



Submission to the Productivity Commission Inquiry

Consumer Policy Framework

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Overview

The Victorian Council of Social Service (VCOSS) has served Victorians as the peak independent coordinating body of the social and community services sector for over 60 years. VCOSS raises awareness of the existence, causes and effects of poverty and inequality and advocates for the development of a sustainable, fair and equitable society. As well as promoting the wellbeing of those experiencing disadvantage and contributing to initiatives seeking to create a more just society, VCOSS also provides a strong, non-political voice for the community sector.

VCOSS works together with its members on issues of poverty and inequality and seeks to ensure that community resources and services are accessible and affordable. VCOSS promotes community participation and strengthening the value of citizenship in our community. VCOSS advocates on behalf of disadvantaged Victorians through:

- policy development and analysis;
- direct advocacy to government;
- evidence based research;
- reports, media releases and submissions;
- an annual State budget submission; and
- strengthening the community sector with collaborative initiatives and by providing a range of services to member organisations.

VCOSS believes that strong consumer protection regulation is necessary to help protect low-income and disadvantaged people from financial hardship caused by detrimental market outcomes. But it is important to recognise that such protections benefit *all* consumers; while those on middle and higher incomes usually have the resources to absorb financial losses, they are still affected by market failure. It is also necessary to recognise that consumer policy, far from impeding competition, is rather a fundamental part of it.¹ Consumers *create* competition, and consumer protections *enable* that creation.²

In this submission we examine a number of discrete areas that we see as central in an effective consumer policy framework. Part 1 discusses the rationale for government intervention in the market, and explores examples that shed light on the connections between intervention, competitiveness and consumer outcomes. Part 2 addresses the difficult question of how to define vulnerability and disadvantage, drawing a distinction between vulnerable consumers and vulnerable people. Part 3 considers the choice between generic and industry-specific regulation, and Part 4 discusses the mechanisms for enforcement and redress. Part 5 considers a national consumer advocacy body to protect the interests of consumers and thus improve competitiveness and consumer outcomes.

1 The rationale for government intervention

Markets have two sides and, for a market to work effectively, producers need to be competitive and consumers need to be able to exercise their buying power.³

Government intervention in markets is necessary to ensure that competition brings the broader social benefits that it is intended to, so targets those areas where unconstrained competition does not, or can not, meet societal needs. The rationale for intervention can thus be understood as:

- addressing market failures, such as power and information asymmetries, and externalities;
- pursuing social objectives, such as ensuring access to essential services, policing crimes, and addressing disadvantage and social or geographic isolation; and
- managing public risk, such as health and safety and standards regulation.⁴

These goals are themselves quite broad and open to interpretation. However a number of underlying principles can guide both the deployment and degree of intervention in different market sectors.

Empowering consumers

The empowerment of consumers is an essential condition for an effective and competitive market. For example, if consumers cannot differentiate and freely choose between products, no incentive is created for businesses to provide better goods at better prices.⁵ Consumer empowerment is especially critical where products are essential and have no practicable substitutes. This lack of alternatives creates a power imbalance that can have serious implications, particularly for vulnerable consumers. This is exemplified in the pay day lending market, where exploitative contracts abound, even though the market is fiercely competitive⁶ — lenders compete for desperate customers in financial hardship not by offering better prices or terms (which do not vary much across the range of market participants), but with loyalty schemes and incentives (such as a 50 per cent discount on the fee of every sixth loan⁷).

Information asymmetry

Consumer empowerment is often undermined where consumers lack the necessary information to make decisions in their best interests. This has been a problem in the energy market: because energy tariffs are complex and difficult to understand, many households have made poor choices that left them worse off.⁸ Similarly, the complexity of mobile phone contracts has left many people burdened with inappropriate choices or locked into unaffordable long-term contracts.⁹

Information asymmetry and intermediaries

The Issues paper suggests that information problems can be addressed by the increasing number of intermediaries to assist consumers in their decision making.¹⁰ However, as intermediaries are often not dispassionate referees but market participants in their own right, their presence in a transaction can simply shift the locus of the problem without actually addressing the information problem itself.

For example, the finance and mortgage broker industry is characterised by a number of persistent problems:

- *the consumer may not receive information about the nature of the services provided by the broker, or their rights in relation to those services;*
- *the consumer may rely on the recommendation of a broker who is influenced by a conflict of interest and that conflict of interest may not be disclosed to the consumer;*
- *the consumer may rely on the recommendation where the broker does not have a reasonable basis for that recommendation, due to the failure of the broker to properly consider the consumer's individual needs, objectives and financial circumstances, and/or to properly research a range of loans or credit facilities;*
- *the consumer may enter into a contract with the broker which is unfair, in that it commits the consumer to paying considerable fees, limits the capacity of the consumer to shop around, and contains few protections for the consumer; [and]*
- *effective and easily accessible remedies are not available to the consumer where advisers fail in their advisory obligations.¹¹*

Similarly, users of utility connection services are more likely to experience a number of specific market failures including:

- delays in connection or disconnection, leading to additional costs;
- being unfairly billed for services they did not sign up for;
- not being informed about their choice of retailers or the terms of the contract that they were given, resulting in some customers being placed on market contracts they did not want and having to pay termination fees; and
- being unable to obtain redress for these failures because the industry ombudsman has no jurisdiction over intermediaries.¹²

Those intermediaries that fulfil their consumer assistance role more successfully (such as insurance brokers and financial advisors) are more strictly regulated (via licence requirements).¹³ Thus it is clear that intermediaries are not a substitute for specific regulation.

