Poverty, Credit Law and Social Justice: Examining the links

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1. INTRODUCTION

The previous speaker, David Tennant from the Care Financial Counselling Service, has given some specific examples and case studies that illustrate the impact of law reform for individual consumers. In this paper, I will take a step back from that detailed picture, and look at the broader framework that underpins and influences the law reform efforts of Care and similar agencies. My comments will be from a policy/research background, and will complement David’s comments from a casework perspective.

Consumers International make a strong statement about the relevance of consumer policy to those interested in social justice, suggesting that:

Consumers also have responsibilities to use their power in the market to drive out abuses, to encourage ethical practices and to support sustainable consumption and production. Developing and protecting consumers’ rights and their awareness of their responsibilities are integral to:

- eradication of poverty
- good governance
- social justice and respect for human rights
- fair and effective market economies
- protection of the environment.¹

In my paper, I will show how this sentiment plays out in the context of credit law in Australia.

I will start with a brief examination of the links between credit and debt law, poverty and social justice – why is the work of consumer lawyers relevant here? I think there are three main areas where credit law can impact on poverty, and I’ll talk briefly about each of these.

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I will mention the broad concept of “the law” that we need to consider in credit and consumer issues, and will then highlight some of the campaigns and activities that consumer lawyers and consumer advocates have been involved.

Finally, some comments about access to justice, and I will close with some lessons and caveats for law reform in this area – and I want to give a particular plug to the role of research in supporting law reform activities.

2. **POVERTY, CREDIT AND DEBT AND SOCIAL JUSTICE**

To start with poverty, credit and debt and social justice – is it possible to say that these concepts linked? In particular, does credit and debt law impact on poverty? And if so, how?

**Credit and overcommitment in Australia**

A quick look at figures on credit and debt will help to answer some of these questions, at least in part. For example:

- The level of consumer debt in Australia continues to grow at a rapid rate. In July 2004, total personal debt to banks (only) was $523.8 billion, up from $452.3 billion in July 2003.\(^2\)

- In July last year, it was estimated that average households owe $1.29 for every dollar that they earn.\(^3\)

- Credit and charge card debt in July 2004 was over $27 billion, up from $24 billion a year earlier.\(^4\) A 2002 report on credit cards suggested that 75% of the outstanding debt on credit cards is interest-bearing, and that this interest-bearing debt is owed by only 35% of the households with credit cards.\(^5\)

- Non-business bankruptcies have increased from 4,994 in 1998/99\(^6\) to 16,441 in 2003/2004.\(^7\) Although there was a drop in bankruptcies between 2002/2003 and 2003/2004, there was a 20% increase in Part IX agreements over the same period.\(^8\)

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\(^3\) Sydney Morning Herald ‘Credit card debt at record $24bn’ 20/07/03.


• For 2003 bankrupts, immediately prior to bankruptcy, 23% of debtors had an income of less than $10,000, and 78% less than $30,000. Excessive use of credit was the second most common cause for non-business bankruptcies (after unemployment).

• Research with financial counsellors in NSW showed that 81% of the 2001 financial counselling client group reported incomes of $30,000 or less, and 60% reported incomes of $20,000 or less. 85% of these clients presented with consumer credit debts, and the median debt was $15,000. The 2001 clients presented with 24% more consumer credit debt overall than the 2000 client group, and there was a 25% increase in the median level of consumer credit debt. Excessive use of credit was the second most frequently reported primary and secondary cause of financial difficulties (after unemployment).

• Young people are often at risk of aggressive marketing campaigns and a ‘have now pay later’ mentality. But, as a rule, their incomes are low, and research in NSW found that ‘nearly a quarter of 18-24 year olds have experienced debt that has caused them some grief’. The average estimated debt for this group was $5,560 according to the parents/guardians and $5,830 according to the young people themselves. Mobile phones and credit cards are seen as the biggest risk areas, and there are perceptions that it is all too easy for young people to get access to credit.

These figures – and there are plenty more - suggest that credit and debt has a significant impact on Australian consumers. Consumers with high debt levels and low incomes are at particular risk of financial distress. But even some on moderate incomes may have left no buffer to withstand an adverse change in their financial circumstances (unemployment, illness, family breakdown).

