



**Response to the Review of
Australia's Consumer Policy Framework
Draft Report**

Productivity Commission

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1. Executive Summary

Anglicare Tasmania welcomes the opportunity to contribute to this review of Australia's consumer policy framework. Anglicare's interest in this area arises out of our delivery of financial counselling services in Tasmania and our commitment to advocating on behalf of low income, disadvantaged and marginalised groups.

In general, Anglicare supports the Commission's proposals to improve the consistency and coverage of Australia's consumer policy framework by moving towards a national, generic consumer law with a single, national regulator, the ACCC. This will assist in overcoming many of the problems caused by inconsistency between jurisdictions and the slow pace of change and reform, and the need for national regulation is particularly marked in the case of finance brokers and credit providers. Fringe lending is emerging as a serious issue for vulnerable and disadvantaged Tasmanian consumers.

In addition to a national generic law, Anglicare believes there is a strong case to support the retention of industry-specific regulation in many instances, including the provision of essential services and the provision of potentially harmful or high-risk products. Regulation is an important preventative measure in areas where consumers are particularly vulnerable or disadvantaged.

Anglicare also urges that any moves to establish the ACCC as a national regulator, including the subsuming of obligations and powers currently held by state and territory consumer affairs agencies, be sufficiently resourced and clearly defined to ensure no reduction in existing consumer protection and the retention of accessible, local avenues through which to obtain information, seek advice and address concerns. There will also need to be mechanisms to ensure states and territories are still able to have input into policy development and articulate regional concerns at a national level.

Anglicare is committed to robust consumer protection policies. For this reason we are proposing that the five year review included in the proposed provision in relation to unfair contract terms explicitly consider whether the provision is achieving adequate protection for consumers. Anglicare also urges that regulators practice proactive enforcement as many disadvantaged consumers lack the knowledge, capacity and sense of empowerment to assert their own rights under legislation. Tasmania's residential tenancy legislation is one example of a situation where despite a reasonable level of protection is provided by legislation, breaches are commonplace and the regulator's response is inadequate.

Finally, Anglicare raises a number of concerns in relation to the implementation of recommendations designed to improve consumers' understanding of consumer issues and their capacity to assert their rights. In particular, many consumers have problems with literacy and numeracy, some groups do not have ready access to the internet, short-term awareness campaigns do not provide adequate coverage, many consumers are reluctant to engage in formal processes and proceedings, including legal proceedings, without intensive support, and the most vulnerable and disadvantaged consumers are the ones most likely to miss out on consumer education opportunities. These issues need to be taken into account when designing or implementing strategies to communicate with consumers.

2. Background to Anglicare Tasmania's response

Anglicare is one of Tasmania's largest community organisations, offering a range of services to the Tasmanian community including accommodation support, counselling and family support, disability and acquired injury support, mental health and employment services, a Registered Training Organisation, a social enterprise and a social policy, advocacy and research centre. Anglicare is committed to social justice and to supporting people in need to reach fullness of life.

For these reasons, Anglicare has recommended a national approach to privacy regulation in relation to residential tenancy databases (Anglicare 2007a, 2007b) and Anglicare's financial counselling service has been involved in the campaign for national regulation of finance brokers and other credit providers. However, there is still a case for retaining industry-specific regulation in some areas. If consumer law is too generic and too centralised, there is a danger that poor practices will slip through gaps in the framework.

According to Consumer Affairs Victoria, general regulation, such as the *Trade Practices Act* and fair trading legislation, has the advantage of providing universal and consistent coverage, has lower associated costs and a reduced risk of regulatory capture, but industry-specific regulation can provide targeted solutions, especially to technical issues, is easier to enforce, and has the capacity to address problems before they occur. An industry-specific approach is most appropriate where general regulation is not working and there is no capacity for improvement, the problem is significant enough to warrant an additional response, the problem and its industry can be effectively targeted by regulation, and the industry is stable enough to make the regulation effective over time (Consumer Affairs Victoria 2006). Industry-specific regulation, because it is able to be tailored to the particular industry, is usually more specific than general regulation; according to the OECD, it is usually adopted in situations of market failure as a means of replacing the market with direct control (OECD 1999 in Consumer Affairs Victoria 2006).

Consistent, comprehensive regulation and consumer protection provisions can promote consumer confidence (Lowe 2007). But Anglicare would argue that industry-specific regulation is also justified as a preventative measure when the industry involved is one in which consumers are highly vulnerable or at risk. Generic regulation is generally reactive, while industry-specific regulation can establish ground rules for participation in a particular industry (Venga 2007). Anglicare believes that there is a strong case for industry-specific regulation in areas of consumer affairs where the service or product is an essential one, such as electricity, or where a consumer can potentially be harmed as a result of the transaction, such as the sale of tobacco, alcohol and gambling products. As well as essential services and high risk products, the Consumer Act Law Centre also supports industry-specific regulation in the case of new markets and credence goods (Lowe 2007).

