



Real Estate Institute of Australia

REIA SUBMISSION TO THE PRODUCTIVITY COMMISSION REVIEW OF AUSTRALIA'S CONSUMER PROTECTION FRAMEWORK: DRAFT REPORT

BACKGROUND

1. On 11 December 2006, the (then) Commonwealth Treasurer, the Hon. Peter Costello MP, requested that the Productivity Commission undertake an *Inquiry into Australia's Consumer Policy Framework*, including its administration, and report within 12 months. The Productivity Commission published an Issues Paper in February 2007 (in respect of which the REIA provided a submission) and a Draft Report, *Review of Australia's Consumer Policy Framework*, in November 2007.
2. The Real Estate Institute of Australia (REIA) is the peak national professional association for the real estate industry in Australia. The REIA has eight members, comprised of the State and Territory Real Estate Institutes, through which about 80% of real estate agencies are collectively represented. The real estate sector is predominately by small businesses with 73% of agencies employing less than 10 people.

PURPOSE

3. This submission constitutes a response to the Productivity Commission's Draft Report, *Review of Australia's Consumer Policy Framework*.

ISSUES

Overall Impression of the Draft Report

4. The Draft Report is comprehensive and well structured. The recommendations contained in the Draft Report generally reflect a logical analysis of Australia's Consumer Policy Framework, with a view to improving the framework into the future.
5. The REIA is pleased that the Productivity Commission has recognised the problems facing consumers arising from inconsistent consumer policy frameworks at the State and Territory level and has recommended the establishment of a national consumer policy framework, underpinned by a single national regulator.
6. Australia stands to gain much from the implementation of a truly national consumer policy framework. The REIA commends the Productivity Commission's Final Report to provide the impetus for Australian Governments at all levels to recognise the need for change and support the required modernisation of the consumer policy framework in Australia.

Major Elements of the Proposed Consumer Policy Framework

7. In accord with the previous REIA submission to the Inquiry, the REIA supports the major elements of the consumer policy framework proposed by the Productivity Commission, specifically, to:

- a. establish common consumer protection objectives across all jurisdictions;
- b. establish a single national generic consumer law;
- c. investigate the establishment of a single national regulator under the auspices of the Australian Competition and Consumer Commission (ACCC);
- d. review industry specific regulation via COAG with a view to harmonisation (including possible transfer of responsibility to the Australian Government);
- e. transfer policy and enforcement in the areas of consumer credit, telecommunications and energy provisions to the Australian Government without further review;
- f. reshape the role of the Ministerial Council on Consumer Affairs (MCCA);
- g. foster closer economic integration with New Zealand (NZ);
- h. ensure all jurisdictions participate in the national consumer complaints database (AUZSHARE); and
- i. enshrine a greater focus on reporting of problem areas and gaining feedback from stakeholders as to how they may be solved.

8. The REIA is however considers that:

- a. the Productivity Commission may miss an opportunity to use recent progress in harmonisation of legislation in the real estate sector as a priority for nationalisation;
- b. has not made any recommendations relating to the activities of property investment advisers; has not made any specific recommendations relating to small businesses; and
- c. has not recommended the inclusion of specific consumer *responsibilities* as part of a new policy framework.

Nationalisation and Harmonisation of Australia's Consumer Policy Framework

9. Australia's domestic markets for goods, services and labour now operate in a national or international context. As the internal boundaries on the Australian business map are eroded through improvements in communications and transport technology, both businesses and consumers are increasingly operating across multiple regulatory jurisdictions. For instance, advances in communications technology, such as the advent of internet sites offering properties for sale, have enabled consumers from across Australia and overseas to more readily consider purchasing property outside of their own regulatory jurisdiction.

10. Australians are also increasingly mobile and prepared to move for work or lifestyle reasons. According to the ABS, 358,800 Australians migrated interstate during 2004-05. The vast majority of these persons will have been required to either purchase or rent a property within their destination State or Territory, in which they are unlikely to be entirely familiar with the local consumer protection framework. Some are also likely to have sold or let their previous property prior to, or shortly after, moving.

11. Despite the erosion of boundaries on the business map, boundaries within the consumer protection framework have persisted and, as noted in the Draft Report, there are numerous specific examples of consumer protection regulation that are inadequate, inconsistent, absent or overlapping. The REIA has previously provided several real estate specific examples of each of these problems.