Others agree. A Senate Committee report on poverty and financial hardship, released earlier this year noted the following:

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Evidence to the inquiry raised concerns in relation to the easy availability of credit and the 
lending practices of some credit providers and the adverse financial impact this has had on 
low-income households in particular.

The Committee believes that there needs to be greater regulation of credit providers to 
minimise the ‘debt traps’ often faced by low income people; improved consumer education 
on issues related to credit; and additional funding for financial counselling services …

Financial exclusion – the poor pay more

Examining ‘financial exclusion’ also highlights the links. In a 2001 report, Connolly and 
Hajaj defined financial exclusion as:

lack of access to financial services by individuals or communities due to their geographic 
location, economic situation, or any other anomalous social condition which prevents people 
from fully participating in the economic and social structures of mainstream communities.

In the United Kingdom and United States, studies of financial exclusion often focus on ‘the 
unbanked’ – those who do not have even a basic savings or transaction account, and are thus 
largely outside the financial system altogether.

In Australia, almost every adult has a day-to-day account with a financial institution. As a 
consequence, studies of financial exclusion here tend to focus on the lack of access to 
affordable, accessible (including geographically) and non-exploitative banking, credit and 
other financial products and services.

The unavailability of affordable credit products is just one example of how financial 
exclusion plays out in Australia. The poorest in the community usually pay more for credit 
and banking products than more affluent consumers.

For example, membership of a professional organisation (the Law Society for example) can 
title a customer to a discount on the standard home mortgage rate. In contrast, the credit 
products often targeted (or available) to consumers unable to access mainstream products 
often have much higher interest rates, default rates, establishment fees, and other fees.

Paying more happens in other consumer markets as well. For example, pre-payment meters 
for electricity are promoted as an effective way for consumers (who might be at risk of 
disconnection for unpaid bills) to pay for consumption as they go, and thus reduce the risk 
of large bills each quarter. But in fact, the experience in the United Kingdom suggests that

19 Senate Community Affairs and References Committee (2004) A hand up not a hand out: renewing the 
fight against poverty p 204.
21 See for example, Financial Services Authority (UK) (2000) In or Out? Financial exclusion: a literature 
and research review, which reviews financial exclusion literature in both the United Kingdom and the 
United States.
22 97% of respondents to a 2003 survey had a savings or transaction account: Roy Morgan Research (2003) 
23 See for example, Dean Wilson (2002) Payday Lending in Victoria – a research report: Ministerial 
the charge for each unit of electricity under a pre-paid system can be greater than if it is for those on the normal post-paid system.\textsuperscript{24} And pre-payment effectively forces consumers to prioritise their electricity bill over other living expenses.\textsuperscript{25} Consumers on low incomes should not have to choose between heating or eating! Pre-payment meters also hides rates of disconnection, and so reduces our ability to measure or monitor fuel poverty.\textsuperscript{26}

Financial exclusion has personal, community and business consequences – including for individuals: the high cost of personal banking and the financial strain that this places on low-income consumers.\textsuperscript{27} Financial exclusion can be self-reinforcing and a contributor to social exclusion more broadly.\textsuperscript{28}

Although they can be addressed through social measures, issues of financial and social exclusion can also have a legal dimension that is relevant to today’s discussions.

**Unfair or poorly designed laws**

Unfair or poorly designed laws and practices can also perpetuate or contribute to increasing poverty.

For example, does the current law do enough to ensure that in the future couples like the Amadis\textsuperscript{29} do not risk the family home (and thus their financial and emotional security) in a contract of guarantee without fully appreciating, and consciously agreeing to the risks that such a contract entails? Maybe not, if the fact that allegations of unconscionability are still frequently raised in guarantee cases.\textsuperscript{30}

Non-existent, unfair or poorly designed laws can facilitate unfair practices. For example, by not regulating finance or mortgage brokers adequately, there is a risk that some make take advantage of commission payments and other incentives to direct consumers to expensive, inappropriate and arguably exploitative credit products.\textsuperscript{31} And allowing loopholes in the *Consumer Credit Code* to remain gives comfort to industry players who want to structure transactions in such a way as to avoid the application of the *Consumer Credit Code* and the consumer protections that it provides.\textsuperscript{32}

\textsuperscript{24} See for example, Energywatch (UK) Media release: 3.5 million pre-payment customers paying over the odds (22 July 2004), which noted that “Consumers who pay as they go for their energy are charged a premium of up to 63[GBP] per year more than cash, cheque or direct debit customers”; available at [www.energywatch.org.uk](http://www.energywatch.org.uk).

