consumer Policy

1. What are the key rationales for government intervention to empower and protect consumers? What should be the balance between seeking to ensure that consumers' decisions properly reflect their preferences (empowerment) and proscribing particular outcomes (protection)?

The key rationale for government intervention to empower and protect consumers are avoiding market failure, minimising harm to small business and consumers and providing avenues for redress. The major focus is on intervention to avoid market failure, protecting consumers from exploitative practices and minimising consumer detriment by offering redress to consumers for harm suffered. Dealing with systemic issues, is paramount to avoiding the large scale inefficient repetition of the need for consumer redress. To operate a competitive market, business needs to supply goods and services at a competitive price and allow consumers to drive competition through exercising choice.

Government intervention is required when there is market failure. At times markets can fail to deliver economically efficient outcomes. The office of Best Practice Regulation, in its *Best Practice Regulation Handbook*⁵ indicates that market failure as occurs in markets with reduced competition that operate as effective monopolies, markets with information asymmetries between buyers and sellers, markets providing goods and services that are essential to well being which may offer limited choice, where the quality of the product or service if not monitored could have detrimental effects on the public and where impacts on third parties are not reflected in market prices. These circumstances may warrant government intervention is needed to prevent harm and redress the balance. Government needs to prevent business from reducing competition through mergers, prohibit collusion and price fixing, investigate abuse of dominant position in market, prevent high switching costs, and ensure that trade is open and fair. In order to make the market more efficient and to encourage traders to develop best service or product for the best price. Rogue traders need to be penalised or removed from the market as they harm consumers' hip pocket and dent their confidence while other traders suffer harm to their reputation.

Not all markets operate freely, and for some markets a higher level of regulation is necessary to ensure maximum public good. Some markets require that their trade is limited such as the gun market, alcohol and cigarettes. Or need to be controlled such as the banking industry. Markets in essential services like gas electricity water and transport need a higher level of regulation. Often essential services markets are natural monopolies so require additional regulation in order to operate for the public good. Taking care of consumers interests may mean that it is not desirable for all markets to trade without restrictions even if it means a reduction in competition.

Competitive markets cannot exist without consumer choice. Without consumers exercising choice there can be market failure. In order for business to produce goods that people want, consumers need to send the right signals. Market failure, can occur when consumers lack confidence in purchasing the goods they want. Certain types of problems that lead to information failure in markets includes information not being available, information complexity with few discernable differences between products or services, information difficult to access and consumers lacking skills to use the information that is available. However by providing adequate information to consumers, this does not mean consumers always make the best possible informed choice. Australian Bureau of Statistics (ABS) show that ⁶about 20 % of the Australian population experience "considerable difficulties" when using print material and an additional 28% experience "some difficulties" when using print material in their daily lives. Almost 50% of the population has difficulties with printed information yet increasingly there is an expectation to rely exclusively on

⁵ Office of Best Practice Regulation 2006, Best Practice Regulation Handbook, Canberra. Available at: <http://www.obpr.gov.au/bestpractice/index.html> 26/04/2007.

⁶ ABS 4228.0 – Aspects of Literacy: Assessed Skill Levels, Australia,1996, released 8/09/1997, www.abs.gov.au 26/04/2007.

printed material to inform consumer choice. If printed information is provided it should only be one means of information provision. However providing adequate information to consumers, does not necessarily result in consumers make the best possible informed choice.

Research on consumer choice by Behavioural Economists, and the marketing industry show that people often make decisions by using short cuts or heuristics. The growth of brands is testament to the use of heuristics by consumers and can work well for consumers especially for repeat purchases. However when people face uncertain situations that may be complex or when necessary to calculate future costs heuristics are often inadequate as they may contribute towards consumers ignoring information or making inaccurate assumptions. Studies by Behavioural Economists based on psychological research found people do not act rationally all the time, and found consumers are more vulnerable to bad decision making than previously thought. This has implications on competitive markets as people's choices may not always be sending the right signals. A stronger safety net is required to better address both business and consumer market failure.

Consumer protections are needed to reduce consumer detriment. Consumer Affairs Victoria (CAV) *Consumer Detriment in Victoria: a survey of its nature, costs and implications* estimates that in 2005- 2006 consumer detriment cost Victoria \$3.15 billion and is slightly higher in impact than figures from the United Kingdom.⁷ CAV includes physical harm, monetary loss, time loss and loss of satisfaction in describing consumer detriment. Consumer detriment is a loss suffered by consumers as a result of an adverse market transaction and includes the consumers loss in seeking redress. Consumer detriment does not only affect consumers the industry's reputation may also suffer through adverse word of mouth.

In a competitive market both consumers and business depend on each other through the exchange of supply and demand. Market failure occurs both through business practices and through consumers difficulties in exercising choice. In order to achieve a balance government needs to intervene to level the playing field to avoid market failure. Market failure results in higher prices and reduced choice. Stronger consumer protections are required to address market failure and provide redress to consumers.

