Chapter 8

The Regulation of Consumer Credit Products: Interrogating Assumptions about the Objects of Regulation

*Graeme W Austin**

8.1 Introduction

The first part of the New Zealand Law Foundation's Regulatory Reform Project asked: "how do baseline assumptions affect regulatory responses?"[1] The first chapter explored this question in the context of the regulation of credit products under the Credit Contracts and Consumer Finance Act 2003 (the CCCFA). It explored some of the assumptions about the "consumer" that appear to underlie the regulatory scheme and suggested that if policy makers were to take concerns about consumer safety seriously, some of the baseline assumptions about appropriate regulation in the area might change.

The CCCFA both prescribes and proscribes certain conduct by purveyors of consumer credit products. Its prescriptions include detailed disclosure requirements.[2] Its proscriptions include rules against charging unreasonable credit or default fees.[3] As is explained in more detail below, the CCCFA puts in place a protective scheme, intervening in private credit markets to protect against harms

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1 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 295.

2 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 298–299.

3 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 300–301.

that could be caused by leaving consumers without appropriate safeguards. The first chapter suggested that the shape and efficacy of a scheme designed to regulate consumer credit products will depend partly on how regulators conceive of the "consumer". From that conception will inevitably be distilled ideas about what exactly the consumer needs to be protected *from*.

Since the first chapter was published, there have been significant developments in this area. A new draft exposure Bill – the Credit Contracts and Consumer Finance Amendment Bill – was promulgated in April 2012, following decisions made by Cabinet in October 2011 to introduce a new concept of "responsible lending" into the regulatory framework.[4] The Ministry of Consumer Affairs explained that responsible lending "means lenders have a duty to look out for their customers"[5] and that lenders "cannot be indifferent to the circumstances of their customers or the effect of the debt they are providing."[6] The inclusion of responsible lending provisions in the current draft of the Bill seeks to ensure that lenders will exercise reasonable care and skill, provide the borrower with sufficient information to enable the borrower to make informed decisions, and ensure that the terms of the agreement are not unduly onerous and are expressed in a clear, concise and intelligible manner. It would be inconsistent with this principle for a lender to do or say (or omit to do or say) anything that would be, or be likely to be, misleading, deceptive or confusing to the borrower. Lenders are to make reasonable inquiries as to the borrower's financial circumstances, including the possibility of hardship, and be satisfied that the agreement is otherwise appropriate for the borrower, in the light of the borrower's circumstances, requirements and objectives. Unreasonable credit fees would also be inconsistent with responsible lending, as are advertising agreements and products or services that are, or could be, misleading, deceptive or confusing to borrowers. This could be especially problematic if the advertisement is aimed at a particular class of borrowers and is misleading, deceptive or confusing to that class.[7]

Other important changes proposed in the Bill include requiring disclosures under the CCCFA to be made *prior to* the parties' entry to a credit contract.[8] In addition, lenders will be required to publicise information about the costs of borrowing – a provision that could provoke greater competition between credit contract providers (and cause the cost of credit to decline). The promulgation of the draft legislation also coincides with important work by the New Zealand Law Commission on the Credit (Repossession) Act 1997, which is linked to the important amendments to

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4 Ministry of Consumer Affairs *Credit Law and Consumer Protection, Exposure Draft Credit Contracts and Consumer Finance Amendment Bill* Consultation Documents (April 2012) at 2, available at <www.consumeraffairs.govt.nz>.

5 Ministry of Consumer Affairs *Credit Law and Consumer Protection: Explanatory Information* (April 2012) at 1, available at <www.consumeraffairs.govt.nz>.

6 Ministry of Consumer Affairs *Credit Law and Consumer Protection: Explanatory Information* (April 2012) at 1, available at www.consumeraffairs.govt.nz.

7 Credit Contracts and Consumer Finance Amendment Bill 2012, cl 7, proposing to insert a new s 9B(2) into the principal Act.

8 Credit Contracts and Consumer Finance Amendment Bill 2012, cl 8, proposing to amend s 17 of the principal Act.

the CCCFA.[9] The Bill also anticipates the creation and promulgation of a new *Responsible Lending Code* that will flesh out the detail of the higher-level responsible lending principles that are set forth in the proposed legislation – an approach that is generally consistent with the government's preference that legislation should, where possible, articulate high-level principles, rather than prescriptive details. Overall, we are seeing a move in the credit contract context to a more protective regulatory regime – one that imposes responsibilities on lenders not only to address information asymmetry issues, but also to take account of the circumstances of borrowers. If accompanied by appropriate public education programmes and proper resourcing of the enforcement agency (the New Zealand Commerce Commission), the proposed changes can only be welcome and also reflect many of the issues raised in the first chapter. Further details of New Zealand's important policy work on consumer credit contracts will be disclosed following the receipt of submissions on the Exposure Bill and through the select committee process.

It is perhaps useful to note the broad consistency between the proposed approach adopted in the Exposure Draft and those adopted in other jurisdictions.[10] Important overseas initiatives include the National Consumer Credit Protection Act enacted by the Australian Federal Government in 2009.[11] The Australian regime requires creditors to assess the suitability of a credit product in the light of the hardship that acceptance of the contract might cause the consumer. In the United Kingdom,[12] there are prohibitions against contracting out of the prescribed disclosure requirements for all consumers except those characterised as being of "high net worth".[13] The United Kingdom regime makes it an offence for anybody to send to a minor any document inviting them to borrow money or obtain goods on credit.[14] In addition, as in Australia, UK law requires creditors to undertake an assessment of creditworthiness prior to entering into a regulated consumer credit agreement.[15] Such an assessment under that section must also be undertaken prior to significantly increasing the amount of credit being provided under an existing agreement. Catalysts for the United Kingdom regime date back to the 1970s. A

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9 Law Commission *Consumers and Repossession: A Review of the Credit (Repossession) Act* 1997 (NZLC R124, 2012) at 7.

10 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 309–310.

