
# The Productivity Commission's Review of Australia's Consumer Policy Framework

## Submission in response to the Issues Paper – January 2007.

**About AFCCRA:**

Financial counselling in an Australian context refers to the provision of information, support and advocacy services to low income and disadvantaged consumers experiencing problems with credit and debt. Key characteristics of financial counselling services and those providing the services include:

- being community based and 'not-for-profit';
- being free of charge to service users and
- acting exclusively in the interests of service users, free from conflict.

There are somewhere between 450 and 500 financial counsellors practicing in Australia, in a variety of full-time, part-time and volunteer roles[1]. The majority of resources for financial counselling activities are provided by governments, although there is wide disparity in the manner of delivery and sufficiency of those resources.

AFCCRA is the national peak body for financial counsellors. It adopts a federated system of membership, with each state and territory represented on the Association's National Council. Formed in the early 1980s AFCCRA received funding from the Commonwealth to operate a Secretariat in Canberra until 1996. Since that time however, AFCCRA has received no recurrent or reliable source of funding for its activities and relies largely on the efforts and energy of its volunteer council. More details regarding AFCCRA can be found on its website www.afccra.org.

Preparation of this submission has been facilitated by Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT.

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[1] More information about the sector can be found in Sharon Barker's presentation, *'An overview of the financial counselling landscape in Australia', delivered at the AFCCRA Conference Melbourne 17 June 2005. A copy is available on AFCCRA's web-site www.afccra.org.*

## Key issues for financial counsellors and their clients:

The Issues Paper invites respondents to consider a number of questions. As indicated at the Initial Hearing in Canberra on 29 March 2007, AFCCRA has adopted three key themes to order this submission:

- where competition does not deliver advantages evenly or at all,
- examples of effective versus ineffective regulation and
- the lack of investment in consumer capacity in Australia.

A number of relevant questions from the Issues Paper are explored under the key themes.

As AFCCRA's membership provides direct services to low income, marginalised and disadvantaged consumers, current examples based on our experience are used where appropriate to explain or expand upon the key themes.

### a) Where competition does not deliver advantages evenly or at all:

**General -**

AFCCRA acknowledges competition in consumer markets can deliver significant and tangible benefits. From product and service innovation, to cost issues, through the range of delivery mechanisms, competition can provide improvements for consumers individually and collectively, as well as being a driver of general economic prosperity. Competition is therefore understandably a key policy priority.

The potential for competition to produce good outcomes does not mean that it does so in all instances. Financial counsellors, informed by the experiences of their clients, consistently see examples of apparently competitive markets failing to deliver benefits equitably or at all. In AFCCRA's view this is because the level of priority afforded to competition as a policy driver fails to recognise or sufficiently balance the importance of other policy priorities, in particular appropriate and robust consumer protection regulation and adequate social policy and planning.

**Relevant questions from the Issues Paper -**

*Questions: What are the key rationales for government intervention to empower and protect consumers? What should be the balance between seeking to ensure that consumers' decisions properly reflect their preferences (empowerment) and proscribing particular outcomes (protection)? (Issues Paper – page 14)*

Response: AFCCRA is pleased to see that the Commission has linked empowerment and protection, rather than presenting them as choices. Financial counsellors strongly support the concept of consumer empowerment. We are less supportive however of the reliance on disclosure as *the* key policy and regulatory tool to deliver consumer empowerment.

Other significant considerations in seeking to encourage and support consumers to exercise choice in an informed and effective way include:

- the nature of the goods or services (for example whether they are 'discretionary' or 'essential', or put another way 'wants' or 'needs') and
- consumers' capacity to engage with and influence the transaction.

As well as a focus on empowerment, it is vital to have broad protection principles that support the development of safe and fair markets. A number of those key principles exist in Part V of the Trade Practices Act and stream from there to other equivalent provisions at both the Commonwealth and State and Territory levels. There is a need however to review and update those provisions and to fix glaring problems with their effectiveness. In particular AFCCRA supports the development of national and consistent rules preventing the promulgation and reliance on unfair contract terms. As a guiding principle, it is AFCCRA's view that a prohibition on unfair contract terms should apply across all consumer markets. Unfair contract terms regulation would provide an important preventative addition to largely reactive unconscionable conduct provisions.

AFCCRA is aware that the Commission has received submissions speaking against prohibitions on unfair contract terms legislation on the basis that such regulation adds costs while producing limited benefit. AFCCRA disagrees with that proposition. Terms that are unnecessary to protect the legitimate interests of the parties to a consumer contract inhibit the growth of safe, fair markets. Standard unfair terms *decrease* consumer confidence. They *increase* regulatory burden by requiring policy, legislative and enforcement attention be diverted to making good on preventable problems.

The changes the introduction of broader and national unfair contract terms legislation would deliver would in AFCCRA's view not end or inhibit commerce. Neither would such a move produce a wholesale scramble to rewrite consumer contracts from the outset. Rather, over time, such legislation could see unnecessary and one-sided terms removed because both substantive and procedural unfairness will be able to be considered.

