Discussion Paper

What do we mean by 'vulnerable' and 'disadvantaged' consumers?

Consumer Affairs Victoria

Victoria
The Place To Be

Disclaimer

Every effort has been made to ensure that the information presented in this discussion paper is accurate at the time of publication.

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Preface

This discussion paper has been prepared by Consumer Affairs Victoria in line with our commitment to assist vulnerable and disadvantaged consumers. To do this we need to better understand who they are.

Typically, vulnerability and disadvantage are considered in relation to an individual's personal characteristics. However, when considering vulnerability and disadvantage in the consumer context,
it is also necessary to have regard to the characteristics of markets which impact on decision making by, in particular, affecting the availability of information.

The subject matter of the paper is not simply of academic interest. In fact, it gets to the heart of good consumer policy.

In an environment of constrained budgets, it is crucial to ensure resources are appropriately targeted in their use and that the strategies adopted to assist the vulnerable and disadvantaged are the most efficient available.

Consumer Affairs Victoria would welcome your comments on the paper, These may be directed to:

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Comments received will assist CAV to further refine its consideration of this important subject.

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Section 1 Overview

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1.1 Introduction

A key objective of Consumer Affairs Victoria is 'to improve access to consumer protection services, particularly for the vulnerable and disadvantaged'. CAV's 2003-06 Strategic Plan requires the development of 'a clearer understanding of the nature and extent of market vulnerability and disadvantage'. A comprehensive definition of consumer vulnerability and disadvantage is a step towards this objective.

This paper attempts to define 'vulnerable' and 'disadvantaged' in a manner relevant to CAV's objectives and functions. The development of a common understanding of the terms across CAV and its stakeholders will assist in evaluating the effectiveness of current services in meeting the needs of vulnerable or disadvantaged consumers and identifying gaps in CAV's activities and lead to improvements in protection targeted to them.

This paper is distributed to promote discussion between CAV and its stakeholders on the concepts of consumer vulnerability and disadvantage and accordingly is not an 'official' CAV statement on the matters, and comments on the paper are welcome.

1.2 Key points in analysis underlying definitions

The analysis underlying the proposed definitions focuses on the characteristics of markets and consumption, as well as personal capacities and circumstances, that are likely to contribute to consumer vulnerability and disadvantage. The analysis emphasises information issues: consumer vulnerability and disadvantage are viewed as the result of the interaction of particular market and transaction characteristics which may create information problems with personal capacities and circumstances that affect consumers' access to and processing or use of information.

The 'market dimension' of consumption incorporates the motivations of buyers and sellers, consumers' information requirements for successful purchases[1] and the capacity of markets to 'fail' in ways that are detrimental to consumers. The 'personal dimension' of consumption incorporates those attributes and circumstances of individuals that affect how purchase decisions are made (particularly access to and use of information) and how a consumer is positioned in transactions relative to sellers.

Variables in each of the market and personal dimensions affect consumer vulnerability, but it is not necessary for there to be problems in both dimensions for concerns about vulnerability to arise. Consumers with normal capacities and in 'ordinary' personal circumstances may still be susceptible to detriment, due to the characteristics of a particular market, product or transaction, for example where complex medical or legal services are purchased. Conversely, a consumer with

[1] Purchases that meet a consumer's reasonable *ex ante* expectations of the satisfaction to be derived from use of the product.

constrained capacities or experiencing adverse circumstances, for example illiteracy, intellectual disability or physical impairment, may be susceptible to detriment in types of purchases commonly satisfactorily transacted by 'average' consumers.

1.3 Implications

Previous work by CAV on defining disadvantaged consumers focused on broader socio-economic indicators, particularly proxy indicators of adverse consumer circumstances such as low income and low educational attainment. The objective of this work was to identify such consumers among CAV's clientele for performance reporting purposes rather than explore the causes of consumer vulnerability. The usefulness of such indicators should be reviewed in the light of the information-based approach and definitions proposed in this paper.

Some implications for CAV's policy development and service delivery are suggested by the analysis underlying the definitions. In regard to policy development generally, an analytical framework that focuses on market, product and transaction characteristics with potential for information-related problems seems likely to be most fruitful. Such a framework could inform CAV's consideration of consumer protection problems generally, including the need for intervention in markets and forms of intervention.

The analysis also suggests that whether issues of concern arise from particular market characteristics may differ if viewed from the perspective of competition policy or consumer protection policy[2]. For example, while a market characterised by easy entry and exit of firms is desirable from a competition perspective (as market power is unlikely to develop or be sustained), it may be a concern from a consumer protection perspective if 'fly-by-night' operators motivated to exploit consumers are easily entering and exiting the market.

In regard to CAV's service delivery to address the needs of vulnerable and/or disadvantaged consumers, the paper's analysis suggests a careful targeting with regard to both problematic markets/products/transactions and characteristics of individual consumers or groups of consumers.

A further implication is that a challenge to more effectively engage with stakeholders exists for CAV. This challenge exists regarding both the market and personal dimensions of vulnerability. In relation to markets with potential information problems, how can CAV most effectively monitor emerging developments and engage with businesses in relevant markets to better understand suppliers' behaviours that may raise consumer detriment issues?

In relation to further refinement of the personal factors contributing to vulnerability, a sustained engagement with the following is required:

- individuals experiencing these factors and their representative organisations;
- businesses supplying goods and services (particularly essential products such as utility services) to people in these circumstances; and
- other government agencies involved in policy development and service delivery to the relevant categories of individuals.

An obvious difficulty in addressing consumer vulnerability and helping disadvantaged consumers is that the same personal variables that contribute to vulnerability and disadvantage also adversely impact on the likelihood of consumers who have suffered detriment complaining to CAV or seeking CAV's assistance to obtain redress. CAV's challenge is to effectively engage with individuals and groups with a high risk of consumer detriment.

[2] For an elaboration on the theme of a tension between the perspectives of competition policy and consumer protection policy, see Trebilcock, M 'Re-thinking Consumer Protection 'Policy' in Ricket, C.E.F. and Telfer, T.G.A (ed) *International Perspectives on Consumer Access to Justice*, Cambridge University Press, 2003

Section 2 Definitions

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Consumer vulnerability is exposure to the risk of detriment in consumption due to the interaction of market, product and supply characteristics and personal attributes and circumstances. The main cause of vulnerability is this interaction resulting in inadequate information, poor access to information and/or ineffective use of information by a consumer or in the deterrence of complaint or the pursuit of redress by a consumer.

Consumer detriment includes, in addition to physical harm or monetary loss associated with a purchase, satisfaction less than a consumer's reasonable *ex ante* expectation and the denial of a transaction sought by a consumer.

A ***vulnerable consumer*** is a person who is capable of readily or quickly suffering detriment in the process of consumption. A susceptibility to detriment may arise from either the characteristics of the market for a particular product, the product's qualities or the nature of the transaction; or the individual's attributes or circumstances which adversely affect consumer decision-making or the pursuit of redress for any detriment suffered; or a combination of these.

Consumer disadvantage is a persisting susceptibility to detriment in consumption.

A ***disadvantaged consumer*** is a person in persistent circumstances and/or with ongoing attributes which adversely affect consumption thereby causing a continuing susceptibility to detriment in consumption. As a result, a disadvantaged consumer repeatedly suffers consumer detriments or, alternatively expressed, generally obtains below-average satisfaction from consumption.

Not all vulnerable consumers are disadvantaged consumers. Some consumers will be vulnerable only because of either temporary personal circumstances that adversely affect them in consumption; or adverse market, product or transaction characteristics specific to a particular purchase, rather than their purchases generally. Consumer vulnerability is the broader concept, but both are relative and dynamic concepts.

Section 3 Basic concepts

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The approach to constructing definitions of vulnerable consumers and disadvantaged consumers adopted in this paper is to start with the basic concepts from common usage, then consider the consumer context *(Section 4)* and consumer injury *(Section 5)*. The concepts are refined by taking into account the relevant features of consumption *(Section 6)*. Some examples of discussions of consumer vulnerability and disadvantage from other sources are provided *(Section 7)* and the proposed definitions set out *(Section 8)*. The final section discusses some implications for further work by CAV.

3.1 Vulnerability

A person who is 'vulnerable' is capable of being easily or quickly harmed or injured. Vulnerability also implies an association with the concept of risk. An alternate formulation of the meaning of vulnerability is that it is the state of exposure to the chance of injury or loss (certain risks).[3] A person who is highly vulnerable is very open to experiencing detriment to his or her interests.

Vulnerability is a relative concept. There are varying degrees of susceptibility to harm and one person may be more, or less, vulnerable than another. A person's degree of vulnerability will be influenced by two categories of factors:

- ability to protect or defend against the chance of injury or loss; and
- ability to cope with the negative consequences of injury/loss when it occurs.

Vulnerability is a dynamic concept. It is likely that a person's vulnerability (in whatever respect) will change during the course of his or her life. There are certain risks intrinsic to specific stages in the life span and factors in the two categories above are likely to vary over a life.

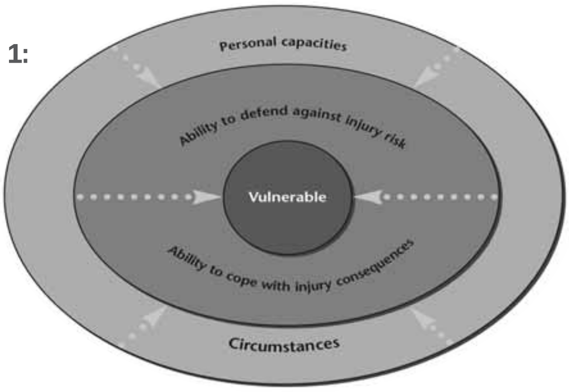
Two broad 'dimensions' of vulnerability can be identified:

- a person's overall mental and physical capacities; and
- a person's circumstances (in the broadest sense, including income, age, class, ethnicity and so on).

