Law Council
OF AUSTRALIA

Via email: consumer@pc.gov.au

Consumer Policy Framework Inquiry
Productivity Commission
GPO Box 1248
Canberra City ACT 2601

Dear Sir or Madam,

Productivity Commission Inquiry into Australia's Consumer Policy Framework

I have pleasure in enclosing a submission in response to the Productivity Commission's inquiry into Australia's consumer policy framework.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been considered by the Council of the Law Council of Australia.

Yours faithfully,

Bill Grant
Secretary-General

5 March 2008

Enc.

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TRADE PRACTICES COMMITTEE SUBMISSION IN RESPONSE TO PRODUCTIVITY COMMISSION DRAFT REPORT

The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**the Committee**) welcomes the Productivity Commission's Draft Report in relation to its Review of Australia's Consumer Policy Framework (**Report**).

The Committee makes the following submission in response to the draft recommendations of the 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.*

The Committee believes there is unquestionable merit in establishing a common overarching objective to guide the future development of consumer policy. The adoption of a consumer policy framework with key operational objectives is likely to assist in the development of a more consistent and outcome oriented consumer law. The Committee supports 5 of the 6 specific operational objectives proposed in draft recommendation 3.1.

However, the Committee does not support the inclusion of the third objective, which provides that the consumer policy framework should efficiently and effectively aim to "prevent practices that are unfair or contrary to good faith". The Committee believes that further consideration needs to be given as to whether the concepts of good faith and fairness are better dealt with as part of the statutory tests for unconscionability already in operation under Part IVA of the *Trade Practices Act, 1974* (as amended) (**TPA**) or an alternative framework needs to be developed that addresses the particular conduct issues that are not being addressed by the current law.

To introduce this proposed new objective would invite the introduction of a new statutory standard of fairness, as the Productivity Commission recommends in draft recommendation 7.1, as well as possibly a new statutory standard of good faith in circumstances where it is unclear this would

address the actual area of consumer complaints. The Committee would see the introduction of these new statutory standards to be premature and not the most effective means of addressing unconscionable conduct issues. The statutory test of unconscionability was first introduced into the TPA in 1986 (with the enactment of a provision which is now section 51AB, which prohibits unconscionable conduct in certain consumer dealings). The unconscionability regime of the TPA has since been further strengthened by the enactment in 1998 of sections 51AA (prohibiting unconscionable conduct within the meaning of the unwritten law) and more importantly, section 51AC (prohibiting unconscionable conduct in business transactions).

The Committee acknowledges that the "special disability" threshold[1] to the application of the equitable doctrine of unconscionability (as invoked by section 51AA) is too narrow for use as a complete regime for the protection of consumers in the future. Accordingly, if Part IVA of the TPA did no more than enact this equitable doctrine, further reform would be required. However, ss.51AB and 51AC in particular, have expanded the traditional operation of unconscionability. This is partly demonstrated by the broader unconscionability criteria used in these statutory provisions.[2] Further, while the case law in this field is still developing, the Courts have already recognized that "unconscionable" conduct for the purposes of sections 51AB and 51AC is a broader concept than under section 51AA.[3] These relatively recent statutory reforms should be given a reasonable opportunity to be applied for the benefit of consumers before further statutory reforms are made in this area.

While recognizing that the existing statutory provisions has not generated an avalanche of case law, a review of the existing cases under Part IVA (and the settlements secured by the ACCC) would suggest that the law is operating effectively. In view of this, the Committee would not support, at this stage, the introduction of a new unfairness and good faith standard in addition to the current unconscionability standard, as this would introduce a level of complexity and potential uncertainty into commercial transactions without any material net benefit for consumers.

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.*

The Committee strongly supports the Productivity Commission's draft recommendation 4.1, that the Australian, State and Territory Governments should establish a new national generic consumer

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[1] Whenever "one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired facilities, financial need or other circumstances affect his ability to conserve his own interests" (*Blomley v. Ryan* (1956) 99 CLR 362), as recognized and affirmed by the High Court in *Commercial Bank of Australia v. Amadio* (1983) CLR 447.

[2] For example, both sections 51AB and 51AC invite the Court, when considering whether conduct is unconscionable, to have regard to whether the consumer or business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party.

[3] "Unconscionable" conduct for the purposes of sections 51AB and 51AC has been defined to include conduct which is clearly unfair or unreasonable or irreconcilable with what is right or reasonable: *Hurley v. McDonald's Australia Ltd* [1999] FCA 1728.

law, mirroring the consumer protection provisions of the TPA, which would apply to both incorporated bodies and natural persons in all jurisdictions.

