



**ACCC submission in response to the Productivity
Commission 2007, *Review of Australia's Consumer
Policy Framework*, Draft Report**

11 February 2008

Contents

Introduction.....	3
1. Generic consumer legislation.....	3
1.1 Single national generic consumer law	3
1.2 Proposed one-regulator model	3
1.3 Cooperation between the ACCC and fair trading agencies	6
2. Industry-specific consumer regulation	7
2.1 Retail price constraints.....	7
3. Unfair practices and conduct.....	8
3.1 Regulatory approval of ‘safe harbour’ contract terms	8
3.2 Private rights of action.....	8
3.3 Transition period.....	9
3.4 Review of UCT provision.....	9
3.5 Public benefit test.....	9
4. Defective products.....	10
4.1 Implied warranties and conditions	10
4.2 Product liability.....	10
5. Access to remedies.....	10
6. Enforcement	11
6.1 Infringement notices	11

Introduction

In June 2007, the Australian Competition and Consumer Commission (ACCC) provided the Productivity Commission (PC) with its submission in relation to the PC's inquiry into Australia's consumer policy framework. In December 2007, the PC released its draft report, *Review of Australia's Consumer Policy Framework*. The PC has sought further submissions in response to its draft report.

This submission contains the response from the ACCC to the draft report.

The ACCC has not sought to respond to every recommendation made by the PC in the draft report. This submission responds to particular commentary and recommendations in the following chapters of the draft report:

- Chapter 4 - Generic consumer legislation
- Chapter 5 - Industry-specific consumer regulation
- Chapter 7 - Unfair practices and conduct
- Chapter 8 - Defective products
- Chapter 9 - Access to remedies
- Chapter 10 - Enforcement

1. Generic consumer legislation

1.1 Single national generic consumer law

As expressed in chapter 6 of its first submission to this inquiry, the ACCC believes the need for uniformity of consumer laws in Australia is becoming more urgent due to the increasingly national and global nature of markets. Accordingly, the ACCC is of the view that jurisdictions should seek to develop uniform generic fair trading and consumer protection laws modelled on the current provisions of the *Trade Practices Act 1974* (TPA).

The ACCC agrees with the view of the PC that the case for introducing a single national generic consumer law is a strong one. Accordingly, the ACCC agrees with draft recommendations 4.1 and 4.2 that the national generic law should be based around the consumer protection provisions of the TPA and apply to all consumer transactions.

1.2 Proposed one-regulator model

The ACCC considers the most effective and efficient way to enforce a generic consumer law will involve a national regulator with responsibility for national issues and state and territory regulators with responsibility for local issues. Good coordination processes are important to ensure that grey areas, where responsibilities overlap or are unclear, are properly managed.

In determining the most effective and efficient way to enforce a generic consumer law, there are three elements to consider: (i) does the activity being regulated by the generic law lead more naturally to enforcement at either a local or national level; (ii) are there economies of scope in the supply of complementary regulatory services at the local level; and (iii) would the Commonwealth be a more cost efficient provider of local services than state and territory governments?

Regarding the first element, in considering the scope of activities being regulated by a generic consumer law, there are two dimensions: (i) the distinction between regulating goods and services and regulating trader conduct; and (ii) with respect to the regulation of trader conduct, the geographical reach of the conduct – that is, whether the conduct is local, regional or national.

Because the vast majority of goods supplied in the Australian economy are supplied nationally, the ACCC considers the enforcement of product safety laws to be a national issue and believes these laws should be enforced by a single regulator. A rapid and national response is often required to deal with immediate and significant threats to public health and safety posed by unsafe products, which does not allow the time otherwise needed for inter-jurisdictional coordination and cooperation. Moreover, there are significant benefits associated with maintaining public confidence across the country in having product safety messages delivered by a single voice. The ACCC therefore supports draft recommendation 4.3.

A generic consumer law will also regulate the conduct of traders in connection with the supply of goods and services. For example, prohibiting the making of false representations about goods or services. Traders and the scope of their conduct will range from national (e.g. a large retailing chain) through to very local (e.g. a used car dealer or a corner store). As with product safety, where the conduct is national in breadth the ACCC believes a strong argument exists for action by a regulator who can address enforcement issues on a national basis. However, more careful consideration is needed in relation to the most effective way to enforce a generic consumer law at the local level.