Recommendations:

Review existing consumer and small business protections and strengthen the current system by addressing the gaps as proposed in Appendix B.

⁷ Consumer Affairs Victoria, Consumer detriment in Victoria: a survey of its nature, costs and implications, research paper No 10 October 2006. [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/cav_report_consumer_detriment_10.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl15b3/2/hilite](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/cav_report_consumer_detriment_10.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl15b3/2/hilite)

2. What are the implications of developments in theory (eg. Behavioural Economics) for consumer policy? Do they render some traditional views of the role for government in this area less relevant, or do they simply require more sophistication in the analytical framework and policy toolkit?

The implications for consumer policy based on findings from Behavioural Economics means we need to rethink and strengthen existing consumer protections. Behavioural Economists by observing how people actually make decisions conclude that decisions people make are often influenced by outside factors rather than people making a rational decision based on maximising their benefit.

An article in the University of Chicago magazine *Can behavioural economics save us from ourselves* by S.A. Stewart,⁸ summarises research by Richard Thaler and Robert P. Gwinn both academics, who studied the Swedish Government's partial privatisation of the country's retirement scheme. The Swedish government advertised the change in the retirement scheme and provided information and encouraged people to shop around for alternative funds while providing a default fund as part of the safety net. A third of people who made no decision and went with the default fund were better off than people who actively chose to change funds resulting in higher fees and less equity than the default fund. As a result Thaler argues for default funds or safety net to form part of consumer choice when it comes to making complex decisions. He is quoted as saying about the Swedish findings: "There is no reason to think that markets always drive people to what's good for them. Markets also drive people to what's good for the people selling."⁹ It also needs to be noted that according to Australian Bureau of Statistics international comparisons on literacy levels, Sweden scored significantly higher on all categories than Australia.¹⁰ Clearly the provision of information on it's own is not sufficient for large numbers of people to make the best possible choice that would advance their interests.

*The Marketplace of Perceptions*¹¹ summarises behavioural economist findings, in the article C. Lambert explains that humans exhibit "...all manner of irrational, self-sabotaging, and even altruistic behavior." Lambert states that Prospect Theory developed by D. Kahneman and A. Tversky demonstrates that the way alternatives are presented is as important as the actual alternatives when people work through risk and uncertainty. The presentation of alternatives can influence people's preferences when deciding about alternatives that involve risk. Lambert summarises Eric Wanner of the Russell Sage Foundation who states that once the choice is framed by the advertiser "...you can argue that the buyer may no longer be acting entirely in his own self-interest if the seller has invented a frame for the buyer, skewing the choice in favour of the seller."¹² We may all be susceptible to the influence of framing when making decisions, so how can we use framing to maximise consumer self interest?

⁸ Stewart, S, *Can behavioural economics save us form ourselves?* University of Chicago Magazine, February 2005 volume 97, Issue 3 . <http://magazine.uchicago.edu/0502/features/economics.shtml>. 26/04/2007.

⁹ Stewart, S., *Can behavioural economics save us form ourselves?* University of Chicago Magazine, February 2005 volume 97, Issue 3 . <http://magazine.uchicago.edu/0502/features/economics.shtml>. 26/04/2007. P.3.

¹⁰ ABS 4228.0 – Aspects of Literacy: Assessed Skill Levels, Australia,1996, released 8/09/1997, www.abs.gov.au 26/04/2007 P.17.

¹¹ Lambert C., *The Marketplace of Perceptions* (March – April 2006) <http://www.harvardmagazine.com/online/030640.html> 26/04/2007 P.1.

¹² Lambert C., *The Marketplace of Perceptions* (March – April 2006) <http://www.harvardmagazine.com/online/030640.html> 26/04/2007 P.14.

Research into consumers ability to decide between suppliers in the UK electricity market by C. Wilson and C. Waddams¹³ found that people have difficulties making comparisons and making decisions that are beneficial and that this then influences how the market develops. Analysis of switching behaviour based on price found that one third to a fifth lost their surplus while others only managed to achieve one quarter to one half of the maximum gains on offer. Wilson and Waddams argue that such bad decision making skews the balance of power in favour of firms and that this type of decision making together with switching costs could undermine competitive markets. Further they stress that this behaviour was not due to misrepresentation but to the complexity of the product on offer and the difficulties consumers faced in making accurate comparisons.

Similarly financial counsellors see consumers who present with problems in switching between electricity suppliers. Often consumers do not know they have switched suppliers until they receive a bill or query their account. If the environment that a person makes decisions is very important then the environmental influences have great implications for people entering contracts and for issues around implicit and informed consent. More research into this area is urgently needed and the findings need to inform and shape consumer protections.