The implementation of this recommendation would eliminate the multiplicity of different Federal and State/Territory consumer laws, avoid the unnecessary differences between the various *Fair Trading Acts* (**FTAs**) in the 8 States and Territories of Australia and establish a platform for a more co-ordinated, consistent and well targeted regulatory response for the benefit of businesses and consumers alike.

At present, there are a large number of small variations in the detailed provisions of the FTAs operative in each State and Territory of Australia, as demonstrated by the report prepared by Professor Stephen Corones and Sharon Christensen. This needless variation in the terminology used in the various FTAs imposes higher compliance costs on business and inevitably higher prices for consumers without any discernable net benefit in terms of the protection or empowerment of consumers. Given the generally broad nature of these laws, which are deliberately drafted to provide a tailored outcome according to the particular circumstances, it is difficult to justify the regional differences in the text of these laws.

The case for a single national consumer law is particularly compelling when one considers the increasingly national nature of businesses who supply consumers, the commonality of the issues facing consumers, the need for a more consistent and responsive legal framework to deal with the rapid and ongoing development of internet based, electronic or mobile commerce and the historic failure of earlier harmonisation initiatives to achieve uniform consumer protection laws between the 9 different governments involved.

The Committee supports the Productivity Commission's proposed "template law" mechanism to implement the new national generic consumer law. Under this mechanism, the Australian Government would enact template legislation, which the States and Territories would adopt without amendment. The Committee agrees that the consumer protection provisions of the TPA should provide the basis for the template law.

The governmental and legislative mechanism adopted in 1995 to support the introduction of the Competition Code affords a useful example of how COAG might achieve a uniform legal framework for consumer protection in Australia. Appendix 1 to this submission details the procedure proposed by the Committee, modelled on the Competition Code, for introducing the single national consumer law.

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.*

The Committee supports in principle the recommendation of one single national generic consumer law that applies to financial services. However, given the complexities involved in the area of financial services, the exceptions to draft recommendation 4.2 appear somewhat incomplete. In these circumstances further review is needed to consider whether it may be the case that the consumer law relating to financial services is better left under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*. The Committee is reluctant to be fully supportive of this recommendation without further analysis.

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.*

The Committee supports draft recommendation 4.3.

The Committee considers that provided the ACCC considers it is able to manage the expanded jurisdiction, one regulator would facilitate a more consistent and efficient administration of product safety laws. At present, the existing product safety regimes are administered by the ACCC at a national level and by a raft of State and Territory Government agencies. This leads to duplication of effort by these regulators and a multiplicity of agencies for any company undertaking a recall to deal with. For example, the national recall of a defective electrical product presently requires no less than 17 different regulatory agencies or sub-agencies to be notified of the product recall[4]. This multiplicity of regulators has the real potential to interfere with the swift implementation of product recalls, which could prove to be detrimental to consumers' interests.

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 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.*

The Committee accepts that while there are good policy reasons for introducing a single national generic consumer law, whether that law should be enforced by one national regulator or, as at present, by specific regulators in all of the jurisdictions, is a more complex issue which requires further exploration.

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[4] ACCC, New South Wales Office of Fair Trading (Safety and Standards Branch), Consumer Affairs Victoria (Trade Measurement and Product Safety), Queensland Office of Fair Trading (Product Safety Unit), WA Department of Consumer and Employment Protection, South Australia Office of Consumer and Business Affairs (Consumer Affairs Branch), Tasmanian Office of Consumer Affairs and Fair Trading (Measurement & Standards Branch),Northern Territory Office of Consumer and Business Affairs (Consumer Affairs) and ACT Office of Fair Trading. In addition, for electrical goods, the following additional agencies or sub-agencies should be notified: Energy Safe Victoria, Department of Industrial Relations (Qld), Department of Consumer and Employment Protection (EnergySafety Directorate) (WA), Electricity Safety & Standards (Tas), Office of the Technical Regulator (SA), Urban Services Department (ACT), Department of Infrastructure, Planning and Environment (NT), Office of Fair Trading (CSIRO/NMI Complex) (NSW).

The Committee advocates that the adoption of a single national regulator be seriously examined by all Australian, State and Territory Governments.

Accordingly, the Committee supports draft recommendation 4.4.

The Committee agrees with the Productivity Commission that the implementation of a single national generic consumer law should not be delayed pending further consideration of whether to transition to a single national regulator model.