In its draft report the PC argued that a one law, one-regulator model has significant advantages in terms of ensuring that the consistent treatment of consumers under a single generic law is not undermined by variations in enforcement priorities and regulatory actions among national and state and territory regulators. The PC also notes there are infrastructure and constitutional issues that need to be resolved before any move to such a model could be considered.

The ACCC agrees that constitutional difficulties may potentially arise under a one-regulator model. As identified by the PC, in addition to the constitutional issues associated with attempting to apply a national consumer law to unincorporated entities, the Australian Government is unable to legislate to create consumer tribunals and small claims courts. The efficient working of a one-regulator model at the local level will depend very much on the continued availability of these fora as a means of expeditiously resolving less complex consumer disputes.

As mentioned above, the ACCC believes there are two other elements to consider when determining whether having a single regulator to enforce the national generic law is effective and efficient. That is, will the introduction of a single regulator remove synergies that currently exist in the overall regulation of economic activity at the local level; and will the Commonwealth be a more cost effective regulator either in the long term or in the shorter term when overall transition costs are potentially significant?

The ACCC is of the view that any benefits associated with the adoption of a one law, one regulator model would need to be weighed against the likely reduction in regulatory effectiveness arising from the loss of synergies at the local level associated with the ability of fair trading offices to utilise a variety of compliance and enforcement tools.

In addition to fair trading legislation, state and territory governments administer a range of other legislation designed to support the efficient operation of different markets. These include occupational and business licensing and laws affecting industry-specific markets such as building services and motor vehicle sales. State and territory governments undertake enforcement action under both their fair trading legislation and other related legislation in order to deliver outcomes for consumers. Having the ability to incorporate both areas of trader non-compliance into one investigation and achieve a dual regulatory outcome represents an efficient use of regulator resources at the local level due to the synergies arising from the joint approach.

Additionally, state and territory fair trading offices have the scope to undertake a range of enforcement and compliance activities in order to support consumers and the efficient operation of markets. These range from education and awareness raising through to enforcement action. It is not clear whether the PC envisages a single regulator taking on all the compliance and education functions currently performed by the various fair trading offices, or just the enforcement role. If both roles were taken on the task of the single regulator becomes even larger, if they were not then the choice of the most effective tools to deliver an outcome by the single regulator is limited.

In terms of cost effectiveness, each state and territory fair trading agency has a network of offices through which they administer their fair trading Acts and provide complementary services. In order to maintain this level of service, a single national regulator would require a similar infrastructure network. The ACCC currently has a single office in each capital city and a regional office in Townsville. Providing the same level of service to consumers would involve more than 'appropriately resourcing' (PC p. 63) these ACCC offices.

In its simplest incarnation the one regulator proposal would be cost neutral – with the staff and other costs simply transferred from states and territories to the Commonwealth. However, in practice the states and territories exploit economies of scope in delivering their regulatory services, which would potentially be lost under this proposal, so it is likely that such a move would involve additional resources. There would likely be considerable duplication in terms of physical presence across the country as both the national regulator and agencies implementing other state and territory legislation would need a regional office network to enforce their laws.

Setting aside the constitutional and infrastructure difficulties, the proposal for a single regulator turns on the assumption that the associated benefits arising from a consistent application of the generic consumer law to local consumer issues are greater than the benefits associated with having a range of consumer and related laws enforced by local regulators who can utilise a full range of compliance tools associated with these laws to deliver outcomes for consumers. The ACCC does not believe the PC has convincingly made this case in its draft report.

The ACCC does not support draft recommendation 4.5. The ACCC believes the challenges outlined above will arise should individual states and territories refer their enforcement powers under a new generic national law to the ACCC.

1.3 Cooperation between the ACCC and fair trading agencies

Whilst advocating a multiple-regulator model, the ACCC is keenly aware that the effectiveness of such a model depends significantly on the level of cooperation that can be achieved between it on the one hand and the state and territory fair trading agencies on the other. As stated in its first submission, the ACCC maintains strong links to the fair trading agencies through its state and territory offices and believes there is a good level of cooperation with each of the agencies in terms of enforcement activities.

