

SEEDS OF CHANGE IN AUSTRALIA'S CONSUMER POLICY

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Robert Fitzgerald:

Thanks very much, George. It's great to be here again. Firstly, may I just say thanks to Stephen French and his team for last night and the terrific dinner and a very enjoyable occasion.

It's great to be here again. Last time I was here, I actually had something to say and that was following the Consumer Product Safety Report. We actually, at that stage, had released the Report and I was able to talk with some degree of confidence about the topic. Today, we are at the beginning of this particular inquiry and I'm reminded of the quip that teaching is the fine art of imparting knowledge, without actually having any and that's a bit where we are at the moment. The beginning of all of these inquiries in the Productivity Commission – it's a bit like a search for knowledge. The one that I am absolutely certain about is that the knowledge exists within you. It is not a matter of us creating the new world, in many senses that already exists within your capacities. What we can do is bring it together. But after yesterday's many references to the Productivity Commission, both by the Parliamentary Secretary, Chris Pearce and many others, one worries about the expectation of this inquiry. It's a bit like being a bridegroom on the wedding day, anticipating the wedding evening, full of high expectations, but that dreaded sense that you might under-perform. Well, I suspect the Productivity Commission is a bit like that today. They say that success always takes place in private and failure in public and with a public inquiry, that's true. But I should just say as a lawyer by background, one's used to that. Indeed, one's used to been disliked. I was reminded of a quip the other day that, "Why did God create snakes before lawyers?" and it was simply to practice on them. So whether we fail or succeed, we are thick-skinned. But I also today want to acknowledge Philip Leichhardt, one of the fellow Commissioners on this particular inquiry. There's a third Commissioner, Gary Potts, who's not with us today and Ian Gibbs, who is head of the staff team which is a Canberra based team.

You have in the papers today the Issues Paper, so it's easier for me today than to try and go through all of those issues, I just want to highlight a couple of key aspects. The first is that this inquiry is the first within the last 20 or so years, but it sits within a broader set of – well, broader context. The broader context is that we've seen extraordinary economic growth and advantages to consumers over the last 15 or so years, brought about by significant macro-economic and micro-economic reforms. Those reforms have in fact on the whole advantaged consumers. There's no question at all that the National Competition policy provided net benefits to the community as a whole and to consumers notwithstanding certain aspects of that which are of concern to groups in this room. But it is also true that over and above those particular aspects, we do need to have a consumer policy framework that does two fundamental things. The first is that it does empower consumers to be active participants in the market and to activate that

market. That is clear. It also needs to protect those that who are most disadvantaged and are at greatest risk or vulnerability. Those two aspects I think everybody would agree on. The challenge for the inquiry is not whether that's right. The challenge is, how do we achieve it and whether the current framework actually achieves both. Does the current framework adequately empower consumers to be active participants in the market place and to stimulate a genuinely competitive environment and do we adequately protect those who are in need of that protection? The framework we have is in evolution. In the last 20 or 30 years it has not been a stagnant system, whilst most of the concentration has been on the competitive elements, particularly in the Trade Practices Act, there have been a range of changes.

Our challenge today is not necessarily to look back, but rather to look forward and to say, "Can we have a framework that best suits the Australian community and the Australian economy for the next 20 or so years?" Put simply, we've got four challenges. We have to look at ways to improve the policy to assist and empower consumers, as I've indicated. We have to look at ways to better harmonise and coordinate consumer policy across the Nation. We do have to look at the issues between general and specific industry regulation, which I'll come back to. We do need to look at areas of consumer regulation that are now unnecessary or overly complex and burdensome both on business and of little benefit to consumers and, overall, we want to look at the effectiveness of a range of instruments that also form part of the consumer policy framework; self-regulation, co-regulation, black letter law regulation, and so on. There are a number of things we will look at specifically, but we do want to look at the burden on consumers of business of current regulatory and future regulatory arrangements. But, more importantly than that, we want to look and see whether or not they are meeting the objectives both now and into the future.

This inquiry takes place where there has been substantial market change since the introduction of key consumer legislation both of States and the Commonwealth. Greater competition has occurred, but we now see much great complexity in the product offerings and, in particular, product bundling produces real areas of new interest in this area. We see much greater inter-state and international trade and one of the aspects of this inquiry is the Trans-Tasman relationships between Australia and New Zealand. We do see the emergence of extraordinary internet and mobile communications commerce. We see the proliferation of standard form contracts and non-negotiable contracts, particularly over the internet, but more generally we are seeing much greater product complexity and therefore the emergence of intermediaries, financial advisors and others. All of those, together with all of that which you heard yesterday, means that we are looking at consumer policy in a changing market as well as a changing world for government and business. Where do we want to go with this inquiry? The first is we want to try to establish what the rationale for consumer policy is and in the issues paper we spend a couple of pages talking about that. It's true that today we need to look at the rationale and say whether or not we have a clear view as to what consumer policy, consumer regulation, should be seeking to achieve. Many people would say that in the past the response of organisations in relation to consumer policy has been fairly narrow. That is to simply look at information deficits and our response to that has been the provision of greater information to consumers. But it's also true that, in that particular area, we know both through behavioural economics and more generally that some of the assumptions that we've made in relation to that have not proven to be correct. It's not to say that

information isn't vital and important, but some of the style of information that we provide no longer seems to inform consumers in a way that they can make meaningful decisions.

We are absolutely aware in this inquiry that it's no good thinking about the theoretical consumer; we also need to look at the way in which consumers actually operate in the market place. You can put behavioural economics as the framework for that, or you can simply say that it's a common-sense approach to the design of public policy. Either way, knowing how consumers actually operate in the market place is important. But more than that, it's also about trying to say, "Well, what are we seeking to achieve" in two areas. One is generic legislation. One of the major focuses in the inquiry is to say does the generic or general legislation that exists in the Trade Practices Act, the Fair Trading Acts, the Sale of Goods Act, and the Contract Review Acts; are they adequate? I refer to a discussion yesterday by Peter Kell in the session yesterday afternoon. When we look at generic regulation, we see three or four areas. We see conduct, contractual terms, product safety and enforcement and redress. Perhaps what consumers are seeking in that is fairness in conduct, confidence and fairness in contractual terms, confidence in the quality and safety of products and fairness and confidence, together with accessibility to remedies and enforcement arrangements and these notions of fairness, confidence and accessibility are important. The question is, does the generic regulation achieve that?

