

# **CONSUMER POLICY FRAMEWORK**

**Submission by Redfern Legal Centre on the**

**PRODUCTIVITY COMMISSION ISSUES PAPER  
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## **About Redfern Legal Centre**

Redfern Legal Centre (RLC) was the first community legal centre in NSW, and the second in Australia. It was established in March 1977.

RLC provides face-to-face and telephone legal advice by appointment, night and day Monday to Thursday, and by day only on Fridays. We provide emergency advice on demand, where necessary, and have specialised appointments for ATSI clients and for clients falling within each of the categories represented by the Services described below.

RLC provides a Credit and Debt legal Service, a “general law” legal service, a Women’s Domestic Violence Court Assistance Scheme, and a Tenants’ Advice and Advocacy Service.

RLC’s Credit and Debt Service provides free legal casework, including Court and Tribunal appearances, and legal advice, information and referral, to disadvantaged people and financial counsellors throughout NSW.

We give priority to people who cannot access the services of a private solicitor or obtain the assistance of the Legal Aid Commission. If it is apparent at an early stage that people are most appropriately referred to pro bono or commercial legal services, then this is done. In credit and debt matters, however, pro bono firms of solicitors often find themselves conflicted out of the proceedings because they represent the creditor banks and finance companies on the other side.

Another of RLC’s objectives is to promote and provide community legal education and community development projects.

RLC also examines and develops new models of service delivery. For example, a number of specialist community legal centres and advocacy services commenced operations as Redfern Legal Centre initiatives, in response to community need. Some of these services have become independent (e.g. Intellectual Disability Rights Service; Disability Discrimination Service; Redfern Legal Centre Publishing) and some have become State-wide programs in NSW e.g. the Women’s Domestic Violence Court Assistance Scheme.

For many years, RLC's Credit and Debt Service has been active in a number of local, Statewide and national networks, including the Consumers Federation of Australia; the NSW Combined Community Legal Centres Group; the National Association of Community Legal Centres; the Financial Counsellors Association of NSW (FCAN); and the Consumer's Federation of Australia.

Due to our position "at the coal face", we become aware of consumer problems at an early stage. (This is true of other community legal centres too). In addition, because we are a small and flexible operation, we can usually respond very quickly to adverse circumstances affecting our clients.

### **Demand**

In 2005/6 RLC provided services to 3,720 clients and of these, 904 were credit and debt matters. ATSI clients comprised 10%, and CALD clients 48% of RLC's total clients. Fifteen per cent of our clients had a disability. We also provided 31 community legal education programmes during the year.

### **Staff and Volunteers**

RLC's main office has 3.8 FTE employed solicitors, 1.8 of whom are with the Credit and Debt Service.

We also have an extensive volunteer program, with an average of 200 volunteers per year. Volunteers include law students and solicitors who work during the day, and four nights a week.

### **Management Structure and Relationship with the Community**

Redfern Legal Centre is a public company limited by guarantee. There are six elected volunteer Company Directors. The day to day management of the Centre is delegated to the staff.

RLC has a strong and close relationship with its local community. Some agencies have been instrumental in the establishment and continuing development of the Centre, most notably South Sydney Council (now Sydney City Council) which has consistently provided both financial and in-kind support.

## **Preliminary note**

Much of our clients' information is subject to legal professional privilege, and hence cannot be disclosed without their permission. In addition, for reasons of privacy, RLC does not wish to provide details of actual clients unless those details are sufficiently de-identified that the client and his/her community cannot recognise him/her. Accordingly, in many of the cases mentioned in this submission, identifying details are not described precisely.

## **Disadvantaged and Vulnerable Consumers**

The “disadvantaged and vulnerable consumers” section of the Commission’s Issues Paper asks at page 18 “ *What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy*”?

Most of Redfern Legal Centre’s clients are “vulnerable and disadvantaged”, or both. This is because they are poor, illiterate, young, do not speak or read English, are culturally and linguistically diverse (“CALD”), mentally or physically ill, intellectually disabled, are homeless, or they abuse substances (including alcohol). Some of our clients fall into all or most of the categories described above.

