



Consumer Credit Insurance Review

Final report

July 1998

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Summary

Prior to this review the Trade Practices Commission (TPC) had conducted a large-scale review of the market for consumer credit insurance (CCI) and released its report on 30 June 1991. In December 1992, a Government working party (GWP) reported on industry's response to the TPC's report and recommended a range of reforms, and that a further review of the market for CCI be undertaken after two years. The Australian Competition and Consumer Commission's review was conducted pursuant to that GWP recommendation.

The current ACCC review is intended to be outcome focussed and as such aims to 'add value' rather than re-examine all issues in detail. Accordingly, the ACCC focused primarily on addressing the review's terms of reference, namely:

- assessing the effectiveness of changes put in place (by industry and government) in addressing the issues identified in the 1991 TPC and 1992 GWP reports (**Part 2**);
- identifying persisting or new problems for consumers of CCI (**Part 3**);
- suggesting cost-effective industry-based action to address any such problems (**Part 4**); and
- providing feedback on the cost-effectiveness of the mix of regulation (**Part 5**).

The ACCC found that since the implementation of the GWP reforms, there have been significant and systemic improvements in the market for CCI in a general sense, with regard to:

- the timeliness, quality and amount of information being supplied to consumers (**section 2.2**);
- access to justice and the remedies available (**section 2.3**); and
- the collection and dissemination of data (**section 2.4**).

However, it is difficult to accurately assess the extent to which these improvements are directly attributable to the GWP reforms as the reforms were bolstered by other changes in the market for CCI such as the General Insurance Code of Practice and, more recently, the Uniform Consumer Credit Code (UCCC).

Despite general improvements to the market as a whole some problems persist. However, these generally do not occur on a widespread basis but in certain 'pockets'.

More specifically, they relate to:

- price and cost of CCI products (**section 3.2.1**);
- competition at the point of sale (**section 3.2.2**);
- training of agents (**section 3.2.3**);
- provision of information to consumers (**section 3.2.4**);
- third line forcing (**section 3.2.5**);
- complaints handling (**section 3.2.6**);

- content and coverage of policies (**section 3.3.1**);
- inappropriate sales (**section 3.3.2**);
- complaints/claims ratio (**section 3.3.3**); and
- overlap of regulation (**section 3.3.4**).

On the supply side, pockets of problems are generally linked to particular distribution systems and outlets, with agents tending to be less reputable the greater the distance between the insurer and agent. This is due partly to differing incentives for sellers at the point of sale according to the seller's relationship to their respective insurer and due partly to issues relating to the training and monitoring of the seller. That is, variations in compliance depend upon whether the seller's income stream is tied to the volume of sales, as is often the case for 'distant agents' where problems tend to occur more readily, or whether the seller receives a salary independent of the number of sales, as is often the case where CCI is sold 'in house' by an employee of the insurer where there tend to be fewer problems.

On the demand side, problems tend to occur more frequently for consumers who are inexperienced, less sophisticated, less educated, in financial need, or who have a poor credit rating (disadvantaged consumers). The inherent difficulties for these consumers are further increased as disadvantaged consumers often purchase CCI through less reputable agents out of necessity and/or a lack of awareness of better alternatives.

The recommendations for change contained in this report are targeted towards those pockets of less reputable agents and disadvantaged consumers. The targeted nature of the recommendations also take into account the fact that substantial costs have recently been imposed on industry in having to comply with various forms of regulation. Accordingly, this report's recommendations are designed, as far as possible, to be implemented through institutions and mechanisms which are already in place in order to provide net gains to consumers with minimal costs to industry.

The recommendations are also intended to be consistent and implemented in line with the Government's response to the Report of the Financial System Inquiry (FSI). Furthermore, as the market for CCI makes up only a very small part of the financial services industry, the recommendations should be adapted, if required, to accommodate any changes that may occur in response to the FSI report.

The ACCC encountered a number of difficulties when assessing the effectiveness of the GWP reforms [**section 5.2**]. Consequently, the conclusions reached by the ACCC as to the relative effectiveness of the GWP reforms and causes were based on a somewhat broad-brush and interpretative analysis.

Nevertheless, GWP reforms regarding information provision [**section 5.3.1**] appear to have delivered net benefits with the most obvious and successful being the post-sale notice and 14 day cooling-off period. For others, such as the pre-sale brochure, the individual benefits are not as obvious or easy to discern relative to the costs.

Consumers have also benefited in terms of greater access to justice and more available remedies [**section 5.3.2**] since the implementation of the GWP reforms, but the precise benefits are less clear cut than for provision of information. Nevertheless, it would appear

that benefits have come about with relatively little, one-off costs either to government or industry.

The GWP reforms relating to the collection and dissemination of data [section 5.3.3] have played an essential part in ensuring the GWP recommendations have had their desired impact.

An assessment of the relative effectiveness of the GWP reforms enabled a number of general implications for future consumer protection regulation initiatives to be identified. These included:

- the importance of a targeted approach to regulation (section 5.4.1);
- the importance of providing optimal information to consumers (section 5.4.2); and
- the need to encourage compliance with regulation by all market participants (section 5.4.3).

Recommendations

Recommendation 1. The reforms that have flowed from the TPC and GWP Reports should be allowed to continue so as to maintain and extend the general improvements which have occurred in the market for CCI over the past two to three years [section 4.2].

Recommendation 2. A range of further targeted initiatives should be pursued in the CCI market but within the framework of existing regulation, industry codes of conduct and institutional mechanisms. These specific initiatives require further action by the Insurance Council of Australia (ICA), Insurance Enquiries and Complaints Limited (IEC), Insurance and Superannuation Commission (ISC) and other (non-insurance) industry associations respectively:¹

2.1 The ICA, when commissioning the next formal review of the General Insurance Code of Practice, should seek to introduce CCI specific guidelines into the code which include requiring its members to:

2.1.1 adopt industry ‘best practice’ with regard to allowing the eligibility to claim on a new CCI policy, after the previous policy is terminated as a result of loan refinancing, to be determined under the previous policy, unless the consequences of entering into the new policy were brought to the attention of the insured at the time the new policy was taken out (section 4.4.2); and

2.1.2 ensure that, where they distribute CCI through ‘distant agents’ who sell CCI in conjunction with other physical and financial products, those agents are required to make consumers complete a simple ‘checklist’ of questions at the point of sale and in the presence of the agent. (The checklist could be developed by the ICA in consultation with relevant regulators and consumer groups and should form part of the insurance proposal.) (section 4.3.2)

2.2 The IEC, as part of its regular review process, should seek to:

2.2.1 establish a common entry point for all CCI related inquiries and disputes in the event a complaint is not satisfactorily dealt with at first instance by internal dispute resolution (IDR) mechanisms. This common entry point should be clearly stated on all CCI policies with the relevant contact details.

The IEC should operate as the common entry point for all CCI related inquiries and disputes on the proviso that a more appropriate alternative is not established following the FSI recommendations on alternative dispute resolution (ADR) schemes in the financial services sector, in particular recommendation 25 which recommends a central gateway for dispute resolution be established.

¹ Future references to the ISC should also be taken to apply to any body that may take over the particular role(s) of the ISC as referred to in this report, for example the recommendation of the Financial System Inquiry to create the Corporations and Financial Services Commission.

The establishment of a common entry point should also be consistent with recent ISC action in convening a ‘Complaints Scheme Roundtable Working Group’ on harmonisation of complaint schemes (**section 4.3.5**); and

2.2.2 extend the jurisdiction of the General Insurance Claims Review Panel to include disputes about an insurer’s/agent’s sales or marketing practices with regard to CCI products (**section 4.3.5**).

2.3 The ISC (or any replacement body responsible for consumer protection in the area of financial services, such as the proposed Corporations and Financial Services Commission CFSC), as part of its on-going regulatory activities and new initiatives in the market for CCI, such as questionnaire surveys, should:

2.3.1 increase its collection and dissemination of disaggregated data which would enable distinctions to be made between the different forms of CCI and the different distribution channels. This may assist in isolating problems to a particular form of CCI, distribution mechanism or individual agent. To this end, the ISC needs to develop industry and consumer surveys that provide a ‘micro perspective’ on the problems which exist and areas where improvements could be made in the market for CCI.

The current ISC/ICA initiatives to develop an industry questionnaire survey as the basis for generating disaggregated industry data should continue and are strongly endorsed by the ACCC. The ISC should extend these initiatives to encompass a similar disaggregated survey for consumers of CCI (**section 4.4.3**);

2.3.2 report on the sale of CCI policies by life insurance companies in a similar way as it does for the sale of CCI policies by general insurance companies (**section 4.4.3**);

2.3.3 review the net benefit of all aggregate CCI data that it collects from industry, with a view to modifying the collection of data and keeping down reporting costs for industry (**section 5.3.3**);

2.3.4 actively target its compliance and enforcement activities to those parts of the CCI market where compliance with the appropriate sales, disclosure and training requirements are likely to be lowest. Specifically, the ACCC suggests that spot-checks, audits and compliance monitoring should target less reputable insurers and agents on a regular basis (**section 4.3.1**); and

2.3.5 continue to liaise and work closely and regularly with consumer and public advocacy groups handling CCI cases in order to further develop a ‘micro’ perspective on the CCI market. (In particular, this should assist the ISC in appropriately targeting compliance and enforcement activities in the CCI market.) (**section 4.4.3**).

2.4 Industry associations which have coverage of motor vehicles, electrical goods and other consumer durables, should seek to: address CCI issues through their own industry regulatory arrangements. More specifically, clauses relating to the sale of CCI contracts should be included in those industry association’s own codes of conduct and other self-regulatory instruments (**section 4.3.1**).

Recommendation 3. Relevant government agencies, industry and consumer advocacy groups should adopt a cooperative approach to develop strategies to educate CCI

consumers. Given that CCI accounts for only a small part of the overall insurance market, the development of strategies to educate CCI consumers should be undertaken in the context of broader industry or ISC awareness and education strategies. This should involve research to examine and identify low-cost, market-sensitive and innovative ways to raise the general level of awareness and education of consumers about CCI (and related insurance) products (**section 4.3.3**).

Recommendation 4. The Government should explore means of boosting the funding of legal centres for insurance related matters. One option worthy of greater examination is supplementing government funding with **industry contributions** to small numbers of community based specialist insurance and finance workers.

These contributions could be linked to complaints data, enforcement action by regulators or the type of products figuring most highly in the work load of these workers. In this way a user pays element can be built in to the cost of providing assistance to ‘disadvantaged’ consumers and ‘grass roots’ market intelligence for regulators and government.

Furthermore, there should be formal arrangements in place whereby community based insurance and finance workers liaise with the relevant regulators on an on-going and regular basis in an effort to share market intelligence as to the difficulties being encountered by consumers.

Even though CCI is over-represented in the work of community based legal workers, it is not sufficient by itself to justify such industry funding. Clearly, a sector wide perspective would need to be taken, and the ACCC is mindful that this can only be taken by the Government in the context of a thorough consideration of the findings of the FSI. If no such funding occurs in the context of the FSI, it is recommended that the Government consider taking action with regard to funding in the context of this report (**section 5.4.1**).

Recommendation 5. The insurance specific exemption under s. 74(3)(b) of the *Trade Practices Act 1974* be removed (**section 4.3.5**).

1. Introduction and overview

1.1 Introduction

The market for Consumer Credit Insurance (CCI) has undergone a number of changes over the past ten years. The history of reviews and reforms is set out at Appendix A.

The involvement of the Australian Competition and Consumer Commission may be traced back to its predecessor's (Trade Practices Commission) study of the market for CCI seven years ago. On 21 September 1990 the TPC received ministerial direction to review the market. The TPC released its report, *The market for CCI — A study of competition, efficiency and the welfare of consumers*, on 30 June 1991. The TPC report identified a number of problems associated with the sale of CCI and made a number of recommendations to address them.

The insurance industry's response to the study included the Insurance Council of Australia (ICA) establishing working parties to implement those recommendations of the study which might be achieved through self-regulatory action by the industry. As part of the Commonwealth Government's response to the study, a Government working party (GWP) was established in July/August 1992 to assess the adequacy of the industry's response and 'investigate and fix' other problems identified by the TPC study.

The GWP made its final report to the Minister for Consumer Affairs and the Treasurer in December 1992. The GWP report included a number of recommendations (reproduced at Appendix B) intended to improve monitoring, performance and consumer protection in the CCI market.

On 31 July 1993 the former Commonwealth Government responded to and released the GWP report. The Government basically accepted the report and a number of legislative and other changes have flowed from that decision.

Late last year the present Commonwealth Government directed the ACCC, in consultation with the Insurance and Superannuation Commission (ISC) and the Federal Bureau of Consumer Affairs (FBCA), to conduct a review of the CCI market and report to the Assistant Treasurer and the Minister for Consumer Affairs upon completion of the review.²

The terms of reference for the ACCC's review are set out in full at Appendix C. Basically, the review was undertaken to identify:

- the **impact** from implementing the GWP recommendations;
- any **continuing problems** being experienced by consumers;
- what, if any, **further action** might appropriately be undertaken by industry; and
- which were the **most effective reforms** and why.

² As from April 1997 the FBCA is formally referred to as the Small Business and Consumer Affairs Division of the Department of Industry, Science and Tourism.

1.2 Objectives, methodology and timing

1.2.1 Objectives of the review

The aim of the review was to assess the effectiveness of changes put in place (by industry and government) in addressing the issues identified in the 1991 TPC and 1992 GWP reports, and to provide feedback on the cost-effectiveness of the mix of regulation. It is hoped that the results will also be useful for guiding the mix of regulation in other industries.

In addition it is hoped that any persisting or new problems for consumers of CCI can be identified and that cost-effective industry-based action to address any such problems can be suggested.

1.2.2 Context of the review

Initially this review was to be conducted by the TPC two years from the release of the GWP report. The meeting of this time frame has not taken place because many of the legislative and regulatory changes recommended were not implemented until some time after the Government's response. Consequently, the initiation of the review has been held back to enable these reforms to take effect before examining their impact.

The timing of the review has also made it possible to take into account the report of the Financial System Inquiry (FSI). Accordingly, the recommendations contained in this report, in so far as they are relevant, are intended to be consistent with the recommendations of the FSI. This will help to ensure the stability, integrity and efficiency of the financial system, which in the words of the FSI are 'critical to the performance of the entire economy'.³

The review is outcome focussed and as such is seeking to 'add value' rather than re-examine all issues in detail. Accordingly, the ACCC will not report in detail on all the GWP recommendations but will focus primarily on identifying the most successful reforms, any remaining problem areas, and market sensitive self-regulatory reforms that can be implemented to improve the market for CCI.

The ACCC notes that the Uniform Consumer Credit Code (UCCC) came into operation on 1 November 1996 and is likely to have a major impact on the market for CCI. However, an assessment of the impact of the UCCC is outside the ACCC's terms of reference and the scope of this review. If it was to be included it could cloud the ACCC's assessment of the impact of the GWP reforms.

Nevertheless, the ACCC is aware of the compliance costs imposed on industry by the UCCC and is conscious of the need to keep any further industry costs to a minimum. Accordingly, the recommendations contained in this report take into account the impact of the UCCC to the extent it addresses the problems and issues identified in this report.

³ Report of the FSI (1997), p. 1.

1.2.3 Review process and information gathering

The initial stage of the ACCC's review saw the preparation and distribution of an issues paper in late November 1996. The paper was circulated to a wide range of interested parties including government agencies, consumer groups, insurance industry associations and insurance companies. It provided information on the issues being considered in the ACCC's review in order to assist those wishing to make a submission to the ACCC.

Subsequent to receiving submissions on the issues paper, the ACCC prepared a draft report which was released for comment on 14 February 1997. The ACCC drew on a number of sources of information in the process of preparing the draft report, including:

- previous studies and reports by the TPC, GWP, insurance industry associations and consumer groups;
- data and statistics from the ISC and General Insurance Claims Review Panel;
- market inquiries conducted by the ACCC;
- discussions with market participants, including industry, consumer groups and relevant government bodies; and
- journal articles, media publications and newsletters.

Shortly after distribution of the draft report the ACCC undertook further market inquiries and had discussions with insurers, industry associations, consumer groups and relevant government bodies.

This final report was prepared based on information obtained from the abovementioned sources and submissions on the draft report received by the ACCC (listed at Appendix D). A roundtable discussion was also held with relevant government agencies, industry and consumer groups to discuss a draft of the final report.

Throughout the review process, the ACCC also consulted and had regard to the advice and comments of the ISC and the FBCA.

1.3 Background

1.3.1 The market for CCI

CCI is designed to protect a consumer's ability to meet loan repayments on personal loans and credit card finance in the event of death (life credit insurance) or loss of income due to injury, illness (disability, or accident and sickness, credit insurance) or, in some cases, unemployment (unemployment credit insurance). These classes of CCI are outlined below in Table 1.

Table 1. Classes of CCI

Class of CCI	Operation of insurance
Life credit insurance	<ul style="list-style-type: none"> ■ Two types — group and individual. ■ Covers — payment of loans in the event of death. ■ Conditions and exclusions — usually excludes death by: insured’s own hand; AIDS; war injuries; a specified age limit. ■ Maximum benefit upon death — balance of loan or a prescribed amount (typically between \$30 000–\$50 000), whichever is the lower.
Disability/accident and sickness credit insurance	<ul style="list-style-type: none"> ■ Covers — payments of loans through loss of income from short or long term incapacity resulting from illness or accident. ■ Conditions and exclusions — definitions vary (e.g. ‘disablement’: must last for a specified period, or unable to engage in any gainful/usual employment); conditions relating to pre-existing illnesses vary; exclusions generally relate to particular causes of illness or injury and specific sporting activities. ■ Maximum benefit — usually a maximum monthly payment (around \$1750), or lump sum (around \$20 000–\$50 000).
Unemployment credit insurance	<ul style="list-style-type: none"> ■ Covers — payments of loans through loss of income from unemployment. ■ Conditions and exclusions — test for unemployment varies (e.g. insured registered with CES, or insured in receipt of unemployment benefits, or insured qualified to receive unemployment benefits); voluntary unemployment excluded; qualifying period often specified. ■ Maximum benefit — period for repayments is limited for continuous unemployment (usually 60 or 90 days); dollar limit often prescribed (usually \$600–\$750 per month).

The structure of the CCI industry is characterised by different distribution arrangements and mechanisms.

The most common method of distribution involves principal/agent relationships. The insurer being the principal/wholesaler, and the credit arranger/merchandise retailer being the agent/retailer. The principal/agent arrangement usually involves CCI being sold by intermediaries (for a commission), such as financiers or car dealers, in conjunction with a loan transaction.

Another distribution arrangement involves CCI being sold by the insurer's (or a subsidiary's or affiliated company's) own employees. This 'in-house' method of distribution closes the gap between the insurer and the seller. Indeed, from the consumer's perspective the consumer is dealing directly with the insurer.

There are also intermediate arrangements in place such as that adopted by the Credit Union Services Corporation (Australia) Limited (CUSCAL) which is a special service provider for credit unions in Australia. CUSCAL is a product finder and developer that on sells CCI to its member credit unions from a large insurer. CUSCAL maintains a central register of all its agents and administers/undertakes the training of agents.

CCI is usually sold as an ancillary product to a finance contract, often for the purchase of consumer durables such as motor vehicles or electrical goods, rather than as a separate item or product in its own right. The implications of CCI being an ancillary product are discussed below in Part 3.

1.3.2 Past difficulties leading to reviews

The reviews of the CCI market (identified at Appendix A) were undertaken after a number of consumer protection issues had been raised during the late 1980s and early 1990s with regard to the sale and purchase of CCI.

In particular the TPC study discovered that many of the difficulties it identified arose largely due to the structure of the industry, that is the CCI market being predominantly characterised by principal/agent relationships.

The agency nature of sales meant there could be a substantial 'distance' between the purchaser and the product provider (the insurer). Furthermore, the need for principals (insurance companies) to gain access to these agents (retail outlets) placed the agents in a relatively strong bargaining position. This appeared to create a number of problems including:

- **costs** — CCI appeared to be an extremely expensive class of insurance to administer and distribute as insurers bid against each other for access to agents with the result that 'reverse competition' increased commissions and delivery costs. This, together with consumers being relatively insensitive to variations in the price and quality of CCI, led to very low loss ratios (funds paid out to consumers as a proportion of premiums);
- **administration** — Problems related to training and supervision of employees and agents, explanation of policy documentation, and claims handling;
- **consumer information** — Consumers' capacity to exercise choice between different CCI products was limited. This arose partly from shortcomings in the timeliness, amount and quality of information made available to consumers and partly from the inherent complexity of the transaction, the ancillary nature of CCI as a product (with consumers usually focussing on the primary transaction rather than on CCI), consumers' lack of familiarity with the product, and the infrequency of the purchase. This led to a reduction in the quality of service the consumer might expect if dealing directly with a reputable insurer; and

- **forcing** — The ancillary nature of the product and high commissions led to concerns about agents forcing CCI on consumers. Conduct of this type is prohibited by the UCCC and could breach ss 47(6), 47(7), 52 and 53(e) and (f) of the Trade Practices Act.

A further concern was the need for effective mechanisms for complaints handling and consumer redress in light of the other problems identified at the time of the review.

2. What has been the impact on the market for CCI products of those GWP recommendations that have been implemented?

2.1 Background to GWP recommendations

The GWP was established in July/August 1992 to examine the adequacy of the industry's response to the TPC report. Reporting in December 1992, the GWP made a number of recommendations (reproduced at Appendix B) to facilitate further improvements in the CCI market.

In particular, the GWP recommendations were intended to improve monitoring, performance and consumer protection. Broadly speaking, these recommendations related to:

- the timeliness, quality and amount of information given to consumers;
- access to justice and complaints resolution for consumers; and
- the collection of statistics and monitoring of the market by the ISC.

The GWP recommendations should not be considered in isolation as they are intrinsically linked to one another. For example, if consumers are to obtain access to justice they need information about their rights and obligations which foreshadows the need for adequate training of agents.