The second thing related to that is, if the generic provisions are adequate, why do we see the growth of so much industry specific regulation? Today we see a growing use of industry specific regulation throughout Australia by all jurisdictions. The opening gambit for that is that we do so in order to protect consumers. But we also know that many of the industry specific regimes have gone well beyond that premise and have now started to introduce many elements that were in fact tried to be attacked in the National Competition Policy Reviews. To that end, we are not going to do an audit of all of the industry specific regulations that exist, but let me flag some of the areas that we are going to look at. We will be looking at financial lending, that's all lending in relation to all financial arrangements, be that consumer credit, bank lending or what's become known as sub-optimal lending. We have decided to look at some in the utilities area; electricity, water, gas and telecommunications.

The third area that we might look at is occupational licensing and, again, I want to be clear that we don't intend to do an audit of that, but one is to try to look at those areas and to try and work out principles by which one can come to some firm decision-making in relation to whether or not one should use licensing and an issue there is in relation to negative licensing. Why do we use proactive licensing? Could we use negative licensing in some cases? And the fourth area, which is not really an industry but a means of transaction, is the electronic and mobile communications commerce area. Now, over and above those, in the next little while with public hearings and submissions, people will raise various other areas that we should look at. What I've said just then about the specific industry areas, we are not going to go into those in great detail in their values – line by line, looking at the regulation, but it is to try and get a sense of what are the frameworks that should operate in those particular areas that have both national significance and are significant in terms of their importance to consumers.

Another area that we will be looking at is clearly in relation to enforcement and redress issues. I want to talk about that in more broad terms. It's not simply whether or not the penalty regimes that exist create the right incentives for business and commerce. It's also about, as I said,

accessibility to the rights of consumers. To that extent, how do external dispute resolution arrangements operate? What is the role of ombudsmen and is that an effective way of dealing with consumer issues? Do we have adequate legal services to support vulnerable and disadvantaged consumers? Are the tribunal systems that operate in the States effective in delivering those issues?

So, again, in enforcement and redress, it's not simply about the framework, but it's about accessibility to it. We are, however, very conscious that we need to look at the gate keeping and review arrangements. One of the terms of reference in this inquiry is to look at unnecessary and overly burdensome regulation. It's absolutely the case that with our good gate keeping arrangements and even better review processes, regulations do exist that may, one, uplift their purposes, secondly may have imposed unintended burdens both on business and more generally and, thirdly, they may have become inconsistent, complex and are in need of reform. We certainly intend to look at that but again, I want to make the point that it's not an audit based approach.

Finally, we do want to look at the jurisdictional issues. What aspects of the consumer policy regimes should be administered by what level of government? That's an important issue. In the consumer product safety we did recommend a one law, one regulator with that particular aspect of consumer policy being transferred to the Commonwealth and that's been worked through at the Ministerial Council at the moment. In relation to trade measurement, I understand that the decision's now been made that that will also go to the Commonwealth and well could become Trans-Tasman. It doesn't mean to say that the rest of the consumer policy framework should follow the same route, but what we will be doing is looking to say what aspects and how should the relationship between the various jurisdictions work through? Equally, we will be looking at the regulatory and oversighting bodies, the arrangements between the ACCC and ASIC, the arrangement between the fair trading bodies and other regulatory bodies. Are they the appropriate mix? Is there clarity in terms of the roles and responsibility? Are there areas for improvement? So it's not simply the regulation, it is actually the jurisdictions and the actual oversighting or regulatory arrangements that exist.

So I'm not going to go on further to go through the actual issues in detail, because I think they're self-explanatory in the issues paper, but what we do want at the end of the day, is a system that well serves the community at large; that notion of community wellbeing. It has to be a system that is proportionate to the risks of consumers and that the burden imposed to both on business and on consumers and more generally have to be proportionate to and absolutely related to the objectives we wish to achieve. The Parliamentary Secretary yesterday, in his vision for consumer policy, said that his vision for Australia's consumer policy framework is one which is more responsive, more cost effective and better coordinated across all levels of government; there's no doubt that they would I think be common aspirations of all of us. To achieve any of those things, however, requires your input and the Commission's processes, as you know, are extensive. We've had now consultations in 9 jurisdictions, next week we commence the public hearing rounds, submissions are due by the end of May I think and then we may have some round tables around key issues. The draft report will be released in early August and then we repeat the whole process again for the final report to be produced by the early part of December. So, there is ample opportunity over the next few months for your input and I encourage you to use all of those

avenues to be able to help guide us as we look at this extraordinarily broad, sometimes complex, but very important area of public policy. Thanks very much.

Catriona Lowe:

Good morning everyone. Can you hear me alright? I have a slight issue with my voice. Those of you that know me well would know that talking is not usually a problem for me, but I will endeavour to make myself clear this morning.

Before we kick off, I wanted to spend a moment talking about the Consumer Action Law Centre. This is both because it's still a relatively new organisation and it's therefore still quite exciting to talk about it, but also because it provides the foundation for some of the comments that I'll make today. Consumer Action was formed by the merger of the Consumer Credit Legal Service and the Consumer Law Centre Victoria, both of which have a long and proud history of research, advocacy and representation of consumers, particularly low income and disadvantaged consumers. Consumer Action is a campaign focussed organisation with 18 staff and we assist thousands of consumers each year through the provision of information, advice and legal representation. You may note that I have called my presentation today "Empowerment and Protection." It's pleasing to see both of these words appear regularly in the Productivity Commission's issues paper and I will, through my remarks to you today, endeavour to suggest to you that these concepts are not separate; they are in fact very strongly related to one another and are indeed necessary to each other.

