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Consumer Affairs Australia and New Zealand  
By email

**Submission (No 2) to CAANZ Review of the Australian Consumer Law**

With respect to your Interim Report last month and/or elaborating on my first Submission dated 8 April 2016:

1. **[Consumer detriment from the current regime - underestimated]** Although your Report and the 2016 Consumer Survey emphasises some improvements in consumer law awareness and engagement compared to 2011, this arguably comes off a low base and anyway eg:
  - a. p66 of the Survey shows that consumers suffer an economic loss of \$16b in 2016, almost unchanged from 2011, and based on a conservative estimate (ie only based on reports of incidents recalled over the last 2 years, and almost 20% of respondents did not take ANY action despite a consumer problem so that loss was not counted)
  - b. p37 Fig 20 lists mostly economic factors behind consumers' unwillingness to pursue their rights (with costs/delays perhaps being assessed realistically, but we should be aware also from social psychology / Kahneman's "prospect theory" that individuals tend to feel losses more than gains so they may be unwilling to risk throwing "good money after bad" to pursue redress). But 21% mention list as a cause that they "don't like confrontation", which indicates a deeply psychological or cultural aspect (perhaps especially among certain socio-economic, ethnic or other vulnerable subpopulations in Australia). It further highlights the need for regulators to (be adequately resourced to) bring representative actions to enforce consumer rights and obtain redress.
  - c. p42 Fig 26 identifies shows that 30% of reported consumer problems involving faulty products, with 10% thereof relating to "unsafe" products. But my empirical research in Japan would suggest that consumers cannot easily objectively identify a safety problem with goods and services, so this proportion is probably significantly higher.



2. **[Research into consumer issues and solutions – generally insufficient]** Your interim report does not address the lack of a contestable pool of funding for consumer law and policy research. As mentioned in my first Submission, the Treasury issued a consultation paper in 2009 but never produced a Report in response to many submissions highlighting this problem in Australia even then. In my book on *Consumer Law and Policy in Australia and NZ* (Federation Press, 2013, co-edited with Prof Justin Malbon) we included an Appendix updating a submission from academics in the Australian Consumer Law Roundtable group (which has met spontaneously every year for the last decade, with no funding, to share research questions and findings including with some regulators and peak NGOs). We called *for a properly funded and transparent mechanism for identifying and conducting focused consumer law related issues*. I reiterate this call and include as an Appendix the page proofs of that 2013 book Appendix for your consideration.
3. **[Research into consumer product safety – insufficient]** I have just received a three-year grant through the Australian Research Council (DP170103136, “Evaluating consumer product regulatory responses to improve child safety”) led by QUT’s A/Prof Kirsten Valmuur and other public health experts. We will compare how and when children’s products are regulated due to safety concerns versus the risks identified by hospital data in Australia (not well collected and shared) compared especially to the US (where the insurers and governments seem to have managed to get better data collected through hospitals). Preliminary research indicates that there may be significant mismatches in Australia, exacerbated by poor data collection and sharing, despite emerging evidence about safety hazards associated with toys and other children’s products. As well as highlighting the need already for legislative improvements in the ACL’s consumer product safety regulatory scheme (eg allowing consumer regulators to share accident reports with hospitals, and indeed the public), *it should not be up to individual researchers to seek (dwindling) ARC funding to do such basic research into significant public policy issues.*
4. **[Potential impact on supply of safe products from extending unfair contract terms regulation to “small business” from November 2016]** Because there is now more scope for business purchasers to challenge exclusion or other clauses in their contracts with suppliers, compared to the Consumer Guarantee regime under the ACL (and earlier TPA), *they may be more inclined to take a risk in sourcing products to on-sell to (real) consumers*. If the latter are harmed by products that turn out to be unsafe and must be compensated, those businesses may just seek recourse from their own suppliers, who now have more liability exposure. This incentive effect is not noted in the Interim Report but bolsters the case for enhancing consumer safety law in other parts of the ACL.

5. **[Adding a general product safety provision (GSP) to the ACL]** The Interim Report picks up my point that Singapore has introduced a Regulation requiring consumer goods generally to comply with ISO, EU or certain American standards. However, *Singapore's partial GSP is not optimal for Australia:*
  - a. It excludes outright many goods regulated by specific statutes (eg foods). By contrast, Australia has seen recently (eg with the unsuccessful Samsung washing machines and Infinity cable recalls) how important it is for general consumer regulators to be able to step in if specialist regulators cannot achieve good safety outcomes. This is true also with foods (eg the konjac jelly snack partial bans introduced by the ACCC around 2004). The Malaysian full-scale GSP (since the Consumer Protection Act 1999) is better because it allows back-up interventions by the consumer regulators.
  - b. The Singaporean regulator allows the supplier to choose the lower standard. A better solution for consumers would be to prioritise standards that have demonstrably more (funded) consumer input, to offset the risk of pseudo-regulatory capture by better resourced industry groups: hence the EU standards, over the ISO and especially American standards.
  - c. The Singaporean Regulation also makes it hard for a regulator to prove a violation of this partial GSP: it will need to access all three listed standards. There is no requirement for the supplier to declare in advance which organisation's standard it purports to comply with, if several deal with the same product.
  - d. Accessing listed standards is also expensive for regulators, responsible businesses, and consumer groups. This is particularly true if Australian Standards were to be listed as an option for suppliers here to comply with. The Western Australian parliamentary report this year is quite scathing of the poor contract negotiated between SA and its (now completely divested, listed) subsidiary SAI in 2003 relating to publication and ongoing development of Australian Standards.
  - e. The Singaporean Regulation anyway provides no direct sanction for supplying consumer goods that don't comply with any of the listed organisations' standards. All the regulator can do is then ban or force recalls of goods it finds to be in violation.

In sum, *the better option for Australia is therefore to introduce a full-scale GSP along the lines instead of the EU Directive* dating back to 2001. Like the Malaysian Act (and more recent Canadian legislation in 2010), it requires goods to be supplied that are reasonably safe. Unlike the Malaysian Act, the 2001 Directive goes on to list various factors that can help guide assessments by suppliers, regulators and others: EU and national standards,

industry codes, general consumer safety expectations (cf also the further factors elaborated in Article 6(1) of the draft EU Regulation of 2013, mentioned further below and in the Attachment).

6. **[Further regulatory powers for consumer safety]** You should also take into account that the EU has also now extensively reviewed the operation of the 2001 Directive and proposed a *draft EU Regulation* (see especially Articles 6 and 15 reproduced in the Attachment) which includes *very useful tools that are missing from and should be anyway added to the ACL*, such as manufacturers' obligations to:

- a. develop (and keep for 10 years for regulatory review) a product risk assessment file
- b. carry out sample testing, investigate and keep register of complaints etc, and inform retailers
- c. ensure type, batch or serial number labelling, as well as contact details
- d. provide safety information in a language easily understood by consumers
- e. take corrective action regarding goods supplied that are unsafe (eg bring them into conformity, withdraw or recall them) as well as informing regulators about serious health risks
- f. comply with directives from regulators to introduce traceability systems proportionate to product safety hazards.