2.2 GWP recommendations intended to improve the timeliness, quality and amount of information given to consumers

2.2.1 Recommendations

The GWP was aware of the need for relevant, comprehensible and timely information to ensure that the market for CCI is responsive to consumers' needs. The GWP proposal involved administrative action by the ISC and legislative solutions.

The GWP recommended that the ISC issue a comprehensive circular covering: the provision of important pre-sale, point-of-sale and post-sale information to consumers; a 14 day cooling-off period from the date of receipt of the post-sale confirmation letter; and agent monitoring and training. The ISC was also to consider alternative methods of conveying important information to consumers other than by using the standard cover system.

The purpose of the ISC's action was to assist the insurance industry to respond quickly to the changes which were already occurring in the CCI market.

The GWP believed legislative action was also necessary to promote effectiveness and efficiency in the supply of insurance to consumers, and especially to purchasers of CCI.

Legislative recommendations involved the amendment of the *Insurance Contracts Act 1984* to provide a statutory basis for disclosure notices. The GWP suggested the prescription of such information as: the length of the cooling-off period; the right to cancel and obtain a full refund of the premium; the amount of commission or other benefit payable; the nature and effect of certain provisions of standard cover; the optional nature of the insurance and the right of the consumer to choose insurers; the duty of disclosure; a statement about derogations from standard cover; and other important matters. The GWP proposed draft of a CCI point-of-sale notice is contained at Appendix E.

2.2.2 Action taken

A number of steps were taken with a view to implementing the above GWP recommendations. These included:

- the issue of Circular G1/94 by the ISC on 16 March 1994. The circular addressed the issues identified by the GWP. It also identified the necessary content of a pre-sale brochure, point-of-sale notice and post-sale letter (reproduced at Appendix F);
- the ISC considered standard cover in its review of the Insurance Contracts Act and against the background of the plain English requirements of the General Insurance Code of Practice. It has been decided to maintain standard cover and to update the regulations as it still has an important role to play in providing safety net cover for policyholders in certain circumstances, and in alerting policyholders to the existence of unexpected exclusions;
- section 64A was inserted into the Insurance Contracts Act (to provide for a 14 day cooling-off period after the insured receives a post-sale confirmation letter);
- the Insurance Contracts Act was amended on 7 April 1994, to require disclosure notices from 1 October 1994. Insurers are now required under s. 71A to: ensure that a pre-sale information brochure is available to a person entering into a CCI contract of insurance; give a written point-of-sale notice, as determined by regulations, to a proposed insured immediately before the insured enters into a CCI contract of insurance; and provide a further written notice by post to the insured, after a consumer enters into a CCI contract; and
- the General Insurance Code of Practice now covers training and monitoring of insurance agents.

2.2.3 Impact

The ACCC notes that the implementation of the GWP recommendations has led to important improvements with regard to the timeliness, quality and amount of information that must be supplied to consumers in the market for CCI.

The improvements in this area were expedited by the ISC circular which assisted the insurance industry in adapting to the changes which were occurring in the market at that time.

The amendments to the Insurance Contracts Act were an essential step to ensure the GWP recommendations were properly implemented.

Basically, the implementation of the GWP recommendations has seen the amount of written information/documentation increase and become more standardised. Consequently, consumers are receiving more uniform written information on a timely basis both before and after their purchase.

The introduction of disclosure notices, as required under s. 71A of the Insurance Contracts Act, has played a fundamental role in improving the provision of information to consumers. However, consumers appear to derive differential benefits from each notice according to the circumstances surrounding the particular transaction (discussed below in section 5.3.1).

The increased availability of information has been supplemented by more formalised and rigorous training requirements for agents. The distribution methods of agents has generally improved with better procedures adopted, greater formality required and better advice being given when dealing with consumers.

The GWP recognised that CCI policies were often complex, legalistic and written in small print, making consumer comprehension difficult. The move towards plain English documentation, particularly under the General Insurance Code of Practice, has seen the quality of information improve with consumers finding it easier to understand the information they receive.

As a whole, consumers of CCI have benefited from the changes as they are generally better informed, have an increased understanding of their own needs, are able to make a more considered choice and are more aware of their rights. Evidence that consumers are more informed may be found in the increase in the incidence of claims since 1992. Although changes in economic conditions may have contributed to the sudden increase in claims during 1993, the level of claims has remained at a comparable level since, which may well reflect better informed consumers (statistics are discussed below in sections 3.2.1 and 3.3.3).

The ACCC notes that the General Insurance Code of Practice, operative since 1 July 1995, has also been responsible for improving the quality of information to consumers through provisions aimed at the training and monitoring of insurance agents and plain English requirements. The objectives and coverage of the General Insurance Code of Practice are summarised below in Information box 1.

Information box 1. The General Insurance Code of Practice

The General Insurance Code of Practice (the code) is a dynamic, self-regulatory code that was developed by the Insurance Council of Australia (ICA) in 1994 and has operated since 1 July 1995. Insurance Enquiries and Complaints Limited (IEC) is responsible for implementing, administering and monitoring the code and has set up a code compliance committee.

The code aims to raise the standards of practice and service across the general insurance industry in the effort to promote good insurance practice and relations between insurers, agents and consumers.

The particular objectives of the code are to:

- describe standards of good practice and service to be met by participating insurers;
- promote disclosure of information relevant and useful to consumers so as to allow them to make an informed choice and compare one product with another;
- facilitate the education of consumers about their rights and obligations under insurance contracts;
- promote informed and effective relationships between consumers, insurers and agents;
- require insurers to have fair procedures for resolution of disputes between consumers and insurers or consumers and agents; and
- provide representation for consumer views in the administration and development of the code.

The implications of the code for CCI include: ongoing obligations on insurers in relation to the training of their agents and employees; documentation to be expressed in plain language; the provision and disclosure of information and advice to consumers; obligations on insurers with regard to claims handling and dispute resolution; participating insurers are required to become members of IEC and participate in the Claims Review Panel scheme; and sanctions may be imposed upon participating insurers if they fail to meet the code's requirements (although a breach of the code does not give rise to any legal right or liability).

Despite the improvements in the market for CCI, the ACCC also notes that the impact of the GWP recommendations has not been uniform. The success of the reforms largely depended upon the action taken by the individual principals/agents when implementing the GWP recommendations. In particular, the level of training and monitoring of agents will greatly influence the benefits which are passed on to consumers.

The main cause for the variation in implementing and complying with the GWP recommendations appears to be linked to the different types of distribution arrangements and mechanisms which exist throughout the market. Generally, the GWP recommendations were more effectively implemented where there was less of a gap between the insurer (principal/wholesaler) and the seller (agent/retailer), or where CCI was sold 'in-house' by the employees of the insurer, or those of a subsidiary or affiliated company of the insurer (as in the case, for example, with most banks).

The different types of distribution arrangements are outlined below in Information box 2.

Information box 2. Different types of distribution arrangements

Firms can adopt a range of methods to distribute and sell their products.

At one extreme, there is a completely in-house sales force and distribution network. In this case firms choose to ‘integrate forward’ to sales and distribution channels, usually to control quality and maintain customer ‘goodwill’ associated with brand name.

At the other extreme firms may sell their products at the wholesale level to chains of stores or to individual retailers, and have relatively little or no influence on how those goods are ultimately sold.

There also exist a range of intermediate commercial arrangements between producers (principals) and retailers of goods and services (agents) — for example, franchising agreements, agency arrangements and the use of subsidiaries/associated companies.

The key determinant for the ‘principal’ in deciding upon appropriate distribution arrangements is the relative costs and benefits of each option.⁴

Clearly, insurance companies in choosing how to distribute CCI products face the same set of calculations.

Selling in-house has a number of benefits in that it can achieve high levels of quality and management control, and compliance with company standards, industry codes of practice and legislative requirements. This can be achieved through tight control of staff training, effective management and reporting systems and auditing of compliance.

However, this investment in quality control, consistency and compliance is expensive in terms of staff training, internal control and management systems, and in the physical infrastructure to distribute the product. These type of distribution arrangements make most sense where the firm is competing on the strength of a well established brand name/customer goodwill, accessibility of ‘branded’ physical or electronic distribution outlets, and is selling a range of products/services through its distribution network.

Distribution arrangements where there is more ‘distance’ between the principal and the ‘agents’ selling the product are generally adopted where the above factors are less important. Principals can achieve significant savings in terms of training, compliance systems and infrastructure through such delivery channels. There are, however, also increased problems for principals associated with these type of arrangements.

⁴ Indeed, the whole issue of ‘in-house’ versus ‘principal/agent’ arrangements, and associated transactions costs, has helped to inform the modern theory of the firm in economics and has also been the focus of a great deal of empirical work in the area of business and economic history. The seminal work in this area was Coase, R. H. (1937), ‘The Nature of the Firm’, *Economica*, 4, November, while the best known practical application to economic history has been the work of Alfred Chandler, Jr., see for example *Strategy and Structure: Chapters in the History of the Industrial Enterprise* (1962), MIT Press, Cambridge Mass., and *The Visible Hand: The Managerial Revolution in American Business* (1977), Harvard University Press, Cambridge, Mass.

More specifically, principals face a form of ‘moral hazard’, in that incentives exist for agents to ‘cheat’ on the agency agreement once it has been entered into, by, for example, lowering standards of service, compliance levels, and in some cases to provide inaccurate reporting of sales, revenues and costs (i.e. fraud). If penalties for cheating and/or the chances of detection are low, or the agent is in a strong bargaining position, then such behaviour by agents is a perfectly rational response to the relative incentives.

Principals can put in place various mechanisms to increase adherence to agreed standards, such as detailed agency contracts, monitoring by local ‘in-house’ agents, and enforcement of contracts through the courts. The more substantial these mechanisms are, the higher the control achieved, but also the higher corresponding ‘transactions’ costs incurred. At the extreme, full re-integration of sales and distribution systems could result, and would be logical if the cost of the principal/agent problems prove to be prohibitive.

In theory, insurance companies operating in the CCI market will choose distribution channels that deliver to them the lowest net costs/highest net benefits taking account of the nature and size of various parameters discussed above.

The lack of uniformity in implementing the recommendations is particularly prevalent in some areas, as evidenced in case studies examined by the ACCC and determinations of the General Insurance Claims Review Panel (reproduced at Appendix G). These include problems with: adequate training of staff; the salesperson failing to explain the optional nature of CCI; failure to comply with the amendments to the Insurance Contracts Act (particularly s. 71A(5) which requires a post-sale confirmation letter and 14 day cooling-off period); and advising consumers of their right to complain.

Overall, the GWP reforms have led to an improvement in the general standard of information being provided to CCI consumers. However, the impact of the GWP reforms varies according to the type of distribution arrangement and outlet for the sale of CCI. Consequently, certain problems regarding information (discussed in Part 3) still exist in some parts of the market.

2.3 GWP recommendations intended to improve consumers’ access to justice and remedies

2.3.1 Recommendations

The GWP was aware of consumers’ need for timely, low cost dispute resolution mechanisms. The following GWP recommendations were aimed at improving consumers’ access to justice, as well as providing mechanisms for regulatory authorities to assist consumers by actively seeking compliance by insurers with existing legislation.

The GWP recommended:

- extending the jurisdiction of all State and Territory small claims tribunals and the NSW Commercial Tribunal to permit them to adjudicate on CCI disputes;
- extending the terms of reference of the General Insurance Claims Review Panel to include all CCI disputes and not just those arising from claims;

- amending s. 15 of the Insurance Contracts Act to clarify that it excludes only the operation of Acts which provide for: judicial review of contract on one of the grounds specifically listed in the current s. 15; and relief for consumers from the consequences of making misrepresentations;
- the repeal of s. 87(1E) of the TPA to allow a court to make orders under s. 87 for contraventions of Part IVA of the TPA where pre-contractual conduct is unconscionable in relation to a contract of insurance to which the Insurance Contracts Act applies;
- consideration be given to the removal of s. 74(3)(b) of the TPA which exempts services under insurance contracts from the implied warranties of due care and skill and fitness for purpose in s. 74 of the TPA; and
- empowering the ISC to intervene on behalf of policyholders, to take representative action, where it is in the public interest.

2.3.2 Action taken

The following actions were taken in relation to the above GWP recommendations:

- the recommendation to extend the jurisdiction of the small claims tribunals and NSW Commercial Tribunal was brought to the attention of the State and Territory Ministers for Fair Trading and Consumer Affairs. However, there has been no significant action to date. In responding to the GWP report, the former Commonwealth Government did not support extending the jurisdiction of the NSW Commercial Tribunal;
- the terms of reference of the General Insurance Claims Review Panel were extended so that the panel can now consider references covering claims including those from small business. However, the panel still cannot hear all CCI related disputes as recommended by the GWP;
- section 15 of the Insurance Contracts Act and s. 87(1E) of the TPA were amended as recommended and effective from 7 April 1994;
- the new Government has not considered whether any changes to s. 74 of the TPA might be justified; and
- section 55A was inserted into the Insurance Contracts Act, which took effect from 7 April 1994. Section 55A empowers the ISC to intervene on behalf of policyholders by bringing an action, or taking over and continuing an action, against the insurer, in respect of the insurance contract, where it is in the public interest to do so.

2.3.3 Impact

Overall, consumers have benefited in terms of access to justice and the remedies available.

The ACCC notes that while it appears that consumers now have greater access to justice and more remedies are available, there have been less complaints as a proportion of the total number of policies in force during 1996 than in previous years (statistics on complaints and claims are discussed below in section 3.3.4).

Less complaints may well reflect less disputes requiring 'external' resolution due to greater consumer satisfaction as a result of improvements in: consumer information; content and coverage of policies; and 'internal' dispute resolution schemes which have expanded in terms of coverage, size and sophistication in recent times. This is more likely to be the case where CCI is sold 'in-house' by institutions (such as banks) who place greater importance on their image, brand name and product reputation. There may also be less complaints due to a fall in the number of agents selling CCI, and a consequent rise in the average standard of remaining agents.

Conversely, consumers being unaware of the right to complain will influence the level of complaints which may impact on the statistics of the General Insurance Claims Review Panel. A complaints flow chart, illustrating the procedure which is followed when a compliant is received, is contained at Appendix A of the IEC 1996 Annual Report.

Although the reforms flowing from the GWP recommendations have significantly enhanced consumers' access to justice, certain difficulties for consumers do still remain. Presently, the General Insurance Claims Review Panel's jurisdiction on CCI is limited to disputes relating to claims. It cannot look at other CCI disputes such as those with respect to an insurer's sales or marketing practices, or general business administration, except where they directly relate to the claim.

There was a great deal of confusion about the scope of s. 15 of the Insurance Contracts Act prior to its amendment on 7 April 1994. The GWP report noted that consumers may be unwilling to take action on the basis of a provision of little known practical application, where there is a possibility of losing and being required to pay the respondent's costs. In theory, consumers' access to justice and available remedies have increased with the amendment of s. 15 of the Insurance Contracts Act, as it has clarified the position of making a claim under other legislation for compensatory damages. Consumers should also be more willing to exercise their rights with the reduced level of confusion as to the effect of s. 15.

The repeal of s. 87(1E) of the TPA provides additional remedies for consumers as a Court can now make orders under s. 87 for contraventions of Part IVA of the TPA in relation to a contract of insurance to which the Insurance Contracts Act applies.

The power of the ISC to intervene in actions on behalf of policyholders has provided private policyholders with an avenue of seeking redress against a large insurer. There has been no such intervention by the ISC as yet.

The recommendations to extend the jurisdiction of the small claims tribunals and NSW Commercial Tribunal and remove s. 74(3) of the TPA have not yet been implemented and accordingly, have had no impact on access to justice or the remedies available to consumers.

2.4 GWP recommendations to collect and disseminate data on the performance of CCI insurers in order to assess the success of the measures proposed in the GWP report

2.4.1 Recommendations

The GWP noted that the collection and dissemination of data on the performance of CCI insurers is critical to the assessment of the success of the measures proposed in its report. Accordingly, it recommended that the ISC publish (at least):

- aggregate statistics on underwriting results, claims made and paid, and commissions paid;
- details of the outcome of ISC inquiries where loss ratios, or other data appear to warrant such an inquiry; and
- information on market concentration, and spread of loss and expense ratios.

The GWP also recommended that the ISC be given adequate resources to enable it to take an active role in:

- monitoring compliance with the provisions of the Insurance Contracts Act and regulations and with ISC circulars;
- ensuring that adequate self-regulatory action is taken by industry; and
- educating insurers, consumers and their legal advisers as to their rights and obligations under the legislation.

2.4.2 Action taken

The above GWP recommendations were implemented in the following manner:

- aggregate statistics have been published by the ISC on a six monthly basis;
- ISC data has not provided sufficient justification for such an ISC inquiry;
- concentration data is published in the December statistical bulletin each year;
- comments on CCI statistics have been provided in ISC media releases and in the statistical bulletins; and
- the ISC was provided with additional resources so it could perform tasks under the new Part 1A of the Insurance Contracts Act. Part 1A provides the Insurance and Superannuation Commissioner with powers in relation to administration and enforcement of the Act. It also enables the Commissioner to obtain documents, review administrative arrangements, collect additional statistics, and promote education. In addition:
 - a compliance section was established;
 - the ISC is represented on the board of the IEC; and
 - a General Insurance Code of Practice was released in December 1994.

2.4.3 Impact

Public reporting has been an essential ingredient in ensuring the GWP recommendations have had their desired impact.

Six monthly publishing of aggregate statistics by the ISC has improved the public visibility of agents and the commercial performance of CCI providers to consumers and governments. The increased transparency has made it easier to monitor and review trends over time and inform credit providers of their agency arrangements.

The collection and publishing of concentration data has assisted in the assessment of the level of competitiveness in the market for CCI.

The additional powers of the ISC has increased the accountability of insurers in providing value for money.

Reporting and monitoring could be further improved with the inclusion of disaggregated data (as discussed below in section 4.3). This may assist in isolating problems to a particular form of CCI, distribution mechanism or individual agent. As noted elsewhere in this report, those problems that do remain in the CCI market tend to be concentrated in pockets, both on the demand and supply sides of the market. Those pockets need to be identified so that monitoring, compliance and enforcement action can be targeted where it is most needed.

2.5 Other relevant issues

The ACCC has received comment on the timing of the review. It has been suggested that the review should have been delayed as more time is needed before the full effect of the reforms can be recognised, especially since CCI policies are usually 3–5 years in duration.

The ACCC considered this issue before undertaking the review. Indeed, as noted above in section 1.2.2, the review, originally to be undertaken by the TPC two years from the release of the GWP report, was held back to enable the reforms to take effect before examining their impact. The ACCC is of the view that there has been sufficient time for those GWP recommendations which have been implemented to have made an impact.

It was also submitted to the ACCC that the review should be delayed until the effects of the UCCC, and corresponding State and Territory legislation, which came into operation during 1996, become fully evident and can be assessed.

The UCCC addresses a number of issues of relevance to CCI which are identified below in Information box 3.

Information box 3. The UCCC

The UCCC was developed as 'template legislation' following the intergovernmental Uniform Credit Laws Agreement 1993. Under that agreement, Queensland was nominated as the State to establish uniform consumer credit laws.

On 2 September 1994, Queensland enacted the *Consumer Credit (Queensland) Act 1994* with the UCCC as an appendix. Since the UCCC was proclaimed to commence on 1 November 1996 as 'template' legislation, all States and Territories have enacted legislation adopting the UCCC with the exception of Western Australia, which introduced 'alternative consistent legislation' that is substantially similar to the UCCC. Consequently any amendments to the UCCC, subject to the approval of the Ministerial Council of the States and Territories, automatically become part of the laws of the other States and Territories. Western Australia must amend its alternative legislation as required in order to maintain uniformity with the UCCC.

The aim of the UCCC is to provide laws which apply uniformly and equally to all forms of consumer lending and to all lenders throughout Australia. It is based on the principle of truth-in-lending which allow borrowers to make informed choices when purchasing credit.

Provisions of the UCCC of particular relevance to CCI include:

- ss 15(N) & 32(I): pre-contractual disclosure of credit-related insurance contract;
- s. 118: liability of credit provider for supplier's misrepresentations in the event of a tied credit contract;
- s. 133: prohibiting mandatory terms;
- s. 135: 20 per cent cap on commissions;
- s. 136: post-sale disclosure;
- s. 137: notification and refund required if proposal rejected by insurer; and
- s. 138: termination of CCI contract if credit contract terminated.

The ACCC accepts that the UCCC is likely to have a major impact on the market for CCI and that it is too early to assess its impact. However, an assessment of UCCC's impact is outside the ACCC's terms of reference and the scope of this review. If the impact was to be included in the review it could cloud the assessment of the impact of the GWP reforms. Furthermore, the UCCC impact will be assessed by the newly created Uniform Consumer Credit Code Management Committee when it undertakes a major review of the UCCC towards the end of 1997.

Nevertheless, the ACCC is aware of the costs which have been borne by industry in order to comply with the UCCC and is mindful of the need to keep any additional costs, which may be imposed, to a minimum. Accordingly, the recommendations contained in this report take into account those provisions of the UCCC (identified above in Information box 3) which impact upon the market for CCI. Furthermore, the recommendations contained in this report are designed to target specific problem areas in the market for CCI so costs are not borne unnecessarily by industry.

2.6 Conclusion

Most of the GWP recommendations have been implemented with various impacts on the market for CCI. Generally, the GWP reforms have led to valuable improvements with a positive trend developing.

Generally, consumers of CCI are now better educated, have an increased understanding of their needs, are able to make a more informed choice and are more aware of their rights. This is largely due to information of higher quality being presented to consumers on a more timely basis.

However, the extent of these benefits varies according to the type of distribution arrangement and outlet for CCI (discussed above in section 2.2.3). This diversity of implementation of the GWP reforms has resulted in some problems still remaining for consumers (discussed below in section 3.2.4). These problems do not appear to be widespread but are confined to pockets of the market where the distance is greater between the insurer and agent.