The PC Review, as many have already noted, provides an important and very timely opportunity to reflect on our consumer policy environment and related questions. How we've changed as consumers, how the market place has changed and what we have learned from that experience? As has also been noted, we've not had an opportunity to look at these issues for several decades. Before turning to look at some of the changes that have occurred in that time, I want to mention some of the positives and risks that are already apparent at this early stage in the review. One of the very strong positives is the very proactive approach that we've already seen the Productivity Commission take in relation to this issue. I think it literally started consultation within hours of receiving the reference from the Treasurer and they've met with many consumer and community organisations on an informal basis and I think the issues paper that's been produced provides – makes it very clear that they have a very real appreciation of what some of the issues are and that that is very much welcome. Many important issues are specifically referenced in both the terms of reference and the subsequent issues paper, including challenges faced by disadvantaged and vulnerable consumers and the importance of consumer behaviours in markets. Of course it also provides an opportunity to take stock of market changes and society changes and to update our framework to take account of these things.

There are, of course, also some risks. We see some strong themes around cutting red tape and reducing compliance burdens. No one, I think, in this room would disagree that red tape and unnecessary compliance burdens help no one and are in fact negatives in our market place, but what is effective and necessary regulation and what red tape is may be the subject, of course, of significant disagreement. I'd suggest that the answers to where the balance lies in these issues should not be driven by ideology of any kind, either pro or anti regulation. As the PC has noted

in the past, an effective, functioning, modern economy and society depends on regulation and of course we all want that effective and functioning economy and, importantly, society.

So, turning then to some of the trends and developments, and we heard many of these mentioned yesterday, particularly by Michael Jenkins from Canada and I was struck by, as he commented, the similarity of some of the issues that we face. Globalisation of markets increasing trends to privatisation and the use of market mechanisms more generally, the emergence of market driven problems, increasing levels of consumer debt, the emergence and importance of industry based internal and external dispute resolution, the uptake of internet and other new technologies, the growing recognition of the importance of a sustainable approach and the growing understanding of the importance of consumer behaviour in markets. That is, acknowledging actual consumer behaviour, as compared to making assumptions about it and expecting change to fit in with those assumptions.

I'd like to focus more closely on a couple of these issues. One, which we've heard much about in recent times is increasing levels of consumer debt. We see rising debt as a percentage of income, we see an increase in personal bankruptcies, we see an increase in forced foreclosures, we see an increase in access to credit, low dock loans, 100 per cent finance loans, and other similar products and we are seeing playing out at the moment in the US the very real and potentially significantwe see also increased levels in credit card debt. I note that we heard yesterday that credit card debt is a small proportion of debt in Australia. To put this small problem in context, this graph, I think, very effectively illustrates the upward trend in levels of credit card debt as compared to a percentage of annual average income. These are based on data produced by the Reserve Bank of Australia and the Australian Bureau of Statistics on those issues. What we can see is that in 1985 down this end of the graph, credit card balances were at 14.15 per cent of annual average income. In November 2006, despite significant increases in annual average income over that time, credit card balances are at 86.39 per cent of annual average income. We welcome very strongly therefore the PC's focus on issues around financial lending. We also note that this probably significantly understates the problem because approximately two-thirds of people do pay off the monthly balances of their credit cards; the third that don't therefore owe a great deal more of the debt. Effective and competitive market places unquestionably deliver benefits to consumers. However, it must also be acknowledged that, left unchecked, markets can create problems for consumers. Let's take just one example, intermediaries. Of course intermediaries can, dare we say it, be a rational response of a market to adapt in consumer information and knowledge and can of course provide very valuable assistance to consumers in navigating the market place and we see the issues paper taut intermediaries as a positive market response to increasing complexity of product and service offerings. We certainly don't disagree about complexity, nor do we disagree that intermediaries can and should play a useful role, but this simply does not occur where intermediaries are hopelessly conflicted. An intermediary cannot be said to be independent, let alone act in the interests of consumers where their source of income is the commission or other payment from a seller.

We also have seen a very welcome increasing awareness of the role of consumers in markets and the importance of consumer behaviour in this context. Of course, some have been aware of the importance of these issues for some considerable time. A quote we've often heard in discussions on these issues in recent times comes from Ron Bannerman, the Chair of the Trade Practices Commission, back in 1984. He said that consumers not only benefit from competition, they

activate it and one of the purposes of consumer protection law is to ensure they are in a position to do so. I note one of the purposes – I will come back to that in a moment.

We also have seen Kahneman and Swersky who received the Nobel Prize for Economics in 2002 for their work in behavioural economics. They of course have been undertaking work in this area for decades and there is much to commend in that body of work. So whilst we have seen many beginning to recognise the importance of these issues for some considerable time, what we've not yet seen is these issues making their presence felt in a systematic way in the making and development of consumer policy. We have an opportunity to change that and we must because, if we are serious about competition, we need to be serious about effective consumer protection. We do not have a contest between market mechanisms and regulations one, as we have noted already, is necessary to the other.

This of course is not an easy task. There are very delicate balances to be struck and there are many competing issues to be considered, but we do see some very positive developments that might show us a way forward. We see important discussion and research taking place at the OECD, we see that the New Zealand Ministry of Economic Development has produced fact sheets and guidelines around using behavioural analysis in policy development drawing on new lessons from economics, philosophy, psychology, cognitive science and sociology. We also see research emerging about why some markets work better for consumers than others and what are the causes and drivers of these things, though we note that research is currently taking place in other jurisdictions than Australia.