Unscrupulous traders of complex goods can very easily exploit lack of consumer understanding. Hence information disclosure is a crucial element of consumer policy.

Protecting consumers

Intervention is necessary to provide mechanisms to enforce compliance with regulations and provide means of redress for consumers affected by regulatory breaches. It is also required to protect vulnerable and disadvantaged consumers from market failures when the impact of those failures is substantial.

Enforcement and redress

While the Issues Paper suggests that the possibility of consumers pursuing legal action 'provide[s] additional discipline on suppliers and thereby facilitate[s] better market outcomes',¹⁴ the legal system is no substitute for appropriate redress and enforcement mechanisms. Most consumers are discouraged, by the costs, inconvenience, and uncertainty of outcomes, from pursuing redress through the

courts.¹⁵ Disadvantaged consumers, in particular, usually lack the financial resources to pursue actions through the legal process.¹⁶

Consumer policy must provide mechanisms outside of the formal legal system for the making and resolution of complaints, to protect consumers from detriment and promote access to justice. State offices of fair trading, industry regulators and ombudsman schemes provide an effective means of addressing consumer concerns and have been instrumental in identifying systemic issues. This will be examined further in Part 4 below.

Protecting disadvantaged and vulnerable consumers

Although all consumers may be vulnerable in particular circumstances to consumer detriment, disadvantaged consumers need special consideration. Disadvantaged consumers are those whose wellbeing and ability to fully participate in the community is compromised by financial hardship, mental or physical illness, homelessness or other situations or attributes. They are more susceptible to consumer detriment, and (because of their limited financial resources) more heavily impacted by it.¹⁷

Intervention to protect vulnerable and disadvantaged consumers should target those market sectors where the impacts are most severe, and those that specifically target vulnerable or disadvantaged consumers. These issues are explored in more detail in Part 2 below.

Market responses

While 'the actions of a small number of well-informed consumers... [will often] be sufficient to deliver good outcomes to most consumers',¹⁸ in some cases this simply leads to stratified markets, where disadvantaged or vulnerable consumers only have access to a sub-sector of the market that, at best, delivers an inferior service and, at worst, preys upon their vulnerability.

The credit market is a good example: while most consumers have access to a range of credit options that suit different purposes and circumstances, disadvantaged consumers are usually limited to pawnbrokers and payday lenders, with onerous terms and enormous effective interest rates.¹⁹ Other stratified markets include banking, with low-income account holders subject to inequitable fees and low service levels, and — in some jurisdictions — utilities.

Extensive research in the UK energy market revealed significant stratification, with affluent customers being 'cherry picked' by new market entrants offering discount prices, special offers and service flexibility,²⁰ while low-income customers were paying the highest tariffs with little payment flexibility and, on the basis of having prior debt, unable to choose another supplier.²¹ A study by the School of Architecture, Planning and Landscape at the University of Newcastle upon Tyne found a number of newly privatised or deregulated services either physically withdrew from disadvantaged areas or systemically discouraged disadvantaged customers.²²

Such 'redlining' was a concern of consumer advocates during the introduction of full retail competition in Victoria's energy industry.²³ The fact that this has not so far eventuated is due to the strong consumer protection framework that has developed (including the obligation on incumbent retailers to supply energy according to a standard contract with a capped price). While all retailers can selectively offer market contracts, which in practice do not vary greatly price-wise from the capped price,²⁴ these provisions mean all customers are able to access an energy supply contract that meets appropriate price and service standards.

The effectiveness of these provisions in preventing redlining raises serious concerns about the impact on vulnerable consumers of these protections being removed.

The costs of intervention

VCOSS recognises the need to minimise unnecessary regulatory burdens on businesses. However it is also vital, both for social equity and for the efficient operation of the market, that consumers are empowered and informed, that disputes can be resolved and redress facilitated, and that vulnerable and disadvantaged consumers are protected. Consequently, assessments of the net benefit of regulatory intervention must consider the impacts of consumer detriment — including the cost of not intervening — as well as the costs of regulation for business and government.

The burden of regulation

In 2006 the Victorian Department of Treasury and Finance calculated the cost burden of existing regulation to be \$3.3 billion,²⁵ while the Productivity Commission estimated compliance costs Australia-wide at 'up to \$35 billion in 2005-06.'²⁶ Other studies have estimated the costs of regulation to be between \$11 and \$86 billion.²⁷ Clearly, there is no consistent methodology for calculating the monetary cost; nor is cost a reliable indicator of the regulatory burden.²⁸

Pages of regulation is another common measure of regulatory burden. Thus, the Victorian Competition and Efficiency Commission (VCEC) reported that in the twelve months to January 2007, the extent and complexity of regulation, measured in pages, increased by 4.6 per cent.²⁹ The same report, however, notes that pages is an imperfect measure, and often bears no relation to the complexity or compliance burden of the regulations thereon.³⁰

An oft-cited cost of regulation is the constraining effect on the effective operation of competition. However we have not been able to locate any reputable study giving evidence of this. On the contrary, the only data we have seen that correlates a measure of the intensity of regulation with the degree of competition — looking at the Victorian energy industry — shows that as regulatory intensity (measured, bluntly, in pages) increased, competition (measured, also bluntly, in customer churn rates) also increased.³¹ This accords with the observation that despite having what are widely regarded as the strongest consumer protections in Australia, Victoria's energy industry is considered (equally with the UK) the most competitive in the world.³²

The benefits of regulation

Where the incidence and degree of specific forms of consumer detriment can be ascertained, costs may be able to be estimated. For example, in the twelve months to March 2006 the direct cost of consumer detriment in Victoria was estimated at 1.5 per cent of gross state product, or \$3.15 billion.³³ This was distributed equally between repairing or replacing faulty goods, out-of-pocket expenses incurred in following up or resolving problems, and personal time.³⁴ But indirect costs and other impacts must also be recognised. For example, electricity disconnections have direct costs (such as reconnection fees), indirect costs (such as food spoilage, the cost of substitutes such as candles, lost household and work or school productivity), and a number of other impacts (such as emotional distress and family conflict) whose intangibility does not negate their significance.