*Questions: What are the implications of developments in theory (e.g. behavioural economics) for consumer policy? Do they render some traditional views of the role for government in this area less relevant, or do they simply require more sophistication in the analytical framework and policy toolkit? (Issues Paper- page 14)*

Response: AFCCRA is aware of developments in behavioural economics and recognises their value. We would also suggest there is considerable potential value in more detailed analysis of the behaviours of low income and disadvantaged consumers. How do those behaviours compare to general consumer behaviour for example? How, if at all are the behaviours of those consumers influenced by their low income or disadvantage? Anecdotally, the service delivery experience of financial counsellors suggests the behaviours of our clients are significantly different to those of the general consuming population. For example, our clients *expect* to be treated badly, if they are not it is a

pleasant surprise. Perhaps that in part explains the success of otherwise overtly unfair and expensive market offerings like pay day loans, where clients make comments like –

> *I knew it was expensive but at least they were pleasant to me and made me feel like they wanted my business*.

*Questions: Under what conditions are markets most likely to develop responses to the various impediments to the effective participation of consumers? To what extent will the actions of well-informed consumers drive outcomes across markets as a whole? (Issues Paper -page 15)*

Responses: Commercial providers, left alone, will develop responses to consumer access or participation impediments *only* where there is a commercial imperative or benefit to doing so. Put another way, in AFCCRA's view and experience where there is no commercial, regulatory or (in mature market segments) reputational risk in ignoring the needs of consumers who are excluded from safe, fair participation in specific markets commercial providers are unlikely to act to solve or respond to the problems – nor should they necessarily be expected to. Further, where problems have arisen, and in the absence of policy guidance or direction, commercial providers will seek to develop responses based almost exclusively on the potential for commercial benefit.

*Example 1:*

Housing finance – A growing crisis exacerbated by a highly competitive consumer market:

There are very few topics that have commanded the consistent public attention and concern that access to affordable housing has over the last decade. Housing affordability represents a complex and multilayered set of policy challenges, however the rapid increase in the rates of mortgage foreclosure represent a dramatic escalation. For financial counsellors, and even many emergency welfare providers, problems in the home finance market threaten to swamp already overstretched services as otherwise 'comfortable' consumers from the mortgage belt face financial ruin.

How has the problem come about? In the absence of coordinated and thoughtful policy responses to escalating housing costs, increasing consumer need and diminishing actual payment capacity have produced inventive market responses, including:

- expansion of Lo-doc and no-doc lending,
- marketing messages suggesting that saving for a deposit is unnecessary and might mean you miss out on being able to buy while you are saving, and
- up to and greater than 100 per cent financing of the purchase price of a home.

The success of these lateral offerings is clear, if take-up is the measure of success. They have however moved away from models based on proper assessment of consumers' needs and means and, if the evidence emerging from the various Supreme Court registries

around the country is anything to go by, they are failing in increasing numbers.

The experience in the housing finance market is a salient reminder that competition is not the only ingredient to good outcomes. Even some consumer advocates have suggested housing finance competition might be a signal that it is safe to reduce regulatory requirements[2], when in fact increasing or better targeting the reach of those requirements may slow the unsafe and unfair conduct. In this instance the existence of a competitive market has not solved the problems associated with housing affordability - it has only served to exacerbate them.

*Example 2:*

Access to landline telecommunications facilities. (An expression of consumer choice or the market the commercial providers are prepared to provide?):

It has been claimed that much of the effort in telecommunications policy in Australia in the last decade has been invested in increasing competition. To the extent that investment has produced benefits those have not been evenly spread, particularly for low income consumers. A good example is reliable access to landline services.

Data across the country confirms that the take up and maintenance of land line facilities by consumers has been falling, in favour of mobile technology. But is this a reflection of consumer choice or rather the outcome of industry dictating where it chooses to compete? In 2005, funded by a small grant from the Telsta Consumer Consultative Council, AFCCRA undertook a survey of financial counsellors' experiences with their clients' telecommunications issues. There were 86 surveys completed, a relatively high rate of return given the small size, disparate nature and resource limitations for financial counselling service delivery.

In response to questions regarding the manner in which clients make contact with financial counsellors (and note multiple options were possible), mobile contact was the most likely at 69 per cent, followed by landline contact at 66 per cent. Indicative comments that accompanied these responses included:

> *Most either cannot afford to ring me or have incoming calls only.*
>
> *Making more calls to mobiles due to clients not able to afford and maintain landlines.*

Further in response to a question asking whether the methods of communications had changed in recent years, and if so how, 61 per cent said yes and over half of those noted

[2] In an article in Australian Financial Review (*The ACCC suggests competitive markets may need fewer rules, writes Toni O'Loughlin,* 18 January 2005), Chris Field then Executive Director of the Consumer Law Centre of Victoria suggested the *'highly competitive'* mortgage market might be one in which *'consumer protection laws could be loosened'*.

increased calls to mobile telephones in particular pre-paid mobiles. Again the additional comments included:

> *Definitely. Less landline, more mobiles – prepaid clients can't afford a landline as they can't afford the bills.*
>
> *Many clients used to have landlines. Now they cannot afford the monthly line rentals, and prepaid services are unreliable as many clients cannot access them until their next payment arrives and they can top up the credit.*
>
> *It seems to be a minority who have landlines; the rental is too expensive for them. This interferes with being able to obtain credit as I know of at least two banks that will not give credit without a landline.*[3]

Supposedly a cornerstone of the Universal Service Obligations, AFCCRA's experience is that low income and disadvantaged consumers are not obtaining or maintaining access to landline facilities when they want and need those facilities. This only exacerbates erosion of physical land-line access for example through the reduction in numbers of pay-phones and current approaches to connection rollout in new suburban developments.