The GWP reforms have also enhanced access to justice and increased the remedies available to consumers of CCI. However, there is still scope for further improvements.

The actions taken by the ISC to collect and disseminate data has helped to ensure the success of the GWP reforms. Reporting and publishing of data by the ISC has led to increased public visibility, improvements in monitoring and review, informing credit providers of agency arrangements and greater accountability of CCI insurers. However, there is still scope for improvements in monitoring and collection of data.

Overall, the GWP recommendations have led to significant systemic improvements with regard to the timeliness, quality and amount of information being supplied to consumers, access to justice and the remedies available, and the collection and dissemination of data. To the extent that problems still exist, they are not widespread but occur in pockets. The ACCC notes that some problems will inevitably occur irrespective of what action may have been taken, such as the GWP recommendations, codes, legislation or other regulatory means.

3. Are there any continuing problems being experienced by consumers in acquiring access to competitive and appropriate CCI products?

3.1 Introduction

The TPC and GWP reports identified a number of serious problems being experienced by consumers in acquiring access to competitive and appropriate products. The GWP recommendations, discussed in Part 2 of this report, targeted most of these problems.

The ACCC notes that the implementation of the GWP recommendations has led to systemic improvements. Overall, the GWP reforms have had a positive impact with consumers being generally better off to the extent that the GWP recommendations have been fully implemented and complied with.

However, the GWP recommendations have not been complied with or implemented to the same extent by all market participants. It appears that problems remain in particular parts following the implementation of the GWP recommendations, and are likely to be the result of persistent residual ‘cowboy’ elements (discussed above in section 2.2.3).

In the absence of a widespread and comprehensive survey, which is beyond the scope and capacity of this review, it is difficult to determine precisely the extent of these problem pockets. However, it is clear from the information and evidence received by the ACCC that the problems which do exist are generally linked to particular distribution arrangements and outlets. As discussed above in section 2.2.3, problems occur more readily the greater the gap between the insurer and agent.

The ACCC notes that the market is undergoing a period of cultural change and that the implementation of the GWP reforms, and other ISC and ICA initiatives, is an on-going process. One reason why problems still occur is that it takes longer for the effects of cultural change to filter down to agents where there is a larger gap to the insurer.

The ‘cowboy’ elements are also able to persist due to the ancillary nature of CCI. As with other ancillary financial products, a consumer’s ability to compare products is inhibited as the transaction occurs at the point of sale of the merchandise and financial credit which it is insuring. This in turn provides the distributor with a position of influence with regard to a consumer’s willingness to acquire particular ancillary products.

This chapter attempts to identify firstly, the nature and extent of any continuing problems for consumers of CCI as identified in the TPC and GWP reports, and secondly, any new issues which are linked to those existing problems.

3.2 Continuing problems identified in TPC and GWP reports

As noted in Part 2, the GWP reforms addressed the problems associated with information provision, access to justice, complaints resolution and collection and dissemination of statistics.

The differential implementation of the TPC and GWP recommendations has seen many problems no longer being widespread but limited to pockets of the CCI market where compliance with the GWP reforms is more limited, although the exact size of these pockets remains unclear.

It must also be recognised that many of the problems (being experienced by consumers in acquiring access to competitive and appropriate CCI products) identified in the TPC and GWP reports arose largely due to the structure of the industry which was mainly based on principal/agent relationships. As noted above in Information box 2, the agency nature of sales meant that there could be a substantial ‘distance’ between the purchaser and the product provider (the insurer). As the TPC and GWP recommendations did not directly target the structure of the industry, which has not changed significantly since those recommendations were made, it is likely that some previous problems will still exist. These problems are identified below in sections 3.2.1 to 3.2.6.

3.2.1 Price/cost

Statistics on the price and cost of CCI, obtained from the ISC bulletin *Selected Statistics on the General Insurance Industry*, are set out below in Table 2.

Table 2. Aggregate data from the ISC

Statistics for year ended 30 June	1992 (\$'000)	1993 (\$'000)	1994 (\$'000)	1995 (\$'000)	1996 (\$'000)
Direct premium	40 581	110 497	88 557	159 435	139 035
Premium revenue*	36 628	95 260	76 647	121 354	118 447
Claims expense**	15 985	43 862	29 248	51 121	46 461
Underwriting expenses	22 832	49 031	36 093	59 227	63 600
Underwriting result	(189)	2 368	11 306	11 006	6 922
Commissions	16 922	38 122	27 413	58 012	45 769
Loss ratio	41%	46%	38%	42%	34%
Expense ratio	59%	51%	47%	49%	46%
Commission %	42%	35%	31%	36%	33%
No. of policies	123 098	179 800	101 553	238 289	201 585
No. of claims	14 675	40 000	29 363	37 533	32 103

Stock of policies

827 474

*Net of reinsurance expense

**Net of reinsurance and other recoveries revenue

The ACCC notes that certain qualifications need to be made when interpreting this data. In particular:

- the 1994 and 1995 data is distorted by the change of balance date of the Commercial Union Group which is not included in 1994 figures but is included with respect to 18 months' business in 1995;
- 'No. of policies' represent **new** CCI policies issued in the respective 12 month period, whereas 'No. of claims' relate to CCI policies **in force** in the respective 12 month period. So that the former is the 'flow' of new policies issued each year and the latter relates to the 'stock' of policies currently extant in each year. As CCI policies are issued for the same period as the finance agreement, usually between 3–5 years, it would be more appropriate to use the 'stock' of policies rather than the 'flow' of policies when comparing the number of claims or number of complaints/disputes to the number of policies. Statistics provided by the ICA indicate that the stock of policies for the 12 months to June 1996 was 827 474. However, this figure may possibly understate the stock of policies as some insurers may still have provided figures based on the flow of policies; and
- in the past, CCI has not achieved some of the economies of scale and distribution efficiencies as seen in higher volume lines of business such as domestic motor vehicles or homeowners/householders. This was due to CCI involving low volumes, and being underwritten by specialty insurers through a distribution system primarily controlled by financiers and retailers.

In any event, CCI has been an extremely expensive class of insurance to administer and distribute, relative to other forms of insurance. In fact, the ISC bulletin *Selected Statistics on the General Insurance Industry for Year Ended 31 December 1995* notes that '[t]he consumer credit class of business is the most expensive paying 54 cents in every premium dollar for selling and administration'.⁵ As shown above in Table 2, selling and administration expenses (underwriting expenses) have exceeded the cost of claims as a proportion of premiums. Conversely, claims expense exceeds underwriting expenses for most other forms of insurance.

A major factor contributing to the high costs associated with CCI has been the need for insurers to obtain access to agents. The use of agents as an outlet for CCI has led to increased costs through higher commissions and greater delivery costs.

Commissions for agents selling CCI were increased by 'reverse competition' as insurers bid against each other for access to agents. An example of 'reverse competition' may be seen in the difficulties encountered by one large multi-product insurance company in obtaining access to motor vehicle distribution outlets (discussed below in section 3.2.2). Although that insurer offered an attractive product from a consumer perspective with a lower premium than some other insurers, it was unable to sell CCI through most motor vehicle dealers.

The ACCC notes that commissions have recently been capped (maximum of 20 per cent) by the UCCC. However, the effect of capped commissions remains unclear. Although

⁵ Insurance and Superannuation Commission (1996), *Selected Statistics on the General Insurance Industry for Year Ended 31 December 1995*, AGPS, p. 7.

intended to reduce premiums, increased administration and compliance costs may offset, at least in the short term, any reduction in expenses and underwriting result. A distributor may still be able to extract significant margins due to the absence of competition at the level of the ultimate consumer.

The cap on commissions has also seen some insurers develop innovative arrangements which provide alternative forms of remuneration and incentives to agents in addition to commissions.

For example, car dealers in one State may become shareholders of a company specialising in marketing motor vehicle insurance products through the purchase of shares on which dividends are paid. This corporate entity wholly owns an insurance company specialising in underwriting CCI products on which commissions are earned independently and in addition to dividends. The ACCC notes that, although such arrangements may have developed in response to the cap on commissions, they also have the potential to bring certain benefits to consumers by closing the gap between principals and agents.

Delivery costs have also been high for the reasons of low sales volume and the highly specialised nature of the product, as outlined above. In addition, the cost of CCI was generally found to be higher when it is sold by a retailer in conjunction with another type of insurance (e.g. comprehensive motor vehicle insurance) rather than by itself. This may be due to the CCI insurer providing financial subsidies, such as cash payments or offsets on the cost of other insurances.

High commissions and delivery costs, together with consumers being relatively insensitive to variations in the price and quality of CCI, has led to very low loss ratios (funds paid out to consumers as a proportion of premiums), noted above in Table 2, compared with other types of insurance which suggests a less competitive market.

Similar problems relating to the price and cost of CCI are also evident in overseas markets for CCI. The Consumers' Federation of America recently released a report on credit life insurance identifying problems in the US market for CCI, such as 'reverse competition' and low loss ratios.⁶ The report noted that the loss ratio for the nation as a whole was 43 per cent in 1993–95 with loss ratios for the individual states varying between 21.3 per cent and 77.3 per cent during that period.

3.2.2 Competition

The CCI market is highly concentrated as reflected in the ISC bulletin *Selected Statistics on the General Insurance Industry for the year ended 31 December 1995* which reported the top five insurers had 79 per cent of the market and the top ten insurers had 96 per cent of the market. However, this degree of concentration is similar to other forms of insurance, so that the market for CCI could still be competitive at the aggregate level between insurers. Although, as mentioned above in section 3.2.1, competition at the level of securing agents is really 'reverse competition' as the associated higher commissions and delivery costs lead to increased prices for the consumer.

⁶ Consumers' Federation of America and U.S. Public Interest Research Group (1997), *Most Credit Life Insurance Still a Rip-off*, Washington, D.C., January.

There appears to be limited competition in the CCI market other than at the level of securing agents. Agents mostly sell CCI through one insurer, so there is little competition at the point of sale. As an example, the difficulties that one large multi-product insurance company has had in obtaining market outlets with a highly competitive product illustrate how the market for CCI can be sheltered from competition. While that insurer's product offered advantages over existing products it was not able to penetrate the market effectively and so competitive pressure on other CCI policies to change prices and cover was truncated.

Also, it is often difficult for consumers to compare CCI policies due to the inherent complexity of the transaction (especially when purchasing CCI in conjunction with a motor vehicle or other consumer durable), consumers' lack of familiarity with the product, the infrequency of the purchase and consumers' being relatively insensitive to variations in the price and quality of CCI. Overall, a consumer's capacity to exercise choice between different CCI products is limited. Consequently, benefits of competition at the aggregate level are not always passed on to consumers at the point of sale.

3.2.3 Training of agents

As noted above in section 2.2.3, the training of agents has generally improved. However, further improvements could be made with respect to the training of particular groups of agents.

The extent of training and the methods employed vary between insurers and the different types of distribution arrangements (discussed above in section 2.2.3). Examinations by the ACCC of a number of case studies and determinations of the General Insurance Claims Review Panel revealed that the training of agents in some instances was inadequate or non-existent (see for example: Determination of the General Insurance Claims Review Panel, Referral No. 496 02 2242, reproduced at Appendix G, which illustrates the type of problems which can occur when the training of agents is inadequate).

Problems of inadequate training still occur irrespective of the General Insurance Code of Practice imposing an ongoing obligation on insurers to require their agents (and employees) to receive adequate training to competently arrange insurance contracts for and provide insurance services to consumers. This is a particular problem where agents, who may not have been adequately trained themselves, employ others (e.g. salesmen in a car yard or electrical store) to 'arrange' the insurance with the consumer.

Those individual consumers of CCI who happen to deal with an inadequately trained agent may encounter a number of problems. These include agents:

- not understanding the policy terms and their legal and professional obligations;
- not complying with their obligations under s. 22 of the Insurance Contract Act due to the use of s. 71A notices being (wrongly) treated as a substitute for the duty of disclosure under s. 22 (see for example: Determination of the General Insurance Claims Review Panel, Referral No. 296 08 2858, reproduced at Appendix G);
- not including all relevant information in the policy;

- incorrectly advising the consumer as to the relevance of a matter or failing to follow up a matter which may be relevant;
- asking questions of a minimal nature about employment; and
- failing to adequately explain the consequences of re-financing (see for example: Determination of the General Insurance Claims Review Panel, Referral Nos. 296 01 2169 and 469 10 3111, reproduced at Appendix G).

3.2.4 Information problems for consumers

Although there have been important improvements in the market for CCI with regard to the timeliness, quality and amount of written information which must be provided to consumers, some consumers still encounter problems in the area of information provision.

In most cases insurers and agents are providing consumers with all the information as required under the relevant laws. However, even where all the necessary information has been provided and disclosed to consumers it is apparent, as evidenced in the determinations from the General Insurance Claims Review Panel, that not all consumers adequately understand the terms and conditions of their policy, their obligations, rights and responsibilities (see for example: Determination of the General Insurance Claims Review Panel, Referral Nos. 596 01 2131 and 696 08 2852, reproduced at Appendix G).

Common areas of confusion for some consumers include: the limitations on unemployment cover (see for example: Determination of the General Insurance Claims Review Panel, Referral No. 296 06 2581, reproduced at Appendix G); the restrictive nature and interpretation of clauses, especially those in relation to pre-existing conditions (see for example: Determination of the General Insurance Claims Review Panel, Referral No. 295 07 1771, reproduced at Appendix G); and the different types of policies which are offered. Consumers are sometimes not even aware that they have been sold a particular policy.

In some instances problems may arise from the consumer not taking the time to read the relevant documentation. However, this may reflect the amount of written material received by the consumer and the form in which it is presented. In the past, problems arose due to consumers not receiving adequate information. Conversely, problems can also occur if a great deal of information is provided in a short timeframe and in conjunction with information relating to other transactions.

It can be expected that consumers will not tediously wade through every page and read every word of a large amount of written material. This is especially true with regard to less sophisticated, uneducated consumers but can also be the case for well informed and intelligent consumers.

Issues regarding the provision of optimal information are outlined below in Information box 4.

Information box 4. The provision of optimal information

Neoclassical economic models of competitive markets assume that both sellers and buyers have a full set of information about all relevant aspects of a given transaction (perfect information).

This is rarely the case in markets for more complex financial and insurance products. The multi-dimensional and contingent nature of many insurance products makes understanding and comparability of policies and prices difficult for consumers. These difficulties are compounded by the infrequent purchase of such products, and can be further compounded by other transactions associated with the decision to buy insurance products, as is the case with CCI.

Information asymmetries in financial markets are well known, and have been the impetus for introducing disclosure regimes for a range of insurance and credit products in Australia in recent years. Their aim has been to provide consumers with sufficient written information to help bridge the information gap between those selling these products and those buying them, thereby protecting consumers and improving the operation of insurance and finance markets.

The mandated provision of large amounts of written information to consumers has been a long running theme in consumer protection regulation over the past 20–30 years and has achieved many positive results. However, recent research has suggested that consumers do not always make effective use of comprehensive product information and that the focus should perhaps be shifting to a consideration of providing ‘optimal information’ to consumers.⁷

There are many reasons why consumers may not make effective use of substantial disclosure documentation.

For some consumers, problems with literacy, numeracy and language can present considerable obstacles to understanding even basic and well presented disclosure information. For others, it may be that their lack of sophistication in financial matters constrains the value they can derive from such information.

Even for financially sophisticated consumers, the opportunity cost of time and competing priorities at the time of purchase may prevent adequate use being made of written information. Reading, analysing and understanding substantial amounts of written product information is not costless — sometimes consumers perceive that these costs are prohibitive when compared to the expected benefits to be gained, and as a consequence the full set of information is not utilised.

⁷ Hadfield, G., Howse, R., and Trebilcock, M.J. (1996), *Rethinking Consumer Protection Policy*, Research Paper prepared for the Canadian Government, Faculty of Law, University of Toronto, August, see especially pp. 5–12 and 44–50. Indeed, issues regarding information asymmetries, optimal levels of information and the effect of search costs are becoming increasingly prominent in much of the recent economic literature on subjects as diverse as labour markets, finance theory and industrial organisation (including the principal/agent problems outlined in Information box 2).

While it is also true that laziness or general disinterest can, in some cases, lead to consumers failing to take advantage of information provided, in many others it is clear that they are unable to do so, either because of genuine impediments to processing the information or because they make a constrained decision not to analyse all information provided in detail.

Perhaps the case of laziness does not warrant a response, but the other cases do raise some important issues regarding the optimal provision of information to consumers.

Put simply, the implications of this for effective consumer protection are not just that in certain circumstances ‘less is more’, but also that the mix of information that consumers receive is important. The more substantial disclosure information that consumers receive, needs to be complimented by shorter and more accessible forms of information to trigger a response by consumers in terms of utilising the more substantial information supplied, seeking independent advice or shopping around further — that is, an ‘optimal mix of information’ for the average consumer.

Indeed, the whole issue of optimal information provision and appropriate consumer education presents an important challenge for industry, consumer groups and for consumer protection regulators and agencies, especially in an age where global and borderless markets for financial and insurance products are being accessed by local consumers.

It may be that there are a number of other causes of information problems which relate to the sales conduct and practices of some agents. The various submissions received by the ACCC, case studies undertaken by a number of different bodies and determinations of the General Insurance Claims Review Panel (reproduced at Appendix G) indicate that the causes of these information problems may be linked to:

- the inadequate training of agents;
- policies being completed in the absence of the consumer without consultation;
- consumers having little time to read and understand the policy;
- little focus or time spent adequately on the terms of the policy;
- individuals not being advised of their right to complain;
- the inherent complexity of the transaction; and
- the distributor’s influence over the consumer at the time of the primary purchase of a good or service.

Information not being supplied or highlighted by agents represents a significant reduction in the quality of service the consumer might expect if dealing directly with a reputable insurer.

Regardless of the cause of problems relating to the provision of information, problems do exist in certain areas of the market. Accordingly, steps need to be taken by industry to ensure that consumers are not just receiving the necessary information as required by law, but are **aware** of and receiving **effective** and useful information. To the extent that

consumers are not being able to make informed decisions when purchasing CCI, their capacity to exercise choice regarding CCI products is limited.

3.2.5 Third line forcing

Third line forcing involves the supply of goods or services **on condition** that the purchaser acquire goods or services from a particular third party or a refusal to supply because the purchaser will not agree to that condition. Conduct of this type is prohibited by the UCCC and could breach ss 47(6), 47(7), 52 and 53(f) of the TPA.

In 1992, the GWP noted that ‘CCI forcing may continue to be a problem despite the fact that that this practice is prohibited. ... The law would not appear to be fully effective in preventing CCI forcing’.⁸

Cases examined by various tribunals indicate that even the most reputable companies engaged in this type of conduct prior to the implementation of the GWP recommendations.⁹

The practice of forcing occurs less often since the implementation of the GWP recommendations. However, anecdotal evidence and case studies examined by the ACCC suggest that third line forcing still occurs in some parts of the industry. It appears that it is more likely to occur where CCI is distributed through ‘distant’ agents. Where it does occur, it appears that representations are being made that the purchase of CCI policies is mandatory in certain circumstances in order to be granted a loan and therefore to be able to purchase a product (e.g. motor vehicle or other consumer durable). This is sometimes taken one step further by including the cost of the policy in the amount borrowed and completing the insurance form without consulting the consumer.

It appears that some sellers of CCI have engaged in this type of conduct partly due to incentives arising from the high commissions and partly due to inadequate training.

3.2.6 Complaints handling and access to justice

It appears that a number of consumers are somewhat confused as to the available and appropriate avenues for seeking redress. The FSI report notes that ‘concerns have been expressed that the complexity of financial services and their convergence with other services will result in consumers feeling bewildered in the face of the diversity of [dispute resolution] schemes’.¹⁰ The avenues for seeking redress open to consumers of CCI include: internal dispute resolution; the General Insurance Claims Review Panel; the Life Insurance Complaints Service; the ISC; the ACCC; various State and Territory claims and credit tribunals; and the courts.

The subject matter of the complaint can also create problems. As indicated by the problems outlined above, such as information provision and the training of agents, the sale of products can present a key source of problems for consumers.

⁸ GWP (1992), Report of the GWP on CCI, p. 24.

⁹ See for example: Commercial Tribunal of New South Wales (1995) ASC 56–307 and (1996) ASC 56–350.

¹⁰ Report of the FSI (1997), p. 287.

Although consumers' access to justice has improved with the extension of the jurisdiction of the General Insurance Claims Review Panel to include claims by small business, the panel still cannot hear complaints about an insurer's sales or marketing practices, or general business administration except where they directly relate to the claim (as opposed to the Life Insurance Complaints Service which can hear complaints about sales of life insurance).

3.3 Emerging issues (linked to continuing problems)

Since the release of the TPC and GWP reports, some new problems are emerging for consumers in acquiring access to competitive and appropriate CCI products. These are discussed below in sections 3.3.1 to 3.3.5.

3.3.1 Policy content

Although there have been changes in the price and/or cover offered by CCI insurers over the past 10 years, the ACCC is of the view that there is still scope for further improvements to be made in this area.

The extent to which there has been limited change may reflect the appropriateness of the product but it may also reflect a product for which price and quality differences have little impact on consumer purchases. As noted above, the ancillary nature of CCI has meant consumers have not been highly sensitive to price and policy content in the past. This is reflected in the content and price of policies not being particularly dynamic.

A reflection of this price/content inertia is that many policies continue to have very restrictive conditions, especially in relation to unemployment cover. Common examples of restrictions involve strict time limits, the insured's form/type of employment, narrow definitions regarding disabilities (see for example: Determination of the General Insurance Claims Review Panel, Referral No. 295 07 1771, reproduced at Appendix G) and the policy lapsing if repayments fall into arrears.

The consequence of this is that individuals may derive little value from their policies due to the limited applicability of generic policies to their circumstances.

3.3.2 Inappropriate sales

The ACCC is aware that circumstances do occur where CCI is sometimes sold to consumers who will not be entitled to claim upon their policy. Causes of inappropriate sales may be seen to include the generic nature of CCI policies and inadequately trained agents.