The ACCC considers this approach has worked well due to the flexibility it provides both the ACCC and the fair trading agencies in their dealings with each other, particularly in relation to determinations about who should take responsibility for differing enforcement matters.

As an example, the operating agreement between the ACCC and the Victorian Office of Fair Trading and Business Affairs (now Consumer Affairs Victoria) states:

The aim of this agreement is to foster a better understanding of each agency's role and responsibility. It will do this by promoting co-operation and co-ordination between the two agencies thus minimising the possibility of duplication of effort in the application of consumer and fair trading laws in Victoria.

As noted in its first submission, the ACCC and the state and territory fair trading agencies participate in two committees, which are part of the Ministerial Council on Consumer Affairs (MCCA) structure and which are important mechanisms of cooperation between agencies. Both these committees, the Fair Trading Officers Advisory Committee (FTOAC) and the Consumer Products Advisory Committee (CPAC), are important mechanisms by which the ACCC and the other agencies can meet on a regular and relatively informal basis and exchange relevant information, particularly relating to their respective enforcement responsibilities.

The ACCC firmly believes the present informal approach to managing enforcement cooperation between it and state and territory fair trading agencies is the most effective means by which to handle the referral of matters between agencies.

2. Industry-specific consumer regulation

2.1 Retail price constraints

The ACCC endorses the principle that retail price constraints in utility sectors should only be removed in fully contestable markets.

Energy markets

In relation to recommendation 5.4, as wholesale prices are currently rising in many energy markets, the ACCC is of the view that when assessing market contestability a cautious approach needs to be taken which assesses the contributing factors behind these increases and any issues this may raise for competition in retail energy markets. In this respect, the ACCC notes that the Australian Energy Market Commission (AEMC) is currently reviewing the effectiveness of competition in the Victorian and South Australian markets.

In the context of high wholesale energy prices, it is noted that the AEMC has considered the issue of barriers to entry in relation to wholesale energy contracts/prices and the impacts of vertical integration between generators and retailers. The ACCC supports an ongoing careful consideration of wholesale energy price issues as part of a fuller, detailed assessment, prior to removing price caps.

The ACCC understands that retail price caps in energy markets are presently being considered under the COAG forum, which is due to report in June 2008.

Telecommunications

Retail price controls over telecommunications services are set by the Minister and apply only to Telstra, although these indirectly influence prices set by other service providers. The ACCC last provided advice to the Australian Government on these retail price controls in 2004-05. The report recommended that a service or market segment should only be subject to retail price controls in order to achieve economic objectives where this would align market outcomes with what would be reasonably expected within a competitive market.

With respect to recommendation 5.4, whether or not a price cap should be applied to achieve these objectives depends in large part upon the level of competition that is reasonably expected to exist within markets or segments of markets. Reflecting this, retail price caps over telecommunications services have been progressively relaxed in Australia as competition has taken hold. The ACCC notes that retail price control regulation has also been used by government as a means to achieve certain social policy objectives.

In both the energy and telecommunications markets, the ACCC recommends that if the removal of price caps is judged to be appropriate, they be phased out over time.

3. Unfair practices and conduct

The ACCC understands the policy rationale for incorporating a provision in a new national generic consumer law that voids unfair contract terms (UCT). However, the ACCC maintains its position (as outlined in its first submission) that in the development of an UCT provision, further rigorous research should be conducted comparing and evaluating alternative approaches to UCT, in terms of benefits and detriments to consumers and business. This should include empirical work in relation to UCT laws in jurisdictions where they already exist.

The ACCC raises the following issues with respect to recommendation 7.1 and the UCT provision proposed therein.

3.1 Regulatory approval of ‘safe harbour’ contract terms

The ACCC does not support the inclusion of an authorisations process in a new UCT provision. This is due to the very high regulatory burden likely to be imposed upon the regulator (probably the ACCC) charged with responsibility for administering the process. The ACCC believes that if a regulatory approval procedure was included, it is likely it will have to deal with a large volume of applications for contract review from risk-averse businesses across the country seeking approval of their own ‘safe harbour’ terms. This will raise significant resource issues for the regulator.