3.1.2. A national regulator

Anglicare supports **Draft Recommendations 4.4 and 4.5**, the introduction of a single, national regulator, the Australian Competition and Consumer Commission (ACCC), to administer the new national, generic consumer law, and the introduction of provisions under which states and territories could elect to transfer their regulatory and enforcement powers to the ACCC prior to the introduction of a single national model.

However, if this approach is to be adopted, it will be absolutely critical that the ACCC receives the resources it will need to deliver on its responsibilities, and the Productivity Commission has noted this. Providing information via the internet or telephone will not be enough (the reasons why are discussed at length in section 3.5 of this submission). To ensure that consumers have accessible, local avenues through which to obtain information, seek advice and address their concerns, the ACCC will need to have shopfront offices disbursed throughout the community. In places like Tasmania, the actual distances involved may be small, but highly deficient intrastate transport and the geographical isolation of many communities means that a single office in the capital would not be sufficient. Achieving this level of coverage could be possible through partnerships with local consumer affairs agencies. There will also need to be a budgetary allocation for ongoing consumer education and proactive enforcement across the country. It would be appropriate for the states and territories to make a proportional contribution to this funding.

debt cycle. A national regime such as the Productivity Commission proposes would overcome many of the concerns in relation to the length of time it takes to obtain essential amendments to the Uniform Consumer Credit Code and the many gaps in regulation that currently exist.

However, it is critical that the move towards a uniform approach occurs quickly. It is of considerable concern that action on this issue has been delayed for over 12 months despite there being a consensus between jurisdictions in relation to its necessity (Lowe 2006).

As with the transfer of regulatory powers from the states and territories to the ACCC, it will also be necessary to ensure that ASIC is appropriately funded to carry out the tasks involved. Mandated membership of alternative dispute resolution schemes will mean that consumers will not face the disincentives involved in direct court action, but issues of accessibility, responsiveness and a local presence will also be particularly critical given the high level of vulnerability of many of the consumers affected by poor practice in finance broking.

3.3. Unfair terms in standard form contracts

In their submissions to the Productivity Commission's original issues paper on this issue, the Tasmanian Council of Social Service (TasCOSS 2007), the Australian Financial Counselling and Credit Reform Association (AFCCRA 2007), CHOICE (CHOICE 2007), the Consumer Action Law Centre (CALC 2007) and the Centre for Credit and Consumer Law (CCCL 2007) all make reference to the need for action on unfair contract provisions. Anglicare supports this call.

The targeted approach adopted by **Draft Recommendation 7.1.** is cautious, and Anglicare welcomes the inclusion of a review within five years of the introduction of the new provisions. However, from the body of the Commission's report, it is clear that consumers wishing to challenge potentially unfair provisions would need to take the matter to court to have it determined (see p.34). Many of Anglicare's clients will simply not take this course of action – due to being unable to understand the process, bearing fearful of it or being unable to afford it – or even approach consumer advocates to take action on their behalf. For this reason, Anglicare recommends that the five year review explicitly consider whether the new provisions are achieving adequate protection for consumers, especially disadvantaged and vulnerable consumers, or whether more stringent regulation is required.

RECOMMENDATION

That Draft Recommendation 7.1. be amended to state:

A new provision should be incorporated in the new national generic consumer law that voids unfair terms in standard form contracts, where:

- the term is established as 'unfair': that is, it is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract;*
- there is evidence of material detriment to consumers;*
- it does not relate to the upfront price of the good or service;*
- all of the circumstances of the contract have been considered; and*
- there is an overall public benefit from remedial action.*

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers subject to detriment, with suppliers also potentially liable to damages for that detriment. There should also be a capacity for an industry or business to secure regulatory approval for 'safe harbour' contract terms that would be immune from any action under this provision. The operation and effects of the new provision should be reviewed within five years of its introduction. The review should explicitly assess whether the provision is achieving adequate protection for consumers, particularly vulnerable or disadvantaged consumers and make appropriate recommendations.

more to reach out to these clients but lack the resources and the on-the-ground presence to even begin to do so.

Without adequate support from specialist government or community services, the access of many Tasmanian consumers experiencing problems with any consumer issue to any remedies provided by the court is in reality very limited. The obstacles for disadvantaged people in accessing justice and legal services, including the courts, have been well documented. Consultations conducted by the Law and Justice Foundation of New South Wales found that people who were socially and economically disadvantaged experienced a number of barriers in obtaining legal assistance, including the high cost of legal services, the relative financial power of the other party and the inaccessibility of legal information websites and help-lines. Legal aid services, which are meant to fill some of the gaps, are poorly funded and can be subject to restrictive guidelines, which limit people's access to support (Schetzer and Henderson 2003). People can find court proceedings intimidating, especially if they have limited or negative experience of the legal system (TUT 2006).

In 2006-2007, the Residential Tenancy Commissioner received 177 applications for a determination on security deposit issues, the highest number since the Office opened (Department of Justice 2007), indicating that when a non-adversarial, accessible means of resolving concerns is provided, people will use it. As a result, Anglicare has recommended extending the Residential Tenancy Commissioner's role so that the Commissioner becomes the first point of contact for all tenants when violations of or disputes around the RTA occur (Jones 2006).

