

Hon Jennifer Rankine MP



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08/00129

Ms Jill Irvine
Review of Australia's Consumer Policy Framework
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Ms Irvine

I am writing in relation to the Productivity Commission's Draft Reform on the Consumer Policy Framework which has been released for public consultation.

South Australia has a keen interest in the information contained in the report, and more importantly the outcomes for consumers across all jurisdictions.

I'm pleased to attach to this letter a copy of the South Australian submission on the Draft Report. This submission outlines my view on the recommendations and the focus for moving forward in this important area.

If you have any queries regarding the submission, please contact Mal Hemmerling, Commissioner, Office for Consumer and Business Affairs on 08 8204 9584 or hemmerling.mal@agd.sa.gov.au.

Thank you for the opportunity to comment on this report.

Yours sincerely



Hon Jennifer Rankine MP
MINISTER FOR CONSUMER AFFAIRS

22/2/2008

Productivity Commission Draft Report

**Review of Australia's Consumer Policy
Framework**

**Submission from the
Minister for Consumer Affairs
for
South Australian**

February 2008

GENERAL COMMENTS

1. The importance of getting the right consumer policies in place

In comments provided by South Australia on the initial terms of reference for this inquiry, concern was expressed that the terms of reference were biased towards minimising the regulation of business at the expense of effective consumer protection. Unfortunately, it appears that this concern was justified.

A recurring theme in the Report is the importance of minimising what is called 'unnecessary regulation' or 'red tape' in order to reduce costs for business. There is no question that regulators should be regularly reviewing their laws to remove any duplication or obsolescence and must be accountable for the efficient implementation of appropriate laws. The focus, however, on the removal of 'unnecessary regulation' in the Report appears to have come at the expense of considered proposals on how to get the right policies in place for effective *consumer benefit*. This should be the primary consideration.

There is an assumption that pervades much of the Report that all consumer protection regulation is 'red tape' which needs to be reduced, without acknowledging fully the economic and non-economic benefits for society which modern consumer protection laws offer. There are numerous examples of consumer protection regulation which provides benefits for business as well as for consumers. For example, restrictions that apply to misleading or deceptive conduct also benefit ethical business persons by protecting them against unfair competition from unscrupulous traders. Moreover, effective consumer protection laws, by empowering individuals through reinforced rights, act to enhance the Australian population's quality of life.

The starting point for a balanced and helpful inquiry would be to ask what consumer problems and concerns currently exist, what are the issues on the horizon, and what are the most effective and efficient solutions to these problems. The Report does this in part. It proposes reforms to the regulation of the building industry, unfair contracts law, and the regulation of finance brokers. However, more vision and analysis is needed. Innovative solutions are required in order for regulators to be able to deal with consumer protection issues of the 21st century - in particular, the need for sustainable consumption, the effects of globalisation, and the use of new technologies by both consumers and industry. Although the Report notes these challenges in passing, it does not explore them in detail, instead favouring a cautious regulatory response.

Furthermore, the proposal for a generic consumer law will inevitably discourage the kind of important policy experimentation that is vital to respond to this changing policy environment.

2. The mistaken assumption that the Commonwealth will do better

There is no guarantee that the Commonwealth will be a leader in consumer protection policy or that the Australian Competition and Consumer Commission (ACCC) will be a more effective regulator if a generic consumer protection law is adopted.

Indeed, the Commonwealth's track record on improving Australia's international leadership in this area is poor. The Commonwealth has frustrated many progressive and important consumer protection policies over the past few years. These include the proposed introduction of national unfair contract terms legislation and proposals to deal with property marketing scams. Indeed, had Victoria not forged ahead with the implementation of unfair contract terms legislation it seems unlikely that the Commonwealth would now be

considering the same. This again reflects the value of independent development of legislative controls in State and Territory jurisdictions.

The Report appears to assume that Commonwealth agencies, including the ACCC, are generally better at handling matters, as compared with State and Territory jurisdictions. This is not necessarily the case. For example, the Commonwealth Government had responsibility for administering legislation¹ which prohibited the importation of toys with high lead content but completely failed to enforce those laws which resulted in the sale of thousands of dangerous toys in Australian shops last year. This resulted in an unnecessary burden and cost to business. South Australia remains unconvinced that any Commonwealth agency could devote equivalent resources to responding to local breaches of consumer protection laws. It seems likely that only major breaches of fair trading and related legislation would be pursued at the expense of lesser infractions. The result of such a paradigm shift would no doubt be an increase in dubious practices and consumer dissatisfaction.