Many of the costs of consumer detriment — particularly when it affects disadvantaged consumers — is transferred to the broader community. Significant consumer detriment often forces those affected to turn to government assistance services and community-based welfare agencies, including emergency relief funds and community financial counselling programs. The latter is a government-funded community services sector that deals extensively with people who have been severely affected financially by consumer detriment. In Victoria, in the last year alone, there have been approximately 36,000 referrals to around 150 financial counsellors.³⁵ This represents substantial community expenditure to mediate the impacts of market failures.

Emotional stress is a significant impact of consumer detriment. Fifty per cent of consumers experiencing detriment report high or very high emotional costs including stress and frustration.³⁶ This rises to around 70 per cent in housing-related matters such as buying, renovating, or renting a home.³⁷ A more recent study focusing on consumer disputes found that 70 per cent of those who had been involved in a dispute with a business experienced a significant emotional cost.³⁸ Not surprisingly, disadvantaged consumers are not only more vulnerable to experiencing detriment and more heavily impacted financially; they are also more susceptible to incurring emotional costs.³⁹

Conclusion

Intervention to protect and empower consumers is necessary to address:

- information and market power asymmetry, especially with complex and technical products;
- access to essential goods and services including energy, water, telecommunications, housing, transport, human services and financial services; and
- disadvantaged and vulnerable consumers, especially in market sectors where the cost of detriment is high (such as expensive or essential goods) or products are only purchased when consumers are vulnerable (such as funerals and health care)

Intermediaries can help consumers with information problems but are no substitute for appropriate regulation.

Cost-benefit assessments must recognise:

- the emotional and financial costs of consumer detriment;
- the costs borne by disadvantaged and mainstream consumers, government and welfare agencies as a result of non-intervention;
- that, notwithstanding the ease with which they can be represented in monetary terms, the costs of regulation are no less difficult to accurately quantify than the benefits; and
- that consumer confidence —boosted by positive consumer outcomes — is fundamental to the effective operation of competitive markets.

2 Disadvantaged and vulnerable consumers

The responsibility to provide support and assistance to the vulnerable and disadvantaged does come at a cost. The cost of not providing the support and assistance where it is needed comes at a much higher cost however – and not simply one recorded in dollar terms.⁴⁰

VCOSS and other community sector organisations commonly use the term 'vulnerable and disadvantaged' to refer to households or people whose wellbeing or ability to fully participate in the community is compromised by financial hardship, mental or physical illness, homelessness or other situations or attributes. For the purposes of this submission, however, we will use the terminology defined by the Commission: 'disadvantaged' referring to the abovementioned group; and 'vulnerable' referring specifically to any consumers at risk of detrimental market outcomes.

Defining disadvantage and vulnerability

Although it is difficult to quantify disadvantaged consumers — as disadvantage is complex and dependent on a range of factors — one indicator often used for financial disadvantage is eligibility for Commonwealth Government-issued concession cards. Around 25 per cent of Victorians hold a concession card, and around 37 per cent of Victorian households contain at least one concession card holder.⁴¹ While not all concession-card holders are severely disadvantaged, the fact that eligibility is determined by personal and household income indicates that the vast majority have low incomes and few (if any) savings, and are thus liable to be heavily impacted by poor consumer outcomes. Consequently it must be recognised that the perception of disadvantaged and vulnerable consumers as a ‘relatively small group of consumers’⁴² is fundamentally inaccurate.

Disadvantaged consumers are usually also vulnerable consumers because their limited capacity to participate fully in the community at large includes a limited capacity to participate in the market. Because they are also least able to absorb the cost impacts of consumer detriment, specific regulatory interventions may be justified to help protect them from being further marginalised. But it must be recognised that because ‘all consumers are vulnerable, at least in the sense that all consumers experience the effects of market failure’,⁴³ and ‘even well-informed consumers are likely to be vulnerable in some situations’,⁴⁴ measures taken to mitigate the impact of market failure on the disadvantaged benefit all consumers.

Market failure affects all consumers (housing)

Reduced housing affordability in the private rental market has had a detrimental impact on all private tenants, regardless of their level of income. Rent increases in the last twelve months have been as high as 27.3 per cent for houses and 53.5 per cent for apartments.⁴⁵ In Victoria, almost 18% of householders are in the private rental market,⁴⁶ so rental market failure has affected a significant portion of the population over all demographic groups. But low-income households are least able to absorb additional costs, and since more low-income households (excluding aged pensioners) occupy private rental than any other tenure, spiralling rental costs are particularly detrimental for this group.⁴⁷

Consumer protections benefit all consumers (energy)

A robust consumer protection framework has evolved in Victoria in response to financial hardship of low-income energy consumers. Intended to assist disadvantaged and vulnerable households, the relevant regulations are targeted on a situational rather than demographic basis, coming into effect only in cases of bill payment difficulty. Thus while disadvantaged and vulnerable households are well protected, the 8% of middle and higher income households who experience bill payment difficulty in any given year⁴⁸ are also protected.