CAFT's current approach to the regulation of the private rental market is reactive rather than proactive. In the report on the post-implementation review of the RTA in 2000, CAFT put forward the following view in response to concerns about the lack of enforcement of the legislation:

While prosecution is important in the event of a blatant breach of a provision of the Act, this is not the only means by which the Act is enforced. Generally, the framework of the Act provides a set of rules which both parties can follow. Some of these rules provide for penalties if not complied with but many provide resource in a court and certainty in the event of a dispute. Having provided, in effect, a set of tools with which to ensure market fairness, it should not be necessary for government to intervene in the event of every dispute (CAFT 2000).

In contrast, the ACCC sees the deterrent and clarification effect of litigation as an extremely valuable element of the policy tool kit (Samuel 2007). The ACCC has made good use of 'strategic litigation' in addressing issues affecting vulnerable and disadvantaged consumers (Samuel 2005). But there is little evidence to suggest, in the more than seven years since the above statement was written, that CAFT's attitude in relation to enforcement of the RTA has fundamentally changed. While it is true that the private rental market is a market, and a highly competitive market at that, the competition in this market is not about providing housing to tenants, especially not to disadvantaged tenants – it is about providing returns, particularly in capital gains, to investors, and this depends on increases in rent and house prices. In this context, given the absolutely fundamental necessity of access to adequate housing, stronger intervention, including proactive enforcement targeting systemic problems and prosecution of breaches of the RTA is absolutely critical to protect consumers.

Residential tenancies legislation is just one example of where many consumers are disempowered and excluded: adequate regulation exists, but there is no commitment to proactive enforcement to protect consumers' rights. Problems with enforcement can occur because the regulator lacks resources or does not prioritise the issue, or because the enforcement provisions in the legislation are inadequate (Consumer Affairs Victoria 2006). A proactive approach from regulators is more likely where there is

People at Level 1 have the lowest level of skill, while people at Level 5 have the highest. According to the 2006 survey (ABS 2006), 46.4% of Australians are assessed at either Level 1 or Level 2 in relation to prose literacy and 31.5% at either Level 1 or 2 in relation to document literacy. Over half, 52.5%, are at Levels 1 or 2 for numeracy, and nearly three quarters, 70.1% at Levels 1 or 2 for problem solving. These figures indicate that a significant proportion of the community – a far higher percentage than would commonly be thought – have real difficulties in correctly completing tasks like locating a single piece of information in a piece of text, enter information based on personal knowledge into a form, understanding simple mathematical operations and evaluating alternatives with regard to well-defined criteria. They may require information to be presented in a range of different formats and where appropriate, support to understand it correctly.

Reliance on the internet to deliver consumer information is not always appropriate for some consumer groups. The reasons for the popularity of the internet as a means of conveying information are fairly intuitive – supporting a website is relatively low cost, information can be updated and new content added very quickly, the internet can be a very effective means of engaging with some groups, particularly young people, the information can be accessed by consumers at any time regardless of the opening hours of the organisation, and a large amount of information can be provided in an interesting and engaging format relatively easily.

However, the internet is not always an appropriate means to contact some groups, especially older groups and people on low incomes. An Anglicare survey of the Tasmanian community found that only 29% of people over 70 years of age had a computer at home, and only 19% had the internet connected. More than half of people aged over 60 had never used the internet. People on Pension Concession Cards or Health Care Cards (a common indicator of low income) were less likely to have either computers or internet connections at home (Madden and Law 2005). While external options exist, such as the Tasmanian Communities Online network of community computer centres, which are based in schools, libraries, government service outlets and community facilities, and training is provided, there is evidence to suggest that for some users, particularly those with a need for special equipment (such as a large screen monitor), the available technology in these centres itself is a barrier (ACT Government 2002). To reach the maximum number of people possible, information must be distributed in as many forms as possible.

To be effective, consumer education campaigns must be adequately resourced and ongoing. Many consumer education campaigns run only for a short period, or in short bursts. Unfortunately Anglicare financial counsellors advise that many people do not notice information unless they actually need it, and then, it may not be immediately available. The solution to this is to ensure that information is provided in as many different formats and locations as possible so that when people do need the information, it is easy for them to locate. Anglicare financial counsellors recommend that instead of directing resources into highly visible but short-term media advertising campaigns, information should be provided through people's usual networks, including health and welfare services, community and neighbourhood houses, churches, schools, Centrelink, public transport (many buses and trains have space for information to be displayed), workplaces, unions, neighbourhood associations, MPs' offices, community newsletters and councils.

Formal processes can be intimidating for many people. Section 3.4. of this submission outlines some of the reasons why people are reluctant to engage in formal legal processes. Anglicare's financial counsellors also report that many of their clients, even if barriers such as costs or lack of access to legal support were overcome, would see court proceedings, even in the Small Claims Tribunal, as 'too hard'. People who are vulnerable and disempowered, who have had negative experiences with the legal system or formalised processes in the past or who are extremely distressed by the legal issue affecting them need intensive support to go through with formal proceedings.

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