12. In essence, the current consumer protection framework has become unnecessarily complicated and does not reflect the reality of the Australian business and consumer environment. The Australian consumer protection framework must be urgently recast with a view to removing regulatory gaps, improving consistency, reducing duplication and reducing red tape.

13. The REIA therefore supports the Productivity Commission's draft recommendations to establish common consumer protection objectives across all jurisdictions, establish a single national generic consumer law, and investigate the establishment of a single national regulator under the auspices of the ACCC.

14. **Common Consumer Protection Objectives and Consumer Responsibilities.** It is eminently sensible to establish common consumer protection objectives as the basis for underpinning a national consumer policy framework, however, the REIA asserts that these objectives should also enshrine common consumer rights and *responsibilities*. While there is much discussion of consumer protection and empowerment within the Draft Report (which each result in an onus on either business or the regulatory system to facilitate some form of consumer redress), there is precious little examination of the basic responsibilities that should be borne by consumers.

15. The REIA appreciates that there are indeed vulnerable and disadvantaged consumers within Australian society. These persons often require assistance to understand and participate, not just as consumers, but as citizens in general. In providing assistance to these persons, regulators must be mindful to avoid imposing unnecessary costs on others in society as this can limit their choice and freedoms that could otherwise be enjoyed. In terms of consumer policy, it is reasonable to expect that most consumers are generally able to assess the suitability of a product or service for their needs prior to purchase and that they should bear some responsibility for making this assessment.

16. It is not always possible for businesses to know the specific circumstances or preferences of consumers. Consumers should, at the very least, be responsible for checking the prices of alternative suppliers, reading any terms and conditions, assessing packaging, considering delivery alternatives, warranties and generally making enquiries regarding aspects of a potential purchase they do not understand. In addition, consumers should be responsible for assessing the fitness of the good or service for their intended purpose in the context of their own personal circumstances and, if necessary, making enquiries concerning alternative colours or styles, features, range of models, likely longevity etc. The basic premise is that of due diligence, 'buyer beware', or as sometimes expressed, *caveat emptor*.

17. In recognition that there are generally at least two parties to a business transaction (i.e. a buyer and a seller) and that each party should have both rights and responsibilities, the REIA suggests that each of these aspects should be included as part of the proposed statement of common consumer policy objectives.

18. **A Single National Generic Consumer Law.** The establishment of a truly national generic consumer law would enable consumers and businesses to operate freely around Australia without the costs, barriers or uncertainties currently associated with operating in different jurisdictions. As noted in the Draft Report however, it is paramount that any national generic consumer law apply to all businesses and consumers, unlike the current *Trade Practices Act 1974* which applies only to corporations, sole traders and partnerships. If this requires constitutional change to achieve via a referendum (which are historically lengthy in terms of preparation periods with generally low chances of success) then the Australian Government progress this matter as a matter of course and work with the States and Territories to instead design an entirely harmonised regime across all jurisdictions during the interim period.

19. **A Single National Regulator.** If there is to be a single national generic consumer law, it follows that there should also be a single, strong, national regulator which is separate from Treasury. The ACCC is the obvious candidate for such a role as it is already actively enforcing consumer policy law applicable to corporations, sole trader and partnerships on a national basis. Overall, consistency of regulatory effort is certain to be more efficient than the current piecemeal approach and liberated government resources could then be more appropriately utilised in other areas. The REIA agrees with the Productivity Commission that the regulation of financial markets via ASIC appears to be a reasonable model for empowering the ACCC as the sole national regulator of consumer policy, while at the same time enabling each individual jurisdiction to influence the policy direction of the organisation via holding seats on a reconstituted ASIC Board.

20. The national regulator will need to have a solid footprint on the ground in each jurisdiction. It may be the case that a better model would be to place the ACCC in charge of administering the national generic policy framework, while continuing the role of State and Territory Fair Trading Departments in dealing with consumer enquiries and enforcing the regulation. These agencies have established offices and are culturally accepted in each respective jurisdiction. As part of an overseeing role, the ACCC would need to ensure that each State and Territory agency enforced the consumer policy framework similarly across Australia. It would also be fitting to re-badge the ACCC and State and Territory Fair Trading Agencies to promote an image of national consistency.

