

**SUBMISSION  
20 February 2008**

**Draft Report of the Inquiry into Australia's  
Consumer Protection Framework**

**SUBMISSION ON BEHALF OF  
LEGAL AID NEW SOUTH WALES  
TO THE  
PRODUCTIVITY COMMISSION**

The Legal Aid Commission of New South Wales (Legal Aid NSW) is established under the *Legal Aid Commission Act 1979* (NSW) and is an independent statutory body. It provides legal services to socially and economically disadvantaged people. Legal services include representation in federal and state courts and tribunals. It also works in partnership with private lawyers in representing legally aided people.

Legal Aid NSW welcomes the Productivity Commission's Draft Report on Australia's Consumer Protection Framework ("the Draft Report"). Legal Aid NSW notes the breadth of the Draft Report and welcomes many of its recommendations. In this brief submission, however, Legal Aid NSW focuses its comments only on those matters that affect Legal Aid NSW's client base – that is, socially and economically disadvantaged people whose legal rights and interests need protecting or enforcing.

***SUBMISSION***

Consumer protection is a major and growing practice area within Legal Aid NSW's civil litigation section. The consumer protection team at Legal Aid NSW's Sydney-based head office has 4 full time and 2 part time solicitors dedicated to consumer casework. In addition, civil solicitors across 13 regional Legal Aid NSW offices provide information, advice, minor assistance, casework and representation to consumers (including disadvantaged and marginalised communities) across NSW.

Legal Aid NSW also undertakes community legal education initiatives such as information sessions, pamphlets, kits and DVDs, which complements our case work. To enhance capacity and reach of our services within limited resources, Legal Aid NSW often works collaboratively with Community Legal Centres (CLCs), financial counselling services and LawAccess NSW (a government-funded telephone legal information, referral and advice service free to people in NSW).

Legal Aid NSW also works in various partnerships across regional, rural and remote NSW with Aboriginal Legal Services, CLCs, tenancy services and other services in the access to justice sector to assist disadvantaged and vulnerable people. From this position, Legal Aid NSW is well-placed to report on the high impact of poor industry practice on our clients. In particular, it is noted the detriment to vulnerable consumers caused by predatory lending practices, consumer scams, unfair business practices in particular in relation to direct selling and unfair contracts in consumer goods such as mobile phones and white goods that target disadvantaged consumers such as older people, young people and people in rural Aboriginal communities. In recent times Legal Aid NSW notes the hardship people face when dealing with natural disasters such as floods and the insurance disputes that often follow. Legal Aid NSW is also working with clients who are experiencing financial stress and hardship in the housing market – in particular in the sub-prime mortgage area. The capacity for these client groups to protect or enforce their rights is limited by low awareness of their rights, their comparative remoteness from legal assistance, deficiencies and gaps in regulation and remedies and the ubiquitous challenge to meet the growing demand. In particular, it is noted the enormous demand for legal and financial counselling services to address the epidemic of credit and debt problems, and in particular mortgage repossession matters.

### ***Enhanced funding***

Legal Aid NSW welcomes the acknowledgement in the Draft Report that organisations such as legal aid bodies, financial counselling services and CLCs require more funding to enable us to better assist disadvantaged and vulnerable consumers (*Draft Recommendation 9.6*). This draft recommendation rightly recognises the difficulties experienced by most frontline service providers to meet

the demand for services, and must in response limit the amount and prioritise the type of consumer protection work that is undertaken.

Legal Aid NSW is keen to increase the volume of support it provides to consumers who are unable to properly access the legal system due to their individual vulnerability or disadvantage. A key Legal Aid NSW strategy for 2008 is to develop priority client group strategies to assist older persons, the homeless, Aboriginal people and communities, and people with a mental illness. Increased funding will benefit consumers in these key groups.

### ***Policy research and consumer advocacy***

Legal Aid NSW refers to proposed increased consumer input into policy development, and the Productivity Commission's support of increased evidence-based approach to support this development (*Draft Recommendation 11.3*). Legal Aid NSW is disappointed that the opportunity to support appropriate structures to practically enhance that input has been missed. Legal Aid NSW submits that the proposal that "contestable" research be funded on specific issues will not provide the infrastructure to close the current gaps in consumer input into policy development. This proposal also misses the opportunity to leverage existing expertise and enhance a more cohesive and coordinated capacity. It is also suggested that any "transparency" and innovation benefits are ad hoc and risks being defrayed by the potential to be held hostage by changing government, industry and consumer agendas alike.