We acknowledge the Commission’s statement that anyone can be described as vulnerable at particular times and in particular circumstances.

Some of our clients are vulnerable and disadvantaged some of the time. Some are disadvantaged all the time, except perhaps at those moments when we are assisting them. Some of them become less vulnerable than they were when they first came to obtain our assistance. Some of them become strong after our assistance, but perhaps only in relation to the issue which was making them vulnerable when they first came to see us.

People can be disadvantaged or vulnerable for short periods of time, such as when a salesman is trying to sell a car to a young person with low reading ability; and for significant periods of time, such as periods following illness, loss of employment or the death of a close family member.

For example, the last 2 major court cases defended by the writer involved clients who were so old (89 and 83 years old respectively) and so ill that they could not walk. Nor could they speak English. The writer had to visit her clients at their homes, with interpreters.

We suggest that the interpretation of the terms “vulnerable” and “disadvantaged” include the items set out in the first paragraph in this section, but preceded by the words “including, but not limited to”. In the alternative, the Australian Council of Social Services or the New South Wales Council of Social Services should be able to provide appropriate definitions.

### **Vulnerable consumers and market mechanisms**

The Commission’s Issues Paper says that close attention should be paid to “*assisting vulnerable consumers [to ensure] that they do not fall victim to inappropriate trading practices* but that “*market mechanisms will often emerge to address such matters*” [p.13].

It is the writer’s experience that market mechanisms will also sometimes emerge to take advantage of vulnerable consumers. By way of example, the RLC Credit and Debt team has had clients who have been taken advantage of in the following ways:

#### Pay-day lending

Our client had a mental illness. This was not evident to a pay-day lender when he went to take out a loan. By the time our client had taken out his second or third short-term loan with the lender, his mother had discovered what was going on. She wrote to the lender and told them about her son’s disability. This was a major breach of his privacy. We were instructed by the client and another relative who had begun to assist him, that when he approached the lender for a third loan, the lender said that it had received a letter from his mother. The lender then held the letter up in front of him and ripped it up. When we wrote to the lender on our client’s behalf, he said that the letter had either never existed or was “lost”. (In the end we negotiated a write-off of the loan).

#### Car sales

Car salespeople take advantage of young, naive people by encouraging them to take out loans with associated lenders. The salespeople will often get commissions. The salespeople will often not disclose these

commissions to the young borrowers. Even if they do, it is questionable whether this will make the young borrower do more than think twice. The young people are encouraged by subtle means such as the sales person acting in a friendly and conciliatory manner, and appearing to genuflect to the young person. Manipulative behaviour is compounded in its affect where the person being subjected to it is intellectually disabled. In one of the writer's cases, the young man in fact had a mild intellectual disability. The disability was not obvious. His girlfriend told the writer about it, later.

The salesman's office wall was covered with pictures of flashy sports cars. The young man had very recently left school, and got his first job. He said the salesman was "really nice" to him, and offered him a cigarette. The salesman spent a while telling our client about "options" and "extras" such as mag wheels, which could be added to the car "for almost no extra money" (which was more or less true, when considered on a weekly basis).

The young man lost his job, and could not keep up the repayments. The car was repossessed, and the lender pursued our client for the outstanding debt, which it was entitled to do on the face of the contract.

We negotiated a hugely-reduced debt repayment plan for our client. (The credit provider did not sue our client in this case, possibly because we were able to get involved at a very early stage).

The Issues Paper says:

*"Especially for frequently purchased goods, businesses have strong commercial incentives to ensure consumers are not adversely affected by poor decisions or inappropriate trading practices" p.13*

This is not our Service's experience at all, particularly with regard to goods and services such as second-hand car sales and associated "cheap" finance, mobile phones (in the past), housing, and privately-run training programmes such as hair-dresser's courses targeted at CALD students.