The Report recommends that the ACCC be given the role of the sole regulator yet provides little evidence for why this should be so. The Report further asserts that 'the Commission has not received any concrete evidence that the ACCC underplays consumer issues' but offers no evidence to support this statement. In particular, there is no analysis of how the ACCC allocates its resources between the investigation of competition and consumer protection issues, nor how it would take on the role of State and Territory agencies without this leading to a significant reduction in national investigation and enforcement activity.

The Report carefully scrutinises the bureaucratic processes and progress of projects through the Ministerial Council for Consumer Affairs (MCCA) yet does not apply that same careful scrutiny to the bureaucratic processes and progress of projects through the ACCC. In particular, the Report pays insufficient attention to the role of the Commonwealth Office of Best Practice Regulation and the Regulatory Impact Statement (RIS) process which it administers. While the RIS process is valuable in principle, it has been used in practice to delay or prevent important MCCA policy projects without an appropriate evaluation of the merits. The risk averse approach of the RIS process tends to underplay the indirect benefits of regulation for consumers, particularly when these benefits are difficult to quantify, and to overstate the costs to industry.

3. The benefits of a harmonisation approach

Our federal system should be viewed as a strength in the context of consumer protection policy, and not a weakness. The Report significantly underestimates the value of allowing for engagement and 'regulatory competition' between the various federal jurisdictions, and generally encouraging local experimentation. The report asserts that there is 'greater consensus on the contours of consumer policy than in the past (and hence less need for 'experiments' to help choose between competing models)'. We cannot be certain of this. The emerging issues described above are already changing the familiar landscape of consumer policy and local experimentation could become even more important than it has in the past. It is vital to have the ability of one State to strike out and develop new legislation, even if the others lag.

The regulation of pay day lending is used in the Report as an example of unnecessary inconsistency but it is better characterised as an example of the federal system fostering leadership and experimentation. New South Wales, for example, has some of the tightest regulation of this industry in the country and other jurisdictions can monitor its success before deciding whether to follow. Victoria's unfair contract prohibition is another example of local

¹ Subregulation 4(1) and Schedule 2 of the *Customs (Prohibited Imports) Regulations 1956*.

experimentation. The Victorian laws have already had considerable success in improving the quality of contracts provided to consumers for mobile phones and airline tickets.

Furthermore, it is important not to overstate the costs of complying with the current variations in consumer law between jurisdictions. As noted in the Report, many businesses comply with consumer laws by simply adhering to ethical standards. Interestingly, the detailed report by Corones and Christensen which compares the generic consumer laws across Australia reveals strikingly few inconsistencies of any great substance. One of the main inconsistencies highlighted in the Report (Box 4.2, p.58) is the ACCC's lack of power to issue substantiation notices. This is a shortcoming of the Trade Practices Act, not State and Territory laws. Indeed, it is an example of experimentation at the State and Territory level which has revealed a useful reform which should be adopted at the national level.

That said, the importance of substantive consistency between jurisdictions in order to minimise the costs of doing business nationally must be acknowledged. South Australia is committed to achieving consistency where appropriate. Indeed, South Australia is currently finalising reform proposals which focus on improving consistency with the Trade Practices Act in many areas. It is, however, not necessary to adopt a national generic law in order to ensure appropriate consistency. This can be achieved through a harmonisation approach. The benefit of harmonisation is that it gives individual jurisdictions the flexibility to make their own consumer laws where this is considered necessary.

The inadequacies, particularly the slowness, of the MCCA process are overstated in the Report. The federal system necessarily requires extensive consultation, whatever form this takes. Even the proposed 'template' approach would still require a process by which jurisdictions in the Australian Commonwealth agree to amend the generic national law. It would be preferable to simply improve the current MCCA process.

4. The benefits of retaining State and Territory regulators

Even if there were to be a national generic consumer law (which is not supported), it would not be appropriate for this law to be administered by a single national regulator, namely the ACCC. The concerns about the ability of the ACCC to play this role are summarised above.

Consumers' needs are best met by having a local regulator with a grass roots understanding of local issues that can respond sensitively and quickly to issues as they arise. This does not preclude improving methods of information sharing between all jurisdictions through engagement, accountability and cooperation, as canvassed in the Report.