Although this does not appear to be a widespread problem, isolated incidents (evidenced in submissions received and case studies examined by the ACCC) still occur where CCI is sold to a consumer when they are clearly excluded under the policy. Examples of inappropriate sales to particular classes of consumers have included:

- disability credit policies to consumers suffering from a pre-existing illness;
- unemployment credit insurance to consumers who are self-employed, making them ineligible to claim under their particular policy; and

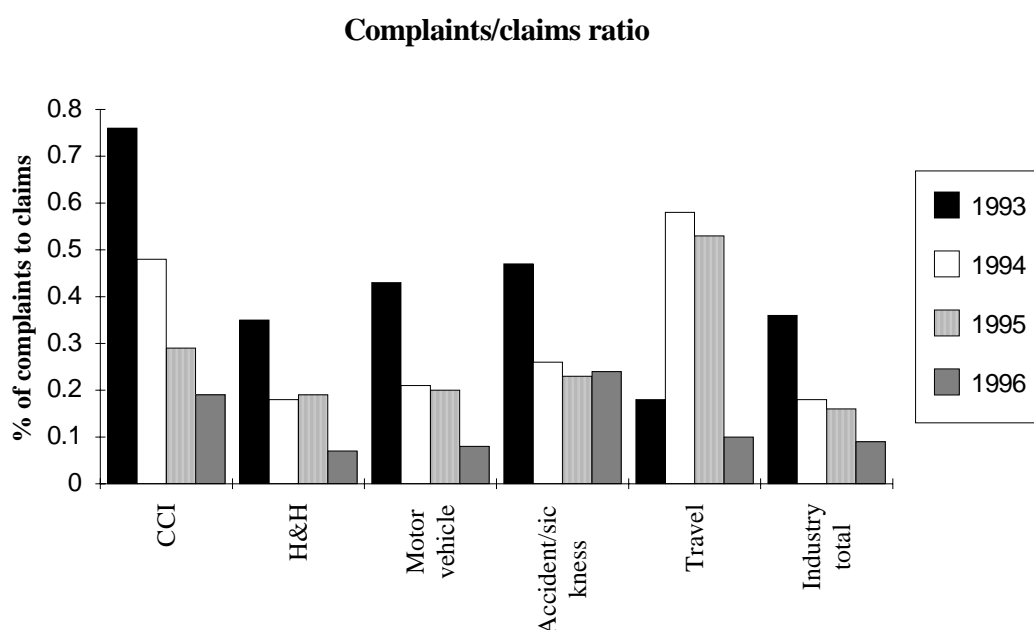
- unemployment credit insurance where the maximum benefit is close to the premium (plus interest).

This problem appears to be most prevalent amongst agents who are also consumer durables dealers, especially where sales of their core product is low. In this situation there is an incentive to generate a high level of CCI sales in order to generate high income per sale (of product) due to the substantial commissions. Inadequate training can also result in policies being sold inappropriately.

3.3.3 Complaints/claims ratio

Statistics on claims and complaints, obtained from the ISC and the General Insurance Claims Review Panel, are set out below in figure 1.

Figure 1. Complaints/claims ratio



The ACCC notes that the statistics from the panel may not adequately reflect the full extent of consumers' problems as some consumers may not be aware of their rights to complain or the appropriate avenue for seeking redress. Nevertheless, a trend can be identified from the statistics depicted above in Figure 1.

The fall in the complaints to claims ratio is due to a fall in the number of complaints to the General Insurance Claims Review Panel with the number of claims remaining steady (as identified above in Table 2).

The fall in complaints is likely to reflect the introduction of statutory notices, improved sales practices, better and more widespread 'internal' dispute resolution schemes and the cooling-off period. It could also be linked, in part, to certain consumers not being aware of or accessing alternative dispute resolution (ADR) schemes.

Although there has been a positive trend in the complaints to claims ratio, it remains higher for CCI than most other classes of insurance.

As noted above in section 3.2.1, the number of complaints and claims for each 12 month period is taken against the stock of policies. Accordingly, the number of complaints and claims may relate to policies that were sold both during and prior to the 12 month period being considered.

3.3.4 Regulation

Regulation of the market for CCI is encompassed by a number of regulatory instruments, including the Insurance Contracts Act, the General Insurance Code of Practice, the Life Insurance Code of Practice, the Code of Banking Practice (where the product is sold through a bank), the TPA, and the UCCC.

This has resulted in an overlap of regulation on a number of fronts. In particular the UCCC has duplicated or supplemented the Insurance Contract Act with the following provisions of the UCCC:

- requiring pre-contractual disclosure for credit-related insurance contracts (ss 15(N) and 32(I));
- prohibition on representing that CCI is mandatory or that it must be taken with a particular insurer (s. 133(1) and (2)(a));
- prohibition on unreasonable terms when taking out CCI (s. 133(2)(b));
- notification and refund required if rejected (s. 137); and
- a proportionate rebate on CCI premium is required to be paid out by credit provider when the financing credit contract is paid out early (s. 138(2)).

Although the UCCC will address many issues identified in this report, the problem remains that there is no single point of reference to ascertain regulatory and compliance requirements in selling CCI.

It is outside the terms of reference of the review to recommend upon the problems of regulation in this area. However, the ACCC suggests Government consider this issue in the context of the FSI report.

3.4 Conclusions

The problems mentioned above should be considered in the context that CCI comprises only a small part of the total insurance market and that the GWP reforms have led to important and systemic improvements, with consumers of CCI being generally better off (as noted above in Part 2).

Furthermore, the extent of these problems in the market for CCI is limited to particular types of agents/delivery channels and less experienced/sophisticated consumers. It is apparent that problems occur more readily where the distance is greater between the insurer and agent. There appear to be fewest problems where CCI is sold 'in-house' by the employees of the insurer or a subsidiary of the insurer.

Nevertheless, the problems identified above do exist and reflect/reinforce the reasons why CCI has received so much attention from consumer and public advocacy groups, regulators and governments in the past. These problems are a major cause of concern for the individual's involved and further action needs to be taken by industry to address those problems.

4. What further action might appropriately be undertaken by industry in consultation with regulatory authorities to rectify such problems?

4.1 Introduction

Part 3 separated the current problems being experienced by consumers of CCI into two categories: continuing problems identified in the TPC and GWP reports, and emerging issues which are linked to the continuing problems.

This part adopts a similar approach when recommending what further action might appropriately be undertaken by industry in consultation with regulatory authorities to rectify the problems identified in Part 3. Recommendations as to further action by industry are provided in order to address, firstly, the continuing problems which are linked to the GWP recommendations and, secondly, the emerging issues which are linked to the continuing problems.

4.2 Rationale of recommendations for further action

As noted in Part 3, the ACCC is aware that these problems generally do not occur on a widespread basis but are taking place in certain pockets of the market for CCI and are mainly limited to less reputable agents and to less experienced/sophisticated consumers.

On the supply side it is clear, from the information and evidence received by the ACCC, that problems are generally linked to particular distribution systems and outlets. As noted above in Part 3, pockets of less reputable agents tend to occur more readily where there is a greater distance between the insurer and agent.

This is partly explained by differing incentives for sellers at the point of sale according to the seller's relationship to their respective insurer. Where CCI is sold 'in house' by an employee of the insurer, or subsidiary of the insurer, the seller usually receives a salary independent of the number of sales.

However, where CCI is sold by an agent who receives a commission from the insurer for the sale of CCI, the agent's income stream is tied to the volume of sales. Accordingly, there is an incentive for an agent who receives a commission, as opposed to an employee who receives a salary, to obtain high penetration rates in order to generate a higher income stream. The agent's income is often further supplemented by various subsidies from the insurer on other forms of insurance where the price is more transparent to the consumer. This is often the case where CCI is sold as an ancillary product to the primary merchandise, such as in the case of motor vehicles, electrical goods or other consumer durables.

Another reason why problems increase as the gap between the agent and the insurer widens relates to training and monitoring. As noted above in section 3.2.3, inadequately trained agents will give rise to a range of problems. Generally, it is easier for an insurer to train and monitor an employee as opposed to a distant, more independent agent.

On the demand side problems tend to occur more frequently for consumers who are inexperienced, less sophisticated, less educated, in financial need, or who have a poor credit rating (disadvantaged consumers). One reason why disadvantaged consumers encounter problems more readily than astute, well educated or more affluent consumers (advantaged consumers) is that disadvantaged consumers often purchase CCI through less reputable agents out of necessity and/or a lack of awareness of better alternatives.

It is clear that pockets of problems occur more readily where CCI is sold to disadvantaged consumers through less reputable agents. Accordingly, the recommendations for change contained in this report target less reputable agents and disadvantaged consumers.

The targeted nature of the recommendations also takes into account the fact that substantial costs have recently been imposed on industry in having to comply with various forms of regulation. The ACCC recognises the importance of keeping any further compliance costs to a minimum and ensuring that those costs are not borne unnecessarily by more reputable sectors of the industry. Clearly there is not a strong case for significant legislative or regulatory changes in the CCI market.

The ACCC recognises the positive impact that other initiatives, such as the General Insurance Code of Practice and, more recently, the UCCC, have had on the CCI market, and on the insurance industry as a whole. The recommendations in this report seek to maintain the continuity and positive impact of past initiatives, and they are designed, as far as possible, to be implemented through institutions and mechanisms which are already in place.

The ACCC recommends that the reforms that have flowed from the TPC and GWP reports should be allowed to continue so as to maintain and extend the general improvements which have occurred in the market for CCI over the past two to three years.

Although these mechanisms have addressed many of the problems identified above in Part 3, it would appear that problems still exist in part because those mechanisms have not been complied with or have not been effectively implemented in some cases. Accordingly, this report recommends what steps need to be taken to ensure that there are higher levels of compliance with existing mechanisms and that those mechanisms are effectively implemented.

However, if it appears that the existing institutions and mechanisms are an inappropriate tool for effective implementation of any of the following recommendations, consideration should be given to other means, such as amendments to legislation, for implementing those recommendations.

The recommendations contained in this report are directed at introducing changes only to the extent that existing regulation falls short of providing an appropriate solution. Accordingly, regulation not directly resulting from the GWP recommendations, such as the UCCC, is taken into account to avoid duplication and any unnecessary compliance costs.

Moreover, as the market for CCI makes up only a very small part of the financial services industry, this report's recommendations, in so far as they are relevant, are intended to be consistent and implemented in line with the Government's response to the FSI report. As the Wallis report notes, '[t]he future is necessarily uncertain, and there is worldwide debate about the nature, scale and pace in the financial system'.¹¹ Accordingly, the recommendations contained in this report should be adapted, if required, to accommodate any changes that may occur commercially and technologically in the market or changes of a regulatory nature that may take place in response to the Wallis report.

Overall, the recommendations contained in this report are intended to be reasonable, feasible, practicable and realistic in order to provide net gains to consumers with minimal costs to industry.

4.3 Further action linked to original GWP recommendations

In order to pinpoint the type of action which is required to rectify a particular problem the cause of the problem must first be identified. As noted in Part 3, problems may persist because the GWP recommendations were poorly targeted, not complied with or ineffectively implemented.

Further action is recommended in regard to the following problems.

4.3.1 Training of agents

Although there have been significant improvements in this area by most insurers, situations still occur where the training of particular agents is inadequate. This is usually linked to particular types of distribution arrangements and outlets for CCI.

The standard of training is more likely to decline as the gap between the insurer and agent widens. Not only is it administratively more difficult, but an insurer has less of an incentive to train a 'distant agent', as compared to an 'in house' employee. When an insurer sells CCI through 'in house' employees, it appears to the consumer that CCI is being purchased directly from the insurer and it is easier for consumers to link any problems which may arise back to the insurer. Consequently, the insurer is more conscious of the need to have adequately trained people selling its product in order to maintain its reputation through brand image and product reputation (see Information box 1).

¹¹ Report of the FSI (1997), p. 11.

The ACCC notes that the training of agents and employees is regulated by the General Insurance Code of Practice. Section 3 of the code requires participating insurers, on an ongoing basis, to ensure that their agents and employees receive adequate training in relation to the matters set out in section 3.¹² Insurers are also required to keep and require their agents to keep records relating to their appointment and training for at least five years which must be available for examination by the IEC.

Problems of inadequate training arise not due to the absence of regulation but due to patchy compliance with regulation at the 'grass roots' level.

The ACCC recommends that the ISC, as part of its on-going regulatory activities and new initiatives in the market for CCI, take targeted compliance and enforcement action, in those parts of the CCI market where compliance with the appropriate sales, disclosure and training requirements are likely to be lowest, to ensure that relevant agents and employees have been adequately trained by their respective insurers.

Specifically, the ACCC suggests that spot checks, audits and compliance monitoring should be undertaken by the ISC which specifically targets problem insurers and agents on a regular basis, especially where CCI is sold through 'distant agents' such as motor vehicle dealers, sellers of consumer durables, etc.

The ACCC also recommends that industry associations which have coverage of motor vehicles, electrical goods and other consumer durables, should seek to address CCI issues through their own industry regulatory arrangements. More specifically, clauses relating to the sale of CCI contracts should be included in those industry association's own codes of conduct and other self-regulatory instruments.

Special attention should be given to the problems identified above in section 3.2.3, that is, ensuring agents:

- understand the policy terms and their legal and professional obligations;
- include all relevant information in the policy;
- advise the consumer as to the relevance of a matter and follow up a matter which may be relevant;
- ask appropriate questions about employment; and
- adequately explain the consequences of re-financing.

¹² Section 3.3 of the code provides that insurers shall require their agents to receive adequate training or instructions, and documentation to competently arrange insurance contracts for and provide the insurance services to consumers which they are authorised to arrange or provide in the areas of: principles of general insurance and any relevant consumer protection law; product knowledge; what to do in the event of a claim; and the requirements of this Code, as may be appropriate in relation to the authority and responsibility of the agent.

4.3.2 Information mix in CCI transactions

As noted above in section 3.2.4, some consumers are still experiencing problems regarding the provision of information for various reasons.

Problems can arise even though consumers are receiving all the necessary information as required by law. Indeed, as discussed above in Information box 4, the provision of large amounts of written information may not provide optimal information to consumers. It is essential that consumers receive **effective** and useful information and that they are made **aware** of that information.

The ACCC recognises that there is scope for improvement with regard to the provision of information during the transaction process.

First, in relation to the provision of effective and useful information, it is important that consumers not only receive quality information but also receive the right amount and mix of written and oral information.

It is unlikely that high quality written information will be fully effective if a great deal of it is provided in a short timeframe and in conjunction with information relating to other transactions. Effective information provision also requires appropriate non-written means of disclosure. The ACCC is aware that consumers often rely more on the verbal information of the salesperson rather than the written material provided.

An integral part of ensuring that consumers are provided with appropriate non-written information involves the adequate training of agents. As discussed already, this could be improved in certain parts of the CCI market.

Secondly, in relation to increasing consumers' awareness during the transaction process, the ACCC recommends that the ICA, when commissioning the next formal review of the General Insurance Code of Practice, should seek to introduce CCI specific provisions into the code that require particular insurers to ensure that agents have consumers complete a 'checklist' of questions (discussed below in section 4.4.1) at the point of sale and in the presence of the agent.

It should be noted, however, that the checklist requirement is intended to supplement other requirements as to the provision of information. The checklist should not be seen to be a substitute for, or to detract in any way from, any other obligations or requirements with which insurers and agents must comply.

As noted above in Parts 2 and 3, the ACCC recognises that problems regarding consumers' awareness of CCI occur more frequently where there is a greater gap between the insurer and agent. Accordingly, in order to produce the most benefit to consumers while keeping associated costs to a minimum, the ACCC further recommends that the checklist requirement be limited to those sellers of CCI who sell CCI in conjunction with other products and transactions, and who are 'distant' agents for insurers, e.g. motor vehicle dealers, sellers of consumer durables, etc.

The ACCC recommends that the ICA, when commissioning the next formal review of the General Insurance Code of Practice, should seek to introduce CCI specific guidelines into the code which include, requiring its members to ensure that, where they distribute CCI through ‘distant agents’ who sell CCI in conjunction with other physical and financial products, those agents are required to make consumers complete a simple ‘checklist’ of questions at the point of sale and in the presence of the agent. (The checklist could be developed by the ICA in consultation with relevant regulators and consumer groups and should form part of the insurance proposal.)

4.3.3 Consumer education

There is also scope for increasing consumers’ awareness of CCI in the wider context of consumer education. Strategies need to be developed and implemented with a view to further educating consumers about CCI.

In order to reach the widest possible audience the ACCC recommends that relevant government agencies, industry and consumer advocates adopt a cooperative approach to develop education strategies for consumers. Given that CCI accounts for only a small part of the overall insurance market, the development of strategies should be undertaken in the context of broader industry or ISC awareness and education strategies. This should involve research to examine and identify low-cost, market-sensitive and innovative ways to raise the general level of awareness and education of consumers about CCI (and related insurance) products.

It is not enough simply to make information available to consumers if consumer awareness about CCI is to be raised outside the transaction process. Information must be relevant to a consumer’s current needs so that the ‘motivation to know’ is created which is necessary to overcome ‘rational resistance’.¹³ Accordingly, education and information dissemination about CCI needs to be done in a way that initially attracts the attention of potential consumers.

While raising consumer awareness in general is important, tailored strategies that target particular groups of consumers also need to be considered. As noted above in section 4.2, problems tend to occur more frequently for consumers who are inexperienced, less sophisticated, less educated, in financial need, or who have a poor credit rating (disadvantaged consumers). The ACCC recognises that it may be difficult to identify these target groups but it is possible to tap into sources of information which they may rely upon, such as consumer affairs agencies, consumer groups, community aid centres, popular magazines and journals, and other forms of media. For example, education packages aimed at teaching young people what to ask about when purchasing their first car should include a CCI component.

Existing education projects provide a great opportunity to disseminate information about CCI in the context of a wider agenda. The ICA Annual Review 1996–1997 noted that

¹³ For further discussion see: Department of Business and Consumer Affairs (1978), *Communicating Information to Disadvantaged Consumers*, Commonwealth Government Printer, p. 5.

education projects achieve a penetration rate into Australian schools of about 80 per cent. The ACCC strongly encourages the use of school education in this regard and recommends the Government continue working towards implementing consumer education in schools. In particular, the ACCC supports the ICA initiative in sponsoring education projects for use in Australian schools. The instalment of teaching materials called 'Insurance is Everyone's Business' is one of the first industry projects to be based on the Federal Government's Key Competencies Programme. School presentations by various agencies and organisations could also serve as a useful tool for informing students.

However, in order to get the message across it is essential that CCI related issues are presented in a way that is relevant to the current needs of students.

This report does not presume to contain all the answers for educating consumers about CCI. However, it is envisaged that possible strategies designed to provide a more optimal mix of information will include:

- direct and indirect personal contact;
- written and oral communication;
- different forms of media;
- the use of new technologies; and
- the coordinated and cooperative involvement of a number of agencies within a flexible framework.

One method for assessing the effectiveness of information provision to consumers could be via consumer surveys (discussed below in section 4.4.3).

The ACCC recommends that relevant government agencies, industry and consumer advocacy groups should adopt a cooperative approach to develop strategies to educate CCI consumers. Given CCI accounts for only a small part of the overall insurance market, the development of strategies to educate CCI consumers should be undertaken in the context of broader industry or ISC awareness and education strategies. This should involve research to examine and identify low-cost, market-sensitive and innovative ways to raise the general level of awareness and education of consumers about CCI (and related insurance) products.

4.3.4 Market structure and the lack of competition

As noted above in section 3.2.2, agents mostly sell CCI through one insurer, due to the complexities of educating their staff about more than one product and the higher administration cost of handling more than one product, so there is little competition at the point of sale. This leads to consumers having little choice as to price or coverage and this may result in policies which are inappropriate for the individual's needs.

The ACCC is aware there have been new players entering the market with the possibility of new distribution mechanisms emerging and some potentially positive implications for the type and quality of products available. However, as noted above in section 3.2.2, any increase in competition is confined to the aggregate level between insurers competing for distribution outlets with little competition from the perspective of the consumer at the

point of sale, due to the structure of the industry being predominantly characterised by principal/agent relationships. It is, however, beyond the scope of this review to recommend changes to the structure of the industry.

An increased general level of consumer awareness would help to prompt consumers into actively engaging in comparison shopping in an effort to seek out the best deal. Accordingly, the ACCC reiterates its previous recommendations directed at increasing the level of consumer awareness.

4.3.5 Consumers' access to justice

One area where access to justice could be further increased relates to the jurisdiction of the General Insurance Claims Review Panel. Although the GWP reforms have seen consumers' access to justice improve with an extension of the panel's terms of reference, the panel still cannot hear disputes/complaints about an insurer's sales or marketing practices, or general business administration, except where they directly relate to the claim (as opposed to the Life Insurance Complaints Service which can hear complaints about sales of life insurance).

Consumers' access to justice is reduced by the inability of the panel to hear such disputes so that consumers must turn elsewhere and consequently are not afforded the opportunity to resolve disputes as quickly and inexpensively as they might through the panel.

The problems associated with sales or marketing practices relate directly or indirectly to many of the problems discussed here and in Part 3. However, the ACCC notes that it is difficult to determine the number of cases that this would generate for the General Insurance Claims Review Panel and consequently the effect on the panel's existing resources. Nevertheless, the ACCC believes that the resultant increase in consumers' access to justice is sufficient grounds for extending the jurisdiction of the panel in this area.

The ACCC recommends that the IEC, as part of its regular review process, should seek to extend the jurisdiction of the General Insurance Claims Review Panel to include disputes about an insurer's/agent's sales or marketing practices with regard to CCI products.

Another area where consumers' access to justice could be improved relates to the avenues available for seeking redress. As noted above in section 3.2.6, consumers are somewhat confused as to the available and appropriate avenues for seeking redress.

The ACCC recognises that internal dispute resolution (IDR) schemes are essential to the efficient handling of inquiries and complaints and does not wish to detract from the value of IDR schemes. Accordingly, IDR schemes should remain as the first point of call for consumers when attempting to resolve inquiries and complaints.