For example, on a different occasion to the one described above, our client obtained finance for the purchase of a car, at a car yard, from a car salesman. The salesman used legal but unscrupulous practices to sign our client up. When we contacted the car yard, the manager said that the salesman in question had left the yard a week ago and he didn't know where he'd gone. Nor had the salesman left a forwarding address. The manager didn't know who the financier was either. The financier was not listed in the ASIC database at all.

On yet another occasion, in similar circumstances, the entire car yard seemed to disappear. There was no answer to letters or phone calls, and there was no answering machine.

These kinds of practices occur on a regular basis.

Our solicitors do not have time to go to individual car yards or businesses to see whether they in fact exist, and our clients cannot afford to pay for private investigators. If we can't find the alleged offenders, we can't negotiate with them or sue them. We can report such "offenders" to the regulators, but the regulators can't do a lot about people or organizations who can't be found.

Often, too, companies listed with ASIC have no assets. (In recent years, due to unfortunate changes to the ASIC company search database, one cannot tell whether this is the case). Therefore even if they can be found, there is no point suing them. The writer is interested in trying to trace the assets of companies and individuals which/who seem to disappear; but this is extremely resource-intensive.

*p.13 "The actions of private parties under common law can ... provide ... discipline on suppliers and thereby facilitate better market outcomes".)*

This concept does work occasionally (see next page under "p.15"). It is the writer's opinion, however, that corporations and their lawyers need to take more responsibility for preventing credit and debt failures before they occur, or resolving them more quickly when they have occurred. The courts could also do more in this regard. This is not a problem with existing law, whether common law or statute. It is a procedural matter. It is a matter of lawyers not encouraging their clients to refrain from suing, or not encouraging them to settle early. Until recently, it was the writer's experience that in the Supreme Court, lawyers for the other side would drag cases out literally for years, and the Registrars of the Court would allow them to do this, despite Case Management Directions being issued by the Courts. (The writer is aware that it is not the responsibility or within the power of this Review to address problems with courts and lawyers. The writer is merely pointing out some of the problems with the suggestion that "actions by private parties ... facilitate better market outcomes").

In addition, quality not quantity of case result is more likely to encourage private sector restraint. Accordingly, it is the writer's view that emphasis



on numbers of cases dealt with, rather than type of cases and results, is misguided. Sometimes, funding authorities and the boards of management of consumer organisations seem to overlook this.

*p.14 Box 3 “There [has been] some attempt to use [behavioural economics] as a basis for new policy tools (such as ‘default’ products or services that consumers must explicitly opt out of)”.*

Our only comment is that whether consumers are vulnerable or not, “opt-in” rather than “opt-out” provisions are preferable.

*p.14 “What are the key rationales for government intervention .... to empower and protect consumers? What should the balance be between seeking to ensure that consumer’s decisions properly reflect their preferences (empowerment) and proscribing particular outcomes (protection)?”*

Obviously vulnerable people should be protected from manipulation, unfair selling practices and so on. Our clients are not vulnerable in only one area of product and services provision. Hence, generic proscription is to be preferred in most broad areas (e.g. unfair contracts should be proscribed as a whole, rather than in specific areas). (See also later).

*p.15 “To what extent will the actions of well-informed consumers drive outcomes across markets as a whole?”*

In one case in which the writer was involved, the finance company AGC (Australian Guarantee Corporation Ltd, as it then was) changed its pro forma finance contract after the writer defended in court a client who had obtained a car loan from it. The writer ran an argument to the effect that one of the standard form clauses in the contract a) didn’t make sense, and b) was a penalty clause. The arbitrator accepted the writer’s argument.

Not long after this, the particular clause in the pro forma contract was changed. (The writer was not able to confirm that her client’s case was the reason why the clause had been changed).

*p.15 “What are the important costs of intervention .....[and] not intervening?”*

As far as the writer is aware, there is insufficient, or no, adequate Australian data or statistics on the costs of intervention from the consumer advocacy perspective as a whole.

In addition, the costs of intervention depend on what kind of intervention occurs. There may be such data on what it costs business to change some of its practices; or there might not. (For example, what did it cost the consumer credit industry to re-write contracts and change selling procedures when the Uniform Consumer Credit Code was introduced? Elements of that industry certainly said at the time that compliance would be costly.)