The UK Better Regulation Task Force defined vulnerability by reference to individual capacity and circumstance. It proposed that these factors need to be considered both separately and in combination to help determine the degree of vulnerability in individual experiences. It observed that 'full capacity will not always mean that there is no vulnerability...' and that 'circumstance does not necessarily lead to high vulnerability.'[4]

Normal capacities will not necessarily mean there is no vulnerability, for example a sole parent with work skills unable to work because of the absence of affordable childcare may experience vulnerability due to low income. Also a circumstance alone may not lead necessarily to high vulnerability, for example an indigenous or immigrant family background. Capacity and circumstance separately and in combination will influence a person's ability to protect or defend against the chance of injury or loss and cope with the negative consequences of injury when it occurs. These generic factors are represented diagrammatically in **Diagram 1** below.

Diagram 1:



3 This risk-based definition is adopted in the Report of the Expert Workshop on Ways and Means to Enhance Social Protection and Reduce Vulnerability, United Nations Commission for Social Development, November 1997 (E/CN.5/1998/5) p. 4.

4 Better Regulation Task Force (UK) *Protecting Vulnerable People*, September 2000, p. 13

3.2 Disadvantage

A disadvantage is any unfavourable circumstance or condition. Common usage of disadvantaged, as in 'the disadvantaged', particularly connotes a persistence of the unfavourable circumstances or conditions because the individual cannot change them (such as mental incapacity, race or ethnicity); or cannot readily or easily change them (such as socio-economic status or educational attainment). The persistence of unfavourable circumstances may be attributed to factors inherent in the structure of the society. For example, a report to the United Nations Economic and Social Council states:

> By "disadvantaged", we refer to all groups that encounter structural obstacles (i.e., obstacles created by society) to access to resources, benefits and opportunities. Those obstacles derive from the relationships of power which exist in all societies and the relative value which society gives to each group…The structural causes that underlie disadvantage include race, ethnicity, gender, religion, indigenous or national origin, and socio-economic status.[5]

Some adverse circumstances are temporary. Retrenchment, which results in unemployment and the associated loss of income, may disrupt a person's usual pattern of consumption. Depending on the duration of unemployment and the level of financial resources able to be drawn on, the retrenchment may cause financial and other hardships. However, the period of unemployment may be relatively short and previous consumption resumed. Such a temporary circumstance of itself would not necessarily lead to the person being described as 'disadvantaged'. This is distinguishable from, for example, the case of an indigenous single mother who probably would be regarded universally as disadvantaged.

Disadvantage also is a relative and dynamic concept. There are varying degrees of disadvantage: one person may be more, or less, disadvantaged than another. It is possible that the degree of a person's disadvantage and/or the cause(s) may change during the course of his or her life.

As standards of living rise over time in a particular society, what is regarded as a disadvantage by one generation may not have been regarded as disadvantageous by an earlier generation. An example in respect of educational attainment (and hence to a substantial degree employment, income and consumption possibilities) is that being educated only to year 11 schooling probably would be considered a substantial disadvantage now, but would not have been in the 1960s.

A number of factors may contribute to disadvantage. Some of these tend to be experienced simultaneously. Some relate to individual capacities; others to broader societal circumstances, including structural factors arising from the distribution of power in a society. Obviously, those who experience multiple factors will be more severely disadvantaged. It is apparent from the list below that an individual cannot change or readily or easily change many of these. A non-exhaustive list of factors could be:

- mental capacity;
- physical capacity;
- race or ethnicity;
- age;
- gender and sexual preference;
- health status;
- educational attainment;
- labour force status (employed or unemployed);
- income status; and
- geographical location (remoteness from urban-based services).

[5] U.N. Report of the Expert Workshop, p. 4.

Section 4
The consumer context

4

Vulnerability and disadvantage are concepts with very wide potential application. As the report to the Economic and Social Council of the United Nations comments: 'Vulnerability is a part of the human condition; some might say it is our vulnerabilities that make us human. No one is without vulnerability…'[6] Disadvantage equally has broad usage. The definitions must be about consumer vulnerability and disadvantaged consumers to be useful to CAV. Thus, the next step is to focus on the pertinent features of consumption that need to be incorporated in workable definitions. The analysis in this section introduces the market dimension and also focuses on the personal attributes and circumstances that are particularly relevant to consumption.

A consumer is a person who purchases a good or service for final consumption.[7] Consumption is the use of a good or service to satisfy a physical or psychological need or desire – for durable goods, use is spread over time. (The satisfaction an individual derives from the consumption of goods or services is referred to as 'utility' in economic theory.) Many consumers purchase goods and services, particularly durable goods, as a member of a household and these purchases involve joint decisions to satisfy joint needs. Everyone is a consumer and consumer spending underpins the national economy as it accounts for 60 per cent of Australia's Gross Domestic Product.

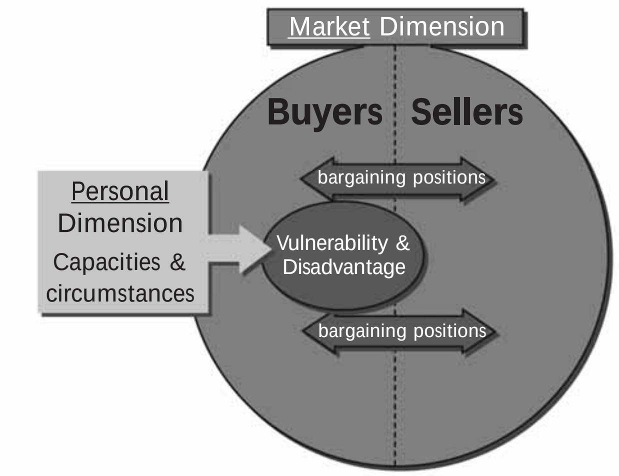
Two major dimensions of consumption relevant to considering consumer vulnerability and disadvantage can be identified.

These are:

1. the *market* dimension – the nature of markets generally and the characteristics of a particular market in question; and
2. the *personal* dimension – individuals' attributes and circumstances which affect consumption decisions, including personal capacities, the determinants of preferences, income and the social context of consumption.[8]

Referring back to the factors affecting vulnerability in Diagram 1 indicates that many of the personal capacity and circumstance variables (such as mental capacity, age, income etc.) that influence vulnerability are relevant to the personal dimension of consumption also. **Diagram 2** depicts the consumer context of vulnerability.

Diagram 2: The consumer context – market and personal dimensions



[6] U.N. Report of the Expert Workshop, p. 4.

[7] Final consumption distinguishes these from goods or services used to produce other products.

[8] These variables include psycho-social factors. Preferences and consumer behaviour may not accord with the premise of microeconomic theory, that is, the individual consumer will purchase a combination of goods/services in line with his/her tastes to maximise total utility within his/her budget constraint.

4.1 Market dimension

Consumer purchases are exchange transactions in markets. A market can be defined as a collection of buyers and sellers that interact, resulting in the possibility for exchange.[9] The subject of transactions for consumers generally will be goods, services, real property[10] or financial securities and the medium of exchange is money.

The main characteristics of markets relevant to our considerations are:

- the tension in the motivations of the parties to a market transaction;
- the information requirements of consumers for successful purchases; and
- the capacity of markets to 'fail' in ways that are detrimental to consumers.

Tension in the parties' motivations

A consumer engages in exchange with a supplier of a good or service for the utility value of the particular good or service, in other words for the satisfaction or pleasure that the use of the good or service is expected to provide the consumer. The supplier engages in the exchange for profit. In most transactions the supplier's objective in supplying the purchased product is to obtain a contribution to profits.[11] In a particular transaction there is a tension between these objectives: achieving one objective is not dependent on the other being achieved. The supplier's profit is not dependent on the consumer fully, or even partially, obtaining the satisfaction he or she expected from the purchased product; and the customer's satisfaction is not dependent on the supplier obtaining a profit from the transaction.

Suppliers have a short-term motive to extract whatever gain is possible from each transaction. However, for most businesses, acting on this motive is tempered (to varying degrees) by the existence of competing sellers in the market and dependence on sales revenue from repeat custom for longer-term profitability. Buyers generally will have other sellers to purchase from. Unfair and 'sharp' dealings by a business or supplying products that do not provide the satisfaction sought by the bulk of its customers generate neither sales revenue from repeat custom nor goodwill that can be capitalised on the sale of the business.[12]

While there is an interdependence between consumers and producers at the macroeconomic level through the circularity of the 'consumption-production-employment-income-consumption' chain, at the microeconomic level there is no interdependence between the individual supplier and consumer in the shorter term. There is an incentive, if only for unscrupulous suppliers in the short term, for suppliers to exploit this situation. At its worst, the tension between consumer and supplier interests can lead to attempts by suppliers to deliberately deceive consumers. Even without exploitative motivations on the part of suppliers, the level of information that is optimal for suppliers to provide may differ from the level of information that is optimal for consumers.

Consumer information requirements

Consumer purchases obviously involve decisions. Rationale choices – where a consumer tries to maximise his or her utility given a limited budget – require information about:

- the capacity of products (substitutes and complements) to satisfy the individual's particular needs/desires;
- the terms and conditions of purchase; and
- the prices of relevant products across suppliers.

The theoretical construct of perfectly competitive markets assumes that consumers and suppliers have the same and complete information about the variables relevant to their choices. In reality that is rarely the case. Differences between the information possessed by buyers and sellers in a market are termed 'information asymmetry'.[13] This type of 'market failure' is discussed further below.