In place of this recommendation Legal Aid NSW strongly endorses the establishment of an independent research and advisory body with representation from all sectors that will have capacity to build on the considerable expertise (as evidenced by the breadth and quality of submissions and evidence put to this Inquiry), monitor developments locally and internationally in a coordinated manner, commission and coordinate research, establish representative committees on an as-needed basis and thus provide opportunity for continuous monitoring and input into policy development and evidence-based advice to government. Legal Aid NSW supports

the proposals put forward by CHOICE for a body to be established along the lines of the effective and influential UK National Consumer Council.

Legal Aid NSW also submits that such a body would be well-placed to conduct the required behavioural economics research<sup>1</sup> into disadvantaged and marginalised consumers and provide evidence-based input into consumer policy that will benefit specifically vulnerable consumers.

### ***New national generic consumer law***

Legal Aid NSW notes the proposed introduction of a nationally consistent generic consumer protection law (*Draft Recommendation 4.1*).

There would seem to be great practical difficulties to creating a uniform generic consumer protection law, including constitutional difficulties and the application of the law by different state-based courts and tribunals. The benefit to consumers by the creation of such a generic law may be fairly minor when compared to the massive effort involved in its creation.

However, if generic national consumer legislation were created it is critical that important consumer protections which at present are not included in the *Trade Practices Act* (Cth) are retained. It is proposed that in considering national generic consumer legislation, a “no disadvantage” or “no detriment” principle must be applied - that any new generic legislation must retain (and build on) all remedial provisions in current specific and state legislation that benefits consumers. An example is the direct commerce provisions in Part 4 of the *Fair Trading Act* (NSW) which provide valuable protections to consumers such as rights in relation to a 5-day cooling off period.

The same principle should be applied in any review of state and specific legislation (*Draft Recommendation 5.1*), noting that many of the recent gains for consumers have come about through the use and testing of specific legislation.

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<sup>1</sup> *Draft Report* p 242.

### ***One regulator?***

Legal Aid NSW gives qualified support to recommendations that aim to encourage a more nationally consistent approach to regulation and enforcement (*Draft Recommendation 4.4*). However, it is submitted that any single regulator must be appropriately resourced and have input into policy development from consumers and organisations assisting disadvantaged and marginalised consumers. However, Legal Aid NSW also notes in passing that one of the advantages for savvy consumers of a choice of regulators and different enforcement regimes has been the capacity to “forum-shop” for more achievable and workable remedies.

### ***Other industry-specific consumer regulation***

*Draft Recommendation 5.1* calls for a review and reform program for industry-specific consumer regulation. Obviously there can be no objection to the repeal of legislation which is needlessly divergent and imposes unnecessary costs on consumers and businesses.

In the experience of Legal Aid NSW as advocates working for disadvantaged and vulnerable consumers, industry-specific regulation provides an important tool for consumers which cannot be substituted by the generic law. This review and reform agenda must take place in close consultation with frontline service providers like Legal Aid bodies, CLCs and financial counsellors to ensure that the considerable gains won by applying some industry-specific legislation are not lost. In circumstances where industry specific legislation exists, a caseworker will most commonly use that legislation as their primary cause of action and then plead the generic law as an alternate in the event that the primary action fails. It is easier to advise clients as to the merits of their claim under industry specific legislation as breaches are prescribed, rather than relying on the discretion of the court/tribunal to judge the injustice or unconscionability in the circumstances. For the same reason it is easier to negotiate an outcome or argue a case before a court/tribunal under the industry specific legislation because the legislation clearly sets out the matters to prove.

Legal Aid NSW supports *Draft Recommendation 5.2*. In particular it is vital that there be a licensing system for finance brokers and other credit providers not currently covered that, amongst other things, requires them to participate in an ASIC-approved ADR scheme. Legal Aid NSW is currently preparing a submission to the Office of Fair Trading in response to the draft Finance Broking Bill 2007.

### ***Unfair terms in consumer contracts legislation***

While it appears that the Productivity Commission accepts that unconscionability provisions have been unwieldy and may not be working in consumers' interests, it is the opinion of Legal Aid NSW that the model proposed by the Productivity Commission creates too many evidentiary barriers for consumers, is impractical, and will not work in consumers' interest.

Furthermore, the proposed model will not have the capacity to proactively improve poor industry practice – as the focus is on individual circumstances and past industry practice. Thus the opportunity to move towards “best practice” in consumer contracts with opportunity to negotiate fairer contracts and industry “buy in” (as has occurred under the Victorian legislation) is lost.

Legal Aid NSW agrees that the definition contained in the Victorian legislation could be improved. It is proposed that the test for unfair contracts should be;

“A term in a consumer contract is to be regarded as unfair where it is either not reasonably necessary to protect the legitimate interests of the supplier or it imposes condition(s) which are unreasonably difficult to comply with.”