A very brief summary of behavioural economic literature indicates that in real markets consumers do not always send out the desired signals. Consumer choices are not always the result of careful consideration of options and consumers do not always end up with the best possible choices and outcomes for their circumstances. In countries with advanced literacy, information, on its own is not always used by consumers to maximise their self interest. This may mean that competitive markets may not be as competitive as we once thought because a large number of people are influenced by a range of factors other than simply maximising their self interest. Decisions are not always based on the facts about the product or service but on other often unrelated factors. Broadly speaking the findings show that consumers misjudge risk when relying on heuristics and framing may have a greater influence on consumer decision making than we thought. Government needs to research into findings from behavioural economists and strengthen consumer protections to redress the imbalance. Robust consumer protections may result in greater clarity and less government intervention overall.

Recommendations:

Research into marketing practice to see whether framing and other marketing practice unfairly swings decision making in favour of the seller. Based on the results of the research introduce more robust and relevant consumer protections.

The adoption of recommendations as proposed in Appendix B.

Timely research into translating findings from Behavioural Economics into the regulatory framework to provide more relevant consumer protections.

¹³ Wilson C., Price C., Do Consumers Switch to the best Supplier?, Centre for Competition Policy Working Paper 07-6. www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP07-6.pdf

3. Has the inclusion of new objectives, such as strengthening the position of small business in their dealings with larger enterprises, impacted on the effectiveness of the framework? Should consumer policy be further extended to cover small businesses as consumers?

In its 05/06 annual report The Australian Competition and Consumer Commission (ACCC) declared that Safeway was involved in “price fixing and misuse of power in the bread market” and had a penalty of 8.9 million dollars levied against it. ACCC openly states in its annual report that it cannot pursue each breach of the Trades Practices Act or bring every matter to Court. Cartel behaviour requires a lot of time to investigate and even when at court they need to often rely on circumstantial evidence for persecution. This could indicate that small business are operating in a market place with various levels of market failure. Market failure means consumers have less choice and are paying higher prices than they need to. The Trade Practices Act needs to be strengthened to assist the ACCC in enforcement so that anti competitive behaviour is stamped out. Anticompetitive behaviour always benefits large business who have the market muscle to squeeze out small competitors. Squeezing out of small competitors reduces competition and could result in market failure. Weak penalties create a climate that encourages companies to give price fixing and other illegal activities as they determine financial risk to be worth the gains.

Small business still remains at a disadvantage. Small Business is defined by Australian Bureau of statistics¹⁴ as a business that employs less than 19 people. Small business and Micro business defined by Australian Bureau of statistics as employing less than 5 people are mainly unprotected. They do not enjoy the same consumer protections in the energy market or in finance, and are not protected by the Uniform Consumer Credit Code (UCCC)¹⁵ or the energy retail code¹⁶. As a consequence Financial Counsellors often see individuals who work 7 days a week as sole traders who may have some ability to keep the business going if they had some basic protections. With few consumer protections they often end up accessing margin lenders or declaring Bankruptcy.

Recommendations:

The Trade Practices act needs reviewing and strengthening so breaches are easier to detect and the ACCC has the power to impose and enforce a range of penalties.

Consumer protections need to include micro and small business.

¹⁴ ABS 1321.0 Small Business in Australia 2001

¹⁵ Consumer Credit Code, Appendix to the Consumer Credit (Queensland Act) 1994, available at: <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/Consum/CredCode.pdf>.

¹⁶ ESC available at <http://www.esc.vic.gov.au/public/Energy/Regulation+and+Compliance/Codes+and+Guidelines/Energy+Retail+Code/Energy+Retail+Code.htm>

4. Policy Tools

Are the right tools being used to meet the objectives of consumer policy? Is the current range of tools sufficiently diverse? Do they work? How well?

There are strengths and weaknesses with current policy tools. The success of self regulation depends on the commitment of the individual industry. Self regulation was not as successful as it could have been in the liquid petroleum gas (LPG) industry in Victoria with little enforcement of the voluntary LPG Retail Code. LPG complaints are now handled by the Energy and Water Ombudsman (EWOV). On the other hand the Code of Banking Practice is a voluntary code. It was developed by the Australian Banker's Association. Consumers can make complaints of non compliance to the Code Compliance Monitoring Committee. Unlike the LPG code it is a code that has commitment from the industry and it works to benefit both industry and consumers. The benefits of self regulation are that industry take responsibility for improving their industry practice and could translate into lower costs for industry and consumers but the limitations of self regulation if poorly administered may prove hollow when consumers seek redress if there is poor compliance by industry. Self regulatory schemes need to be monitored by a regulator like CAV or ACCC in a formal capacity and commit some resources to ensure self regulation meet required standards.