\textsuperscript{25} Andrea Sharman (2003) *Second-Class Customers: Pre-Payment Meters, the Fuel Poor, and Discrimination*, prepared for Energy Action Group, p 15.

\textsuperscript{26} Sharman (2003) pp 12, 19.

\textsuperscript{27} Connolly & Hajaj (2001) p 23.

\textsuperscript{28} Connolly & Hajaj (2001) p 22.

\textsuperscript{29} *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.


\textsuperscript{31} See for example, Consumer Credit Legal Centre (NSW) Inc. (2003) *A report to ASIC on the finance and mortgage broker industry* pp 20-21, 26-27.

\textsuperscript{32} David Niven and Tim Gough (2004) *The Operation of the Uniform Consumer Credit Code: Why is it failing consumers?* for the Consumer Credit Legal Service (Vic) pp 4-12.
Relevance of law reform

These three issues – overcommitment; financial exclusion; and unfair marketing and transacting practices – overlap to some degree. And they are all areas where the law can be part of a solution. Credit law reform that is directed to: reducing the risk of overcommitment; promoting access to fair, safe and affordable products; properly regulating poor marketing, transacting, and debt collection practices; can therefore be one part of the solution to poverty issues in Australia.

3. LAW AND “QUASI-LAW”

Before I discuss some current examples, it is important to acknowledge that, for credit and consumer issues, ‘law reform’ is not just about reforms to the ‘laws’ as made by Parliaments or the common law. These days, many significant changes in consumer protection happen outside the traditional regulatory framework – through industry codes, regulator guidelines, prescribed codes, industry disputes schemes, standards making bodies, and other instruments.

Self-regulation and co-regulation remain favoured options for governments, at the expense of formal regulation. For example, in a 1998 policy framework on codes, the Commonwealth Department then responsible for consumer protection explained:

The Government supports a fair and informed marketplace where consumers’ interests are protected without excessive regulation being imposed on business. The Government will not hesitate to regulate to protect public safety and other essential objectives, but would generally favour the minimum effective regulation necessary to achieve the desired outcomes …. Self-regulation in the form of codes of conduct will therefore be examined before more interventionist approaches are considered …. Effective self-regulation can avoid the often overly prescriptive nature of regulation and allow industry the flexibility to provide greater choice for consumers and to be more responsive to changing consumer expectations.33

Needless to say, industry too is often in favour of self-regulation.

The influence of these alternative forms of regulation is very high in the consumer protection sector. In some cases, you can even find (at least on paper) greater rights given to consumers in codes than in legislation.

For example, under the revised Code of Banking Practice,34 subscribing banks promise the following (in clause 2.2):

We will act fairly and reasonably towards you in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us. (emphasis added)

34 Copies of the Code of Banking Practice are available at www.bankers.asn.au.
If is difficult to know how this commitment will play out in practice, but it arguably goes beyond anything that would be required of Code members at law.

And certainly, many more consumers will use the services of an industry dispute resolution scheme than they will use the court system.\textsuperscript{35} Lawyers and caseworkers interested in consumer law therefore cannot ignore the pervasive impact of these quasi-regulatory controls on industry behaviour.

4. SOME CURRENT ISSUES AND RESPONSES

Having provided an overview of how credit and consumer law reform can have an impact on poverty, I would like to highlight some current issues and law reform responses.

\textbf{Law reform to reduce financial exclusion}

The first issue I will mention is law reform that seeks to address financial exclusion. And here, it is useful to distinguish issues relating to consumer loans from those relating to transacting and savings accounts.

(i) \textit{Fringe and exploitative credit}

Fringe credit is a broad term – encompassing a whole range of credit products and services that are outside the mainstream lending.