21. Given that it is the Australian Government that is charged with funding the operation of the ACCC and that there will be cost savings for other jurisdictions in transferring regulatory responsibility to the ACCC, the REIA suggests that the Australian Government should not be required to provide financial incentives to the States and Territories to facilitate this change, rather it would be more equitable for, individual jurisdictions to consider contributing to the operation of the national regulator on the basis of population or value of goods traded within their domestic markets, taking into account resources contributed in kind in operating their own fair trading offices.

22. The REIA's past experience in working with the ACCC on select consumer policy issues would suggest that national industry associations would generally be in a better position to co-operate with Australian governments in addressing consumer policy issues under a single national regulator model. Currently, it is often the case that individual regulators in each jurisdiction will formulate different policy responses and enforcement procedures in respect of matters that are essentially national in character, for instance, as has happened with the regulation of residential tenancy databases. This forces industry associations to duplicate consultation efforts on a State and Territory basis. A single national regulator would be in a position to liaise with a national industry association to formulate a single national response to perceived consumer issues.

23. The REIA agrees with the Productivity Commission that it is appropriate for the Australian and State and Territory Governments to jointly explore the scope and means to overcome any obstacles to, and potential risks of, adoption of a one-regulator model, including through:

- a. arrangements to ensure that the ACCC is sufficiently resourced to undertake those enforcement functions currently performed by the Fair Trading Offices in regard to their generic consumer laws;
- b. a mechanism to enable State and Territory Governments to formally convey their priorities and concerns in the consumer policy area to the ACCC;
- c. enhancements to the ACCC's reporting requirements to provide assurance that consumer policy issues, including those arising at the local level, receive appropriate attention; and
- d. legislative changes necessary to ensure that the ACCC can take action against non-corporate entities and that consumers continue to have access to State and Territory tribunals and small claims courts.

Facilitating Economic Integration with New Zealand

24. The REIA favours an approach that would foster a closer economic relationship with NZ. The establishment of a national generic consumer policy law would help to reduce the regulatory differences between Australian jurisdictions for Australian traders and for those from overseas, including NZ. The REIA applauds the efforts of the Australian and NZ Governments in developing legislation that can assist the ACCC and its NZ counterpart to overcome impediments to effective enforcement of breaches with a Trans-Tasman dimension.

25. However, facilitating greater economic integration with NZ will not simply be a matter of considering the regulations in place across Australian jurisdictions and developing a generic consumer law. It will also be vitally important to also consider the consumer policy objectives and regulations in operation in NZ and take these into account when developing the Australian model if true integration is to occur. For its part, the NZ Government will be required to consider consumer protection in the Australian context, and liaise with the Australian Government, to develop a complementary consumer policy framework that minimises the theological and operation differences between the regulatory systems. The REIA agrees that it is vital that NZ retain a seat on both MCCA and SCOCA as a means of continuing close relations in the area of consumer policy.

26. Neither country can afford to develop an improved consumer policy framework in the absence of negotiation and compromise with the other, if differences in consumer policy frameworks across the Tasman are to be absolutely minimised.

Industry Specific Regulation

27. The REIA considers that it is preferable to impose broad, generic regulation that can be applied to all situations rather than a plethora of industry specific regulations that must be separately drafted, monitored, enforced and maintained. However, generalised regulation can also impose costs on businesses, which in themselves, are not the target of the intended regulation and it will sometimes be more appropriate to legislate on an industry specific basis to ensure both that the level of regulatory detail required to address a particular problem is workable and that unnecessary regulations are not imposed on unrelated businesses.

28. Where industry specific legislation is required, the REIA favours the close harmonisation of regulation across jurisdictions with strict limitations on any proposed unilateral deviation. For example, real estate practice should remain the legislative responsibility of the States and Territories but other areas such as the TPA, the Corporations Act, and the Financial Service Reform Act, and Privacy Act should be the responsibility of the Federal Government. State legislation should be harmonised at the very least. Unless governments take action to harmonise State and Territory legislation, regulatory multiplier effects can ensue, wherein X jurisdictions impose Y industry specific regulations.