Further, it must be recognised that disadvantage is a condition, not a personal trait. Disadvantage is often connected with life stages (for example, period of unemployment, occurrence of serious acute illness, separation while children are young), and while some people are chronically disadvantaged, many more experience it transitionally. This is one reason why it is impracticable to target consumer protection legislation specifically at disadvantaged consumers.

On the impracticability of targeting, it is not possible to define and identify ‘the vulnerable’. The demographics of vulnerability and disadvantage change: individuals move in and out of financial stress, subject to a range of external

factors (such as unanticipated financial crisis through accident, adult-onset health problems, family breakdown, changes in labour markets and social security policies, and so on). 'Temporary financial hardship' can become 'chronic'. Rigid definitions invariably fail to accommodate this movement and transition.⁴⁹

So the perception of vulnerable and disadvantaged consumers as a small minority among consumers in general (for example, the Issues Paper posits that 'the use of 'universal' approaches in order to protect an often relatively small group of consumers may be... costly, or... ineffective') is false, not only because those definable as 'vulnerable and disadvantaged' *at any one point in time* are in reality a significant minority (as noted above⁵⁰), but because over any period of time the number is significantly higher as individuals and families enter and leave a period of disadvantage.

Furthermore, measures such as income thresholds are overly simplistic as they fail to take into account the impact of household type or reasonable cost of living and therefore what can be considered 'reasonable income'.⁵¹

Disadvantage is multi-faceted. Measures of income and expenditure, assessments of social exclusion or inclusion, and indicators of wellbeing are all used to define, quantify or assess disadvantage and all approaches have strengths and shortcomings. While they are useful in developing an overall view of the nature and incidence of disadvantage, and enable the identification of specific demographic sub-groups that are most susceptible to disadvantage and hardship (such as the unemployed, single-parent households, private tenants, Indigenous Australians, people with chronic physical and mental illnesses, and those experiencing homelessness⁵²), they are not sufficient to target legislation or regulations intended to protect disadvantaged people without excluding some who should be protected.

Effectively targeting vulnerable and disadvantaged consumers

Protections that target specific issues and outcomes rather than demographic groups are in most cases sufficient to protect vulnerable and disadvantaged consumers, with the added benefits of comprehensiveness (because they also protect mainstream consumers from market failure) and efficiency of implementation (because, being universal, they can be integrated into standard business practices). As discussed in Part 1 above, although consumer detriment is more obvious when it affects disadvantaged consumers (because of their increased susceptibility to it and their limited capacity to mitigate financial losses), *all* consumers are affected at times, and the impacts are still significant, both financial and emotional.

Protecting vulnerable energy consumers — a case study

Because electricity and gas are essential services with no practicable substitutes, systemic market failure in the energy retail industry is a serious social problem. In Victoria, the existence of significant levels of energy-related hardship among disadvantaged consumers — including high levels of disconnection for non-payment⁵³ (especially among already marginalised communities⁵⁴), accumulation of unsustainable debt to pay high bills,⁵⁵ and rationing consumption at inappropriately low levels to ensure affordability⁵⁶ — led to incremental additions to energy-specific legislation until a quite comprehensive consumer protection 'safety net' was in place. An inquiry into financial hardship among energy consumers in 2005 noted the broad effectiveness of the consumer protection regime but identified a number of opportunities for further strengthening the protection framework.

Currently the Victorian energy consumer protection framework is probably the strongest in Australia, including obligations to supply, financial penalties for breaching disconnection protocols, obligations to implement comprehensive policies and programs to assist customers in hardship (including offering flexible payment arrangements), restrictions on marketing, information disclosure requirements, and price regulation.

While protecting disadvantaged consumers is the aim of the regulations, they are tied to particular events (such as a customer advising of incapacity to pay a bill, or the retailer reaching certain points in the pre-disconnection process) rather than applied to a certain kind of customer. This ensures that the protections are activated by a reliable symptom of hardship (inability to pay) rather than relying on customers meeting 'disadvantaged' criteria which, as discussed above, are inherently inaccurate.

The universalist nature of the protections also means that retailers can incorporate their obligations into their existing account and payment management systems. This simplifies ongoing compliance for retailers and helps ensure comprehensive coverage for consumers.

Regulations that protect vulnerable consumers should address the key factors in vulnerability — information asymmetry, market power imbalance, and circumstances or sectors where consumers under pressure or stress (particularly relevant for products or services accessed in times of crisis such as funerals and tow-trucks). Those protecting disadvantaged consumers need to consider essentiality and the magnitude of adverse financial impact of detriment.

Hardship policies

Hardship policies are a feature of the Victorian energy and water industries and have been instrumental in improving outcomes for disadvantaged consumers. Hardship policies are concerned with bill payment problems and are thus relevant to products or services given on credit, especially those considered essential.

Victorian utility retailers' hardship policies include provisions for varying payment terms, assistance with managing consumption, and (for customers in serious or ongoing hardship) case-managed hardship programs. These programs can deliver debt discounts or write-offs if deemed necessary, and offer protection from disconnection or other punitive action while participating in the program. Debt discounts are often given as repayment incentives: for example, for every three instalments (of a payment plan) made by the customer, the retailer itself makes an additional payment on the customer's behalf.