Turning then, quickly, to some other roles of consumer protection, clearly it is critical to enabling consumers to operate efficiently, confidently and effectively in markets and I'd like to come back briefly to the words "empowerment" and "protection." Provision of sensible consumer protection can of course of itself empower consumers to take steps to be active in markets, particularly markets where they may be less familiar in making choices and decisions. Knowing that there is some form of basic safety net in place is a very critical element in consumer confidence to entering some of these markets. Consumer protection does and should also seek to deliver on other objectives. It can reflect our goals as a society beyond efficiency, including access to essential services, protection of the vulnerable and it can also assist to ensure that the benefits of competition are distributed.

This leads me to issues facing disadvantaged and vulnerable consumers. There are a number of points to make about this group. First, it's important to recognise it's not necessarily a small group. All of us may be vulnerable at a particular time in relation to a particular issue. Equally, we can readily identify some sources of disadvantage and perhaps look at policy targeted at relieving that disadvantage. That is – it's clear that what we need is both general solutions that are cognizant of these problems and targeted initiatives. We have seen, for example, that programs targeted at consumers in the utilities area with a lack of capacity to pay have not just paid off in terms of social responsibility, they have actually had a positive impact on the bottom line and I was chatting to a colleague at dinner last night and she mentioned that one of the proponents of these products, Yarra Valley Water, now boasts a 94 per cent on time payment record by their disadvantaged and vulnerable consumers in their program. This is better than their general customer base.

It's also important to recognise that problems experienced by disadvantaged and vulnerable consumers may be signposts to broader consumer detriment. It's just that some other consumers have more capacity to absorb the detriment than others. So, depending on the nature of the issue, either a broad or targeted approach may be preferable. The need for a diversity of our approach is the theme that I will return to. Before I do that, I want to mention another theme that sits in the background of the Productivity Commission Review, the debate regarding industry specifics versus general regulation.

There's a sense of a theme running through the issues paper that suggests that industry self-regulation drives inconsistency and duplication. Whilst this is undoubtedly the case in some arenas, in others the availability of necessary targeted regulation can in fact drive down compliance costs and improve certainty. It should also be noted that industry self-regulation is not always driven by consumer groups and their representatives. It is often industry itself that calls for specific guidance on how general principles may apply to them. Equally, governments may see virtue in a targeted and visible response to a problem. In our view, there is a role for both general and industry specific regulation. There are circumstances, we believe, where it can be identified that industry self-regulation may be more necessary and more appropriate. These include where the market in question involves essential services. We don't really want to see a number of payment methods available to consumers mandated in a Fair Trading Act. Equally, it is important that consumers have a range of ways of making payments for essential services. This is just one example of a matter that's dealt with in industry specific regulation. We also see industry specific regulation as potentially important in new markets where consumers would be unfamiliar with the choices they have to make and may require extra levels of confidence and support to enter the market. (Indistinct) goods, goods that consumers purchase infrequently and rely strongly on trust and the information provided by the trader is another example, and we would add high risk products.

So what do all of these issues and trends say about how we should approach consumer protection going forward? First and foremost and I think we all agree that we require a range of tools in the arsenal. No one policy tool is always the right response or should be automatically preferred over another. It is a question of identifying the right tool for the job and making sure that the tool kit is maintained and updated. Nor, we suggest, should application necessarily be linear. It should not always be necessary to try an information or education approach before moving to co-regulation or regulation, nor should regulation be an automatic response. These questions should not be driven by ideology of any colour, but by evidence. Of course, evidence is critical and cost benefit processes acknowledge this to a degree. But evidence should be just that. We should no more assume compliance and other costs to business than we should benefit to consumers and there are many elements of the cost benefit equation we need to get much better at. Evidence should be required to deregulate as well as to regulate. We need to be better at counting the costs to consumers in the absence of regulation and at measuring the benefits, even though these things may be much less amenable to plotting on a graph or applying a dollar figure to. One issue that we are currently considering is the virtue of consumer impact statements in this context. We've seen these initiatives used in victims of crime; we see them used in assessments in relation to environmental initiatives. There is no good reason and many very positive reasons that impacts on consumers can provide information to policy makers, but also provide an avenue for consumers to aerate their actual experience.

None of these things can be done without data and information and we've heard a recurring theme around the lack of data. It is simply not good enough to require cost benefit analysis to be undertaken without addressing the critical shortage of consumer data and indeed bodies charged with the responsibility to obtain it. Both are necessary to a successful process.

I also want to say a word or two about consumer protection at the Federal level. Whilst we've seen some very promising signs of late, not least of which is the current review and the commitment to it, we've also seen for a number of years signs that suggest consumer protection is perhaps less prominent and given less importance than we consider it ought be. No slight is intended to the Parliamentary Secretary when I say this, but a Minister with responsibility for consumer affairs is not the same as a Minister for Consumer Affairs and we have not had a Minister for Consumer Affairs at a Federal level since 1998. We have also seen the funding of consumer advocacy and research organisations and this is clearly detrimental in the context of the need for evidence-based regulation. Our Centre is also undertaking a project at present which examines the extent to which the Trade Practices Act could be said to have fallen behind world's best practice and we look to other jurisdictions, some within Australia such as Victoria, the United Kingdom and the EU to name a few of examples where improvements can be made to the Act.

We should also note that even basic improvements to the existing framework have floundered. We saw decisions in Medi Bank Private in 2002 and in DanOz Direct in 2003, both of which had significant limiting impact on the ability of the ACCC to obtain redress for consumers, either in the form of refunds for consumers not named as party to action, or indeed in requiring specific performance of advertising claims. Since 2002, there have been 21 Acts of Parliament that have amended the Trade Practices Act. There have been 15 since 2003. That is many opportunities to correct the problem that has been created by those decisions and enable the ACCC to obtain a broader suite of redress for consumers. Those opportunities have not been taken.