11 National Consumer Credit Protection Act 2009 (Cth).

12 The regime is regulated by inter alia the Consumer Credit (Disclosure of Information) Regulations 2010 (UK) (2010 UK Regulations), the Consumer Credit (Disclosure of Information) Regulations 2004 (UK) and the Financial Services (Distance Marketing) Regulations 2004 (UK).

13 See the Consumer Credit (Exempt Agreements) Order 2007 (UK), which defines an individual as being of high net worth when s/he received during the previous financial year net income totalling an amount of not less than £150,000, and/or had throughout that year net assets with a total value of not less than £500,000.

14 Consumer Credit Act 1974 (UK), s 50.

15 Consumer Credit Act 1974 (UK), s 55B.

1971 report[16] recommended a complete replacement of the current consumer credit system, due to numerous defects in the system of the time. As in New Zealand, there has been considerable concern in the United Kingdom with the so-called "credit binge".[17]

Given the significant initiatives that have occurred since the submission of the first chapter, this follow-up chapter shifts focus. Rather than engaging with the details of the CCCFA reforms, this chapter seeks to inaugurate a broader concern with the "objects" of regulatory schemes. The term "object" here is used to denote the people whom regulators seek to protect through policy initiatives such as the current proposals for amendment to the CCCFA. Of course, in the CCCFA regime, the parties who are regulated directly are purveyors of consumer credit products: the suppliers of credit themselves. The principal beneficiaries of the regime are the individuals and families whose safety is implicated by inappropriate marketplace practices and are the consumers of credit products. There is nothing unusual here. The Fair Trading Act 1986 adopts a similar approach: the direct objects of the legislative controls are often traders, but the ultimate objects of protection are often the consumers who are vulnerable to misleading statements and practices. The aim of this chapter is therefore to bring to the surface assumptions about characteristics of the people affected by any regulatory scheme, and to invite a more critical evaluation of the assumptions about those characteristics that might be embedded in the specific scheme under examination. Rather than focusing on the details of the regulation of consumer credit contracts and the issues raised at the end of the first chapter (tasks that are now rendered largely redundant by the policy work that has since occurred), this chapter asks a more general set of questions about policy makers' understanding of the characteristics of the people whom *any* protective regulatory scheme seeks to protect. The salience of this inquiry does not depend on an articulated description of the characteristics of intended "objects" of regulatory reform. More likely, those characteristics will be taken for granted and unarticulated, but nevertheless shaping policy choices that are manifest in any specific regulatory intervention. For example, contained in the original CCCFA's travaux (including government reports detailing the preliminary policy work) there was almost no discussion of the characteristics of the consumers of credit products the CCCFA was designed to protect. These characteristics often need to be discerned through an interrogation of the kinds of regulatory choices that animated the scheme and the assumptions upon which those choices appear to be grounded. Most obviously, the choice to use requirements as to information disclosure as the key regulatory tool in the original CCCFA, reveals a picture of the consumer as somebody who both understands the information provided to him or

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16 Baron Geoffrey Crowther (Chair) *Consumer Credit: Report of the Committee* (London, HMSO, 1971).

17 The literature and commentary in the United Kingdom featured the "familiar parade of horribles" such as the receipt by a nine-year-old of a credit card with a £10,000 limit. Iain Ramsay "'Wannabe WAGS' and 'Credit Binges': The Construction of Overindebtedness in the UK" in Johanna Niemi-Kiesiläinen, Iain Ramsay and William C Whitford (eds) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing, Oxford and Portland (OR), 2009) 75 at 75.

her *and* is in a position freely to choose between different consumer credit products. The object of the current CCCFA seems to be somebody needing protection against making bad choices between different consumer credit products, but not necessarily somebody for whom purchasing *any* of these products might be harmful. As discussed at Stage One, this picture of the consumer envisaged by the current CCCFA can be derived from the Act's emphasis on addressing information asymmetry problems, and the barriers (including vague standards and enforcement costs) that inhibit recourse to other aspects of the scheme, such as the CCCFA's prohibitions against unreasonable fees and the power it gives to reopen oppressive contracts.[18] As part of its inquiry into baseline assumptions, the first chapter explored the implications of supplementing the information disclosure model with a different paradigm for regulation of consumer credit markets. Specifically, it asked whether a "consumer safety" paradigm might change the way we think about the regulation of credit. A consumer safety paradigm suggests that it might be appropriate to prevent consumers from making some informed trade-offs between safety and price. Through motor vehicle safety regulations, the state attempts to prevent drivers from choosing to drive cheap "rust buckets"; by so doing, it significantly damages, if not destroys, the market for such cars. In this context, New Zealand society does not entertain the idea that drivers should be able to purchase such vehicles, so long as the vendor ensures that car buyers "know what they're getting". The first chapter developed similar ideas about the regulation of children's nightgowns.[19] Of course, a consumer safety paradigm itself reflects a cluster of ideas about the characteristics of consumers – most saliently the idea that they are vulnerable to harm if they are not protected from choosing to shoulder more than a sustainable level of debt.

It is always useful to inquire whether the idea that appears to underlie any regulatory intervention reflects the lived realities of the "objects" of the intervention, the real people, whom regulators seek to protect. In the motor vehicle and nightwear contexts, at least, the connections seem clear: bones break, spinal cords sever, flesh burns. Regulations that are trained on safety concerns (in addition to those that help consumers make better choices) tether the scheme to the realities of peoples' lives. The safety focus presages a shift in, or an expansion of, the ideas as to what the consumer envisaged by the CCCFA might be like. The current initiatives in this area that are briefly outlined above suggest that this kind of shift in thinking has already occurred. Policy work in this field is drawing on information provided by a range of community groups and stakeholders. In addition, as a result of a detailed and diligent public consultation process, policy makers in this area have detailed knowledge of the specific problems associated with burdensome debt – as well as the pressing *need* for credit that can arise from

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18 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 300–304.

19 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 307.

time-to-time in peoples' lives.[20] The key idea in the proposed reforms – the introduction of responsible lending concepts – discloses a commitment to protecting consumers from bad decisions about credit, not just bad choices between products. In short, in the current initiatives in this area, we are starting to see emerge an understanding of the consumer as being vulnerable to harms *other than*, or in addition to, making the wrong choice as to which product to purchase.