*Questions: What are the important costs of intervention? How significant are the hidden costs of intervention? How do these compare with the costs of not intervening? (Issues Paper - page 15)*

Response:

There is considerable focus on the costs of policy or regulatory intervention in consumer markets. AFCCRA's observation would be that too much of this focus is on the cost to industry, rather than recognising the costs to consumers individually and collectively and, perhaps even more importantly, the range of other costs to the community as a whole.

Some of the costs of not responding to problems or preventing their occurrence in the first instance can be readily translated into monetary amounts. In example 1 on page 4 of this submission, reference was made to the growing numbers of consumers losing their houses as a result of failing home loans, many of which appear to have been unaffordable from the outset. In addition to costs specific to those transactions, consumers who exit failed housing loans frequently face residual debts that they cannot pay, which may in turn lead to bankruptcy. Bankruptcy costs the community directly in the administration of the process, with the overwhelming majority of bankrupts utilising the services of the publicly funded Insolvency and Trustee Service of Australia. The rates of return to creditors in the bankruptcy process are low, passing on costs to other parts of the

[3] A full copy of the Survey report can be obtained from AFCCRA's web-site at www.afccra.org/documents-12-06/telsra%survey.doc

community. Debtors who have lost their homes still require accommodation, potentially transferring further costs to the provision of public housing, or increasing the pressure on those already over-stretched systems.

Other costs are more difficult to translate directly into dollars and cents, but no less significant in their implications, socially and economically. For example, the links between financial stress and relationship breakdown are now being more clearly recognised[4]. So too are links between financial stress and health problems, up to an including suicidal thoughts and actions[5]. At an even broader level, issues like fairness and equity contribute in important ways to social capital.

AFCCRA accepts that there must be a framework for investigating and determining when regulation will be an appropriate response and how that regulation will be designed. We also accept that 'cost' must be part of that framework. What passes for an assessment of costs at present however is not only too narrow, it focuses disproportionately on the interests of the market, forgetting in the process that the market exists to serve society – and not the other way around.

To provide a practical example, a response often touted as likely if increasing compliance and regulatory burdens are passed on to industry sub-sectors like fringe credit providers, is that those providers may go out of business. AFCCRA is not convinced that would be the case, however if the establishment and maintenance of core principles of fair conduct forces some providers out of the market because they can no longer turn a profit, then that is a good outcome. Similarly, if appropriate policy and regulatory settings increase the likelihood that issues of a *welfare* or *social policy* nature are properly recognised as such, rather than outsourced to thriving commercial sub-markets rife with exploitation, that is also a good outcome.

The current processes for investigating and weighing the costs of intervention, principally through Regulatory Impact Statements, are poorly suited and ill-equipped to consider non-market costs. Even if those processes were better equipped than they currently are, there is in any event little investment in research and information gathering to feed in. This issue will be explored further under the third theme, the lack of investment in consumer capacity in Australia.

*<u>Questions:</u> What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy? Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms? (Issues Paper - page 18)*

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[4] Stephen P Martin, *Trends in Marital Dissolution by Women's Education in the United States,* Demographic Research, University of Maryland College Park US, 13 December 2006 (can be accessed online at http://www.demographic-research.org/volumes/vol15/20/ )

[5] See for example: Commonwealth Department of Health and Aging, *Life – Living is for everyone, A framework for prevention of suicide and self-harm in Australia,* Canberra 2000

Response: AFCCRA has welcomed the interest shown in developing a more sophisticated understanding of issues of vulnerability and disadvantage. For example, the ACCC launched a campaign focusing on market conduct that sought to exploit vulnerability and disadvantage in early 2003 and Consumer Affairs Victoria (CAV) released a detailed Discussion Paper exploring the meaning and implications of the terms in 2004[6].

The Consumer Law Centre of the ACT provided feedback to the CAV Discussion Paper, recognising the distinctions between disadvantage and vulnerability:

> *…a disadvantaged consumer is one who can be identified by reference to personal characteristics (including age, lack of education, mental or physical incapacity etc), whereas a vulnerable consumer is one of a class most likely to react poorly to, or to suffer detriment as a result of engaging with a particular market or market segment.*[7]

AFCCRA endorses the Consumer Law Centre of the ACT's approach, which was also endorsed at the time by the Consumers' Federation of Australia (CFA). In its cover letter to Consumer Affairs Victoria in April 2004, the CFA noted:

> *There is little argument that in allocating consumer protection resources, priority should be given to issues that impact on disadvantaged and vulnerable consumers. However, it is important that protection of the vulnerable and disadvantaged is a priority – but not the role – of the regulator.*[8]

And further:

> *The risk of identifying this priority, and defining 'vulnerability' and 'disadvantage', is that the role of the regulator is narrowed, and that consumer protection (whether advice, legislative protection, dispute resolution and enforcement) is regarded as something specifically for certain disadvantaged groups. It is vital that consumer protection continues to be regarded as a right for all consumers, rather than a 'safety net' for those most in need.*[9]

AFCCRA also agrees strongly with the views expressed by the CFA in 2004. Those views not only confirm the importance of designing an appropriately safe and fair system for all consumers, it also lends weight to the significance of the role that direct consumer support services, like financial counsellors and consumer legal centres provide to vulnerable and disadvantaged consumers.