Along similar lines, from 2016 China's GAQSIQ regulation also requires manufacturers to:

- Collect and analyse information on product defects
- investigate known *possible* defects
- carry out corrective action,
- collaborate in investigations by regulators and provide reports on corrective action progress.

Vietnam's 2010 Consumer Protection Law also requires suppliers to publicise recalls if their products have safety defects.

7. **[Turnover-based sanctions for consumer law violations]** Noting diminishing compliance with EU requirements, the Netherlands has recently introduced such sanctions and they should also be considered for the ACL, in the context of your Interim Report's discussion of concerns that *our maximum sanctions are inadequate*. (I will email you separately a PDF containing details of this and the Chinese regulatory changes mentioned at 6. Above.)

I am happy to elaborate on any of these points and would urge you to conduct a public hearing in capital cities like Sydney, to allow all stakeholders to have face-to-face input in this ACL Review process.

Yours sincerely



THE UNIVERSITY OF  
SYDNEY

Luke Nottage

**ATTACHMENT:** extracts from COM/2013/078 final

available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2013:0078:FIN>

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE  
COUNCIL**

**on consumer product safety and repealing Council Directive 87/357/EEC and  
Directive 2001/95/EC**

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**CHAPTER I****General provisions**

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*Article 4***General safety requirement**

Economic operators shall place or make available on the Union market only safe products.

*Article 5***Presumption of safety**

For the purpose of this Regulation, a product shall be presumed to be in compliance with the general safety requirement laid down in Article 4 in the following cases:

- (a) as regards the risks covered by requirements designed to protect human health and safety laid down in or pursuant to Union harmonisation legislation, if it conforms to those requirements;
- (b) in the absence of requirements laid down in or pursuant to Union harmonisation legislation referred to in point (a), as regards the risks covered by European standards, if it conforms to relevant European standards or parts thereof, the references of which have been published in the *Official Journal of the European Union* in accordance with Articles 16 and 17;
- (c) in the absence of requirements laid down in or pursuant to Union harmonisation legislation referred to in point (a) and European standards referred to in point (b), as regards the risks covered by health and safety requirements laid down in the law of the Member State where the product is made available on the market, if it conforms to such national requirements.

### *Article 6*

#### **Aspects for assessing the safety of products**

1. In the absence of Union harmonisation legislation, European standards or health and safety requirements laid down in the law of the Member State where the product is made available on the market as referred to in points (a), (b) and (c) of Article 5, the following aspects shall be taken into account when assessing whether a product is safe, in particular:
  - (a) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
  - (b) the effect on other products, where it is reasonably foreseeable that it will be used with other products;



- (c) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;
- (d) the categories of consumers at risk when using the product, in particular vulnerable consumers;
- (e) the appearance of the product and in particular where a product, although not foodstuff, resembles foodstuff and is likely to be confused with foodstuff due to its form, odour, colour, appearance, packaging, labelling, volume, size or other characteristics.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product not to be safe.

2. For the purpose of paragraph 1, when assessing whether a product is safe, the following aspects, when available, shall be taken into account, in particular:

- (a) the state of the art and technology;
- (b) European standards other than those the references of which have been published in the *Official Journal of the European Union* in accordance with Articles 16 and 17;
- (c) international standards;
- (d) international agreements;
- (e) Commission recommendations or guidelines on product safety assessment;
- (f) national standards drawn up in the Member State in which the product is made available;
- (g) product safety codes of good practice in force in the sector concerned;
- (h) reasonable consumer expectations concerning safety.

## CHAPTER II

### Obligations of economic operators

#### *Article 8*

##### **Obligations of manufacturers**

1. When placing their products on the market, manufacturers shall ensure that they have been designed and manufactured in accordance with the general safety requirement laid down in Article 4.
2. Manufacturers shall ensure that procedures are in place for series production to remain in conformity with the general safety requirement laid down in Article 4.
3. Proportionate to the possible risks of a product, manufacturers shall, to protect the health and safety of consumers, carry out sample testing of products made available on the market, investigate complaints and keep a register of complaints, non-conforming products and product recalls, and shall keep distributors informed of any such monitoring.
4. Proportionate to the possible risks of a product, manufacturers shall draw up a technical documentation. The technical documentation shall contain, as appropriate:
  - (i) a general description of the product and its essential properties relevant for assessing the product's safety;
  - (j) an analysis of the possible risks related to the product and the solutions adopted to eliminate or mitigate such risks, including the outcome of any tests conducted by the manufacturer or by another party on his behalf;
  - (k) where applicable, a list of the European standards referred to in point (b) of Article 5 or health and safety requirements laid down

in the law of the Member State where the product is made available on the market referred to in point (c) of Article 5, or other aspects referred to in Article 6(2), applied to meet the general safety requirement laid down in Article 4.

Where any of the European standards, health and safety requirements or other aspects referred to in point (c) of the first subparagraph have been only partly applied, the parts which have been applied shall be identified.

5. Manufacturers shall keep, for a period of ten years after the product has been placed on the market, the technical documentation and make it available to the market surveillance authorities, upon request.
6. Manufacturers shall ensure that their products bear a type, batch or serial number or other element allowing the identification of the product which is easily visible and legible for consumers, or, where the size or nature of the product does not allow it, that the required information is provided on the packaging or in a document accompanying the product.
7. Manufacturers shall indicate their name, registered trade name or registered trade mark and the address at which they can be contacted on the product or, where that is not possible, on its packaging or in a document accompanying the product. The address must indicate a single point at which the manufacturer can be contacted.
8. Manufacturers shall ensure that their product is accompanied by instructions and safety information in a language which can be easily understood by consumers, as determined by the Member State in which the product is made available, except where the product can be used safely and as intended by the manufacturer without such instructions and safety information.
- Member States shall inform the Commission about any provisions adopted by them determining the required language(s).
9. Manufacturers who consider or have reason to believe that a product which they have placed on the market is not safe or is otherwise not in conformity with this Regulation shall immediately take the corrective action necessary to bring that product into conformity, to withdraw it or



recall it, if appropriate. Furthermore, where the product is not safe, manufacturers shall immediately inform the market surveillance authorities of the Member States in which they made the product available to that effect, giving details, in particular, of the risk to health and safety and of any corrective action taken.

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### *Article 15*

#### **Traceability of products**

1. For certain products, categories or groups of products which, due to their specific characteristics or specific conditions of distribution or usage, susceptible to bear a serious risk to health and safety of persons, the Commission may require economic operators who place and make available those products on the market to establish or adhere to a system of traceability.
2. The system of traceability shall consist of the collection and storage of data by electronic means enabling the identification of the product and of the economic operators involved in its supply chain as well as of the placement of a data carrier on the product, its packaging or accompanying documents enabling access to that data.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 20:
  - (l) determining the products, categories or groups of products susceptible to bear a serious risk to health and safety of persons as referred to in paragraph 1;
  - (m) specifying the data which economic operators shall collect and store by means of the traceability system referred to in paragraph 2.
4. The Commission may by means of implementing acts determine the type of data carrier and its placement as referred to in paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 19(3).

5. When adopting the measures referred to in paragraphs 3 and 4, the Commission shall take into account the following:
  - (n) the cost-effectiveness of the measures, including their impact on businesses in particular small and medium-sized enterprises;
  - (o) the compatibility with traceability systems available at international level.