COMMENTS ON RECOMMENDATIONS IN THE DRAFT REPORT

Below are specific comments on each recommendation included in the draft Report

CHAPTER 3 — Objectives for consumer policy

DRAFT RECOMMENDATION 3.1

Australian Governments should adopt a common overarching objective for consumer policy: 'to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith'.

To provide more specific guidance to those developing and implementing consumer policy, this overarching objective should be supported by six operational objectives.

The consumer policy framework should efficiently and effectively aim to:

- ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition;*
- ensure that goods and services are safe and fit for the purposes for which they were sold;*
- prevent practices that are unfair or contrary to good faith;*
- meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;*
- provide accessible and timely redress where consumer detriment has occurred; and*
- promote proportionate, risk-based enforcement.*

COMMENTS

The proposed objectives generally capture the objectives of consumer policy. They are supported, subject to the following comments.

Second objective - Ensure that goods and services are safe and fit for the purposes for which they were sold

Progressive thinking on consumer policy now recognises the impact that consumption can have on the environment. For example, the United Nations Guidelines on Consumer Protection 1999 emphasise the importance of sustainable consumption and of educating consumers about the environmental impacts of consumer choice. Consumers International asserts that consumers have the right to a healthy environment. As noted in the general comments made above, a progressive consumer policy should therefore capture the importance of sustainable consumption. It is therefore proposed that the second objective should be amended to read 'ensure that goods and services are safe for consumers and the environment and fit for the purposes for which they were sold'.

Third objective - Prevent practices that are unfair or contrary to good faith

This objective should be amended to state 'prevent practices that are unfair, misleading or contrary to good faith'. Arguably 'misleading' conduct may not always be strictly unfair or contrary to good faith, but is nevertheless detrimental to consumers.

Sixth objective - Promote proportionate, risk-based enforcement

This objective is not clear in its terms. There is a risk that it could be wrongly interpreted to mean that certain lesser offences should not be enforced in favour of larger matters.

CHAPTER 4 - A new national generic consumer law

DRAFT RECOMMENDATION 4.1

Australian Governments should establish a new national generic consumer law to apply in all jurisdictions, enacted through applied ("template") law arrangements. Unless otherwise appropriate, the new law should be based on the consumer protection provisions of the Trade Practices Act, as amended by other recommendations in this report, or as necessary to ensure that the new law covers non-corporate entities and accommodates jurisdictional differences in court and tribunal arrangements.

COMMENTS

As noted in the general comments above, there is merit in ensuring consistent regulation throughout the country so as to avoid imposing unnecessary costs on business. South Australia is committed to achieving consistency where appropriate. Indeed South Australia is currently finalising reform proposals which focus on improving consistency with the Trade Practices Act in many areas. It is not, however, necessary to adopt a national generic law in order to ensure appropriate consistency. This can be achieved through a harmonisation approach. Please see the general comments above under point 3 'The benefits of a harmonisation approach'. It is preferable for nationally consistent consumer protection, which recognises best practice, to be implemented across all jurisdictions.

DRAFT RECOMMENDATION 4.2

The new national generic consumer law should apply to all consumer transactions, including financial services. However:

- *the Australian Securities and Investments Commission should remain the primary regulator for financial services; and*
- *financial disclosures currently only subject to "due diligence" requirements should be exempted from the misleading or deceptive conduct provisions of the new law.*

COMMENTS

This is essentially a recommendation to amend the Trade Practices Act in order to resolve technical, legal problems with Commonwealth administration. It is not directly relevant to South Australia's areas of responsibility and South Australia does not propose to comment.

DRAFT RECOMMENDATION 4.3

Responsibility for enforcing the consumer product safety provisions of the new national generic consumer law in all jurisdictions should be transferred to the Australian Government and undertaken by the Australian Competition and Consumer Commission.

COMMENTS

The recommendation in the Report that consumer product safety should be contained in the national consumer law and administered by the ACCC is at odds with the harmonised model agreed at the MCCA meeting held on 15 September 2006. South Australia supports the product safety model agreed by the States and Territories at that meeting and which is planned to contain the following elements:

- Uniform approach to product safety by a harmonised model
- Uniform template legislation modelled on the provisions in the TPA (similar to the Consumer Credit Code)
- Independent assessment body (National Product Safety Advisory Committee) funded by states and territories to develop national bans and mandatory safety standards (final approval of each by MCCA)
- Interim bans by individual jurisdictions for up to 120 days.