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.*

The Committee supports draft recommendation 4.5.

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 Government and how this transfer might be best pursued.*

The enactment of a single national generic consumer law will create opportunities to repeal unnecessary industry-specific consumer regulation. The Committee would support a CoAG sponsored review and reform program for industry-specific consumer regulation, with a particular focus upon identifying and repealing unnecessary regulation.

The Committee therefore strongly supports draft recommendation 5.1.

The Committee is a long standing advocate of legislation which is uniformly applied across Australia and across different industries, and supports the Productivity Commission's general opposition to industry-specific regulation.

The Committee agrees with the Productivity Commission's view that strong regulatory assessment processes are the key to ensuring that any new industry-specific consumer regulation is genuinely required. Industry-specific consumer regulation should only be implemented when a full review of the specific industry is undertaken to ensure that the generic law is insufficient to regulate the area and there is a genuine need to supplement it.

Existing industry-specific regulation should be the subject of robust review to assess whether it is superfluous to the national generic consumer law, and in such instances be repealed.

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.*

The Committee agrees that the 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 ASIC. The Committee has interpreted this recommendation as retaining the status quo as to products and services currently covered by the applicable legislation and not an expansion.

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.

The Committee supports draft recommendation 5.3 for the reasons of seeking to have uniform legislation.

Draft recommendation 5.4

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.

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.

The Committee supports draft recommendation 5.4 based on the principle that in general competition leads to optimal pricing - not price controls.

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.*

The Committee supports draft recommendation 5.5.

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.*

The Committee supports draft recommendation 6.1.

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.

The Committee supports draft recommendation 6.2, subject to the requirement that future policy changes should require the agreement of the Australian Government and four other jurisdictions. The Committee also believes that consistent with figure 3.1 of the Draft Report, it is important that best practice regulation principles are used.

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.

The Committee does not support draft recommendation 7.1 in relation to standard form contracts. While the Committee accepts there is a need to review conduct issues, no compelling case has been made to support this recommendation in relation to standard form contracts, either based on evidence of significant consumer complaints or on a cost benefit analysis to the economy based on the Commission's own best practice principles for regulation making.

The Committee sees little or no merit in prohibiting the passive inclusion of "unfair terms" in standard form contracts. The current unconscionable conduct regime adopts the preferred approach to consumer protection regulation by attacking the exercise of contractual rights which in all the circumstances is unconscionable or unfair. The basic requirement of fairness is already enshrined as a relevant factor in determining unconscionability under Part IVA of the TPA. For example, both sections 51AB and 51AC expressly include the following factors in determining unconscionability:

(a) whether the consumer is required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation[5]; and

(b) whether undue influence, pressure or unfair tactics are used against a consumer[6].

Many contractual provisions exist in standard form contracts which may be used legitimately in some circumstances but unconscionably in others. For example, a provision which provides the supplier with an unilateral right to vary the terms of a contract might be legitimately used by a bank to vary the interest rate of a variable rate home loan in response to a cash rate change by the Reserve Bank but would be unconscionably used by a supplier to substantially increase the price of goods the subject of a short term supply contract in circumstances where the supplier's costs of supply had not increased.

Given this paradigm, the Committee agrees with the Productivity Commission's assessment that the prohibition of apparently unfair terms per se involves a risk of regulatory error in circumstances where there is no evidence of widespread consumer detriment to justify such an intrusion into the freedom to trade and privacy of contract.

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[5] See sections 51AB(2)(b), 51AC(3)(b) and 51AC(4)(b).

[6] See sections 51AB(2)(d), 51AC(3)(d) and 51AC(4)(d).

The Committee acknowledges that the Productivity Committee's proposed new prohibition against unfair contract terms is to be constrained by a number of factors, including a requirement that the term be established to be "unfair", that there be evidence of material detriment to consumers and that there be an overall public benefit in allowing remedial action to be taken. However, the Committee is concerned that the introduction of such a new prohibition would result in a complex law, the subject of exceptions, limitations and safe harbours, and attendant contractual uncertainty with no clear evidence of significant consumer detriment.

Given that the Productivity Commission is proposing to configure this prohibition of unfair contract terms so that it applies only when a Court determines that the offending term causes material detriment to consumers and there would be a net public benefit in taking remedial action, having regard to the cost and price savings associated with the use of the term, it is difficult to believe that this new prohibition would prove to be any less costly to litigate than any of the current unconscionability prohibitions.