It is our view that more work needs to be done on assessing what the costs of intervention are. We think that it may be found that the costs of enabling “intervention” through preventive action and by redressing problems through consumer advocates, community legal centres and financial counsellors, will be much lower than most other kinds of “interventions”.

## **New Developments**

*p.15 “What new developments are likely to have material implications for the policy framework over the next decade?”*

Among the most obvious answers are that climate change (e.g. drought, storms and floods, sea water rising, water salinity etc) and [un]sustainability are major issues for Australia (and the rest of the world). These issues will affect the price of water, power, food, and housing. They also will affect people on low incomes disproportionately to the more well-off unless there are forms of price control, goods and services subsidies, or other mechanisms. This is a huge issue which we will not purport to address here, except to say that the writer already has had a court case along these lines, although not quite in the circumstances one might expect. The court case is this:

There is a major aquifer under the ground in a certain area of the Sydney basin. Many enterprising residents put down pipes and pumps into the aquifer, to obtain water for use in their homes and on their gardens. The residents did not know that some years ago, a major chemicals company had contaminated the aquifer. This then became public knowledge. The company, perhaps in an attempt at partial repatriation, among other things made available to the residents a scheme whereby it would pay for most of the cost of the installation of rainwater tanks in the residents’ back

yards. It recommended a particular company as the preferred provider of rainwater tanks. Unfortunately, an unscrupulous person utilised a company name almost identical to the name of the preferred provider. He installed a water tank in our client's home; but the tank did not collect any water despite huge rains. Our client therefore refused to pay the man. The unscrupulous provider sued our client for the money allegedly owed. The case is still on foot.

Other issues of importance to the consumer policy framework in future include a rise in home mortgage defaults and hence repossessions; increases in disputes relating to insurance claims, particularly for medical procedures; and increased applications for early release of superannuation.

Where mortgagors have defaulted due to imprudent lending by creditors seeking higher (and hence more risky) returns, the solution should not be to penalise potential mortgagors further by privacy-invasive mechanisms such as increased credit checks. Rather, the lenders and creditors should either control themselves or be subject to control.

### **Framework**

*p.16 & 17 "Is the current consumer framework fundamentally sound .... Are there significant gaps or imbalances in coverage..?"*

It is our view that the consumer policy framework is basically sound. For example, in a case involving a pay-day lender, our client had a gambling problem. This was unknown to the lender. However, the lender took advantage of our client's lack of disposable income to offer him loans at very high interest rates. Our client was not so uneducated as to not realise that an interest rate of 28 % was unduly high compared to interest rates offered by banks and credit unions for personal loans. He did not know, however (and the majority of borrowers do not know, and never would have) that because the loan was for a short term, it was not covered by the UCCC (i.e. was not illegal under the UCCC).

A number of consumer legal centres, together with some financial counsellors, recommended that the Uniform Consumer Credit Code (UCCC) be amended to prevent pay-day lenders from utilising a loophole in the UCCC.

This amendment was adopted. In short, the system worked (although it took enormous effort on the part of consumer advocates. Katherine Lane

of the Consumer Credit Legal Centre in NSW was instrumental in the success of this initiative).

On the other hand, it seems that there are currently a number of legislative programmes which are in train for national implementation, but seem to be wedged in various cracks. Uniform legislation with regard to unjust contracts, finance brokers, harassment by debt collectors and door-to-door marketing are examples.

Another difficulty in the past has been that it was hard to work out who or what was the appropriate IDR and EDR Schemes in various cases.

*p.17 “Is the framework ... sufficiently evidence based?..... How well has it coped with [changing circumstances]?”*

There is incomplete and inadequate evidentiary data, particularly from the consumer perspective. RLC recommends that support be provided to the gathering, collation, and analysis of data in this regard.

We acknowledge that it is very difficult to be flexible enough and sufficiently consultative to cope with fast-changing circumstances. We discuss this further below.