# **Appendix: Updated Submission to the Australian Government's Consultation on 'Consumer Voices: Sustaining Advocacy and Research in Australia's New Consumer Policy Framework'<sup>\*</sup>**

## **I What is the Australian Consumer Research Network (ACReN)?**

The researchers listed in the table below are experts in consumer law and policy, who are engaged in teaching, policy advocacy and research regarding consumer issues. They are presently members of a broader informal network that meets annually to share their research work regarding consumer issues among each other as well as with some regulators and representatives from peak consumer organisations.<sup>1</sup> We are committed to constituting a more formal research network to undertake research that informs government policy and legislative reform, along with consumer advocacy for reform.

This submission assumes that if the Australian government were to commit funds for the Australian Consumer Research Network (ACReN, or the Network),<sup>2</sup> further discussion and negotiation would need to be undertaken regarding the establishment of a centre – which it is envisaged would be predominately based at one university – to administer the activities of the Network.

ACReN is open to new members and aims to form further linkages. The original members of the proposed Network are listed as follows:<sup>3</sup>

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- \* This Submission was originally drafted primarily by Justin Malbon and provided to the Australian Treasury in July 2009. In September 2012 it was edited and updated (primarily through adding footnote references) by Luke Nottage.
- 1 'Australasian Consumer Law Roundtables', including some regulators and peak consumer group representatives as well as academics, have taken place annually since 2005 at universities in Sydney, Melbourne, Brisbane, Perth and Wellington.
- 2 Given the ever-closer economic, political and legal connections between Australia and New Zealand, and growing links also with other parts of the Asia-Pacific region, it is now proposed that the Network be expanded to include at least participation from New Zealand; ACReN could then be renamed the 'Australasian Consumer Research Network'. See generally Chapters 1 and 3 of this volume; Nottage L, 'Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era' (Sydney Law School Research Paper No 09/125, 4 October 2011) at <<http://ssrn.com/abstract=1509810>> accessed 8 September 2012.
- 3 The establishment and expansion of ACReN, as proposed in this Appendix, is also supported by the authors of the present volume – namely: Associate Professor Aviva Freilich, Adjunct Professor Dr Jocelyn Kellam, Associate Professor Nyuk Yin Nahan, Dr Jeannie Paterson, Dr Christine Riefa and Kate Tokeley. One of the original signatories to this Submission, David Squire (an expert in financial services law and

CONSUMER LAW

Institution	Name	Expertise
Griffith University	Dr Therese Wilson <sup>1</sup>	Credit markets, alternative access to credit for vulnerable consumers
Monash University	Professor David Cousins <sup>2</sup>	Economic aspects of competition, pricing regulation and consumer policy
Monash University	Professor Justin Malbon <sup>3</sup>	Financial products
Monash University	Associate Professor Bronwyn Naylor <sup>4</sup>	Regulatory theory and consumer protection
Monash University	Dr Lisa Spagnolo <sup>5</sup>	International consumer transactions
University of Melbourne	Dr Jeannie Paterson <sup>6</sup>	Consumer credit law, unfair contract terms; contract, equity, tort and consumer protection
Queensland University of Technology	Professor Sharon Christensen <sup>7</sup>	Property transactions, rentals, guarantees
Queensland University of Technology	Professor Stephen Corones <sup>8</sup>	Competition law, consumer protection law
Queensland University of Technology	Professor Bill Duncan <sup>9</sup>	Mortgages, sale of businesses, consumer leases
Queensland University of Technology	Nicola Howell <sup>10</sup>	Consumer credit, consumer law, unfair contract terms, energy
University of Queensland	Dr Paul O'Shea <sup>11</sup>	Consumer behaviour, credit
University of Sydney	Professor Luke Nottage <sup>12</sup>	Product liability and safety regulation, unfair contracts, consumer credit, consumer redress and alternative dispute resolution
University of Sydney	Professor Gail Pearson <sup>13</sup>	Financial services, credit; sale of goods
University of Sydney	Professor Robert Slonim <sup>14</sup>	Behavioural economics, pro-social behaviour
University of Tasmania	Lynden Griggs <sup>15</sup>	Ticket scalping, consumer protection
University of Western Australia	Associate Professor Eileen Webb <sup>16</sup>	Consumers and real estate, consumer credit, comparative (EU, US and Canadian) consumer law

Notes:

- 1 See <<http://www.griffith.edu.au/criminology-law/griffith-law-school/staff/therese-wilson>> accessed 8 September 2012.
- 2 See <<http://www.law.monash.edu.au/staff/dcousins.html>> accessed 8 September 2012.
- 3 See <<http://www.law.monash.edu.au/staff/jmalbon.html>> accessed 8 September 2012.
- 4 See <<http://www.law.monash.edu.au/staff/bnaylor.html>> accessed 8 September 2012.
- 5 See <<http://www.law.monash.edu/staff/lspagnolo.html>> accessed 8 September 2012.
- 6 See <<http://www.law.unimelb.edu.au/melbourne-law-school/community/our-staff/staff-profile/username/Jeannie%20Paterson>> accessed 8 September 2012.
- 7 See <<http://staff.qut.edu.au/staff/christes/>> accessed 9 September 2012.
- 8 See <<http://staff.qut.edu.au/staff/corones/>> accessed 9 September 2012.
- 9 See <<http://staff.qut.edu.au/staff/duncan/>> accessed 9 September 2012.
- 10 See <<http://staff.qut.edu.au/staff/howelln/>> accessed 9 September 2012.
- 11 See <<http://www.law.uq.edu.au/academic-staff/staff.php?nm=pauloshea&tab=>>> accessed 9 September 2012.
- 12 See <<http://sydney.edu.au/law/about/staff/LukeNottage>> accessed 8 September 2012.
- 13 See <<http://sydney.edu.au/business/staff/gailp>> accessed 8 September 2012.
- 14 See <[http://sydney.edu.au/arts/economics/staff/academic/robert\\_slonim.shtml](http://sydney.edu.au/arts/economics/staff/academic/robert_slonim.shtml)> accessed 8 September 2012.
- 15 See <<http://www.utas.edu.au/law/people/law-people-profiles/Lynden-Griggs>> accessed 9 September 2012.
- 16 See <<http://www.uwa.edu.au/people/eileen.webb>> accessed 9 September 2012.

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alternative dispute resolution based at the Queensland University of Technology), sadly passed away in late 2011.

## II The Treasury's Issues Paper

On 8 May 2009, the federal government's Treasury Department released an Issues Paper entitled *Consumer Voices: Sustaining Advocacy and Research in Australia's New Consumer Policy Framework (Issues Paper)*.<sup>4</sup> This submission is largely confined to responding to the questions in Chapter 3 of the *Issues Paper*, which deals with policy-related consumer research. The proposed members of the Network believe they are better positioned to respond to research issues than matters relating to advocacy itself, although several members have experience in advocacy.