Institutional arrangements – I briefly want to touch on issues around the Ministerial Council for Consumer Affairs and the scope which sits under it, the need for speed I think is probably something we can all agree about. We acknowledge very strongly the challenges that are involved in bringing together 9 jurisdictions to reach agreement on some of these issues and we suggest there are some practical things that can be done to assist this process, including smaller agendas and more resourcing to do work in between meetings. But for some things there are no excuses. All jurisdictions reached agreement in September 2006 regarding a response in relation to problems regarding finance brokers. In March 2007, we see media reports suggesting that legislation is still a year away. There is no explanation or no reasonable explanation for a delay when we have agreement amongst all of our jurisdictions.

So, what is a way forward? We think there are a number of elements to getting this right. One is world class consumer protection. This involves some specific initiatives to update our framework, but also some general approaches, and by general approaches I mean using some of the new lenses that we are seeing emerge to look at consumer problems and to contextualise them in markets to enable us to respond in a way that will support consumers in those markets and we welcome the Parliamentary Secretary's commitment yesterday to world class consumer protection for Australia in this context.

As mentioned, we need to improve our ability to analyse costs and benefits and independent research is critical in this context. We need to strengthen the consumer voice. That doesn't just mean making sure there are consumer organisations there to speak for consumers and to represent their experience, but also to make sure that where we are engaging in debates that impact on the consumer interest, that the consumer interest is represented in those debates. We must also have greater enforcement of existing law. We do have, don't get me wrong, we have some excellent consumer protection law in this country, but we do need to make sure it's enforced regularly and often. This means effective and sufficient resourcing of regulators and also a willingness to take the hard cases, a willingness to stretch the boundaries of the law, or at least explore where those boundaries are. Losses can be wins in that context.

All of these matters, in our view, will help achieve what are our existing objectives of our consumer law to make markets work for consumers, both now and in the future. Thank you.

Peter Hendy:

Righto, thank you very much. Thanks particularly to the organisers for inviting me to speak today and particularly to Stephen French from the Commonwealth Treasury. Thank you very much for giving me an opportunity to speak. It's a beautiful venue today. I don't know if anybody said it yesterday, but we are very lucky to be able to look left and right and see these magnificent views and, if I get too boring, please exercise your consumer choice and do that.

The Chamber of Commerce represents some 350,000 businesses in Australia. The bulk of them are small to medium sized businesses almost by definition, but also includes in our membership the largest companies in Australia and of course the majority of these businesses have daily interactions with consumers as sellers, yet, importantly, they themselves are also consumers of goods and services. At the outset I need to affirm that the Chamber recognises that consumer protection laws, policies and practices have a role to play in limiting fraudulent, misleading and unfair commercial conduct, thereby helping to build consumer confidence. This enhances the relationship between business and consumers in commercial transactions and results in increased business to consumer activity. For this reason, business supports the need for consumer protection policies which provide consumers with valuable information regarding the products they are purchasing and protection from unfair behaviour.

We believe there are four key elements to providing a balanced consumer protection framework. They are:

1. Information. Consumers need relevant and reliable information to make informed decisions about available products and services;
2. Protection. Consumers must feel that the government has in place a legal framework that will protect them from those who may treat them unfairly;
3. Redress. Consumers must also have ready access to redress for occasions when disputes arise about whether a deal has been fair; and
4. Cost. Minimal compliance costs should be imposed on business in this area.

In my presentation today, I would also like to share some over-arching comments regarding regulation law generally. Increasing business related regulation is of priority concern to the Chamber, our members, wider industry and government. The Federal's Government's Task Force are reducing the regulatory burden on business, the Gary Banks Review which reported early last year is evidence of the priority afforded to the problem of regulation.

The pressure to regulate is a direct result of the increased sophistication of developed economies and the increased complexity and range of goods and services on offer within the community. Accompanying this development are demands placed on governments from the population for a new risk-free life. These demands often lead to market intervention and regulation if all available options have been considered. This disproportionate approach to risk was recognised by the British Prime Minister, Tony Blair, during a recent speech for the Institute for Public Policy Research where he noted, "The result is a plethora of rules, guidelines, responses to scandals of one nature or another that ends up having utterly perverse consequences." From a wider perspective, and based on international economic research, the Chamber has estimation regulation costs in the Australia economy at approximately \$86.0 billion dollars per year, or 10.2 per cent of GEP. Amongst the biggest losers from anti-business regulation are consumers who are inevitably forced to pay higher prices as compliance costs get passed through to end products and services.

The Chamber has put forward a model for regulatory reform which is built on achieving clear policy and political accountability, making the system more transparent and subjecting all proposed regulation to straight-forward cost benefit assessments. Interestingly, we also consider a one-in and one-out approach to new regulation proposals should be adopted whereby policy makers can only introduce new regulation if a redundant or superseded regulation is removed. We whole-heartedly welcome the current review by the Productivity Commission dealing with the consumer policy framework and we intend to participate actively in the process. We are particularly interested in assessing:

1. The effectiveness of the regimes applying at Federal and State level;
2. The need to coordinate policy developments;
3. How to minimise duplication; and
4. The role of self-regulatory and co-regulatory approaches.

In relation to the last point, through self-regulation it is possible, by encouraging professions and industries to regulate their own activities, to avoid much of the overly intrusive legislation that we have. Companies have incentives to provide safe and quality products to consumers. They also have incentives to reassure investors about the financial and managerial expertise of the organisation. Therefore, the willingness to comply is often higher than if government instigates conditions arbitrarily. Self-regulation is one of the ways that regulatory outcomes can be achieved in a more flexible and non-interventionist manner than by government regulation. Self-regulatory approaches can achieve minimum effective regulation or a best practice approach.

The office of Regulation Review's report of the Commonwealth Inter-Departmental Committee on quasi regulation adopted the following check list for using self-regulation:

1. Where there is no strong public interest concern, in particular, no major public health and safety concern;
2. Where the problem is a low risk event of lower impact and/or significance; and
3. Where the problem can be fixed by the market itself, that is, there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements for their own industry survival or market advantage.