Where there is asymmetric information in a product market, almost invariably sellers will have more information than buyers. Some products would require the compilation and comprehension of large amounts of technical knowledge for prospective consumers to make informed decisions about their quality and utility. The cost of obtaining such information may be prohibitive to an individual. Even if it were obtained, ordinary consumers would not be able to comprehend the information and make knowledgeable decisions based on it. In the case of most services (and some products with a goods component such as restaurant meals) their quality and capacity to satisfy needs can only be assessed after purchase and consumption.[14]

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[9] Pindyck, R. S. and Rubinfeld, D. L., Microeconomics, Macmillan, New York, 1989, p. 11.

[10] 'Real property' is interests in land (with the exception of leasehold interests, however, being classified as personal property).

[11] There are various theories about the economic objectives of suppliers, such as profit maximisation (the working assumption in the theory of the firm), sales-revenue maximisation, asset-growth maximisation etc. These are beyond the scope of this paper.

[12] 'Fly-by-night' traders will not be constrained by such longer term considerations.

[13] This asymmetry is distinguishable from the potential asymmetry between *ex ante* and *ex post* information.

[14] We would expect differences between *ex ante* and *ex post* information to result in difference between the optimal choices that would be made, given the availability of either information. These different decisions, in turn, are likely to result in differences between *ex ante* expected utility and *ex post* utility. This difference, however, should not be taken as evidence for consumer detriment. See the discussion of consumer detriment in Section 6

Some suppliers may be inclined to exclude certain customers from access to supply or provide them with information that is inferior to that provided to customers generally. In other words, a supplier informs or supplies a consumer on a discriminatory basis due to the supplier's perception of the customer's capacities or circumstances.

Discrimination may be based on cultural or racial differences. Other examples are where a supplier does not provide wheelchair access to the business's premises or does not provide sales information in languages other than English.

'The personal dimension' section, on page 9, identifies issues arising from the interaction of consumer information requirements and personal capacities and circumstances. The other side of the market, that is supplier behaviour in relation to information disclosure, is not examined in any detail in this paper, but it is obviously important to developing an understanding of consumer vulnerability and how the problem may be better addressed by CAV.[15]

Market failure

Markets may fail to operate competitively or produce efficient outcomes for several reasons. There are four major sources of failure: the existence of 'public goods'[16]; 'externalities' of production or consumption[17]; market power and information asymmetries. Of these, the first two involve effects that tend not to impinge on the position of individual consumers in market transactions and are not discussed further here. The last two are more relevant to a consideration of consumer vulnerability or disadvantage.

A definition of market power is 'the ability of a firm or firms profitably to divert prices, quality, variety, service or innovation from their competitive levels for a significant period of time'.[18] Market power may be exercised either unilaterally by a single firm in a market (a monopoly), or coordinated among firms.

Market power brings with it a particular danger of exploitation of the consumer by the supplier. Market failures may prevent an efficient quality and quantity of product information from being provided. As with consumer search, information may be costly to produce and disseminate, such that at some point the provision of additional information is no longer desirable from a supplier's viewpoint (the marginal cost exceeds the marginal benefit of producing the information). This implies that the level of information provision that is optimal for a supplier may differ from the level of information that is optimal for consumers to obtain.

A supplier with a large degree of market power also may use information as a strategic variable. Different levels of search costs may be used to price discriminate between consumers, charging customers for whom search is expensive a higher price than customers who are willing to search more. Suppliers with market power may have an incentive to create uncertainty by creating product price and quality dispersion and making information more complex ('informational noise'), perhaps through bundling of products together with add-ons like guarantees or maintenance contracts if it is difficult to isolate the costs and benefits of particular products.

The exercise of market power may include the provision of only minimal information to prospective customers without concern that sales may be diverted to competitors. Competitors may share the same negative attitude to consumers and have no interest in countering misleading or limited information, for example the health hazards of cigarettes and advertising by cigarette manufacturers.

Consumers may face higher prices and lesser standards of service than would be the case otherwise under competitive market conditions. Even in markets where the traditional tests of market power used by competition authorities would raise no great concerns, there may still be some 'informational market power'. This simply reflects the likelihood that consumers lack comprehensive knowledge about prices and quality. If consumers are less than perfectly informed about the prices charged by other firms (highly likely), a supplier may be able to increase its prices without losing all customers.[19] Search costs are likely to be substantial in cases where:

- product characteristics are unobservable prior to purchase or it would be prohibitively expensive for an individual consumer to assess the relevant characteristics ;
- products are technically complex and even though there may be no hidden characteristics interpretation and evaluation of the available information would require considerable expertise;
- purchase decisions have effects reaching into the longer term future, which in turn implies that some degree of uncertainty is unavoidable so that any decision involves

15 For a discussion of supplier information disclosure see Chapter 3 of United Kingdom Office of Fair Trading, Research Paper, No. 11 'Consumer detriment under Conditions of Imperfect Information'.

16 A public good is a good that cannot be supplied to one person without being provided to others, i.e. it is impossible to prevent joint consumption. As anyone can receive the benefit without paying for it, no one will pay for it and private producers have no incentive to produce it. The market fails to provide such goods/services (e.g. street lighting, national defence etc.) which a community requires.

17 An externality of consumption is any cost or benefit from consumption that fall on others besides the buyers and sellers of a particular good or service. Where there are external costs (e.g. passive smoking) not reflected in market price, society incurs a loss due to the costs not met by the buyers and sellers; where there are external benefits (e.g. immunisation against infectious disease) not reflected in market price, society incurs a loss through the missed opportunity of not having more of the product.

18 Australian Competition and Consumer Commission, Merger Guidelines, June 1999. Dawson J. in the well-known High Court QWI Case quoted approvingly the Kaysen and Turner definition of market power: 'a firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions'. [Kaysen and Turner (1959), Antitrust Policy, p.75 quoted in Queensland Wire Industries Pty. Ltd. v. The Broken Hill Proprietary Company Limited & Anor (1989) ATPR 40–925, at 50,015.]

19 It is not necessarily rational for consumers to attempt to obtain all possible information relevant to a particular purchase decision – this depends in part on the costs of obtaining and processing information which in turn partly depends on supplier behaviour.

probability assessments (many types of financial services, some consumer durables and purchases requiring the signing of lengthy contracts); and

- combinations of these characteristics occur.

The importance of product and price information to decision-making by consumers has been noted already. The market mechanism, left to operate unfettered, would often fail to provide adequate information, such as in relation to products that are only purchased infrequently, or that are too complex for the ordinary consumer to knowledgeably evaluate. A potential consequence of information asymmetry for consumers, in addition to its impact on their decision-making effectiveness and bargaining position in transactions, is that lower quality products may drive higher quality products out of the market due to (apparent) price advantages. Alternatively, firms that are able to establish a reputation as producers of high quality products (supported by marketing and advertising) may be able to extract a price premium over the additional costs of producing higher quality. The outcome of either situation is that overall community welfare is reduced because quality is lower or prices higher than would occur without information failures.

4.2 The personal dimension

The second dimension of consumption is the personal attributes and circumstances that affect consumption decisions. Personal attributes and circumstances can impinge on consumption by affecting:

- the formation of needs to be satisfied;
- whether the information requirements for effective purchases are met[20]; and
- access to particular product markets.

Formation of consumption needs

Personal attributes and circumstances affect the composition of the 'basket' of products that a consumer purchases in a particular period and over time. We have noted already that consumers purchase products for the satisfaction or pleasure that they provide. What provides satisfaction to a particular consumer is the result of a web of physiological, psychological and social variables that influence his or her needs, desires, tastes and preferences. Consumption occurs within a social context also. Individual consumers live in households and communities and belong to ethnic, religious or cultural groups with various norms of lifestyle and associated consumption patterns. The mix of products purchased is not a causal factor in consumer vulnerability or disadvantage, but it may reflect vulnerability or disadvantage.

Information requirements

Perhaps most importantly for defining consumer vulnerability and disadvantage, personal attributes and circumstances affect how a consumer makes purchase decisions and how he or she is positioned in transactions relative to sellers. Personal attributes or circumstances that affect access to and effective use of information are probably most relevant, for example, those that affect a consumer's:

- ability to access information about
  - a product's capacity to satisfy his or her needs, its quality and price,
  - prices charged by alternative suppliers, and
  - potential substitute products and their prices;
- inclination to seek information relevant to the purchase decision and to persist where it is insufficient or not initially forthcoming;
- capacity to understand the information provided by a supplier or suppliers and to recognise deficiencies such as likely omissions, exaggerations or deceptions;
- ability to search for information provided by third parties, meet any associated search costs incurred and understand the information provided;
- inclination to complain or seek redress in the event that the expected satisfaction from a particular purchase is not realised after consumption; and
- capacity to initiate and pursue redress through available channels.

It is evident these are both supply-side and demand-side aspects of information requirements. Some relate to the behaviours of suppliers, others to consumers' behaviours.

Access to particular products or transactions

Some personal attributes and circumstances may preclude access to particular products or price offers or entry to particular markets, or render access difficult so that transaction costs, and hence total purchase costs, incurred are higher than for 'average' consumers without those attributes. Some attributes or circumstances particularly affecting access include:

- intellectual disability;
- impaired hearing, vision or mobility;
- low income (e.g. inability to access price reductions for bulk purchases or direct debit payments); and
- remoteness from urban population centres (e.g. related to access to medical services).

[20] Effective purchases are those that result in the consumer fully obtaining the utility he or she expected on entering the purchase transaction provided the expectations are 'reasonable'.

Section 5
Consumer injury

5

Before refining the concepts of vulnerability and disadvantage by taking into account the pertinent features of consumption identified in Section 4, it is necessary in relation to vulnerability to also define ‘injury’ in the consumer context. An injury in common usage is defined as damage or harm done to or suffered by a person and a particular form of hurt, damage, or loss.[21] This leaves open what constitutes damage or a loss to a consumer. Injury to a consumer could take many and varied forms, including most obviously:

- physical injury or illness from the purchase and use of a product that proves unsafe or inappropriate to the individual’s circumstances or condition; and
- loss of money from a purchase when the product proves to be objectively unsatisfactory (e.g. a purchased good does not work) and a refund is not readily obtainable.