Over all the energy market in Victoria operates well however there are problems with addressing systemic issues. The Energy and Water Ombudsman (EWOV) competently handles disputes however EWOV reports but does not handle systemic issues. Systemic issues are referred to Essential Services Commission (ESC) and in future to the Australian Energy Regulator (AER). In EWOV's latest report Resolution 23 April 2007¹⁷ that covers the previous 6 months July-December most of EWOV's complaints are with electricity retailers and the majority of those complaints 65% are in two categories billing 45% and retail competition 20%. These two categories have been problematic for sometime. ESC has some limitations on how they pursue compliance since the ultimate sanction the removal of a retailers operating license is a very blunt instrument and almost impossible to implement on the first tier retailers Origin AGL and TRU without adversely affecting the rest of the market mainly due to the first tier retailer's market share and the complexity and risk of the energy market itself. Clearly the ESC needs a wider range of tools to handle systemic issues. The regulation and enforcement of energy in Victoria works well but can be improved by strengthening ESC to issue penalties through infringement notices or fines and the power of enforceable undertakings. Currently CAV has the power to require enforceable undertakings but not ESC. CAV and in NSW the Independent Pricing and Regulatory Tribunal (IPART) took action and required enforceable undertakings against two energy retailers around marketing practices.¹⁸ EWOV handles complaints well but ESC needs a wider range of tools to handle systemic issues.

The Uniform Consumer Credit Code (UCCC) needs updating. UCCC has been abused by lenders who regularly sign consumers to contracts for business loans and leases so the protections of the code do not apply. It is not unusual for lenders to sign up consumers for car leases while the consumer thinks they are signing up for a personal loan at the end of the lease the consumer not only does not own a car but has to pay a lump sum balloon payment. Usually consumers see a financial counsellor close to the end of the contract and when they are in

¹⁷ EWOV resolution 23 available at: http://www.ewov.com.au/html/Publications/publications_res.htm

¹⁸ Information based on Early Termination fees Compliance review - Draft Decision by CLCV August 2006, 4.2.1, P4, available at [http://www.esc.vic.gov.au/NR/rdonlyres/2EC87E68-8324-465A-AABE-5320BF428BA0/0/Early Termination Draft Decision CLCV.pdf](http://www.esc.vic.gov.au/NR/rdonlyres/2EC87E68-8324-465A-AABE-5320BF428BA0/0/Early%20Termination%20Decision%20CLCV.pdf) also available on CAV website <http://www.consumer.vic.gov.au/CA256F2B00224F55/page/List-of-Enforceable-Undertakings-2005?OpenDocument1=950-List-of-Enforceable-Undertakings-&2=090-2005-&3=-#EnergyAustralia> also available on IPART website: <http://www.ipart.net/>

arrears making redress significantly more difficult. The hardship provisions in the UCCC offer limited protections to consumers so in order to enforce their rights consumers need to argue their case at the Victorian Civil and Administrative Tribunal. Unlike the hardship provisions required from energy retailers under the Electricity Industry Act 2000¹⁹ complaints are handled by EWOV and compliance is monitored by the ESC. Hardship provisions under UCCC are difficult to access by consumers who are largely unaware of their existence.

Mortgage brokers is a growing industry that is confusing for consumers. Banks are regulated but the same product sold by a mortgage broker is not regulated. Consumers transfer confidence to a mortgage broker because they were used to trusting the bank. Brokers are unregulated and commission based usually with a limited number of products and institutions. Mortgage brokers do not have the same arrangements with all institutions. It is highly questionable whether mortgage brokers will give clients the best advise or whether they are acting in the clients best interests yet consumers have expectations that they will get a good deal from mortgage brokers but when things go wrong they have little redress.

Like the mortgage broker industry there are few protections for consumers who engage the services of a pay day lender. The adverse lending conditions of payday lenders often attracts people who are desperate for cash and therefore are magnets to people experiencing hardship. Despite the poor socioeconomic target market there are scant consumer protections.

Similarly the pawn broker industry needs review and regulation more consistent with other finance industry regulation since their customers are especially desperate and experiencing hardship.

Research is needed into the reverse mortgage industry and standards imposed so that consumers do not lose all their house equity through compounding interest if they borrow a sum like twenty thousand dollars. There are few consumer protections for reverse mortgages and no industry standards. As part of their community obligations finance institutions need to develop more suitable products for this market sector.

Some policy tools work better than others in the environment that they are placed. Some self regulation can work while other fails. To ensure consistency in both regulation and self regulation consumer protections need an accessible complaints mechanism and systemic issues need to inform and improve consumer policy so systemic issues are addressed.

Recommendations:

Self regulatory schemes need to be monitored by a regulator to ensure consistency of standards and compliance with their undertakings.

Consumer protections require an accessible complaints mechanism and systemic issues need to inform and adapt consumer policy.

Regulators like the ESC and ACCC need a range of tools to address systemic issues. Imposing fines and enforceable undertakings would greatly enhance consumer protections.

The UCCC needs reviewing to include business. Hardship provisions need to be strengthened and made consistent with the Kildonan model.

Review the mortgage broker industry so they are considered as agents of banks or regulated separately.

Pay day lenders need to be regulated with complaint handling mechanisms and systemic issues

¹⁹ Electricity industry act 2000, also available at http://www.austlii.edu.au/au/legis/vic/consol_act/eia2000261/

shaping consumer policy.

The Pawn broking industry needs to be reviewed and consumer protections regarding complaints need to be consistent with finance industry standards.

Consumer protections and standards need to be introduced to the reverse mortgage industry to minimise harm.