- National application of interim bans on the proviso that the intergovernmental agreement contains evidence based decision making criteria
- A positive statement in all mandatory safety standards
- The inclusion of second hand goods

DRAFT RECOMMENDATION 4.4

Beyond the enforcement of consumer product safety, Australian Governments should jointly consider the scope and means to overcome any obstacles to the introduction of a single national regulator for the new national generic consumer law, including through:

- *arrangements to ensure that the Australian Competition and Consumer Commission (ACCC) is sufficiently resourced to assume the enforcement functions currently performed by State and Territory Fair Trading Offices in regard to their generic laws;*
- *the introduction of a mechanism to enable State and Territory Governments to formally convey their priorities and concerns in the consumer policy area to the ACCC;*
- *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*
- *legislative changes to ensure that consumers maintain access to State and Territory consumer tribunals and small claims courts*

COMMENTS

Even if there were to be a national generic consumer law (which is not supported), it would not be appropriate for this law to be administered by a single national regulator, namely the ACCC. As noted in the general comments above, consumers' needs are best met by having a local regulator who has a grass roots understanding of local issues and who can respond sensitively and quickly to issues that arise. This does not preclude improving methods of information sharing through engagement, accountability and cooperation as canvassed in the Report.

DRAFT RECOMMENDATION 4.5

Pending any across-the-board adoption of a single national regulator model for the new national generic consumer law, individual States and Territories should have the option to refer their enforcement powers for all of this law to the Australian Competition and Consumer Commission

COMMENTS

For the reasons given in the general comments above, this recommendation is not supported.

CHAPTER 5 — Industry specific consumer regulation

DRAFT RECOMMENDATION 5.1

CoAG should instigate and oversee a review and reform program for industry-specific consumer regulation that would:

- *identify and repeal unnecessary regulation, with a particular focus on requirements that only apply in one or two jurisdictions;*
- *drawing on previous reviews and consultations with consumers and businesses, identify other areas of specific consumer regulation that apply in all or most jurisdictions, but where unnecessary divergences in requirements or lack of policy responsiveness impose significant costs on consumers and/or businesses; and*
- *determine how these costs would be best reduced, with explicit consideration of the case for transferring policy and regulatory enforcement responsibilities to the Australian*

COMMENTS

The most appropriate body to instigate and oversee a review and reform program for industry-specific consumer regulation is not CoAG but MCCA. As noted in the general comments above, the criticisms in the Report of MCCA are overstated. The federal system necessarily requires extensive consultation, whether this takes the form of a CoAG or MCCA review.

South Australia supports the aim of repealing unnecessary regulation. Importantly, however, the mere fact that some industries are regulated in South Australia but not in the majority of the other States (e.g., concrete workers, fencing contractors, glaziers, and hire-voltage power line workers) does not mean those regulatory schemes should automatically be considered to be unnecessary. The regulation of each industry should be considered on its merits.

A principal aim of the review is to increase the uniformity of industry specific regulation across Australia. There is an assumption that transferring regulatory power to the Commonwealth is the best way to achieve that result. As noted in the general comments above, it is not the case that the Commonwealth is generally better at handling matters. Consistency across the jurisdictions is better achieved by taking the harmonisation approach.

DRAFT RECOMMENDATION 5.2

Responsibility for regulating finance brokers and other credit providers should be transferred to the Australian Government, with the regulatory requirements encompassed within the regime for financial services administered by the Australian Securities and Investments Commission (ASIC).

As part of this transfer:

- the Uniform Consumer Credit Code and related credit regulation, appropriately modified, should be retained. The Australian and State and Territory Governments should give priority to determining the precise requirements, and how they would be best incorporated within the broader regime, having regard to initiatives recently canvassed by the Ministerial Council on Consumer Affairs and the recent House of Representatives inquiry on home lending;*
- a licensing system should be introduced for finance brokers that, amongst other things, requires them to participate in an ASIC-approved alternative dispute resolution (ADR) scheme; and*
- a registration system should be introduced for other credit providers, not already covered by the broader licensing arrangements for financial service providers, with a condition of registration being participation in an ASIC-approved ADR scheme.*

COMMENTS

The Productivity Commission says that the regulation of consumer credit should be transferred to the Commonwealth and expanded to include the licensing of finance brokers and the registration of credit providers.

The Uniform Consumer Credit Code Management Committee is drafting a uniform response to these recommendations.