This is not to suggest that research and advocacy are, or should be, unrelated. Indeed, well-conducted research using robust research methodologies can inform consumer advocacy. However, considerable caution needs to be exercised in ensuring that research is not undertaken for the purpose of providing evidence to support pre-determined advocacy positions. A fundamental principle underlying good research is that it is undertaken with an open mind. Indeed, to achieve a balanced approach to research we believe that the engagement of all stakeholders<sup>5</sup> is essential in achieving an outcome that can be objectively tested and therefore accepted as credible and robust by most (if not all) stakeholders. Good researchers work hard at not falling for the error of setting out to prove 'what is already known'.

Research can, however, set out to answer questions or fill in knowledge gaps for which answers are sought by government or consumer advocates and also industry. That is, the setting of research agendas and programs can, and indeed should, be set by ministers and government officers, along with consumer advocates and industry where appropriate. In framing research agendas and programs, the advice and assistance of a variety of researchers is invaluable. The ultimate goal of consumer policy research is to apply appropriate and reliable methodologies to investigate and obtain evidence about a matter that can inform and drive good public policy outcomes. A unifying principle of the work that would be undertaken by the Network is that high-quality research is essential to the development of evidence-based policy decisions.

## III Responding to the Issues Paper Questions

Chapter 3 of the *Issues Paper* seeks responses to a number of questions, including:

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- 4 See <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1532>> accessed 9 September 2012.
  - 5 Stakeholders include, but are not limited to, consumer advocacy groups, industry participants, industry trade associations, not-for-profit groups (for example, External Dispute Resolution Schemes, and independent institutes such as the Australasian Compliance Institute and the Risk Management Institute of Australia), State and federal regulators, as well as the federal and State governments.

1. What other key policy evidence issues exist in relation to consumer policy in Australia, other than the issues mentioned in the *Issues Paper*?
2. What approaches can provide an effective mix of both advocacy-focused and objective qualitative and quantitative consumer policy research?
3. How effective are existing consumer policy research programs and bodies?
4. Drawing on Australian and international examples, what models are successful in funding effective advocacy-focused and objective qualitative and quantitative consumer policy research in the medium to long term?

Our responses to these questions are set out below.

A *What Other Key Policy Evidence Issues Exist in Relation to Consumer Policy in Australia?*

The *Issues Paper* identifies a number of key policy evidence issues regarding consumer policy in Australia, including:

- **Consumer detriment:** including harmful, exploitative or problematic conduct by traders, product safety issues or the effect of existing laws.
- **The merits of policy action and of alternative policy options:** what are the policy options? Should and if so, how, ought intervention take place?
- **The nature of consumer behaviour and the influences that may impact on it:** a better understanding of how consumers make decisions in different markets.
- **The most effective tools for addressing consumer detriment and dealing with consumer disadvantage and vulnerability:** gaining an awareness of emerging vulnerabilities and a better understanding of the behaviour of these groups of people.
- **The relative merits of principles-based and rules-based regulation:** and the circumstances in which the different forms of regulation can lead to effective outcomes.

In addition to these broad categories of policy evidence issues, we believe that there are a number of more specific issues requiring further investigation. The effectiveness of the disclosure requirements under consumer credit legislation and Chapter 7 of the *Corporations Act 2001* (Cth) regarding financial products, for instance, requires further research. Present policy, as given effect in the legislation, assumes that disclosure will enhance consumer confidence and the more effective operation of the marketplace. The legislation assumes that, generally speaking, consumers will overcome information

asymmetries with the aid of the mandated disclosure information. There is increasing evidence, however, that neither of these legislative and policy assumptions are correct, and that the ways in which the legislative requirements are being applied in practice are not sufficiently effective.<sup>6</sup>

Other issues requiring investigation include:

- the effectiveness of unfair terms legislation, in particular comparing the Australian experience with that of the United Kingdom (UK), Europe more generally and other major trading partners such as Japan;<sup>7</sup>
- the nature and effect of the electronic commerce marketplace upon consumers;<sup>8</sup>
- the existing and potential impact of reverse mortgages on consumers;
- small business credit and the residential and other unregulated property investment markets;
- the extent to which there should be product regulation of financial products;
- the effectiveness of product safety laws and practices, including new provisions requiring suppliers to inform regulators of serious consumer product-related incidents (as in the United States (US), Europe, Japan and China, and Canada), as well as the new financial product safety regulator in the US;<sup>9</sup>
- consumer redress mechanisms, including the governance structure of and access to alternative dispute resolution schemes, particularly in cross-border contexts and as Australia continues to harmonise substantive consumer law and attempts to improve enforcement;<sup>10</sup>
- conflicts of interest particularly in the (investment) financial services sector including responsible entities of managed investment schemes, superannuation trustees and inherent conflicts in the intermediation of financial services;
- disclosure as an effective means of informing consumers of the nature of financial services being offered, costs involved and the risks involved (case studies include problems involving Westpoint, Bridgecorp and Storm Financial);<sup>11</sup>
- how the term ‘responsible credit’ should be defined, the extent to which access to ‘responsible credit’ can be beneficial or harmful to

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<sup>6</sup> See further Chapters 9 and 10 of this volume.

<sup>7</sup> See further Chapter 5 of this volume.

<sup>8</sup> See further Chapter 15 of this volume.

<sup>9</sup> See further Chapter 8 of this volume; Nottage L and Kozuka S, ‘Lessons from Product Safety Regulation for Reforming Consumer Credit Markets in Japan and Beyond’ (2012) 34 *Sydney Law Review* 129.

<sup>10</sup> See further Chapters 13 and 15 of this volume.

<sup>11</sup> On both disclosure and conflicts of interest, see further Chapter 10 of this volume.

low-income consumers, and the most appropriate model for responsible lending regulation;<sup>12</sup>

- the effectiveness of cooperative State and federal regulatory systems, and scope for harmonisation internationally;<sup>13</sup>
- the appropriate role of civil penalties;
- the effectiveness of due diligence defences;
- contractual terms for international consumer transactions and development of harmonised terms;<sup>14</sup>
- the evaluation of effective regulatory models nationally and internationally;<sup>15</sup>
- effective mechanisms for enforcement and compliance;<sup>16</sup>
- the effectiveness of price regulation in the consumer credit market, and the impact on access to credit for low-income consumers;<sup>17</sup> and
- the effectiveness of regulatory and self-regulatory responses to consumers suffering financial hardship.

*B What Approaches Can Provide an Effective Mix of both Advocacy-Focused and Objective Qualitative and Quantitative Consumer Policy Research?*

High quality research directed at finding whether present policy settings are working, or identifying inadequacies in present regulation and operation of the consumer marketplace, can play an important role in informing advocacy for reform. Considerable care needs to be taken, however, to ensure that research is not directed at confirming presumptions about the appropriate policy responses. That is, research can inform advocacy, but advocacy should not direct research towards predetermined outcomes.

A key requirement is that the research be seen as relevant to the important policy concerns of governments and key stakeholders. These concerns should influence the subject matter of the research, but not the detail of that research which must maintain appropriate academic independence.

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12 See further Chapters 9 and 11 of this volume.

13 See further Chapters 3 and 14 of this volume.

14 See further Nottage L, 'The Government's Proposed "Review of Australian Contract Law": A Preliminary Positive Response' (Sydney Law School Research Paper No 12/49) <<http://ssrn.com/abstract=2111826>> accessed 8 September 2012.