However, some disputes will inevitably occur after IDR mechanisms have been exhausted and consumers must know where to turn if they are in any way unsatisfied with the insurer's response. A common entry point as the first point of reference for all 'external'

CCI related disputes would avoid confusion and improve access to justice for consumers. Consumers could then be advised at first instance as to the appropriate course of action.

The ACCC recommends that the IEC, as part of its regular review process, should seek to establish a common entry point for all CCI related inquiries and disputes in the event a complaint is not satisfactorily dealt with at first instance by IDR mechanisms. This common entry point should be clearly stated on all CCI policies with the relevant contact details.

The IEC should operate as the common entry point for all CCI related inquiries and disputes on the proviso that a more appropriate alternative is not established following the FSI recommendations on ADR schemes in the financial services sector, in particular recommendation 25 which recommends a central gateway for dispute resolution be established.

The establishment of a common entry point should also be consistent with the recent ISC action in convening a ‘Complaints Scheme Roundtable Working Group’ on harmonisation of complaint schemes.

The available remedies to CCI consumers could be further increased by extending the implied statutory warranties under the TPA to contracts of insurance. Although this has ramifications for the insurance industry beyond CCI, the ACCC believes it is appropriate for this review, as it was for the GWP, to consider such an important issue.

Currently, s. 74(3)(b) of the TPA exempts services under insurance contracts from the implied warranties of due care and skill and fitness for purpose in s. 74 of the TPA. Section 74 implies non-excludable warranties in relation to the supply of services into most contracts. Specifically, s. 74(1) provides that services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. Section 74(2) provides that where a consumer makes known, either expressly or by implication, to the supplier any particular purpose for which the services are required, those services will be reasonably fit for that purpose. The implied warranties are enforceable under the law of contract.¹⁴

The ACCC believes, as did the GWP, that as a matter of general policy, legislation such as the TPA should not include industry specific exemptions. The TPA is a statute of general application and, as the Australian Law Reform Commission has noted, is ‘the principal source of consumer protection at the Federal level’.¹⁵ The ACCC has no evidence before it to justify special treatment of CCI contracts, or insurance contracts in general, to the extent that they should be exempt from the implied warranties under s. 74 of the TPA.

Section 74(3) of the TPA was amended in 1986, to exclude insurance contracts from the operation of s. 74, due to the enactment of the *Insurance Contracts Act 1984*.¹⁶ The

¹⁴ *E v Australian Red Cross Society* (1991) ATPR 41-085 at 52,364.

¹⁵ ALRC (1994), *Compliance with the Trade Practices Act 1974*, Report No 68, National Capital Printing, p. 6.

¹⁶ Trade Practices Amendment Act 1986, s. 38.

reason for this exclusion may be found in the Explanatory Memorandum to the Trade Practices Revision Bill 1986. Although the explanatory memorandum noted that ‘the basic warranties implied by s. 74 should apply, as far as possible to **all** contracts for the supply of services’, it justified the exclusion of contracts of insurance from s. 74 on the ground that ‘[c]ontracts of insurance are covered by the Insurance Contracts Act and there is no need for additional regulation in this area’ (emphasis added).

However, the extent to which the Insurance Contracts Act provides for the implied warranties as found in s. 74 of the TPA is unclear. Section 13 of the Insurance Contracts Act implies a duty of utmost good faith into all insurance contracts (that applies to both insurers and insureds). The meaning of utmost good faith is not defined in the Insurance Contracts Act and has been the subject of debate since the operation of the Insurance Contracts Act in 1986. Its scope is still being tested in the courts.

Sutton notes that the term utmost good faith ‘has many different meanings in the legal context but in essence it encompasses notions of fairness, reasonableness and community standards of decency and fair dealing. It imposes a market standard of fairness ...’¹⁷

The ISC Guide to the Insurance Contracts Act states that the ‘principle of utmost good faith (*uberrima fides*) implies into each contract a requirement to act with the highest degree of honesty and integrity towards the other party, to be full and frank in disclosure and to act with fairness. There must be no intention to mislead or deceive. ... The courts have held that while innocent errors or mere carelessness will not be sufficient to demonstrate a lack of utmost good faith, reckless conduct is likely to do so. Conduct that is fraudulent or dishonest is a breach of the duty of utmost good faith’.¹⁸

Section 13 of the Insurance Contracts Act is a very broad section and it appears to be directed toward conduct of a different nature than that regulated by s. 74 of the TPA. The duty of utmost good faith is derived from concepts such as honesty, fairness and full and frank disclosure which import an element of intent. Whereas, intent is irrelevant with respect to the implied warranties under s. 74 of the TPA.

The limited coverage of the Insurance Contracts Act in respect of insurance contracts was expressed in the Notes to Draft Insurance Contracts Bill 1982: ‘The Insurance Contracts Act is not a code of insurance contract law. It only relates to certain aspects of the law relating to insurance contracts.’

So, it may be that the Insurance Contracts Act, by virtue of s. 13 or otherwise, does not provide an insured with the same implied warranties that are found in s. 74(1) and (2) of the TPA which are enforceable under contract law. If this is the case, access to justice and the remedies available to consumers are unnecessarily limited. In any event, there is a degree of uncertainty surrounding the relationship between s. 13 of the Insurance Contracts Act and s. 74 of the TPA. The repeal of s. 74(3)(b) would remove any uncertainty in relation to this matter. Accordingly, the ACCC is of the view that the implied warranties under s. 74 of the TPA should apply to insurance contracts at least until

¹⁷ Sutton, K. (1991), *Insurance Law in Australia*, 2nd Ed, The Law Book Company Limited, p. 101.

¹⁸ ISC (1996), *A Guide to the Insurance Contracts Act*, AGPS, p. 5.

it can be said without question whether or not the Insurance Contracts Act provides **those** rights to consumers.

A curious situation exists in respect of the history of s. 74(3)(b) and s. 87(1E) of the TPA. They were amended by the same Act in 1986 for essentially the same reason (i.e. the Insurance Contracts Act was enacted which was viewed to provide adequate protection in those areas). In 1992 the GWP recommended they both be repealed as it believed that ‘as a matter of general policy, legislation such as the TPA should not include industry specific exemption’.¹⁹

Section 87(1E) of the TPA (discussed above in section 2.3.3) was subsequently amended in accordance with the GWP recommendation to allow a court to make orders under s. 87 for contraventions of Part IVA of the TPA where pre-contractual conduct is unconscionable in relation to a contract of insurance to which the Insurance Contracts Act applies.²⁰

Although the GWP also recommended that consideration be given to the removal of the insurance specific exemption from s. 74(3) of the TPA, no action has been taken in this regard.

While contracts of insurance are covered by the Insurance Contracts Act, the role of the TPA (and State Fair Trading legislation) in complementing the Insurance Contracts Act should not be overlooked. This is particularly so in light of the findings of the FSI which recognised that the distinction between financial products is becoming less clear. The TPA (and State Fair Trading legislation) has a vital role to play in this area as it contains **specific** provisions aimed at protecting consumers against misleading or deceptive conduct and from anti-competitive practices. The ISC guide notes that ‘[t]he TPA and the Fair Trading legislation provide codes covering all industries, not just insurance’.²¹ However, as noted above, the Insurance Contracts Act is not a code of insurance contract law. It only relates to certain aspects of the law relating to insurance contracts.

The ACCC notes that the ICA (representing the general insurance industry) is not opposed to the removal of the exemption to s. 74(1) (i.e. due care and skill and fitness for purpose) as it agrees ‘that insurance services should be rendered with due care and skill’.²²

However, the ICA is opposed to the removal of the exemption to s. 74(2) (i.e. fitness for a particular purpose that was made known) as it believes ‘that there is a substantial risk that a court could hold that the particular purpose made known by implication by the consumer was that the insurance should be exclusion free’.²³ The ICA also noted that this would make it impossible for insurers to market an affordable product as they do today. The ICA

¹⁹ GWP (1992), *Report of the GWP on CCI*, p. 42.

²⁰ As noted by the GWP, the implied duty of utmost good faith appears to have led to the enactment of s. 15 of the Insurance Contracts Act (s. 15 is discussed above in section 2.3.3). The amendment to s. 87(1E) of the TPA was linked to the amendment of s 15 which clarified the scope of s. 15 and its relationship to the TPA.

²¹ ISC (1996), *A Guide to the Insurance Contracts Act*, AGPS, p. 4.

²² Letter from the ICA to the ACCC dated 26 June 1997.

²³ *ibid.*

expressed concern that the removal of the exemption to s. 74(2) would ‘destroy ... sensible commercial safeguards in a sound and well-meaning contract without regard for the consequences to both parties’.²⁴

The ACCC is of the opinion that such an extreme scenario is unlikely to occur. For a court to hold that the particular purpose was that the insurance should be exclusion free, it must first be proven that such a purpose was made known by the consumer. If it were in fact made known to an insurer, the insurer has a choice as to whether or not it will supply services for that particular purpose.

It is outside the scope of this review to undertake an in depth analysis of the regulatory impact of the removal of the insurance specific exemption in s. 74(3)(b) of the TPA. Nevertheless, the ACCC believes that the repeal of s. 74(3)(b) will result in a net benefit from the improvements that will ensue in terms of access to justice for consumers. Costs to industry are likely to be negligible, especially for those businesses already acting in accordance with the spirit of s. 74. Furthermore, the application of the implied warranties under s. 74 of the TPA to insurance contracts encourages good business practice which benefits both consumers and businesses.

The ACCC recommends the insurance specific exemption under s. 74(3)(b) of the TPA be removed.

4.4 Additional action

As discussed above in section 3.3, issues are emerging which are linked to, but not directly targeted by, the GWP recommendations. The following issues have been identified where action can be taken to address the associated problems.

4.4.1 Inappropriate sales

A lack of attention by particular agents (identified above in section 4.2 as ‘distant agents’) to the nature of CCI and inadequate training in conjunction with consumers’ generally low level of awareness, sometimes leads to CCI being sold inappropriately in ways such as those discussed above in section 3.3.2. One method to raise the awareness levels of consumers, and to ensure that CCI is sold to the right people, involves the introduction of a ‘checklist’ of questions (discussed above in section 4.2 under ‘Information mix in CCI transactions’).

Clearly, the scale and scope of the checklist needs to be kept in line with the overall value of the product so as not to impose an undue cost in selling the product. A much simplified and shorter version of the ‘needs analysis’ contained in the *Code of Practice for Advising, Selling and Complaints Handling in the Life Insurance Industry* may be a good starting point.

The requirement for particular agents selling proposals to require consumers to use a checklist would help to avoid inappropriate sales by helping **consumers** to decide whether

²⁴ *ibid.*

they needed CCI and what level/form of cover is appropriate for their situation. Basically, it would act as a trigger mechanism with regard to consumer awareness at the point of sale.

Other benefits that would flow from the checklist would include:

- helping to ensure that agents analyse the needs, circumstances and objectives of the customer to ensure that advice is given on a reasonable basis;
- agents obtaining necessary information about the consumer's personal circumstances (e.g. age, state of health, employment status, and other insurance coverage) in order to advise them properly;
- agents being required to discuss CCI more thoroughly, which would lead to improvements with regard to verbal information;
- improved compliance of agents with existing ISC regulations and legislation; and
- assistance in monitoring the training of agents by insurance companies.

A checklist would also assist ADR panels in making determinations on certain disputes. In the past, ADR panels have sometimes been forced to make determinations on issues involving pre-sale disclosure, in the absence of any written evidence as to disclosure (see for example: Determination of the General Insurance Claims Review Panel, Referral No. 596 01 2131, reproduced at Appendix G). A checklist would help to overcome evidentiary problems in the area of pre-sale disclosure by providing a written account of what was disclosed by the consumer (and **accepted** by 'distant' agents).

Accordingly, the ACCC reiterates its previous recommendation (in section 4.3.2 above) in relation to introducing a checklist of questions.

4.4.2 Re-financing

Cases examined by the ACCC, submissions received by the ACCC and determinations of the General Insurance Claims Review Panel (see for example: Determination, Referral No. 296 01 2169, reproduced at Appendix G) have indicated that the consequences of re-financing on a loan are not always explained to consumers of CCI. This has sometimes led to disputes when consumers claimed in respect of injuries or disabilities which were determined to be 'pre-existing' as they developed during the operation of the previous policy.

Consumers need to be made aware of the consequences of entering into a new policy with emphasis on any change in circumstances since the previous policy was entered into. In particular, consumers should be made to undergo the process of full disclosure pertaining to the new policy.

The ACCC recommends that the ICA, when commissioning the next formal review of the General Insurance Code of Practice, seek to introduce CCI specific guidelines into the code which include requiring members to adopt industry 'best practice' with regard to allowing the eligibility to claim on a new CCI policy, after the previous policy is terminated as a result of loan refinancing, to be determined under the

previous policy unless the consequences of entering into the new policy were brought to the attention of the insured at the time the new policy was taken out.

The ACCC understands that some CCI insurers already have policies and claims procedures which operate along these lines, and considers this to be ‘best practice’ for the industry. The ICA, when commissioning the next formal review of the General Insurance Code of Practice, should seek to introduce CCI specific provisions into the code that require its members to adopt this practice.

4.4.3 Monitoring

The ISC currently monitors and reports on the sale of CCI policies by general insurance companies. The benefits associated with the publishing of such data were discussed above in section 2.4.3. The ACCC recognises the importance of continual monitoring and associated enforcement action in keeping a check on the pockets of problems in industries such as CCI. However, it is also recognised that despite a range of mechanisms being in place, some parts of the industry may comply less effectively than others.

Nevertheless, there is an important role for monitoring and enforcement action in the effort to reduce those pockets of problems.

The ACCC recommends that the ISC, as part of its on-going regulatory activities and new initiatives in the market for CCI, such as questionnaire surveys, should:

- **increase its collection and dissemination of disaggregated data which would enable distinctions to be made between the different forms of CCI and the different distribution channels. This may assist in isolating problems to a particular form of CCI, distribution mechanism or individual agent. To this end, the ISC needs to develop industry and consumer surveys that provide a ‘micro perspective’ on the problems which exist and areas where improvements could be made in the market for CCI;**

The current ISC/ICA initiatives to develop an industry questionnaire survey as the basis for generating disaggregated industry data should continue and are strongly endorsed by the ACCC. The ISC should extend these initiatives to encompass a similar disaggregated survey for consumers of CCI;

- **report on the sale of CCI policies by life insurance companies in a similar way as it does for the sale of CCI policies by general insurance companies; and**
- **continue to liaise and work closely and regularly with consumer and public advocacy groups handling CCI cases in order to further develop a ‘micro’ perspective on the CCI market. (In particular, this should assist the ISC in appropriately targeting compliance and enforcement activities in the CCI market.)**

5. Which of the industry and regulatory based changes introduced in response to the Reports by

the TPC and GWP have been relatively more effective, and why?

5.1 Introduction

This part looks at the relative effectiveness of the reforms which were implemented in response to the TPC and GWP reports (GWP reforms).

The method of assessment and the conclusions reached by the ACCC are qualified according to a number of provisos and assumptions which are discussed below.

Implications for consumer protection regulation generally are also discussed.

5.2 Difficulties in assessing effectiveness of GWP reforms

The ACCC encountered a number of difficulties when assessing the effectiveness of the GWP reforms.

Firstly, changes have occurred within the industry apart from those in response to the GWP reforms. The ACCC's task of apportioning the amount of benefit directly attributable to CCI measures was complicated by:

- the General Insurance Code of Practice which has also been responsible for improving the quality of information being made available to consumers, through provisions aimed at the training and monitoring of insurance agents and plain English requirements;
- the implementation of the UCCC at a time when the full potential of the GWP reforms were still being realised. This will cloud the assessment of the true impact of the reforms;
- a fall in the number of agents selling CCI, and a consequent rise in the average standard of remaining agents; and
- the pervasive impact of cultural and behavioural changes flowing from the above factors on many CCI market participants, which has positively effected the way CCI is being sold to consumers.

Secondly, difficulties were also encountered in relation to the interpretation of data due to a number of factors. These included:

- the effect of the cyclical nature of the economy on the market;
- the change of balance date of a large insurer (the Commercial Union Group) distorted the data for 1994 and 1995;
- there were time lags before the impact of the changes were reflected in statistics due to the long term nature of CCI products (usually between 3–5 years in duration); and
- most data is calculated in relation to the 'flow' of new policies issued each year rather than the 'stock' of policies currently extant in each year. As CCI policies are issued for the same period as the finance agreement, usually between 3–5 years, it would be

more appropriate to use the ‘stock’ of policies rather than the ‘flow’ of policies when comparing the number of claims or number of complaints/disputes to the number of policies.

Thirdly, a major determinant of the impact of each of the GWP recommendations will be the extent to which they are complied with by market participants. Commitment by insurers and agents to implementing and complying with the reforms is a prerequisite to ensuring the reforms have their intended impact and that benefits flow to consumers. As noted above, the lack of uniformity in implementing the reforms has resulted in not all consumers having benefited to the same extent.

5.3 Relative effectiveness of GWP reforms and causes

Because of the above difficulties, a rigorous cost-benefit examination of each of the GWP reforms was not practical given the scope and timing of this review. Comprehensive cost-benefit conclusions have also been constrained by a lack of readily available evidence relating to some of the individual GWP reforms.

As a consequence, the analysis presented below is necessarily somewhat broad-brush and interpretative, and the conclusions reached are qualified by the data available. The analysis will proceed by considering each of the broad categories of GWP reforms analysed in Part 2, namely:

- information provision to consumers;
- consumers’ access to justice; and
- the collection and dissemination of CCI statistics.

5.3.1 The timeliness, quality and amount of information given to consumers

GWP reforms included:

- disclosure requirements (ISC Circular and amendments to the Insurance Contracts Act — s. 71A);
- 14 day cooling-off period (ISC Circular and amendments to the Insurance Contracts Act — s. 64A);
- training and monitoring of agents (ISC Circular and General Insurance Code of Practice); and
- plain English documentation (General Insurance Code of Practice).

As noted above in section 2.2.3, the introduction of disclosure notices, as required under s. 71A of the Insurance Contracts Act, has played a fundamental role in improving the timeliness, quality and amount of information being given to consumers. The pre-sale brochure, point-of-sale and post-sale notices have seen the quality and amount of written information/documentation increase and become more standardised while being received by consumers on a more timely basis.

However, consumers appear to derive differential benefits from the different disclosure requirements due to the nature of the product and the circumstances surrounding the particular transaction. Generally, the point-of-sale and post-sale disclosure notices appear

to have been more effective than the pre-sale brochure in providing useful information to consumers. In particular, the notices have raised consumers' awareness of the opportunity to cancel their policy and receive a full refund within the cooling-off period.

The post-sale disclosure notice is particularly useful for consumers. It draws the consumer's attention to the 14 day cooling-off period at the same time that it allows consumers to reflect upon the CCI purchase away from the point and time of sale, and the pressures associated with the purchase of related products and finance.

The 14 day cooling-off period is an essential element in providing consumers with an opportunity to make an informed choice as to whether or not to buy CCI. It is particularly effective as a compliment to the post-sale notice since the cooling-off period runs from the day the consumer receives the post-sale notice. Consequently, consumers' awareness of the cooling-off period is triggered by the post-sale notice on day one of the cooling-off period. Although the current post-sale cancellation rate is low in aggregate, this could reflect either the impact of all the GWP recommendations in improving the market or a low response by consumers to the information provided.

The point-of-sale notice is also useful, but its impact is lessened somewhat as it is often provided along with a great deal of other written information pertaining to the purchase of physical products and the finance that the CCI is insuring.

Pre-sale information is usually of lesser value to consumers than other forms of disclosure due to CCI often being sold as an ancillary product in connection with other goods and services. Consumers often do not 'shop around' for CCI specifically, but rather purchase it as an adjunct to their primary transaction.

The increased availability of information has been supplemented by more formalised and rigorous training requirements for agents which have helped to enhance the distribution methods of agents with better procedures adopted, greater formality demonstrated and better advice being given when dealing with consumers. However, it is less easy to judge the individual effectiveness of GWP reforms in this area than it is for the case of written disclosure information and cooling-off periods because of the more pervasive and cultural nature of the changes.

More recently the GWP reforms relating to the provision of information to consumers of CCI has been reinforced by the adoption and operation of the General Insurance Code of Practice since 1 July 1995. The code has assisted the GWP reforms through its plain English requirements for disclosure information, and the provisions aimed at improving the training and monitoring of insurance agents by insurers.

As has been noted above the impact of the GWP recommendations has not been uniform despite the improvements in the market. The benefits delivered by the reforms largely depended upon the action taken by the individual principals/agents when implementing the GWP recommendations to ensure compliance with the reforms. In particular, the level of training and monitoring of agents will greatly influence the benefits which are passed on to consumers.

The different types of distribution arrangements and mechanisms which exist throughout the market (as discussed in Information box 2) appears to be the main cause for the

variation in implementing and complying with the GWP recommendations and associated benefits.

The costs associated with the improvements in information provision must also be taken into account when determining the effectiveness of the GWP reforms. Inevitably, costs were incurred by industry and government during the implementation of, and ongoing compliance with, the GWP recommendations. These costs included:

- the development, publishing and distribution of a circular by the ISC;
- procedural and administrative costs associated with the amending and passing of legislation; and
- administrative, printing, training and monitoring costs borne by industry in order to comply with disclosure requirements.

As outlined in Part 2, the GWP reforms have delivered significant and systemic benefits to consumers in a segment of the insurance market that had been a source of major problems for consumers. In this regard, and taken as whole, the GWP reforms regarding information provision appear to have delivered net benefits to society, and more particularly to consumers of CCI, despite the costs noted above and the differential impact of the reforms.

That said, some of the reforms have delivered more visible benefits than others. Perhaps the most obvious and successful have been the post-sale notice and 14 day cooling-off period. For others, such as the pre-sale brochure, the individual benefits are not as obvious or easy to discern relative to the costs. However, as part of an overall package of reforms, the effectiveness of less visible GWP reforms should perhaps not be underestimated.