Payday lending is one example. Here the lender advances money to a customer until their next payday, in exchange for a fee. The ‘fee’ is charged instead of interest, loans are small in amount (normally around $250), and initially short-term (2 – 4 weeks), but are often ‘rolled over’ on subsequent paydays for an additional fee.\textsuperscript{36}

Research in Victoria found that payday loans met a real need for low value, short-term credit to smooth out, or cover for inadequate income (58\% of respondents said that the loan was to pay bills or cover day-to-day living expenses).\textsuperscript{37} Banks and other mainstream financial institutions are reluctant to provide loans for small amounts, and interviews with payday lending customers suggested that many were wary of credit cards.\textsuperscript{38}

However, consumers are paying a high cost for this type of credit. For a $200, 14 day loan, loan fees from Victorian payday lenders were around $50-$60. If these figures were translated into an annualised percentage interest rate, it would range to between 585\% and 897\%.\textsuperscript{39}

In addition, consumers are often ‘encouraged’ to give direct debit authorities to cover repayment of the loan or the rollover fee. This effectively forces them to prioritise repayment of this debt over other bills and expenses, and exposes them to the risk of high dishonour fees from their bank if the amount is not there on the required date.\(^{40}\)

The research also found that the consumers interviewed in depth were aware of the high cost of this type of lending – but felt that they had no other option.\(^{41}\)

Fringe credit – including payday lending – is characterised by some or all of the following: high interest rates, high set up costs, excessive churning/refinancing (with new costs each time), high default costs, and/or onerous terms and conditions.

Payday lenders are not the only source of expensive or inappropriate credit for consumers on low incomes, or with poor credit histories. Others include pawnbrokers; fringe credit providers – some of whom take ‘blackmail securities’ over household furniture;\(^{42}\) and solicitors/mortgage investment companies – who offer short-term, interest-only loans secured by the consumer’s home.\(^{43}\)

What have been some of the ‘law reform’ responses to the issues of fringe credit?

Consumer lawyers have generally targeted their attentions to reform of the Consumer Credit Code, and some of the tools have included submissions; case studies and reports; research; and media comment.

I’ve already referred to one of the key research reports in this area – the payday lending report that was prepared by Dean Wilson for the Consumer Law Centre of Victoria.\(^{44}\) This research examined the experiences of 78 customers of payday lenders via short survey, and 12 depth interviews, and its findings influenced the momentum for change to the Consumer Credit Code.

Case studies are a particular resource of caseworkers. A compilation of case studies on a particular issue or, indeed, company, can highlight failings of current systems, raise the issues in the community, and generate public and government support for change.

An example here was a report on the lending practices of AVCO – compiled by Legal Aid NSW and the Consumers’ Federation of Australia in 1997. This report included 70 case

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\(^{42}\) Care Inc Financial Counselling Services, Consumer Credit Legal Centre (NSW), Consumer Credit Legal Service Inc. (Vic), Consumer Law Centre of the ACT, Consumer Law Centre Victoria (undated): Joint consumer submission in relation to the MCCA’s Discussion Paper on Long Term Regulation of Fringe Credit Providers p 4.

\(^{43}\) See generally, Nicola Howell (2004) Solicitor lending to consumers: a study of interest only loans and asset-based lending practices in Victoria, for Consumer Credit Legal Service (Vic).

\(^{44}\) D Wilson (2002).
studies from around Australia, and it highlighted concerns about AVCO’s lending practices, particularly to consumers on low incomes.  

Case studies and case study reports are often criticised by industry, and in some cases, by regulators – particularly for being non-representative, and not having statistical validity. Critics of this type of research argue that it only shows the problem cases – what about all the cases where there were no problems? But case studies provide a real picture of the impact on individual consumers – as you can appreciate from David Tennant’s paper – and can therefore be very powerful. And in practice, consumer advocates rarely have the resources to undertake what might be seen as statistically valid research.

Both the AVCO and the Payday Lending reports were accompanied by campaigns and media stunts, and this too helped to generate a climate for change.

In combination, these have lead to some successes:

• Amendments to the Consumer Credit Code in 2001 had the effect of bringing most short term, high cost credit (ie payday loans) into the Code. This gave the customers of this type of credit rights to pre-contractual disclosure; to seek a variation to the contract on the grounds of hardship; and to seek a declaration that the transaction is unjust or the interest rates or fees and charges unconscionable.

• Under further amendments to the Consumer Credit Code, a comparison rate that incorporates fees and charges must now be disclosed for some loans.

• The Standing Committee of Officials of Consumer Affairs (‘SCOCA’) has ‘fringe credit’ on its working agenda, and is looking at issues such as prohibiting the taking of securities over household goods; extra disclosure and warnings for high cost loans; and interest rate caps.