29. If there is one clear principle that should be applied when considering whether or not to impose generic or industry specific regulation, it should be to ensure that industry specific problems do not become general business costs. As outlined in the REIA's previous submission, the real estate sector is already subject to a plethora of industry specific regulations at the State and Territory level that aim to deliver a level of consumer protection.

30. As a first step in the progressive transfer of responsibility to the Australian Government, the REIA supports the Productivity Commission's recommendation to immediately transfer to the Australian Government responsibility for policy and enforcement in the areas of consumer credit, telecommunications and energy provisions without further review.

31. The REIA also supports the recommendation to instate a COAG oversighted program to review and reform industry-specific consumer regulation across all jurisdictions which would identify and repeal unnecessary legislation, identify and rectify needless inconsistencies, and examine the case for transferring policy and enforcement responsibilities to the Australian Government. The REIA concurs with the Draft Report assertion that occupational licensing should be an early priority for review.

32. However, while supportive of the initial transfer and review process, the REIA continues to maintain that the Australian Government should progressively assume responsibility for overarching aspects of the Australian consumer policy framework. Assuming that responsibilities *are* progressively transferred to the Australian Government, it will also be important that the proposed national regulatory agency has the power to devise and maintain industry specific guidelines, that reflect a harmonised State and Territory regime, in conjunction with business and consumer stakeholders as a second tier of general legislation.

33. **Co-regulation and Self-Regulation.** The REIA concurs with the Productivity Commission that, in considering the need for industry specific regulation, an assessment of other alternatives, such as industry self-regulation or co-regulation, should occur.

34. In general, Australian businesses take the view that “less is better” when considering the potential introduction of new regulation and there is an important role for co-regulation and self-regulation in the property sector. Real estate industry associations have a clear interest in ensuring that consumers remain confident and active participants in the property market.

35. Self-regulation allows the real estate industry to address specific issues before and as they arise, ensuring that consumers are protected without imposing prohibitively high costs on businesses. As illustrated previously, it can sometimes take many years for legislation to be introduced, whereas industry can usually develop and implement a system of self-regulation in a much shorter timeframe.

36. It is also fair to say that industry expertise can assist in developing a much more efficient regulatory model that requires significantly lower ongoing government resource commitments. However, there is usually an inherent cost in self-regulation which government should not presume is the sole responsibility of industry. The national regulator (the ACCC as may be the case) should be prepared to contribute to industry self-regulation where this is the least cost model as compared to direct government regulation.

37. There are many examples of self-regulation in the real estate industry including the various REI codes of conduct and the articles of association that underpin membership of professional industry bodies, which have been explored in the REIA’s previous submission.

38. Co-regulation is also important in the real estate sector. The REIA has previously worked with ASIC and the ACCC to produce guidelines for agents on various matters including the TPA. As a result of the guidance provided to agents by the REIA and REIs in recent years, complaints received by the ACCC concerning real estate agents dropped 16% during 2005/06 to their lowest level in over five years. There are several other instances of co-regulation in the real estate industry as espoused in our previous submission.

39. As a general rule, the Federal Government has used the approach of educating business and consumers before beginning to introduce or police regulations. For instance, the Federal Government went to considerable lengths to educate businesses prior to the introduction of the GST as well as prior to the enforcement of WorkChoices provisions. This approach is particularly useful in the case of broader regulation that is applicable to all businesses and all consumers.

40. There is also the global context for business and consumers. The REIA is a founding member of the International Consortium of Real Estate Associations (ICREA) comprised of 26 countries. ICREA has established arrangements and protocols for agent education and the selling of properties internationally which have not yet been sanctioned by sovereign governments. As in this circumstance, business will generally lead the way when regulations are required to ensure a stable business environment. If governments are consigned to playing “catch up” there may be inappropriate pressure on the need for a political response where there is market failure. For this reason, it is preferable that governments play a role in the development of industry co-regulation or self-regulation if this can be achieved in a timely fashion.