A number of Victorian utility retailers have found that far from being a burden, hardship policies and programs have been good for business. By engaging productively with non-paying customers, retailers maintain good relationships with them and are more likely to get partial payment of most debts; whereas a more aggressive debt-collection oriented approach has a lower overall yield. For example, Yarra Valley Water's hardship program has led to both better outcomes for disadvantaged customers and for the company itself through improved cashflow and debtor management. By industry standards Yarra Valley Water has one of the lowest proportions of debtors as a percentage of total revenue.⁵⁷

Conclusion

Vulnerability and disadvantage are conditions, not attributes, defined by a combination of factors including personal circumstances as well as characteristics of the products or market sector in question.

The needs of vulnerable and disadvantaged consumers are best met through regulatory processes that target the detrimental outcome rather than demographic sub-groups.

Victoria's energy regulations are an excellent example of effective targeting of vulnerable and disadvantaged consumers through specific consumer policy.

Protecting vulnerable and disadvantaged consumers generally benefits *all* consumers, because:

- all consumers are sometimes vulnerable;
- many consumers will be disadvantaged at some point in their lifecycle; and
- consumer confidence is *fundamental* to the effective operation of markets.

Universalist approaches (whether in generic or industry-specific regulation) are cost effective for businesses because necessary protocols can be integrated into standard systems.

3 Choosing between generic and industry-specific regulation

*Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in a position to do so.*⁵⁸

Generic provisions in the *Trade Practices Act* (TPA) and *Fair Trading Acts* (FTA) form a firm foundation for consumer policy. The ability to review the effectiveness of these Acts and strengthen them where necessary is the most effective way of addressing emerging issues in the marketplace. For example, amendments to Victoria's FTA in 2002 and 2003 (strengthening the compliance regime and proscribing unfair contract terms) addressed market failures associated with a minority of traders across a range of industries by dealing with inadequacies in both the content and enforceability of the generic legislation.

Industry-specific regulation should supplement generic regulation where necessary by dealing with specific features of or issues in the industry in question that require more targeted responses than can be achieved under general regulation. This is fundamentally distinct from covering 'inadequacies in the design and/or enforcement of generic regulation,'⁵⁹ which should be addressed by strengthening the coverage and compliance regimes of generic regulation. Rather, industry-specific regulation should address:

- idiosyncratic features of markets that are not found in most industries and therefore would be superfluous in generic regulations; and
- the need for more detail or stronger protections than is given in generic regulation due to certain qualities of the product in question.

The effectiveness of specific consumer protections in utilities and the financial services sector suggest that industry-specific regulation is especially necessary in areas of technical complexity or where the services provided are of an essential nature.⁶⁰

Energy-specific regulation in the Victorian energy industry

The Victorian energy industry makes for a good case study because:

- Energy is a unique product that meets most of the criteria for considering industry-specific regulation (for example, it is essential, has no effective substitutes, and is given on credit); and
- Energy regulation in Victoria is comprehensive, highly effective, and does not appear to have constrained competition (see Part 1 above).

Victorian energy regulation addresses both idiosyncratic market features (such as modes of delivery) and the essential nature of energy and its interrelationship with basic health and wellbeing.

Idiosyncratic market features

Energy is delivered to households instantaneously and consumption measured with meters. Energy regulation prescribes minimum standards for meter reading and the billing system (including frequency of meter reads, provisions for estimated reads, bill frequency and information requirements), limits customer liability for back-billing owing to meter or billing errors, and governs quality of supply and safety issues. Including these details in the TPA or FTA would be impracticable because the requirements for each are specific to the products in question.

Special considerations

Energy is an essential product that is fundamental to individual and community wellbeing. Much of energy regulation is aimed at ensuring ongoing access to a sufficient quantity for all households regardless of wealth or income levels. Consequently, the following is delineated:

- Payment terms, including offering a range of payment methods (including cash, EFT and online) and options (such as instalment plans);
- A range of requirements relating to dealing with customers experiencing one-off or ongoing payment difficulties due to hardship;
- Restrictions on disconnections for non-payment, including specific procedures that must be followed before disconnection;
- Specific regulations on explicit informed consent, credit assessment, product disclosure and marketing that go further than those provisions in generic regulation;
- Dispute resolution protocols including obligatory membership of the industry dispute resolution scheme; and
- Specific compliance and enforcement mechanisms including penalties for wrongful disconnections.

Although some of these areas are dealt with in the TPA and FTA, Victorian energy regulations are more detailed and in some areas more stringent due to the significant negative social impact of lack of access to ongoing energy supply for households.

Utilities and many aspects of financial services are also defined by the provision of credit. (Although utilities providers are not typically considered as credit providers, the transaction between an electricity retailer, for example, and its customer is essentially in the nature of a loan — the provision of electricity to consumers,

payment for which is deferred until the bill becomes due, accords with the definition of a 'loan' in the *Privacy Act 1988 (Cth)*. Victorian electricity retailers typically provide three months of credit to their customers, hence it may be said that all consumers incur a debt.⁶¹) The ability of consumers to service the resultant debt is affected by their financial situation. Consequently, procedures for dealing with payment defaults are required — ideally, as discussed in Part 2 above, with specific hardship policies — for both the protection of vulnerable consumers and the financial health of the business.