15 Compare, for example, Choice, 'Good Practice in Consumer Protection Enforcement: A Review of 12 Regulators' (28 July 2009) at <<http://www.choice.com.au/~media/Files/Consumer%20Action/Other%20campaigns/Consumer%20protection%20enforcement/f134118.ashx>> accessed 9 September 2012; Treasury, Parliament of Australia, *Consumer Policy in Australia: A Companion to the OECD Consumer Policy Toolkit* (March 2011) at <[http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer\\_policy/cp\\_policy\\_toolkit.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer_policy/cp_policy_toolkit.htm)> accessed 9 September 2012; and Lima CM, Arroyo FD, Ramsay I and Pearson G (eds), *The Global Financial Crisis and Need for Consumer Regulation* (Orquestra Editora, Porto Alegre, 2012).

16 See further Chapter 14 of this volume.

17 See further Chapter 12 of this volume.

We propose that, as an important part of the government's commitment to consumer research, a Network be established to undertake consumer policy research in Australia. In order to meet the objectives identified by the government, ACReN would be university-based, involve key consumer policy scholars, and the research output will be conceptually sound, academically rigorous, and subject to peer review mechanisms to maintain quality.

To ensure that the research is relevant to Australia's consumer policy challenges, there needs to be liaison with all relevant stakeholders to help discern research needs. It is envisaged that forums, seminars and workshops will be conducted to assist in this regard. The State and federal governments through the (equivalents of) Ministerial Council on Consumer Affairs (MCCA) and the Standing Committee of Officials of Consumer Affairs (SCOCA)<sup>18</sup> would have views on the research that needs to be conducted. It is envisaged that there would be close liaison with MCCA and SCOCA to help it determine the work program.

It is understood that MCCA's research program remains managed by SCOCA, with projects sometimes being contracted to consultants on an ad hoc basis.<sup>19</sup> Because of the Network's proposed national coverage, interest across all consumer protection policy issues and access to a comprehensive resource base it may be beneficial to have direct consultation with SCOCA to assist it in this regard.

The appropriate research methodologies for any particular project will very much depend on the nature of the project itself. In some instances, quantitative surveys will be appropriate, although this can often be a very expensive methodology. The founding members of ACReN have extensive consumer research experience, covering social research (qualitative and quantitative), legal research and comparative research. Well-designed qualitative research can yield important insights.

For instance, research released in 2008 by Howell, Wilson and Davidson provided insights into the impact upon vulnerable consumers of payday and micro-lending. The research involved qualitative interviews with regulators,

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18 As mentioned in Chapter 1 Section III.A of this volume, MCCA has now been replaced by the 'COAG Legislative and Governance Forum on Consumer Affairs'; SCOCA, by 'Consumer Affairs Australia and New Zealand' (CAANZ). See <[http://www.consumerlaw.gov.au/content/Content.aspx?doc=ministerial\\_council.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=ministerial_council.htm)> accessed 23 September 2012.

19 See the outline of activities undertaken since 2010 by the Policy and Research Advisory Committee established within SCOCA (now CAANZ), comprising policy officers from Australian and New Zealand consumer affairs agencies as well as the ACCC and ASIC: Australian Government (Treasury), *Implementation of the Australian Consumer Law: A Report on Progress* (June 2011) at <[http://www.consumerlaw.gov.au/content/Content.aspx?doc=the\\_acl/implementation.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/implementation.htm)> accessed 30 September 2012, pp 7-8. See also Australian Government, *Consumer Policy in Australia: A Companion to the OECD Consumer Policy Toolkit* (March 2011) at <[http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer\\_policy/cp\\_policy\\_toolkit.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer_policy/cp_policy_toolkit.htm)> accessed 10 September 2012.

credit providers and consumer advocates in Victoria, New South Wales (NSW), Queensland and the Australian Capital Territory, and confirmed the challenges of providing a regulatory framework that protects vulnerable and disadvantaged credit consumers. The Queensland government then introduced an interest rate ceiling of 48% (inclusive of fees and charges) on consumer credit products. The research report notes that there is a demand for short-term, small-amount credit products in the market; that 'fringe credit' products such as payday loans are to some extent meeting that demand; but that the high costs associated with those products, as well as features such as loan rollovers or renewals, result in a worsening of some people's financial positions, particularly vulnerable, low-income consumers. The report calls for regulatory efforts to go into a policy and regulatory framework to promote the provision of safe, affordable short-term credit for vulnerable, low-income consumers.<sup>20</sup>

Qualitative research conducted by Sheehan, Wilson and Howell (also released in 2008) explored the effectiveness of consumer credit disclosure documents for low-income consumers, both in terms of understanding the terms of the contract, and any rights under consumer credit law. The research suggests that, at least for this group of consumers, the goals of disclosure in the credit market are not being achieved in practice. This provides further insights to explain and support the quantitative studies of consumer credit disclosure.

Qualitative research by Bathgate (formerly at the Centre for Credit and Consumer Law) has also provided important insights into regulation in the electricity sector.<sup>21</sup> For example, the findings of interviews and focus groups with metropolitan, regional and rural consumers and small businesses in Queensland highlight the challenges that will face government seeking to encourage consumer participation in the electricity sector, through the introduction of competition.

Quantitative research is also key to understanding consumer markets. Research undertaken by Malbon in 1999 for MCCA involved a quantitative survey of 1600 consumers, along with focus group interviews and interviews with credit providers to find what impact, if any, pre-contractual disclosure of information had on the ways in which consumers shopped for credit. This research informed the National Consumer Protection review, which recommended the adoption of Recommendation 1.1 of the Post-Implementation Review, namely: 'Amend Regulation 13 to provide a simplified "Schumer Box" format containing essential financial information. Other essential information would be provided outside the "box" and would prominently

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20 See further now Chapters 11 and 12 of this volume.

21 See Bathgate J, 'Electricity Issues: Interstate Perspectives on Full Retail Competition for Residential Consumers (Issues paper, Centre for Credit and Consumer Law, April 2006) at <[http://www.griffith.edu.au/\\_data/assets/pdf\\_file/0009/174492/CCCLElectricityIssuesFRC.pdf](http://www.griffith.edu.au/_data/assets/pdf_file/0009/174492/CCCLElectricityIssuesFRC.pdf)> accessed 8 September 2012.

indicate that other important information was contained in the contract document'.<sup>22</sup>

More recently, O'Shea conducted research for the Western Australian Department of Consumer and Employment Protection, acting on behalf of the Uniform Consumer Credit Management Committee (UCCMC) and MCCA, regarding the most effective form in which disclosure information should be presented. The research was the most comprehensive and intensive empirical research into consumer credit ever undertaken in Australia, and superior to anything similar done in the UK or Europe. Indeed, in terms of the number of participants and variety of analytical techniques, it was comparable with some of the more advanced work done in the US. The research can contribute to a streamlining of the regulatory impost on industry by reducing the volume but increasing the effectiveness of pre-contractual disclosure. This will reduce costs whilst more effectively attaining the desired outcome of having consumers understand product information. Such a reduction in regulatory 'red tape' and an increase in cost-effective regulation remains a core commitment of the Australian government.