41. **Real Estate Agents.** The REIA considers that the Productivity Commission may have missed an opportunity to specifically list real estate as a priority candidate for nationalisation. The regulation of real property affects all Australians whether renting or purchasing as a private citizen or as a business. With nine jurisdictions legislating in the area of real estate practice, there are substantive differences between cross-jurisdictional regulatory requirements, compliance procedures and the treatment of persons/businesses found to be in breach of regulations. As espoused in the REIA’s previous submission, there are a plethora of examples of gaps, overlap and inconsistencies in the regulation of real estate agents including in the areas of:

- a. licensing (e.g. license categories);
- b. allowable commission rates;
- c. advertising restrictions;
- d. limitations on agency agreements;
- e. fee recovery;
- f. cooling off periods; and
- g. vendor and dummy bidding.

42. In a cross-border locality such as Queanbeyan/Canberra, Albury/Wodonga, or Gold Coast/Tweed Heads, real estate agents doing business in both jurisdictions are required to hold two separate licences, maintain two registered offices and have two separate trust accounts with no obvious benefits resulting for the consumer. In fact, consumers doing business across multiple jurisdictions are often baffled by, for instance, differing cooling off periods, leading to confusion and unnecessary angst in their property transactions.

43. The patchwork of regulation affecting real estate stands in contrast to the direction of business and workplace reforms, advanced through the National Competition Policy and other mechanisms. In order to address this situation, a multi-government approach to identifying and removing unnecessary regulatory inconsistencies across the various jurisdictions is urgently required.

44. Interestingly, while not specifically listing real estate as a priority category for review, the Draft Report acknowledges that general occupational licensing is a priority issue (which presumably includes real estate licensing), and under the section relating to property investment advice, notes that “*it would be premature to make recommendations prior to any changes in the location of responsibility for the regulation of real estate that might ensue from the broader review process*”. The Draft Report also notes that there are several unresolved property related issues being dealt with by MCCA including property investment advice, home building, residential tenancy databases and reverse mortgages.

45. Separately, the Productivity Commission is conducting an *Inquiry into the Market for Retail Tenancy Leases in Australia* and, as part of *Business Regulation Benchmarking Stage 2*, is currently collecting comprehensive information about the costs and red-tape associated with the registration of real estate agencies across the various jurisdictions (one of five top priority industries).

46. Given the plethora of property related matters under review by both the Productivity Commission and MCCA (which all relate to jurisdictional inconsistencies of one type or another), and the importance of real estate to both consumers and businesses, the REIA submits that the Productivity Commission should consider including the real estate industry as a primary candidate for nationalisation under Section 5.4 of Volume 2 of the Draft Report.

47. **Property Investment Advice.** In August 2003, as a result of the activities of property spruiker Henry Kaye which left a number of property investors significantly out of pocket, the MCCA decided to review the licensing of property investment advisers. The Joint Parliamentary Committee on Corporations and Financial Services subsequently also conducted a separate review on the same issue. The Terms of Reference essentially related to the effectiveness of current legislation of the property investment advice industry in protecting consumers. The Joint Parliamentary Committee tabled its report in June 2005. Some four years after the event, the real estate industry is still awaiting a report from MCCA. Meanwhile, property investment “advisers”, often referred to as spruikers, may continue to operate in the marketplace.

48. While the sale of property (including property law and real estate licensing) is regulated at the State and Territory level, matters relating to the provision of personal financial advice, whether in relation to property or other asset classes, should be regulated under the *Financial Services Reform (FSR) Act 2001*, with ASIC as the single national regulator. The Joint Parliamentary Committee recommended in its report, inter alia, that “... the regulation of property investment advice, but not of real property or real estate transactions generally, should be a Commonwealth responsibility”.

49. The REIA supports this approach, and it is understood that all the State and Territory governments support this approach. Moreover, the Committee suggested that a definition of property investment would be needed. As part of the review process, the REIA has supplied the MCCA with a useful definition of a “Property Investment Promoter” which is included at Attachment 1.

50. The Draft Report appears to agree in principle that property investment advice ought to be regulated similarly to the provision of financial advice, but has stopped short of making a formal recommendation to this effect. Although the defining characteristic of financial investments subject to the ASIC Act is that funds must be provided to a third party to manage on the investor's behalf, it would also appear that, in practice, ASIC regulates the provision of 'one-off' financial advice (that which is similar to that given in the property industry) via the conditions imposed on those licensed to give such advice.