This chapter advances the relatively uncontroversial point that different regulatory schemes are based on different conceptions of the characteristics of the people whom the scheme seeks to protect. A brief survey of other kinds of regulatory regimes in section [8.2] illustrates that some schemes are more directly concerned with consumer safety and, as such, they conceive of the consumer differently from the current CCCFA legislation. As the brief discussion of these other regimes underscores, the approach in the 2012 Credit Contracts and Consumer Finance Amendment Bill Exposure Draft is not wildly out of step with understandings of the objects of regulation that are disclosed elsewhere in New Zealand's regulatory framework. This is predictable: the various regulatory regimes discussed in section [8.2] are all concerned to some extent with human vulnerability. This chapter then further develops the theme that there might be utility in incorporating ideas about consumer safety into the regulation of consumer debt. The first chapter referred to New Zealand research on the deleterious impacts of over-indebtedness on personal wellbeing. Section [8.3] examines this question in more detail, drawing from overseas research on the topic. Section [8.4] briefly concludes with some suggestions for future development of these themes by those tasked with developing detailed regulatory responses.

8.2 Different schema – different objects

Across the New Zealand regulatory space there exists many different models for constructing the "objects" of the regime. Each has its own history and is informed by different ideological commitments. Each also reflects the concerns of various stakeholder groups: international organisations, unions and government officials focusing on reducing negative externalities. They all, however, reflect a concern with protecting the safety of the regulatory objects against different types of harm and set in place a variety of different regulatory levers to help ensure that these harms do not occur. This section of the chapter surveys a range of different regulatory regimes whose aims include protecting people against certain kinds of harm. As might be expected, these different regimes adopt different approaches to protecting people from harm, but they are all concerned to some extent with protecting people against types of vulnerability that are inherent in the human condition.[21]

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20 Ministry of Consumer Affairs *Consultation Questions on Credit Contracts and Consumer Finance Amendment Bill Exposure Draft* (April 2012) <www.consumeraffairs.govt.nz>.

21 I am indebted to John Yeabsley (NZIER) for his suggestions as to which regulatory regimes might best illuminate this point. The choice is of course somewhat arbitrary: similar lessons

New Zealand's maritime safety regime provides a useful starting point. The underlying statutory basis for the regulation is the Maritime Transport Act 1994, s 430 of which specifies the functions of Maritime New Zealand as including "undertak[ing] its safety, security, marine protection, and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system." These aims are realised through a number of mechanisms, including the Standards of Training and Certification for Watchkeepers.[22] Maritime New Zealand's *Code of Safe Working Practices for Seafarers*[23] reflects both information disclosure and safety concerns. As an example of the former, the *Code* makes specific provision for good practice in hazard identification, making detailed stipulations with the aim of enabling hazards to be identified by both employers and employees. Its emphasis is not, however, on identifying specific hazardous substances that should not be present on a vessel. Instead, the document lists various "factors" that enable people to assess the risks associated with carrying different kinds of things on vessels.[24] For the most part, the regime is concerned with mandating the provision of information so that seafarers are able to make the best decisions relating to safety. Once a hazard has been identified and the extent of the hazard is assessed, however, the required action is much more proscriptive.[25] For example, once a risk is deemed to be intolerable, work must stop or, if relevant, may not commence until the risk has been abated. If a risk cannot be reduced work must remain prohibited.

Aspects of New Zealand's regulation of civil aviation are, as might be expected, also focused directly on issues of safety. The Civil Aviation Act 1990 includes a number of public welfare regulatory offences[26] against, for instance, causing "unnecessary danger",[27] careless operation of an aircraft,[28] acting without necessary aviation documents,[29] and failing to comply with requests for inspection or monitoring.[30] Regulation of civil aviation in New Zealand is also partly distilled in the context of responses to specific accidents. For example, the 1995 "Dash 8" crash near Palmerston North[31] provoked a number of detailed recommendations

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might be derived from other regimes, such as food safety or hazardous substances regulations.

22 Maritime New Zealand *2009/10 Annual Report* (Maritime New Zealand, Wellington, 2010) at 13–14, available at <www.maritimenz.govt.nz>.

23 Maritime New Zealand *Code of Safe Working Practices for Merchant Seafarers* (Maritime New Zealand, Wellington, 2007), available at <www.maritimenz.govt.nz>.

24 Maritime New Zealand *Code of Safe Working Practices for Merchant Seafarers* (Maritime New Zealand, Wellington, 2007) at 17–18, available at <www.maritimenz.govt.nz>.

25 Maritime New Zealand *Code of Safe Working Practices for Merchant Seafarers* (Maritime New Zealand, Wellington, 2007) at 19, available at <www.maritimenz.govt.nz>.

26 *Laws of New Zealand* Aviation: Regulation of Air Operations – Offences and Penalties (online ed) at [121].

27 Civil Aviation Act 1990, s 44.

28 Civil Aviation Act 1990, s 43A.

29 Civil Aviation Act 1990, s 46.

30 Civil Aviation Act 1990, s 44A.

31 See *Report 95-011 de Havilland DHC-8, ZK-NEY, controlled flight into terrain near Palmerston North, 9 June 1995* Transport Accident Investigation Commission (Transport Accident and Investigation Commission, Wellington, 1997), available at <www.taic.org.nz>.

concerning safety matters.[32] Civil aviation safety in New Zealand also reflects a number of international commitments, most prominently prescribed by the Convention on International Civil Aviation 1944 (the Chicago Convention). This instrument prescribes that "the sole objective of the investigation of an accident or incident shall be the prevention of accidents or incidents".[33] The instrument then stipulates that "It is not the purpose of this activity to apportion blame or liability."[34] These themes are reflected in the Civil Aviation Authority's 2011 Report[35] which stipulates that the "Authority's primary concern is not to secure prosecution *but to promote a high standard of aviation safety*".[36] However, if willing compliance with relevant standards is not achieved, the Authority is committed to taking appropriate enforcement action if necessary.[37]

The Department of Labour prosecution system offers an example of a regime that is directly trained on safety issues. This is a complex regime; the source of the Department's authority (specifically through the Labour Group – one of six groups within its current organisational structure) to regulate safety issues is derived from some 23 statutes and 67 sets of regulations.[38] Some of these powers reflect key international commitments reflected in international labour rights treaties.[39] The scope of the Department of Labour's initiatives in the area of workplace safety is suggested by its 2011 Report, *New Zealand Thriving Through People and Work*.[40] Many of the Department of Labour's goals are of course tied closely to New

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32 Criminal proceedings associated with the accident provoked complex litigation not only on the substance of the issues, but also on evidentiary matters. See *Sotheran v Ansett New Zealand Ltd* [1999] 1 ERNZ 548 (NZEmpC) per Palmer J; The Court of Appeal judgment is available at *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA); *R v Sotheran* (2001) 19 CRNZ 132 (CA); *R v Sotheran* HC Palmerston North T31/00, 18 May 2001 per Gendall J.