Nottage (with Souichirou Kozuka) has co-authored a series of papers to test theories derived from various schools of economics, political science and cultural studies that purport to explain the development of unsecured consumer credit markets in Japan and/or their recent re-regulation. The analysis draws on empirical studies and policy debates such as those mentioned above focused on Australia, as well as research in the US and Europe.<sup>23</sup> Nottage (with Jocelyn Kellam) has also replicated in Australia and throughout the Asia-Pacific a large-scale survey assessing the significant but differential impact of (mostly strict-liability) product liability reforms in the region since the 1990s.<sup>24</sup>

As part of a multinational study by Japan's Cabinet Office in 2008, Nottage also undertook (partly interview-based) research into consumer redress mechanisms in Australia, including the new home building dispute

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22 See further Chapters 9 and 10 of this volume.

23 Nottage and Kozuka, above n 9; Kozuka S and Nottage L, 'Re-Regulating Unsecured Consumer Credit in Japan: Over-Indebted Borrowers, the Supreme Court, and New Legislation' in Nordhausen C, Howells G, Parry D and Twigg-Flessner C (eds), *The Yearbook of Consumer Law 2009* (Ashgate, Aldershot, 2008), p 197; Kozuka S and Nottage L, 'The Myth of the Careful Consumer: Law, Culture, Economics and Politics in the Rise and Fall of Unsecured Lending in Japan' in Niemi-Kiesilainen J, Ramsay I and Whitford W (eds), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart, Oxford, 2009), p 199. See also Nottage L, 'Innovating for "Safe Consumer Credit": Drawing on Product Safety Regulation to Protect Consumers of Credit' in Wilson T (ed), *International Responses to Crisis: Credit, Over-Indebtedness and Insolvency* (Ashgate, 2013), p 185. Compare also Chapters 9-12 of this volume.

24 Kellam J and Nottage L, 'Europeanisation of Product Liability in the Asia-Pacific Region: A Preliminary Empirical Benchmark' (2008) 31 *Journal of Consumer Policy* 217. See further Chapter 8 of this volume.

resolution processes in NSW.<sup>25</sup> This followed on from a broader report about Australia for a larger multinational study by the European Commission in 2006, which included an online survey component and underpinned initiatives to develop class actions or similar collective redress mechanisms throughout Europe (also influencing Japan).<sup>26</sup>

The researchers identified at the beginning of this submission are willing to become members of the proposed Network, and have expertise in undertaking research in the field, using a range of research methodologies. Projects undertaken by a number of members have already made considerable contributions to consumer advocacy and legislative reform. The researchers who will join the proposed Network have an impressive track record for undertaking consumer policy research, which might also inform consumer advocacy.

### *C How Effective are Existing Consumer Policy Research Programs and Bodies?*

The comprehensive 2008 Inquiry Report from the Productivity Commission's *Review of Australia's Consumer Policy Framework* identified a number of significant problems with consumer policy research, namely that:<sup>27</sup>

- there is a need for a better information base for good policy-making;
- significant information gaps exist in a range of areas relevant to the nature of the consumer policy framework;
- the overall quantum of research undertaken in Australia at present is quite limited and often takes a State rather than a national perspective;
- there is a lack of a coherent process for gathering together and disseminating the lessons learned through the considerable research on consumer behaviour undertaken in other countries; and
- the results and insights of research are not always disseminated as effectively as they could be.

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25 See further Nottage L, 'The New Australian Consumer Law: What About Consumer ADR?' (2009) 9 *Queensland University of Technology Law and Justice Journal* 176; and Chapter 13 of this volume.

26 See National Report on Australia, to KU Leuven, for European Commission Project SANCO 2005/B/010, *An Analysis and Evaluation of Alternative Means of Consumer Redress other than Individual Redress through Ordinary Judicial Proceedings* (2007) at <[http://ec.europa.eu/consumers/redress/reports\\_studies/inded\\_en.htm](http://ec.europa.eu/consumers/redress/reports_studies/inded_en.htm)> accessed 8 September 2012. Nottage also contributed an analysis of New Zealand law for a multinational research project coordinated by the Kyoto Comparative Law Centre, for the Organization for Economic Co-operation and Development's Project DTSI/CP(2006)8: Directorate for Science, Technology and Industry, Committee on Consumer Policy, *The Report on OECD Member Countries' Approaches to Consumer Contracts* (6 July 2007) at <<http://www.oecd.org/dataoecd/11/28/38991787.pdf>> accessed 9 September 2012.

27 At <<http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>> accessed 7 September 2012, especially pp 283-292.

It could also be said that much of the research conducted is ad hoc, uncoordinated and sometimes fairly shallow – in part because it has not been related to a sustained research agenda. Some research is done by the government agencies responsible for consumer policy, although generally the smaller agencies do not have the resources to do this. The establishment of a research component on MCCA's strategic agenda has been a positive step forward in this regard, as has been the attempt to establish a national complaints database.

Government agencies have provided some funding to consumer bodies to conduct research in specific areas subject to structural and other reforms. A significant example is the funding by Consumer Affairs Victoria, through the Consumer Utilities Advocacy Centre, for research on energy and water regulatory issues particularly affecting low-income and rural consumers.<sup>28</sup> A similar scheme under the national energy regulatory arrangements is also in operation.

There are a number of university centres that have been established specifically to conduct consumer policy research. The Centre for Credit and Consumer Law (CCCL), attached to Griffith University, and the WA Centre for Advanced Consumer Research attached to the University of Western Australia,<sup>29</sup> were both established with short-term funding support from the State government consumer agencies in those States. The former CCCL ceased to operate at Griffith University but was established as a research program within the Law and Justice Research Centre at the Queensland University of Technology (QUT).<sup>30</sup> The Advisory Board for the CCCL – incorporating consumer, government, academic and industry representatives – will continue largely unchanged at QUT. The CCCL 'program' is initially operating at a relatively small scale, although the Law and Justice Research Centre is well established and has eight research programs operating in a number of fields of research across multiple disciplines. The Centre at the University of Western Australia is only operating at a small scale.

Several broader-based regulatory centres have also undertaken some consumer policy research work. The Centre for Competition and Consumer Policy, part of the Regulatory Institutions Network (RegNet) at the Australian National University,<sup>31</sup> has had a three-year partnership arrangement with the Australian Competition and Consumer Commission (ACCC) to conduct

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28 See <[http://www.cuac.org.au/index.php?Itemid=30&option=com\\_docman](http://www.cuac.org.au/index.php?Itemid=30&option=com_docman)> accessed 9 September 2012.

29 See <<http://www.law.uwa.edu.au/research/CCR>> accessed 9 September 2012.

30 The Law and Justice Research Centre no longer exists, and consumer law research (especially at present regarding consumer credit) is now conducted as part of Queensland University of Technology Law Faculty's broader 'Commercial and Property Law' program. See <<http://www.qut.edu.au/law/research/research-areas/commercial-and-property-law>> accessed 23 September 2012.

31 See <<http://regnet.anu.edu.au/CCCP/projects>> accessed 9 September 2012.

some specific research largely relating to competition matters, and the work is understood to be largely complete. Other centres with a broader focus than just consumer policy include the Centre for Regulation and Market Analysis at the University of South Australia,<sup>32</sup> and the Centre for Regulatory Studies at Monash University.<sup>33</sup> At other universities there are individual researchers who work on consumer policy issues.