But progress is slow and uneven. The payday lending reforms only partially address the problem. For example, even though some states have interest rate caps, they can be avoided by loading costs into fees and charges.

And the fringe lending discussions are hampered by the structure of the Consumer Credit Code and the priorities of the state government agencies responsible for developing legislative amendments. Meanwhile, unscrupulous lenders find new ways to exploit consumers and avoid Code obligations. And, unlike mainstream lenders such as banks, your average fringe lender is not a member of an independent dispute resolution scheme.

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45 Legal Aid NSW and Consumers’ Federation of Australia (1997) In whose interest? AVCO lending practices exposed.
46 Consumer Credit (Queensland) Amendment Act 2001 (Qld).
47 Consumer Credit (Queensland) Amendment Act 2002 (Qld) introducing a new Part 9A to the Consumer Credit Code.
Access to banking services

In relation to access to banking services, consumer lawyers and advocates have been lobbying for banks (in particular) to accept, or have imposed upon them, broader social responsibilities. This could take the form of initiatives such as:

- basic banking accounts;
- low cost finance / microcredit;
- commitment to retention of banking services in communities; and
- better notification and transition procedures if banking services are removed from rural and regional communities.

Here it is worth remembering that, even though these might be thought of as primarily social policy issues, not legal issues, in fact, they can be addressed (at least partially) through law reform. For example, the Community Reinvestment Act in the United States requires institutions to report on how they meet the needs of their local communities, including the needs of low and middle-income consumers. The record of an individual institution can have an impact on regulatory decisions.49

In Australia, work has also focused on submissions to and appearances at Parliamentary Committees; responding to authorisation applications to the Australian Competition and Consumer Commission; and submissions and campaigns on the review of the Code of Banking Practice.

Have these law reform efforts been successful?

The revised Code of Banking Practice includes some positive changes, including the following clauses:

We recognise the needs of elderly customers and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services (clause 6).

If you tell us that you are a low income earner or a disadvantaged person (regardless of whether you are an existing or prospective customer but not if you are a small business), we will provide you with details of accounts which may be suitable to your needs. We will also do this if you ask for this information or if, in the course of dealing personally with you, we become aware that you are in receipt of Centrelink or like benefits (clause 14).

We will comply with the ABA’s protocol on branch closures, as publicised by the ABA from time to time (clause 32).

Although again we will have to see how these principles and commitments are put into practice.

There has been recognition of at least some in Parliament of these issues, and the need for regulation to reduce financial exclusion. For example, a recent Parliamentary Committee report\textsuperscript{50} included a range of recommendations relating to financial exclusion, some of which were directed at quasi-regulatory instruments like the Code of Banking Practice and Australian Banker’s Association’s Branch Closure Protocol,\textsuperscript{51} and others which recommended further examination of legislative responses along the lines of the US Community Reinvestment Act.\textsuperscript{52}

And there have also been some initiatives by individual institutions. For example, one major bank has implemented a pilot matched savings program, and another is trialling a low value, but affordable loan product. The first bank has also commissioned research on community finance.

**Reform of laws governing marketing and transacting behaviour**

The regulation of mortgage and finance brokers provides a good case study of ineffective laws that may contribute to poverty and financial hardship.

Although there is nationally uniform credit regulation, regulation of brokers is much more patchy – some jurisdictions have specific regulation, others simply rely on general consumer protection laws.

In practice, there seem to be two types of brokers. Mainstream brokers promote themselves as ‘helping the consumer through the maze of home loan options’. Fringe brokers often target consumers who are having difficulty obtaining finance from mainstream lenders, through ads that include phrases like “easy finance”, “bankrupts okay”, and “no credit checks”.

A 2003 report by the Consumer Credit Legal Centre (NSW) (‘CCLC’) identified a range of consumer problems with fringe brokers in particular:

- Poor quality of advice – for example brokers who recommend interest only loans in inappropriate circumstances; or who misrepresent the savings available from changing a home loan.
- Brokers who avoid the Consumer Credit Code by arranging for consumers to declare (incorrectly) that the loan is for business purposes.
- Charging excessive broker fees (particularly when the broker knows that there is little prospect of the loan being approved) or not disclosing the amount of fees to be charged.
- Cold calling and pressure selling tactics.
- Placing consumers into loans that they could not afford.