33 Convention on International Civil Aviation, Annex 13 (9th ed, 1944) at [3.1] (Chicago Convention), available at <www.icao.int/publications/pages/doc7300.aspx>.

34 Convention on International Civil Aviation, Annex 13 (9th ed, 1944) at [3.1] [Chicago Convention]. The Court of Appeal has held that this provision is not directly binding as a matter of domestic law. See *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

35 Civil Aviation Authority *Annual Report 2010–2011* (Wellington, 2011), available at <www.caa.govt.nz>.

36 Civil Aviation Authority *Annual Report 2010–2011* (Wellington, 2011) at 76 (emphasis added), available at <www.caa.govt.nz>.

37 Civil Aviation Authority *Annual Report 2010–2011* (Wellington, 2011) at 76, available at <www.caa.govt.nz>. For an example of a recent prosecution, see *Dale-Emberton v Civil Aviation Authority* HC Dunedin CRI-2008-425-18, 7 April 2009 per Dobson J.

38 Department of Labour *Annual Report For the year ended 30 June 2011: New Zealand thriving through people and work* (New Zealand Government, Wellington, 2011) at 9, available at <www.dol.govt.nz>.

39 Department of Labour *Annual Report For the year ended 30 June 2011: New Zealand thriving through people and work* (New Zealand Government, Wellington, 2011) at 9, available at <www.dol.govt.nz>.

40 Department of Labour *Annual Report For the year ended 30 June 2011: New Zealand thriving through people and work* (New Zealand Government, Wellington, 2011), available at <www.dol.govt.nz>.

Zealand's no-fault accident compensation regime.[41] The Report refers, for example, to the goal of achieving a comprehensive 24/7-no-fault coverage system designed to support injury prevention, effective rehabilitation and appropriate compensation.[42] An experience rating system, which alters the amount businesses pay to ACC based on their claims history, is characterised as "rewarding those with good safety records".[43] Incentives are also put in place to encourage businesses to engage with health providers.[44]

One of the most exhaustive analyses in recent years of issues of safety was a 2001 study on issues of safety in public hospitals.[45] While not strictly an example of direct governmental regulation, due to the exhaustive nature of the inquiry (it was drawn from 6,579 medical records) and the Report's direct engagement with issues of safety, it provides a useful touchstone for present purposes. The specific concern of the Report was "unintended injury which resulted in temporary or permanent disability, including increased length of stay and/or financial loss to the patient, and which was caused by health care management rather than the underlying disease process",[46] described throughout the Report as an "adverse event" (AE). The paper was a review of the New Zealand health system through the lens of a concern to reduce the impact of adverse events and to reduce the burden of AEs on the health system. It was therefore a comprehensive sector-specific investigation of safety issues. Most of the details of the Report are not relevant to the present project. What is relevant, however, is the Report's detailed engagement with issues of preventability.[47] The Report noted: "A key consideration with AEs is the extent of their preventability. This section canvasses various dimensions of this issue ranging from the assessment of preventability, through the distribution of preventable AEs, to the potential for corrective action".[48] Preventable AEs occurring in public

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41 Accident Compensation Act 2001. The 2001 Act is the latest iteration of accident compensation legislation. The scheme was inaugurated in 1972 (in force 1974). See Accident Compensation Act 1972.

42 Department of Labour *Annual Report For the year ended 30 June 2011: New Zealand thriving through people and work* (New Zealand Government, Wellington, 2011) at 13, available at <www.dol.govt.nz>.

43 Department of Labour *Annual Report For the year ended 30 June 2011: New Zealand thriving through people and work* (New Zealand Government, Wellington, 2011) at 33, available at <www.dol.govt.nz>.

44 Department of Labour *Annual Report For the year ended 30 June 2011: New Zealand thriving through people and work* (New Zealand Government, Wellington, 2011) at 33, available at <www.dol.govt.nz>.

45 Peter Davis and others "Adverse Events in New Zealand Public Hospitals: Principal Findings from a National Survey" (Occasional Paper No 3 prepared for Ministry of Health, December 2001), available at <www.health.govt.nz>.

46 Peter Davis and others "Adverse Events in New Zealand Public Hospitals: Principal Findings from a National Survey" (Occasional Paper No 3 prepared for Ministry of Health, December 2001) at 13, available at <www.health.govt.nz>.

47 Peter Davis and others "Adverse Events in New Zealand Public Hospitals: Principal Findings from a National Survey" (Occasional Paper No 3 prepared for Ministry of Health, December 2001) at 28 and following, available at <www.health.govt.nz>.