51. In suggesting that "*it would be premature to make recommendations prior to any changes in the location of responsibility for the regulation of real estate that might ensue from the broader review process*", the REIA is concerned that the Productivity Commission is confusing the activities of property investment advisors with those of 'high street' real estate agents, currently regulated under State and Territory licensing regimes.

52. Property investment advisors, or 'spruikers', are essentially marketeers who engage in high pressure selling techniques that are often disguised as education seminars. The marketeers generally provide investment advice, boast that large returns can be made very in short periods of time with little or no risk, suggest a particular property for purchase in which the marketeer has an interest (and which is often over-valued), and may even offer to arrange on-the-spot finance for the purchase.

53. On the other hand, high-street real estate agents operate on behalf of a vendor and market the property to those who are, of their own volition, interested in purchasing a property. Real estate agents merely facilitate a transaction between an individual buyer and seller and do not make recommendations regarding whether or not it is in the financial interests of a particular purchaser to invest in a particular property.

54. The REIA specifically proposes that:

- a. anyone providing financial services advice including financial advice which compares investment in property to other asset classes, and personal investment advice such as borrowings, should be licensed under the FSR Act;
- b. anyone who sells real property (as their business) must be licensed in accordance with State and Territory legislation;
- c. those who are licensed to provide financial services advice and/or sell real property should comply, at least, with education and training standards already in place;
- d. real estate practice is already highly regulated by the State and Territory governments, therefore any change to regulations should not unduly affect the 'high street' real estate agent in accordance with the current application and spirit of the intention of the FSR Act; and
- e. there should be reform of existing legislation with additional requirements short of a full licensing regime because it would enhance conduct and disclosure requirements and ensure that these measures apply to all those who give property investment financial advice.

55. To facilitate a clearer understanding of this issue, the REIA provides Attachment 2, which comprises a recent submission made to the Parliament of Victoria Law Reform Committee Inquiry into Property Investment.

56. The REIA proposes that the Productivity Commission make a recommendation that property investment advice be regulated by ASIC under the FSR Act.

Small Business

57. While real estate agencies are predominately small businesses, they are also consumers in their own right, purchasing everything from office stationery, vehicles, phones, computers, clothing and advertising. The REIA agrees with the Productivity Commission assertion that it is important to enhance consumer protection for small business while at the same time reducing costs for small businesses as suppliers that must themselves conform with regulation. This may appear to be a paradox, yet there are other examples of legislation where this has already been achieved, for instance, under privacy legislation. One example of a practical measure that would both assure consumers of their rights and reduce the instance of frivolous complaints faced by small businesses would be the REIA's proposal to enshrine a charter of consumer rights and *responsibilities* within the objectives of the national consumer policy objectives.

58. On the basis that there is a strong diversity amongst the small business community and that the specific needs of some small businesses may vary, the Productivity Commission has declined to make any recommendations specific to small business, instead suggesting that small business needs should be considered only as part of the broader review of the consumer policy framework.

59. One of the key differences between small businesses and other consumers is that they may be in competition with their suppliers, and are at a natural disadvantage due to being small in size but large in number as compared to their larger competitors. While the Productivity Commission's proposals relating to a review of unfair contract terms, improvements in disclosure and allowing small claims courts to resolve consumer complaints on the basis of written submissions are welcome, it can be envisioned that, independent of the outcome of a broader review of Australia's consumer policy framework, small businesses will require some protection from the predatory practices of larger competitors – as currently is enshrined in the *Trade Practices Act 1974*.

60. The REIA therefore proposes that the Productivity Commission include a recommendation relating to the maintenance or improvement of the current protections for small businesses from the predatory practices of larger competitors within the Final Report.

Role of MCCA

61. The developmental process and timeliness of government policy development in consumer protection has been of particular concern to the REIA. The MCCA and the Standing Committee of Officials on Consumer Affairs (SCOCA) are key elements of the development process for consumer protection policy. While each committee is useful for co-ordinating a whole of government response to consumer issues, the committee process is generally much too slow to respond to rapidly emerging consumer issues, sometimes resulting in a 'stop gap' piecemeal approach by various individual jurisdictions awaiting outcomes. Despite being on the MCCA agenda, there is sometimes no practical solution implemented for many years, if at all, in some instances.