## **Policy Tools**

*p.17 Are the right tools being used to meet the objectives of consumer policy?*

### Disclosure as a policy tool

It is our view that pro forma protective mechanisms (such as warnings on consumer credit contracts), do not necessarily protect vulnerable people such as those who can't read them because of language or literacy difficulties (including difficulty in interpreting legal language).

We neither support nor object to further emphases on disclosure as a mechanism for protecting consumers. Whilst it doesn't hurt the consumer, in our (anecdotal, but evidence - based) experience, nor does it always work. Simply providing lots of “information” does not necessarily help the consumer, especially those who fall within our most

common categories of client (e.g. those who are illiterate, or can't speak or read English).

We note that warnings on credit and finance contracts are usually not read by our clients at all, and where they are, the warnings are not understood or are ignored, or both.

### Education as a policy tool

There should be more effective use of consumer education programmes.

Mass education programmes such as those run through schools are all very well, but it is our view that perhaps better targeting could be achieved than is currently the case.

In addition, better support for existing programmes would be of use. For example, our 1.8 FTE credit and debt solicitors run training programmes for financial counsellors, community groups, and our volunteer solicitors. We would like funding for a dedicated "credit and debt training" position.

### **Generic approaches**

*p.18 "Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms?"*

[Preliminary note: The writer assumes that in the Commission's paper, the term "generic" in effect is an alternative to "industry-specific". (At page 8 of the Paper, the Commission says that "[the current consumer] policy framework involves a mix of generic and industry-specific regulation").

RLC supports both of the methods described in the quotation above. Generic proscription is to be preferred to much industry-specific regulation, but if the latter is the most effective way of achieving a particular desired result, then this is supported. We suggest that the used car sales industry is a case in point.

Uniform or national legislation will reduce the regulatory burden from the perspective of all the relevant parties; i.e. the regulators, the private sector, government, and consumers and their advisors. The problem, of course, is in achieving uniformity of the highest order, not the lowest

common denominator. We would not want to trade off best practice for the sake of uniformity.

### **Generic v Industry-specific regulation**

*p.18 “How effective are the generic provisions in the TPA and (NSW) FTA in meeting their intended outcomes? AND*

*(p. 19) How effective are the Trade Practices Act and the Fair Trading Act(s)?”*

The Trade Practices Act may be effective as a preventive mechanism (although business will be more able to answer that question) BUT it is not currently effective, in the writer’s opinion, as a mechanism of redress for consumers.

The Act has become far too complex. The writer has difficulty finding, let alone wading through, the relevant sections. The Act should be stripped back as much as possible, to the simple form it was in when it was introduced.

In addition, the Act’s original purpose was to control restrictive trade practices and “protect consumers from unfair commercial practices” (Hansard, House of Representatives, Second Reading speech, 25 October 1973). It seems that the Act is now used largely by big businesses to attack one another. Big business should be prevented (by legislative amendment) from using the Act at all. Any provisions which big business thinks it needs should be moved to Corporations law.

(See also “redress and penalty provisions” discussion below).

*(p.20) “[Can the] costs of industry-specific regulation be reduced without reducing its effectiveness? For example, would more emphasis on principles-based regulation be helpful?”*

Our answers to the above questions are yes and yes.

With regard to the first question, see above under the heading “Generic approaches”.

With regard to the second question, principles-based (or what can sometimes be described as “uniform”) legislation can be helpful. For example, the consolidation of the various Credit Acts into the Uniform Consumer Credit Code was useful from our perspective.

In Box 4 at p.20 of the Commission’s Paper, the Commission says that, inter alia, “perceived limitations of the generic provisions (particularly the unconscionable conduct provisions) ... saw Victoria amend its FTA in 2003 and introduce specific unfair contract provisions”. With respect, unfair contract provisions are really a sub-set of generic unconscionable conduct provisions, not an alternative to them. In addition, unfair contract provisions should address the problem of substantive unjustness, rather than procedural unfairness. (In 2004, RLC’s Credit and Debt Service wrote a submission to the Standing Committee of Officials of Consumer Affairs, regarding its Discussion Paper on Unfair Contract Terms. In that submission, we said that there should be national uniform legislation covering the issue of unfairness in contracts. We also said that we thought the Uniform Consumer Credit Code should be covered by general unfair terms legislation).