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[6] Consumer Affairs Victoria, *Discussion Paper – What do we mean by 'vulnerable' and 'disadvantaged' consumers?*, Melbourne, March 2004.
[7] Tim Gough, *Response to Consumer Affairs Victoria Discussion Paper "What do we mean by 'vulnerable and 'disadvantaged' consumers?"*, Consumer Law Centre of the ACT Canberra, 15 April 2004, page 2.
[8] Consumers' Federation of Australia letter to Consumer Affairs Victoria 15 April 2004
[9] CFA letter to CAV, ibid.

*Example 3:*

Vulnerability, disadvantage and access to essential utilities:

Utilities are identified as *essential* services because of the fundamental needs they meet. As the traditional regulators of utility services, State and Territory Governments have generally put in place mechanisms to recognise the essential nature of the services and the need to prioritise continuity of access to those services. In particular these mechanisms, to greater and lesser degrees of success, provide additional protections to ensure low income consumers are able to establish and maintain reasonable utility access.

Setting aside which approach is best, financial counsellors have expressed dismay that the move to full retail contestability in some markets, with others to follow, has resulted in a diminution of the priority afforded to keeping consumers connected from within the regulatory system. We believe strongly that this represents an abrogation of the responsibilities that correctly rest with governments in favour of greater market control of such issues. An excellent example is the drift toward delivery vehicles like pre-payment meters without appropriately robust assurances that people who want to pay but cannot are not more easily forgotten or ignored as they euphemistically 'self-disconnect'.

There is nothing wrong with allowing the market to produce greater choice. There is everything wrong in AFCCRA's view with overseeing the slow erosion of fundamental concepts like the right to establish and maintain access to essential services, because of a greater commitment to market expansion.

## b) Examples of effective versus ineffective consumer regulation:

**General:**
AFCCRA accepts and acknowledges the benefits that can flow from layered consumer regulatory approaches. So long as the broad principles are clearly expressed and at the 'apex of the regulatory pyramid' there is a genuine consequence to not following the rules, there are many practical ways to tackle individual market issues that can reduce compliance costs for industry and increase utility, access and simplicity for consumers. It is where that genuine consequence is missing that some of the worst possible consumer policy outcomes can be found.

**Relevant questions from the Issues Paper:**
*Questions: Is the current consumer framework fundamentally sound? Does it simply require fine-tuning or are more comprehensive changes required? What measures could be used to assess whether it is delivering for consumers? (Issues Paper - page 16)*

Response: We note the comments made by Peter Kell, CEO of Choice at the Commission's initial hearing in Sydney on 16 April 2007 and agree that at the broadest level Australia's consumer protection is sound.[10] We would however also agree that some of the changes required to update, modernise and protect the integrity of that consumer protection framework go beyond 'fine-tuning'.[11]

*Questions: What are the examples of policies that are very ineffective in targeting vulnerable and disadvantaged consumers? Are there instances where a desire to protect these groups has imposed significant net costs on the wider community? (Issues Paper - page 18)*

Response: As noted earlier, AFCCRA's general view is that regulation should provide a framework that is appropriate for all consumers rather than singling out vulnerable and disadvantaged consumers for special treatment. The often unacceptable and overtly unfair market experiences of vulnerable and disadvantaged consumers can however help to provide greater clarity and resolve in designing that appropriate regulatory framework and on how and where enforcement energy is most effectively invested.

*Example 4:*

The ACT's approach to the appropriate marketing of credit cards:

From November 2002, section 28A of the ACT Fair Trading Act required credit providers offering new or increased credit on card facilities to conduct a *satisfactory assessment process* prior to extending the credit. Such an assessment process requires the credit provider to ask for and have regard to a consumer applicant's income and expenses in forming a view about whether the consumer can afford the credit being offered.

Although the ACT is the only jurisdiction to date to have implemented such an amendment, it is far from being the only state or territory that has considered the issues and the need for further action. For example, the Victorian Consumer Credit Review released in February 2006 recommended a significantly expanded plan although including a similar assessment model to the ACT[12].

[10] Productivity Commission – Inquiry into Australia's Consumer Policy Framework, Transcript of Sydney initial hearing 16 April 2007, (Peter Kell and Gordon Renouf) page 429.
[11] Sydney initial hearing transcript, Ibid page 430. (We also note and support comments in relation to the need for updating the compensation arrangements under the Trade Practices Act and some of the splits in regulatory responsibility between the Commonwealth and the States and Territories later in the transcript.)
[12] Consumer Affairs Victoria, *Report of the Consumer Credit Review*, Melbourne, February 2006 (In particular Option 6.2). The Victorian Government backed away from this recommendation in its response,

At a national level the issues have been on the agenda of the Ministerial Council of Consumer Affairs for many years.

