



Submission to:

Productivity Commission

**Review of Australia's Consumer Policy
Framework, Issues Paper**

**Centre for Credit and
Consumer Law, Griffith University**

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Key Points and Recommendations

Overall principles for consumer policy

1. Australia's consumer law and policy suffers from the lack of an overarching, clearly articulated and consistent rationale for legislation and regulation. In consultation with community, consumer and industry representatives, Government (Commonwealth, State, and Territory) should develop an overarching principles document that sets out the rationale, expectations, and even limitations, of consumer policy.
2. The principles document should be consistent with the eight consumer rights articulated by the international consumer movement; and should explicitly acknowledge that fairness, social justice and distribution objectives are a necessary part of consumer policy.
3. The principles document should focus on:
 - Facilitating and supporting universal access to essential services on a fair and reasonable basis, including through pricing mechanisms, but also through specific consumer protection measures such as fair practices in the event of default or non-payment.
 - Protection from exploitation, unfair practices and unsafe goods and services.
 - Facilitating the development of skills to make effective choices, and to identify and avoid unfair practices.
 - Clear, concise, comparable and timely information on products and services.
 - Access to redress and effective independent complaints and dispute resolution processes.
4. At the same time, Governments should continue to improve and enforce competition law and policy.
5. Policy makers should be wary of relying on the theory that a small number of well-informed consumers can drive outcomes across markets as a whole. This theory is particularly limiting where there are submarkets, with products and services targeted to consumers on low incomes and/or in circumstances of vulnerability.

Consumer policy tools

6. Disclosure initiatives should continue to be an important part of the regulatory mix in consumer policy. However, greater efforts must be made to ensure that disclosure is accessible, relevant, timely, and comparable. In addition, policy makers should be conscious of the limitations of disclosure as a policy tool, and should not use disclosure as a replacement for more specific conduct and transaction regulation where that is needed to protect consumers.
7. New initiatives to address complexity, bounded rationality, and the reality of consumer decision-making in markets are needed. These might include a

greater use of default options; standard basic products that meet certain criteria, and independent facilities for comparing products.

Disadvantaged and vulnerable consumers

8. All consumers are potentially vulnerable in specific situations; however, a more extensive vulnerability or disadvantage may result in an increased level of severity and impact of poor treatment or non-compliance with consumer protection regulation.
9. In the context of essential services, appropriate policies to deal with financial hardship are part of a response to consumers generally, but are likely to be of particular importance for consumers who are more vulnerable or disadvantaged.

Generic provisions in the Trade Practices Act

10. Although the generic provisions in the Trade Practices Act, ASIC Act, and State/Territory Fair Trading Acts generally work well, the absence of protection against substantive unfairness in consumer transactions is a significant gap. Legislation to prohibit unfair terms in consumer contracts should be implemented in all jurisdictions as a matter of priority.

Generic vs Industry-specific regulation

11. Consumer policy should continue to include a mix of generic and industry-specific regulation, and industry specific regulation is particularly important in the case of essential services. While there is perhaps room for some changes at the margins, there is no need to withdraw copious amounts of industry specific regulation. In addition, moves towards more principles-based regulation should be taken with great caution.

Redress and dispute resolution

12. Redress and dispute resolution, including industry-based external dispute resolution, are a key component of the consumer policy framework. Governments should continue to facilitate and provide effective redress options for consumers.
13. In the financial services sector, greatest priority should be reserved for ensuring (i) that membership of an ASIC-approved EDR scheme is compulsory for all credit providers, finance brokers, and mortgage brokers; and (ii) there is a seamless entry point to all financial services EDR schemes for consumers.
14. Policy makers need to give consideration to the fact that the vast majority of consumer disputes will now be resolved away from the Court system, and the implications that this has for the development and interpretation of consumer law.

Consumer research

15. Consumer law and policy issues are considerably under-researched in Australia, and this has an impact on the effectiveness of legislation and other initiatives. Commonwealth, State and Territory Governments need to provide an adequate and stable level of funding for consumer research.
16. Funding (both untied grants and project grants) should be provided to relevant State-based, non-profit, research, policy and casework agencies. In addition, an Australian version of the UK's National Consumer Council should be established, with government funding as a major component of its income stream. In addition, funding options based on cy pres orders or industry levies should also be considered.
17. Greater coordination and information sharing on consumer research, and the setting of national priorities, should be facilitated through MCCA and an NCC.

Consumer advocacy – advice, casework, and financial counselling services

18. Individual consumer advice and advocacy can give effect to consumer rights and remedies that exist on paper, and can draw the attention of regulators and others to non-compliance. However, for many consumers, and many consumer disputes, private advice or assistance is not accessible or realistic. Despite this, access to publicly funded information, advice and individual advocacy in relation to consumer issues is patchy and often inadequate across Australia. In particular, funding for legal advice, casework and financial counselling funding in Queensland is very low compared to the other major jurisdictions.
19. All consumers, wherever they are based, are entitled to an adequate minimum level of information, advice and advocacy in relation to consumer law problems. Commonwealth, State and Territory Governments need to provide greater investment in this area overall, and the particular disparity with respect to services available in Queensland needs to be redressed.

Consumer group networking and coordination

20. A properly funded peak body is an essential part of the consumer policy framework. Such a body can play a role in linking large and small community and consumer organisations; increasing the capacity of member organisations to feed into policy processes; coordinating requests for consumer representation on government and industry bodies, and supporting and developing consumer representatives in their roles; and coordinating and developing policy positions and submissions.

Consolidating regulation in one level of government

21. The administrative and policy arrangements supporting the Uniform Consumer Credit Code have not been effective in ensuring timely amendment to the Code to address identified deficiencies or emerging problem areas. Consideration should be given to migrating consumer credit

regulation to the Commonwealth level, under the regulation of ASIC, and within a framework that includes mandatory licensing and EDR membership (as is the case with all other financial services). State and Territory government agencies could have concurrent enforcement responsibilities.

22. Retail regulation of electricity, gas and other utilities should not be transferred to the national level unless, and until, there is a commitment to recognising the place of social and environmental objectives in the regulatory framework, and a commitment to adopt the best of State and Territory regulation, not simply adopt a lowest common denominator approach.

Regulation making and review processes

23. The involvement of community and consumer organisations is crucial to developing effective consumer law and policy. In particular, input from agencies that provide casework, information and advice services (including community legal centres and financial counselling services) can provide a practical and crucial perspective on the failures and successes of policy interventions and of any problems in the market.
24. However, there is a lack of capacity for consumer and community organisations to respond to the demands for input. Governments need to provide greater financial support for relevant organisations to participate in policy processes.
25. Current regulatory impact statement processes, with their focus on economic costs and benefits, place an unreasonable hurdle on those proposing regulation that has real, but difficult to quantify, non-economic benefits. Alternatives need to be examined, and research being conducted for ASIC's Consumer Advisory Panel is likely to provide some alternatives.

Ministerial Council arrangements

26. The Ministerial Council arrangements are not working well, and need to be reformed. Greater priority and resourcing for consumer protection work by Governments at all levels may assist.

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1. Introduction

The Centre for Credit and Consumer Law is pleased to provide a submission to this Inquiry into the Consumer Policy Framework.

The Centre for Credit and Consumer Law is an academic centre, hosted by the Griffith University Law School. The Centre for Credit and Consumer Law (CCCL) was established in March 2004 to be a source of expertise, and a centre for excellence on credit and consumer law issues, and we have the overall objective of promoting the attainment of a fairer, safer and more efficient marketplace, particularly for low income and vulnerable consumers.

CCCL's core funding is provided by the Queensland Government through the Consumer Credit Fund (administered by the Office of Fair Trading) and Griffith University.

Relevant research we have undertaken, or are undertaking, includes research on the merits of regulation to control the cost of consumer credit; unfair contract terms regulation; treating customers fairly; the collection of statute-barred debts; and overcommitment, responsible credit and responsible borrowing; and consumer and small business views on retail contestability in electricity. Most of our research, policy and other papers are available electronically at www.griffith.edu.au/centre/cccl. In addition to this submission, we will also forward under separate cover, a copy of each of the four papers below, which are directly relevant to some of the key issues being canvassed in this Inquiry:

- Howell, Nicola & Wilson, Therese 'In Competitive Markets, is there still a need for Consumer Protection and Fair Trading Regulation' (2007) Paper presented to the International Association of Consumer Law conference, Capetown, April 2007.
- Howell, Nicola & Wilson, Therese 'Access to Consumer Credit: The Problem of Financial Exclusion in Australia and the Current Regulatory Framework' (2005) *Macquarie Law Journal* 5.
- Howell, Nicola 'An Update of Unfair Contracts Legislation – Examining the Need for Nationally Consistent Regulation of Unfair Contracts Terms in Consumer Contracts', paper presented to 15th Annual Credit Law Conference on 29th September 2005.
- Howell, Nicola "Searching for a National Consumer Policy Program?" (2005) 12 *Competition and Consumer Law Journal*.

This submission was prepared by Nicola Howell, Director, and Dr Tenzin Bathgate, Senior Research Assistant.

2. Outcomes of CCCL's Consumer Network Meeting

On 1 May, 2007, the CCCL hosted a meeting for consumer and community workers, government agencies, and academics in Queensland. The meeting focused on the Productivity Commission inquiry, and included presentations from the Hon Margaret Keech, Minister for Fair Trading, and Robert Fitzgerald, Presiding Commissioner for this Inquiry.

Following the formal presentations and questions in response, we asked participants to discuss in small groups responses to the following questions:

1. What are the components/attributes of the consumer policy framework that do work?
2. What are the components/attributes of the consumer policy framework that do not work?
3. What changes are needed to improve the consumer policy framework?

A list of the responses from the small groups is attached to this submission for your reference. Key points included:

- satisfaction with external dispute resolution schemes
- the generic legislation
- some industry codes
- some specific instances of appropriate resourcing of consumer involvement.

On the other hand, participants expressed dissatisfaction with the assumptions that lie behind many consumer policy decisions, including assumptions about the benefits of competition and about consumer understanding of contracts. Participants also expressed dissatisfaction with the lack of funding and enforcement for consumer issues.

3. Rationale for consumer policy

In Australia, there is not an overarching, clearly articulated rationale for consumer protection. Louise Sylvan, ACCC Deputy Chair, has noted that, with the exception of regulation to stop consumers being misled:

Other consumer protection regulation, while plentiful and much of which is crucial, is not woven together into a well-structured pattern.¹

In his speech to the National Consumer Congress in March 2007, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce, MP, spoke of a vision of a 'truly world class' consumer policy framework; one 'which is more responsive, more cost-effective, and better coordinated across all levels of Government'.²

¹ Sylvan, L. (2004) "Activating competition: The consumer – competition interface" *Competition and Consumer Law Journal* 12, 191-206, p. 193.

² http://www.treasury.gov.au/ncc/content/download/Presentations/Transcripts/pst_%20opening_address.pdf, viewed 24 May 2007.

We suspect that few would disagree with this sentiment. However, the Minister did not appear to articulate a framework or set of principles for implementing that vision.

An indication of the Commonwealth's Government priorities in consumer policy can be seen in its activity – which in recent times, focused on consumer empowerment, particularly as it is described or developed through information disclosure and financial literacy initiatives. However, as we discuss below, we believe that these issues should be only a component of a 'world class' consumer policy, and not the primary or major activity.

The Commonwealth Government has also relied on competition to drive good consumer outcomes. In fact, it often seems to promote the position that competitive markets are the true end game for delivering consumer protection. This also reflects a belief that, in general, markets will self-correct in order to ensure competitive prices and quality, and to drive out poor practices.

It is true that competitive markets often benefit many consumers, and as we note below, a strong laws against anti-competitive behaviour, and a well resourced and effective competition regulator are key for consumers. However, consumer policy should not be seen as merely a subset of competition policy – it should be treated as an equal partner in the regulation of markets.

In a paper to the International Association of Consumer Law Conference in April 2007, Nicola Howell and Therese Wilson described the relationship in the following way:

Competition law and consumer law are related, and are both equally important to the effective operation of markets in the interests of the community as a whole. The key here is the equal importance of the two aspects of law. Giving effective priority to competition, as appears to be the current approach of the Commonwealth Government, risks ignoring the needs and realities of many consumers, to the ultimate detriment of the community as a whole.