DRAFT RECOMMENDATION 5.3

A single consumer protection regime for energy services should be developed and implemented under the auspices of the Ministerial Council on Energy. It should apply to all jurisdictions participating in the national energy market and be enforced by the Australian Energy Regulator.

COMMENTS

This recommendation is supported.

The issue of a single consumer protection regime for energy services is currently being considered by the Ministerial Council on Energy Standing Committee of Officials (MCE SCO).

A SCO policy document is due to be released for comment in April 2008.

DRAFT RECOMMENDATION 5.4

i) The Australian Government should remove any retail price caps applying to telecommunication products and services. Also, following the establishment of national consumer protection arrangements for energy services (see draft recommendation 5.3), participating jurisdictions should remove any price caps still applying in contestable retail energy markets.

ii) Ensuring that disadvantaged consumers continue to have sufficient access to utility services at affordable prices should be pursued through transparent community service obligations, supplier-provided hardship programs, or other targeted mechanisms that are monitored regularly for effectiveness.

COMMENTS

i) - this recommendation is not supported.

The Australian Energy Market Agreement (AEMA) currently has a framework for the Australian Energy Market Commission (AEMC) to review existing retail energy price controls and this process should be supported.

The AEMA states that the AEMC will assess the effectiveness of competition in each State and Territory for the purpose of retention, removal or reintroduction of retail energy price controls commencing from 1 January 2007. The review into the effectiveness of competition in South Australia will take place in 2008.

The AEMC is expected to report its findings to the South Australian Government and MCE by the end of 2008. In accordance with the AEMA, SA will provide a public response to the AEMC's advice within 6 months of receiving the final report, which will contain the Government's view on retail energy price controls.

ii) - this recommendation is supported.

The South Australian Government has transparent community service obligations, one example of which is the pensioner concession rebate on energy bills of \$120.

DRAFT RECOMMENDATION 5.5

Australian Governments should take early action to provide better and uniform protection for those having a home built or renovated. Specifically, this should entail:

- *guaranteed access for consumers to alternative dispute resolution mechanisms;*
- *provision of greater scope to de-register builders who do not meet appropriate performance standards; and*
- *a revamping of compulsory builders' warranty insurance to ensure that it is of genuine value to consumers and that consumers understand the product.*

COMMENTS

South Australia supports these recommendations. Indeed South Australia is currently finalising reform proposals which aim to achieve these outcomes.

CHAPTER 6 — Supporting institutional changes

DRAFT RECOMMENDATION 6.1

As part of the transfer of greater responsibility for the consumer policy framework to the national level, the Australian Government should:

- *ensure that portfolio responsibility for consumer policy is readily visible, effective and influential;*
- *put in place arrangements to promote effective coordination across other areas of government with responsibilities in the consumer policy area; and*
- *maintain the current portfolio linkage between consumer and competition policy.*

COMMENTS

If we leave aside the transfer to the Commonwealth of greater responsibility for consumer policy, the first two dot points of themselves are supported.

As noted in the general comments above, further information is required to support the conclusion that the current portfolio linkage between consumer and competition policy should be maintained. In particular, analysis is required of how the ACCC currently allocates its resources between the investigation of competition and consumer protection issues.

DRAFT RECOMMENDATION 6.2

The arrangements within the Ministerial Council on Consumer Affairs for voting on changes to consumer policy should be altered to reflect the greater proposed role for the Australian Government in the development and application of both the generic consumer law and industry-specific consumer regulation (see draft recommendations 4.1, 4.3 and 5.1-5.3). Specifically, future policy changes should only require the agreement of the Australian Government and three other jurisdictions.

COMMENTS

This is not supported. The development of consumer policy should remain shared among all jurisdictions.

It is recommended, however, that the governance arrangements for MCCA and SCOCA be reviewed to ensure that they are operating effectively and are able to focus attention on strategic and priority projects.

Currently, MCCA decisions can only be made unanimously (clause 12, MCCA Protocols and Procedures). It is proposed that there should be a two thirds majority voting structure for MCCA. There are many precedents for this. Several Ministerial Councils make decisions by a two thirds majority. In addition, changes to the Credit Code must not be introduced by a State or Territory unless there has been a resolution of MCCA passed by a majority comprising at least two thirds of the members who are present and vote. This arrangement works well to ensure that one or two jurisdictions do not thwart the progress of a project. The proposed Uniform Cooperatives Laws Agreement which is planned to require a two thirds majority agreement of the jurisdictions is another precedent for this approach.