It should also be noted that while industry-specific regulation generally addresses particular instances of consumer detriment, consumer advocates are not always responsible for its introduction. Often industry groups request specific regulation in order to regularise the application of generic principles to specific instances, and to safeguard consumers from the actions of rogue traders (in recognition that falls in consumer confidence harm business overall).⁶² Clearly, then, industry-specific regulation is not an overall burden on businesses *per se*. In fact, industry-specific regulations frequently simplify compliance by providing greater clarity and enabling business procedures to incorporate mechanisms to ensure compliance.⁶³

Benefits and weaknesses of industry-specific regulation

Generic regulation has the significant benefit of its broad coverage, especially with regard to emerging markets. Industry-specific regulation, where used, should supplement, not replace, generic regulation — except for instances where the particular idiosyncrasies of the industry it applies to demand it.

Targeting

Industry-specific regulations have the potential benefits of targeting particular issues in particular industries.⁶⁴ This is especially desirable for complex or highly technical products and services, those with health and safety implications, and those of which the impacts of market failure or consumer detriment — either for all consumers or for disadvantaged groups — are severe. For example, industry-specific regulations in telecommunications and (in Victoria) energy and water have led to more equitable outcomes for disadvantaged consumers, particularly by ensuring universal access to services and (in energy and water) assistive treatment of customers with bill-payment difficulties.⁶⁵

Compliance and enforcement

Industry-specific regulation is usually easier to enforce than generic regulation.⁶⁶ This is primarily due to the specificity of requirements and obligations. By defining what (for example) unconscionable conduct, defective goods, misleading and deceptive conduct, and harassment and coercion constitute in a specific industry, breaches can be more readily identified. For example:

*...proving that a food product falls below an acceptable standard involves obtaining the expert opinion of a qualified analyst. Preparing such an analysis is time consuming and costly. The outcome is uncertain because manufacturers are likely to present alternative expert views... Under industry-specific regulation, expert evaluations are needed initially to set the rules. The level of analysis to test performance against those rules, however, is usually less.*⁶⁷

Industry-specific regulation also provides a vehicle for incentivising compliance in specific problem areas. This was used successfully in Victoria to address systemic non-compliance with the disconnection protocols in the Energy Retail Code. By implementing a substantial financial penalty for retailers who disconnected customers in breach of the terms of the Retail Code, retailers were encouraged to review their systems to ensure that they were fulfilling their obligations. Consequently, complaints to the Energy and Water Ombudsman Victoria (EWOV) regarding disconnections

declined by more than 70%.⁶⁸ Targeted regulatory intervention in this case has encouraged retailer compliance and led to more effective consumer outcomes.

When industry-specific regulation includes an industry-specific regulator or dispute resolution scheme, there is the additional advantage of industry-specific expertise or 'institutional memory', which optimises the efficacy of the compliance and enforcement regime.⁶⁹

Regulatory capture

Industry-specific approaches can potentially be vulnerable to regulatory capture. This is a particular concern in highly technical industries (such as energy), especially because those are the industries that are more likely to have specific regulations.

The risk of regulatory capture can be obviated by ensuring adequate representation from other stakeholders such as consumers, other industries (related but distinct), and technical experts. Sometimes other stakeholders may need additional resources to enable them to participate in consultative processes. For example, the National Electricity Consumers' Advocacy Panel gives grants (funded by market participants) to business and domestic consumer representatives to participate in consultative processes around the establishment and management of the National Energy Market.⁷⁰ Given on a needs basis, most grants have been directed to groups representing domestic consumers. This has facilitated the growth of energy expertise in the community sector and led to stronger consumer representation in state-based as well as national processes.

Regulatory capture can also be addressed by the existence of a strong, funded consumer advocacy body. In Victoria, the Consumer Utilities Advocacy Centre (CUAC), funded by Consumer Affairs Victoria, has played a vital role in both addressing power asymmetries in the regulatory process and, importantly, pursuing systemic problems identified by EWOV and community services organisations such as those delivering financial counselling. We draw on the CUAC model when we consider the role of a national consumer advocacy body in Part 5 below.

Conclusion

Well-targeted industry-specific regulation (as long as *all* stakeholders are equitably represented in the regulatory process, to prevent regulatory capture) supplements generic regulation, ensuring that the core principles of the consumer policy framework can be delivered in complex markets, and facilitating positive consumer outcomes without unduly burdening traders. The following factors should guide choices about whether industry-specific regulation is appropriate:

The nature of the industry and its products — including, but not limited to:

- *The complexity of the products*
Complex or highly technical goods or services generally require a higher level of product information to enable consumers to make an informed choice. They may also require specific regulations around product quality and safety if these are not readily assessable by consumers.
- *The nature of the products*
Those that are essential to maintaining a basic standard of living (such as energy, water and food), participating in community life (such as telecommunications and banking), or obtaining other essential goods (such as finance) require stronger regulations to ensure access and affordability.

The impact of market failures on consumers — including, but not limited to:

- *Whether products are purchased on credit*
When payment for goods or services is in arrears, some consumers (especially but not exclusively disadvantaged consumers) will fully or partially

default due to financial hardship. If products are expensive or essential, specific regulations are necessary to enable affected consumers to manage the debt without entering a 'debt spiral' leading to more severe and finally catastrophic financial hardship.

- *When products are expensive*
Highly expensive purchases such as cars and houses can leave consumers vulnerable to massive detriment if market failure occurs. Additional regulation is necessary in industries dealing in major purchases such as these to minimise these impacts.

