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Review of Australia's Consumer Policy Framework
Productivity Commission
P O Box 1428
Canberra City ACT 2616
AUSTRALIA

Review of Australia's Consumer Policy Framework

This is a submission on the review of Australia's consumer policy framework by the New Zealand Commerce Commission ("The Commission"). We appreciate the opportunity to respond to the draft report.

- 1) The Commission agrees with the emphasis on reinforcing effective market competition as the most important safeguard for consumers. As an agency with responsibilities in both the competition and consumer areas, it is our view that, the provision of accurate and relevant information to consumers is a key ingredient of the competitive process. Because competitive markets are driven by consumer choice, consumers need reliable and accurate information about pricing, product characteristics and quality in order to make informed choices. Where traders are able to mislead consumers about key aspects relating to goods or services, then it is likely that consumers' purchasing decisions will be less likely to drive the effective competition which is in the consumers' best interests.

The Commission also believes that significant benefits can result from the regulation of competition and fair trading laws being carried out by a single entity. In our view that follows from the close inter-relationship between competition and consumer laws. In a number of instances the Commission's work in the fair trading area has been informed by its knowledge of the operation of the markets gained from its competition work. We believe that a proper consideration of consumer issues from an industry wide competition perspective can assist greatly in enabling a consumer regulator to better identify the full nature and extent of the detriments resulting from breaches of consumer law.

- 2) The Commission notes and agrees with the perspective that, in most cases, a reliance on generic law is the best model for consumer policy. Generic law is based on a core number of clear principles. Those principles can be immediately applied to new areas of commercial practice or technologies which develop. It is not easy for traders to find ways around the application of such legislation and consequently they must operate in a way that is mindful of the risks and uncertainty associated with conduct that may be in breach. By contrast, legislative regulation or industry codes of conduct which seek to provide business with greater certainty can operate to transfer risk from businesses to consumers. If such rules fail to specify a particular conduct, consumers tend to bear the risks associated with that conduct. Industry codes may also offer minimum standards which may not offer consumers the same protections as businesses would if they were concerned to minimise the significant risks associated with borderline conduct.
- 3) The Commission further agrees that it is important to improve the generic law to ensure that enforcement agencies can be more effective in the actions that they take. In the New Zealand context the Commission has also advocated some of the possible improvements promoted in the discussion paper, in particular, substantiation notices, banning orders and the rules governing class actions. We agree that the consumer policy toolkit needs to be expanded and shaped by amendments to the generic law which enable that law to be enforced more readily and effectively.
- 4) The Commission notes the proposal for a prohibition on unfair terms in standard form contracts. If such a prohibition were enacted this could create some enforcement difficulties especially in the short term until legal precedents provide greater guidance as to how the courts are likely to interpret the provision. Since there is no such provision as yet in New Zealand, the Commission has limited information about the extent of the use and impact of unfair contract terms in the marketplace. However some complaints have been received by the Commission where issues that initially appeared to involve unfair contract terms were, in reality, disclosure issues. Of course it is important that any unfair contract terms provision contributes positively to the overarching objective of the informed participation of consumers in competitive markets in which both consumers and traders can trade fairly and in good faith. In that context it is important that any prohibition in this area does not create significant business uncertainty.
- 5) Finally the Commission wishes to endorse the importance of uniformity in fair trading laws both within Australia and between Australia and New Zealand. This would foster greater consistency in approaches across jurisdictions and make it easier for businesses to transact. It would also be a significant boost to enforcement. In an increasing number of situations the Commission is dealing with the same issues and/or traders as Australian consumer enforcement agencies. This gives rise to opportunities for the Commission to work collectively with those agencies. Greater uniformity of fair trading laws would foster greater co-ordination of enforcement and reduce duplication of work.

For the same reasons, the Commission would wish to support co-ordination, where possible, between the proposed amendments to fair trading law in Australia and New Zealand. In our view the benefits that can be obtained from uniformity in this area are substantial.

Yours sincerely

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Fair Trading Branch

Encl.