As the present unconscionability law stands under the TPA, the Courts are already required to have regard to all relevant circumstances in determining whether unconscionable conduct has occurred. This proposed prohibition seeks to invite the Courts to undertake similar but more complex exercise, but against an "unfairness" standard, rather than the existing "unconscionability" standard. The Committee is not convinced there is a sufficient degree of difference in the two standards to warrant the introduction of this new regime.

As stated in relation to draft recommendation 3.1, the Committee's view is that considerations of fairness fall properly within the unconscionable conduct provisions of the TPA, and that another layer of complexity, in the form of a separate 'unfairness' test for contract terms, is unnecessary and impractical.

The introduction of a new prohibition against unfair contractual terms would require careful and extensive consideration of the meaning of 'unfairness' and it is not apparent that this is required given the existence of the unconscionability regime and the developing body of case law on that subject.

There is no real evidence that the laws prohibiting unconscionable conduct are deficient or failing, and that some form of supplementation to those laws is required in the form proposed by draft recommendation 7.1.

Chapter 8 - Defective products

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.*

The Committee supports draft recommendation 8.1.

It is a sound recommendation that consumers be made more aware of their statutory rights and protections. It is also appropriate that specific enforcement action be taken against, in particular, the sale of extended warranties, as many consumers are unaware that the purchase of an extended warranty provides little more, if any, protection beyond that already provided under statute.

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.*

The Committee supports draft recommendation 8.2.

It is sensible for data relating to consumer product safety to be uniformly collated.

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.

The Committee supports draft recommendation 8.3 and agrees that it is important to study and assess the outcomes of the 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.*

The Committee supports draft recommendation 9.1.

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.*

While the Committee supports the further integration of financial ADR services, it believes that further consideration should be given to the balance of recommendation 9.2 in relation to the extension of ADR across such a broad range of industry sectors.

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 judgments about civil disputes based on written submissions, unless either of the disputing parties requests otherwise.*

The Committee supports draft recommendation 9.3.

The Committee agrees that it is important to retain the rights of parties to request an oral hearing in order to adhere to principles of natural and open justice.

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.

The Committee expresses no view on draft recommendation 9.4.

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.*

The Committee supports draft recommendation 9.5.

It is logical that consumer regulators be able to take representative actions on behalf of consumers, provided that a minimum number of consumers, who have suffered the same loss, agree to the regulator commencing that action. Without this requirement for the regulator to obtain the consent of a minimum number of consumers to the commencement of legal proceedings, there would be a risk of regulatory error, where proceedings may be commenced which are neither representative of consumers' concerns nor do they embody a common causation of loss.

Draft recommendation 9.6

> *Australian Governments should provide enhanced support for individual consumer advocacy through increased resourcing of legal aid and financial counselling services, especially for vulnerable and disadvantaged consumers.*

The Committee supports draft recommendation 9.6.

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 claims or representations are made; and*
> - *issue infringement notices for minor contraventions of the law.*

The Committee has previously considered civil pecuniary penalties under the TPA, when it responded to a Discussion Paper entitled "*Civil Penalties for Australia's Consumer Protection Provisions – Options for Reform*", released by the Ministerial Council on Consumer Affairs in September 2005. The Committee's submission in response to that Discussion Paper is reproduced at Appendix 2.

As the Committee stated in its earlier submission, the unavailability of civil pecuniary penalties has the potential to distort the regulatory response to a contravention of the consumer protection provisions. However, if civil pecuniary penalties are to be introduced, the Committee questions the need for the retention of criminal sanctions, particularly in respect of those provisions of Part VC listed in the Committee's earlier submission (on page 9) which do not seem to involve such reprehensible or blameworthy behaviour as to warrant society's reprobation in the form of criminal sanction.

The Committee believes that the imposition of banning orders, which are penal in nature, should be confined to those contraventions which, following the type of review we advocated in our earlier submission, warranted being retained as a criminal offence.

The Committee does not endorse the draft recommendation that infringement notices be issued for minor contraventions of the law, as this would appear to involve the regulator discharging a judicial power which it is ill-equipped to administer, giving its key role as a prosecutor.

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.*

The Committee does not support draft recommendation 10.2 on the basis that no case has been made for such a review.

The regulator currently has extensive, and certainly adequate, information gathering powers under section 155 of the TPA. Once Court proceedings are commenced, the regulator has rights under the Courts' discovery procedures to obtain any further information, documents or evidence that it failed to obtain during its initial investigations under section 155. Accordingly, it is unnecessary to broaden the already very wide powers of the regulator in relation to evidence gathering, particularly in circumstances where the regulator has yet to commence substantive proceedings.