48 Peter Davis and others "Adverse Events in New Zealand Public Hospitals: Principal Findings from a National Survey" (Occasional Paper No 3 prepared for Ministry of Health, December 2001) at 28, available at <www.health.govt.nz>.

hospitals comprised 6.3 per cent of admissions, representing a significant burden on the public health sector.[49] The paper also surveyed a range of different methods for improving safety, including system factors, consultation and education.[50]

Different ideas about the vulnerabilities of the objects of the regulations animate each of these regimes. To different degrees and to different extents, each regime is concerned with directly intervening into specific spheres of activity and helping to make those activities safer. Different levers are envisaged, including specific prohibitions on activities being conducted, criminal prosecutions and economic incentives, such as experience rating, monitoring and education. All such interventions seek, again to different degrees, to increase the amount and quality of information – encouraging self-regulation is always a relevant desideratum in any scheme. According to the analytical models developed in the first chapter,[51] we might say that these interventions are grounded on both information disclosure and safety ideas. As to the former, "production" of information by the various agencies is also encouraged or mandated. This is also true in the CCCFA context. Providers of consumer credit contracts are required to produce relevant data, such as interest rates, as well as providing that information to prospective consumers. The Exposure Draft also, and appropriately, seeks to enhance the quality of information available for individual consumers and in the consumer credit marketplace more generally. A number of these regimes go further and directly proscribe relevant conduct. In key respects, the maritime safety regime, for example, seeks to enhance the quality and quantity of the relevant information that will assist with the assessment of risk but once that information is used to identify an intolerable risk, the activity must stop. This is *not* a regime that allows people to make an informed decision to continue with risky activity.

For present purposes, the significance of this brief survey lies in the understandings of the characteristics of the people whom it is envisaged need protection. As with the Fair Trading Act 1986, for example, the direct aims of regulatory regimes such as these is to change firms' behaviour – but the ultimate beneficiaries of these changes are the individuals who might be rendered more vulnerable to harm if firms' behaviour is *not* modified. The objects of these regulatory interventions include people who require protection from harm; their safety appears to animate – albeit to different degrees and in different respects – the key aspects of the specific intervention. They are not in any relevant sense sovereign consumers free to choose whether or not to engage in the risky activity. Regulation of maritime safety, for example, is not premised on the idea that seafarers are free to choose whether to run intolerable risks. Airline passengers are

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49 Peter Davis and others "Adverse Events in New Zealand Public Hospitals: Principal Findings from a National Survey" (Occasional Paper No 3 prepared for Ministry of Health, December 2001) at 48, available at <www.health.govt.nz>.

50 Peter Davis and others "Adverse Events in New Zealand Public Hospitals: Principal Findings from a National Survey" (Occasional Paper No 3 prepared for Ministry of Health, December 2001) at 28, available at <www.health.govt.nz>. Few details are, however, provided as to how these methods would be put into practice.

51 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011).

never permitted to purchase seats on commercial airlines that are avowedly non-compliant with the safety provisions in the Civil Aviation Act 1990. The objects of all of these regimes require protection against more than making bad choices between different choices that markets put before them.

8.3 The objects of consumer credit product regulation

The discussion in [8.1] suggested that the current CCCFA is premised, at least in part, on assumptions of the characteristics of the consumers of consumer credit products. These premises are not expressly stated, but may be discerned from an interrogation of the shape of the original scheme. Whether ideologically grounded in commitments to consumer sovereignty or simply the product of path dependence, these premises might benefit from further scrutiny. (Of course, this is less of a problem if, by happenstance or design, the objects of regulation coincide with the lived realities of consumers of credit products.)

Unarticulated assumptions about the objects of any regime are possibly more powerful than specifically delineated ones. The latter can be more easily contested for being expressly stipulated. Unspoken ideas, in contrast, are likely to reflect those deep ideological commitments. As one legal scholar put the point: "If ideology is a rationalizing set of principles and concepts that link discourses to power, it follows that a close examination of discourse reveals the implicit aspects of an underlying ideology."[52] Interrogating the CCCFA as discourse reveals some very conventional ideas about consumer sovereignty. Consumer sovereignty is, as Professor Slater once put it, "the most powerful image of the consumer as social hero".[53] It is a "maxim … so perfectly self-evident, that it would be absurd to attempt to prove it."[54] Recourse to consumer sovereignty as an (unarticulated) organising principle is in turn grounded in deep philosophical and legal commitments to liberal individualism and the creation of the liberal subject.[55]

Professor Iain Ramsay notes: "models of credit regulation are based on assumptions about credit, debt and *consumer behaviour*".[56] This emphasis on the "sovereign" consumer risks crowding out other ideas. In the regulation of consumer credit, it does not, for instance, offer an especially fertile terrain for other ideas about the realities of actual consumers' lives, or, as the decisional heuristics

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52 Martha Albertson Fineman *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge, New York, 1995) at 21.

53 Don Slater *Consumer Culture and Modernity* (Polity Press, Cambridge, 1997) at 34.

54 Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan (ed), University of Chicago Press, 1976) (1776) Book IV, chapter 8 at 179.

55 See generally John Locke *Two Treatises of Government* Ian Shapiro (ed) (Yale University Press, New Haven (CT), 2003) (1689).

56 Iain Ramsay "'Wannabe WAGS' and 'Credit Binges'" in Joanna Niemi-Kiesiläinen, Iain Ramsay and William C Whitford (eds) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing, Oxford and Portland (OR), 2009) 75 at 88 (emphasis added).

literature reminds us,[57] about the capacity to make choices between the array of (appropriately described) products. Exposing underlying assumptions about the characteristics of the objects of the regulatory regime offers possibilities for more accurately targeted kinds of regulatory intervention. The proposed changes to the CCCFA reflect New Zealand policy makers' recognition that the 1993 Act did not provide appropriate levels of protection for New Zealand consumers at risk of making bad choices about debt.[58] Of course, it would be puerile to suggest that more critical scrutiny of implicit assumptions about consumers' ability to "look after themselves" would have led to earlier proposals for reform; such facile assumptions are belied by the vicissitudes of politics and the rationing of legislative time. Even so, it is possible that regulatory intervention will be better targeted, and more likely to achieve the desired ends, if regulators have a clearer appreciation of the capabilities of the objects of regulation, and the risks to which they are exposed.