As noted in the general comments above, these procedural reforms require more constructive participation on the part of the Commonwealth.

CHAPTER 7 — Unfair contracts

DRAFT RECOMMENDATION 7.1

A new provision should be incorporated in the new national generic consumer law that voids unfair terms in standard form contracts, where:

- the term is established as 'unfair': that is, it is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract;*
- there is evidence of material detriment to consumers;*
- it does not relate to the upfront price of the good or service;*
- all of the circumstances of the contract have been considered; and*
- there is an overall public benefit from remedial action.*

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers subject to detriment, with suppliers also potentially liable to damages for that detriment.

There should also be a capacity for an industry or business to secure regulatory approval for 'safe harbour' contract terms that would be immune from any action under this provision.

The operation and effects of the new provision should be reviewed within five years of its introduction.

COMMENTS

The key points on p 109 of the report states:

"The benefits to be gained from a law against unfair contract terms are hard to assess, because there is limited information on the extent of the detriment associated with them and because the nature of the problem can make it difficult to collect data."

Yet a subsequent key point notes that:

"...a more targeted approach is to design a policy that requires a public benefit test whenever it is used, thus shifting the evidential burden to a point where it can be more easily gauged."

It appears these points are contradictory. If it is difficult to demonstrate a public benefit in respect of introducing unfair contract terms legislation, then surely the introduction of a public benefit test will severely and unnecessarily limit the useful application of such laws in circumstances where the benefit of intervention is difficult to quantify.

No such test has been included in the Victorian legislation, and South Australia considers that model to have been an unqualified success in terms of rapidly and successfully preventing the use of unfair terms in a very broad range of circumstances. Indeed, as suggested in the Report, the introduction of actively enforced unfair contract terms legislation, precludes the need, in many instances, for legislation that targets particular industries.

To limit the application of the legislation to circumstances in which detriment is, in fact, suffered by consumers would be to significantly curtail the responsive power of the Victorian model. Indeed the Commission recognises that introduction of the Victorian model would be more likely to lead to early changes to a greater number of contracts because of the threat of

pre-emptive regulatory action.² Therein lies the true value of such a model. Moreover, the Report seems to imply that this model could not be effectively introduced nationally because regulators would fail to act in good faith in consulting with business about changes to contracts.³ South Australia does not accept that this would be the case, and it certainly does not appear to have occurred in Victoria.

South Australia does not support limiting national unfair contract term legislation as is proposed. It is argued that the Victorian model should be supported and reconsidered for national application. To “water down” the Victorian model would be to fail to recognise the inherent value of what could be an effective and powerful consumer protection tool.

CHAPTER 8 — Defective product

DRAFT RECOMMENDATION 8.1

Australia’s consumer regulators should:

- *raise awareness among consumers and suppliers about the statutory rights and responsibilities conferred by the implied warranties and conditions in the generic consumer law; and*
- *where appropriate, take specific enforcement action against misleading marketing and sale of extended warranties.*

COMMENTS

The first dot point is supported. Indeed the SA Office of Consumer and Business Affairs and other State agencies have been raising awareness about warranties with consumers and traders through education sessions, publications and website information for many years.

The recommendation is unclear in that if there is a single regulated and generic common law, it is not clear what the States and Territories would be expected to do.

The SA Office of Consumer and Business Affairs already takes enforcement action when appropriate. It is also currently leading a Standing Committee of Officials on Consumer Affairs working party which is examining consumer protection issues relating to mobile phones and is looking for a test case to specifically look at the issue of implied and extended warranties.

DRAFT RECOMMENDATION 8.2

Consistent with the recommendations in the Productivity Commission’s recent consumer product safety report, Australian Governments should, as soon as practicable:

- *commission a study to assess product-related injuries;*
- *develop a hazard identification system for consumer product incidents;*
- *introduce mandatory reporting requirements for product recalls; and*
- *require suppliers to report products associated with serious injury or death or products which have been the subject of a successful product liability claim or multiple out-of-court settlements*

COMMENTS

The first three dot points reflect matters which have already been addressed and are all the responsibility of the ACCC.

² p124 of the Report.

³ p125 of the Report.

The fourth dot point is supported and should be undertaken by the ACCC.

DRAFT RECOMMENDATION 8.3

Drawing on the mechanisms proposed in draft recommendation 8.2, Australian Governments should monitor any possible impact of the recent civil liability reforms on the incentives to supply safe products.