Consumer law and policy should not be a secondary consideration for Governments. It should be a high level priority in its own right. Responding effectively to consumer issues requires us to acknowledge the strengths and limitations of both competition law and consumer law; to articulate the problems and their genesis; and to identify one or more solutions without being blinkered by the mantra that competitive markets are always the answer.³

While the goals for competition law are clear, consumer protection instruments across Australia vary in their objectives and scope and in some cases, objectives and rules can be inconsistent, even within the same instrument. For example, a tension often exists between objectives that require pre-contract disclosure to facilitate comparison shopping between products and providers, and objectives that seek to promote flexibility in product/service design. This is because permitting flexibility and variation in product design can often reduce comparability between products, as consumers are no longer able to compare apples with apples.

³ Howell, Nicola & Wilson, Therese 'In Competitive Markets, is there still a need for Consumer Protection and Fair Trading Regulation' (2007) Paper presented to the International Association of Consumer Law conference, Capetown, April 2007, p. 22.

These tensions might be better dealt with, and objectives better prioritised, if Australia were to adopt overarching principles document, setting out the rationale, expectations and even limitations of consumer policy. Such a document could be used by governments (Commonwealth, State, and Territory), industry and consumers to develop, implement and assess consumer policy instruments and initiatives, and could ensure greater consistency and coherence between various instruments. Two examples (from New Zealand and the United Kingdom) are summarised below.

New Zealand

*Creating confident consumers: The role of the Ministry of Consumers Affairs in a dynamic modern economy.*⁴ This document outlines an overarching objective of an environment where ‘consumers transact with confidence’. This means that consumers’ reasonable expectations of the transaction will be met, and if not, they will have access to effective redress’.

United Kingdom

*A Fair Deal for All: Extending Competitive Markets: Empowered Consumers, Successful Business.*⁵ This sets out an objective of a regime that ‘delivers social justice, economic and environmental progress, and which is as fair to business as it is to consumers.’ In turn, this is said to mean a regime where

- Consumers are equipped with the skills, knowledge, information and confidence to exercise their rights to get a good deal.
- Strong consumer advocacy exists at the general policy making level and in special cases.
- Consumers have access to appropriate and convenient sources of advice and redress, including effective alternative dispute resolution (ADR).
- Consumer rights are proportionate, balanced with responsibilities, and clear and simple enough to be well understood.
- Consumers are able to understand the impacts of their own consumption decisions on our shared environmental and social wellbeing.
- Vulnerable consumers are protected without placing undue restraints on markets overall.
- Enforcement is fair, consistent, effective and proportionate.
- Markets are regarded as fair by both consumers and business.

And that is underpinned by a strong competition regime, and a rigorous evidenced-based approach.

We do not necessarily advocate the adoption of the content of these overarching principles documents, but the concept of articulating principles in this way is an important one for Australia. We hope that this current Inquiry will be a catalyst for the development of such a document.

⁴ *Creating confident consumers: The role of the Ministry of Consumers Affairs in a dynamic modern economy*, Mat 2003, available at <http://www.consumeraffairs.govt.nz/aboutus/review/report/index.html>.

⁵ See Department of Trade and Industry, UK, *A Fair Deal for All: Extending Competitive Markets: Empowered Consumers, Successful Business*, at <http://www.dti.gov.uk/files/file23787.pdf>.

In terms of the emphasis or content of a principles document for Australia, we believe that it should reflect a rights-based approach. A rights-based approach is appropriate because, overall, consumers suffer from an inequality in bargaining power when compared to traders, and market mechanisms cannot necessarily be relied upon to ensure that this inequality in bargaining power is not abused. Of course, there will be individual consumers, and individual transactions, where there is a more equal bargaining relationship. However, in light of the facts that:

- markets and products are becoming more complex;
- consumers are having to carry more risk and/or costs in relation to services that were previously secured by government (health, education, retirement funding, energy, water);
- e-commerce and m-commerce are changing the way that transactions are conducted;
- some consumers have poor financial literacy skills, particularly those with lower education levels, those who are not working, or are working in unskilled occupations, and those with lower income and/or savings levels;⁶ and
- many transactions are entered into by way of standard form contracts, with no practical opportunity for negotiation;

it is still correct to conclude that there is an overall inequality of bargaining power between consumers and traders.

Eight consumer rights have been articulated by the international consumer movement. These rights and our additional reflections are outlined below.

- **The right to satisfaction of basic needs.** This is particularly important as essential services are opened up to competitive markets. We also note that the category of goods and services considered essential can be quite wide. In addition to energy and water, there are elements of telecommunications and financial services that have the characteristic of essentiality, such that all consumers should have reasonable access to those services.⁷
- **The right to safety.** As well as safety in terms of risks to physical health and well-being, it might be timely to consider a wider view of safety, so that products that are, for example, financially unsafe, are also regulated.⁸
- **The right to information.** This should encompass clear, concise, effective and (wherever possible) comparable information.
- **The right to choice.** Ensuring competitive markets is obviously a key component of ensuring the right to choice.
- **The right to representation.** Later in our submission we discuss the importance of the representation of consumer interests in policy making.

⁶ ANZ Bank (n.d.) *Adult Financial Literacy, Personal Debt and Financial Difficulty in Australia, Summary Report*, p. 2.

⁷ For example, the UK Office of Fair Trading has suggested that the provision of short-term consumer credit is an essential service: Office of Fair Trading (UK) *Vulnerable Consumers and Financial Services: The Report of the Director-General's Inquiry OFT255* (1999), 19.

⁸ For example, we have suggested that some very high cost loan products could be characterised as unsafe - Howell, Nicola & Wilson, Therese 'Access to Consumer Credit: The Problem of Financial Exclusion in Australia and the Current Regulatory Framework' (2005) *Macquarie Law Journal* 5, p. 1; Howell, Nicola *High Cost Loans: A Case for Setting Maximum Rates?* (2005) CCCL Background Paper, p. 11.

- **The right to redress.** Accessing consumer redress should be easy, low-cost and informal.
- **The right to consumer education.** This should be more than just the proliferation of more and more brochures.
- **The right to a healthy environment.** This incorporates the issue of sustainability and clearly covers more than consumer policy, however, this right and its implementation can also be influenced by consumer policy.

Although Australia does well in respect of some of these rights, in some cases, there is room for improvement on all fronts. Implementing and ensuring access to these rights should be the cornerstone of the consumer policy principles document for Australia.

The Issues Paper asks: *What should be the balance between seeking to ensure that consumers' decisions properly reflect their preferences (empowerment) and proscribing particular outcomes (protection)?*

This question appears to articulate an apparent tension between a liberalist approach, that simply provides information and gives consumers the opportunity to make their own choices, and an approach that seeks to provide protection, particularly to those who are vulnerable or at risk of exploitation, by preventing some choices from being made, or preventing some products or services from being offered in the market. The former approach is consistent with the emphasis of government initiatives in recent years, as discussed above. The latter approach is often categorised, rather negatively, as more paternalistic. However, this approach can and should be viewed in a more positive sense, as an approach that prevents unfair practices and exploitative behaviour, prevents harm, and protects individuals (and the community) from decisions that have unforeseen consequences.

The more paternalistic approach has regularly been subject to criticism from economists and others.⁹ However, others suggest that the fact that consumers make decisions under conditions of bounded rationality makes a stronger case for paternalism.¹⁰ In addition, some commentators distinguishing liberal or weak paternalism from strong paternalism, with the former involving initiatives to influence or direct choice, but not to restrict choice, and the latter involving initiatives that prevent particular choices. Some commentators suggest that liberal paternalism is more defensible,¹¹ but others suggest that liberal paternalism is as equally subject to poor decision making by policy makers.¹²

The opposition to so-called paternalistic regulation comes from a view that individuals are better placed than governments to determine their own preferences, and to weigh up the costs, benefits and risks of competing options. In truth, however, consumer choices are manipulated by advertising and marketing, and consumers' purchasing may not in fact reflect their 'true' preferences. In this context, there can be circumstances in which a more restrictive approach is appropriate, even if it is not termed paternalism, with its

⁹ For example, Glaeser, E.K. (2006). Paternalism and Psychology. *The University of Chicago Law Review*, 73, 133 – 156; Durkin, T. (1993). An economic perspective on interest rate limitations. *Georgia State University Law Review*, 9, 821.

¹⁰ For example, Sunstein, C.R. (2006). Boundedly Rational Borrowing. *The University of Chicago Law Review*, 73, 249-270; Camerer, C., Issacharoff, S., Loewenstein, G., O'Donoghue, T., and Rabin, M. (2002-2003). Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism". *University of Pennsylvania Law Review*, 151, 1211-1254.

¹¹ For example, Sunstein, C.R. and Thaler, R.H. (2003). Libertarian Paternalism is Not an Oxymoron. *The University of Chicago Law Review*, 70, 1159-1202.

¹² Glaeser above n. 9.

very negative connotations. It is not always possible to outline these circumstances in abstract, however, intervention can be appropriate in order to prevent harm (as in the case of product safety), to prevent exploitation, and to ensure fairness and social justice objectives are met, particularly in the context of essential services.

In the 2007 Consumer Affairs Victoria Lecture, Dr David Cousins, Director of Consumer Affairs Victoria, suggested that consumer policy should be about promoting fair trading, and that this should be the overriding objective in preference to possible objectives of promoting consumer rights and promoting market efficiency.¹³

We agree, and note that fairness (or lack of unfairness) is increasingly the test used in modern consumer policy instruments. Examples include the unfair contract terms legislation in Europe and Victoria; industry dispute resolution schemes that include 'fairness in all the circumstances' in their decision making criteria; the promises in the Code of Banking Practice to treat customers 'fairly and honestly'; and objectives in the Corporations Act regarding the 'fairness, honesty and professionalism' of financial services providers. Consumers also value notions of fairness, and this is expressed through concern over the very high prices that some consumers pay for consumer credit; and at what often is seen as unjustifiable profit-taking in the price of petrol. This sense of fairness persists even if there might be a valid economic reason for the high cost (ie in terms of supply and demand, or the costs of provision).¹⁴

We also take the view the social justice concerns should be explicitly acknowledged. Social justice and fairness are intrinsically linked, and in an environment where citizenship is becoming increasingly linked to consumerism, seeking to achieve social justice is an important part of our consumer policy framework. We note the view, put by a number of environmental and consumer advocates in the context of the National Electricity Market reforms, that:

Australia's leaders should ensure the National Electricity Market does not obstruct environmental and social goals, but helps to facilitate them.¹⁵

The same should be said for the general consumer policy framework.

In this light, distributional goals can also be an important part of consumer policy. Again, this approach is often criticised, with the comment that distributional goals are best achieved through social policy, rather than consumer policy. However, in practice, social welfare programs are decreasing, rather than increasing, and in any case, this criticism fails to acknowledge that the existing structures and arrangements have a distributional impact. As Professor Iain Ramsay notes:

“Unregulated markets” do not exist because all markets have ground rules, whether they be the common law of property and contract or a statutory

¹³ Cousins, D. (2007) Consumer Affairs: Past, Present and Future. Consumer Affairs Victoria 2007 Lecture, Melbourne, 13 March 2007, p. 17.

¹⁴ For example, Ramsay, I. (2001). The Alternative Consumer Credit Market and the Financial Sector: Regulatory Issues and Approaches *Canadian Business Law Journal*, 35(3), 325–410, p. 374.

¹⁵ Total Environmental Centre and Other Organisations 'Power for the People Declaration' on 22 May 2007, http://www.cana.net.au/documents/Power_for_the_People_210507.pdf.

framework, which specify the extent to which individuals are able to take advantage of others in the market.¹⁶

Where does this leave a principles document for consumer policy in Australia? In New Zealand, the regulator has taken an information-based approach. The overarching objective of New Zealand's consumer policy is to create an environment where 'consumers transact with confidence'. This means that consumers' reasonable expectations of the transaction will be met, and if not, they will have access to effective redress.¹⁷

The limitation of this approach however, is that it provides little comfort for consumers who have low expectations about transactions and traders. For example, consumers on low incomes often expect to be treated poorly by traders, particularly in relation to financial services.¹⁸ In the specific example of consumer credit, research with customers of high cost products regularly shows that one of the major selling points of the high cost loan providers is that they treat their customers with respect in their service delivery.¹⁹

A consumer policy based on meeting consumer expectations risks leaving some consumers to the mercy of exploitation and unfair practices, and does not necessarily promote social justice.