The regulator may have the ability to charge an application fee to businesses seeking approval of their contract terms. However, this fee may be of a level which imposes significant compliance costs, particularly on small businesses.

The ACCC is in agreement with the PC when it states on p. 124 of the draft report, that ‘[i]t would be relatively easy for regulators to provide guidance to business about indicative lists of terms that would usually fail a fairness test ...’ The ACCC submits that a more efficient alternative to a ‘safe harbour’ approvals process would be for the regulator to issue guidelines concerning the types or categories of contract terms that may raise concerns regarding potential unfairness.

The ACCC has a good deal of experience in issuing such guidelines, having released similar guidelines for business aimed at improving awareness and compliance with the TPA in areas such as unconscionable conduct, product safety and labelling requirements, advertising and country of origin claims.

This approach allows plenty of scope for the market to readily adjust to a new UCT provision. The ACCC anticipates that businesses will err on the side of caution and remove terms regarded as potentially unfair by the regulator.

3.2 Private rights of action

The ACCC submits the PC should make it clear in its report that the proposed UCT provision should include private rights of action. Private rights of action arising from contraventions of UCT legislation will be particularly important given the current difficulties experienced by the ACCC in undertaking representative action for breaches

of the consumer protection provisions of the TPA. This is discussed in chapter 9 of the PC's draft report.

The PC suggests that representative actions for groups of consumers would be possible using the TPA or the *Federal Court of Australia Act 1976*. Given the proposed UCT provision relies on proof of material detriment to consumers, the ACCC believes the difficulty and costs inherent in proving material detriment for each individual consumer concerned will likely make representative actions for contravention of the proposed UCT provision very difficult to prosecute.

3.3 Transition period

The ACCC agrees with the PC, as noted on p. 124 of its draft report, that a sensible implementation policy for any new UCT legislation would accommodate firms' time cycles of contract document changes.

The ACCC submits that a transition period (e.g. 12 months) after the introduction of a new UCT provision, before it is enforced by regulators, would be appropriate to allow business a reasonable time to adjust and comply with the new law. This would also allow regulators time to publicise and disseminate any guidelines that are produced to assist business compliance.

In addition, the ACCC submits that a 'grandfathering clause' would be desirable, such that consumer contracts on foot at the time of introduction of a new UCT provision should not be subject to the new provision for the duration of the contract.

Furthermore, the grandfathering clause should also include a reasonable 'sunset date' to ensure that ongoing contracts, which contain no fixed date of cessation, or contracts with an end date several years in the future, can transition smoothly to non-prohibited contract terms that disadvantage neither the consumer nor the provider.

3.4 Review of UCT provision

The ACCC agrees with the proposal in recommendation 7.1 that any UCT provision in the national generic law be reviewed after a fixed period (e.g. five years). Over the intervening period, the application of the new provision should be closely monitored in order to determine whether amendments to the provision are appropriate.

3.5 Public benefit test

The ACCC submits that the requirement for a court to determine an overall public benefit from remedial action in order to void UCT may prove problematic and recommends it be removed.

Courts are not experienced in applying public benefit tests. Including such a test in the proposed UCT provision may therefore lead to uncertainty regarding how it will be interpreted by the courts.

4. Defective products

4.1 Implied warranties and conditions

The ACCC agrees it is important that consumers and suppliers are made aware of the statutory rights and responsibilities arising from the warranties and conditions implied into consumer contracts by the TPA.

As noted in the ACCC's first submission, printed publications are an important means of providing information to consumers and small businesses. Since making this submission, and relevant to recommendation 8.1, the ACCC has released a range of new refund and warranty publications as part of its public education and awareness activities. In January 2008, the ACCC released a consumer fact sheet about mobile phone handset refunds and warranties issues. The ACCC is also preparing further material for publication in 2008 to educate consumers and suppliers about their statutory rights and responsibilities in relation to implied warranties and conditions. This material includes a revised version of the ACCC brochure on warranties and refunds.