62. The REIA is pleased that the Productivity Commission has recognised the unresponsive and ineffectual nature of MCCA under the current modus operandi, in particular in the context of issues relating to the provision property investment advice, home building, residential tenancy databases and reverse mortgages.

63. The REIA supports the Productivity Commission recommendation that voting arrangements within MCCA be changed (to require only the support of the Federal Government and three States or Territories [two of which must be States]) to reflect the greater proposed role for the Federal Government in the development of and application of both generic and industry specific consumer law.

64. However, an important observation that should be considered by the Productivity Commission is that blockages in the MCCA system have often arisen due to disagreements between the Federal Government and all other participants. It is difficult to see how the proposed voting arrangements will remove blockages in these situations. While this situation is not uncommon, it is also true that in general, this situation arises from a reluctance on behalf of the Federal Government to assume responsibility for matters which it determines have been the traditional responsibility of the States and Territories.

65. If it is assumed that the Federal Government will change its position and become eager to take on some of these responsibilities in the future, then the proposed voting arrangements are likely to be of major benefit. However, if this cannot be assumed to be the case, perhaps a complimentary voting system will be required such that, consumer policy responsibilities may be transferred to the Federal Government with the support of all States and Territories, with or without the express support of the Federal Government. In other words, if all State/Territory jurisdictions concur that an issue needs to be dealt with on a national basis, then it should be.

66. In addition to the voting changes outlined above, the REIA also suggests that the operation of both MCCA and SCOCA should be more transparent to external stakeholders to improve accountability and responsibility for the progression of particular policy items. This transparency could include the public circulation of basic agendas prior to meetings and the public circulation of meeting outcomes, rather than the carefully scripted post-meeting media releases or communiqués.

Unfair Contract Terms

67. The REIA is cautiously supportive of the proposal to insert a tightly constrained provision into the proposed national generic consumer law dealing with the use of unfair contracts - which would require a court to determine that the contract was indeed unfair and that consumer detriment had actually been suffered. The REIA is however supportive of the possibility that businesses using standard contracts could apply to the national regulator for prior approval of the contract to indemnify them from consumer action.

68. It is important to remember that once approved, businesses using standard contracts may be reluctant to modify the terms of the contract, even at the behest of the consumer, due to the likelihood of nullifying the inherent indemnity of pre-approval. This will lead to unnecessary restrictions on the choices able to be exercised by consumers resulting in an increase, rather than a decrease, in the perceived rigidity of supposed ‘take-it-or-leave-it’ standardised contracts (which, in the real estate industry at least, often *can* be varied via negotiation). There is, of course, also a regulatory cost associated with the pre-approval of standardised contracts.

69. While cautiously supportive at this stage, it will be extremely important that rigorous stakeholder consultation be undertaken prior to the final decision as to whether or not to actually proceed with the inclusion of such a provision in the generic consumer law.

Administration, Education, Remedies and Enforcement

70. **Centralised Complaint Handling.** The REIA supports the implementation of a centralised system to improve the re-direction of consumer complaints to an appropriate agency (or branch) under a national consumer policy framework. This service should however comprise contact points at the State / Territory level within a national framework to enable easy redirection to specific State / Territory facilities such as industry tribunals. The service should also be capable of screening out frivolous complaints upon first contact with the consumer.

71. Two clear advantages of a centralised complaint handling system would be to firstly reduce consumer confusion as to which entity they should call to seek redress, and secondly, to enable the collection of information concerning compliant numbers and types via AUZSHARE. From the perspective of national industries, there would enormous benefits in being able to access standardised national data concerning complaints that have been made, such that pro-active steps could be taken to address perceived problems within the industry.

72. **Education.** An important element of a national policy framework will be education of the consumer. Education should generally be based upon the consumer policy objectives, the REIA’s proposed charter of consumer rights and responsibilities, and the generic consumer law. In some cases, industry specific education will also be required.

73. Education programs should be nationally consistent, but implemented at the State and Territory level to firstly spread the associated regulatory burden over all jurisdictions and secondly to allow for modifications where State and Territories have retained a specific role in, say, industry specific regulation based upon differing underlying laws, such a property law.