5. Disadvantaged and vulnerable consumers

What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy? Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms? Costs to the community?

The terms disadvantaged and vulnerable to describe consumers has always been problematic. Australian Council of Social service (ACOSS) CAV and ACCC provide three complimentary definitions.

Disadvantaged Australians are defined by ACOSS as people in the community who 'lack what most Australians would regard as the essentials for a decent life',²⁰ they could also be people who 'are excluded from participation in important areas of economic and social life, such as employment, decent housing, basic services, and social support'. The term disadvantage according to ACOSS includes the concepts of poverty and social exclusion. ACOSS describes disadvantage as: "The purpose of this term is to convey that a person, family or community has unmet needs which would generally be regarded as 'basic' (e.g income, housing, health). That is, they are seriously 'deprived' in a major area of their lives, according to community standards. Their unmet needs therefore warrant special attention from Governments and other agencies.' According to ACOSS low income households are those earning the bottom 40% of household income based on ABS data.

Consumer Affairs Victoria in its research and discussion papers *What do we mean by 'vulnerable' and 'disadvantaged' consumers?*²¹ has adopted the.. UK Better regulation Task Force definition of vulnerability as a combination between capacity and person's circumstances. Disadvantage is a "persistence of unfavourable circumstances" or what we would call barriers. Further disadvantage is created through things that an individual cannot always change like, mental, physical, race, age, gender, health, education, income geography etc. Consumer vulnerability is also described in relation to information access & use. Finally a vulnerable consumer is a person who is capable of readily or quickly suffering detriment in the process of consumption.

The ACCC has a practical definition of disadvantage or vulnerable. In its publication for business *Don't take advantage of disadvantage*²² the ACCC lists characteristics that some vulnerable consumers may have. The list includes the following consumers, have a low income, are from non-English speaking background, have a disability –intellectual, psychiatric, physical, sensory, neurological or a learning disability, have serious or chronic illness, have poor reading, writing and numerical skills, are homeless, are very young, are old, come from a remote area or have an indigenous background. In our experience from direct case work business is either largely not aware of the ACCC definition or with the best intentions they use the above as tick a box and apply scrutiny with intrusive questions that may result in people either not feeling inclined to reveal their disadvantage or not being aware that disadvantage is part of their identity. Case work experience shows that broadly speaking people are not inclined to see themselves as disadvantaged and therefore will probably not relate to the disadvantaged tag.

It may also be problematic if based on the above definitions consumers are excluded from goods and services because vulnerable and disadvantaged can be seen as an undesirable target market and offered high cost products instead. Low income and rural households may be

²⁰ ACOSS, How do we measure low income and disadvantage Meeting 25/5 February 2007 pp 1-4 available at: www.acoss.org.au

²¹ CAV What do we mean by 'vulnerable' and 'disadvantaged' consumers?, Debt collection and the fair-trading act, 2004, CAV Melbourne available at [http://www.consumer.vic.gov.au/CA256902000FE154?Lookup?CAV_Publications_Reports_and_Guidelines/\\$file/vulnerabledisadvantaged.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl3263/2/hilite](http://www.consumer.vic.gov.au/CA256902000FE154?Lookup?CAV_Publications_Reports_and_Guidelines/$file/vulnerabledisadvantaged.pdf#xml=http://search.justice.vic.gov.au/isysquery/irl3263/2/hilite)

²² ACCC, Don't take Advantage of Disadvantage: a compliance guide for businesses dealing with disadvantaged or vulnerable consumers, available at: <http://www.accc.gov.au/content/index.phtml/itemId/704340>

exploited through limited choice. For example credit offered to low income consumers at 26% when credit card interest is often advertised below 10% but under Consumer Credit (Victoria) Act 1995 s 39 (1)²³ financial institutions can charge interest up to 48%. Often when Financial Counsellors discuss interest rates with consumers who have borrowed money from more marginal lenders they are largely unaware they are paying more interest than what most banks charge. Consumers know they borrow money and what their repayments are but when Financial Counsellors discuss interest rates with consumers often the reply from the consumer is “well they were the only ones who would lend me money so I didn’t look at the interest rate”. Financial Counsellors often encounter in their casework consumers with limited choices who often are asked to pay more even though they can least afford it. Consumers often approach pawn brokers and pay day lenders as lenders of last resort without fully understanding the implications of such actions. Products like National Australia’s Step up loans²⁴, No Interest Loan Scheme²⁵, low or no interest microfinance, and ANZ’s Saver Plus²⁶, financial literacy²⁷ and matched savings program should be encouraged to expand and more such products need to be seen in the market place, otherwise more consumers go to pay day lenders, pawn brokers, access rent buy schemes and access high interest rate lending in order to secure basic necessities mainly through a lack of choice.