\textsuperscript{50} Parliamentary Joint Committee on Corporations and Financial Services (2004) *Money Matters in the Bush: Inquiry into the level of banking and financial services in rural, regional and remote areas of Australia.*

\textsuperscript{51} For example, recommendations 2, 3 and 19.

\textsuperscript{52} For example, recommendation 33.
• Operating loan approval scams – that, for example, require the consumer to dial premium telecommunications services; or to take out a credit card to pay the broker fee through a cash advance.⁵³

These practices ultimately result in higher costs to consumers, an increased risk of default (which often involves more costs), and – for consumers who have a mortgage – the risk of losing their home.

As with fringe lending, consumer advocates have used a variety of mechanisms to advocate for more effective and comprehensive broker regulation. These have included formal and informal submissions, the CCLC research report that I have already referred to; case study reports;⁵⁴ litigation in appropriate cases; commenting on draft legislation; reporting cases to regulators, which in turn resulted in enforcement action and significant publicity (for example, in 1999, the ACCC successfully prosecuted a ‘dial a loan scheme’, which encouraged consumers to make expensive 1900 calls to obtain a loan).⁵⁵

Again, results have been mixed and reform is slow. However, the CCLC report generated substantial publicity and in part was responsible for galvanising the State and Territory Fair Trading agencies to consider a nationally consistent approach to regulating brokers.⁵⁶

The Australian Securities and Investments Commission (‘ASIC’) has partially resolved the lack of access to external dispute resolution (‘EDR’) schemes for broker customers. It has given finance and mortgage brokers an exemption from the licensing regime governing those who provide advice about mortgage offset accounts if they belong to an approved EDR scheme.⁵⁷

And individual jurisdictions have taken some steps forward. For example, NSW has recently introduced new broker legislation.⁵⁸ This is a start, but arguably does not go far enough.⁵⁹

5. ENFORCEMENT AND ACCESS TO JUSTICE

It is also important to recognise that, in consumer law (as in many other areas of law), it is not possible to look at law reform in isolation from issues such as enforcement (both public and private), compliance, and access to justice for consumers.

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⁵⁴ For example, the Consumer Credit Legal Service (Vic) prepared a case study report on debt reduction schemes, often promoted by brokers or loan introducers.
⁵⁵ Australian Competition and Consumer Commission, Media release 072/99 Consumers to get compensation from illegal loans scheme 26/05/99.
⁵⁷ Australian Securities and Investments Commission Class Order CO 03/1048 Mortgage Offset Accounts, issued 8 December 2003.
⁵⁸ Consumer Credit Administration Amendment (Finance Brokers) Act 2003 (NSW).
⁵⁹ The Consumers Federation of Australia has argued that: ‘finance brokers should be deemed to be the agent of the lender’ (see http://www.consumersfederation.com/financebrokers.htm).
Without compliance monitoring or enforcement activity, some players may choose not to comply, with the result that laws that look good on paper have little impact in practice.

Access to justice and thus private enforcement is a key issue for those of us working in credit and consumer law. Many consumer disputes are relatively small in the scheme of things (although often significant to the consumer), with the result that litigation is simply not feasible. Legal Aid funds are limited for consumer protection matters; and community legal centres have limited capacity to take on large numbers of consumer and credit cases.

Efforts to improve access to justice in consumer disputes, whether through small or specialised tribunals, and/or through industry EDR schemes, are therefore another important part of the broader ‘law’ reform focus in consumer law.

Similarly, there is a real need for public enforcement of consumer law. ‘Law reform’ efforts have also been directed at making sure the regulators have the necessary enforcement powers and a culture that recognises the importance of consumer protection law, and of ensuring compliance.

One example here is the considerable efforts by consumer advocates in the mid-1990s to promote the need for the 3rd “C” (“consumer”) in the title of the Australian Competition and Consumer Commission (‘ACCC’), and to ensure that the legislation establishing the ACCC included a requirement that at least one Commissioner must have knowledge of, or experience in, consumer protection.

6. LESSONS AND CAVEATS

What can we learn from previous efforts to reform credit and consumer law?

First, successful law reform in credit and consumer law involves a mix of strategies and activities at different levels, and often over a substantial period of time. And not all of these strategies and activities need to focus on the formal legal framework.

Second, it is important to incorporate the intelligence gathered by caseworkers into the law reform process. As case study reports show, caseworkers – consumer lawyers, financial counsellors, consumer support workers – see directly the poor practices of industry, the impacts on consumers, and the limitations of current regulatory frameworks.