5.3.2 Consumers' access to justice and remedies

GWP reforms included:

- extending the terms of reference of the General Insurance Claims Review Panel to including those from small business;
- s. 15 of the Insurance Contracts Act amended as recommended;
- s. 87(1E) of the TPA repealed (enabling a court to make orders under s. 87 for contraventions of Part IVA of the TPA in relation to a contract of insurance to which the Insurance Contracts Act applies); and
- s. 55A inserted into the Insurance Contracts Act (enabling the ISC to intervene in actions on behalf of policyholders).

Clearly, consumers now have greater access to justice and more remedies are available. However, it is difficult to measure the effectiveness of the GWP reforms in this area.

Although there have been improvements in this area, there has been a fall in the number of complaints as a proportion of the total number of policies in force since the implementation of the GWP reforms. However, the number of complaints to ADR schemes is, of itself, in many ways, an inappropriate measure of access to justice as less complaints may reflect a number of factors (as noted above in section 2.3.3).

Consumers' access to justice through the General Insurance Claims Review Panel is still limited as the panel's jurisdiction is limited to disputes relating to claims (as noted above in section 2.2.3). It cannot look at other CCI disputes such as those with respect to an insurer's sales or marketing practices, or general business administration, except where they directly relate to the claim.

In theory, consumers' access to justice and available remedies have increased with the amendment of s. 15 of the Insurance Contracts Act and repeal of s. 87(1E) of the TPA (as discussed above in section 2.3.3). Consumers should be more willing to exercise their rights with the reduced the level of confusion as to the effect of s. 15.

A court can now make orders under s. 87 for contraventions of Part IVA of the TPA in relation to a contract of insurance to which the Insurance Contracts Act applies.

However, the ACCC has been unable to identify clear evidence to ascertain the practical effect of these two specific elements of the GWP reforms for consumers of CCI.

Further, the effectiveness of ISC intervention in actions on behalf of policyholders cannot be assessed as there has been no such intervention by the ISC as yet.

In terms of access to justice and available remedies, the costs to government associated with the GWP reforms have been limited to those associated with changes to legislation and the terms of reference of the General Insurance Claims Review Panel.

Industry has also incurred costs in contributing to the ADR schemes, in having cases determined by the schemes, and in developing/improving 'internal' dispute resolution schemes. However, to the extent that improvements to internal complaints handling and consumer redress also deliver benefits to industry in terms of customer service and goodwill, and in terms of identifying problems of compliance and monitoring, the net costs to industry of these are likely to be considerably lower than the full cost of setting-up internal complaints resolution schemes.

While the precise benefits delivered by the GWP reforms are less clear cut in regard to access to justice than for provision of information, it would appear that they have come about with relatively little, one-off costs either to government or industry.

5.3.3 Collection and dissemination of data on the performance of CCI insurers in order to assess the success of the measures proposed in the GWP report

GWP reforms included:

- aggregate statistics on underwriting results, claims made and paid, and commissions paid for CCI published by the ISC on a six monthly basis;
- information on market concentration, and spread of loss and expense ratios published by the ISC in the December statistical bulletin each year;
- comments on CCI statistics provided in ISC media releases and in the statistical bulletins; and
- the ISC was provided with additional resources so it could perform tasks under the new Part 1A of the Insurance Contracts Act. Part 1A provides the Insurance and Superannuation Commissioner with powers in relation to administration and

enforcement of the Insurance Contracts Act. It also enables the Commissioner to obtain documents, review administrative arrangements, collect additional statistics, and promote education. In addition:

- a compliance section was established;
- the ISC is represented on the Board of the IEC; and
- a General Insurance Code of Practice was released in December 1994.

Public reporting has been an essential ingredient in ensuring the GWP recommendations have had their desired impact.

Six monthly publishing of aggregate statistics by the ISC has improved the public visibility of agents and highlighted the performance of CCI providers to consumers and governments. The increased transparency has made it easier to monitor and review trends over time and view the aggregate impact of credit providers using agency arrangements to sell the product.

The collection and publishing of concentration data has also delivered net benefits through assisting in the assessment of the level of competitiveness in the market and the underlying commercial performance of insurers.

The additional powers of the ISC has increased the accountability of insurers in providing value for money CCI products. However, restricting the collection and dissemination of data to aggregate data limits the effectiveness of reporting and monitoring. Data collection and dissemination would be more effective if it included disaggregated data (as discussed above in sections 2.4.3 and 4.3).

Costs associated with the GWP reforms in this area have impacted on both the ISC and the insurance industry.

For the ISC these have included the collection, analysis and publication costs associated with the publishing of aggregate statistics and concentration data, and the cost to government of providing the ISC with additional resources so it could perform tasks under the new Part 1A of the Insurance Contracts Act.

For industry there are on-going reporting costs. While much of the information collected for the ISC is the sort of commercial data that industry would collect to manage its business in any case, there are costs associated with transformation of data for ISC use and the generation of additional data that would not otherwise be collected.

With regard to reporting costs it is important that collection costs are kept to a minimum through periodic review and assessment of the need for certain data and the identification of ways to reduce collection costs. In this way the net benefit of public reporting of performance data by the ISC can be increased. As noted above the net benefit could also be increased through a greater emphasis on identifying and generating more disaggregated data on the CCI market from both industry and consumers.

In this context a review by the ISC, in consultation with the ICA and consumer bodies, of the forms of aggregated data it collects, the manner in which it collects such data and the relative mix of aggregated and disaggregated data, could be very timely.

The ACCC recommends that the ISC, as part of its on-going regulatory activities and new initiatives in the market for CCI, such as questionnaire surveys, should review the net benefit of all aggregate CCI data that it collects from industry, with a view to modifying the collection of data and keeping down reporting costs for industry.

5.4 Implications for future consumer protection regulation initiatives

In addition to drawing some conclusions about the relative effectiveness of the measures flowing from the TPC and GWP reports, the current ACCC review of the market for CCI has been able to identify some more generalised lessons for future regulatory initiatives in insurance and finance markets. These general lessons are interrelated and pertain to issues raised throughout this report, namely:

- the importance of a targeted approach;
- the importance of providing optimal information to consumers; and
- the need to encourage compliance with regulation by all market participants.

5.4.1 The importance of a targeted approach

The GWP reforms were directed at the market for CCI as a whole and they have resulted in overall systemic improvements.

However, the combination of legislative, regulatory and self-regulatory reforms that resulted have tended to adopt a 'blanket' approach, in that they did not necessarily distinguish between the different types of distribution arrangements and outlets for CCI. The result has been that certain problems have persisted in particular areas of the market, both on the supply-side (distant agents) and on the demand-side (disadvantaged consumers).

Although 'blanket' regulation can go a long way to addressing problems in a market, especially when first identified, it will not be completely effective if those problems are a result of diverse situations and relationships, such as the different types of distribution arrangements in the CCI market. Instead, the undiscerning nature of 'blanket' regulation will result in 'pockets' of problems remaining where the specific causes of those particular problems have not been appropriately or adequately targeted. Even where 'blanket' regulation is effective in stamping out all the problems in a market it is too heavy handed most of the time.

Furthermore, as 'blanket' regulation does not discriminate between individual market participants but imposes the requirements across the whole market, there may be different results in terms of the net public benefits and costs delivered in particular segments of the market. Net benefits will be higher where there were many problems and little compliance by market participants prior to regulation, conversely they will be lower (and possibly negative) where there were few problems and compliance by market participants was already high prior to regulation.

In considering measures to address market problems, governments, regulators and industry need to consider regulation and/or compliance measures which are tailored towards problem areas. This will help to ensure, not just that problems are appropriately addressed, but also that compliance costs are not imposed unnecessarily on industry. A targeted approach is particularly important in markets or industries where a considerable quantity of legislation, regulation and self-regulatory initiatives are already in place in order not to over regulate those segments of the market that are not causing problems.

As an integral component of a targeted approach to regulation, the ACCC recognises the importance of utilising intelligence from those best placed to identify persisting problems at the 'grass roots' level. In particular, the role of consumer and public advocacy groups in providing a 'micro-view' of the market needs to be recognised by government, regulators and industry if persisting problems are to be targeted effectively.

Organisations such as State legal aid, consumer credit legal centres, financial counselling associations, etc have the greatest exposure to problems relating to products like CCI and are invaluable in identifying problem areas.²⁵ Not only can they help to identify problems on the demand side (less reputable operators) but through their core activities they provide targeted assistance for (disadvantaged) consumers at the 'bottom end' of the market who are most badly affected by problems.

The ACCC recognises that other avenues for resolving disputes, such as IDR and ADR schemes, also play an important role towards improving access to justice for consumers. However, they are not always able to offer consumers the type of assistance that is required or able to offer an appropriate remedy. Organisations such as Legal Aid are sometimes the only place where consumers, and 'disadvantaged' consumers more so, can turn.

These organisations are also a vital part of a regulator's inventory and should be utilised to their full potential. Accordingly, the ACCC notes that funding by industry and government for this form of 'market intelligence' is not only warranted, but essential if problems are to be appropriately addressed.

One of the problems of people representing themselves in court, at the moment, is that; the case usually takes much longer, extra costs are generated which are borne mainly by the community in funding the court system and by the opponent, and a seemingly deserving litigant may lose everything and an unmeritorious party succeed due the inability of the litigant to fully understand the rules of evidence, to know what witnesses to call and what facts have to be proved to establish a case.²⁶

High costs mean lawyers are less accessible for the poor and middle class consumers. Consequently their use of lawyers is limited to where:

²⁵ Most of the consumer advocacy groups that were consulted informed the ACCC that for their staff specialising in insurance and financial markets, insurance matters accounted for approximately one third of their cases, half of which were CCI matters. Evidence of this type suggests not only that CCI is over-represented as a source of problems for disadvantaged consumers but also that it impacts disproportionately on the already stretched resources of public advocacy and legal aid groups.

²⁶ Young, P. W. (1992), *Deregulation of the Legal Profession*, 66(8) ALJ 482.

- monopoly practices require it;
- successful litigation is highly probable and will cover legal costs;
- the consequences of failure are so grave that all resources are committed to paying legal fees; or
- where legal costs are provided for (such as legal aid) or underwritten.²⁷

This will undoubtedly result in many of the legal needs of ‘ordinary’ people not being met. Justice Kirby made the point:²⁸

Unless funded by legal aid, supported by a community group, assisted by a legal centre or *pro bono* lawyer or somehow facilitated by funding or other support, there are thousands of people who cannot pursue their legal rights. To them, the legal profession seems inaccessible. The courts appear remote.²⁹

Legal aid organisations do not have sufficient resources to cover demand. Consequently, the majority of ordinary people are being denied the assistance of legal aid as they fail to meet the increasingly stringent eligibility criteria for legal aid that is necessary to ensure their limited funds are applied in the most equitable and cost-effective way.³⁰

The ACCC is aware that funding is also provided to 46 community organisations throughout Australia which employ trained financial counsellors who provide free services. The ACCC notes that the former Minister for Small Business and Consumer Affairs has secured funding of around \$2 million for the Financial Counselling Program in 1997–98, similar to that allocated to the 1996–97 program.³¹ Such funding will undoubtedly assist individuals and families in low income and disadvantaged circumstances.

Nevertheless, the majority of ordinary people are still not eligible to receive assistance from these types of public legal services despite significant Government funding. The ACCC is not recommending that Government increase current levels of funding in this area, but that funding is supplemented from other sources where this is appropriate.

²⁷ Weisbrot, D. (1990), *Australian Lawyers*, p. 231.

²⁸ Justice Michael Kirby is President of the NSW Court of Appeal.

²⁹ *Australian Lawyer*, February 1994, p. 24.

³⁰ More than 50 000 applicants for legal aid were turned down in 1991–92.

³¹ Media release by the Hon. Geoff Prosser, *Funding maintained for financial counselling*, 14 May 1997.

The ACCC recommends that the Government explore means of boosting the funding of legal centres for insurance related matters. One option worthy of greater examination is supplementing government funding with *industry contributions* to small numbers of community based specialist insurance and finance workers.

These contributions could be linked to complaints data, enforcement action by regulators or the type of products figuring most highly in the work load of these workers. In this way a user pays element can be built in to the cost of providing assistance to ‘disadvantaged’ consumers and ‘grass roots’ market intelligence for regulators and government.

Furthermore, there should be formal arrangements in place whereby community based insurance and finance workers liaise with the relevant regulators on an on-going and regular basis in an effort to share market intelligence as to the difficulties being encountered by consumers.

Even though CCI is over-represented in the work of community based legal workers, it is not sufficient by itself to justify such industry funding. Clearly, a sector wide perspective would need to be taken, and the ACCC is mindful that this can only be taken by Government in the context of a thorough consideration of the findings of the FSI. If no such funding occurs in the context of Wallis, it is recommended that the Government consider taking action with regard to funding in the context of this report.

5.4.2 The provision of optimal information to consumers

Another implication for consumer protection regulation relates to the provision of information to consumers. There have been significant benefits to consumers from the disclosure requirements that were mandated by the various GWP reforms and other legislative and (self-)regulatory changes.

However, some consumers are still experiencing information problems (discussed above in section 3.2.4) despite receiving substantial disclosure documentation. The provision of information can be of limited benefit to consumers if they do not make effective use of the information provided.

Although the particular characteristics/circumstances pertaining to the individual may give rise to some problems, the nature of the disclosure regime may also be responsible for consumers not making effective use of information (as discussed in Information box 4).

Clearly, when regulating the provision of information, consideration must be given, not just to minimum disclosure requirements, but also to how that information can be most effectively communicated to consumers. The effective provision of information requires a sufficient **level** of disclosure to consumers, but it also requires that consumers are **aware** of that information so they are able to make use of that information. Possible mechanisms to trigger/raise consumer awareness are discussed above in section 4.3.2.

Basically, regulation must provide for the **optimal level and mix of information** in addition to the content of information being disclosed.

5.4.3 The need to encourage compliance with regulation

Regulation needs to be both properly implemented and complied with in order for the benefits to be passed on to consumers. As noted above in section 4.2, part of the reason why problems still exist in the market for CCI is because the regulatory mechanisms are not being complied with by all market participants.

Effective compliance with regulation by all market participants will only be achieved when the potential costs of not complying (the consequences of being caught) outweigh the benefits of not complying (the gains from cheating). That is, there must be sufficient incentive to comply with regulation in that the expected disincentives for non-compliance are prohibitive.

The potential costs (expected value) of being caught for non-compliance are calculated by multiplying the probability of detection (influenced by the level of enforcement action) by the corresponding penalty for non-compliance (e.g. fines, loss of licence, loss of business, court costs, adverse effect on reputation, etc.) as a result of enforcement action.

Therefore, compliance may be improved by increasing the level of targeted monitoring and regular enforcement action (i.e. chance of being caught) and raising penalties to sufficiently high levels. Furthermore, targeting enforcement action at particular 'cowboys' will help to improve compliance amongst similar operators, precisely that segment of the market where compliance is likely to be lowest.

5.5 Conclusion

The assessment of the relative effectiveness of the GWP reforms and relative causes was subject to a number of constraints and provisos, including:

- a lack of readily available evidence in relation to some of the GWP reforms;
- changes within the CCI industry apart from those in response to the GWP reforms (making it difficult to apportion the amount of benefit directly attributable to CCI measures);
- difficulties in relation to the interpretation of data; and
- the lack of uniformity by insurers and agents in implementing and complying with the reforms.

Consequently, the conclusions reached by the ACCC were based on a relatively broad-brush and interpretative analysis.

The GWP reforms regarding information provision appear to have delivered net benefits to society, and more particularly to consumers of CCI, when viewed as a whole. Perhaps the most obvious and successful reforms have been the post-sale notice and 14 day cooling-off period. For others, such as the pre-sale brochure, the individual benefits are not as obvious or easy to discern relative to the costs. As part of an overall package of reforms the effectiveness of less visible GWP reforms should perhaps not, however, be underestimated.

Consumers have also benefited in terms of greater access to justice and more available remedies since the implementation of the GWP reforms. However, it is difficult to

measure the effectiveness of the GWP reforms in this area. Clearly there have been improvements, but the precise benefits delivered by the GWP reforms are less clear cut than for provision of information. Nevertheless, it would appear that benefits have come about with relatively little, one-off costs either to government or industry.

The GWP reforms relating to the collection and dissemination of data have played an essential part in ensuring the GWP recommendations have had their desired impact. Although there have been net benefits as a result of the reforms in this area, data collection and dissemination would be more effective if it included disaggregated data.

An assessment of the relative effectiveness of the GWP reforms has enabled a number of general implications for future consumer protection regulation initiatives to be identified.

First, it is important that governments, regulators and industry adopt a sufficiently targeted approach to addressing market problems in order to ensure those problems are appropriately and adequately addressed, and that compliance costs are not imposed unnecessarily on industry. This is particularly important in markets or industries where a considerable quantity of legislation, regulation and self-regulatory initiatives are already in place.

Secondly, regulation must provide for the **optimal level and mix of information** in addition to the content of information being disclosed.

Thirdly, it is not enough that there are regulatory mechanisms in place to address problems in a market. There must also be sufficient incentives for market participants to comply with regulation. To achieve this targeted monitoring, regular enforcement action and penalties need to be at sufficiently high levels.

Appendix A. Summary time line of CCI reviews

1996	Ministerial direction that the ACCC conduct a review of the effectiveness of changes to regulation and industry practices in addressing the issues identified in the Commission's original study.
1994	General insurance code of practice developed in consultation with the TPC — covering claims procedures, disclosure, and training of agents.
1994	Recommended changes to the Insurance Contracts Act implemented to require disclosure notices, provide a cooling off period, and to give the ISC the power to enforce the Act on behalf of policyholders. Act also changed to allow the ISC to collect statistics from an insurer. The ISC publishes aggregate information on underwriting results, claims, and commissions, on a six monthly basis.
1993-4	Government release of the GWP report and acceptance of recommendations. ISC consultation to develop statutory point of sale and post-sale notices.
1992	Government working party (FBCA, ISC, TPC) formed to develop mechanisms for implementing the recommendations. GWP reported.
1991	TPC reported. Major recommendations included: <ul style="list-style-type: none"> ■ annual reporting by insurers on underwriting results, claims paid and denied, commission paid etc; ■ implementation of plain language standard form point-of-sale and post-sale information; ■ introduction of a cooling off period; ■ improved training for agents; and ■ public enforcement of the Insurance Contracts Act.
1991	TPC given a Ministerial direction to review the CCI market.
1990	Committee looking at uniform credit legislation raised CCI issues in discussions.
1987	Australian Financial Counselling and Credit Reform Association published report on consumer problems with CCI.

Appendix B. GWP recommendations

Extent of implementation of GWP recommendations intended to improve the timeliness, quality and amount of information to consumers.

GWP recommendations	Action taken
The issue of a comprehensive ISC Circular covering: the provision of important pre-sale, point of sale and post-sale information to consumers; a cooling off period; and agent monitoring and training.	<ul style="list-style-type: none"> ■ ISC issued Circular G1/94 on 16 March 1994; ■ Section 64A inserted into Insurance Contracts Act (to provide for a 14 day cooling off period after the insured receives a post-sale confirmation letter); ■ The general Insurance Code of Practice now covers training and monitoring of insurance agents.
Amendment of Insurance Contracts Act to provide statutory basis for disclosure notices.	<p>Insurance Contracts Act amended on 7 April 1994 requiring disclosure notices from 1 October 1994. Section 71A requires insurers to:</p> <ul style="list-style-type: none"> ■ ensure that a pre-sale information brochure is available to a person entering into a CCI contract of insurance; ■ give a written point-of-sale notice, as determined by regulations, to a proposed insured immediately before the insured enters into a CCI contract of insurance; and ■ provide a further written notice by post to the insured, after a consumer enters into a CCI contract.
ISC to consider alternative methods of conveying important information to consumers other than by using the standard cover system.	The ISC considered standard cover in its review of the Insurance Contracts Act and against the background of the plain English requirements of the code of practice. It has been decided to maintain standard cover and to update the regulations as it still has an important role to play in providing safety net cover for the policyholders in certain circumstances, and in alerting policyholders to the existence of unexpected exclusions.

Extent of implementation of GWP recommendations intended to improve consumers' access to justice and remedies.

GWS recommendations	Action taken
<p>Extend the jurisdiction of small claims tribunals to permit them to adjudicate on CCI disputes.</p> <p>Extend the jurisdiction of the NSW Commercial Tribunals to include CCI disputes.</p>	<p>These issues were brought to the attention of the State and Territory Ministers of Fair Trading and Consumer Affairs. There has been no significant action. The latter recommendation was not supported by Government.</p>
<p>Extension of terms of reference of the General Insurance Claims Review Panel to include all CCI disputes.</p>	<p>Panel can now consider references covering claims and breaches of the General Insurance Code of Practice, including those from small business.</p>
<p>Amendment to s. 15 of the Insurance Contracts Act to clarify that it only excludes the operation of Acts which provide for:</p> <ul style="list-style-type: none"> ■ judicial review of contract on one of the grounds specifically listed in the current s. 15; ■ relief for consumers from the consequences of making misrepresentations. 	<p>Act amended as recommended and effective from 7 April 1994.</p>
<p>Repeal of s. 87(1E) of TPA.</p>	<p>Act amended as recommended and effective from 7 April 1994.</p>
<p>Consideration of removal of s. 74(3) of TPA.</p>	<p>Paragraph 74(3)(b) of the TPA exempts insurance contracts from the implied warranties of due care and skill and fitness for purpose in s. 74 of the Act. The new Government has not considered whether any changes to s. 74 of the Act might be justified.</p>
<p>Empowering the ISC to intervene on behalf of policyholders, to take representative action, where it is in the public interest.</p>	<p>Section 55A inserted in the Insurance Contracts Act which took effect from 7 April 1994.</p>

Extent of implementation of GWP recommendations to collect and disseminate data on the performance of CCI insurers in order to assess the success of the measures proposed in the GWP report.