However, beyond such concrete events, there is an area of grey in relation to what constitutes a loss. For example, can a consumer suffer harm or loss even when no transaction and no consumption occur? Is dissatisfaction from a mismatch of a consumer’s needs with product features and quality necessarily an injury? Does a consumer detriment[22] extend to obtaining lower utility from a purchase within a budget constraint because :

- another product providing satisfaction of a particular need equal to that of a product purchased was available for a lower price; or
- another product providing greater satisfaction of a particular need for the same or lower price was available?

Is there a detriment if a consumer pays more to a supplier than a price readily available from alternative suppliers because he or she did not bother to ‘shop around’?

Two approaches to defining injury in the literature are outlined below. The first is a very broad interpretation without reference to causation. The second is a narrower interpretation and involves an assessment of causation.

5.1 A broader interpretation

The UK National Consumer Council defines ‘consumer detriment’ to be ‘any harm or loss suffered by a consumer during, or as a result of, a transaction, or arising from a denial or absence of a transaction’’.[23] Two observations on this definition can be made.

First, it throws no further light on what exactly constitutes a loss to a consumer. Is a consumer loss constituted by the actual satisfaction from consumption of a particular product being less than what was expected by the consumer? If so, does that hold where a consumer held irrational expectations about the satisfaction to be obtained from a particular purchase and does it matter in determining the existence of

21 In legal usage injury has the particular meaning of the infringement of another’s legal rights. Note that the discussion in this section is not concerned with whether there are any remedies under law for the ‘injuries’ described in this section. The injuries listed are not necessarily actionable in the courts.

22 ‘Detriment’ is used interchangeably with ‘injury’ in this paper.

23 National Consumer Council (UK), Consumer Disadvantage, Consultation Paper (October 2000), p. 4.

detriment whether the supplier contributed to those unreasonable expectations by exaggerated claims in its advertising?

If loss is defined to include a shortfall in the actual benefit compared to the expected benefit from a purchase no matter the reasonableness of the expectation, then the argument is effectively one that a detriment arises anywhere a consumer's expectations are not met.

This provides limited practical assistance in policy development and service delivery for a consumer protection agency. The imposition of some qualification on expected consumption benefits through a test of 'reasonableness' seems appropriate.

Second, the latter part of the definition – 'arising from a denial or absence of transaction' – raises the question of whether a consumer can suffer harm or loss even where no transaction and no consumption occur. Under this definition, not only are detriments the outcomes of transaction, they are also denials/absences of transactions. Thus, a person confined to a wheelchair who cannot enter a particular shop to buy a product he or she requires because it is only accessible by stairs presumably suffers a consumer detriment. That consumer was denied the opportunity to enter the transaction by the shop operator's provision of only limited access. What if there is another supplier of the same product accessible by wheelchair in an adjacent suburb? Is the denial of the opportunity for a particular transaction *per se* the loss, or is it the inconvenience and cost of travel and the opportunity cost of time (both probably measurable) to effect a transaction with another supplier whose premises have wheelchair access?

5.2 A narrower interpretation

The economic consulting firm *London Economics* in a research paper prepared for the UK Office of Fair Trading (OFT) defines consumer detriment as 'the loss to consumers from making misinformed or uniformed choices'.[24] The paper elsewhere qualifies 'loss' to be a utility loss. This still leaves a fair degree of uncertainty in interpreting loss. In Section 4 we noted a broadly accepted definition of utility in microeconomics was that it is the satisfaction an individual derives from the consumption of goods or services. Thus a loss would be reduced satisfaction derived from a consumption decision. Reduced satisfaction relative to what? Presumably it is relative to what the consumer expected before he or she entered the purchase transaction. What if a consumer had not previously consumed that product, made little effort to obtain information or held uninformed, exaggerated or irrational expectations about the satisfaction to be obtained from the consumption of a particular product?

Again, a qualification that expectations be 'reasonable' given available information seems appropriate. However, this is not as straightforward as it may seem at first glance.

This interpretation takes into account the cause of loss – 'from making misinformed or uniformed choices'. A fairly complex argument underlies the incorporation of causation in the definition and this is outlined in the following paragraphs.[25] The practical usefulness of this exposition is that it leads to identifying some characteristics of markets and industries where consumer detriment is likely to occur and to a set of indicators signalling potentially problematic markets. This may be of some practical assistance in policy development and service delivery for a consumer protection agency. (*London Economics'* conclusion on potentially problematic markets is summarised later in the box in Section 7

> Consumer detriment can be identified as the utility loss to consumers from making misinformed or uninformed choices. Not every case of choice made with less than the maximum information potentially available constitutes a detrimental choice. In consumption decision-making the following can be distinguished:

24 Office of Fair Trading (UK), Research Paper No.11, 'Consumer Detriment under Conditions of Imperfect Information' prepared by London Economics, (August 1997), p. 60.

25 The following paragraphs in this sub-section are based on Chapter 4 (pp.59-72) of OFT, Research Paper No.11, 'Consumer Detriment under Conditions of Imperfect Information'.

- ‘actual beliefs’ (A), which describe the information the consumer has when making a purchase;
- ‘rational beliefs’ (R), which describe the information the consumer would have after having completed a rational search process and is in effect what the consumer ought to know at the time of a purchase decision;[26] and
- ‘the true distribution’ (T), which describes the best possible information about the world.

Theoretical detriment, therefore, is measured by the difference in the utility level (u), or its money equivalent, that results from consumers making a decision based on their actual beliefs rather than on the true distribution of attributes. However, taking the utility level that would have been achievable had the consumer had the maximum possible information is unhelpful because it takes as the standard of reference an idealised outcome that is simply unachievable in the real world.

Clearly detriment occurs in *all* cases where consumers make choices they should not have made if they had had rational beliefs about the products and services they purchased. This detriment can be defined as (u^R-u^A). Thus, any difference between R and A should give rise to concerns about consumer detriment. A may differ from R in cases where suppliers provide misleading information or where consumers follow some common behavioural patterns that are not perfectly rational because of common human limitations, for example giving excessive emphasis to the recent past.

Detriment should further be identified in cases where some part of the difference between T and R is *avoidable*. It is important to note that not all of the difference u^T-u^R represents a consumer detriment (and, hence, total detriment is not properly captured by u^T-u^A) because information may be incomplete (and, thus, R may differ from T) for good reasons such as, for example, high search costs. Some part of this difference, however, may result from the behaviour of suppliers (for example, search costs may be artificially high due to supplier behaviour). Any part of the difference (u^T-u^R) that is avoidable represents a consumer detriment. The difference between u^T and u^R is completely unavoidable if there is no way to reduce the T– R rational information shortfall, and, in this case no consumer detriment results from the divergence between R and T

The rational information shortfall itself does not give rise to concerns about consumer detriment. Rather it is the extent to which this rational information shortfall could be reduced (and, thereby, the extent to which market outcomes could be improved) that should be addressed as detrimental to consumers. In other words, the degree to which we judge a particular action or type of behaviour as detrimental depends critically on what we can do to remedy (or avoid) it. Without considering avoidability,
it is not possible to consider detriment. It must
be stressed, however, that avoidability has to be addressed on the basis of the *utility* loss from the rational information shortfall rather than on the size of the gap between R and T.

Avoidability is based on the existence of an alternative set of institutional arrangements that, if put in place, would reduce the rational information shortfall. This focus on alternative institutional arrangements is crucial to any measure of consumer detriment. In considering alternative institutional arrangements, one has to take account of the actual beliefs that would result under this alternative institutional arrangement. Remedies may affect the speed and effectiveness with which consumers adapt from possibly mistaken initial beliefs towards the set of rational beliefs. Finally, the cost of the remedy must be taken into account. Even if a specific remedy may lead to a lower difference between u^T and u^R, this has to be balanced against a possible loss on the side of producers and the overall cost of implementing the remedy.

26 R is a key concept and requires a more precise definition: The set of rational beliefs are those pieces of information which a consumer will hold after weighing up the costs and benefits of search (including the assignation of probabilities to uncertain outcomes) and then searching to the point where no further benefit can be gained. As such, it is clear that R must be different for each individual, but we can think of a rational information ‘set’ that is averaged across all consumers, or is based on a representative consumer. In this way, by using the concept of a ‘rational person’ we can draw a parallel to the use of the ‘reasonable man’ in legal cases. (OFT, Research Paper No.11, ‘Consumer Detriment under Conditions of Imperfect Information’, p. 9.)[3] FTA s.160

Avoidability is highest, thus resulting in the largest potential for consumer detriment, in cases where:

- a product is perhaps not intrinsically complex but relevant information is asymmetric and agents (suppliers or consumers) behave such that these asymmetries are not removed and uninformed decisions are made; or
- a product is perhaps not intrinsically complex but relevant information is asymmetric and there exists no credible way to transfer information from the better informed to the less informed party.

The first of these two market circumstances raises questions about behaviour and, in particular, whether a specific form of behaviour directly results in some form of utility loss.

Where a product or service is intrinsically complex or new, the cost of getting more or better information may be so high that the rational information shortfall (T – R) is large. Owing to non-avoidability, this problem may not result in any detriment at all.

In general, consumer detriment does not result from the fact that the consumer made a choice which was optimal at the time it was made (i.e. based on *ex ante* information) but which would not have been made on the basis of ex post information. Rather, consumer detriment occurs because *ex ante* information was not rational (R – A) and/or some part of the rational information shortfall, defined with regard to *ex ante* information, were avoidable.