The UK document noted above includes specific reference to the needs of vulnerable consumers, fair markets, and environmental goals. It might provide a useful starting point for the development of an Australian principles document.

In our view, a consumer policy principles document for Australia should be explicitly concerned with fairness, social justice and distributional goals. Costs and benefits of proposed regulatory changes will always need to be considered, however, as we discuss below, a broader understanding of the non-economic costs and benefits must be developed. Regulatory approaches that implement these broader goals for consumer policy should not be dismissed on the grounds they interfere with 'natural' or 'neutral' market operations.

A consumer policy principles document for Australia should focus on the following elements:

- Facilitating and supporting universal access to essential services on a fair and reasonable basis, including through pricing mechanisms, but also through specific consumer protection measures such as fair practices in the event of default or non-payment. (See example A below.)
- Protection from exploitation, unfair practices and unsafe goods and services.
- Facilitating the development of skills to make effective choices, and to identify and avoid unfair practices.

¹⁶ Ramsay (2001), above n 14, p. 367.

¹⁷ Above n 4, p.7.

¹⁸ For example, AFFCRA 2007, *Submission in response to the Issues Paper*, p. 3.

¹⁹ D Wilson (2002) *Payday Lending in Victoria – A research report*, Consumer Law Centre Victoria Ltd, p 76.

- Clear, concise, comparable and timely information on products and services.
- Access to redress and effective independent complaints and dispute resolution processes.

There will necessarily be overlaps between consumer policy and broader social policy because consumer policy is not just about markets and economics and consumers are not just economic actors, operating in a blindly self-interested manner. Consumer policy issues are often a cause or a consequence of wider social issues.²⁰

Consumer policy should sit alongside competition policy, with competition policy and competition laws implemented to ensure that, wherever possible and appropriate, competitive marketplaces flourish and anti-competitive conduct is driven out of markets.

Example A – Essential services in the utilities sector

The key rationale for consumer policy in the utilities sector is essentiality. Where an essential service is concerned key protections need to be in place, and in fact, one could argue that robust consumer protections are equally if not more necessary in a competitive market driven environment.. In Queensland the move to full retail competition for residential users and small business (under 100 megawatt hours per annum) has necessarily been accompanied by the establishment of an Energy Industry Code and an independent Energy Ombudsman. The establishment of a competitive retail electricity and gas market for small end-users in Queensland has resulted in the establishment of more robust energy specific consumer protections than previously existed.

4. Developments in theory

Consumer policy should be influenced by the developments in theory across a range of disciplines, including legal and regulatory theory, economics, including behavioural economics, psychology, sociology and others.

Consumer policy is not just a legal issue, and not just an economic issue. In the recent past, we believe that consumer policy has been unduly influenced by classical economics and classical contract law theory. These have tended to focus on hypothetical, economically rational, consumers. To develop an effective consumer policy, what is needed is an understanding of the ways in which consumers, traders, and markets operate in the real world. It is here that insights from other disciplines and other approaches can be very relevant. Behavioural economics is somewhat flavour of the month in this regard, with, among others, the OECD encouraging policy makers to incorporate its findings into the policymaking process.²¹ Developments in a range of areas should influence the development and implementation of consumer policy, and this

²⁰ Ramsay 2001, above n. 14, p. 356.

²¹ Organisation for Economic Co-operation and Development ‘Report on a Roundtable on Demand-Side Economics for Consumer Policy’ (2006), <http://www.oecd.org/dataoecd/31/46/36581073.pdf>.

does require greater sophistication in analysis and implementation from our policymakers and other stakeholders.

We also suggest that a greater understanding of the motivations and decision-making processes of traders is important, especially where traders are exploiting loopholes in regulation or designing products or marketing campaigns that arguably take advantage of consumer vulnerability. For example, Professor Ramsay refers to the idea of market manipulation as a market failure, where firms ‘exploit the “irrationalities” identified by psychological research’.²²

5. Relying on markets to deliver consumer policy

Much of the discussion around consumer policy asserts that it is in the interests of traders to act fairly and ethically towards their customers, and that competitive markets will meet consumers needs. Once markets are competitive, the competitive process will weed out unfair practices, excessive prices, and poor quality. Regulation will largely only be needed to deal with the so-called ‘rogue traders’, said to be operating on the fringes of markets, with little regard to consumer interests. For example, discussions around the need to implement nationally consistent regulation of finance and mortgage brokers often suggest or imply that it is just a fringe or rogue element that is (unfairly) giving the rest of the industry (the mainstream, reputable players) a bad name.²³

However, markets and traders are not altruistic. They are self-interested, and do not necessarily have broader social objectives. This is particular apparent in the case of essential or near essential services. Markets and traders are unlikely to provide essential goods or services, at affordable prices, if it is not in their financial interest to do so, and the concept of a safety net is not a naturally occurring feature of markets. Corporations are responsible to their shareholders for financial performance, and, for example, corporate social responsibility outcomes will often be pursued only if they have a positive impact on reputation, leading in turn to a positive impact on financial performance. The current requirements of the Corporations Law generally encourage such a narrow approach.²⁴ This is not to downplay some of the very effective social responsibility initiatives that have occurred, particularly in the financial services sector.²⁵ However, these are often small scale, and we suspect that other priorities and imperatives for the companies mean that they are unlikely to grow beyond a small scale.

Similarly, markets and companies will not provide goods or services to ‘unprofitable’ customers or at unprofitable prices. This is perhaps one reason for the withdrawal of mainstream lenders from the small loans market, and the consequent expansion of high cost small loans in Australia by fringe credit providers, who assert that it is not possible to deliver these products on a cheaper basis and also make a profit.²⁶

²² Ramsay 2001, above n. 14, p. 372.

²³ For example, Fair Trading Policy Branch, Department of Tourism, Fair Trading, Wine Industry Development and Women (2007), Regulatory Impact Statement, Regulation of Finance and Mortgage Brokers in Queensland, p. 7.

²⁴ For example Howell & Wilson 2005, above n. 8, p. 148.

²⁵ For example see National Australia Bank’s ‘Step Up’ Loans, http://www.nab.com.au/About_Us/0,,82040,00.html, viewed 10 June 2007.

²⁶ This was a common view held by the microlenders interviewed for CCCL’s research on interest rate caps (forthcoming).

In this context, it is perhaps unduly optimistic to rely solely on the goodwill of companies and the driving forces of competition to ensure good consumer outcomes in all cases. The benefits of competition are not distributed equally. The idea of market failures is readily accepted as a grounds for intervening in consumer markets, however, Howell and Wilson also suggest the concept of ‘competition failure’ – that is, where a market is competitive in an economic sense, but it fails some or all of the consumers seeking to transact in that market.²⁷ This needs to be acknowledged and addressed by policy makers.

The Inquiry Issues Paper also asks whether the actions of a small number of well-informed consumers can drive outcomes across markets as a whole. We are not convinced that this is an accurate reflection of transacting in many consumer markets today.

The issue of unfair contract terms is one in point. No amount of attempts by well-informed consumers to negotiate or waive unfair terms in a standard home loan contract are likely to be successful, given the practical reality that most providers will include the same type of term in their contract; and that individual credit provider employees are unlikely to have any ability to waive or vary standard contract terms.

In addition, in some markets, the notion of a well-informed consumer is probably unrealistic. Again, the fringe lending sector provides a useful case study, where it is suggested that borrowers do little shopping around; have low expectations about their ability to obtain finance; and will accept high cost loans because they believe other lenders would not provide finance.²⁸ In addition, there is little advertising of interest rates or fees and charges, and a level of individual tailoring, making comparison shopping difficult if not impossible.²⁹ In these circumstances, it is unreasonable to rely on markets alone to deliver fair outcomes.

In this sector, some have also suggested that a two-tiered marketplace has emerged, with the second tier characterised by higher prices, more risk, and fewer protections.³⁰ The actions of well-informed consumers in the first tier marketplace are unlikely to have any impact on the conduct of traders or of competition in the second tier.

In addition, markets and traders are likely to migrate to less competitive and cosier arrangements wherever possible. For example, the experience of the UK utilities market indicates that rather than providing choice the market offers have narrowed down to half a dozen large vertically integrated companies which has significantly dampened the benefits of competition for consumers. Hence the concept of consumers having a real choice becomes more problematic over time in what is supposedly a mature energy market.

²⁷ See Howell & Wilson 2005 at 1.

²⁸ Wilson (2002), above n 19, p. 78.

²⁹ For example, the widely used finance comparison service, Cannex (www.cannex.com.au), does not include information about short-term or small amount loans.

³⁰ For example, Drysdale, L. and Keest, K.E. (2000). The two-tiered consumer financial services marketplace: the fringe banking system and its challenge to current thinking about the role of usury laws in today’s society. *South Carolina Law Review*, 51, 589.

Allan Asher, the CEO of Energywatch UK, has observed that while liberalisation has brought benefits it has also resulted in a consolidation and creation of ‘...an industry of insiders, where the barriers to entry either stop entry altogether or require a new entrant to ally itself with one of the existing players...Consumers can choose, but most offerings are similar shades of grey, not vibrantly different.’³¹ One of the impacts of a ‘non-effective’ wholesale market is that consumers have borne the brunt of price increases without ‘...any significant countervailing power.’³²

Professor Philip Wright has also commented on the unchecked price pass-through undertaken currently by UK retailers in the UK’s de-regulated price regime with consumers bearing most of the price risk. Professor Wright potentially advocates a return to price regulation.³³

Allan Asher sums up the situation for consumers in the UK utilities market and why regulation is a necessary countervailing power in these circumstances:

‘The goal of energy regulation in the UK is to protect consumer interests. Liberalisation is one of the tools in the regulator’s armoury. In many ways, opening up markets is the easy step. There is a clear and definable change that is being made. However, once liberalised, consumers are exposed to less stable prices, as suppliers find it easier to change end user prices than challenge the trend in a possibly non-effective wholesale market. Breaking the grip of the dominant players by liberalising the market leads on to a new set of challenges: regulators and governments need to act so that the benefits from liberalisation are not lost.’³⁴

Companies should be given every opportunity to develop effective corporate social responsibility programs and initiatives. However, it is not appropriate to rely on markets and competition to deliver structures and frameworks that ensure fair safe outcomes for all consumers. This is the proper role of government.

6. Market trends and developments

Some of the market and social trends and developments that have implications for the policy framework include:

- continuing (and perhaps even increased) use of standard form contracts, it is unrealistic to expect that the drafters of standard form contracts will not try to shift risks to the other party to the contract;
- sustainability and climate change initiatives (see Example B below);
- the ageing population, with the emergence of products targeted particularly at this sector (eg reverse mortgages);

³¹ Allan Asher (2007) ‘It’s not where you start, it’s where you finish’ in *Consumer Policy Review*, 1-7, 1, Jan/Feb 2007, p.22 (19-26)

³² Allan Asher (2007), p.25

³³ Professor Philip Wright (2007) ‘Competition in gas and electricity: companies profit, consumers pay’ in *Consumer Policy Review*, Jan/Feb 2007:17,1, p.10 (1-11)

³⁴ Allan Asher (2007), above n. 31, p.25

- increasing heterogeneity of consumers, and increasing ability of traders to segment markets and incorporate differential pricing. One result might be that traders devote even greater attention to the most profitable customers groups, with others being left behind. Similarly, there is a risk that low technology customers will be left behind in an increasingly electronic world;
- relatedly, an increasing gap between wealthy and poor consumers, with consumers on lower income finding it more and more difficult to cover their basic needs and expenses;
- increasing consumer interest in non-economic issues, including socially responsible consumption, environmental sustainability, fair trade, animal welfare, and socially responsible investment. These have labelling and information disclosure implications (for example, the validity of claims about sustainability or fair trade), but also broader implications for corporations regulation and trade policy;
- increased interest in corporate social responsibility initiatives, although the quality and effectiveness of initiatives varies enormously.