*(p.21) “Are current redress and penalty provisions appropriate and effective?”*

Penalties under the Trade Practices Act can only be obtained through criminal proceedings, which require a high standard of proof. It would perhaps be more appropriate if civil penalties were available.

### **Self-Regulation**

*p. 21 “Is enough use made of self-regulation ?”*

Probably not. However, there is no point in self-regulation if it doesn’t work.

As mentioned elsewhere in this submission, only business can advise on this point from its own perspective. From the consumer’s perspective, self-regulation (such as the use of Codes of Conduct) is not necessarily the best answer.

It is the writer’s experience that some Codes of Conduct (such as the Banking Code) are not strong enough from the perspective of the consumer.

Further, as the Commission must be aware, certain Codes of Conduct have limited value in relation to particular organizations because they do not apply to any organization which has not signed on to the relevant Code.

Where industries are currently unregulated, they should be required to develop Codes of Conduct, or be a member of an External Dispute Resolution Scheme, or be subject to a licensing regime, or be subject to regulation, or a combination of these. If they are incapable of developing a Code of Conduct for themselves, then someone else can develop one for them.

### **Non-regulatory approaches**

*(p. 21) What are the best examples of effective ... non-regulatory approaches and why have they worked well in [these] cases? Is enough use currently made of such measures? If not, where are the main opportunities for further uptake?*

It is our view that community legal centres, consumer advocates and financial counsellors are the most efficient and effective non-regulatory approach to problems occurring under the consumer policy framework. We can (and do) improve the capacity of the consumer framework.

It is the writer's view that the reason RLC's Credit and Debt Service obtains excellent results for its credit and debt clients is the quality, skill and expertise of our (employed and volunteer) solicitors and barristers.

We spend most of our [casework] time negotiating with the other party on behalf of our clients. In effect, we are unrecognised and largely unacknowledged External Dispute Resolution Schemes (although one EDR Ombudsperson has been kind enough to say recently "[you people] are the best negotiators there are").

As mentioned in the early pages of this submission, due to our small size, we are able to react rapidly to events as they occur. We also see "new" problems as soon as they become a problem for our clients.



At this stage of world and Australian “development”, flexibility is key. It is our view that more attention should be paid to better funding of community legal centres and other consumer advocacy mechanisms. We are not perfect however. We could perhaps do better with regard to our own structural and internal efficiencies.

In short, more use could be made of community legal centres and consumer advocacy groups as a “non-regulatory” approach in the consumer framework dominion.

### **A Consumer Advocacy body**

*p.22 “Would there be benefits from government support for a consumer advocacy body and would they outweigh the funding and other costs involved?”.*

We support any proposal to fund a consumer advocacy body (such as the Consumers’ Federation of Australia, which we have found to be very useful in the past in developing consistent policy for consumers nationwide).

### **Regulatory Bodies**

*(p.24) “Do consumer regulators have the appropriate .. resources, skills and powers?”*

The regulators need to be better resourced or more effectively run.

The writer has occasionally found that some employees at the EDR Schemes are not quite up to the task, in that they seem not to be able to understand legal issues, or in one case, did not think logically.

The regulators’ powers are inadequate in some cases. Current enforcement mechanisms are too unwieldy. The ACCC has to get written consent from consumers before taking legal action. It is difficult for community legal centres to support the running of this kind of case, due to our limited resources. Also, it is hard to obtain permission from clients who are already massively stressed, cannot speak English, and just want everything to go away.

*(p. 24) “Should consumer policy be administered separately from competition policy ...”?*

We see no reason to separate competition and consumer policy functions. They are perhaps two sides of the same coin. In addition, separation will

not of itself lead to more effective implementation or development of consumer policy. As with many things, real responsiveness and effectiveness depend on how seriously the prime movers care about the issue, and how well the relevant units or divisions are resourced.

P.Quarry

End.