“Section 6 Vulnerability and disadvantage in the consumer context”

6

The next stage is to refine the concepts of vulnerability and disadvantage by taking into account the pertinent features of the consumer context identified in the Section 4.

6.1 Factors in consumer vulnerability

Essentially, consumer vulnerability – susceptibility to detriment in consumption – arises from the interaction of market and product characteristics and personal attributes and circumstances causing poor access to information and/or ineffective use of information by the consumer or deterring complaint and the pursuit of redress. A consumer in this situation faces a high risk of detriment.

The main **market factors** creating consumer vulnerability are:

- information asymmetry;
- market power;
- exploitative supplier motivations; and
- complex products/transactions.

The main **personal factors** creating consumer vulnerability are those ongoing circumstances listed in ‘Factors in consumer disadvantage’ (right) and temporary ‘life events’, such as the sudden death of an immediate family member, serious acute illness or retrenchment, where a consumer faces unavoidable complex and/or infrequent transactions and/or the consumer’s financial position is significantly altered without warning. The emotional trauma associated with such events may affect the consumer’s capacity for critical assessment of information and logical decision-making and expose him or her to manipulation by unscrupulous suppliers. **Diagram 3** on page 15 provides a broad schematic representation of consumer vulnerability causation.

In terms of the concept of consumer detriment outlined in Section 5, the personal factors listed below highlight that consumers are not homogeneous and the extent of consumer detriment arising from particular market factors will differ across consumers. The distribution of individual detriment is central to concerns about consumer vulnerability. The determinants of consumer search costs are relevant to distributional issues and the effectiveness of individuals in processing and evaluating information is an important determinant (along with the opportunity cost of time). Many of the factors listed below affect capability in processing information and the opportunity cost of time is correlated with income.

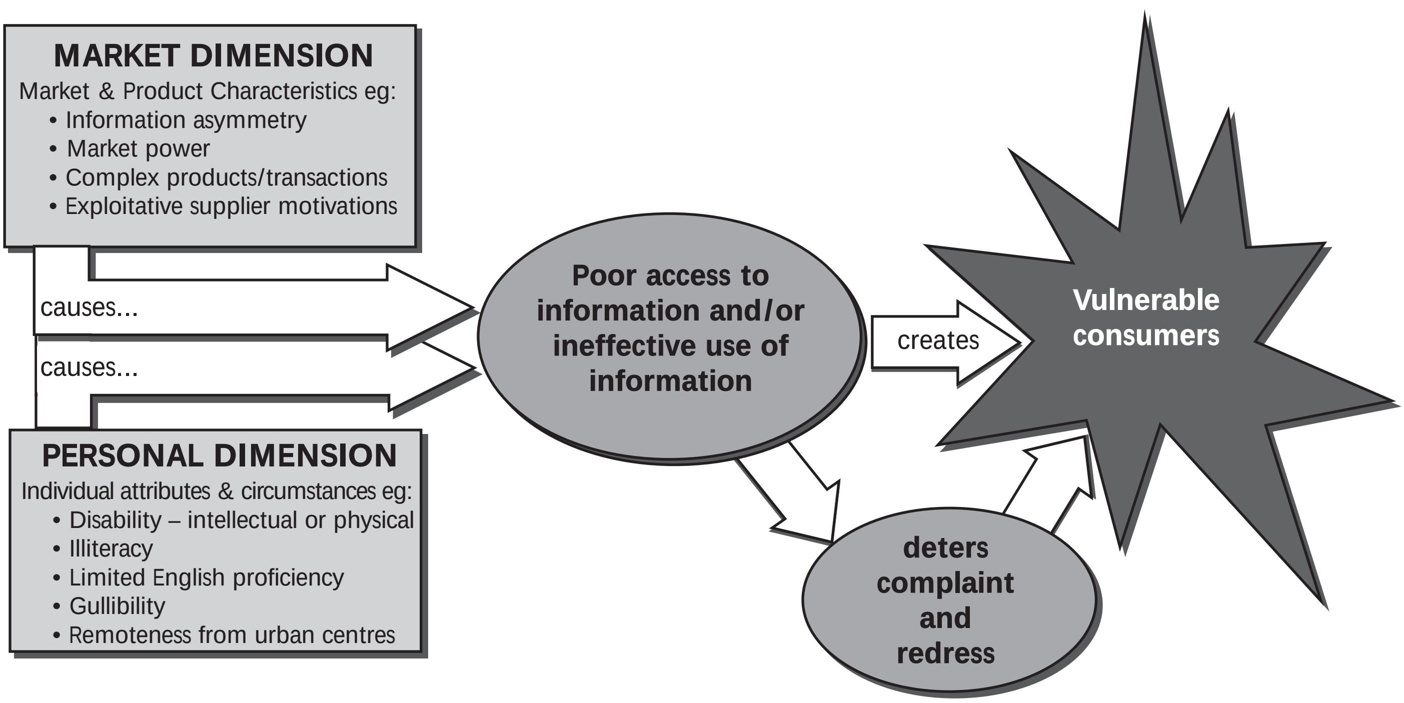
6.2 Factors in consumer disadvantage

The generic definition of disadvantage in Section 3 refers to persisting circumstances or conditions adverse to the interests of an individual. In relation to 'consumer disadvantage', the next step requires identifying what particular ongoing circumstances or conditions may be adverse to the interests of individuals or groups as consumers. The following personal attributes and circumstances that are not easily altered are likely to adversely affect access to and use of information in market transactions and result in detriment to consumers:

- intellectual disability;
- hearing, vision or mobility impairment;
- illiteracy;
- limited English language proficiency;
- low educational attainment (e.g. related to capacity for critical assessment or comprehension of complex/technical product qualities, terms and conditions of transaction etc.);
- gullibility (e.g. related to inclination/ capacity for critical assessment);
- low confidence in exercising interpersonal skills (e.g. related to inclination to seek relevant information and persist if inadequate information is provided initially);
- low income (e.g. capacity to bear own or third party information search costs such as fees for independent financial advice in relation to finance products);
- remoteness from urban population centres (e.g. related to access to particular products or information services); and
- 'time deprivation', that is, insufficient time due to work, family, household or other circumstances to obtain and absorb information relevant to more complex purchase decisions (e.g. to understand a mobile telephone service contract).

The significance of some of these conditions for purchase decisions will vary according to the complexity of the product or transaction. For example, limited proficiency in English may have a negligible effect on everyday purchases from local shops, but probably will have an adverse effect on major purchases of complex services such as legal advice, medical services or financial services.

Diagram 3: Causation of consumer vulnerability



A number of further attributes or circumstances indirectly relating to access to and effective use of information through their association with the variables above can be identified. These include:

- youth (e.g. related illiteracy etc.);
- old age (e.g. related to sensory and analytical capacities, interpersonal skills, mobility etc.);
- non-English speaking background;
- unemployment (e.g. related to low income);
- low educational attainment (e.g. related to unemployment and capacity for critical assessment of information); and
- sole parent status (e.g. related to unemployment, low income and time deprivation).

The income (and wealth) circumstances of a consumer obviously also affect the composition and quantity of consumer purchases. Consumption choices are generally limited by what can be afforded within the consumer's budget constraint (although it may not be consciously formulated as a budget), but does a low income per se make a person a disadvantaged consumer? It seems likely that a proportion of low income recipients will be able to access product and transaction information for their particular consumption 'basket', understand it and use it effectively to make satisfactory purchases. The opportunity cost of time is lower for low-income recipients and, in this sense, information search may be more 'affordable' for low-income consumers.

However, on the other hand, as higher income tends to be associated with higher educational attainment, high-income consumers may have greater capacity to process and evaluate complex product information. Quicker processing and evaluation may outweigh higher opportunity costs of time for higher income consumers. Some kinds of information may not be able to be accessed and processed without a certain level of education and transaction experience at all (for example, perhaps financial services and retirement income products). If the effectiveness of processing and evaluating information is an important determinant of overall search costs, then lower income consumers may tend to pay higher prices than high-income earners. Furthermore, the UK National Consumer Council cites research demonstrating that 'people with low incomes not only have less to spend but also face higher costs and receive poorer quality goods and services'.[27]

6.3 Matrix of consumer vulnerability

The diagram on page 18 contains a 'matrix of consumer vulnerability'. Variables in both the market and personal dimension affect consumer vulnerability. The main variables are listed down the page in headings in the matrix table. The main requirements for effective consumer purchases that relate to information are summarised in the headings across the page. Where these requirements are not likely to be met or only partially met, the potential for vulnerability exists and this is indicated by the shaded cells in the table. The higher the likely vulnerability, the darker the shading. No shading indicates that there is no necessary reason to consider the information requirements would not be met. The shadings are indicative only and a range of arguable views could be held about their appropriateness. It is important to note that each market would produce a different pattern of shadings. Information 'Availibility and Access' mainly reflect supply-side factors; Search and Use reflect demand-side factors.

The matrix concept provides a guide to the potential consumer vulnerability based on the probability of the information-related requirements for satisfactory consumer purchases not being met. For example, looking across the 'intellectual disability' row there is a dark shaded cell under all nine 'information requirement' columns (grouped under the three broad categories of 'availability'', 'search' and 'use'). Clearly a consumer with this personal attribute is generally unlikely to effect purchases where the identified information requirements are satisfactorily met. By comparison, looking across the 'geographical remoteness' row there is no shading in the 'inclination to search' or 'capacity to understand' columns. While remoteness may affect a person's access to information there is no reason to assume that it necessarily determines a remote consumer's inclination to search for information (although he or she may incur higher search costs) or his or her ability to understand it once obtained.

27 National Consumer Council (UK), Consumer Disadvantage, p. 3 referring to National Consumer Council, Why the Poor Pay More, MacMillan, 1977 and Scottish Consumer Council, Poor and Paying For It, HMSO, 1994.