Problems associated with the inappropriate marketing of credit cards, particularly *pre-approved* cards or limit increases, have become prominent largely through the impacts on low income and disadvantaged consumers. The issues are not however contained to this segment of the market. Inappropriate extension of high cost revolving credit presents risks across consumer demographics.

The ACT credit card assessment process has been roundly critcised by credit providers, in particular by the banking sector. Those criticisms include a variety of claims, but principally focus on:

- relatively low levels of credit card default in Australia, in spite of the increasing amounts of credit being extended on card facilities and
- the continued advancement of automated credit scoring techniques - which are claimed to be more effective in predicting consumer conduct, rather than application based approaches that are undermined by consumers providing incomplete or inaccurate information.

From AFCCRA's perspective, the growth in credit card balances and limits available provide dramatic examples of the increasing levels of personal debt being carried by Australian consumers[13]. AFCCRA accepts that default levels are low. It does not however accept that this alone proves there is not considerable and preventable hardship being caused or exacerbated.

Credit card marketing is not curtailed by the ACT intervention. Nor is the potential value of credit scoring technology in better targeting that marketing. What is required and AFCCRA believes is appropriate across all forms of consumer credit provision, is a review of a consumer's needs and capacity *before* the credit is extended. The cost that is imposed is part of designing and delivering a safe, fair market for credit cards.

The ANZ Bank has questioned both the effectiveness and utility of the ACT legislative approach.[14] It is interesting to note however that the ANZ has also been a market leader in developing a guideline for responsible lending which, amongst other things, actively suppresses the making of offers for new cards or increased credit to benefit recipients or those whose account conduct indicates potential payment difficulties. In other words, the better industry responses are recognising that a more effective and up to date assessment of needs and capacity is part of a fair credit card marketing regime.

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opting for further research and clearly deferring any regulatory action to the national consumer credit review process.

[13] RBA data confirms the total amount owing on credit and charge cards at the end of March 1997 as $7.6 billion. At the end of march 2007, the balance owing was 39.5 billion. (www.rba.gov.au/Statistics/Bulletin/C01hist.xls )

[14] Jenny Fagg, *Win-win situations – the relationship between business and consumers (Speaking notes for the National Consumer Congress)*, ANZ Banking Group Limited, Melbourne, 14 March 2007

*Questions: What principles and considerations should guide the use of self-regulatory, co-regulatory and non-regulatory options in the consumer policy framework? What are the best examples of effective self-regulation, co-regulation and non-regulatory approaches and why have they worked well in these cases? (Issues Paper - page 21)*

Response: Across and even within markets in Australia there is an extraordinary range of regulatory approaches. In the general comment at the start of this section considering effective versus ineffective regulation, we noted the best outcomes appear to be delivered where the 'apex of the regulatory pyramid' delivers a genuine consequence for not following the rules. Below that apex, any number of approaches can be and are employed but their success or failure at the most fundamental level remains closely related to the genuine threat and practical risk of some ultimate sanction. If that is missing, then in AFCCRA's view no amount of effort, or inventive system design further down the pyramid, can ensure reliable safety and fairness for consumers.

Questions: *Are there significant enforcement gaps in the current framework? If so, do they mainly reflect the level of resourcing for those entities responsible for enforcement or are there other factors at work? (Issues Paper - pages 20 & 21)*

Response: Yes, there are gaps. Sometimes those gaps are related to resources, but that is not always the case. Broadly understood principles of fair and appropriate conduct across markets could in AFCCRA's view assist in the provision of clear messages to product and service providers and to consumers about what is acceptable. Those messages will however be undermined if there is no consistency and clarity in how reports of failure to meet acceptable standards are dealt with. Good policy and regulatory design are of little value if consumer rights cannot be accessed and activated.

*Example 6:*

Telecommunications – what happens when Regulators cannot or will not regulate:

Financial counsellors are not the only consumer commentators to raise concerns about how effective the telecommunications regulatory framework is in Australia. There is a great deal of regulation and a voluminous and multi-layered set of industry codes. Many of the Codes are registered under the Telecommunications Act and therefore, at least theoretically, enforceable. There are two national regulators of considerable size and capacity in the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC), as well as a significant industry External Dispute Resolution Scheme, the Telecommunications Industry Ombudsman (TIO). And yet with this apparent embarrassment of riches, there is almost no industry sector in which the general consumer experience described to financial counsellors is more consistently negative.

There are fundamental failures in relation to basic issues like:

- access to safe, affordable products,
- reliable, accessible internal dispute resolution processes and
- decent mechanisms for responding to financial hardship.

The issues listed exist as problems in other markets. They just appear to occur more frequently in telecommunications, with little apparent interest from industry in resolving those problems in a structured way.