This test seeks to catch illegitimate conduct in two types of situations: where terms are unfair on their face, and where terms are unfair in their effect. The envisaged end result from effective unfair contracts legislation is an improved market place with less disputes, less costs for industry and enhanced consumer confidence.

For the proposed legislation or indeed any legislation, to have an impact, it will

require clear powers being given to the regulator to intervene where necessary and more importantly it will require a significant commitment of resources to that regulator. The remarkable success of the UK experience with unfair terms is largely based upon the powers provided to the UK Office of Fair Trading and the work that they have been resourced to do.

Legal Aid NSW is also of the opinion that for unfair terms legislation to be effective it must contain a broad range of remedies to be exercised by the regulator. The regulator must also be well funded so as to actively investigate and where necessary act to remove unfair terms.

Legal Aid NSW's preferred approach to unfair terms legislation is outlined in its 2006 submission to the NSW Standing Committee on Law and Justice<sup>2</sup>. The following summary is taken from that report:

- National legislation or uniform state based legislation
- Broad range of civil remedies be available to consumers and the regulator including the capacity to declare the term void (see the *Fair Trading Act (VIC)* s32Y, s32ZA, s32ZB, s32ZC and s32ZD).
- Well-resourced, committed regulator who can put into effect the objects of the proposed legislation
- The legislation should apply to consumer credit contracts
- Civil penalty provisions should apply
- Criminal sanctions available for use of prohibited terms in certain circumstances
- That a specialist jurisdiction be established to deal with the litigation, perhaps connected to an existing tribunal such as the NSW CTTT.

Legal Aid NSW is cautiously supportive of proposed “safe haven” contracts –with the provisos that such contracts are determined in close cooperation with the appropriate regulator in consultation with relevant stakeholder and consumer groups

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<sup>2</sup> See

[http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/7f6e0f9936f66529ca25720d000aa282/\\$FILE/ATTL9WVA/sub%2022.pdf](http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/7f6e0f9936f66529ca25720d000aa282/$FILE/ATTL9WVA/sub%2022.pdf).

and that a strict public benefit test is applied. There must also be scope and flexibility to revisit such contracts as marketing inevitably changes with developments in markets and technology.

### ***Better consumer access to remedies & dispute resolution schemes***

Legal Aid NSW welcomes the Draft Report's recommendations that facilitate better access to remedies for consumers.

While Legal Aid NSW supports the suite of recommendations, in this brief submission it focuses on the recommendation that encourages further integration of external dispute resolution (ADR/EDR) schemes in financial services (*Draft Recommendation 9.2*).

Legal Aid NSW also strongly supports the recommendation that better regulates finance brokers and brings consumer disputes with finance brokers within the EDR regime (*Draft Recommendation 5.2*). This is long over-due.

External dispute resolution is a very useful tool for consumers and Legal Aid NSW has had good outcomes for our clients using EDR schemes. The EDR schemes in financial services generally allow consumers the opportunity to have their disputes resolved early without cost and without prejudicing their right to take the matter to litigation.

Legal Aid NSW supports further consolidation of ADR schemes in financial services. However, in amalgamating schemes' functions, structures and operations, it is submitted that any joint/consolidated scheme must ensure that equal consumer and industry representation be entrenched within any corporate structure. Further, Legal Aid NSW says that a "no detriment" test in relation to accessibility and remedies for consumers be applied - for example in relation to the variety of remedies, financial jurisdiction limits and jurisdiction of disputes (for example, ability to inquire into the fairness of bank penalty fees). That is, the benefits available to consumers of individual schemes must not be lost in any amalgamation.



### ***Other matters - Super-complaints***

Legal Aid NSW also supports CHOICE's proposal for adoption of the UK model of super-complaints in Australia – whereby complaints are made by designated consumer bodies to the regulator, which must make a considered response within 90 days to properly investigated complaints.

There are not, in the view of Legal Aid NSW, any analogous infrastructure nor avenues already in place in Australia to conduct these kinds of inquiries or deal with systemic problems. Legal Aid NSW notes CHOICE's reference to the volume of complaints in relation to bank penalty fees and the relative incapacity or unwillingness of any regulator to deal with the issue which is clearly harming the interests of consumers.

### **CONCLUSION**

Legal Aid NSW is grateful both for the opportunity to make a submission on the Productivity Commission's Draft Report into Australia's Consumer Protection Framework and for the extension of time granted to lodge its submission.

Where

Legal Aid NSW feels able to support the Productivity Commission's recommendations, it has indicated that to be the case. It is hoped that those areas where Legal Aid NSW has expressed concern will be revisited by the Productivity Commission in its continuing deliberations. For further information please contact Jenny Lovric via email [jenny.lovric@legalaid.nsw.gov.au](mailto:jenny.lovric@legalaid.nsw.gov.au) or by telephone on 92195102.