Under the ‘market context’ category in the ‘supplier motivated to exploit’ row, for example, there is no shading under the columns relating to access to information on alternative suppliers or substitute products as such access is outside the control of the exploitative supplier; nor is there any shading under the (consumer) ‘capacity to understand’ column, again because the supplier cannot influence this. The risk of vulnerability would increase significantly in this particular market context where there is an interaction with a gullible consumer.

6.4 Relationship between vulnerability and disadvantage

Vulnerability and disadvantage are often used as though they were interchangeable. They are clearly inter-related concepts. Disadvantaged consumers are by definition vulnerable consumers. The greater the degree of disadvantage suffered by a person, the more likely the person’s degree of vulnerability will be greater also. The more vulnerable a consumer due to personal factors, the greater the likelihood that he or she will be a disadvantaged consumer.

While they are related, a distinction can be drawn between the concepts. Will a person who is vulnerable in a particular transaction at a particular time necessarily be a disadvantaged consumer? The generic definition of disadvantage offered in Section 1 suggests the distinction rests on the persistence of a specific adverse circumstance or condition causing vulnerability. An event through which a person has a reduced capacity to defend against risk of consumer detriment, such as an acute illness, or retrenchment, will not necessarily constitute an ongoing disadvantage.

Disadvantage is more likely to be enduring where it arises from the innate capabilities of the individual and/or the distribution of power in a society (and in that sense may be considered to be ‘structural’). A person subject to such disadvantages is almost certainly vulnerable as a consumer. Where vulnerability arises from temporary circumstance (a ‘life event’ circumstance) but an individual otherwise suffers no incapacity, the consumer would not be regarded as disadvantaged as well. Consumer vulnerability is the broader concept and the two concepts could be thought of schematically as in **Diagram 4** below.

Diagram 4: Relationship between consumer vulnerability and disadvantage

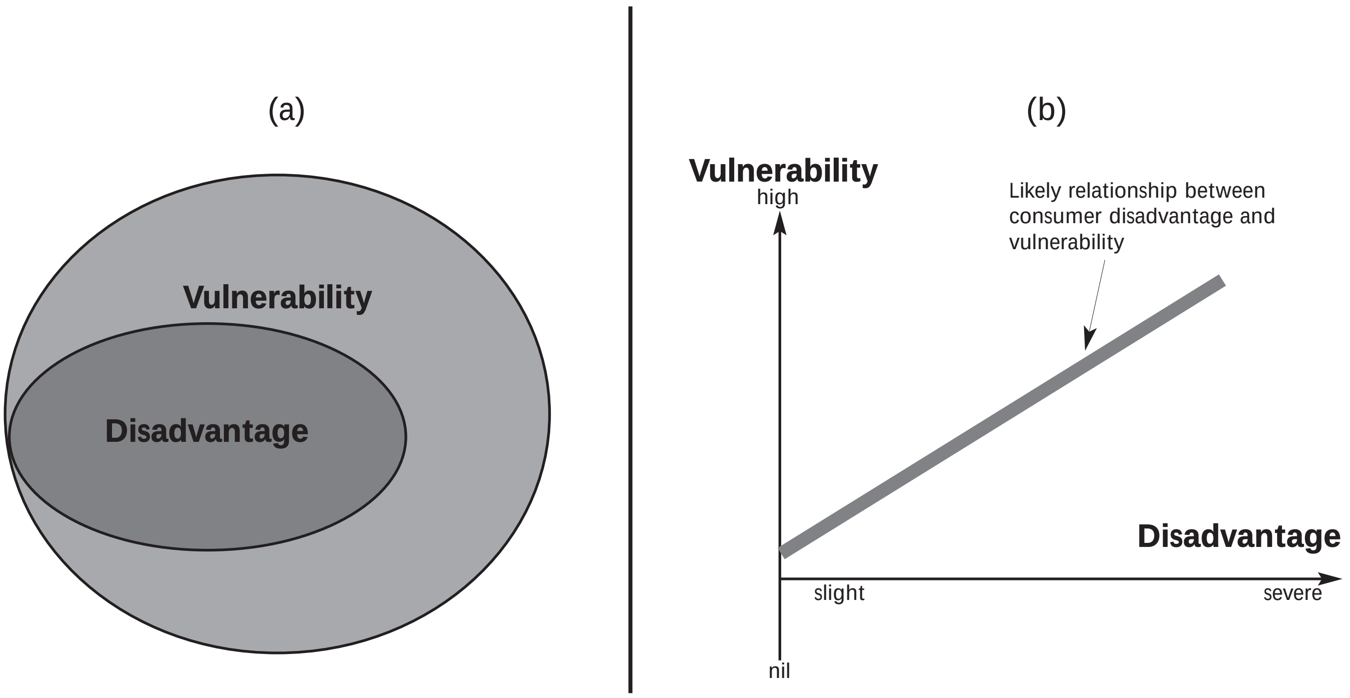
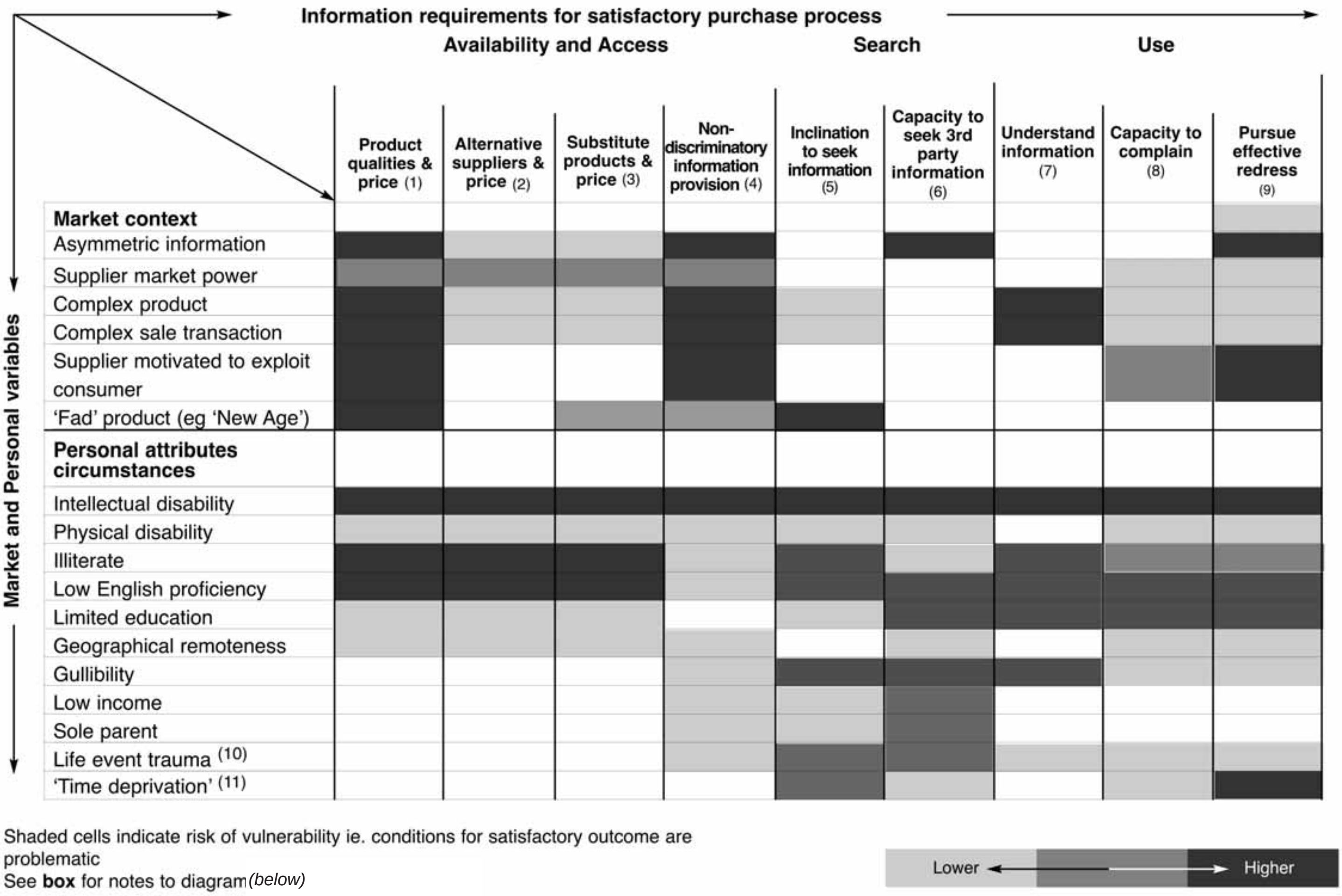


Diagram 5: Matrix of Consumer Vulnerability



Shaded cells indicate risk of vulnerability ie. conditions for satisfactory outcome are problematic
See **box** for notes to diagram *(below)*

Notes to Diagram 5: Matrix of Consumer Vulnerability (above)

Satisfactory purchases' are those that result in the consumer obtaining the utility he or she expected on entering the transaction. Market variables (i.e. the market context and product/transaction characteristics) and personal variables (i.e. individual attributes and circumstances) will affect how a consumer makes purchase decisions and how he or she is positioned in transactions relative to sellers. Given the significance of information to buyers' decision-making and bargaining positions, personal attributes or circumstances that affect access to and effective use of information are most relevant to the concepts of consumer vulnerability. Major information requirements for effective consumer purchases are summarised in the horizontal headings in the matrix. Where these requirements are not likely to be met the outcome for the consumer is problematic and potential for vulnerability exists.

(1) Product qualities & price: Information about a product's capacity to satisfy a consumer's needs, its quality and price is available from suppliers and a consumer is able to easily access the information.