Example B - Climate change and consumers

The burgeoning green energy market, and more generally climate change and sustainability issues will have significant implications for consumer protection in energy. In the short term in Queensland this is reflected in the establishment of a more price reflective cost index the Benchmark Retail Cost Index which is based on the cost of energy, network costs, retail operating costs and retail margin.³⁵ With the onset of the drought electricity prices are increasing, but it is likely that in the future that there will be more volatility in the market.³⁶

This will have a particular impact on low income consumers, who also often be in less of a position to take advantage of demand management incentives (because they rent not owner-occupy); and/or are more likely to have poor infrastructure in terms of energy and water saving devices (because they are cheaper and/or purchased by landlord) and structure (ie poor quality housing). They are also more likely to live in areas underserved by infrastructure such as public transport, therefore more likely to rely heavily on cars, and thus susceptible to rapid increases in fuel costs and greenhouse mitigation initiatives.

Cost-reflective pricing, which takes into account the true cost of essential services, such as energy and water, will impact particularly on low income households. Policymakers will need to find ways to address this, and ensure that consumers on low incomes do not suffer hardship in the drive to address sustainability concerns. This is also an area where consumer and environment groups need to work closely together.³⁷ The recent declaration *Power for the People* is an example of this sort of collaboration.³⁸

³⁵ Queensland Competition Authority (2007) Draft Decision Benchmark Retail Cost Index for Electricity: 2006-07 and 2007-08,.

³⁶ 'Government holds firm on energy prices' (21/05/2007) in *The Australian Financial Review*, p.1, p.10.

³⁷ Brotherhood of Saint Laurence (2007) 'Response to climate change is about environment, economy ... and equity', <http://www.bsl.org.au/main.asp?PageId=4956>.

³⁸ See above n 15.

7. Complexity in markets

Greater complexity definitely makes it more difficult for consumers to participate in markets and to make effective choices. This is true for many sectors, including those sectors involved in recent privatisations and/or the introduction of competition, including the energy sector.

For example, studies by Waddam et al indicate that, in the energy sector, choice is a challenge. A recent study shows that ‘...the capacity of consumers to choose efficiently between [energy] suppliers may be limited...’ with a third to a fifth of customers losing ‘...surplus as a result of switching.’³⁹

In this context Wilson and Waddam describe consumers as making ‘...pure decision errors.’ Other evidence indicates that in the case of utilities switching does not necessarily result in the consumer getting an improved offer.⁴⁰ Moreover choice is not simply the problem, but rather the complexity of the choice in how the offers are structured. Non-price incentives can entice consumers in to a contract that in the long term may not be the best outcome.

Often, the result of complexity is a tendency to stick with incumbency, or not to make choices at all.

Possible policy responses are to change the default options; making use of understandings of the relevance of framing; and developing basic products, that meet certain criteria with respect to terms, price components, etc.; and provide or improve comparability services. Many of these options also require effective consumer education initiatives.

8. Coverage of small business

We do not have a firm view on whether consumer policy should include small business. However, it is clear that small business have specific needs in its transactions with larger businesses (see case study below), and this has been recognised by the Commonwealth government by, for example, implementing specific unconscionable conduct provisions designed to assist small business (s 51AC, *Trade Practices Act 1974* (Cth)).

We also note that there is in many cases an increasing blurring of the line between consumer and small business – for example, consumers are using online auction services, such as eBay, and payment services, such as Paypal, to generate significant income. This development needs to be taken into account when considering the consumer policy framework.

³⁹ Chris M. Wilson & Catherine Waddams Price (2007) ‘Do Consumers Switch to the Best Supplier?’ in Centre for Competition Policy Working Paper 07-06, pp.26-27 (1-31).

⁴⁰ Energywatch (nd) Energywatch Submission Our Energy Challenges: securing clean, affordable energy for the long term, p.12.

Example C – small business and the utilities sector

In the utilities sector in Queensland small end users are defined as those who use under 100 megawatt hours per annum. This includes both residential users and small business. Like residential users, small businesses do not benefit from the economies of scale that large end-users have in the wholesale gas and electricity market. While small businesses need to be distinguished from residential users on a commercial basis, there are some similarities. For example, many small businesses lack knowledge about how to benefit from the array of choices offered, and about what retail contract offers and tariffs are available.⁴¹

In a study CCCL conducted last year many small business and small farm enterprises were as unaware of the impending changes to Full Retail Competition as the residential customers were and did not have access to sufficient information – particularly in regional Queensland.⁴² There are also differences between small businesses in their existing knowledge or awareness of energy issues. This may reflect, to a degree, resourcing issues and differences in the capacities of member/peak body organisations to respond to a wide variety of market issues, on behalf of their members; it may not be an energy-specific issue. It is also apparent that the specific needs of small business may be lost in member organisations/peak bodies which also include large businesses. The lack of capacity for small business including small farmers to participate in utilities debates is highlighted by their absence from the National Consumers Electricity Advocacy Panel funding applications. This contrasts with the large number of applications from large energy users like the Energy Users Association of Australia.⁴³

9. Consumer policy tools

In our view, there has been too much emphasis on disclosure and financial or consumer literacy as the primary tools of consumer policy in Australia in recent times. This is not to say that disclosure and financial/consumer literacy are not important – indeed they should continue to be a key component of the consumer policy framework. Developing and enhancing the skills of consumers to use information that is provided by governments, traders and community organisations can only enhance consumer interactions in the market.

However, disclosure and literacy should not be used as a replacement for the more specific conduct or transaction regulation where this is needed to protect consumers. Nor should it be assumed that disclosing ever-increasing volumes of product and transaction information will, in practice, assist consumers to make informed choices.

Many consumers simply do not have the skills or aptitude to navigate through complex disclosure documents, and this will continue to be the case as products become more and more complex, in an effort by traders to distinguish their products from their competitors.

⁴¹ City of Greater Bendigo and Bendigo Manufacturing Group (2005) ‘Central Victorian Demand Tariff Energy Project’, funded by the Consumer Utilities Advocacy Centre (CUAC).

⁴² Tenzin Bathgate (2006b) ‘Electricity Matters: Interviews with Queensland small end-users and their advocates’, Centre for Credit and Consumer Law, Griffith University, Brisbane.

⁴³ See NCAEP web-site www.advocacypanel.com.au/NewFundedReports.htm

Disclosure is also of limited effectiveness where comparability is not possible, is not easy, and/or is not facilitated by traders. This is particularly the case in the financial services and telecommunications sectors, where individual providers can have very different fee structures, terminology, and time horizons. The consumer credit market provides a good example of some of the challenges with disclosure as a regulatory tool (see Example D).

Example D – disclosure in the consumer credit sector

In the consumer credit sector, the comparison rate (an effective annual percentage rate) has been considered a tool that would allow consumers to compare loan products easily. However, research has indicated that consumers do not understand its impact or relevance; and the comparison rate schedules have also been criticised as not being relevant to the actual loan that is being sought.⁴⁴

However, the lack of consumer appreciation of the comparison rate may be more to a failure to adequately support and promote the changes; the legislation has not really been given an adequate opportunity to work.

In addition, research that we have undertaken on small, short-term loans in Queensland shows that a reliance on an effective APR alone can be misleading when comparing loans of different duration.⁴⁵ Other information, such as repayments as a percentage of principal can also be important.

Indeed, it is a common complaint of the small loan providers that the effective APR is misleading or inappropriate to use in the context of short-term loans.⁴⁶ On the other hand, if competition is to be facilitated, consumers do need to have a mechanism for identifying the true cost of different loan products. At present, the only mechanism that we have is the comparison rate. While some have suggested that the comparison rate should be abandoned, this would appear to be inconsistent with a philosophy of promoting informed choice. Without a comparison rate, it will be almost impossible for consumers to compare the true cost of different loans. Rather than abandoning the legislation, what is needed is a greater effort to support the legislation and facilitate consumer awareness and use of the comparison rate.

We agree with comments by Professor Iain Ramsay that the problems with disclosure do not mean that it should be abandoned entirely.⁴⁷ Disclosure and disclosure regulations are important component of the consumer policy framework, with disclosure potentially playing a role in:

⁴⁴ Ewing, Scott (2006) 'The Effectiveness of Mandatory Comparison Rates: Information, capacity and choice – Final Paper' *Swinburne University of Technology*, Institute for Social Research, http://www.creditcode.gov.au/content/downloads/Swinburne_survey_paper.pdf.

⁴⁵ See CCCL (2006) *Submission to the Managing the Cost of Consumer Credit Discussion Paper*, December 2006.

⁴⁶ This was a common view held by the microlenders interviewed for CCCL's research on interest rate caps (forthcoming).

⁴⁷ Ramsay, I. (2004) "Consumer Credit Regulation as "The Third Way"?", Keynote Address, Australian Credit at the Crossroads Conference, Melbourne, 9 November 2004, p. 15, available at: <http://www.consumer.vic.gov.au> (links to Publications – Conference & Seminar Proceedings).

- Providing a warning signal (eg as to whether the price of a product/service is out of step to the bulk of its competitors);⁴⁸
- comparison shopping;
- understanding the key terms, costs and benefits before committing to a transaction; and
- as a resource (for a consumer or their adviser) in the event of problems after the transaction.

We should keep experimenting and adjusting disclosure requirements, including through pre-testing of proposed changes,⁴⁹ to ensure that the requirements are as effective and useful as possible. At the same time, however, policy-makers need to be realistic about the role that disclosure regulation can play, and not overstate its importance.

As one example of a different approach to disclosure in consumer credit, Professor Lauren Willis suggests that, for home loans, disclosure should contain only four loan terms:

- total loan proceeds;
- total upfront fees and charges (including those financed and those not financed, and including fees payable to third parties);
- maximum monthly payment; and
- loan length in years.⁵⁰

Professor Willis acknowledges that this approach would result in some reduction in choice and product flexibility,⁵¹ but suggests that overall any harm resulting from this would be outweighed by the benefits.

The limitations of disclosure in framing choices also reflect the increasing complexity of consumer transactions. Responses to the challenges posed by complexity might include:

- greater use of default options;
- provision for standard basic products that meet certain criteria (in a similar vein, private health insurers are now required to issue standard information statements⁵²);
- facilities for comparing products, including web-based programs.

Examples of the last point, comparing products, include the recently launched comparator for private health insurance (at www.privatehealth.gov.au), and the FSA UK's comparison tables.⁵³

In terms of consumer policy, there has also been a tendency to overemphasise financial literacy objectives. Unfortunately, while most would agree that consumers will benefit

⁴⁸ Duggan, A. (1991). Some Reflections on Consumer Protection and the Law Reform Process. *Monash University Law Review*, 17, 252, p. 266.

⁴⁹ As is happening with respect to the proposed changes to Credit Code disclosure.

⁵⁰ Willis, L. E. (2005). Decision-making and the Limits of Disclosure: The Problem of Predatory Lending. *Loyola Law School Legal Studies Paper*. Los Angeles, p. 27.

⁵¹ Willis (2005), above n. 50, p. 28.

⁵² See <http://www.privatehealth.gov.au/sis.htm>

⁵³ See Financial Services Authority's Comparative Tables available at <http://www.fsa.gov.uk/tables/>.

from improved financial literacy, it needs to be much more than information disclosure, through brochures and websites. Effective financial literacy initiatives are often more costly and are a long-term strategy. Intensive, face to face programs, like those associated with savings programs or low interest loans schemes appear to have successes in improving financial literacy.⁵⁴

We also suspect that the practical one-on-one services provided by financial counsellors, although not identified as financial literacy, will often have an equivalent or greater impact on financial literacy than government or industry sponsored initiatives because the information and skills are provided at a relevant time. Indeed, our current research with financial counsellors in Queensland indicates that counsellors believe that there is a real potential, and need, for financial counsellors to engage in proactive work, getting to people before a crisis. However, the demands on services for crisis assistance means that they are not able to engage in more proactive, early intervention work.