It is very difficult trying to discern who from the general public fits into the category of vulnerable or disadvantaged and such an interpretation was needed in order to implement energy and water retailers’ hardship programs. At Kildonan we do not believe the definition itself is all that useful. Disadvantage may apply to different experiences in a person’s life cycle for example when a person has a marriage breakdown or temporary illness or death in the family and over a period of time the person goes back to work. Some disadvantage may be more long term. Similarly given the findings of Behavioural economics and depending on the stage in our life cycle and personal circumstances we may all be vulnerable or at a disadvantage at different times. Kildonan has developed a model that assists business work with and support consumers experiencing hardship. This is done by training front line staff to respectfully pick up customer cues and streamline customers away from credit into hardship specific programs. See Appendix A. The model has advantages both for consumers and business. Consumers are dealt with respectfully and are given the opportunity to pay their bills and the business benefits from increased cash flow, customer loyalty and improved community image. This model is currently working in the energy and water sector and is being trialled in telecommunications and the banking sector. It is a model that can be adapted to other sectors as well.

The needs of consumers who are experiencing barriers to full participation in the market place due to financial, or social hardship need to be addressed both through generic approaches and through more targeted mechanisms. Consumers experiencing hardship may suffer greater consumer detriment than other consumers. Consumers with more resources may suffer less loss and employ greater skills in successfully seeking redress than consumers with less money and skills. General legislation can offer all consumers protections and alternatives dispute resolution schemes and industry specific complaints handling schemes can offer redress to complaints however in our experience as financial counsellors it is very difficult for people experiencing hardship either to self advocate or seek redress without an advocate and resources for advocacy in Australia are extremely scarce or non existent.

²³ Consumer Credit (Victoria) Act 1995 s 39 (1) also available at:
http://www.austlii.edu.au/au/legis/vic/consol_act/cca1995263/

²⁴ National Australia Bank step Up Loans, information available form: <http://www.nabgroup.com/0,,76553,00.html>

²⁵ Good Shepherd facilitates the NILS program information is available from, Recycling Money For Low Income Australians, No Interest loans, <http://www.infoxchange.net.au/haasp/hasnils.htm>

²⁶ ANZ Saver Plus information available on: <http://www.anz.com/aus/aboutanz/Community/Programs/Saver.asp>

²⁷ ANZ Money Minded program, information available from
<http://www.anz.com/aus/aboutanz/Community/Programs/FinLit.asp>

²⁸ Grameen Bank, information available from <http://www.grameen-info.org/>

Many consumers who present to financial counsellors know that they have been treated unfairly but do not know where to complain or how to complain, neither do they have an understanding of the process. On presentation to a financial counsellor consumers are confused or frightened and often frustrated. It takes considerable resources and skill to listen to the stories, filter out what can be addressed, discuss options and take agreed action. Financial Counsellors are under-resourced, and undervalued resulting in waiting lists for clients and extreme skills shortage in the sector. Kildonan agrees with the Australian Financial Counselling and credit Reform association (AFCRA) not to support the American model of funding financial counsellors through a remuneration of a percentage of the debt repaid as this would seriously compromise their independence and limit the options they offer consumers. Kildonan employs financial counsellors who are funded by industry on the understanding that they retain their independence by not prioritising industry debt and the service is free for consumers. In order for this model to work the financial counsellors independence is maintained. The more common model of funding for Financial counsellors are through the Victorian government with a small number funded through the Commonwealth. However they are funded, financial counsellors need to maintain their independence from industry in order to act as effective advocates for consumers experiencing difficulties in seeking redress.

Consumers experiencing hardship usually do not have a lot of resources or choice as they are often on low incomes and have few assets. They often access credit from fringe lenders like pay day lenders, credit cards with higher interest rates, and pawn brokers. Consumers are not able to access mainstream lending institutions where they could benefit from a lower interest rate. Even if they have assets they may chose products like reverse mortgages that could result in losing their hard earned assets. Regulation of the finance sector should allow banks or banking products based on the Grameen Bank ²⁸ model to offer micro credit products to consumers experiencing hardship. Muhammad Yunus founder of Grameen Bank won the 2006 Nobel Peace Prize for the banks lending model contributing to the public good.

Recommendations:

Any definitions of vulnerable and disadvantaged should be used as guides only. Customers experiencing difficulties paying for goods and services if treated with respect and flexibility are more likely to pay their bills and keep their commitments.

The Kildonan model to be rolled out across financial markets and essential services.

Consumer protections should encourage more low income products like Saver Plus, Step Up Loan, and No Interest Loans and the introduction of products like micro credit and the introduction of new licenses to financial institutions that conduct most of their business with such products.

More funding for advocates like financial counsellors and community workers and solicitors.

6. Generic versus Industry- Specific Regulation

How effective are the generic provisions in the TPA and Fair Trading Acts in meeting their intended objectives? What if any, changes are required to deliver better outcomes?