(2) Alternative suppliers & prices: Information about prices is available from alternative suppliers and the consumer is able to easily access the information.

(3) Substitute products & prices: The consumer is aware substitute products exist and information about potential substitutes and their prices is available from suppliers and the consumer is able to easily access the information.

(4) Non-discriminatory provision: Suppliers of the product in question do not provide to certain categories of customers information which is inferior to or more costly to access than that provided to customers generally (in other words, suppliers do not inform prospective customers on a discriminatory basis due to their perception of customers' capacities/circumstances).

(5) Inclination to search: The consumer is inclined to seek information relevant to his or her purchase decision.

(6) Capacity to obtain third party provided information: The consumer is inclined to search for product and price information provided by third parties and can afford third party provider charges.

(7) Ability to understand: The consumer is able to understand the information provided by suppliers, recognise deficiencies such as likely exaggerations or deceptions and draw reasonable conclusions about the capacity of a particular product to meet his/her needs.

(8) Capacity to complain: The consumer is inclined to complain/seek redress in the event that the expected satisfaction from a particular purchase is not realised after consumption and there is an avenue for complaint handling provided by the supplier.

(9) Pursue effective redress: The consumer has the capacity to pursue redress through available complaint and dispute resolution processes.

(10) 'Life event' trauma: An event, such as the sudden death of an immediate family member, serious acute illness or retrenchment, where a complex and/or infrequent purchase is required urgently and/or the consumer's financial position is significantly adversely affected without notice.

(11) 'Time deprivation': Insufficient time due to work, family, household or other circumstances to access and absorb information relevant to a particular purchase decision.

“Section 7 Discussion of ‘vulnerable and disadvantaged’ in other sources”

7

The terms vulnerable or disadvantaged appear in consumer policy literature, although often without definition. Some examples of discussion of the terms are provided below. Where a discussion extends to the causes of vulnerability, it tends to emphasise consumers’ access to and use of information.

7.1 UK Office of Fair Trading

The United Kingdom Office of Fair Trading (OFT) provided the following answer to the question ‘What is vulnerability?’ in ***Vulnerable Consumers and Financial Services: The Report of the Director General’s Inquiry:***

> Most of us have felt vulnerable at one time or another when faced by a new consumer situation. We can recall not having or not understood the information we felt we needed and possibly afterwards regretting an ill-considered decision. We may feel that we have been positively misled by the information we were given. Vulnerability to, or detriment suffered from, inadequate information is relative… Such vulnerability can be increased by higher search costs as a result, for example, of a disability that restricts mobility. Often it can be quite difficult simply to identify where information can be obtained. Other causes of difficulty may include the individual consumer’s level of education and general understanding of financial services. Language and cultural difference can also impose a barrier to understanding the information that is available.[28]

An earlier consultant’s research paper prepared for OFT in 1998, ***Vulnerable consumer groups: quantification and analysis***, which aimed to determine the membership sizes of seven groups of consumers which are commonly assumed to be vulnerable in some respects, observed:

> Consumers may be vulnerable for two reasons. First, some may have greater difficulty than others in obtaining or assimilating the information needed to make decisions about which goods and services, if any, to buy. Second, they may be exposed to a greater loss of welfare than other consumers as result of buying inappropriate goods or services, or failing to buy something when it would be in their interests to do so. Both forms of vulnerability may be experienced by the same individual.[29]

[28] UK Office of Fair Trading, *Vulnerable Consumers and Financial Services: The Report of the Director General’s Inquiry* (January 1999), p. 13.

[29] UK Office of Fair Trading Research Paper, No. 15 (April 1998), *‘Vulnerable consumer groups: quantification and analysis’* by Ramil Burden, p. 5.

7.2 UK National Consumer Council

The UK National Consumer Council paper referred to in Section 3, ***Consumer Disadvantage***, discusses the concepts of consumer vulnerability and disadvantage. The NCC defines a vulnerable consumer to be 'a consumer who possesses a vulnerability factor relevant to a particular transaction or transaction opportunity'. A consumer vulnerability factor is defined as 'a characteristic of a person that exposes him or her to consumer detriment in a particular transaction or transaction opportunity'.[30]

The NCC defines consumer disadvantage as a 'persistent shortfall in consumer benefits experienced by an individual or group' and disadvantaged consumers as 'people who repeatedly get below average benefit from the supply of goods or services'.[31]

The NCC also develops the idea of 'provision deficit' involving the features of supply of a particular product or transaction and the consumer's characteristics (their vulnerability factors). A provision deficit occurs when there is a mismatch between the two and this results in a consumer detriment. In the case of a consumer confined to a wheelchair the vulnerability factor is his or her limited physical mobility and the supply feature is lack of wheelchair access to a particular shop. In the case of a bank customer with no computer skills and no access to a computer the vulnerability factor is the incapacity for electronic transactions, the supply feature is the waiver of fees on electronic account transactions and the consumer detriment is higher fees incurred by the customer to operate his or her account.

7.3 UK Department of Trade and Industry

A comparative study by the UK Department of Trade and Industry released in October 2003[32] included an examination of the extent to which the consumer policy regimes in the 10 countries surveyed 'recognised the issue of protecting vulnerable consumers'. The study's report commented indirectly on the meaning of vulnerability as follows:

> Although consumer policies recognised the issue of protecting vulnerable consumers the team found little in the way of explicit definitions of who constituted the vulnerable at a policy level. At one level they have been defined in terms of case law…; at another it was possible to find legislation that had been enacted which covered all consumers but the benefit of which was really aimed at the vulnerable, for example laws about cooling off periods for agreements concluded in the home. Concepts such as unconscionability in US and Australian law operated to provide greater protection to the vulnerable. In Denmark the Consumer Ombudsman aims to protect consumers on the basis of an "average norm". This means protecting consumers on the basis of the experience and knowledge of the average consumer.[33]

The report concluded that the types of problems faced by consumers, including vulnerable consumers, across the countries were very similar.

These were:

- safety of goods and services;
- purchases of services where asymmetric information existed with the supplier…;
- competency of service providers

and additionally for vulnerable consumers:

- the ability to understand more complex transactions;
- the difficulty in making rational decisions when subjected to high pressure sales techniques;
- worries about excessive borrowing/lending; and
- susceptibility to scams.[34]

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30 National Consumer Council (UK), *Consumer Disadvantage, Consultation Paper* October 2000, p. 4.

31 National Consumer Council, *Consumer Disadvantage,* 2000, p. 4.

32 Department of Trade and Industry (United Kingdom), *Comparative Report on Consumer Policy Regimes,* October 2003 (www.dti.gov.uk/ccp/publications.htm), pp.9-10. The countries surveyed were: Australia; Canada; Denmark; France; Germany; Italy; Japan; The Netherlands; UK; US and the legal framework of the European Union.

33 DTI, *Comparative Report on Consumer Policy Regimes*, p.10.

34 DTI, *Comparative Report on Consumer Policy Regimes*, p.9.

7.4 Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC), in conjunction with member organisations of its Consumer Consultative Committee and other consumer and community organisations, commenced a campaign during 2003 'to improve the ACCC's ability to access trade practices complaints affecting [disadvantaged and vulnerable] consumers by encouraging referrals from these organisations.'[35] The campaign did not include a definition of disadvantaged and vulnerable consumers. However, the ACCC 'referral guide' for these organisations contained a list of 'characteristics of disadvantage or vulnerability':

- low income;
- disability
  - intellectual
  - physical
  - sensory
  - head injury, stroke, brain injury
  - other eg autism;
- serious or chronic ill-health;
- non-English speaking background;
- illiteracy;
- indigenousness;
- homelessness;
- remoteness;
- elderly;
- youth[36]

7.5 High Court Amadio case

The main case revealed in a search of Australian cases using 'disadvantaged' as a search keyword was the landmark High Court Amadio case[37] which effectively has augmented the responsibility of financial institutions towards third party guarantors.[38] While this was a case in equity and the transaction in question was not a consumer purchase, it is noted here because of the discussion of 'disadvantage' and 'disability' in a transaction and the discussion of disclosure and unconscionable dealing issues which are often central to problems of vulnerability.

Deane J. observed that:

> The adverse circumstances which may constitute a special disability for the purpose of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued.[39]

Mason J. elaborated on the use of the qualification 'special' by stating that it is used:

> …in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgement as to his own best interests…[40]

Deane and Mason JJ quoted approvingly Fullagar J in Blomley v Ryan (1956) where he listed examples of 'circumstances adversely affecting a party':

> …poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-á-vis the other.'[41]

35 '*Campaign to protect disadvantaged and vulnerable consumers*', ACCC website (www.accc.gov.au/pubs/publications/consumer/Camp.htm)

36 ACCC, *Campaign to protect disadvantaged or vulnerable consumers:* ACCC Referral guide, 2003, p. 6.

37 Commercial Bank of Australia Ltd v Amadio and Another (1983), 46 ALR 402. Essentially the Court set aside a mortgage guarantee on the basis that it would not be consistent with equity or good conscience for the bank to enforce a dealing with Mr and Mrs Amadio who were under a special disability in dealing with the bank (unconscionable dealing).

38 Monahan, P. and Orr, G., *'Unconscionable Conduct since Amadio'* in The Law Institute Journal, February 2002, p. 55-8.

39 46 ALR 402 at 423.

40 46 ALR 402 at 413

41 99 CLR 362 at 405.

In the specifics of Amadio, Deane J concluded:

> …the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature [in the kitchen of their home for immediate signature] and, most importantly, their lack of knowledge and understanding of the contents of the document was that…they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any degree of equality between themselves and the bank.[42]

A noteworthy point here is the implicit emphasis on the individual's decision-making capacity in the circumstances of a particular transaction, as in Mason's observation that 'the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgement' and Deane's observation that 'they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any degree of equality'.