The role of Standards Australia is a classic example of a player in a self-regulatory field, and the Chamber is a very strong supporter of the work of Standards Australia and, indeed, I am a member of the Board of that institution. Notwithstanding some of the benefits of self-regulation, from ACCI's perspective, standing atop of the prescriptive law based approach or in industry specific compliance regime is the much more persuasive and tougher arbiter which is the market. In an open and competitive market place such as Australia, often business needs little incentive to do other than observe what the consumer dictates. Governments should recognise that most businesses are not in the practice of intentionally misleading or deceiving consumers, it's clearly not a sustainable business model and a repugnant notion to mainstream business operators in this country.

The UK Better Regulation Task Force identified four possible situations when it may not be sensible to intervene in the market:

1. Intervening in a market that is not operating perfectly and seems likely to cause more problems than it solves;
2. When the benefits which are often difficult to quantify look unlikely to justify the costs. In particular, when the costs of preventing a highly improbable event outweigh the estimated benefits;
3. When any regulatory intervention would be difficult or impossible to enforce; and
4. When the common law already exists in the area.

In the above circumstances, regulatory failure is likely to have a more detrimental effect on welfare than market failure. Rigorous cost benefit analysis may help prevent knee-jerk reactions to adverse situations. Cost benefit analysis should be transparent, allowing informed public debate on the relevant issues to be considered, while providing some surety that matters are being addressed in a manner that will lead to workable outcomes. From an historical perspective, it is worth noting that the architecture of consumer law, as contained in the Trade Practices Act, is now some 30 years old and it is certainly worth testing how well that overall consumer framework has aged.

We all know that the world is a different place to the 1970's and 1980's. The character of our economy has changed remarkably which without doubt has benefited consumers. In Australia we

have seen a shift away from manufacturing to a service economy with an amazing increase in the range of services now being provided to consumers. Lower tariffs have provided greater export opportunities for Australian companies while consumers have wide choice through availability of more exports. In product markets, manufacturing standards have improved and hence reliability and fitness for the purpose tests have lessened as an issue. Digitisation technology has been a major driver of this change.

Competition reforms have changed many markets where once monopoly providers dominated and consumer access to information, for example, via the internet, to compare prices and specifications of goods and services have never been easier and, in the case of services, there are a greater number of intermediaries in the market place to assist with choices.

This revolution in the capacity to gain information is probably the single most important development in the market place, which has changed the relative market power of the consumer. The provision of timely and relevant information can prove a less costly option than more deliberate regulatory alternatives. Increasing public information can provide three benefits over other forms of intervention. Firstly, it can be cheap to provide other methods in terms of compliance, administration and policy costs. Secondly, it serves to enhance the decision-making processes of businesses and consumers. And thirdly, it can enhance the working of the market without any associated downstream complications. Information can be provided by governments, businesses and consumers simultaneously, each targeting their specific demographic more efficiently than any other. Information can also be provided within a particular section of the community, without burdening unintended or innocent parties.

So, in conclusion, Australian business supports a cost effective consumer regime which delivers tangible benefits for Australian consumers. The present Productivity Commission review of these arrangements provides us with an opportunity to consider how appropriate or beneficial that framework is. Importantly, it would also allow all participants to suggest ways to make our approach, or mix of approaches, more relevant to the contemporary Australian economy.

Finally, I would like to again thank the organisers for inviting me to speak today to put a business view. Thank you very much.

George Negus:

Do you feel like, as the Commissioner responsible for this inquiry, the thorn between two roses or the rose between two thorns? How do you walk the tightrope between – I'm being facetious, but you know what I mean. How do you walk the tightrope between the interest of the consumer and the interest of business in conducting an inquiry like you are conducting; because this is what we're all about?

Robert Fitzgerald:

I mean, basically, the framework is to look at what we might call community wellbeing. I mean, basically, all of these inquiries, which are fundamentally about public policy, are about trying to enhance the wellbeing of the community and that community includes business and consumers but, as Peter's rightly indicated, in this area there is an unusual coalescing, business are

consumers. And a very, very strong part of this inquiry is actually looking at not only the role of the individual consumer, but also the role of small business as consumers. So, in this inquiry, they actually come together, but if you actually take that sort of community wellbeing notion, what you're trying to say is, what is the mix - the range of policy tools or instruments you need to use to achieve that broad definition of wellbeing? Now what we know in this area, it is not a dispute about whether or not you need regulation – the answer is you do. There's no dispute at all hopefully that the market itself provides some of the benefits and protections for consumers as well and, in the middle of that, we've already the notions of self-regulation, co-regulation and every other version. So, it's really a matter of trying to say, "Do we have a commonality of objectives?" That's the first point and I think we can come to that pretty quickly. The second and more complex is the range of tools and instruments that you use and that is where there will be differences between business and consumers, between regulators both at Commonwealth and State level. So it's a fairly pragmatic task, but the third thing is then trying to weigh all that up and say at the end of the day, given that range of instruments, do we achieve the objectives we've agreed on, are the costs both to business and consumers and society generally reasonable and proportionate and how do we continually review it to ensure that, as the market place changes, as consumers' preferences and aspirations change, they change as well? And one of the problems we've got in the system now is the inflexibility that the market is rapidly changing, consumers' expectations are in fact changing, but whether the system is capable of changing rapidly enough is one of the issues and one of the dangers in a regulatory environment is that you may or may not have got it right at the beginning. But most certainly at some point later on, you've actually got to review it, assess it and change. That might mean getting rid of it entirely, or replacing it with some new.

So I think the debate is partially about ideology, but it's absolutely about the tools that you use and on that I think, that's where the differences are likely to occur.

Robin Brown:

Robin Brown, few hats, but the one today is member of the Council of the Australian Consumers Association – Choice, sorry. Now Robert mentioned that the Commissioner is going to look at a few particular markets, but absent from that list was the market for food. It's a market that has all the characteristics that Catriona noted. As a special market, food is essential; a lot of it is novel these days. Some products I think have credence qualities and it's a high risk market, especially for vulnerable consumers, especially for young consumers. It's a market where most of us it would seem are making actually wrong choices and that's costing individuals in terms of being overweight and obesity and the consequences and it's costing the community in health care. Now, the problem that the Commission has is that there's a parallel inquiry being conducted by Mr Bethwaite, but it's a short shaft inquiry into food regulation.