At the 2006 Consumers' Telecommunications Network Annual Conference, AFCCRA's Chairperson presented a paper entitled *Telecommunications complaint handling procedures: Still failing consumers in the most fundamental ways.* The paper noted:

- that the top market segment for consumer complaints to the ACCC info-line for a number of years had been telecommunications;
- that contacts to the TIO had escalated from around 1300 per week in the 03-04 financial year, to around 1900 per week in the 04-05 financial year and were, at the time the paper was presented in March 2006, nudging 3000 per week, and
- that the ACMA, in spite of producing various guidelines on what it might do in enforcement was simply not doing so.[15]

The main consumer protection regulatory roles in the telecommunications space fall to the ACMA. The ACCC's jurisdiction predominantly relates to competition issues. In AFCCRA's view, ACMA has been at best ineffective and at worst inactive in enforcing the standards expected in the legislation and in the registered consumer codes. The lack of enforcement capacity or resolve appears to be the greatest obstacle to improving conduct in the telecommunications market. In the meantime, the TIO's weekly count of incoming contacts now exceeds 4000.

Not all TIO contacts become complaints, although matters that do become complaints are also increasing both in number and as a proportion of intake. It is also the case that market activity, particularly in emerging technologies, is increasing and that may contribute to increasing contact with the industry EDR. But the rate of increase is extraordinary. It should also be read in the context of section 4 of the Telecommunications Act 1997, which provides:

> *The Parliament intends that telecommunications be regulated in a manner that:*
> *(a) promotes the greatest practicable use of industry self-regulation; and*
> *(b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;*
>
> *but does not compromise the effectiveness of regulation in achieving the objects in section 3.*

It is AFCCRA's view that sections 4 a) and b) of the Telecommunications Act, have been prioritised in ways that compromise the regulatory objects. The effectiveness of industry

[15] A copy of the speaking notes for this presentation can be found on Care Inc Financial Counselling Service's web-site at www.carefcs.org/publications/policymaterials/telecommunications.html

self regulation is compromised where there is no credible threat of sanction for non-compliance. In telecommunications, the experiences of the clients of financial counselling services suggest that currently no such credible threat exists.

*Questions: Are the current dispute resolution mechanisms and arbitration processes, including consumer tribunals readily accessible and effective? (Issues Paper - page 21)*

Response: No. In relation to dispute resolution options, there is no real consistency across markets in the availability, reliability and effectiveness of appropriate internal dispute resolution (IDR) options. In very general terms, IDR is more likely to be available and to work effectively if there is an external dispute resolution (EDR) option independent of industry and available free of charge to consumers. In turn the effectiveness of dispute resolution options, both internal and external, are related to the effectiveness and credibility of the regulatory regime in which they are sited.

More formal mechanisms, through Courts and Tribunals are increasingly out of reach for ordinary consumers. Not surprisingly, the costs and complex legal nature of those options, even in forums designed to be accessible and user friendly for consumers, present barriers that are difficult to overcome. Consumer advocacy services, in particular consumer legal services can assist people to access legal options. The consumers that can access those services represent the tip of the iceberg in terms of need and demand.

## c) The lack of investment in consumer capacity in Australia:

**General:**

Consumer advocacy, research and general capacity in Australia are at a low ebb[16]. For example:

- Direct service programs, largely focused on the needs of low income and disadvantaged consumers are responding to increasing demand in both complexity and volume. They are attempting to do so with resources that are decreasing in real terms.
- Peak bodies that seek to connect the work of direct service agencies and assist them to access appropriate training and professional development have largely been defunded.

[16] See for example the comments of Allan Fels and Fred Brenchley, *Consumers last in line,* Australian Financial Review, 16 January 2007. AFCCRA notes in particular the conclusion to this opinion piece:

> *Apart from looking at red tape, Australia's PC inquiry is tasked with ways to "assist and empower" consumers. Maybe the innovative and independent PC could use that as a lever to shift Australia's consumer policy back to world class status.*

- There is no body at a national level that is responsible for drawing together consumer issues and conducting research into emerging consumer needs and/or market failures.

**Relevant questions from the Issues Paper:**

*Questions: Would there be benefits from government support for a consumer advocacy body and would they outweigh the funding and other costs involved? Should such a body's role be limited to advocacy, or should it also be responsible for bringing forward consumer complaints? Do consumer advocacy bodies adequately represent the interests of all consumers? If not, what other means could be used to elicit the views of consumers? Is there a need for greater research into consumer and market behaviour to inform policy development? If so, who should be responsible for carrying out and resourcing such work? (Issues Paper - page 22)*

Response: This set of questions is worthy of its own dedicated review. Ideally such a review would draw from the collective experience of the groups that currently provide services to consumers around Australia. The Commission is however aware of the limitations consumer groups face in providing a thoughtful and coordinated response.

AFCCRA representatives have contributed to a qualitative survey recently conducted by Fiona Guthrie, as consultant to the Consumer Action Law Centre in Victoria. The survey was funded by a grant of $5000 allocated from the research budget available to ASIC's Consumer Advisory Panel (CAP). We will defer our comments regarding the broader national needs for consumer capacity in Australia to the report Ms Guthrie is preparing, which we understand will be submitted to the Commission.