While the various centres based at individual universities have produced a great deal of high quality research, major challenges for many of the centres have been those of the availability of sufficient researchers in a particular field and of securing sustainable funding. While short-term research project funding can often be obtained, it is more difficult to secure funding for administration and ongoing operating costs. As a result, it becomes difficult to provide certainty for staff and stakeholders, and this adversely impacts the ability of a centre to attract and retain staff or to attract further funding.

It is our understanding that this has also been the experience of other consumer law centres established within a university community including the former Financial Services Consumer Policy Centre based at the University of New South Wales. This centre was not able to secure sustainable funding and was ultimately closed.

We believe that, with appropriate support from the Commonwealth government and MCCA, a network of researchers across a number of universities would enhance the sustainability of research centres at universities generally. An administrative centre could, however, be based at one university to ensure the efficient and effective operation of the national Network.

Unfortunately, funding support for consumer policy research from non-government sources has also been limited. Some consumer agencies have received funds from philanthropic bodies to undertake small-scale research projects and some larger companies have either themselves undertaken relevant research or provided funds to other bodies to do so. For example, funding has been provided for research into financial literacy issues on this basis. A difficulty with company funding is that it often raises issues concerning the independence of the research response. However, opportunities to obtain funding from private sector sources could be fully explored by ACReN, if it had a well-established and properly funded administrative arm. An independent, objective and inclusive network will more readily attract stakeholders to provide short-term specific project funding; but in order to sustain a long-term viable network, government support is imperative.

There is also the potential to access national competitive grant programs, including Discovery and Linkage Grant programs supported by the Aust-

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32 See <<http://www.unisa.edu.au/research/crma/>> accessed 9 September 2012.

33 See <<http://www.law.monash.edu.au/centres/regstudies/research.html>> accessed 9 September 2012.

ralian Research Council (ARC).<sup>34</sup> The strong track record of many of the Network's intended members, the existing links with potential industry partners, and especially the potential for strong cross-institution collaborations, should increase the likelihood of successful outcomes for consumer law and policy research.

It would be desirable to build links with overseas research institutions. In particular it would be advantageous to establish links with New Zealand, which is a member of MCCA; and, over the longer-term, other major trading partners (especially those with links further institutionalised through free trade agreements) and regional or international bodies (such as the Asia-Pacific Economic Cooperation forum, European Commission and Organization for Economic Co-operation and Development).<sup>35</sup>

**D *Drawing on Australian and International Examples, What Models are Effective for Funding Effective Advocacy-Focused and Objective Qualitative and Quantitative Consumer Policy Research in the Medium to Long Term?***

As discussed above, we suggest that funding ACReN as an important focus of consumer policy research in Australia would be an effective model for funding consumer policy research in the medium to long term.

History has shown that a specific 'project funding' model does not sustain continuity of resourcing for research capability and, in particular, the administrative support essential for the efficient operation of research centres. This lack of continuity and certainty is also a barrier to long term industry partnerships with research centres as well as the ability for centres to attract and retain committed researchers.

It is envisaged that the Network would be a leading nationally and internationally recognised body facilitating high quality research to advance our knowledge of consumer engagement with the marketplace, so as to improve consumer-related policy and laws.

Although not a model previously tried in Australia in relation to consumer policy, research networks have been established in other areas of law and policy, including the ARC Governance Research Network (GovNet) (based at Griffith University),<sup>36</sup> and the Australian Network for Japanese Law (centred in the University of Sydney, the Australian National University and now Bond University).<sup>37</sup> These networks have delivered impressive results.

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34 For Discovery Projects see <[http://www.arc.gov.au/ncgp/dp/dp\\_default.htm](http://www.arc.gov.au/ncgp/dp/dp_default.htm)> accessed 9 September 2012; for Linkage Projects see <[http://www.arc.gov.au/ncgp/lp/lp\\_default.htm](http://www.arc.gov.au/ncgp/lp/lp_default.htm)> accessed 9 September 2012.

35 See, respectively, <<http://www.apec.org/>>, <[http://ec.europa.eu/index\\_en.htm](http://ec.europa.eu/index_en.htm)> and <<http://www.oecd.org/>> accessed 9 September 2012.

36 See <[http://vitro-test.rcs.griffith.edu.au/vitro/display/a1fd16b22840640db9b"62b7c3fa8c3cb](http://vitro-test.rcs.griffith.edu.au/vitro/display/a1fd16b22840640db9b)> accessed 9 September 2012.

37 See <<http://sydney.edu.au/law/anjel>> accessed 9 September 2012 (co-founded and co-directed by Luke Nottage).

Another example is the ARC Centre of Excellence for Creative Industries and Innovation (CII),<sup>38</sup> which was established in July 2005. Funding for the CII was by way of the ARC providing core funding to establish the CII and to ensure continued funding through to 2009. QUT is the administering institution for the support of the CII. The main collaborating partners are Swinburne University of Technology, Australasian CRC for Interaction Design, Australian Film Television and Radio School, Edith Cowan University and the University of Wollongong.

We propose that ACReN would be supported by an administrative arm, which would be overseen by an operational committee and/or advisory board. It would play a coordinating role in facilitating research by leading researchers. Importantly, it would also seek to build consumer policy research capacity across the country. In addition to providing assistance to MCCA in setting its research agenda, it is anticipated that research priorities would be developed over time and would seek to attract researchers from other organisations and countries wishing to participate in its work.

An important element of this will be the further development of a teaching program in consumer law and policy across Australia. The aim will be to build both undergraduate and postgraduate teaching and to attract PhD and other students wishing to do research as part of their higher degrees, thus ultimately building the level of consumer research capacity across Australia.

## **IV Proposed Organisational Features for ACReN**

### *A Aims of the Network*

ACReN would seek to:

- build a strong Australia-based network of researchers to advance knowledge and insights into the operation and regulation of the marketplace for consumer products and services;
- foster opportunities for collaborative research across institutions;
- undertake independent and high quality research to inform policy, regulatory and legislative reforms, and to inform consumer advocacy;
- develop links with consumer organisations, industry, government and academic organisations and networks to ensure that research projects are relevant and informative;
- develop international links so that Australian research informs and is informed by international research;
- encourage and nurture new researchers in the field; and
- conduct, collect, collate and distribute research in the field for public benefit.

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38 See <<http://cci.edu.au/>> accessed 9 September 2012.

## B Network Strategies

To achieve its aims, ACReN would:

- identify areas in which there are gaps in knowledge, requiring research;
- establish research priorities;
- conduct research in line with the identified priorities;
- maintain close links with government, consumer and industry groups to ensure that research priorities are relevant and will inform policy and any legislative reforms;
- work to develop international research links, particularly with other major economies or free trade agreement partners;
- create knowledge databases and a clearing house for this field;
- publicise widely the outcomes and policy implications of the research to the academic community, government and policy-makers, consumer and industry organisations, and the public (for example, through the Network website, media comment, submissions to relevant reviews and inquiries, Social Science Research Network,<sup>39</sup> a collaborative blog,<sup>40</sup> a regular consumer law conference and smaller workshops);
- encourage links between researchers in Australia, particularly in relation to prioritised research projects;
- provide seed funding for prioritised research; and
- seek additional funding from industry and other sources for prioritised research projects.