74. **Enforcement.** Currently, it is generally only possible to pursue meaningful enforcement of consumer protection laws via court based prosecution. The REIA concurs with the Productivity Commission that it would be of benefit to both consumers and businesses to have a range of civil penalties available for alleged minor breaches of consumer law. These penalties could include fines, substantiation notices, cease and desist notices or other types of remedies. In order to ensure that the standard of proof remains high however, the REIA suggests that those prosecuted should retain an ability to appeal penalties to the courts, at the risk of greater penalties being applied. There should also be penalties for consumers found to be making frivolous complaints which result in unnecessary costs for affected businesses.

75. Given the likely resource requirements associated with a nationwide enforcement effort and cultural differences that may pervade the national framework, it is fitting that State and Territory agencies retain their role as the primary regulatory enforcers in each jurisdiction.

76. **Reporting.** The REIA supports the implementation of mechanisms which would require frequent reporting highlighting emerging consumer issues, steps that have been taken to rectify problems, and how successful responses have been. The REIA suggests that this process should also allow external stakeholders (such as industry associations) to comment on the performance of the generic consumer law, the national regulator, MCCA and the COAG reform process on a regular basis.

77. **Consumer Advocates.** The REIA does not support the establishment and funding of a wholly publicly funded consumer advocate. If established, it is likely such an entity would continually assert its own relevance by pursuing perceived consumer issues infinitum – whether or not these were actually considered important by consumers at large. There are no equivalent funds provided to support business interests.

SUMMARY

78. The REIA considers that the Draft Report is comprehensive and well structured. The recommendations contained in the Draft Report generally reflect a logical analysis of Australia's Consumer Policy Framework, with a view to improving the framework into the future.

79. REIA supports the major elements of the proposed national consumer policy framework, specifically, to:

- a. establish common consumer protection objectives across all jurisdictions;
- b. establish a single national generic consumer law;
- c. investigate the establishment of a single national regulator under the auspices of the Australian Competition and Consumer Commission (ACCC);
- d. review industry specific regulation via COAG with a view to harmonisation (including possible transfer of responsibility to the Australian Government);
- e. transfer policy and enforcement in the areas of consumer credit, telecommunications and energy provisions to the Australian Government without further review;
- f. reshape the role of the Ministerial Council on Consumer Affairs (MCCA);
- g. foster closer economic integration with NZ;

- h. ensure all jurisdictions participate in the national consumer complaints database (AUZSHARE); and
- i. enshrine a greater focus on reporting of problem areas and gaining feedback from stakeholders as to how they may be solved.

80. While generally supportive of the Productivity Commission's recommendations, the REIA asserts that the Draft Report could be enhanced by:

- a. recommending the inclusion of a charter of consumer rights and responsibilities as part of the common consumer protection objectives;
- b. specifically nominating real estate as a priority candidate for nationalisation;
- c. recommending that property investment advisers be nationally regulated under the auspices of ASIC;
- d. recommending the maintenance or enhancement of existing protections for small business under a generic consumer policy framework;
- e. recommending that, in addition to the already proposed voting structure under MCCA, that consumer policy issues be transferred to the Australian Government where all States and Territories vote to that effect;
- f. noting the importance of rigorous stakeholder consultation before proceeding with the inclusion of an 'unfair contracts' provision within the generic consumer policy law;
- g. proposing that any centralised complaints re-direction facility screen out obviously frivolous complaints at the first point of contact;
- h. proposing that industry associations be granted access to data held by AUZSHARE;
- i. proposing that those prosecuted under a civil penalty regime retain an ability to appeal these penalties to the courts, at the risk of greater penalties being applied, and that there should also be civil penalties for consumers found to be making frivolous complaints which result in unnecessary costs for affected businesses; and
- j. proposing to extend the stakeholder feedback role in the reporting process to invite comments on the performance of the generic consumer law, the national regulator, MCCA and the COAG reform process.

81. Australia stands to gain much from the implementation of a truly national consumer policy framework. The REIA hopes that the Productivity Commission's Final Report will provide the impetus for Australian Governments at all levels to recognise the need for change and support the required modernisation of the consumer policy framework in Australia.

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Attachments:

1. REIA Proposed Definition of a Property Investment Promoter

2. REIA Submission to the Victorian Parliamentary Law Reform Committee on Property Investment Advice