The ACCC participates in the National Consumer Education and Information Taskforce, established under MCCA. Social marketing campaigns to increase awareness among consumers and suppliers about statutory rights relating to warranties and refunds are topics currently being considered by the Taskforce.

4.2 Product liability

According to recommendation 8.2, Australian governments should commission a study to assess product-related injuries and introduce mandatory reporting requirements for product recalls.

The ACCC understands that a 'baseline' study of product-related injuries was commissioned by MCCA and completed in late 2007. It is not clear whether the PC is recommending a further study or was unaware the MCCA study had been completed.

It is also unclear what the PC intended when recommending that mandatory reporting requirements for product recalls be introduced. The ACCC notes there is no reference to such a proposed requirement in the 2006 PC report; Review of the Australian Consumer Product Safety System. The PC may wish to note that notification of safety-related product recalls is already mandatory under s. 65R of the TPA.

5. Access to remedies

Regarding recommendation 9.1, the ACCC fully supports the operation of the AUZSHARE complaints database and agrees that all consumer regulators should participate in it.

Further to recommendation 9.1, the ACCC is already well advanced in developing an enhanced contacts and information database as part of a redevelopment of the existing ACCC website. The existing website includes content that is multilingual and accessible to people with print disabilities. The redevelopment process has involved user testing to facilitate increased accessibility of content to consumers.

The revised database will consolidate the current *Australian Consumer Handbook Online* national referral database hosted on *Consumers Online* and the ACCC's existing contacts database. The database will refer consumers to the appropriate organisation for dispute resolution and also provide information to assist consumers with their complaint or inquiry.

Additionally, the ACCC manages the *SCAMwatch* website, which contains advice on scam-related issues and contact information for other organisations that can also assist consumers with scam-related complaints and enquiries.

6. Enforcement

As part of the proposed new national generic consumer law, the PC has recommended the introduction of a number of powers which will contribute significantly to the enforcement capabilities of consumer regulators. The ACCC welcomes the PC's views embodied in recommendation 10.1, and acknowledges this recommendation as being largely in line with the ACCC's first submission.

As previously submitted, the ACCC believes that the availability of civil pecuniary penalties, banning orders and substantiation notices would be important additions to its capacity to enforce the consumer protection provisions of the TPA. However as outlined below, the ACCC has reservations with regard to the PC's recommendation for the introduction of infringement notices.

6.1 Infringement notices

The ACCC notes that granting powers to issue infringement notices to a Commonwealth agency may raise important constitutional issues. As noted by the PC in Box 4.3 of the draft report, the Constitution restricts Commonwealth agencies that belong to the executive from exercising judicial power. Therefore, a power to issue infringement notices needs to be carefully drafted.

In relation to the constitutional considerations that arise concerning the issue of infringement notices by Commonwealth bodies, the PC may wish to note the ALRC report; *Principled Regulation: Federal Civil & Administrative Penalties in Australia*¹, in particular chapter 12. *A Guide to Framing Commonwealth Offences, Civil Penalties*

¹ *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (ALRC 95, 2002).

*and Enforcement Powers*² also discusses the requirements for a Commonwealth infringement notice scheme at length, and asserts in chapter 6:

The decision to issue an infringement notice is not a decision to impose a penalty, as it is not a final or operative determination of substantive rights.³

Infringement notice provisions should state that a person to whom an infringement notice is issued has the right to opt to have the matter dealt with by a court. Direct 'enforcement' of the notice by any other means should not be permitted.⁴

A number of Commonwealth agencies, including ASIC, have infringement or penalty notice powers in various forms. The ACCC understands that Treasury is currently conducting a review of the operation of the infringement notice provisions contained in the *Corporations Act 2001*.

² February 2004; Attorney-General's Department, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~ConsolidatedGuideFebruary2004.pdf/\\$file/ConsolidatedGuideFebruary2004.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~ConsolidatedGuideFebruary2004.pdf/$file/ConsolidatedGuideFebruary2004.pdf)>.

³ Ibid p. 49.

⁴ Ibid p. 53.