GWP recommendations	Action taken
ISC publish aggregate statistics on underwriting results, claims made and paid, and commissions paid for CCI.*	Published by ISC on a six monthly basis.
ISC publish details of outcomes of an inquiry where loss ratios, or other data appear to warrant such inquiry.	ISC data has not provided sufficient justification for such inquiry.
ISC publish information on market concentration, and spread of loss and expense ratios.*	Concentration data is published in the December statistical bulletin each year. Comment on CCI statistics has been provided in ISC media releases and in the statistical bulletins.
<p>ISC be given adequate resources to enable it to take an active role in:</p> <ul style="list-style-type: none"> ■ monitoring complaints with the provisions of the Insurance Contracts Act and regulations and with ISC circulars: ■ ensuring that adequate self-regulatory action is taken by industry; and ■ educating insurers, consumer and their legal advisers as to their rights and obligations under the legislation. 	<p>ISC was provided with additional resources so it could perform tasks under the new Part 1A of the Insurance Contracts Act. Part 1A provides the Commissioner with the powers in relation to administration and enforcement of the Insurance Contracts Act. It also enables the Commissioner to obtain documents, review administrative arrangements, collect additional statistics, and promote education. In addition:</p> <ul style="list-style-type: none"> ■ a compliance section was established; ■ the ISC is represented on the Board of Insurance Enquiries and Complaints Ltd (the body corporate overseeing the insurance industry complaints panels); and ■ a General Insurance Code of Practice was released in December 1994.

* These statistics are set out in Table 2.

Appendix C. Terms of reference

Having regard to:

- previous reports by the Trade Practices Commission and the Government working party on consumer credit insurance;
- recommendations by the GWP and the response by the previous Government to those recommendations; and
- advice by and comments from the Insurance and Superannuation Commission and the Federal Bureau of Consumer Affairs

the Australian Competition and Consumer Commission shall, within four months, report to Ministers on:

- the impact of the implementation of the recommendations of the GWP on the market for consumer credit insurance products;
- any continuing problems being experienced by consumers in acquiring access to competitive and appropriate consumer credit insurance products;
- any further action which might appropriately be undertaken by industry in consultation with regulatory authorities to rectify such problems; and
- which of the industry and regulatory based changes introduced in response to the reports by the TPC and GWP have been relatively more effective, and why.

Appendix D. Submissions received by the ACCC

Government agencies

Department of Fair Trading (NSW)
Federal Bureau of Consumer Affairs
Insurance and Superannuation Commission
Ministry of Fair Trading (WA)
Office of Consumer Affairs (QLD)
Office of Consumer Affairs and Fair Trading (NT)
Office of Consumer and Business Affairs (SA)
Office of Fair Trading and Business Affairs (VIC)

Consumer groups

Consumer Credit Legal Centre Inc (NSW)
Consumer Credit Legal Centre (WA)
Consumer Credit Legal Service (VIC)
Consumers' Federation of Australia Inc
Legal Aid Commission (NSW)
Public Interest Advocacy Centre (NSW)
The Credit Helpline

Industry associations

Australian Bankers' Association
Australian Finance Conference
Australian Lifewriters Association
Credit Union Services Corporation (Australia) Ltd
General Insurance Claims Review Panel
Insurance Council of Australia
Motor Trades Association of Australia

Insurance companies

AMP General Insurance Limited
Avco Financial Services Ltd
Colonial Mutual General Insurance Co Ltd
Hallmark Insurance
Mercantile Mutual Insurance (Australia) Limited
MTQ Insurance Services Ltd (QLD)
National Australia Financial Management Limited
National Mutual Holdings Limited
QBE Insurance Group
Swann Insurance (Aust) Pty Ltd
Westpac General Insurance Limited

Appendix E. Model post sale confirmation letter

Dear...

Thank you for your decision to buy consumer credit insurance which provides some protection for the repayments on your recent loan.

You should have received your insurance policy document at the time of applying for the loan or when the loan was approved. If you did not please phone us as soon as possible on the number below.

Your policy document contains important information. You should note that your policy covers:

1. Full repayment of your loan in the event of your death (subject to a limit of \$X).
2. Repayment of your loan instalments, subject to certain limitations and exclusions if you are totally disabled (subject to a limit of \$X).
3. Repayment of your loan instalments, again subject to certain limitations and exclusions if you become unemployed for a period of no more than X months (subject to a limit of \$X).*

Limitations and conditions apply to benefits under the policy. These are set out in the policy document. If you gave us the wrong or incomplete information on the proposal form the company may not have to pay you.

This is a single premium policy for which you paid \$X when taking out your loan.

You have a cooling off period which closes (on date/14 days after you received this letter) during which you can cancel this policy by (telephoning/writing to) us and get a full refund of the premium.

If you have any questions regarding the policy or need any assistance in making a claim do not hesitate to contact us.

* The inclusion of the words in this box are recommended **unless** the ICA can provide adequate legal opinion or advice showing that the inclusion of reference to policy information will compromise the contractual position of the insurers.

Appendix F. Pre-sale brochure

The pre-sale brochure may be in a format and contain such information as suits each individual insurer's marketing requirements.

It should include at least the following in a plain-language easily readable format:

- a brief explanation of the purpose of CCI;
- the general areas of cover offered by the policy;
- a reminder to the insured that it is important to read the policy carefully to understand the extent of the cover and its limitations;
- a statement to the effect that the purchase of CCI cover is not a condition of the granting of consumer credit; and
- information about the company's internal disputes resolution arrangements and, if applicable, the industry dispute resolution arrangements.

The pre-sale brochure should be readily available at all CCI points of sale. They should be handed over to all customers who express an interest in, or reveal some need for, consumer credit, and should be handed to the purchaser at the point of sale.

The principle of utmost good faith should be applied to the pre-sale brochure. In particular, care should be taken to ensure that the document is not misleading through omission, implication, ambiguous terms or industry jargon.

The letter should clearly show the name and address of the insurer.

Post-sale confirmation letter

The post-sale letter should be as simple as possible and should not contain or be accompanied by any promotional information.

It should include the following information, set out in plain language and in an easily readable format:

- advice that the policy holder has purchased consumer credit insurance with the loan;
- a copy of policy documentation if this has not already been provided;
- a reminder that there may be limitations on the need to refer to policy documents to understand clearly how these affect cover;
- notice of the existence of a cooling-off period (a minimum of 14 days) and the method by which the policy may be cancelled;
- a telephone number of a person or position to contact at the insurer if the policyholder has any queries; and
- advice of the existence of the insurer's internal dispute resolution arrangements and, where applicable, the external claims review scheme.

The post-sale letter should also contain an information box presented as follows:

Unemployment	Maximum number of claims	Benefit limit (e.g. insurer will meet instalments for months per claim)
Disability	Maximum number of claims	Benefit limit (e.g. insurer will meet instalments for months per claim)
Death	Cover available/ Not available	

Where the policy sold is a single premium policy the insured should be notified of the total premium paid for the policy.

Appendix G. Determinations of the General Insurance Claims Review Panel

Determinations of the General Insurance Claims Review Panel are made by the Panel and decided on the merits and particular facts of the individual case. They should not be treated as a precedent for other cases.

DETERMINATION

REFERRAL NO: 96 08 2858

Personal Accident — Insurance Contracts Act 1984 ss 22 & 71(A)

[ACCC note: this determination illustrates the use of s. 71A notices as a substitute for the duty of disclosure under s. 22 of the Insurance Contract Act.]

The claimant arranged consumer credit insurance on 9 September 1995 with the loans officer at a car dealership at the time of taking out a loan to purchase a car.

The claimant subsequently suffered an injury to his back while lifting and stacking timber at work on 15 March 1996 and, as a result, was unable to continue to work. The claimant has a long history of back complaints, stemming from an accident in his youth. The original accident ultimately necessitated surgery and some level of ongoing treatment has been required over the intervening twelve or so years.

A claim under the disability provisions of the policy was denied by the insurer on the basis that the claimant had failed to provide correct answers to questions contained in the proposal form.

The proposal contained three questions, each answered in the negative and initialled by the claimant. The relevant question asks:

Have you ever had treatment for, or been informed that you have ... back or neck trouble,?

The claimant answered 'No' to this question.

The claimant states that he has limited reading skills and that the loans officer completed the proposal, and showed him where he was required to sign or initial. The claimant maintains that he was not asked any questions regarding his medical history by the loans officer. The claimant's wife, who was present at this interview supports this assertion.

The claimant and his wife also contend that the loans manager was aware of the existing back problem as he was 'off work' due to this condition at the time of the proposal.

The loans officer has provided a statement denying that the claimant mentioned his back condition, and stating that it is his usual practice to ask proponents all the questions contained in the proposal.

The insurer has advised the claimant that if it was aware of his history of back problems, it would have endorsed the policy to exclude cover relating to this condition.

However, before the Panel can consider whether the claimant has or has not failed in his duty of disclosure to the insurer, the Panel must first consider whether the insurer has complied with its obligations to the claimant pursuant to the provisions of section 22 of the *Insurance Contracts Act 1984*. Section 22 of the Act is as follows:

22. (1) The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure.
- (2) If the regulations prescribe a form of writing to be used for informing an insured of the matters referred to in subsection (1), the writing to be used may be in accordance with the form so prescribed.
- (3) An insurer who has not complied with subsection (1) may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent.

In relation to subsection (2) above the regulations have, in fact, incorporated a form in writing for use in informing an insured of the matters referred to in subsection (1). This notice reads as follows:

PRESCRIBED FORMS OF WRITING TO BE USED FOR INFORMING INSUREDS
OF GENERAL NATURE AND EFFECT OF DUTY OF DISCLOSURE.

CONTRACTS OF GENERAL INSURANCE

Your duty of disclosure

Before you enter into a contract of general insurance with an insurer, you have a duty, under the *Insurance Contracts Act 1984*, to disclose to the insurer every matter that you know, or could reasonably be expected to know, is relevant to the insurer's decision whether to accept the risk of the insurance and, if so, on what terms.

You have the same duty to disclose those matters to the insurer before you renew, extend, vary or reinstate a contract of general insurance.

Your duty however does not require disclosure of a matter

- that diminishes the risk to be undertaken by the insurer;
- that is of common knowledge;
- that your insurer knows or, in the ordinary course of his business, ought to know;
- as to which compliance with your duty is waived by the insurer.

Non-disclosure

If you fail to comply with your duty of disclosure, the insurer may be entitled to reduce his liability under the contract in respect of a claim or may cancel the contract.

If your non-disclosure is fraudulent the insurer may also have the option of avoiding the contract from its beginning.

The Panel asked the insurer to clearly identify and explain to the Panel how it believes it has complied with section 22. The insurer, by letter dated 3 December 1996, advised as follows:

We contend that the document 'Important Information About Consumer Credit Insurance', a copy of which was given to the claimant at the time of his completion of the Proposal, conforms with the requirements under section 22 of the *Insurance Contracts Act 1984*.

That document which was issued to the claimant in accordance with the insurer's obligations pursuant to section 71(A) of the *Insurance Contracts Act*, and the regulations made thereunder, included the following paragraph:

2. If you decide to buy CCI you must:
 - answer all questions on the application form truthfully and accurately; and
 - tell the insurer everything which you know about that may increase the likelihood of your making a CCI claim in the future.

(if you don't do that, the insurer may not have to pay claims under your policy).

In the Panel's opinion, the terms of clause 2 of the notice referred to above (which in fact is a statutory notice) does not contain the information as required by section 22 and the notice contained in the regulations made pursuant to the Act. A significant matter not referred to in paragraph 2 above, is that the insured person must tell the insurer not only everything 'you know about' but also anything the insured 'could reasonably be expected to know about relevant matters'. In addition, the test is not as to whether the duty to disclose relevant matters "may increase the likelihood of making a claim" but that it must be relevant to the 'insurer's decision whether to accept the risk of insurance and if so, on what terms'.

There is nothing in the provisions of section 71(A) of the Act, nor with regard to the material relevant to the legislative history of this section which in any way relieves an insurer who is obliged to provide a notice under section 71(A) of the Act, from complying with its duty under section 22 of the Act. Indeed, in the speech made by the Minister to Parliament, when introducing the amending bill, he said in regard to the financial impact or important information statement that such a document is 'for added protection of purchasers of insurance products generally, and consumer credit insurance products in particular'.

Another brochure which the insurer states was provided to the claimant does not alter the situation described above and does at no point deal with the issues raised by section 22 of the Act.

For these reasons, the Panel determines that the insurer has not complied with its obligations pursuant to section 22 of the Insurance Contracts Act, and in accordance with sub-section 3 of that section (there being no allegation of fraudulent non-disclosure in this case), the Panel determines that the insurer is not entitled to exercise any rights that it may have in respect of any alleged failure by the claimant to comply with the duty of disclosure. The Panel, for these reasons, does not propose to deal further with the allegations with regard to non-disclosure.

The Panel therefore determines that the insurer is liable to indemnify the claimant with respect to this claim. The claimant seeks payments of benefits pursuant to the policy for disablement/unemployment. The Panel is not in a position to assess the amount payable pursuant to this claim. The Panel requests that the parties immediately enter into negotiations seeking to resolve this issue. If they are unable to do so within the next 28 days, the matter should be referred back to the Panel for a determination on this issue.

DETERMINATION

REFERRAL NO: 496 02 2242

Consumer Credit — extent of cover

[ACCC note: this determination illustrates problems, which occurred prior to the implementation of the GWP reforms, associated with the inadequate training of agents, evidentiary problems for the General Insurance Claims Review Panel in regard to pre-sale disclosure, and CCI being sold through car yards.]

The claimant suffered an injury at work in January 1995 and lodged a claim under his consumer credit insurance policy for payment of the ongoing instalments on his motor vehicle loan whilst he remained disabled. The claimant had purchased the motor vehicle, finance, comprehensive motor vehicle insurance and consumer credit insurance in one package through a motor vehicle dealer in April 1994. The company initially met the claim for three months, making the payments to the relevant finance company. However, it then refused the claim and recovered the payments from the finance company on the basis that the claimant had only taken out life cover and was not insured for disability.

The proposal form signed by the claimant is, at the relevant question, ticked for life cover only. However, the claimant has provided evidence by way of statutory declaration that when he initially chose the vehicle, he discussed consumer credit insurance and having been told that he could not afford unemployment cover, which he wanted, he and the salesman compromised on life plus disability cover. He says he was asked to and did sign the proposal form in blank as the salesman said he didn't like paperwork. Two days later, he was asked to attend again as his loan had been approved. He was taken by car to another office and there dealt with a second officer of the car dealer. He again asked about unemployment cover and was again told he could not afford it. When he said 'at least I've got sickness', he alleges the officer said 'yes'. He then signed the loan contract which had already been prepared.

It appears from the documents including the proposal that they were completed by the second officer. In response to the claimant's allegations the company relies on the fact that the normal procedure is for the insurance to be fully explained and that the proposal was signed and a copy of the policy provided. The company relied on an investigation carried out by the finance company. They interviewed the second officer. He said he could not remember the transaction but that he would have explained the policy terms.

It appears to the Panel that there may have been some confusion in the communication of the claimant's insurance needs by the salesman to the second officer. Weight is added to this impression by the fact that the claimant has provided evidence by way of statutory declaration from himself and his girlfriend to the effect that, when the claim was finally denied and they went to see the salesman, the salesman said he thought that the claimant had disability cover.

The fact that the company has relied upon the finance company's investigation of the allegations, and the lack of any evidence of the salesman's recollection of events, means that the company is able to offer little by way of evidence to contradict the claimant's account of what happened. That account is internally consistent and is in line with other instances of problems in the arranging of finance and insurance in car yards which have come to the Panel's attention. The complexity of the various transactions taking place and the time pressures involved greatly magnify the possibility of misunderstanding and confusion. The company's reliance on its usual procedures is not reinforced by the fact that it subsequently paid the claim for three months, although in its view disability cover had not in fact been provided.

Taking into account all of the circumstances the Panel considers that it would be fair and reasonable that the claim be met. Accordingly it determines that the claim be assessed and paid on the basis that the claimant has disability cover under the policy terms, subject to the deduction of the appropriate amount to cover the premium for such cover over the period of the loan. Interest should also be paid at the statutory rate from the date each instalment became due to the date of actual payment.

DETERMINATION

REFERRAL NO: 296 09 2939

Consumer Credit — non disclosure

[ACCC note: this determination illustrates problems associated with failing to inform consumers of their duty of disclosure.]

On 22 September 1995 the claimant arranged Life, Sickness and Accident cover to protect a loan of \$9000 over a term of three years. On 25 February 1996 he was declared unfit for work on medical grounds. The claim is for \$8 810.80, the balance of the loan as at 26 February 1996, plus interest. Included in this amount is \$9.10 for the cost of telephone calls, certified letters and photocopying.

The insurer refused the claim on the basis of the policy wording which states:

...

WE WILL NOT PAY

Any sickness or injury for which you have a consultation or treatment within the 6 months immediately preceding the Commencement Date and which requires treatment or results directly or indirectly in a trauma within the 6 months after the Commencement Date.'

The insurer submits that, although the proposal form does not call for details of health issues, the claimant signed a declaration which reads:

...

4. I understand that any sickness or injury for which I had a consultation or treatment within six months immediately preceding the Commencement Date and which requires treatment or results directly within the six months after the Commencement Date is excluded from cover.

The insurer applied the 6 months policy exclusion in respect of the claim on the ground that the claimant had a history of heart disease and stress at the time the policy incepted. It contended that the claimant consulted his doctor on 24 March 1995 (within the prior six month period) and again, on 19 October, 1995 and 9 January 1996 and that he was receiving continuous medication for ischaemic heart disease during this period.

The claimant's doctor has confirmed that he was diagnosed in 1992 as having ischaemic heart disease and that he was treated since then with Betaloc, Transiderm Nitro and Aspirin. The claimant points out that the heart attack he sustained in 1992 did not disable him from work. He says the condition for which he was disabled from work on

28 February 1996 was diagnosed as anxiety/stress reaction as the result of work related problems and personal factors related to his mother's death.

It is clear that the claimant was receiving medication for his heart condition during the six month period prior to the policy's inception and that he consulted his doctor within that period, on 24 March 1995, 19 October 1995 and again on 2 January 1996. His doctor has provided the following details of those consultations:

- | | |
|----------|---|
| 24/ 3/95 | Generalised lethargy, anxiety. No specific findings. |
| 19/10/95 | Viral upper respiratory tract infection — no specific treatment. |
| 9/ 1/96 | Routine review of cardiac states - problems re: sleep treatment — normison. |

The claimant was taking medication for a long standing heart complaint, but says the insurer's agent was informed of this fact. The agent advised 'There are no comments recorded on file stating that [the claimant's] medical history was discussed.'

The copy of the proposal supplied to the Panel does not contain any questions relating to pre-existing illness or the taking of medication. Nor does it appear to inform the proponent of his duty of disclosure. The Panel does not regard the declaration referred to by the insurer as a substitute for ascertaining information by specific questions on the proposal.

The claimant's medical history since March 1995, including the three medical consultations on which the insurer relies, does not provide a basis for denial of this claim. On balance, the Panel determines that the claimant is entitled to be paid the benefits provided by the policy. The policy does not provide cover for the cost of telephone calls, certified letters or photocopying.

DETERMINATION

REFERRAL NO: 296 01 2169

Consumer Credit — pre-existing medical condition

[ACCC note: this determination illustrates the problems associated with failing to explain to consumers the consequences of re-financing a loan. In this instance a dispute arose when the consumer claimed under the new CCI policy in respect of a disability which occurred during the operation of the previous policy. Although the disability would not have been excluded under the previous policy, it was excluded under the new policy.]

On 12 January 1995 the claimant suffered a back injury while engaging in heavy lifting at work. He lodged a claim for benefits under his consumer credit insurance policy as the event left him disabled from work and necessitated spinal fusion surgery.

The insurer denied liability for the claim on the basis of a policy exclusion which provides:

We do not pay any claim that is caused by an event or circumstance [where].....

....

D. You had advice or treatment from a Medical Practitioner for an injury or sickness within the 12 months before the policy began, and you require treatment for the same condition within the 12 months after the policy began.

The words 'injury' and 'sickness' are not defined under the policy.

The policy inception on 8 December 1994 and the event leading to the disabling injury, which is the subject of the claim, occurred on 12 January 1995.

The Panel notes that the claimant has suffered back problems for a number of years. In the claim form he indicated that he had been afflicted with the same problem in 1983, citing 'ligament damage to lower back', and in October 1994 'due to heavy lifting'. The Panel has been informed by the claimant that he has suffered continuous back pain for a number of years.

Prior to the commencement of the policy the most recent treatment received by the claimant for his back pain was on 4 November 1994, although the Panel notes that this treatment was provided by a Medical Practitioner in conjunction with other treatment, which had been sought for pain in the claimant's legs.

The claimant's Medical Practitioner reports that the claimant's pain started some 13 years prior to his having been first consulted in 1994, and that the 'pain started some 14 years ago, has never completely resolved, and has been exacerbated by his various episodes of work'. This doctor also reported that the claimant's catscan of 7 November 1994, showed 'some moderate posterior bulging or herniation of the L4-L5 disc and posterior bulging of the L5-S1 disc with possible compression of the left 5th. lumbar nerve root in the intervertebral foramine.'

Another Medical Practitioner reported that the claimant had advised him that he first hurt his back when he fell from a truck in 1981, and that he subsequently suffered an injury to his back while lifting in 1983. This Practitioner has stated that he was consulted by the claimant on 26 September 1994, 'when he complained of neck and lumbar pain.'

The injury which is the subject of this claim, in the Panel's view, is the event which occurred in either 1981 or 1983. From this date, it is reasonable to conclude that each episode of back pain, whether precipitated by lifting or not, is an exacerbation or manifestation of the original injury.