Exposing (and possibly jettisoning) tacit assumptions about the characteristics of the objects of regulation opens up new lines of inquiry about the characteristics of the objects of regulatory regimes. This section discusses some of the international literature on the harms associated with debt. This literature offers some support for the conclusions suggested by the New Zealand literature referenced in the first chapter[59] as to various kinds of psychological harms experienced by those who make poor choices about debt products. It should not be surprising that consumer debt issues are analysed though the lens of behavioural economics. Those insights are exposing ways that our choices are subject to a poor ability to use information, overconfidence, susceptibility to framing, lack of self-control and other-regarding preferences.[60] Predictably, scholars have advanced the theme that consumers of credit products cannot be regarded as rational actors, along with the corresponding point that the influences of decisional biases should provoke different kinds of regulatory responses.[61] As one commentator has observed:[62]

> Rational economic theory proposes that consumers do act rationally when using credit cards and that the discrepancies between their behavior and the large balances they carry can be explained by classical and neoclassical economics. Alternatively, the

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57 See generally Farah Majid "The Irrationality of Credit Card Debt: Examining the Subconscious Biases of Credit Card Users" (2010) 34 Law & Psychol Rev 165.

58 Discussion at the launch of the Exposure Draft Credit Contracts and Consumer Finance Amendment Bill, Consultation Documents (2 April 2012), Parliament Buildings.

59 Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 306, citing Families Commission *Escaping the Debt Trap: Experiences of New Zealand Families Accessing Budgeting Services* (Research Report No 6/09, December 2009), available at <www.familiescommission.org.nz>.

60 See generally Timothy Irwin "Implications of behavioural economics for regulatory reform in New Zealand" (2010, chapter prepared for the New Zealand Law Foundation as part of its project on regulatory reform in New Zealand; draft chapter on file with author) (surveying the standard literature).

61 Farah Majid "The Irrationality of Credit Card Debt: Examining the Subconscious Biases of Credit Card Users" (2010) 34 Law & Psychol Rev 165.

62 Farah Majid "The Irrationality of Credit Card Debt: Examining the Subconscious Biases of Credit Card Users" (2010) 34 Law & Psychol Rev 165 at 166.

> behavioral economic approach argues that consumer bias causes irrational purchasing decisions and that these biases may account for why so many consumers are burdened by daunting credit card balances.

As is discussed in detail in a 2012 paper prepared by Dr Richard Tooth for the New Zealand Law Foundation, there is an important literature on consumer debt that speaks to a range of problems with consumer decision making. These include: purchasing debt products that the consumers could neither understand nor afford;[63] conflating increased credit limits with assumptions as to future earning capacity;[64] poor decision making based on unrealistic expectations as to earning capacity and the ability to weather conditions of economic downturn;[65] social pressures; and speculative mania in areas such as housing.[66]

There is abundant data dating back to at least the 1980s on the relationship between indebtedness and some kind of negative psychological consequence. A 1994 article in the British Journal of Psychiatry concluded that patients in debt were more likely to harm themselves with greater suicidal intent and, after the episode, to report more symptoms of depression and hopelessness.[67] Research from Finland,[68] has identified debt as a contributing factor in suicide attempts and suicidal thoughts.[69] Similar conclusions were reached in a 2011 English study, which

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63 Richard Tooth "Behavioural Economics and the Regulation of Consumer Credit" (chapter published with the assistance of the New Zealand Law Foundation as part of its project on regulatory reform in New Zealand, August 2012) at 5, available at <www.srgexpert.com/Consumer%20Credit%20Behavioural%20Economics%20Case%20Study%202012%20-%20Final.pdf>, citing Michael Barr and others "Behaviorally informed financial services regulation" (New America Foundation, Washington (DC), 2008) at 10, available at <www.fdic.gov/about/comein/behaveApril1a.pdf>.

64 Richard Tooth "Behavioural Economics and the Regulation of Consumer Credit" (chapter published with the assistance of the New Zealand Law Foundation as part of its project on regulatory reform in New Zealand, August 2012) at 10, available at <www.srgexpert.com/Consumer%20Credit%20Behavioural%20Economics%20Case%20Study%202012%20-%20Final.pdf>.

65 Richard Tooth "Behavioural Economics and the Regulation of Consumer Credit" (chapter published with the assistance of the New Zealand Law Foundation as part of its project on regulatory reform in New Zealand, August 2012) at 11–12, available at <www.srgexpert.com/Consumer%20Credit%20Behavioural%20Economics%20Case%20Study%202012%20-%20Final.pdf>.

66 Richard Tooth "Behavioural Economics and the Regulation of Consumer Credit" (chapter published with the assistance of the New Zealand Law Foundation as part of its project on regulatory reform in New Zealand, August 2012) at 12–13, available at <www.srgexpert.com/Consumer%20Credit%20Behavioural%20Economics%20Case%20Study%202012%20-%20Final.pdf>.

67 Simon Hatcher "Debt and deliberate self-poisoning" (1994) 164 British Journal of Psychiatry 111.

68 J Hinitikka and others "Debt and suicidal behaviour in the Finnish general population" (1998) 98(6) Acta Psychiatrica Scandinavica 493.

69 The report concedes, however, that there may be differences between those suffering acute economic stress and those with longer-term financial problems, as the distinction had not been addressed during the course of the study. J Hinitikka and others "Debt and suicidal behaviour in the Finnish general population" (1998) 98(6) Acta Psychiatrica Scandinavica 493 at 496.

concluded that those in debt were twice as likely to think about suicide.[70] A United States study[71] of the relationship between debt and anxiety, as well as the impact that age can have on both, concluded that "credit card debt causes higher anxiety levels, which disproportionately affects young individuals [and] should be further studied in the future using many indicators of debt."[72] A 2008 study published in Psychological Medicine disclosed clear connections between debt and mental disorders.[73] As the latter study noted, such links already existed between psychological disorders and lower household income generally (regardless of debt);[74] but once debt was taken into account it became a much stronger factor.[75] Around 25 per cent of those surveyed to have a mental disorder were in debt, compared with eight per cent of people with no mental disorder.[76] Substance dependence was not linked to those with lower incomes; however, those with substance dependence were twice as likely to be in debt.[77] There is also a literature identifying the deleterious effects of debt on marital satisfaction.[78] These studies reinforce the significance of insights drawn from decisional heuristics concepts. Drawing the two strands together, consumers of debt products cannot always be expected to make appropriate or rational choices. This likelihood might be expected to exacerbate problems likely to be caused by low rates of adult literacy.[79]

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70 H Meltzer and others "Personal debt and suicidal ideation" (2011) 41 Psychological Medicine 771.