4 Enforcement and redress

In the twelve months to March 2007, a quarter of Victorians had a dispute with a business. While most of these disputes were resolved between the consumer and the business, one in eight required the intervention of a third party.⁷¹

There are a number of avenues through which consumers may seek enforcement of their rights and redress for breached entitlements, ranging from lodging complaints with industry-specific dispute resolution bodies (such as the industry ombudsman schemes which operate in telecommunications, financial services, energy and water) to pursuing litigation through the formal legal system. The consumer policy framework should facilitate the accessible and timely resolution of breaches of entitlements for all consumers — this is essential to minimise the incentive for unscrupulous businesses to systemically breach their obligations for market gain. Our test for the accessibility of enforcement and redress mechanisms is the ability of disadvantaged consumers to both determine that their rights have been breached and seek appropriate resolution or restitution. However, as has already been mentioned, policy that is appropriate for disadvantaged consumers safeguards the rights of all consumers; and regulations responsive to outcomes rather than personal eligibility minimise both administration costs and the potential for people in need 'falling through the gaps'.

The legal system

Consumer policy should not rely on the individual litigation of problems alone. Most consumers are disinclined to pursue redress through the formal legal system and many — not just disadvantaged ones — lack the means to do so. Many disadvantaged people have little awareness of their legal rights, and are reluctant to exercise their rights due to an apprehension of the potential costs involved in legal proceedings.⁷²

The combination of excessive demand and strict eligibility criteria for legal aid constitutes a huge barrier to access for disadvantaged individuals.⁷³ Consequently, disadvantaged litigants are increasingly forced to self-represent, usually leading to poor outcomes.⁷⁴ Most consumers, whether they are disadvantaged or not, are reluctant to seek redress without a cost-effective means of doing so; they simply absorb the costs of their loss, given the relatively small size of their claims, rather than engage in potentially costly, lengthy, and uncertain legal proceedings.

The formal legal system does play a role in consumer policy, both for resolving complex disputes and for ensuring that important legal principles continue to be developed and inform the work of other dispute resolution mechanisms.⁷⁵ But cost and complexity mean it should remain an avenue of last resort for addressing consumer detriment. More appropriate mechanisms are vital.

Consumer policy regulatory and enforcement bodies

State government offices of fair trading (such as Consumer Affairs Victoria (CAV)) have an oversight role of consumer policy and play a significant role in enforcement and redress, though their capacities vary from state to state. In Victoria, by way of example, CAV has a dispute resolution function, but is also empowered to obtain information, act in relation to rogue traders and product claims, and make a broad range of civil injunctions and adverse publicity orders.⁷⁶

Generic consumer protections under the *Trade Practices and Fair Trading Acts* may also be enforced by boards and tribunals such as, in Victoria, the Victorian Civil and Administrative Tribunal (VCAT). Taking complaints to VCAT is cheaper and simpler than pursuing litigation, and VCAT's ability to make a broad range of enforceable orders makes it an effective avenue for enforcement and redress. However, VCAT's processes and capacities still limit access and outcomes for disadvantaged consumers because:

- Applications need to be made in writing. This is an obstacle for the 17 per cent of Australians affected by a print disability (including vision impairment, learning disabilities, cognitive impairment, lack of functional literacy and limited English language ability)⁷⁷
- Most applications attract a fee. Although fees can be waived in cases of hardship, a written application must be made. As print disabilities are much more common among disadvantaged consumers,⁷⁸ this compounds the issue.
- VCAT lacks the capacity to identify and resolve systemic issues. Resolution of individual manifestations of systemic problems does not generally lead to remedial measures that benefit other consumers similarly affected but without the knowledge or capacity to seek resolution through the Tribunal.

Industry-specific dispute resolution schemes

Research indicates that the cost of pursuing a dispute through the legal system or VCAT deters over 50 per cent of consumers.⁷⁹ 37 per cent were deterred by the expected time demands of pursuing the dispute.⁸⁰ Almost 60 per cent, possibly deterred by the apparent complexity of the process, or lacking confidence in its efficacy, simply saw no advantage in taking their dispute to VCAT.⁸¹

Although TPA and FTA enforcement through bodies such as VCAT is clearly an essential element of the consumer policy framework, the limitations discussed above still pose obstacles for many consumers, especially disadvantaged ones. More accessible forms of alternative dispute resolution, like the dispute resolution services offered by state offices of fair trading such as CAV, address many of these limitations. But where the impacts of consumer detriment are considerable, where information asymmetry is marked, or where products are of an essential nature with few or no substitutes, industry-specific dispute resolution mechanisms are necessary.

Industry dispute resolution (IDR) schemes (such as ombudsman schemes), despite a degree of variance, have a number of features in common that mitigate the disadvantages of tribunals such as VCAT.

Accessible and affordable

Because IDR schemes can generally be accessed by consumers at no cost, disadvantaged consumers are able to pursue redress irrespective of their financial position. This is especially important because payment or financial issues are often fundamental to the dispute. It also means that consumers are not discouraged from pursuing a complaint if they are unsure of its validity or the likelihood of a beneficial outcome. This is crucial because in many cases a dispute may hinge on technical or complex procedural issues that are difficult for consumers to fully comprehend,

making it hard for them to be certain about whether they actually have grounds for the complaint.

Another significant point of difference is that consumers can lodge complaints over the phone, considerably enhancing access for those with a print disability. At the Energy and Water Ombudsman Victoria (EWOV), for example, 95 per cent of complaints received during the 2005/2006 period were lodged by phone, while only three per cent were lodged electronically (via email or the EWOV website) and two per cent written or faxed.⁸² EWOV has a freecall phone number, accepts reverse charge calls, and will phone back complainants who only have access to a mobile phone — thus ensuring that the cost of access is minimised irrespective of a complainant's circumstances.