[42] 46 ALR 402 at 425.

“Section 8 Proposed definitions”

8

Drawing on the preceding discussions the following draft definitions are provided for comment. Reflecting the previous sections, the central theme of the definition relates to issues in the access to and use of information.

Consumer vulnerability is exposure to a risk of detriment in consumption due to the interaction of market, product and supply characteristics and personal attributes and circumstances. The main cause of vulnerability is this interaction resulting in inadequate information, poor access to information and/or ineffective use of information by a consumer or in the deterrence of complaint or the pursuit of redress by a consumer.

Consumer detriment includes, in addition to physical harm and monetary loss, a level of satisfaction less than was reasonably expected from a purchase and the denial of a transaction sought by a consumer.

A ***vulnerable consumer*** is a person who is capable of readily or quickly suffering detriment in the process of consumption. A susceptibility to detriment may arise from either the characteristics of the market for a particular product, the product’s qualities or the nature of the transaction; or the individual’s attributes or circumstances which adversely affect consumption decision-making or the pursuit of redress for any detriment suffered; or a combination of these.

Consumer disadvantage is a persisting susceptibility to detriment in consumption. A disadvantaged consumer is a person in persistent circumstances and/or with ongoing attributes that adversely affect consumption thereby causing a continuing susceptibility to detriment in consumption. As a result, a disadvantaged consumer repeatedly suffers consumer detriments or, alternatively expressed, generally obtains below-average satisfaction from consumption.

Not all vulnerable consumers are disadvantaged consumers. Some consumers will be vulnerable only because of either temporary personal circumstances that adversely affect them in consumption; or adverse market, product or transaction characteristics specific to a particular purchase, rather than their purchases generally. Consumer vulnerability is the broader concept, but both are relative and dynamic concepts.

“Section 9 Some implications for further work: identifying vulnerability in practice”

9

It was suggested at the beginning of this paper that a common understanding of terms could assist in the subsequent design, delivery and evaluation of CAV’s programs and products and improvements in consumer protection by more targeted service delivery. Two main sets of implications arise:

1) in practice how does CAV identify problematic markets, products or transactions or who are vulnerable consumers or disadvantaged consumers; and

2) how can CAV most effectively assist consumers who are vulnerable or disadvantaged?

The second set of implications is beyond this paper, but some observations are offered regarding the first.

9.1 Personal dimension

Work has been done within CAV (and its predecessor CBAV) around some of these issues. The working definition developed in earlier projects was largely based on the variables included in the ABS’s Socio-Economic Indexes for Areas (SEIFA).[43] Thus the definition was essentially a listing of household characteristics included in the SEIFA (e.g. families with annual incomes less than $15,600, households renting from a government authority etc.). This is reasonable as they are proxy indicators of some potentially adverse consumer circumstances relevant to vulnerability and disadvantage.

The purpose of this earlier work was not to explore the causes of vulnerability.

However, this provides only part of the picture in two respects:

- it is limited in its coverage of personal attributes and circumstances, for example the SEIFA-based socio-economic analysis of postcodes that is used to measure access to CAV’s services does not cover variables such as intellectual or physical disabilities ; and
- it does not encompass the market dimension of consumer vulnerability.

In terms of the various personal vulnerability factors, the list in Section 1, (‘Disadvantage’) is a starting point and the focus on their affects on the accessibility and use of information provides an integrating analytical thread. Further refinement of the personal factors requires further engagement with:

- individuals experiencing these factors and their representative organisations;
- businesses supplying goods and services (particularly essential products such as utility services) to people in these circumstances; and
- government agencies involved in policy development and service delivery to the relevant categories of individuals.

An obvious difficulty in addressing consumer vulnerability and helping disadvantaged consumers is that the same

43 See for example ABS, Information Paper: *1996 Census of Population and Housing Socio-Economic Indexes for Areas*, Catalogue no. 2039.0 (October 1998).

personal variables that contribute to vulnerability and disadvantage also adversely impact on the likelihood of consumers who have suffered detriment complaining to CAV or seeking CAV's assistance. Engaging effectively with individual consumers and groups of consumers who are the most vulnerable is an ongoing challenge for CAV.

9.2 Market dimension

Consumers with normal capacities and in ordinary personal circumstances may still be vulnerable, due mainly to information problems related to the characteristics of a particular market, product and/or transaction. A significant implication to draw from the discussion in this paper is that the market context needs to be incorporated more into CAV's consideration of vulnerability and disadvantage. This requires more research into and understanding of information problems and includes aspects of the structure of particular markets, market behaviours, the nature of products and the characteristics of particular transactions. A conceptual framework is necessary to guide research and policy development efforts if concern about consumer vulnerability and disadvantage is to be translated into effective assistance. An information-based framework focusing on the quality and cost of consumer information seems likely to be most productive.

An illustration of where such a framework may lead, without elaborating on the analytical steps or the policy issues, is provided in the **Box** on the next page. This sets out a set of 'indicators' of 'problematic markets' where concerns about consumer detriment might arise. Some of these have been noted already in the discussion in Section 4. The Table applies these indicators to a number of goods and services. These examples are in the context of the United Kingdom of course and are provided here as illustrative of the use of an information-based approach to identifying consumer protection concerns. These do not represent CAV's assessment of the corresponding markets in Victoria.

However, consumer problems have arisen in relation to some of those listed in the table, for example funerals, cars, building services, mobile phones, life insurance. Some of those listed are subject to jurisdiction of regulatory agencies other than CAV, for example life insurance and pensions.

Greater incorporation of market factors into developing policy on vulnerable consumers requires research on the characteristics of particular markets and monitoring of 'emerging developments' in particular markets, particularly with an eye to potential informational problems. This, in turn, requires engagement with businesses in relevant markets to better understand suppliers' behaviours that may raise consumer detriment issues.

Trebilcock refers to:

> the special importance of devising early warning systems to alert policy-makers to potential problems in their incipiency so that pre-emptive action is facilitated. Timeliness is a prerequisite of effective government action. Markets are likely to solve most information problems, given time, although many consumers may be prejudiced in the meantime. A central issue thus whether government can abridge these market lags.[44]

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44 Trebilcock, M., 'Re-thinking consumer protection policy' in Rickett, C.E.F and Telfer, G.W. (ed.) *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, 2003, p.69

Box: London Economics' indicators of potentially problematic markets

Significant price dispersion for relatively homogeneous goods

This suggests that consumers do not engage in sufficient search and do not effectively compare prices. An assessment will need to consider the degree of homogeneity. Few markets contain homogenous goods, so the issue is one of degree. Does the price dispersion represent any objective difference between the goods and services on offer? How large is the price dispersion relative to estimated search costs? If search costs appear to be low, price dispersion may exist for other reasons.

Focal points of competition

Focal points of competition (e.g. cost-per-copy price in the photocopier market) indicate that the market is characterised by informational problems for which the creation of focal points is a solution. Is the particular focal point of competition that can be observed in a market or industry likely to result in a rational information shortfall that is larger than it would be with a different focal point? This would give rise to an avoidable T-R gap and, consequently, consumer detriment.

Bundling of primary and secondary purchases and after-markets

Focal points of competition may be of particular importance where the consumers decide on bundles of primary and secondary purchases or where the initial purchase decision creates demand in an after-market. If the focus of competition is not on the true lifetime cost of the equipment, this may result in misguided consumer decisions and, consequently, consumer detriment. The existence of an after-market may be technologically determined. The need to use compatible spare parts and, to a lesser extent, consumables results in a lock-in of customers.

Commission payments

The use of commission incentives, by any player in the value chain, may force a divergence between the incentives of sales people and consumers. The resulting problems include:

- consumers purchasing products or services that are not appropriate to their needs;
- consumers paying more than necessary for a given product or service; and
- products being of a lower quality than the consumer had been led to believe.

Commission payments paid by upstream firms to sales people or advisers, to encourage the sale of a specific product or service, are likely to be most damaging to consumers.

Complex products

Goods or services that are intrinsically complex (health services or electronic products, for example) present potential information problems for consumers. If consumers cannot understand the nature of the purchase they are making there may be scope for suppliers to exploit this ignorance though high prices or low quality. Not all complex product markets suffer from these problems. If branding, supplier credibility or the efficient use of focal points are employed, the market may solve any informational problems.

Infrequent purchases or credence goods

Consumers can usually learn more from actually buying and using the product or service than from any other source. However, if these mechanisms do not operate well (because the consumer cannot judge quality even after purchase – credence goods), or are of little value (because the consumer is unlikely to make a similar purchase again for some time), learning is hindered and informational problems are likely to occur. Any good or service which is purchased infrequently can result in these problems, not just expensive consumer durables.

Table: Examples of markets with information problems in the UK

Market	Indicators					
	Price dispersion	Focal points	Secondary purchases	Commissions	Complex products	Infrequent or credence purchases
Life insurance	x	–	–	x plus ties	x	x
Pensions	–	–	–	x plus ties	x	x
Mortgages	–	x	x	x plus ties	x	x
Extended warranties	x	–	x	–	–	x
New cars	–	x	x	ties	x	x
Used cars	x	x	–	–	x	x
Building services	x	–	–	–	x	x
Plumbers	x	–	–	–	x	x
Mobile phones	–	x	–	x	x	x
Appliance repairs	x	–	–	–	x	x
Photocopiers	x	x	x	x	x	x
Package holidays	–	x	x	x plus ties	–	–
Domestic appliances	–	–	x	–	–	x
Funerals	x	x	x	–	–	x
Contact lens solutions	x	–	x	–	–	x

Source: Office of Fair Trading (UK), Research Paper No. 11, *'Consumer Detriment under Conditions of Imperfect Information'* prepared by London Economics, (August 1997)

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