71 Patricia Drentea "Age, Debt and Anxiety" (2000) 41 Journal of Health and Social Behaviour 437.

72 Patricia Drentea "Age, Debt and Anxiety" (2000) 41 Journal of Health and Social Behaviour 437 at 448.

73 R Jenkins and others "Debt, income and mental disorder in the general population" (2008) 38(10) Psychological Medicine 1485. The study's classifications of mental disorder were based on a 1992 classification by the World Health Organisation. The relevant categories include:

- alcohol misuse, alcohol dependence and drug dependence;
- non-psychotic psychiatric disorders, including depressive episodes, obsessive-compulsive disorder, panic disorder, phobic disorder, generalised anxiety disorder and mixed anxiety/depressive disorder (these were categorised in a group as common mental disorders); and
- psychotic disorders, such as schizophrenia or manic depression.

74 R Jenkins and others "Debt, income and mental disorder in the general population" (2008) 38(10) Psychological Medicine 1485 at 1488.

75 These findings have been generally confirmed in a major survey on the relationship between mental health and debt by the United Kingdom "Mind Association": Mind *In the Red: Debt and Mental Health* (Mind, London, 2008), available at <www.mind.org.uk/assets/0000/9121/in_the_red.pdf>.

76 R Jenkins and others "Debt, income and mental disorder in the general population" (2008) 38(10) Psychological Medicine 1485 at 1489.

77 R Jenkins and others "Debt, income and mental disorder in the general population" (2008) 38(10) Psychological Medicine 1485 at 1489.

78 Jeffrey Dew "Debt Change and Marital Satisfaction Change in Recently Married Couples" (2008) 57 Family Relations 60.

79 See Ministry of Consumer Affairs *Consumer Credit Law Review: Part 3: Transparency in Consumer Credit: Interest, Fees and Disclosure* (2000) at 13, citing Ministry of Education *Adult Literacy in New Zealand: Results from the International Adult Literacy Survey* (1997).

Moreover, as this literature underscores, serious psychic harm might be the consequence of making poor choices about consumer credit – not merely poor choices between products. In short, some of the assumptions that appear to underlie the regulation of consumer credit markets in New Zealand might be belied by the lived realities of the objects of the regulatory scheme. Where such a gap exists, there is a risk that the efficacy of the regulatory intervention might be impeded. Closing the gap is likely to require a willingness on the part of regulators to view vulnerability to psychic harm both as a characteristic of the objects of the regulatory scheme, and one that is sufficiently serious to take account of in the crafting of new regulatory solutions in this area. In the policy space, a focus on the objects of regulation is relevant both substantively and procedurally. As is discussed above at [8.1], the recently-promulgated amendments to the CCCFA make significant headway toward recognising and responding to characteristics and vulnerabilities *other than* those that are reinforced by (and that, in turn, reinforce) the ideology of the sovereign consumer. Of course, all policy work relies on generalities. That is different, however, from failing to acknowledge embedded assumptions about the objects of regulation. Refreshingly, the policy work behind the CCCFA amendments has been informed by consultations with community groups and other agencies with first-hand knowledge of the deleterious effects of poor decisions about debt.[80] In addition, a number of the new initiatives – such as the obligation to make reasonable inquiries as to the possibility of hardship – bear the signs of expert policy analysis that takes account of the serious consequences for individuals and families of taking on inappropriate levels of debt. These can include the kinds of psychic harms that are discussed earlier in this section. Acknowledging these risks should help policy makers create a more detailed picture of the objects of the regulation – the real, flesh-and-blood individuals whom regulatory regimes such as the CCCFA seek to protect. This may enable more sharply focused regulatory responses than are likely to be distilled by treating the decidedly more idealised sovereign consumer as the regulatory object. If anything, this chapter seeks to underscore the importance of the kind of policy work that is reflected in the proposed amendments to the CCCFA regime. More generally, it seeks to draw attention to the utility of intensifying the policy focus on the real-life characteristics of the people whose lives regulators seek to improve.

8.4 Conclusion

As was the case with Stage One, the aim with this part of the project is not to resolve the difficult policy questions that are raised in this context, nor, of course, is it to design a better credit contract regime; that task is currently being expertly progressed by a number of experienced New Zealand policy analysts and, as

[80] The policy background to the proposed amendments was a financial summit attended by around 250 representatives of consumers, financial service providers, academia, dispute resolution services and industry associations that was held in Auckland on 11 August 2012. Further information on the summit is available at <www.consumeraffairs.govt.nz/legislation-policy/policy-development/financial-summit>.

signalled above, will be the subject of much further public consultation. Instead, the task here is to raise a set of questions about the premises that appear to underlie the current regime – and the importance of the issues that are currently being ventilated in the law reform process.

Moreover, as Professor Ramsay has noted, the cluster of issues with which regulators must engage in the consumer debt space are unlikely to be susceptible to easy resolution:[81]

> Models of credit regulation are based on assumptions about credit, debt and consumer behaviour. A focus on consumer irrationality in credit decision making or a belief that credit is a potentially dangerous product will result in a different institutional structure to a structure premised on the assumption that credit contributes to the alleviation of poverty and is generally a positive benefit to society. There is a danger in credit policy making that those who need credit may be denied it because of false assumptions about how they use or manage credit. Given the social anxieties and fears about credit in society policy must navigate between the Scylla of middle class moralisms and the Charybdis of a belief that disclosures and financial literacy are the answer to debt problems. Excoriating our 'want it now' society or 'credit bingeing' will not provide a clear guide. It is unlikely that there will be convergence on a common international approach to consumer credit regulation as exists in competition policy. Attempts by international institutions to establish a consensus on ground rules for credit markets is likely to reflect controversial assumptions about credit and its role. It is therefore necessary to ensure that there is a proper dialogue on the role of credit within society.