Industry-specific regulation in the Victorian energy sector also obliges energy retailers to inform customers in payment difficulty or threatened with disconnection about EWOV and provide contact details. This greatly enhances access of customers to the dispute resolution service when it is needed most. The replication of this requirement is currently being considered in a number of other industries.⁸³

Expedient and developmental

Industry-based schemes promote the expedient resolution of complaints by giving their member institutions financial disincentives for protracted disputes. For example, the Banking and Financial Services Ombudsman (BFSO) and EWOV both charge members (financial services providers and energy and water retailers respectively) a sliding scale of fees dependent on the length of time taken to resolve a complaint. This encourages businesses to resolve disputes themselves if possible, and to work swiftly for resolution if the ombudsman is involved.

But probably most significant is the capacity of IDR schemes to identify and resolve systemic issues. Industry-specific bodies, by virtue of their narrower focus on a subsection of the market (and independence from government), are in a better position to identify specific issues in more detail and envisage appropriate remedies. Due to their extensive case-handling experience in a specific industry, they can document the incidence of specific types of market failure, thus readily identifying systemic issues. The BFSO and EWOV have both, for example, successfully identified and investigated numerous systemic issues.^{84,85} EWOV also plays an instrumental role in the enforcement of regulation, bringing breaches of the Energy Retail Code to the industry regulator.⁸⁶

Although they do not develop common law (in that decisions under IDR schemes do not create binding legal precedents), an ombudsman is empowered to consider a broader range of issues and factors than the ordinary courts and tribunals. The BFSO, for example, may consider a member institution's obligations under the Code of Banking Practice where relevant in a dispute;⁸⁷ EWOV will consider fairness of outcomes, not just the strict requirements of regulation. IDR schemes generally have the ability to make binding decisions, but more commonly reach conciliated outcomes.

Conclusion

Access to many dispute resolution and arbitration is compromised by cost and literacy requirements. These can be addressed by:

- routinely waiving application fees for concession card holders; and
- providing alternative modes of application such as via telephone.

Industry-specific dispute resolution bodies provide the most accessible and effective means of enforcement and redress for disadvantaged consumers, and should be used in industries where:

- the impacts of consumer detriment are considerable;
- information asymmetry is marked; or
- products are of an essential nature with few or no substitutes.

We commend the **Energy and Water Ombudsman Victoria** as a best practice example of industry dispute resolution, especially with regard to:

- accessibility;
- capacity to identify and act on systemic issues; and
- public reporting of data.

5 A national consumer advocacy body

While business interests are strongly represented in regulatory and policy debates, there is often a distinct lack of effective and coherent consumer voices. Where a strong consumer voice does exist (such as in energy policy, especially in Victoria), it is generally attributable to the presence of an industry-specific, fully funded consumer advocacy body. The establishment of an independent, government funded, national consumer advocacy body would facilitate the articulation of a strong consumer voice across all industry sectors.

Currently, there is 'no single lead agency for the development of consumer policy in Australia'⁸⁸, with the role shared between a number of industry specific bodies, including the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission.⁸⁹ These bodies have a broad range of functions and areas of engagement, but no specific consumer advocacy orientation. State offices of fair trading, burdened by their regulatory functions, have limited capacity to contribute broadly to consumer policy research and development, much of their work being reactive.⁹⁰

Consequently, federal regulation has not kept pace with developments in consumer markets. The consumer protection provisions of the *Trade Practices Act*, for example, have not been comprehensively reviewed in over 30 years, suggesting that a more responsive and systematic approach to consumer policy is long overdue.

Most proactive consumer research is being undertaken by government affiliated or independent organisations,⁹¹ such as the Consumer Action Law Centre (CALC) and the Consumer Utilities Advocacy Centre (CUAC), both in Melbourne. In the Victorian energy and water sector, for example, the risk of regulatory capture has been minimised and industry practice has improved by the presence of a strong consumer voice in CUAC. By funding advocacy projects and initiating research in specific areas, CUAC has also built capacity in the Victorian community sector and facilitated proactive work and early identification of issues of concern and systemic problems by community, government and industry bodies. Drawing on CUAC as a best practice model for a national consumer advocacy body, such a body would have the following features:

- Be fully funded by government but retain its independence.
- Provide a means for harmonising regulatory measures between the jurisdictions by investigating the potential for greater harmonisation and advocating for better consumer protections on issues such as unfair contract terms. Without undermining strong existing consumer protections in

jurisdictions such as Victoria, it could promote consumer policy developments in all states and territories and ensure that consumers do not get left behind.

- Be responsible for identifying systemic issues, and advocating for necessary changes.
- Commission or conduct original and independent research into a broad range of consumer policy issues.
- Have the capacity to collect consumer data and case studies. It could provide an avenue for community agencies to contribute their data anonymously and raise systemic issues. Duplication would be minimised by collaboration with existing industry-specific bodies such as CUAC, the Energy and Water Ombudsman Victoria and the Banking and Financial Services Ombudsman.
- Articulate the consumer voice, with a particular focus on the experience of disadvantaged consumers.
- Drive better industry practice through advocacy and making recommendations on a broad range of consumer policy issues.
- Collaborate with existing consumer advocacy bodies, both government and independent, state and federal to develop a cohesive approach to consumer policy.

Conclusion

An **independent, government-funded national consumer advocacy body** would be a cost-effective way of optimising the effectiveness of the consumer policy framework.

A **research role** would supplement and resource its advocacy role and assist in the identification of systemic issues.

We commend the **Consumer Utilities Advocacy Centre** as an appropriate model for a national consumer advocacy body.

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