10. Meeting the needs of vulnerable and disadvantaged consumers

An effective consumer policy meets the needs of all consumers, including those who might be considered to be vulnerable or disadvantaged. We would not support any suggestion that protecting vulnerable consumers is a goal of consumer policy only to the extent that it does not impose any wider costs. We would also be concerned if Australia were to adopt a policy that focused on protecting vulnerable consumers only to the extent that markets overall are not unduly restrained, as appears to be the suggestion of consumer policy in the UK.⁵⁵ Instead, it is an appropriate goal of consumer policy to ensure that the vulnerability of individual consumers is not exploited.

In fact, there is a potential for any individual consumer to be vulnerable in an individual transaction. For example, even well informed, financially savvy consumers can be vulnerable to sophisticated scams and frauds.⁵⁶

In many cases, the relevance of a more permanent vulnerability or disadvantage is in the increased level of severity and impact of poor treatment or non-compliance with consumer protection principles. In considering legislative or regulatory responses, the experiences and perspectives of those who are regarded as vulnerable or disadvantaged, and those who work with such consumers, need to be given due consideration.

In the context of essential services, discussions around vulnerability and disadvantage often crystallise in discussions about how to respond to financial hardship. In the utilities sector the concessions framework regime is vital. In Victoria for instance the concessions regime forms a vital part of the safety net along with the mandating of retailer hardship

⁵⁴ For example, Russell, R., Brooks, R., Nair, A. and Fredline, L. (2006) *Saver Plus, improving financial literacy through encouraging savings: Evaluation of Saver Plus phase 1 – final report*, available at

<http://www.anz.com.au/Documents/AU/Aboutanz/Community/Programs/SaverPWSReportFA.pdf>.

⁵⁵ Department of Trade and Industry, UK, above n. 5.

⁵⁶ For example, see Australian Securities and Investments Commission (2002) *Hook line and sinker: who takes the bait in cold calling scams?*, available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/HookLineSinkers.pdf/\\$file/HookLineSinkers.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/HookLineSinkers.pdf/$file/HookLineSinkers.pdf).

policies.⁵⁷ In addition there are important retailer/NGO partnerships which assist such as AGLs 'Staying Connected Policy' and Origin Energy's 'Power On Policy'. In Queensland Ergon's work with Lifeline is an example.⁵⁸ In Queensland this regime is less robust and to date has relied on a pensioner concessions framework and the cross-subsidy. The latter has now been superseded and the former will be insufficient in a climate of significantly increased and volatile electricity prices.

Clearly the government has a role to play in the development of social policies and consumer policies that address and respond to hardship, particularly in a competitive environment where the concept of a safety net is not a naturally occurring feature of markets.

11. Effectiveness of the generic provisions in the TPA and Fair Trading Acts

Overall, the generic provisions in the TPA and Fair Trading Act are appropriate and important components of the consumer policy framework. Particularly important is the fact that s 52 does not require an intent to mislead or deceive for successful action.

Other generic provisions in the TPA (and mirror legislation in the States and Territories) including the prohibitions against false or misleading statements, and against unconscionable conduct are also key underpinnings to the consumer policy framework.

A recent limitation on the effectiveness of these provisions has been a number of court decisions affecting the ability of the regulators to obtain refunds for affected consumers.⁵⁹ This anomaly needs to be urgently addressed.

In addition, while the prohibitions against unconscionable conduct are very important, and their failure in most cases, to address issues of substantive fairness.

However, the generic provisions also miss one important area for consumers – fairness in the substantive elements of transactions and contracts. The prohibitions against unconscionable conduct focus on unfair conduct in a *procedural* sense. Although it might be possible to argue these provisions to seek remedies for transactions that are substantively unfair, the courts have traditionally been reluctant to intervene in the substance of transactions.⁶⁰ This is largely the case even for the *Contracts Review Act*, where the policy makers deliberately chose the term 'unjust contract' to encourage judges to take a different approach than had been taken in the development of the

⁵⁷ Energy Legislation (Hardship, Metering and Other Matters) Bill 2006 (Vic); May Maseuth Johnston (April 2006), "'Chronic' Hardship Customers and Government Responsibility" in Tenzin Bathgate (Ed) (2006a) *Electricity Issues: Interstate Perspectives on full retail competition for residential consumers*, CCCL, Griffith University, pp. 44-49.

⁵⁸ CCCL (June 2006) *Submission to the Energy Competition Committee, Electricity Full Retail Competition: Proposed Electricity Industry Code*.

⁵⁹ Graham Samuel Speech to National Consumer Congress on 15 March 2007, http://www.treasury.gov.au/ncc/content/download/Presentations/Transcripts/future_frameworks.pdf.

⁶⁰ Howell, Nicola (2005) 'An Update of Unfair Contracts Legislation – Examining the Need for Nationally Consistent Regulation of Unfair Contracts Terms in Consumer Contracts', paper presented to 15th Annual Credit Law Conference on 29th September 2005, <http://www.griffith.edu.au/centre/cccl/pubs/clc0905.pdf>.

unconscionability doctrine.⁶¹ In addition, the ability of these provisions to generate systemic change can be limited by their focus on individual situations, and the resource intensive nature of investigations and litigation that this implies.

To complement the existing generic provisions, a prohibition against the use of unfair contract terms in consumer contracts is needed, along the lines of provisions in Victoria, the United Kingdom, and Europe more generally.

We have discussed the need for, and benefits of this legislation elsewhere.⁶² In summary, unfair contract terms regulation is needed because:

- Most consumer transactions are standard form contracts, with little or no scope for negotiation on the terms (in contrast to the assumptions underlying classical contract theory).
- As a rule, consumers do not read the fine print in contracts.
- Contracts are about sharing risks between the parties to the transactions – it is in the interests of traders who draft contracts to shift risks to consumers wherever possible and legal.
- Behavioural economics suggests that consumers are optimistic about their own abilities to understand transactions and meet contract obligations (particularly in the context of consumer credit); as a result, they do not look at ‘back-end’ clauses, such as default clauses and consequences.
- For the most part, it seems that traders do not compete on terms.
- Even if consumers did shop around for terms, they would find that many of the most unfair terms are found in the contracts of all traders offering the product or service in question;
- As noted above, prohibitions against unconscionable conduct and unjust conduct have focused on procedural unfairness/unconscionability, rather than substantive unfairness.

As we understand it, unfair contract terms regulation in Victoria and the United Kingdom has operated effectively, and, with the considerable investment by the regulator in guidance, discussions and negotiations with traders, has resulted in clearer, more balanced contracts across a range of industries, to the benefit of both traders and consumers.

We are strongly in favour of implementing unfair contract terms regulation in all Australian jurisdictions as a matter of priority, and believe that it is an essential component of world class consumer policy. However, any such laws must also be supported by adequate resourcing of the regulator(s), otherwise the legislation risks have minimal impact in practice.

⁶¹ Carlin TM, “The Contracts Review Act 1980 (NSW) – 20 Years On” (2001) 23 *Sydney Law Review* 125, at 129.

⁶² See Howell (2005) above n 60.

12. Generic vs industry- specific regulation, and principles based legislation

In our view, consumer policy in Australia will continue to need a mix of generic and industry-specific regulation. We refer to the detailed work done by Consumer Action Law Centre on this issue in the energy sector,⁶³ and suggest that industry-specific legislation is necessary in the case of essential nature of goods or services.

In the utilities sector, for example, generic legislation, for instance, cannot cover off on the universal obligation to supply. Industry specific ombudsman schemes are one key example of the relevance of industry-specific regulation and the ability to address industry-specific issues via the complaints process. Industry-specific ombudsman schemes play a vital role in the consumer complaints mechanism in Australia and, as statutory organisations, have an important source of redress for consumers. Examples of effective industry schemes include Energywatch UK and the Energy and Water Ombudsman of Victoria.

While industry-specific legislation will continue to be necessary in many circumstances, it is possible that generic legislation could play a greater role.

For example, in addition to prohibitions against misleading or deceptive conduct, unconscionable conduct, and unfair contract terms, generic legislation could theoretically cover issues such as marketing practices (telemarketing, door-to-door sales, e-commerce, m-commerce); hardship policies; lay-by arrangements; internal and external dispute resolution requirements; and disclosure obligations (in the way that chapter 7 of the Corporations Act sets out standard requirements for disclosure in different types of financial products and services). However, further work would be needed to assess the practicalities of these options.

For example, it is difficult to imagine what a generic, economy-wide disclosure regulation would look like, and when it would apply. How would a generic requirement deal with the fact that, in some transactions, pre- and post-contractual disclosure will be completely unnecessary and unhelpful (for example, the purchase of clothing, or standard household goods)? A generic regime could impose disclosure requirements on transactions over a certain value, but this is not necessarily an accurate reflection of the need for pre- and post-contract disclosure. (For example, we accept the need for disclosure in a \$500 loan, but would probably baulk about formal disclosure requirements for a \$3000 television). An alternative approach might be to require disclosure in the case of services rather than products. However, there is not always a clear distinction between these terms – for example, standard bank transaction accounts are referred to as both products and services in different contexts. Another option would be to impose disclosure requirements where it is intended that there be an ongoing relationship between the parties – for example, a service or product is to be provided over time (eg most financial services, book clubs, etc). Again, this might be difficult to define, and could potentially leave open the risk of loopholes and gaps.

⁶³ Consumer Action Law Centre 2006 *Consumer Protections in the National Energy Market – The Need for Comprehensive Energy-Specific Consumer Protections*, November 2006, at <http://www.consumeraction.org.au/downloads/Energy-specificConsumerProtectionsintheNEM.doc>,

We would welcome further consideration of this issue.

We also note that any move towards greater reliance on generic legislation would need to be accompanied by an increase in enforcement action and litigation, in order to determine the applicability of generic obligations in particular circumstances.

There is also scope for greater coordination and consistency between various instances of industry-specific regulation, and more effective MCCA processes would be a key here.

The Issues Paper asks, in the context of suggesting a reduction in industry-specific regulation where ‘more emphasis on principles-based regulation be helpful?’ We are not convinced that principles-based regulation will necessarily achieve the lofty goals that are promoted by its advocates. Instead, we suspect that the implementation of principles-based legislation will simply lead to the generation of more guidance/regulation through mechanisms that are possibly less transparent or accountable. In addition, from a consumer perspective, greater reliance on principles-based regulation would need to be accompanied by sufficient regulatory resources, to investigate and take action against traders contravening the principles. For example, Professor Ramsay suggests that, for vulnerable consumers, a high level of specificity in consumer protection regulation might be preferable to ‘vague, open-textured standards’.⁶⁴

In a presentation in Sydney earlier this year, Professor Julia Black describes some of the limits, risks and challenges of taking a principles-based approach,⁶⁵ including issues of:

- a lack of certainty for industry;⁶⁶
- consequent proliferation of guidance in a variety of different forms (and in turn, concerns about ‘increasing prescription, complexity and inaccessibility’, inconsistency, and the precedent value of cases settled, rather than litigated.);⁶⁷
- accountability, as elaboration of principles may not go through the same public consultation processes as detailed legislation rules are required to go through.⁶⁸

Professor Black sounds some warnings about a wholesale move to principles based regulation without careful consideration of the circumstances in which principles based regulation is better than detailed rules, and of what the regulation is intended to achieve. She suggests that criteria for using a principles based approach are needed.⁶⁹

In recent research for ASIC’s Consumer Advisory Panel, CCCL looked at the merits of applying the UK’s Treating Customers Fairly (TCF) initiative in Australia. The TCF initiative is said to be a principles-based one. Although our research did not purport to provide a comparison of principles-based and rules-based regulation, we noted that:

... there is not yet evidence to suggest that a principle based system can deliver fairer outcomes for consumers. Ultimately the choice of system is based on a consideration of many factors including regulator cost, firm compliance costs and

⁶⁴ Ramsay (2001), above n. 14 , p. 378.