Though an important and timely exercise in the context of the Commission's review, the consumer advocate survey does not claim to be more than an introduction to the range of issues and possible responses. The Commission has adopted a lateral approach to engaging consumer groups in the early stages of this review. AFCCRA has welcomed that approach and suggests that the issue of designing an appropriate national consumer research and advocacy framework might benefit from similar thinking. A roundtable drawing together some of the key stakeholders could be one such mechanism.

AFCCRA also feels it is important to note that to our knowledge the $5000 contributed by the ASIC CAP to the consumer survey has been the ***only*** dedicated commitment of resources nationally to facilitate the engagement of the consumer movement with this critically important review. That is of itself an example of the urgency and extent of the need for investment in consumer capacity. The work of consumer groups in Australia is undervalued and underfunded.

*Example 7:*

Financial counselling, from canary in the coalmine to credit and debt emergency room, a sector in desperate need of investment:

As noted in the introduction, the Australian financial counselling sector is very small – between 450 and 500 workers nationally, in a mix of full-time, part-time and volunteer roles. Although an estimation only, it is likely that the sector would compact down to around 200 to 300 full-time equivalent workers. The sector's profile has increased in recent years however the financial counselling workforce is not expanding in any demonstrable way. The sector is predominantly funded by governments. That funding is patchy, insufficient and diminishing in real terms.

If the availability of financial counselling matched the demand for services, there would be no problem with the small size of the sector. It does not and the gap is getting wider. Personal debt levels in Australia have ballooned over the last decade and there is increasing evidence that the financial crises caused by over-commitment are moving up the income groups. Across the board, including mainstream credit markets, industry standards in credit assessment have been and continue to be eroded – a fact that has drawn considerable public comment, including warnings from the Reserve Bank.

As well as increases in the amount of personal debt being carried by Australian consumers, there have been some other key changes that impact the work financial counsellors undertake, including:

- growing complexity in the products and services on offer;
- a blending of financial services and products with other market segments, for example telecommunications;
- increasing expectations for consumers to prepare for and fund their own retirements;
- growing gaps across classes of consumers in the products and services they can access and on what terms,
- and so on.

Increasing demand, increasing complexity and decreasing resources in real terms undermine the sustainability of the financial counselling sector in total. That reality does not appear to have been recognised across governments. On the other hand the further diminution of access to and the capacity of financial counselling services will only add to costs elsewhere[17].

There has been no commitment to review the effectiveness and efficiency of financial counselling as a service model for some many years. Similarly review of the funding and

[17] A good example of the structural significance of the role that financial counsellors play can be found in the latest Profile of Debtors 2005, released by the Insolvency and Trustee Service of Australia in August 2006. Of the 22,953 consumers who became bankrupt in 2005, 25 per cent received information about bankruptcy and its impacts from financial counsellors, second only to ITSA itself at 32 per cent (this information is contained in figure 7 on page 6 of the report).

structure of mainstream financial counselling is decades overdue. As a point of contrast, the Rural Financial Counselling program, a specialist sub-sector, was reviewed by the Commonwealth Department of Agriculture, Fisheries and Forestry in 2006. As a result of that review, significant changes were delivered, including increases in funding per worker of in excess of 40 per cent of their prior levels.[18]

In spite of the lack of resources and increasing expectations, financial counsellors have taken up the challenge of improving the quality and reliability of the services they provide. The sector has been actively involved in the development and accessibility of a nationally recognised qualification, the Diploma of Community Services (Financial Counselling). A number of states and territories have also worked hard to implement accreditation regimes that operate on the good will and hard work of experienced practitioners. These efforts are significant and vital to providing quality services. Our clients are the poor and financially stressed, but they are no less deserving of appropriate levels of service and accuracy of information.

AFCCRA has explored and continues to explore the use of appropriate industry partnerships. Those partnerships should not compromise the integrity of the service model and the sector is currently undertaking an important national discussion relating to industry partnerships and conflicts of interest. A copy of the Discussion Paper the vehicle for encouraging this important engagement is annexed to this submission.

At the initial hearing in Canberra, the Commission asked us whether financial counsellors might play more of a proactive, preventative role. The answer provided was yes that might be an avenue worth exploring. It is important to stress however that financial counsellors are no longer able to meet even the many crisis requests for assistance made at agencies around the country. Unless and until this situation is addressed in a coordinated and committed way, adopting a more proactive role would be code for giving up on the central focus of the sector's work in direct service provision to consumers in need.

*Questions: How effective are the current regulation making and review processes (at both the Commonwealth and State and Territory level) in facilitating the development of best practice consumer regulation? Are there ways to ameliorate some of the difficulties in measuring the benefits and costs of consumer regulation without compromising the integrity of the assessment process? (Issues Paper - page 23)*

Response: At the Canberra initial hearing, a question was raised regarding the effectiveness of the current state and territory based scheme of regulation of consumer credit, primarily delivered through the Uniform Consumer Credit Code 1996. Further, AFCCRA was asked whether the responsibility for consumer credit regulation would be

[18] Minister for Agriculture, Fisheries and Forestry, the Hon Peter McGauran MP, *Media Release – Australian Government support for Rural Financial Counsellors in NSW,* Department of Agriculture, Fisheries, Canberra 28 September 2006.

appropriately devolved to the Commonwealth. AFCCRA agreed to take these questions on notice.