It would therefore appear that the policy exclusion condition applies to the circumstances of the claimant, i.e. that he had treatment for an injury within the 12 months prior to the policy inception and required treatment for the same condition within the 12 months after the policy began. In these circumstances, the Panel determines that the insurer is not liable under the policy.

The claimant has advised that this policy inception as a result of his having sought an extension of an existing financial accommodation by his credit provider, and that he has had this form of insurance with the same insurer since 1992 when he obtained the original financial accommodation. In consequence of this cycle of insurance, the claimant contends that he should be indemnified under the policy, because the policy exclusion would not apply under the original policy.

The Panel has considered the arguments raised by the claimant, but notes that the insurer has recognised these circumstances, and agreed to accept the claim for the present condition under the prior insurance policy. The claimant is thus receiving benefits under the policy which was effected for the previous financial accommodation, notwithstanding that this policy was replaced by the present policy. In these circumstances, the Panel believes that the insurer has fulfilled its obligations to the claimant.

DETERMINATION

REFERRAL NO: 596 01 2131

Consumer Credit — insurer's onus to prove — pre-existing medical condition

[ACCC note: this determination illustrates problems relating to the interpretation of clauses which contain general terms.]

The insured died on 16 May 1995. The cause of death was stated in the death certificate to be 'Coning of the cerebellum right cerebellar haemorrhage'. Her legal representative claimed under a consumer credit insurance policy which had been taken out in March 1995. Amongst other things, the policy provided cover for death. The company has denied liability on the ground that she had failed to disclose part of her medical history — in particular sleep apnoea and treatment for depression.

The proposal form shows that in answer to the question about her medical history she disclosed that she had suffered 'high blood pressure for short time now under control'.

The question had also asked whether the insured had:

ever had treatment for, or been informed that you have ... stress related illness, depressive or nervous disorder ... mental illness or any chronic illness or disease.

The insured's medical history cards obtained from the medical centre she usually attended were examined on behalf of the company by its underwriter (the Panel notes that no medically expert commentary on that history was submitted). The company advised the Panel that on the advice of its underwriter it would not have underwritten the risk had it known of the insured's history.

A medical opinion was submitted on behalf of the insured. It stated that:

At no time was she diagnosed with Psychotic Neurosis or in fact severe endogenous depression by [two psychiatrists who had attended her at times of family crises]. Further more she continued to work and study and was able to care for her [young children] until her death (she obtained I believe a BA with her major in psychology).

On pure medical grounds I was unaware of any causative relationship between cerebellar haemorrhage and any depressive or psychotic illness.

The insurer advised that 'we are treating the policy as cancelled with effect from the date of entry' and refunded the premium to the finance provider. In other words, it avoided the policy. In legal terms, that amounts to saying that the insured had fraudulently given a wrong answer. Despite the gravity of such a decision the insurer offered no evidence to support its allegation of fraudulent conduct on the part of the insured.

A more reasonable explanation for her answers is the way in which the question was worded. There is nothing in the question to indicate that the company was interested in her experience with sleep apnoea. The use of general terms such as 'stress related illness, depressive or nervous disorder or mental illness' could well mean nothing to a person who is not medically informed. In the Panel's view, the question is directed to more serious and ongoing conditions rather than seeking to elicit disclosure of isolated incidents of depression. The medical opinion referred to earlier supports the view that, to the extent the claimant suffered depression, it was not long term nor severe and was not related to the cause of her death.

The Panel is not convinced that the company has established that she suffered from the conditions it said would exclude her from cover.

Accordingly, the Panel determines that the company is required to provide the policy benefit. An adjustment is to be made in respect of the premium refunded to the finance provider following the purported avoidance of the policy.

DETERMINATION

REFERRAL NO: 296 06 2581

Consumer Credit — unemployment

[ACCC note: this determination relates to a CCI policy that was incepted prior to the implementation of the GWP reforms. It has been included to illustrate some of the problems associated with CCI policies when they offer very restrictive unemployment benefits.]

In conjunction with the purchase of a motor car, the claimant took out a Loan Protection Policy which commenced on 3 November, 1990 for a period of 5 years to 3 November, 1995. It provided life, injury, accident and unemployment cover and cost her \$3361, which was included in the amount financed.

In April/May 1993, the claimant was retrenched from her employment, and was granted unemployment benefits by the Department of Social Security as from 30 June 1993. She was still receiving those benefits as at 7 March 1996. The claimant fell into arrears with the finance company which then repossessed the car. The Panel understands that the total amount outstanding is \$6314.35 and the claimant seeks payment of that amount by way of benefit.

The claimant completed the appropriate claim form on 6 April 1995 and forwarded to the insurer a certificate from the Department of Social Security dated 9 January 1995, stating that unemployment benefits commenced by 30 June 1993 to 23 December 1994. The reason for the delay in making the claim is not known to the Panel.

The policy defined the event of unemployment as follows:

Unemployment which shall mean the Insured Person being required to cease employment during the Period of Insurance and shall mean the period during which such Insured Person is either:

- (a) registered for and in receipt of unemployment benefits under the Social Security Act, 1947 and any amendment thereof; or
- (b) such Insured Person is qualified to receive such unemployment benefits but the rate of such benefits is reduced to zero by reason only of the fact that another person is in receipt of an income.

The Benefit was defined as follows:

For each day of Unemployment but excluding the first 14 days of each and every period of Unemployment, the following amounts:

1. SINGLE PERSON COVER
 - (a) If paragraph (a) of the definition of 'Unemployment' applies, one-thirtieth of the Monthly Instalment shown in the Schedule, up to:
 - (i) a maximum Benefit of \$600; or
 - (ii) a maximum Benefit period of 90 days for any one period of Unemployment, whichever is the lesser.

The insurer assessed its liability under the policy and calculated that the claimant was entitled to 3 days compensation, 14 to 16 July 1993, after application of the 14 day excess from 30 June 1993, being the date of default which triggered cancellation of the insurance. The amount of \$72.00 was forwarded to the financier on 13 April 1995, in accordance with a term of the contract.

On 30 November 1995 the claimant wrote to the insurer disputing the payment and requested a review of the insurer's decision. On 28 March 1996, 'as an act of good faith', the insurer advised that it was prepared to make payment of the maximum unemployment benefit of \$600 under this policy to [the claimant's] financier, less the \$72.20 already paid under this claim.

The insurer told the Panel, 'we should point out that had the Policy remained current the maximum we could pay was \$600 as per the Policy cover.'

The grounds on which claimant supports her claim can be summarised as follows:

1. On the basis of general notions of fairness and good insurance practice.
2. That, to the best of her recollection, she did not receive a copy of the policy prior to her entry into the insurance contract.
3. The manner of cancellation of the policy contravened section 60 of the Insurance Contracts Act 1984.
4. The agent, at the point of sale, failed to advise the claimant of the existence or effect of the policy section 4(ii) which states
 - this Policy shall automatically terminate and all Benefits shall automatically cease on the earliest of
 - (i) ...
 - (ii) the date on which the Finance Agreement is discharged or terminated (for whatever reason).
5. A breach of good faith and 'deplorable insurance practice' by the insurer.

The schedule and proposal completed on 3 November 1990 by the claimant included the following declaration:

1. ...
2. ...
6. I have been handed a copy of this policy prior to entering into this Contract of Insurance,

upon which declaration, the Panel must conclude the claimant was in possession of the policy terms and conditions and had the opportunity to read and understand such terms within the 14 days 'free look' period provided by the contract. In addition the policy sets out an offer to the policyholder that 'Similar insurance may alternatively be arranged with another insurer of your choice.' In the light of that declaration, it is difficult to accept that the claimant did not receive a copy of the policy.

The Panel considers that the purported cancellation, although provided for in the contract, does not observe the requirements of the Insurance Contracts Act (sections 63 and 60). That, however, does not assist the claimant. The terms of the policy make it clear that the unemployment benefit it offers is very restricted. Although a consumer may reasonably expect that an insurance contract that cost \$3361 would provide a better benefit than \$600, the fact is that the benefit is so restricted by the terms of the contract.

The Panel has no option but to uphold the insurer's decision to restrict benefits to the contractual limit.

DETERMINATION

REFERRAL NO: 295 07 1771

Consumer Credit — extent of cover — total disability

[ACCC note: this determination illustrates problems associated with the use of narrow and restrictive definitions in CCI policies.]

This claim was made on 8 March 1995, pursuant to a Consumer Credit policy for alleged total disability arising from chronic fatigue syndrome ('CFS'). The claimant had been working as a security guard for some years but ceased work in May 1992, and retired 'medically unfit' in May 1993.

The definition of 'disablement' under the 'Sickness and Accident' cover of the policy is 'total and continuous inability to engage in or attend to any gainful occupation'; while 'illness' is defined as 'a condition, sickness or disease which first requires the Insured Person to be treated by a legally qualified practitioner during the Period of Insurance and which results solely and directly and independently of any other cause in Total Disablement'.

The insurer consulted a physician who examined her on 6 June 1994 and reported at length on the claimant's medical, family and social history going back to childhood, noting among other things, that she had knee surgery in 1992 as well as a back injury, which following repeated treatment, was shown to be normal on CAT-scan.

He concluded:

I find a generally healthy young woman who seems preoccupied with her symptoms. ... I have no doubt that [the claimant] is physically fit to return to work in her usual occupation as a security guard. She believes that she is totally disabled by her knees, her back, and leg symptoms, and CFS, but this is not true. She has a form of hypochondriasis, and is responding to her own attitudes, thoughts, feelings, beliefs, and motives. She is currently physically fit to return to work performing her normal duties.

On 11 August 1994, she was examined by a specialist who reported on 23 March 1995 on the nature of her illness as follows: 'Cause obscure; symptoms are those of chronic fatigue and undiagnosed diarrhoea. No evidence of any immunodeficiency. Chronic pain (orthopaedic).' He also noted: 'Patient does not have a diagnosed viral infection of any type tested.'

Her general practitioner referred her to a specialist in infectious diseases who, following examination, reported on 26 March 1996 that after excluding other possible causes of her condition, gave the opinion that 'she has typical chronic fatigue syndrome' and that there is 'no definitive therapy for this disorder, but the natural history is one of slow and steady improvement.' He also said that he had advised the claimant on the management of her condition, emphasising the importance of sleep and suggesting that she set herself 'physical, intellectual and social tasks, which she should seek to achieve in an increasing pattern over months'. He concluded by saying that he did not believe there was any need for further investigation 'as no alternative diagnosis is likely.'

On 11 November 1995, her general practitioner certified that she was suffering from CFS and 'has not been fit for duty since September 1992 and will not be fit for duty indefinitely.'

The insurer referred her various medical reports to a consultant physician who gave an opinion based on these reports and without examination of the claimant. This consultant was critical of the reports of the doctors consulted by the claimant, in particular of her general practitioner, whose report he stated was not medically supported. The Panel notes, however, that her general practitioner relied on the specialist in infectious diseases to whom he had referred the claimant.

In reference to the latter specialist's report, the insurer's consultant said that he 'based his diagnosis of CFS on a combination of current and past symptoms as well as his physical examination, in which the only positive finding was cervical lymphadenopathy.' The consultant concluded that in his opinion, based on the documentation supplied, the claimant 'does not suffer from CFS. In my view, she does not conform to the formal Case Definition of CFS'. The Panel however would have been better assisted had the insurer's consultant physically examined the claimant.

The Panel sought the opinion of a specialist in immunology and rheumatology who reported, following consideration of the various medical reports and an examination of the claimant, that her symptoms are 'certainly consistent' with the diagnosis of CFS. However, he maintained that there is no specific diagnosis test for this disorder; the symptoms are 'non-specific', and 'can occur secondary to other diseases'. He therefore stated it is necessary to exclude other relevant underlying disorders before a confident diagnosis of CFS can be made. In particular, the specialist considers that the cause of the diarrhoea needs to be investigated by a gastroenterologist, 'specifically to exclude the

possibility of inflammatory bowel disease'. In addition, to exclude other diseases, he stated 'the presence of inflammatory connective tissue disease should be investigated'.

The specialist concluded that if the various suggested tests do not indicate the presence of another disorder,

it would be a reasonable assumption to believe that this lady has chronic fatigue syndrome, and historically has had this since 1992. If the illness has lasted this length of time, I see essentially no prospect of it improving spontaneously. On the basis of the symptoms that she indicates she has, it would seem unlikely that she could be gainfully employed in any of the occupations which she has previously undertaken which involve physical labour. I cannot ascertain if she might be capable of some part-time employment of a nature that was largely sedentary.

On the basis of all of the medical evidence available, and the contradictory opinions expressed, the Panel considers that, on balance, no confident conclusion can be drawn as to the claimant's medical condition without further tests. Nevertheless, the Panel does conclude from the medical evidence presented, that the claimant has suffered a disability as a result of one or more medical conditions.

However, the critical issue for the Panel to determine is whether, the claimant is totally disabled within the terms of the policy. The policy definition of 'total disablement' is 'total and continuous inability to engage in or attend to any gainful occupation'. Under this narrow and formidable definition, the Panel is unable to conclude, from all the evidence, that the claimant is not capable of doing non-manual work on a part-time basis.

Accordingly, the Panel determines that the insurer is entitled to deny the claim as the claimant has not established to the Panel's satisfaction that she is totally disabled within the meaning of the policy.

DETERMINATION

REFERRAL NO: 496 10 3111

Consumer credit

[ACCC note: this determination illustrates problems associated with failing to explain to consumers the consequences of re-financing a loan, evidentiary problems for the General Insurance Claims Review Panel in regard to pre-sale disclosure, and CCI being sold through car yards.]

On purchasing a newer vehicle, on 29 December 1995, the claimant took out a new consumer credit policy, terminating the old policy on the previous vehicle's finance, as at the day before.

The claimant told the Panel that in the course of making these arrangements with the car salesman, he asked whether the new policy would provide cover as a flow on from the old policy. He could see no reason to pay the premium for the new policy if cover was not continuous from the old cover. A Justice of the Peace who witnessed the transactions told the Panel that:

During the course of filling out papers (the claimant) asked (the salesman) about the previous insurance policy that he obtained when he had purchased his previous vehicle and whether he could have the same type of policy with his new vehicle pointing out to (the salesman) that he had made a claim on that policy and would that be detrimental to any further policies that he may take out, and (the salesman) assured him most assuredly that it certainly would not, but (the claimant) wanted verification from the insurance company before he would continue with the sale.

(The salesman) then attempted to contact a representative of the relevant company but informed those present that there was no answer. He then went on to reassure (the claimant) that there was no need for concern that everything would be alright and he would obtain confirmation first thing next day and (the claimant) should ring him next day which I believe he then did as the contracts were signed and the sale then went ahead.

On 5 July 1996, the claimant completed a claim form for chronic renal failure which the insurer rejected in a letter of 17 July 1996. The claim submitted under the previous policy had also been for renal failure and the insurer denied the new claim on the grounds of the pre-existing illness exclusion, which states that the company will not pay for:

Any sickness or injury for which you had advice or treatment within the 6 months immediately preceding the Commencement Date and which requires treatment within the 6 months after the Commencement date.

The claimant had received treatment, or had consulted a doctor, five months before taking out the new policy and a fortnight after.

The claimant considers that the denial of the new claim is unfair in view of the undertakings given by the salesman, who is the insurer's agent. In his submission to the Panel, the claimant has included a medical report of 14 October 1996, which indicates the claimant has suffered from a medical condition since he was seventeen years of age when it was first diagnosed. It appears the first need for treatment has just occurred in connection with the claim under the old policy.

The insurer arranged for a detailed signed statement to be taken from the car salesman. The relevant portions of his statement are as follows:

During the negotiations, they told me that they had loan insurance cover with (insurer) on their old vehicle, and requested this same cover for the new vehicle. They asked me if the cover from the old policy would flow on to the new vehicle.

I was not exactly sure of the position with the insurance cover, so I made some phone calls to (insurer) and was advised that when the old vehicle was sold and the finance paid out, the protection cover ceased and a new policy would have to be taken out for the new vehicle. I informed (claimant and de facto wife) of this fact.

They had wanted the old policy to continue, but after making the phone calls I advised them that it was not possible and a new policy would have to be written.

They informed me that they had made a prior claim on the old policy, and after making my inquiries with (insurer), I told them that any future claims would have to be made on the new policy.

The salesman also says that the person whose statement is referred to above, was only present during a part of the discussion. It is to be noted that the claimant, in his statement, partially supports the car salesman, when he states, contrary to the assertion made by the claimant's witness, that the salesman made 'several phone calls' to the insurer while he was present. This is what one would expect in the circumstances.

The insurer also states that, once a claim has been made for the renal condition, and after replacement of the superseded policy in October of 1995, the claimant was no longer covered by it. It follows on that basis, that when the new policy commenced in 1995, it did not provide cover for the renal condition. The insurer has also referred to the claimant having signed the policy declaration that he was in good health, and not suffering or receiving treatment for a chronic illness.

However, the critical issue of the determination in this case, is whether the salesman, as agent for the insurer, represented to the claimant, that the new policy would provide the same benefits and have the same legal effect as the old. If the salesman had made such a representation, and the claimant had acted upon it to his detriment, the insurer would be estopped from denying the truth or accuracy of the salesman's representation.

Clause 8.7(b) of the Terms of Reference provides as follows:

- 8.7. The Chair of a Panel may determine that the Panel shall not consider a matter referred to it for review on any of the following grounds:
- (a)
 - (b) there are substantial issues of fact which, given the procedures adopted by the Panel, it would not be appropriate for the Panel to seek to determine;
 - (c)

Before accurate findings of fact could take place as to the critical conversations described above, the claimant, his de facto wife, the witness, the car salesman, and representatives of the insurer, would all need to give evidence on oath and submit themselves to cross examination. The Panel is not a court and it is not appropriate for the Panel to carry out these procedures.

I therefore formally determine pursuant to Clause 8.7(b) of the Terms of Reference, that this matter not be referred to the Panel. It will thus be necessary, should the claimant wish to pursue this matter further, for him to take action through another forum, such as the court system.

DETERMINATION

REFERRAL NO: 696 08 2852

Consumer Credit—pre-existing illness

[ACCC note: this determination illustrates problems associated with consumers' misunderstanding in regard to the significance of policy exclusions.]

Under a mortgage protection policy, which inceptioned on 1 February 1996, the claimant submitted a claim on 3 June 1996 in respect of an injury to his spine. The claim form indicated he was still working, but an accompanying medical certificate indicated an operation was to take place on 13 June 1996. This was expected to bring about a period of disability.

In answer to the question on the proposal:

Have you ever had medical advice, investigation or treatment for:

...

4. Any disorder or injury to the spine, back, neck, joints or bones?

the claimant correctly ticked the 'Yes' box and the insurer responded with the following exclusion showing on the policy schedule issued on 19 February 1996:

Death, disablement or cash assistance due to ANY INJURY, DISEASE OR DISORDER OF THE SPINE, ITS MUSCLES, LIGAMENTS, DISCS OR NERVE ROOTS whether arising alone or in conjunction with any other illness is not covered under this policy.

The covering letter to the claimant enclosing the schedule, stated:

Please note that there are limitations and conditions to benefits under this insurance. These are set out in the policy. You should refer to them to understand how they affect your cover.

A 'free look' period of 14 days was also provided.

The dispute arose when the insurer rejected the claim and on 19 June 1996 it advised the claimant:

We refer to your current Disability Claim with this office.

WE wish to advise that your disability relates to the exclusion for 'Spine' placed on your policy at time of acceptance, copy attached.

We therefore regret to advise that we are unable to accept your claim for benefits in this instance.

On 18 July 1996, the insurer also pointed out to the claimant, that the declaration completed by him on the proposal form, contained the following:

4 I understand that any illness or injury for which I had a consultation or treatment within the 6 months immediately preceding the Commencement Date and which requires treatment within 6 months after the Commencement Date is excluded from cover.

The medical certificate provided by the claimant's doctor indicated a consultation date of 5 September 1995.

On 28 June 1996 the claimant corresponded with the insurer through the Internal Disputes Resolution Scheme, stating:

I wish to make the following points:

1. The actual Policy Schedule (dated 19 February 1996) received by me (copy attached) made no reference to the Exclusion as per your Policy Schedule, which indicates no date, and reprinted 18 June 1996.
2. I have held this type of Policy with your company since September 1990 and have copies of all Policies etc. as from this date.

It is your company's procedure to effect new Policies as alternative mortgage arrangements are made.

I have never received any Schedule excluding spine-related problems as per the attachment to your letter dated 19 June 1996.

3. When I first effected the Policy in 1990, my back problem was minor; I was not to know it would deteriorate to the point where an operation would be necessary.

I have always ticked the appropriate box when completing your proposals.

In regard to the first point, the Panel is satisfied that the insurer has discharged its obligation under the Insurance Contracts Act 1984 and the appropriate policy/notice documentation was prepared and despatched to the claimant at his mailing address.

In regard to the second point, the claimant had two previous policies with the insurer, from 12 September 1990 to 7 September 1993 and from 7 September 1993 to 17 January 1996. The insurer has provided the Panel with documentation concerning these policies, which confirms the application of the "spine" exclusion, albeit in a different wording, but with the same effect. It is unfortunate that the claimant did not realise the significance of the policy exclusion, but the Panel is satisfied that the insurer has acted properly with respect to this client. The insurer has also provided the Panel with other examples as evidence of the application of its underwriting criteria leading to the policy exclusion.

The panel therefore determines that the insurer was entitled to deny payment of benefits to the claimant in this instance.

Acronyms

ACCC	Australian Competition and Consumer Commission
ADR	Alternative dispute resolution
CCI	Consumer credit insurance
CFSC	Corporations and Financial Services Commission
CUSCAL	Credit Union Services Corporation (Australia) Limited
FBCA	Federal Bureau of Consumer Affairs
FSI	Financial System Inquiry
GWP	Government working party
ICA	Insurance Council of Australia
IDR	Internal dispute resolution
IEC	Insurance Enquiries and Complaints Limited
ISC	Insurance and Superannuation Commission
TPA	Trade Practices Act
TPC	Trade Practices Commission
UCCC	Uniform consumer credit code