⁶⁵ Julia Black (2007) Principles Based Regulation: Risks, Challenges and Opportunities, presentation at the Banco Court, Sydney, 27 March, available at: <http://www.econ.usyd.edu.au/download.php?id=7431>

⁶⁶ Black, above n. 65, p. 14.

⁶⁷ Black, above n. 65, p. 14-15.

⁶⁸ Black, above n. 65, p 17.

⁶⁹ Black, above n. 65, p. 20.

compliance psychology. Principles can be enunciated, regulations enacted, rules duplicated in co-regulation and the regulators sentiments made clear. However, without full compliance in the industry there will be instances where financial services customers receive unfair treatment and do not have the wherewithal or inclination to seek redress or report their difficulties. This needs to be the regulator's key concern and ASIC needs to continue to address compliance in the financial services industry. Whether compliance can be enhanced by a principle based approach to regulation warrants further research.⁷⁰

13. Redress and dispute resolution

In recent years, consumer access to independent dispute resolution services has become a key component of the consumer policy framework. In some sectors, including financial services, and jurisdictions, it is well established; in others it is at an earlier stage.

In Queensland for example, for many years we have had an energy complaints mechanism that is not independent of Government, and as a consequence, its roles was not widely publicised in the community and therefore widely known as a possible source of redress. The lack of independence and accountability has been a major drawback of this scheme.⁷¹ And as Fiona Guthrie and Simon Cleary point out there is much to be said for retaining the jurisdictionally based industry specific model ombudsman in energy because it allows consumers to be '...able to contact a local ombudsman in their own State, who in turn has close ties with the community and understands the local situation.'⁷² That anomaly has now been addressed, with the independent Energy Ombudsman to commence operations on 1 July 2007.⁷³

In the financial services sector, the major anomaly in relation to dispute resolution is the absence of an obligation on all credit providers to provide their customers with access to an independent external dispute resolution process. Ensuring this access should be a key priority of policy development in this area.

There has also been much discussion about the proliferation of schemes, particularly in the financial services sector, with some arguing that there should be a move towards a single financial services scheme, perhaps like the Financial Ombudsman Service in the United Kingdom.

However, in our view, while there may be some benefits to consolidation in the sector, the greatest priority should be reserved for (i) ensuring that all financial services providers, including credit providers, must belong to an approved EDR scheme; and (ii)

⁷⁰ Davidson, James 'The UK Financial Services Authority's "Treating Customers Fairly" initiative and its potential for application in the Australian Financial Services Industry' (2006) *CCCL Research Paper*, <http://www.griffith.edu.au/centre/cccl/pubs/ukfsa-tcf0706.pdf>, pp 43-44.

⁷¹ It is difficult to calculate the impact and profile, or lack thereof, of the Energy Consumer Protection Office in Queensland (soon to be replaced by the Energy Ombudsman) but the lack of independence has been a key concern of Queensland consumer groups for many years. For discussion of the drawback of this model see Fiona Guthrie and Simon Cleary (2006) 'Structure Matters: Solving Disputes between Consumers and Electricity Companies' in Jane Bathgate (Ed) (2006a) *Electricity Issues: Interstate perspectives on full retail competition for residential users*, Centre for Credit and Consumer Law, Griffith University, pp.26-37.

⁷² Bathgate (2006a), above n. 71, p. 37.

⁷³ *Energy Ombudsman Act 2006* (Queensland).

ensuring a seamless front-entry to dispute resolutions schemes, so that consumers can be easily and quickly directed to the most appropriate scheme.

Instead of consolidation, we believe that a more pressing challenge for the external dispute resolution schemes is the likelihood that they will be, in a de facto manner, becoming law making bodies. Consumer regulation is traditionally under-enforced, with the result that there is little judicial consideration and interpretation of some of the key consumer protection provisions, including the provisions relating to unjust transactions and unconscionable fees in the *Consumer Credit Code*.

In this context, industry dispute resolution schemes may be called upon to resolve disputes for which there is no relevant judicial pronouncements on the way in which the law should be applied. In our view, this is the case where, for example, the Banking and Financial Services Ombudsman Scheme (BFSO) makes decisions in relation to unjust contracts and the failure to assess capacity to repay. This is not to be critical of the BFSO in its role here; it is simply to acknowledge that as the EDR schemes become the primary route for consumer disputes, we will gain less and less guidance from the courts on the scope of legislation. Policy-makers and others need to give consideration to the implications of such a trend (particularly when EDR schemes do not all report the reasons for decisions, nor treat previous decisions as having binding precedent).

Of relevance here are comments from Professor Ramsay, in relation to the need for more consumer law research, in particular, for research on what he calls 'low law':

My article also carries a plea for future research on consumer law and policy. Given the instrumental nature of consumer law there continues to be a very modest amount of empirical work on consumer law and institutions and their relationship to market behaviour. Legal centralism is still influential in consumer law and 'high law' as represented by decisions of appeal courts or the European Court of Justice continue to be the focus of attention. The vast amount of 'low law' that is generated in small claims courts, administrative tribunals, ombudsmen, and the private complaint handling practices of firms remains relatively unstudied.⁷⁴

Another factor that is key in dispute resolution and redress is access to information, advice and representation for consumers. The demand for free or low cost legal and financial counselling advice on consumer issues is far from being met, particularly in Queensland, with the consequences that unfair treatment remains unremedied for many consumers (especially those who are unlikely to take action by themselves). For example, in another paper, we referred to UK and NSW studies that suggest disadvantaged consumers are unlikely to take action in relation to credit and debt problems.⁷⁵

14. Self-regulation and co-regulation

In the past, we believe that there has been too much rhetoric about the potential for self-regulatory initiatives to realise consumer protection objectives.

⁷⁴ Ramsay, I. Consumer law, regulatory capitalism and the 'new learning' in regulation. *Sydney Law Review* 28(1) 9-35, p. 34.

⁷⁵ Howell and Wilson 2007, above n. 3, p 13, citing Genn (1999, p. 101) and Coumarelos (2006, p. 99), although the sample size for credit/debt matters was only 26.

Examples of successful self-regulatory initiatives are few and far between, and have largely been limited to industry segments with most or all of the following characteristics:

- a relatively small number of members;
- maturity;
- openness to government and consumer involvement in development and review of the code,
- effective mechanisms for compliance and redress,
- codes that go beyond the requirements of the law, and
- codes that are backed up by access to internal and external dispute resolution.

In the financial services sector, effective examples include the Code of Banking Practice, the General Insurance Code of Practice, and the Electronic Funds Transfer Code of Conduct. It would be incorrect, however, to suggest that these codes are necessarily cheaper or more flexible than government regulation.

Both the ACCC and ASIC have facility to approve codes of conduct.⁷⁶ However, we are not aware of any consumer-related code that has been approved using this process. This contrasts with the experience in the United Kingdom, where the codes approval process appears to have had greater success.⁷⁷

A more consistently successful form of self-regulation in Australia has been the development of industry-based external dispute resolutions schemes, particularly in energy and financial services. The success of these schemes is due to factors such as:

- genuine consumer involvement (ie as consumer representatives hold Directorships on the Boards of many schemes);
- backing of the regulatory framework (eg holders of Australian Financial Services Licenses are required to belong to an approved EDR scheme);
- relatively small industry sectors, with similar sized players (although this is also starting to change now, as for example, the BFSO now has a range of non-bank members);
- accountability through regular and public reviews, and through publication of data, including inquiries, complaints and disputes; decisions; guidelines; bulletins, etc.

The industry EDR schemes are by no means perfect; the TIO in particular has been the subject of complaints by consumer organisations. However, they can be an important mechanism for increasing access to justice for many consumer disputes. There is also likely to be scope to improve or increase industry-based EDR schemes in other sectors, for example, in telecommunications, credit reporting, privacy, motor car dealers and repairers, etc.

⁷⁶ *Corporations Act 2001* (Cth), s 1101A; *Trade Practices Act 1974* (Cth) Part IVA.

⁷⁷ Office of Fair Trading media release 'Study shows OFT codes scheme is good for business and consumers', 31 October 2006, at <http://www.offt.gov.uk/news/press/2006/152-06>, viewed 23 May 2007.

15. Consumer advocacy, research and representation

Governments in many developed countries acknowledge the importance of consumer advocacy and representation, and consumer research, and in many cases, they have matched this acknowledgment with financial support. Unfortunately, this is an area where Australia has fallen well behind its international counterparts, to the detriment of improved consumer policy outcomes for the whole community.

In this context, we refer to and support the comments made in the submission by the Consumers' Federation of Australia to this Inquiry, and the document 'A Strong Consumer Voice', the preparation of which was funded by ASIC's Consumer Advisory Panel. We understand that the Productivity Commission has been provided with a copy of this document.

'A Strong Consumer Voice' highlights the gaps that currently exist in relation to consumer involvement in the policy development process, and shows strong consensus amongst consumer advocates for filling those gaps by:

- the establishment of an independent consumer research centre;
- funding of the peak body, the Consumers' Federation of Australia;
- the establishment of external dispute resolution services in presently unserved areas;
- improving access to financial counselling and community legal services; and
- more extensive recognition of the need for consumer representation.

CCCL was consulted as part of this project, and we strongly support these suggestions. Further comments are provided below.

Consumer research

The need for greater consumer research has been highlighted in many forums recently, including the National Consumer Congress in March 2007. Unfortunately, whilst many recognise that we need better information about consumers – their behaviour, skills and preferences; and about the operation of different consumer markets, there has been little financial support for such work.

The case of CCCL provides a specific example of the limitations of current approaches to funding consumer research and advocacy. CCCL was established in 2004, with a 3 year funding grants from the Queensland Government (\$130,000 annually⁷⁸) and Griffith University (\$65,000 annually). Griffith University also provided (and continues to provide) in kind support, through office accommodation, access to equipment and access to resources.

At the time, CCCL was only the second consumer law research centre established in partnership with a university; the Financial Services Consumer Policy Centre at the University of New South Wales was established in 1998, but effectively closed in mid-late 2005 due to lack of ongoing funds. (More recently, the Centre for Advanced Consumer

⁷⁸ Funds from the State Government have been allocated out of the Consumer Credit Fund. The Fund collects fines imposed for breaches of the Consumer Credit Fund and court costs awarded to the Queensland Office of Fair Trading, see *Consumer Credit (Queensland) Act 1994*, ss 51-54.

Research has been established at the University of Western Australia through funds from the University and the Department of Consumer and Employment Protection.⁷⁹⁾

Towards the end of our 3 year agreement, we were advised that the Queensland Government would offer additional funding of \$65,000, but that the Government did not propose to provide additional funding to Griffith University in respect of the CCCL beyond 30 June 2008. Griffith University has also offered an additional 12 months' funding of \$65,000.

While the extension of support from the Queensland Government and Griffith University is very welcome, both of our original funders have indicated that further funding will not be offered, and they have expressed the understanding that CCCL will seek further funding and support from alternative sources.

As a consequence, CCCL will need to spend a substantial part of staff and volunteer Board time this year in developing relationships with potential funders and making funding applications, including project funding applications. This is time that could otherwise be spent in conducting consumer research.

The uncertainty of such a funding situation also has implications for CCCL's ability to develop and maintain a coherent research program (as research projects and research directions must chop and change in line with the priorities and criteria of different funding programs); and its ability to recruit experienced and skilled staff, and to retain and develop existing staff (because only short-term employment contracts can be offered).

Our experience in relation to funding is reflected in the experience of many other consumer organisations trying to undertake effective policy and research activities.

We believe that CCCL has made a strong contribution to consumer policy and research in Australia to date. In large part, this has been due to the fact that the initial 3 year funding arrangement allowed the Centre to be considered and strategic in its approach, to both get short-term runs on the board and to establish longer-term research projects, to enable both considered and timely responses; to establish the networks for effective consultation and communication with other consumer and community organisations in Queensland and nationally that in turn ensured the relevance of our work and its links to the experience of casework and grassroots organisations.

On the other hand, while short-term and project funding arrangements allow for specific responses and interventions, they do not build up a body of knowledge, or add to capacity in a sustainable manner, because organisations operating in such an environment risk losing talent, skills, experience and networks, and then regularly need to reinvent the wheel.