The TPA in regulating industry and the Fair Trading Act, Victoria (FTA) are broadly effective in meeting their intended objectives. The TPA has a focus on corporation behaviour and the FTA on how traders operate. It is not always easy for ACCC to either investigate or enforce action against collusion and it is not always easy for small business to make these complaints. Similarly it is not always easy for consumers to seek redress for their issues. Legal Aid has been restricted to essential legal issues. Given the literacy levels of the Australian population ²⁹many consumers require advocates to assist with complaints. Based on our work experience often if business or consumers do not phrase their complaint to the relevant body in the required form their complaints are over looked. There needs to be research into both TPA and FTA to benchmark them with best practice overseas and analyse systemic issues and barriers to enforcing action that if addressed may have positive outcomes for consumers.

Recommendations:

TPA and FTA need to be linked to a consumer safety net (refer to Appendix B.)

TPA and FTA need to be continually benchmarked with best practice in consumer protections overseas.

Systemic issues and barriers to enforcing action by TPA and FTA need to be monitored and used to develop evidence based consumer protections.

²⁹ ABS 4228.0 – Aspects of Literacy: Assessed Skill Levels, Australia,1996, released 8/09/1997, www.abs.gov.au 26/04/2007.

7. Enforcement and redress Issues

Are there significant enforcement gaps in the current framework? If so, do they mainly reflect the level of resourcing for those entities responsible for enforcement or are there other factors at work? To what extent has more regulation been substituted for better or more timely enforcement? Could penalties in general legislation reduce need for industry specific legislation?

Kildonan supports the need for general as well as industry specific legislation. Both serve the purpose to deliver consumer protections. Some industries like the energy market are essential to consumers welfare and the market's inherent complexity requires industry specific legislation. The Consumer Action Law Centre argues the need for specific consumer protections in their paper *Consumer Protections In The National Energy market- The Need For Comprehensive Energy – Specific Consumer Protections*.³⁰ CAV in their research paper number 8 *Choosing between General and Industry Specific Regulation*,³¹ acknowledges the need for both general and industry specific legislation to deliver robust consumer protections. General legislation delivers consumer protections across all industries it is consistent and can reduce costs to business however it is harder for consumers to seek redress both because of the level of proof required as well as the level of skill required to achieve redress. Industry specific legislation imposes specific expectations on traders, their behaviour is easier to monitor, there may be higher compliance costs but rules are easier to impose and consumers have easier access to redress.

A recent financial counselling client was involved in an extreme abuse of implicit and informed consent where an under-aged boy was tricked into signing up both his parents to a new energy supplier. The issue was effectively dealt with under the industry specific regulator ESC as a systemic issue. Under general legislation it would take a lot of time and effort for the consumer and for their advocates to seek redress.

There is little point in having more legislation if it is difficult to enforce. An example of legislation without enforcement is the Victorian State Government's legislation that made underquoting in real estate illegal. According to a recent AGE article³² the law is poorly monitored and houses are regularly selling 20% more than the quoted estimate. Despite the widespread practice "Not one agent has been prosecuted under the state law." Estate Agents were quoted saying that the reputation of Agents was undermined. Consumers felt very angry spending large amounts of time searching and large sums of money on building inspections and legal fees only to be outbid by another bidder by a very large margin. "Only 16% of properties sold within 10% of the quoted price". Practices are monitored but action not enforced by CAV. Action is too hard by consumers to bring to court.

Both general and industry specific legislation is useful for consumer protections. Having legislation to protect consumers without monitoring and enforcement is not very useful. Whether general or industry specific legislation it needs to be informed by what is happening to consumers in the marketplace. Detrimental trading practices need to be addressed, consumers need easy redress and access to advocates and systemic issues need to be dealt with. To achieve this adequate resources are needed.

³⁰ Consumer Action Law Centre, *Consumer Protections In The National Energy Market-The Need For Comprehensive Energy-Specific Consumer Protections*, November 2006, Melbourne, contact Gerard Brody

³¹ Consumer Affairs Victoria Research and Discussion Papers, *Choosing between General and Industry Specific regulation*. Research paper No 8 November 2006. [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/industry_and_specific_regulation](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/industry_and_specific_regulation).

³² Schneiders B., Rumble C., *The Age* April 26, 2007. News P3. *Misquoting leaves industry paying a price, say leading agents*.

Recommendations:

Both general and industry specific legislation is needed for robust consumer protections.

Adequate resources to ensure enforcement of consumer protections and funding of advocates to assist consumers to seek redress.

8. Are the current dispute resolution mechanisms and arbitration processes, including consumer tribunals, readily accessible and effective?

Dispute resolution mechanisms offer various level of redress to consumers, however systemic issues are identified but not addressed.

Financial Counsellors find that most Ombudsman Schemes offer good access and redress for consumer complaints. Trends in complaints are documented.

State tribunals range from informal to formal. Small claims are dealt with through Civil Claims list under Victorian Civil and Administrative Tribunal which is more accessible for consumers with a focus on fairness rather than the law. It is still daunting for consumers to gather evidence and represent themselves without an advocate.