What I'd like to ask Robert is whether he can see any way of coordinating and collaborating with Mr Bethwaite so that the broad principles that the PC inquiry is going to settle on in relation to consumer interests, the wellbeing of the nation, or consumers, whether they can gel with where the Bethwaite Inquiry is going? It's a hard one, sorry.

Robert Fitzgerald:

The food area is, as you say, an extraordinarily important area for consumer policy, both in terms of product safety issues and a whole range of informational issues. Because of the Bethwaite Inquiry, our view is to work with them to see what the terms of reference are, and to see what the scope of that inquiry will be and certainly hopefully that can inform our inquiry and we are looking at that at the moment. If that inquiry is sufficiently broad, then it's not our intention to do an in-depth analysis of the food area, but that's a work in progress. We will just wait and see. So, I take on board the points that you've raised but it really does, at this stage, depend on the extent and the scope of the Bethwaite Review. Secondly, when I decided to list the areas we'd look at, my erstwhile colleagues, Ian and Philip, I think looked at each other. There is a terrible danger in this inquiry that the minute we list what we might look at, we don't list a whole lot of other stuff. We'll be informed by what comes through in the public hearings and the submissions, but I want to be very clear, it is not possible in this inquiry to look at every aspect of consumer policy and one of the reasons to look at the different areas is not so much to look at them because in and of themselves they're important, which they are, but to see whether there are lessons that can be learnt. Are there framework issues that arise in those that we can use more broadly?

But the long and the short of it is, we are certainly not excluding looking at food but, at this stage, our hope would be that the Bethwaite Review would cover some of the central issues and could feed into our arena.

Catriona Lowe:

I'd simply comment that we certainly think its an issue that does bear significant consideration both in the specific and also as an illustration of some of the consequential costs, if you like, of not getting the framework right in the first place and we think that it might have some very interesting lessons and case studies in that context.

Peter Hendy:

I note the Bethwaite Inquiry is going on and I think it would just simply be sensible to let it get on and do its job and it's specifically looking at the industry or that sector. You might be interested to know, the Chamber has a number of standing policy committees in areas like trade and education and industrial relations and environment, but one of the very few standing committees we have is actually the food sector. So it is a very important area of regulation.

John Mumford:

John Mumford, I'm a financial counsellor working in Wanthaggi in the Bass Coast areas. A common theme this morning and, in fact, through most of yesterday, was the provision of information and how important that is and, Peter, you made a statement there that gets me really excited, "Consumer access to internet has never been easier." This is just not true for many disadvantaged and vulnerable consumers, but it's even more so in rural areas where a lot of us don't have Broadband and I would challenge all these people that keep talking about, "Let's provide more information." Try looking at it at a dial-up service and see how useless it is. And

there are probably a lot of other impediments and I think rural people often have a lot of trouble in being even able to sort of get involved in these inquiries, just because of where they live. So what can be done to better protect rural consumers and basically give better access to people?

George Negus:

So basically, you are suggesting the information divide, as it were, applies to the situation of consumer policy?

Peter Hendy:

Well, I can't disagree with what John said. I mean, it's just a statement of fact that rural and regional people don't have the same access and ability to utilise the new technology as the wider community. Apart from that, that becomes a question about general telecommunications policy. I'm not quite sure it's a consumer policy issue, it's a question about ensuring that people get access to the...

George Negus:

So to consumers of telecommunications...

Peter Hendy:

Yes, but you see what I mean, it's not a consumer protection issue, it's provision of telecommunication service issue which I could talk about in a different...

Catriona Lowe:

I guess I'd simply say that it is a consumer protection issue, if what we're talking about is putting forward information as a solution to consumer problems. Again, you have to look at the actual experience that consumers are having in order to make that an effective tool.

Peter Hendy:

Can I just make one comment on information that will come up? This inquiry is very interested to know, and a central issue in this inquiry is in fact the provision of information and how we provide it, is it effectively been provided, does it meet its objectives? There is no assumption in this inquiry that the answer to consumer problems is, in and of itself, information. Information is a critical element. The question for us is whether or not we've worked out how to provide appropriate, cost-effective information for consumers, both vulnerable and disadvantaged consumers and generally and that is a central part of this inquiry for which we'd love your advice and expertise because information, in and of itself, doesn't achieve anything unless it's comprehensible and usable. So, that's a slightly different issue, but I want to make the point about information. It's the nature and the quality of that information that's critical in this inquiry because it obviously is an important element in it.

George Negus:

Will your inquiry, without pre-empting you, would it be likely to include a pretty extensive prelude, as it were, prologue, explaining what's happened in the last twenty years, so that the inquiry is seen in that sort of context?

Peter Hendy:

It will have some set up chapters in it which talk about that and I understand there were some presentations yesterday that did a very comprehensive review of what's happened both for consumers and more generally. So, we'll do that. Whether it's comprehensive, well, we'll just have a look at that. But certainly, we want to put the inquiry in that context, but it won't be a... (inaudible – mumbling)... let me just make that comment. But we will be trying to contextualise the current arrangements. How long or short a knot is yet to be decided.

Jennifer McNeill:

Jennifer McNeill of ACCC. I just wanted to invite both Catriona and Peter to expand a little on how consumer benefits might be quantified. I think both of them spoke about doing a benefit detriment analysis when you're looking at regulation and it might be thought to be a relatively simple exercise to tot up the dollars that compliance cost represents to a business, but how do you go about quantifying consumer benefits?