COMMENTS

Unlike other States, the civil liability reforms do not impact on the SA fair trading legislation.

As product liability under the Trade Practices Act does not depend on proving negligence, it seems unlikely that the civil liability reforms will reduce the incentive to supply safe products. Even if there were to be an increase in the supply of unsafe products, it would be difficult to judge whether that could be attributed to civil-liability reforms. In particular, the safety of products made overseas and imported into Australia would be unlikely to be affected by our civil liability reforms.

CHAPTER 9 — Access to remedies

DRAFT RECOMMENDATION 9.1

To facilitate more effective referral of complaints to the right body and sharing of information on complaints:

- *all consumer regulators should participate in the shared national database of serious complaints and cases, AUZSHARE; and*
- *the Australian Competition and Consumer Commission should provide an enhanced national web-based information tool for guiding consumers to the appropriate dispute resolution body, as well as providing other consumer information. It should be subject to consumer testing to ensure that it is easy to use and has the appropriate content.*

COMMENTS

This recommendation is supported.

The SA Office of Consumer and Business Affairs is a member of AUZSHARE and shares its information regularly, however, there may be merit in re-visiting national protocols surrounding the uploading of data to ensure all jurisdictions provide similar information.

Consideration should be given to enhancing the information recorded on the database so as to enable in-depth statistical analyses of emerging consumer issues.

DRAFT RECOMMENDATION 9.2

Australian Governments should improve the effectiveness of alternative dispute resolution (ADR) arrangements for consumers by:

- *extending the functions of the Telecommunications Industry Ombudsman to all telecommunications premium content services, pay TV and other associated services and hardware;*
- *establishing a national energy and water ombudsman that incorporates relevant existing State and Territory ADR bodies;*
- *encouraging further integration of financial ADR services, which would involve:*

- consolidating the existing financial ADR services into a single umbrella dispute resolution scheme for consumers, but with the option for those services of retaining their independence as arms within it;
- adopting a common monetary limit on consumer disputes they can consider;
- requiring that any new industry ADR services, including for credit, should be part of this scheme; and
- ensuring there is an effective and properly resourced ADR mechanism to deal consistently with all consumer complaints not covered by industry-based ombudsmen.

COMMENTS

This recommendation is not supported.

Current energy and water ombudsman schemes may be subject to review following the implementation of the Retail Energy Legislative Package. The AEMA states, however, that small customer dispute resolution schemes will remain the responsibility of the States and Territories.

Currently there are jurisdictional and constitutional differences in the energy and water ombudsman schemes, with some schemes having responsibility for energy matters only and others for energy and water. The South Australian Scheme only has jurisdiction over gas and electricity matters, and there are no current plans for water to be included in the Scheme. Any consideration of a national ombudsman scheme should take into account the necessity for strong representation at the state level.

DRAFT RECOMMENDATION 9.3

Australian Governments should improve small claims court and tribunal processes by:

- ***introducing greater consistency in key aspects of those processes across jurisdictions, including:***
 - ***common higher ceilings for claims;***
 - ***uniform subsidy rates for consumers seeking redress for small claims;***
 - ***equal availability of fee waivers for disadvantaged consumers; and***
- ***allowing small claims courts and tribunals to make judgements about civil disputes based on written submissions, unless either of the disputing parties requests otherwise.***

COMMENTS

This recommendation may be appropriate for referral to the Standing Committee of Attorneys-General.

DRAFT RECOMMENDATION 9.4

In the light of the Victorian Law Reform Commission's current inquiry and recent decisions by the Federal Court of Australia regarding third-party financing of private class actions, the Australian Government should assess whether further clarification or amendment of the legislation to facilitate appropriate private class actions is required, taking into account any risks of excessive litigation or other unintended effects.

COMMENTS

This recommendation is supported.

This recommendation may be appropriate for referral to the Standing Committee of Attorneys-General.

DRAFT RECOMMENDATION 9.5

A provision should be incorporated in the new national generic consumer law that allows consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.

COMMENTS

This provision is already included in the SA Fair Trading Act 1987.