It is advisable for Consumers seeking redress for Credit or building issues to go to the tribunal with a solicitor. This raises access and equity issues for consumers experiencing hardship. There are few options for consumers seeking no cost representation. Financial Counsellors may assist with some issues, Consumer Action Law Centre may assist and the Micah Law Centre, and Community Law Centres may also assist however their resources are very limited. There is a need for consumer access to low or no cost dispute resolution after all why should consumers who have already suffered detriment pay for action against a trader who caused the detriment?

Systemic issues are documented but not addressed by dispute resolution mechanisms and arbitration processes.

Recommendations:

Access for consumers to low or no cost dispute resolution and arbitration processes.

Greater access to free advocacy for consumers seeking redress.

Research into Systemic issues identified by dispute resolution schemes to develop informed policy and regulation.

Conclusion

The current consumer protection framework works well but can be improved. Any proposed new framework needs to consider current market failure both in the business environment and consumer choice. Findings from behavioural economists need to inform consumer protections. There are strengths and weaknesses in the current consumer protection framework and changes need to be based on evidence with demonstrated improvements. Consumer advocacy needs to be strengthened through increased funding to ensure greater consumer choice and reduced consumer detriment. Systemic issues need to be researched and addressed to improve the efficiencies of consumer protections. The proposed safety net builds on the existing consumer protections and suggests strategies to improve them.

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APPENDIX A

The Kildonan Model

Access to essential services (gas electricity and water) has always been problematic for people experiencing hardship. Disconnections carry a myriad of costs, not all financial, both to business and consumers. Kildonan developed a partnership with Yarra Valley Water (YVW) that commenced in 1998 offering an alternative model to restrictions for consumers who experience hardship. This model won the Prime Minister's Judges' Encouragement Award for Excellence in Community Business Partnerships in 2003 and won the Prime Minister's Award for Excellence in Community Business Partnerships in 2005. The category was for the Victorian Large Business category "for demonstrating a commitment to their community through excellence in a community business partnership." The partnership is based on sharing knowledge and skills transfer between the community and business sector with a clear focus on consumer outcomes. The model is based on the premise that most people experiencing financial hardship want to pay their bills if treated with respect and flexible payments are offered. The model includes training to front line business staff, customer focus groups, consultation with community groups, energy and water audits as well as access to independent financial counselling. The Kildonan model informed the Committee for Melbourne Utility Debt Spiral Project³³. This model has been evaluated by the Boston Consulting Group. The results from the evaluation are highly positive and Kildonan can present the findings to the Productivity Commission in an oral presentation if required.

Kildonan has also partnered with two large national utility companies to provide energy auditing and financial stability aligning usage and affordability to their customers in Victoria. The model has been further refined to apply to the telecommunications, banking and local government sectors. The Kildonan model can strengthen consumer protections by developing partnerships between business and community sector that work in the best interest of consumers.

³³ Committee For Melbourne, Utility Debt Spiral Project, Melbourne 2004.

APPENDIX B

Gaps in Existing Consumer Protection addressed

Current Consumer protections at commonwealth and state level work well. A report by the OECD³⁴ found that Australia compared favourably to European countries. There are some gaps in the current system may be addressed by the following:.

- Strengthening of Trade Practices Act to reverse onus of proof on product safety and products affecting health. The legislation will require the trader to prove that their product is safe and within acceptable standards. This process could reduce the cost of redress and enforcement and raise consumer confidence in the market.
- Easy to follow comparators available at point of sale and websites, with compulsory risk disclosure within all markets that sell complex goods and services. Currently comparators are used in the energy and financial markets. In addition, star ratings are used for appliances to determine energy efficiency comparisons. To our knowledge compulsory risk disclosure is not used with comparators. Risk disclosure could greatly strengthen service and product comparisons.
- Introduction of regular nation wide reviews of state fair trading acts and benchmarking of consumer protections. Benchmarking would include Australia wide adoption of unfair terms in consumer contracts as per the Victorian Fair Trading Act (1999) and uniform cooling off periods in all contracts. The proposed fair trading act is to be administered by state or territory jurisdictions.
- State and Federal jurisdictions to work under a centralised complaints and referral system similar to the proposed system in the United Kingdom. Centralised complaints could enhance consumer access and reduce inefficiencies in existing systems. The centralised system would handle some complaints, refer other complaints to appropriate bodies and gather information on systemic issues to inform government of policy, and regulatory and legislative gaps.
- The Kildonan model utilised to inform financial markets and essential services.
- Fund consumer advocacy for prevention of consumer detriment. Consumer advocates can inform consumers about their rights, assists consumers to lodge complaints, access alternative dispute resolution schemes, and conduct research and policy development from the consumer's perspective. Consumer advocacy is under-funded in Australia. Inadequate funding reduces the effectiveness of advocacy services through reduced access due to waiting lists. Research and policy development needs to be funded to address systemic issues. Increased funding to financial counsellors, community consumer workers and specialist law centres ie Consumer Action Law Centre and Micah Law Centre.

³⁴ OECD, Best Practice for Consumer Policy: Report On The Effectiveness of Enforcement Regimes, <http://www.oecd.org/dataoecd/56/7/37863861.doc> 25/04/2007