Catriona Lowe:

Actually the dollar figure on it, I think that is the \$10 million question. What we need to do I think is look beyond some of the tools that were perhaps used to martialling in the context of undertaking cost benefit analysis and look at qualitative information, as well as quantitative information. I think some of these things are amenable to some quantification and we've seen, for example, publications by Consumer Affairs Victoria in recent times that look at the costs to consumers of ineffective regulation and I think there's much to commend that approach. But I also do think that one of the things we often strike when we go to try to explain a problem or a benefit that we perhaps experientially know to be true, is we then come up against that lack of data and that lack of research to underpin those...

Peter Hendy:

Most of what our policies boil down to is having an assurance that we have a robust cost benefit analysis if we're going to have regulation or if we're looking at changing regulation and so every jurisdiction in this country is committed to cost benefit analysis, unfortunately every jurisdiction in this country fails in doing that in a robust way from our point of view and so, we with Catriona think it's really vital that we have the relevant data and that we have the relevant methodology to both assess the benefits and the costs.

Toni Fordman:

Toni Fordman from the Trade University, I actually had a response to one of the questions but also another question about the need for baseline and independent research and I suppose my
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response to the vulnerable and disadvantage consumer question was that I've just been involved in a large research project and we looked particularly at Victorians and the way which they access both Consumer Affairs Victoria and Vicap (?) and the report will come out next week and there were specific and quite defined impediments in terms of access there were some major issues in that where you would expect that there would be consumer credit debt you didn't in fact have the number of complaints surfacing which suggests that there are significant issues for some consumers but my question was really, I think George referred to a rose between two thorns and I think it really does, give you an indication I think of the type of discussion and debate that occurs in this area. You have industry on one side and then you have the various consumer action groups and I'm not suggesting that either of them don't do a wonderful job in presenting a viewpoint however neither of them in fact independently research and I don't think you could ever say that the research and the baseline information that you get from either group, however passionate and however interesting and sometimes very important is actually independent, I know of only one academic in the room whose sitting next to me and I know academic is actually a dirty word but I'm concerned that you're not engaging in terms of independent research, there is little funding for independent research in this area and that the questions that you're seeking to answer are really done in a bit of a vacuum in terms of information and again I don't want to put the economists down in terms of productivity commissioned work but it just seems to me to be very surprising that that level of engagement doesn't occur.

Robert:

Just a couple of comments on Peter and Catriona might have made a comment clearly one of the things that we look at is the level of research, sorry the level of information that is available and in the consumer product safety area, one of the recommendations that we made, which I understand the Ministerial Council has now adopted, is the need for baseline data in relation to consumer product matters. Now America has much better data in relation to that, we have very poor data and so it's very clear that good quality data is important. The difficulty however for policy makers is that they have to make policy's in the absence of that as well so whilst I think Australia is poorly served in relation of a whole range of data and research and that needs to be addressed that will take a great, a considerable period of time and so as we develop that better and there is already work being done in various areas, then I think that's great but policy makers don't have the luxury of waiting. So therefore you've got to in fact, look at all the factors both qualitative and quantitative that are available and try to make recommendations or policies based on that and the Productivity Commission is no different. We look at the international research that is available, we look at the domestic research that is available and from that you try to find a way forward but I agree with you, the level of data available in a whole range of consumer issues and the Commission has been involved in bits and pieces of this for a long time, is way below where you would want it to be and hopefully there are moves to improve that over time.

If I just go back to the fundamental point, you can't, policy makers don't have that luxury waiting for perfect information, it never happens so they have to use whatever tools you have available in that context but on the product safety stuff (?) I think the governments, the collective 9 governments have made a positive decision, I understand they are in fact going ahead with some studies and that's a very welcome response to one of our recommendations.

Catriona:

Look I certainly strongly welcome and agree with the need for academic research in this area and we have been very excited to see the development for example of the a centre focusing specifically on consumer issues out of the University of Western Australia, it's a very very important initiative and we do see other examples of centres that are focusing on some of these issues. I do also think that there are some roles that consumer advocacy and indeed business organisations can play in these processes both in terms of identifying issues that are worthy of or needing of research but also of themselves to provide some data and research information themselves, I mean, there is always a spin that can be put n information but at the same time and I think Choice for example provide extremely valuable independent consumeral information about products and services I think that there are examples that can be drawn through, the case work experience that other sorts of organisations see every day which is not which is nothing more than the experiences of consumer clients that they see, now there's ways in which you know, people self select through those processes and they certainly need to be acknowledged but I think we can all agree that there is more information data that is needed and that there are a range of people that can assist us in the task of getting a better sweet (?) of data available.

George:

Peter?

Peter Hendy:

Well only just making the observation; the older I get, the more I am of the view that no one's independent and everyone's got their gender.

George:

Good comment. Yes. Except journalists (inaudible-laughter) if you believe that you believe in the tooth fairy.

Caroline Bond:

Caroline Bond from Consumer Action, Peter you mentioned self regulation and I guess we've seen a number of industry voluntary codes that have been introduced to address problem areas and generally the experience from our point of view is that the good guys comply, the bad guys don't and it seems to me that some of these self-regulations are probably the worse example of red tape that we see, where we've actually got rules in there for business and they don't have to comply.

Peter Hendy:

Well I just have a different look at it, I mean that fact is that for example if you look over all, the overall economy for example I mentioned Standards Australia for example, they've got something like 7000 areas of standards that are affecting the Australian economy every day of the week. A large proportion of that is voluntary and it works extremely well for the Australian economy and the Australian consumer.

George:

Any other comments?

Robert:

Other than we will be trying to look at that mix between self regulation right through to (inaudible-mumbling) regulation and what we are asking people to do is to give us illustrations of where they believe that self regulation or co-regulation which is often the case, is working well or a spy of (?) Peter's right, I was the Commissioner on the enquiry into standards and accreditations and that's one form of both self regulation and (inaudible-mumbling) regulation because a number of those standards are in fact mandatory so we are very interested in that and what we're interested in is case studies of things that are working well, things we could have done better, where's co-regulation working and not working so that we can actually use real life examples, theoretically I we understand all the items but what's the practice of that and again you have to provide that information to us if you can.