Case studies and case study reports can be extremely valuable in promoting the need for change, and generating public and government support for change. But there is also a great deal of scope for more detailed research.


61 Trade Practices Act 1974 (Cth), s 7(4).
Casework agencies rarely have the time or resources for this type of research, and there are only a small number of dedicated consumer policy/research workers in Australia. There is therefore real scope for academics to work with caseworkers and casework agencies to build upon the casework experiences, statistics and case studies and to fill this research gap.

And research does not necessarily need to be doctrinal legal research. Socio-legal research can be equally relevant, and sometimes more so, particularly because the vast majority of consumer disputes are not resolved through the court system.

But consumer advocates also need to think about engaging with other disciplines. I suspect that there is a range of marketing and behavioural research that could help inform consumer policy and law reform debates.

Third, while much consumer law happens outside of Parliament, there are risks in engaging in some self-regulatory and co-regulatory processes.

While the revised Code of Banking Practice can be seen as a success, many of the consumer groups who had devoted considerable efforts to the process, and achieving a good outcome, were discouraged (to say the least) at factors such as the very slow rate of take-up by the banks, the delay in constituting the Code Compliance Management Committee, and the actions of the banks in making unilateral amendments, with minimal consultation, after the revised Code had been publicly released.

And, as the previous speaker’s case studies show, many consumer advocates see that self-regulation in the telecommunications sector has been a failure for consumers, and have decided not to participate or contribute to code development processes in that sector.

Fourth, law reform takes time, and this is particularly so in relation to reform of credit laws because of the rather unwieldy structure that was used to create nationally consistent laws. Some relatively straightforward changes recommended in a 1997 review have yet to be implemented, despite the fact that there is agreement to the need for change. In the meantime, consumers who might benefit from these changes are losing out.

This begs the question – can we afford to retain the current regulatory structure for credit? Is Commonwealth regulation the answer? On the other hand, does the current structure leave scope for one jurisdiction to take test out a new approach, and thus facilitate its subsequent acceptance into nationally consistent law. (The ACT legislation in relation to unsolicited credit card limit increases might be an example here.)

Finally, those seeking credit law reform also need to take account of the social, political and economic framework that credit and consumer law operates within. Ideas and perceptions about capitalism; deregulation; consumerism; buyer beware; the role of marketing; the need

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63 Fair Trading Amendment Act 2002 (ACT), introducing s28A. This section requires a lender to carry out a satisfactory assessment process of a debtor’s credit-worthiness before their credit limit may be extended.
for certainty of contract; economic rationalisation; all influence thinking and possible responses.

These ideas also generate some difficult and possibly unresolved philosophical issues that underpin consumer protection theory: Should we be ‘protecting consumers from themselves’? What about the rights of parties to freely set the terms of their own bargains? Does restricting fringe credit mean that some consumers cannot access needed credit? How do we identify unfairness in consumer contracts? What is the role of the market and competition in protecting consumers?

Similarly, the political environment is key. This is an interesting challenge because of the overlapping Commonwealth/State/Territory responsibilities in credit and consumer law. At the moment, the Commonwealth Government seems to be fairly reluctant to contemplate new consumer protection regulation. On the other hand, State and Territory governments are at least moving ahead (albeit slowly) on a range of credit and consumer law issues.

7. CONCLUSION

Does ‘law reform’ in the broadest sense that I have talked about here make any difference to issues of poverty and social justice? I think the answer is a qualified yes.

We have to be clear about the limits of reform of credit and consumer law. It would be unrealistic to think that credit law reform can eliminate poverty. Poverty is a function of a whole range of factors, many of which are simply unconnected with credit, consumerism, or the law. Credit law reform cannot address the broader need to secure adequate income levels for all Australians.

However, an improved regulatory framework could reduce the risk that credit consumers will become overcommitted and/or exploited. An improved framework could facilitate the development of safer credit products, and increase access to justice. And an improved regulatory framework could also reduce the risk that those who are already disadvantaged and in financial difficulties, will not have their positions made worse because of consumer credit.

In this way, efforts to improve the regulatory framework for credit and consumer law can promote social justice. And the result will be better outcomes for those who are the most disadvantaged in our market and capitalist economy.