Ramsey's insights also succinctly capture why the issues raised by the regulation of consumer credit products are not readily susceptible to cost-benefit analysis (CBA). As is well known, there is an important literature contesting the utility of cost-benefit analysis in the policy space.[82] CBA "strives to enhance social welfare by predicting, weighting, and aggregating all relevant consequences of policy proposals in order to identify those choices that represent welfare-maximizing uses of public resources."[83] As Kate Tokeley discusses in her first chapter, value judgments about the potential benefits of any form of government regulation are likely to shape how costs and benefits are to be measured.[84] But critiques of CBA cut deeper. According to the so-called "precautionary principle", typically associated with the work of European regulators, cognisance of certain kinds of risks should trigger an

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81 Iain Ramsay "'Wannabe WAGS' and 'Credit Binges'" in Joanna Niemi-Kiesiläinen, Iain Ramsay and William C Whitford (eds) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing, Oxford and Portland (OR), 2009) 75 at 88–89.

82 See Frank Ackerman and Lisa Heinzerling "Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection" (2002) 150 U Pa L Rev 1553.

83 Douglas Kysar "It Might Have Been: Risk, Precaution and Opportunity Cost" (2006) 22(1) J of Land Use 1 at 3–4.

84 Kate Tokeley "Consumer Law and Paternalism: a Framework for Policy Decision-making" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 267 at 286–287; see also Frank Ackerman and Lisa Heinzerling "Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection" (2002) 150 U Pa L Rev 1553 at 1576–1578; Laurence H Tribe "Political Science: Analysis or Ideology?" (1972) Phil & Pub Aff 66, 89 and 98-105.

incremental process of risk regulation through the simple admonition: "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically."[85] For this reason, the suggestion that "[a]n important part of developing *any* regulatory reform is to conduct a cost-benefit analysis"[86] risks overstatement. The observations by Professor Ramsey highlight the difficulty of *identifying* the relevant costs and benefits.[87] While one consumer might be spared a bad decision about purchasing a credit product, another might be turned out of her house because she could not secure a "payday loan" in time to pay the landlord. It should be anticipated that in the public consultation accompanying the proposed amendments to the CCCFA that exactly these kinds of issues will be raised by parties on different sides of the debate.[88] Additionally, as the literature on the friction between the CBA and "precautionary principle" approaches reminds us, even if the costs and benefits of regulatory interventions can be identified clearly, and even if this can somehow be achieved in a value-neutral way, it is not at all clear, in the light of the risks of bad credit decisions to human health and well-being, that CBA is an appropriate methodological approach.

In recent scholarship, Professor Martha Fineman has inaugurated the concept of the "vulnerable subject."[89] Acknowledging that vulnerability is inherent in the human condition produces a complex foundation on which to build social policy and regulatory responses – but it is one that responds to our lived realities. Vulnerability, Fineman argues, can act as a heuristic device, enabling us to examine

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85 Douglas Kysar "It Might Have Been: Risk, Precaution and Opportunity Cost" (2006) 22(1) J of Land Use 1 at 4, citing Peter Montague "The Precautionary Principle" Rachel's Env't & Health Wkly (18 February 1998) at 1.

86 Kate Tokeley "Consumer Law and Paternalism: a Framework for Policy Decision-making" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 267 at 285.

87 Kate Tokeley, the author of the statement quoted immediately above, develops precisely this point, in the context of a very insightful discussion of the role played by values in ascribing costs and benefits. Kate Tokeley "Consumer Law and Paternalism: a Framework for Policy Decision-making" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 267 at 286–289.

88 Moreover, as some scholars have noted, CBA analysis sometimes has difficulty accommodating the dialogic or iterative characteristics of preference formulation, the acknowledgement of which contests the utility of recourse to "expressed preferences" in the context of ascribing values. As Professor Tribe insightfully notes, the making of social policy choice can be to "define, and sometimes deliberately to reshape … values … of the individual or community *that is engaged in the process of choosing*": Laurence H Tribe "Policy Science: Analysis or Ideology?" (1972) 2 Phil & Pub Aff 66 at 99 (emphasis added). Thus, the processes of political participation described by Mark Bennett and Joel Colón Ros in their first chapter in this project may be critical, not only in the context of political or constitutional legitimacy; they might also play an important role in the formulation of "preferences": Mark Bennett and Joel Colón-Ros "Public Participation and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 21.

89 Martha Albertson Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20(1) Yale JL & Feminism 1.

hidden assumptions and biases that shaped original social and cultural meanings.[90] As this project has suggested, there have in the past been hidden assumptions embedded in our regulation of consumer credit issues. The consumer of a credit product might well be somebody who is, by dint of the regulations that prescribe disclosure of information, able to choose freely between different available credit products in the New Zealand market. But the picture of a detached, atomised consumer is likely to capture only part of her reality. She might also be experiencing a cluster of diverse pressures as well as a number of misapprehensions about the significance of choosing to purchase a product of this kind. In the context of the CCCFA, these concepts might usefully sharpen ideas about some of the issues raised in the first chapter: why, for instance, it matters if oppressive contracts can only be re-examined by initiating complex and costly judicial proceedings,[91] or why regulations directed against inappropriate high fees should deploy clear and readily accessible standards and be amendable to inexpensive dispute resolution processes. An appreciation of this kind of vulnerability is not itself alien to New Zealand's regulatory commitments, as is suggested in the regimes briefly surveyed in [8.2]. Engaging with the kinds of vulnerabilities under which consumers of credit products labour, and the risks associated with making poor choices, might improve the quality of baseline assumptions that inform this area.

Regulatory choices in this field are at large and are unlikely to satisfy everyone. At the very least, concern with the kinds of issues that have been explored in this part of the New Zealand Law Foundation Regulatory Reform Project might provide a clearer picture of the characteristics of the ultimate objects of regulation. The current policy and law reform initiatives in this area suggest that there is a welcome appreciation of the kinds of vulnerabilities that might affect decision making in this area emerging in our regulatory frameworks as well as a sense that the sovereign consumer is not the only available lens through which to view the objects of regulation.

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90 Martha Albertson Fineman "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20(1) Yale JL & Feminism 1 at 9.

91 See Graeme Austin "The Regulation of Consumer Credit Products: The Effects of Baseline Assumptions" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) at 302–303.