The Network will be a formal group of consumer policy researchers initially drawn from across Australia. As noted above, the Network membership will be originally based on the consumer policy academics who meet annually to discuss written papers at what are now known as 'Australasian Consumer Law Roundtables'.<sup>41</sup> For example, a Roundtable hosted in January 2009 by Monash University's Centre of Regulatory Studies benefited from some funding from Consumer Affairs Victoria to assist the attendance of a European expert at this meeting. The Roundtable hosted in December 2009 at the University of Sydney attracted funding from the ARC's 'Asia-Pacific Futures' Research Network to help invite experts from Japan and New Zealand.

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<sup>39</sup> See <<http://www.ssrn.com>> accessed 9 September 2012.

<sup>40</sup> See, for example, <<http://acren.wordpress.com/>> accessed 9 September 2012 (developed by Luke Nottage and other prospective ACReN members to facilitate networking and input into policy-making during Australia's complex consumer law reform process over 2009-2010).

<sup>41</sup> 'Consumer Law Roundtables', above n 1.

The network of experts will be developed along the lines of the ARC-funded Economic Design Network,<sup>42</sup> which is administered by the University of Melbourne. That aims to:

- coordinate and facilitate research in economic theory, experimental economics and economic design;
- promote innovative policy development through the application of this research;
- provide a central forum for communication and the dissemination of information;
- support regular and occasional conferences;
- support a program of academic visitors to the Network;
- provide professional training and support to policy-makers; and
- build capacity in the region in the subject area.

Further inspiration can be drawn from other recent research-driven groups such as the Australian Research Network on the Japanese Economy and the Australian Network for Japanese Law.<sup>43</sup>

### *C Network Administration*

ACReN will require a stable and efficient administration to enable it to undertake its tasks. The administration would:

- be flexible in its operations, whilst being predictable and not overly bureaucratic;
- be focused on getting the best results, not favouring any one or more institutions over others;
- keep administrative overheads to a minimum;
- have open and transparent processes; and
- actively support researchers.

ACReN will be assisted by an executive board<sup>44</sup> that would include members from participating universities, one or two consumer groups, and one or two industries, as well as government observers. The executive board's role would include setting the research agenda for the Network, and facilitating the input of relevant stakeholders into the design of individual projects.

It is envisaged that both full-time and part-time staff of the Network would be based in one location, which is yet to be determined. The Network

42 See <<http://www.economicdesign.com.au/>> accessed 9 September 2012.

43 Australian Network for Japanese Law, above n 37; for the Australian Research Network on the Japanese Economy, see <<http://arnje.anu.edu.au/>> accessed 9 September 2012.

44 To ensure independence and appropriate governance of projects it would be proposed that the executive board comprise equal representation from consumer advocacy groups, trade associations and universities participating in the Network, along with government observers.

will also be assisted by an advisory board, comprising leading researchers from Australia and world-wide as well as financial counsellors, consumer, regulatory and industry representatives.

#### *D Communications*

It will be important that the Network builds a strong communication program around its research. Ensuring appropriate awareness of its research program will help to maintain confidence in its work and will ensure that the work is usefully built into the policy-making process.

In line with the views of the Productivity Commission, it is not envisaged that the Network will become an advocacy body. Rather it will seek to ensure that the policy debate is informed by rigorous, independent research of the evidence.

#### *E Funding*

It is understood that until around 2009, MCCA allocated between AU\$250,000 and AU\$300,000 per annum to undertake research in line with its strategic priorities. To achieve the objectives articulated by the Productivity Commission, it is assumed that funding will need to be increased by several multiples of this figure.

The level and term of funding available to any new Network will influence the way it is established and operated, for example the nature of its accommodation, the level of its facilities, the extent to which it can attract and support researchers and the liaison it has with stakeholders and governments around the country. Ideally the Network should not just have to rely on government funding, but will be able to also support its functions from other sources such as private sponsors, teaching and consultancies.

However, given the past history of centres in Australia struggling to attract commercial or other partners, substantial and secure government funding is critical to the short and long-term effectiveness and viability of the Network, and thus to generating high quality consumer policy research over the medium to long term. To achieve these objectives, initial funding should be for a minimum of five years, and renewals should be for an equivalent period.

This proposal has assumed that if the Network's administrative arm is based at one university, there will be substantial support provided to it by all participating universities. This will be through assistance with staffing, accommodation and other in-kind services. It has also assumed that a significant proportion of the funds provided to the Network would be directed to facilitate research activity at various research institutions throughout Australia.

In light of this, it is suggested that the Australian government consider providing an appropriate negotiated level of funding to the proposed Network annually for five years initially, subject to adjustment for movements in the Consumer Price Index. Again, in line with the Productivity Commission's recommendation, it would be appropriate to have an independent review conducted of the effectiveness of the Network near the end of that five-year period.

## V Support for Other Consumer Policy Research Programs

In addition to this proposal to expand and support ACReN, we also support the existence of funded research programs that can be accessed by other organisations, including community organisations. Such funding programs can give community organisations the opportunity to undertake activities that are additional to their core activities (that is, providing advice and advocacy), but are complementary.<sup>45</sup>

For example, smaller competitive grant programs that are accessible to community organisations can allow for the detailed analysis of information collected by the organisations, or a focus on particular local issues that have been identified through the organisation's service delivery activities. These could include the programs currently managed by State governments (for example, the Consumer Credit Funds in Victoria and NSW), and the Commonwealth government (for example, the Telecommunications Research Grants program).<sup>46</sup> Continuing some level of separate contestable grant programs also provides scope to increase the level and diversity of consumer policy research in Australia.

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45 For a recent example of an ad hoc small-scale joint consultancy, see Harrison P and Gray C, '*Profiling for Profit': A Report on Target Marketing and Profiling Practices in the Credit Industry*' (Consumer Law Action Centre, 2012) at <<http://www.consumeraction.org.au/downloads/ProfilingforProfit-final-formatted.pdf>> accessed 9 September 2012. This research by the Centre was supported by the Consumer Advisory Panel of ASIC. The Commonwealth and NSW governments have also provided extensive funding to establish in 2012 a Centre for International Finance and Regulation, based in Sydney and including support from six universities as well as two research centres and three industry partners: see <[http://www.cifr.edu.au/site/About/Who\\_We\\_Are.aspx](http://www.cifr.edu.au/site/About/Who_We_Are.aspx)> accessed 9 September 2012. Our present proposal to establish a formal inter-institutional Network for consumer law and policy research more generally would complement this new centre, which concentrates on developments in 'wholesale' as well as 'retail' financial markets.

46 See, respectively, <<http://www.consumer.vic.gov.au/clubs-and-not-for-profits/grants/consumer-credit-fund-grants>> and <[http://www.dbcde.gov.au/funding\\_and\\_programs/telecommunications\\_research\\_grants](http://www.dbcde.gov.au/funding_and_programs/telecommunications_research_grants)> accessed 9 September 2012.