In providing a direct, but constructive response, AFCCRA prefers to note that the current regulatory system and the policy development process that maintains and supports the consumer credit regime is undermined by serious practical challenges. For example, the otherwise entirely beneficial intention of maintaining consistency across all of the jurisdictions in which the regime is delivered, has itself become a barrier to effective maintenance, enforcement and updating of the framework. Even where problems are clearly articulated and there is agreement on both the need for action and the most appropriate course to take, delivering outcomes can take years. The post implementation review of the Consumer Credit Code, completed in 1999 has still yet to fully deliver the agreed set of recommendations.

AFCCRA provided just one example of the failures these practical problems produce in its evidence at the initial hearing, describing the leap in the monetary cap to access the Consumer Credit Code's hardship provisions, from $125,000 to over $300,000 in one hit[19]. Whilst the outcome was welcome, how many consumers who needed access to a formal hardship process but were denied one whilst the machinery ground through the reform process, lost their homes because the old cap was demonstrably too low?

If moving credit to the Commonwealth level streamlined the process for maintaining the effectiveness of the Credit Code regime, then it would have AFCCRA's full support. This does not mean that the state and territory agencies would cease to have a critically important role. As local 'cops on the beat' those agencies would be able devote more time to ensuring the regulatory framework is given effect.

As to which Commonwealth agency might be best placed to oversee the credit regime, in AFCCRA's view the logical choice is ASIC. Although consumer groups, AFCCRA included, were skeptical of ASIC's capacity to take on a broader consumer protection role in financial services, our observation is that the Commission has risen to the significant challenges presented to it. With an active and robust Consumer Protection Directorate, the most effective of the current consumer consultative processes amongst the range of regulatory agencies, reinserting credit into the Financial Services Reform regime appears to AFCCRA to be a logical fit. Indeed the excision of credit from that framework has always appeared artificial. Any such move would require careful planning to ensure a net gain in the delivery of the regulatory framework. It would also require an appropriate level of resourcing commitment.

In terms of streamlining regulation, moving credit to the national stage would go considerable way to addressing industry concerns about a multiplicity of compliance regimes.

[19] The increase to the hardship threshold commenced in November 2004. Further details regarding the floating threshold can be obtained from the Uniform Consumer Credit Code website www.creditcode.gov.au

*Questions:* *Are the Ministerial Council arrangements working well? If not, what changes are required? Would changes to other policy oversighting arrangements help to deliver better outcomes for consumers? (Issues Paper – page 24)*

Response: It follows from our response to the previous group of questions, that AFFCRA believes the answer to the first question here is no. Given the generally unhelpful way difficult or complex issues tend to lead to exercises in public blame shifting between the States and Territories and Commonwealth, AFCCRA is not able to suggest a solution. It is AFCCRA's view however that a strong set of agreed and understood consumer principles that are applicable across markets, and the development of genuine research capacity that might amongst other things test success or failure of various industry sectors to meet those principles, could be part of informing more effective cross jurisdictional cooperation.

*Example 8:*

The failure to deliver nationally consistent regulation of mortgage and finance broking in a manner reflective of the need and urgency:

Mortgage and finance broking in the consumer credit market have been causing problems for many years. Attempts to address those problems by attaching or imputing the conduct of intermediaries to principal credit providers through the Consumer Credit Code have been largely unsuccessful. The continued growth in the credit market and the relative proportions of new consumer loans being negotiated through brokers have turned a problem requiring attention into something closer than a crisis. The problems are particularly prevalent in the sub-prime home lending market.

The Ministerial Council began reviewing the issues in 2003. A Regulatory Impact Statement was circulated in 2004 and the Council anticipated completion by March 2006. At the Council's last meeting in September 2006, the following notation was included in a Joint Communique:

> *National Regulation of Finance Brokers:*
>
> *Ministers today discussed issues related to the national regulation of finance and mortgage brokers. The proposals have been the subject of on-going consultation with industry and consumers. A decision on the scheme will be announced after further consideration out of session.*[20]

AFCCRA understands that drafting instructions for an exposure Bill have been provided. There is however nothing in the Communique or in the follow up or lack thereof that attributes any priority to what has become an obvious need. That need for action has been strongly supported by industry and consumer groups.

[20] Ministerial Council on Consumer Affairs, *Joint Communique – Ministerial Council on Consumer Affairs Meeting*, Melbourne, Friday 15 September 2006.

One of the likely outcomes of continuing delay is individual jurisdictions taking action alone on a clearly national issue. Queensland has already committed to doing so and other states and territories already have inconsistent legislation in this space. Further break-out will exacerbate the confusion created. AFCCRA is not critical of individual jurisdictions recognising the importance and urgency of the issues, just that the national reform process is so slow and fraught.

## Conclusion:

We thank the Commission for the opportunity to comment and look forward to continuing our contact with this critically important review.

**May 2007**