CHAPTER 10 — Enforcement

DRAFT RECOMMENDATION 10.1

The new national generic consumer law should give consumer regulators the capacity to:

- *seek the imposition of civil pecuniary penalties, including the recovery of profits from illegal conduct, for all relevant provisions;*
- *apply to a court to ban an individual from engaging in specific activities after the court has found that a breach of consumer law has occurred;*
- *issue notices to traders requiring them to substantiate the basis on which claims or representations are made; and*
- *issue infringement notices for minor contraventions of the law.*

COMMENTS

The issue of whether to impose civil pecuniary penalties is a national project which is already considerably progressed and is currently with MCCA for consideration. While South Australia is generally supportive of the proposal, and of the recovery of profits from illegal conduct, it is considered that the appropriate forum for detailed discussion of this proposal is MCCA.

The SA Office of Consumer and Business Affairs already has the power under its fair trading legislation to ban individuals, issue substantiation and infringement notices.

DRAFT RECOMMENDATION 10.2

The Australian Government should commission a review by an appropriate legal authority of the merits of giving consumer regulators the power to gather evidence after an initial application for injunctive relief has been granted, but prior to substantive proceedings commencing.

COMMENTS

The Office of Consumer and Business Affairs currently has the power to seek injunctive relief. It may be that these powers could be extended and this will be explored.

DRAFT RECOMMENDATION 10.3

Australia's consumer regulators should be required to report on the nature of specific enforcement problems, their consequences, steps taken to address them and the impact of such initiatives. Such commentary should be informed by surveys of targeted stakeholder groups.

COMMENTS

While this is considered to be a useful strategy, more information is required as to who would coordinate the preparation of these reports and to whom they would be provided.

CHAPTER 11 — Empowering consumers

DRAFT RECOMMENDATION 11.1

When imposing information disclosure requirements on firms, Australian Governments should require that:

- *information is comprehensible, with the content, clarity and form of disclosure consumer tested, and amended as required, so that it facilitates good consumer decision-making; and*
- *complex information is layered, with businesses required to initially provide only agreed key information necessary for consumers to plan or make a purchase, with other more detailed information available by right on request or otherwise referenced.*

Consistent with these principles, reform of mandatory disclosure requirements in financial services should be progressed as a matter of urgency.

COMMENTS

Disclosure Provisions [Recommendation 11.1]

The general thrust of recommendation 11.1 is that any information disclosed to consumers should be comprehensible and highlight key points up-front. Of course information provided to consumers should be comprehensible. The more difficult question is how to achieve this. Governments across Australia have struggled with that question and the Report has not provided any new solutions. It is inherently difficult to simplify information without losing accuracy.

This recommendation is for the Commonwealth to answer (since financial services are regulated through ASIC). Nevertheless, the Productivity Commission will be aware that, in early 2007 MCCA released a discussion paper which examines the pre-contractual disclosure requirements of the consumer credit code. The overwhelming view of both industry and consumer groups was that any changes to the disclosure requirements should be properly researched and tested before they are implemented. MCCA therefore decided to engage a consultant to research and test the disclosure requirements of the consumer credit code. Funding for the consultant was approved by SCOCA on 7 December, 2007.

This type of research has never been conducted in Australia. It has been difficult to find a consultant who is both willing and able to carry out the testing. No matter whether MCCA or some other body oversees the project it is likely to take some time to complete. That is the nature of this project (because it requires significant public participation).

DRAFT RECOMMENDATION 11.2

Australian Governments should commission a cross-jurisdictional evaluation of the effectiveness of a sample of consumer information and education measures, and the prospects for improving them. The evaluation should be targeted at high cost measures and/or those that deal with high risk issues for consumers.

COMMENTS

Some of the work described in this recommendation is already well underway. The National Education & Information Task Force (NEIAT) was established by MCCA in 2007 in order to

achieve the more coordinated approach to consumer information and education initiatives which is recommended in the Report. The NEIAT comprises senior education and information staff from all jurisdictions, including the Commonwealth and provides expert advice to MCCA and SCOCA on consumer education issues that require a national and coordinated approach.

NEIAT has researched and developed a national behavioural change program in the areas of mobile telephones and mobile phone debt which includes warranties, unfair contracts and financial literacy. These areas have been identified as high risk issues for consumers.

DRAFT RECOMMENDATION 11.3

The Australian Government should provide modest additional funding to support:

- *specified research on consumer policy issues, distributed on a contestable basis;*
- *the basic operating costs of a representative national peak consumer body; and*
- *the networking and policy functions of consumer groups.*

Such additional funding should be subject to appropriate guidelines and governance arrangements to help ensure that it is used effectively.

COMMENTS

This recommendation for additional Commonwealth funding for consumer research and advocacy is supported.