We note that in the United Kingdom, the government has acknowledged the greater benefits that longer-term funding arrangements can provide for the community as a whole. Its *Funding and Procurement Compact Code of Good Practice* notes:

⁷⁹ See <http://www.cacr.law.uwa.edu.au/>.

Longer term planning and financial arrangements often represent better value for money than one year agreements by providing greater financial stability and by reducing the amount of time and effort wasted on applying for new funds or renegotiating contracts. For grants, this includes roll-forward multi-year agreements.⁸⁰

And in HM Treasury's document: *Improving financial relationships with the third sector: Guidance to funders and purchasers*, the merits of short-term vs long-term funding arrangements are summarised in this way: (footnotes omitted)

3.7 Short-term contracts can lead to the diversion of valuable third sector resources into bidding for Government funds – often from multiple sources – and away from the development and delivery of better services. Annual funding means a considerable level of uncertainty for both funding bodies and providers, limits the ability of third sector organisations to engage in longer-term planning, borrowing and investment, and can put third sector organisations into undesirable financial difficulties. Both funders and providers may struggle to keep up with the annual renewal processes, and can often end up with a period of uncertainty while decisions are made on whether the funding is to be renewed. Longer-term funding will reduce the incidence of these comparatively expensive and unproductive periods.

3.8 In addition to this, many of the client groups of the services provided by third sector organisations are in need of sustained care and support, which can be put at risk by dependency on annual grants by the third sector organisation delivering the service. The lesson here is clear: short term funding – if used inappropriately - can produce suboptimal outcomes for both the third sector organisation and the client group that benefits.

3.9 Longer term funding can reduce such dependency, allow the third sector organisation more flexibility to carry out its core function, and produce clear benefits for the – often highly vulnerable – client groups supported by such organisations. Quite simply, longer term planning and funding arrangements can often represent better value for money than one year funding agreements by providing greater financial stability. Through the Compact, government has undertaken to “implement longer term financial arrangements when these represent good value for money”.⁸¹

In relation to consumer research, the Inquiry Issues Paper asks: ‘... who should be responsible for carrying out and resourcing such work?’

In our view, for effective consumer research programs to be carried out in Australia, there needs to be a stable and generous component of government funding for that work, from both the Commonwealth and State/Territory levels of government.

⁸⁰ *Funding and Procurement Compact Code of Good Practice*, Para 2.8, at http://www.thecompact.org.uk/shared_asp_files/GFSR.asp?NodeID=100322.

⁸¹ HM Treasury (UK), *Improving financial relationships with the third sector: Guidance to funders and purchasers*, May 2006, p 22, at <http://www.hm-treasury.gov.uk/media/485/B9/guidncefunders1505061v1.pdf>

There are a range of practical difficulties associated with expecting consumer research organisations to be self-funding, including:

- the low level of philanthropic funding in Australia, particularly when compared to the United States;
- the very few opportunities for untied grant funds;
- the reluctance of most grant programs to support applications for core-funding, as opposed to project-based grants;
- the potential for conflicts of interest to emerge (or be seen to exist) in relation to industry-sponsored research.

In addition, as many acknowledge, good consumer research is essential for effective policy development and implementation processes. Governments therefore have a key interest in ensuring that the necessary research takes place.

However, Government funding should be provided on a longer-term basis, to ensure that the knowledge base is built and secured for the future, and that a research program can be developed strategically, rather than on an ad-hoc basis.

Government funding for research can come and should include untied and project grants to State-based and casework agencies with the capacity to undertake research on consumer law and policy issues. In consumer credit, the Consumer Credit Fund in Victoria provides an example of an effective project based funding program, and the *initial* Queensland Government/Griffith University support for CCCL provides an example of a longer-term, core funding model. Some elements of the National Electricity Consumers Advocacy Panel potentially provide a good model for consumer advocacy, for example the program of funding for capacity building and advocates on a 12 month basis. However, without a commitment to longer term funding, the 12 month programs face the risks and problems described above.

We also strongly support the development of an independent consumer research centre, modelled along the lines of the National Consumer Council (NCC) in the United Kingdom. The NCC has been financially supported by the UK Government since 1975, with a mandate to safeguard the interests of consumers and to ensure that these interests are represented to and are taken account of by decision makers. The NCC carries out research and, where change is needed, develops policy solutions and campaigns, and works with providers of goods and services to ensure that the policy solutions work.⁸²

There is also a need for national coordination and information sharing on consumer research, and the setting of national priorities. To some extent, this occurs on an informal basis now,⁸³ however, it could be much more strategic. An NCC-type organisation, working with MCCA, could undertake these tasks.

Of course, there is also a role for non-Government funding of consumer research, and in particular, for academics to undertake research in this area as part of their day-to-day work. CCCL is implementing a number of initiatives to encourage and support academics researching in consumer law, including:

⁸² See <http://www.ncc.org.uk/about/faq.htm>, viewed 23 May 2007.

⁸³ For example, the Ministerial Council on Consumer Affairs includes 'research into consumer concerns and trade practices' as one of its principal strategies.

- with the University of Sydney, Department of Business Law, co-hosting a Consumer Law Roundtable in 2006. A second Roundtable is planned for December 2007, and we hope to make it an annual or biannual event.
- with the University of Sydney, Department of Business Law, establishing a Consumer Law Network for academics;
- co-editing a special edition of the Griffith Law Review, focusing on consumer protection law;
- at Griffith University, offering the CCCL prize for excellent consumer law research by an undergraduate student – with the aim of fostering interest in this area of law.

In addition, consideration should be given to the potential for cy pres funds and industry levies to support consumer research.

Consumer advocacy – advice, casework and financial counselling services

We also believe that Commonwealth, State and Territory Governments need to put adequate resourcing into ensuring that all consumers in Australia have access to a minimum level of information, advice and individual advocacy in relation to complaints and disputes on consumer issues.

As noted earlier, the industry-based EDR schemes, where they exist, can provide an important means of accessing redress. Most schemes have the objective of facilitating self-advocacy and representation. Consumer and small claims tribunals are also intended to be used by consumers without the need for legal advice or representation. However,

- some consumers will still need assistance with making a complaint and progressing through the process;⁸⁴
- some consumers find it very difficult to self-advocate, particularly if the trader is not receptive to initial approaches;
- many traders and consumer disputes are not covered by an effective EDR scheme;
- consumer rights can be found in a range of instruments, including legislation, regulations, codes and charters, and it is unrealistic to expect that individual consumers will be able to navigate through the process;
- without knowledge of their rights (for example, the right to a statement of account in the case of a consumer credit contract), consumers can be disadvantaged in some processes, particularly in processes that focus on mediation rather than adjudication, or where the decision-maker does not have expertise in the specialist area;
- many consumer transactions are complex, as are the regulatory requirements surrounding them; and legal advice and assistance may be needed to navigate through that complexity;

⁸⁴ This was a key issue raised by caseworkers that CCCL consulted in preparing the joint consumer submissions to the reviews of the Banking and Financial Services Ombudsman and the Insurance Ombudsman Service in 2005 and 2006.

- traders have more familiarity with the processes of the dispute resolution schemes and courts and tribunals; in contrast, for most consumers, it will be their first approach.

We understand that consumers with low incomes, or who are otherwise disadvantaged, are under-represented in complainants to EDR schemes, and are less likely to self-advocate.⁸⁵ Without access to individual advocacy services, these consumers are less likely to receive redress for poor treatment by traders.

In Queensland in particular, access to individual consumer advocacy is low compared to other States and Territories. There is no community legal centre funded to provide legal advice and assistance on consumer law matters (in contrast with Victoria, NSW, WA and the ACT). The consumer protection unit of Legal Aid Queensland consists of one effective full-time position, based in Brisbane, but servicing the whole state. And in our current research with financial counsellors in Queensland, they have told us that all services are over-stretched, that most who are working part-time are doing so because of a lack of funding, not a lack of demand, and that there are clear gaps in geographical coverage of financial counselling services. In addition, increasing recognition of the role of financial counselling by government, industry associations, and traders,⁸⁶ are having the welcome effect of increasing community awareness of these services, but problems can emerge when increasing demand is not matched by increased funding and support.

Individual consumer advocacy can help to make real the consumer rights that exist on paper, and can ensure that there is action in the event of non-compliance. It is particularly important for consumers on low-middle incomes, for whom private legal assistance is often not a realistic option, particularly given the relatively low value of many disputes. Access to information, legal advice and legal assistance are key components of a consumer policy framework that delivers for consumers, and we strongly urge the Productivity Commission to make recommendations that acknowledge the need for greater investment in this area overall, and a redressing of the disparity that currently occurs between Queensland and the other large states in particular.

We also note that our comments above, in relation to long-term funding arrangements, are equally applicable to the funding of casework, advice, financial counselling and other frontline services provided to consumers by community and non-profit organisations.

Consumer group networking and coordination

Finally, we strongly support the comments in ‘A Strong Consumer Voice’ that a properly funded peak body is an essential component of the consumer policy framework. Among other things, a peak body such as the Consumers’ Federation of Australia can play an essential role in:

⁸⁵ For example, Gordon Renouf and Simone Watson (CCCL) (2005) *Joint Consumer Group Submission to the Independent Review of the Insurance Ombudsman Service 2005*, p. 16, available at www.griffith.edu.au/centre/cccl.

⁸⁶ For example, government and industry consumer education material, codes of practice, and terms and conditions documents regularly advise consumers to see a financial counsellor if they are in financial difficulty.

- communicating with, and linking, large and small consumer and community based organisations across Australia to facilitate the sharing of information and knowledge;
- increasing the capacity of community and consumer organisations to have input into policy processes (for example, by providing summary and background documents, lists of key issues, and consulting with members);
- coordinating requests for consumer representation on government and industry bodies;
- responding to requests for comment on consumer policy issues; and
- coordinating and developing policy positions and submissions.

A similarly important role can be played in subsectors of the consumer sector – for example, by the Australian Financial Counselling and Credit Reform Association.

16. Consolidating regulatory responsibility into one level of government

One of the challenges of Australia’s consumer policy framework is the overlapping consumer protection responsibilities of the Commonwealth, State and Territory governments. In some cases this works well (for example, mirror provisions and enforcement responsibilities in relation to the general fair trading obligations). In others, the overlap leads to inaction because governments seek to pass responsibility to one another, and/or it is difficult to get a uniform approach.

The Inquiry Issues Paper therefore asks where there are areas of regulatory responsibility that could readily be consolidated within one level of government?

In our view, there would be a strong case for transferring **consumer credit regulation** to the national level.

As we have already noted, there have been ongoing difficulties associated with reviewing and updating the Consumer Credit Code, and this in part reflects the fact that credit is regulated at the level of the States and Territories. In 1997, the Financial System Inquiry recommended that:

The States and Territories should retain responsibility for the *Uniform Consumer Credit Code* (UCCC) and related laws and focus efforts on improving its cost effectiveness and nation wide uniformity. After it has operated for two years, the UCCC should be subject to a comprehensive and independent review to consider what improvements are necessary and whether a transfer to the Commonwealth would be appropriate.⁸⁷

Unfortunately, this recommendation was never implemented.

The fact that consumer credit is regulated by the State and Territory governments is an anomaly where all other consumer financial services are regulated at the Commonwealth

⁸⁷ The Financial System: Towards 2010, <http://fsi.treasury.gov.au/content/downloads/FinalReport/overview.pdf>, Recommendations p. 3 (Recommendation 6).

level. The anomaly has practical outcomes, including the fact, mentioned above that, alone of all financial services providers, consumer credit providers are not required to be licensed, nor to belong to an external dispute resolution scheme. Apart from historical reasons, there seems to be no good reason why consumer credit should be treated differently to other financial services.

In the public hearings in Brisbane, it was suggested that Commonwealth regulation might be overkill for the very small credit providers, offering small loans. However, businesses in the financial planning sector can be small operations, and banking products can be very low value. As far as we are aware, this has not led to any suggestions that Commonwealth regulation should be replaced by State/Territory regulation.

There is therefore a strong case for migrating consumer credit regulation to the Commonwealth level, with ASIC as the primary regulator. However, as with the general fair trading provisions, there is no reason why State and Territory governments could not also have concurrent responsibilities for enforcement, providing that they are given appropriate coordination and resourcing; this can be seen as an effective model in Australia's federal system.

Obviously, the detail of any transfer would need further work. It might be possible to simply add credit providers into the Financial Services Reform Act framework for disclosure and other matters, however, it will be vital to ensure that existing protections are not lost if this approach is taken. An alternative might be to implement the Consumer Credit Code as national legislation, and implement a separate licensing and EDR regime. However, given that many credit providers will already hold an Australian Financial Services Licence, it might be administratively simpler to incorporate credit providers into the existing AFSL framework.

Regardless of the final form of any transfer of consumer credit regulation to the Commonwealth level, the key points are that (i) a national approach is needed, so as to ensure timely response to problems in the market; (ii) all credit providers must belong to an approved EDR scheme; (iii) credit providers must be licensed; and (iv) credit advice and credit advisers must be regulated.

In relation to the regulation of **electricity**, however, we are less confident about the merits of transferring regulatory responsibility to the national level.

The establishment of the National Electricity Market (NEM) is designed to consolidate regulatory responsibility at the national level. As key elements of jurisdictional responsibility are still being transferred to the regulator it is difficult to comment on how effective this will be in the long term from a social policy perspective. We refer back to our earlier comments on essentiality.

From a consumer point of view one aspect is very clear – that a competition model which underpins the NEM – and which narrowly defines the long term interests of consumers in terms of price, quality, safety, reliability and security of supply without reference to social and environmental concerns – is potentially deleterious in the long term consumer interest. This is because the current model lacks a mechanism for

recognising the key place of social and environmental policy in the establishment of a consumer framework for energy.⁸⁸

We note the critical need for explicit mechanisms to deal with socio-economic disadvantage and utilities policy which currently lie with the States and for which there is no place in the current NEM. For instance the UK is far more advanced than Australia in its explicit recognition of the social and environmental elements necessary in the establishment of a viable national energy market.⁸⁹ At the present time States are acting as a bulwark in the NEM in potentially preserving hardship provisions, community service obligations, uniform tariffs etc. In those circumstances, transfer of regulatory responsibility to the federal level poses great risks of implementing lowest common denominator policies, and failing to address the relevant social and environmental issues.

Perhaps one reason why transfer of consumer credit regulation to the national level merits consideration is that the regulatory content is relatively settled (ie uniform, or mostly uniform), and there is little variation in expectations of standards and rules between the jurisdictions.

In contrast, in electricity, there is both considerable variation in standards between the States and Territories, and a failure to acknowledge social and environmental issues in the federal regulatory environment, and the risk of a race to lowest common denominator regulation is therefore very real.

17. Regulation making, review and policy development processes

One of the major difficulties of current policy and regulation development processes is the lack of capacity within consumer and community organisations to provide input. There are increasing demands from regulators, government and industry for that input, but these demands are not matched by any increased support for non-profit organisations.

CCCL's involvement in the policy development processes for Queensland's introduction of full retail contestability in energy highlights the difficulties in current approaches.

The Stakeholder consultation process was convened by the Energy Competition Committee (ECC) (appointed by Government). The ECC invited all stakeholders (retailers, distributors and consumer groups) to participate in a detailed consultation process on the drafting of the Energy Industry code (Gas and Electricity) and the relevant legislation and regulations. In principle this was a welcome process because it effectively invited stakeholder participation in the actual drafting of the content of the regulatory instruments. Ideally, this would lead to a more viable set of documents, reflecting the diverse needs and interests of the different stakeholders in a process that relied heavily on both oral and written submissions.

⁸⁸ Total Environment Centre, Consumer Utilities Advocacy Centre, Australian Conservation Foundation, St Vincent de Paul Society, BCSE, ACOSS and WWF (2007) 'Power for the People Declaration'.

⁸⁹ Energywatch (2007) A social responsibility? The Energywatch consultation on the nature of social tariffs in the energy market: Executive Summary.

In practice, however, this arrangement did not serve consumer groups very well. For a start the two consumer representatives, one a volunteer with the Queensland Consumers Association, and the other a staff member of CCCL were significantly under resourced in dealing with the volume and complexity of information required of them compared with the resources, including legal counsel, available to the more numerous retailers and distributors.⁹⁰ Secondly, on issues of critical importance to the consumer representatives such as the jurisdictional model that was relied on to shape the legislation and hardship provisions, meaningful debate was not possible, because the Government decided not to consult on particular parts of social policy in the debate. Finally, the consultations were facilitated by consultants. While Government representatives (including the representatives of the regulator) were present at these consultations, their position was more as a neutral observer rather than a participant. The lack of direct government engagement, combined with the authority vested in the Energy Competition Committee and the consultants' resulted in a process that heavily favoured a market model, and did not adequately support the consumer issues.

Similarly, consumer representatives have found it difficult to engage effectively in the current consultation processes under the Ministerial Council of Energy, and it is not clear what weight consumer submissions carry compared to the submissions by industry members.

It is critical to effective policy outcomes that consumers and their representatives are engaged in, and able to contribute to, the policy development process. Unfortunately, the lack of resourcing for consumer advocates places severe limits on their ability to participate, and this in turn means that policy makers are making decisions without full information on the consumer perspective. For the most part, individual consumers are unlikely to be motivated, or to have the capacity to participate in detailed policy making processes on an individual basis, but if our research on electricity issues is any guide, consumers want independent, informed consumer advocates to promote the consumer perspective in policy debates.⁹¹

In this regard, we support the recommendations of the Consumers Federation of Australia for better resourcing of consumer policy advocacy and representation.

We also note that the current costs and benefits analysis requirements for policy and regulation development find it difficult to account properly for non-economic costs and benefits. We note that ASIC's Consumer Advisory Panel has commissioned some research on this issue, and the findings will hopefully encourage policy making and gatekeeping arrangements to find a better balance in the assessment of economic and non-economic issues.

Finally, we note that there is often a lack of coordination between different government departments and Ministers in relation to issues that have consumer protection implications. For example, it is not clear what, if any, participation fair trading ministers

⁹⁰ It should be noted that the CCCL staff member concerned was new to the area of energy and full retail competition. The lack of resources at the table was in spite of NECAP funding to enable CCCL to employ expert consultants. Unfortunately, the experts were mostly unavailable for face to face consultations. They did provide significant assistance on written submissions; however, more support was required at the table for oral submissions.

⁹¹ See Bathgate (2006b), above n. 42.

and agencies have had in the proposals around the national electricity market, even though these proposals have clear consumer protection and fair trading implications.

18. Ministerial Council arrangements

In our view, the Ministerial Council arrangements, and the supporting Standing Committee of Officials on Consumer Affairs (SCOCA), are not working well. MCCA is slow in generating outcomes in terms of legislative or regulatory change, often despite good intentions, conscientious Department staff, and general agreement on the need for change. The delays associated with many of the proposed changes to the Uniform Consumer Credit Code; and the failures to progress action in relation to unfair contract terms regulation and property investment regulation are a clear example of the failures of the MCCA/SCOCA processes.

In part, this is a reflection of the difficulties achieving agreement in a Federal system. Perhaps it also reflects insufficient resourcing for MCCA and SCOCA, which in turn possibly reflects the relatively junior position that consumer affairs / fair trading ministers have in most governments. Finally, it has also been suggested that delays in some areas have been caused by the inflexibility and arbitrary nature of some of the requirements of the regulatory impact statement processes.⁹²

The difficulties associated with getting outcomes through the MCCA/SCOCA processes can cost consumers heavily; but can also impose unnecessary costs on government agencies and stakeholders to reform processes.

Better resourcing of MCCA; the development of an agreed consumer policy framework document; more effective leadership on consumer policy from the Commonwealth government (including by appointing a Minister for Consumer Affairs and Fair Trading) and transferring consumer policy out of the Treasury portfolio); and greater prioritising of consumer policy within governments would hopefully have some impact on the effectiveness of the MCCA process.

Contact for further information

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⁹² Cousins (2006), above n. 13, p. 31.

Attachment

Centre for Credit and Consumer Law, Griffith University

Consumer Network Meeting

Brisbane, 1 May 2007

Notes from Small Group Workshop

Introduction

On 1 May 2007, the Centre for Credit and Consumer Law hosted a Consumer Network Meeting focusing on the Productivity Commission's Inquiry into the Consumer Policy Framework. Following presentations from the Hon Margaret Keech, MP (Minister for Fair Trading), Robert Fitzgerald (Productivity Commission), Paul O'Shea (University of Queensland), and Kathleen Dare (Office of the Public Advocate), the participants divided into small groups to discuss one of the following questions:

1. What are the components/attributes of the consumer policy framework that do work?
2. What are the components/attributes of the consumer policy framework that do not work?
3. What changes are needed to improve the consumer policy framework?

Small groups were also asked to identify whether there were any questions or issues that would assist them to participate in the Productivity Commission's Inquiry process.

The following summarises the responses from the small groups. There were approximately 20 participants in this exercise, including financial counsellors, representations from other consumer and community organisations, representatives from State and Federal government agencies, and academics. Participants were based in Brisbane and surrounds.

1. **What are the components/attributes of the consumer policy framework that do work?**

- External Dispute Resolution Schemes.
- Some specific legislation e.g. door-to-door sales because it is very prescriptive.
- Generic legislation provides a good umbrella of general principles e.g. fit for purpose requirements.
- Generic legislation works best for tangible products rather than services.
- Small claims tribunal works well because it is cheap, broad-focused and accessible.#
- Some industry codes work well, but it depends on the actual industry. Some good industries, in terms of their codes, are electricity and insurance. One factor of a good industry code is a requirement for membership of an EDR scheme.
- In some cases, resourcing of consumer representatives to carry out their functions works well, e.g. ASIC & ACCC consumer advisory panels.
- Advocacy funding to encourage consumer involvement in policy making (via funded advocate) e.g. the full-retail contestability process, where the National Electricity Consumers Advocacy Panel has funded an advocate/researcher, and has also funded consultants to prepare submissions.
- Financial counsellors, as they inform/empower/assist and advocate and act as intermediaries for consumers.
- Support for financial counsellors – especially CCCL, ITSA and Paul O’Shea.#
- Legal Aid Queensland, in its ability to take on strategically chosen clients, with results that can assist many.#
- ASIC’s FIDO website.

These responses may be specific to Queensland.

2. What are the components/attributes of the consumer policy framework that do not work?

- The assumption that competition is always the cure for consumer problems, e.g. the assumption that the market will correct itself.
- Assumptions about forming contracts e.g. that consumers have a full understanding of terms and conditions, and that people read contracts before they enter transactions.
- Information & knowledge exchange e.g. disclosure requirements are often not effective.
- Traditional litigation redress avenues.
- Industry responses to market problems – often they deny the problem, and avoid the issue, instead of taking steps to solve the problem.
- Lack of funding for consumer advocates and enforcement by the relevant regulators.
- Some industry codes.

3. What changes are needed to improve the consumer policy framework?

- More funding for caseworkers, and for academic centres to conduct research.
- A section in Trade Practices Act that allows for refunds for all consumers affected by enforcement actions taken by the ACCC (to overcome the limitations raised by the Danone, and Medibank cases).
- ‘Critical moment’ advice and assistance.
- Mandated industry contribution to independent organisations for consumer advice, education and research.
- Consumer representative bodies managed and funded to take representative actions.
- Unfair contracts legislation from all States with more focus on remedies and somewhere for consumers to go. This is linked to reform of tribunal system for easier access.

- Mandated EDR (ombudsman) scheme with membership required for all credit providers.
- Codes of Conduct mandating IDR for those industries that do not have it.
- Focus on financial literacy.
- Consumer impact statements for new or revised regulation.
- Onus on credit lenders to investigate and “make reasonable enquiries” into a debtor’s finances and ability to repay the loan.
- Responsibility of industry and Federal Government’s to ensure proactive and reactive consumer research.
- No unsolicited credit card increases.
- Government action where there is market failure (including looking at social impact).

4. Issues/questions that could facilitate involvement in the Productivity Commission Inquiry

- Funding of consumer submission for current review.