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.*

The Committee supports draft recommendation 10.3, and notes that it is important that the regulator be required to report on its activities to promote a culture of accountability and continual improvement.

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.*

The Committee supports draft recommendation 11.1 in principle and agrees with the importance of providing consumers with reliable and concise information to allow consumers to make informed

decisions - provided there are checks and balances on the reasonableness of the nature of the information required to be provided.

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.*

The Committee supports draft recommendation 11.2.

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.*

The Committee supports draft recommendation 11.3.

APPENDIX 1

DEVELOPMENT OF CONSUMER PROTECTION CODE

1. Introduction

1.1 The Productivity Commission was asked by the Australian Government to conduct a public inquiry on Australia's consumer policy framework and its administration.[7] In doing so it was asked to report on ways to "better harmonise and coordinate consumer policy across jurisdictions".[8]

1.2 In line with this reference, the Trade Practices Committee believes that it is desirable to achieve harmonisation of consumer protection laws throughout Australia. From a legislative perspective, this requires a harmonisation of the consumer protection laws in place at the Commonwealth level, under the *Trade Practices Act 1974* ("TPA"), and those in place in the States and Territories, under the *Fair Trading* legislation.

1.3 The Trade Practices Committee has identified below the most efficient governmental and legislative mechanism to achieve this harmonisation.

2. The harmonisation mechanism

2.1 The governmental and legislative mechanism adopted in 1995 to support the introduction of the Competition Code affords a useful example of how COAG might achieve a uniform legal framework for consumer protection in Australia.

2.2 The Independent Committee of Inquiry into National Competition Policy produced the "Hilmer Report"[9] which promulgated the creation of a national competition policy. The Hilmer Report recognised that a broader policy framework would be beneficial through increasing the efficiency of reforms undertaken, producing a nationally consistent approach to policy and reducing costs involved in "developing a plethora of industry-specific or sub-national regulatory arrangements".[10] Furthermore it could present the opportunity to "further integrate the national market, reduce the complexity and possibly achieve savings through reduced duplication."[11] Many of the Hilmer Report's recommendations were accepted by the Australian Government and the various State and Territory Governments; leading to the implementation of the *Conduct Code Agreement* and the *Competition Policy Agreement*. This led to the enactment of the *Competition Policy Reform Act 1995.*

2.3 Part XIA of the TPA was enacted to facilitate the application of the "Competition Code" by participating State and Territory Governments. The Competition Code effectively reproduces the text of Part IV of the TPA, except that references to "corporation" are replaced with "person". In addition, all ancillary provisions of the TPA that support or relate

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[7] *Review of Australia's Consumer Policy Framework*, Productivity Commission Circular, 14 December 2006

[8] *Review of Australia's Consumer Policy Framework*, Productivity Commission Circular, 14 December 2006

[9] *Towards a National Competition Policy,* Report by the Independent Committee of Inquiry, AGPS, Canberra, 1993

[10] *Towards a National Competition Policy,* Report by the Independent Committee of Inquiry, AGPS, Canberra, 1993, at paragraph 13

[11] *Towards a National Competition Policy,* Report by the Independent Committee of Inquiry, AGPS, Canberra, 1993, at paragraph 13

to Part IV (except sections 2A, 5, 6 and 172), together with relevant regulations under the TPA are also reproduced (section 150C).

2.4 The Competition Code contemplates that each of the States and Territories, all of whom are parties with the Commonwealth to the Conduct Code Agreement made on 11 April 1995, will, by means of an "application law", apply the Competition Code as part of its local law. The wider reach of Part IV of the TPA is achieved by each application law because the States and Territories are not limited to the corporations power. Importantly, as each application law adopts the Competition Code as it stands in Part XIA of the TPA, the same law is applied in each State and Territory of Australia.

2.5 An example of an application law is the *Competition Policy Reform (NSW) Act* 1995 (NSW). Sections 19-20 confer powers on the Commission, the Tribunal and the National Competition Council. Section 21 confers jurisdiction on the Federal Court, while sections 22-23 deprive New South Wales Courts of jurisdiction unless jurisdiction is conferred by a New South Wales cross vesting law.

2.6 Section 150D provides that the Federal Court may exercise jurisdiction (whether original or appellate) conferred on that Court by an application law with respect to matters arising under the Competition Code.

2.7 The Trade Practices Committee submits that a similar mechanism, as that detailed above in relation to competition law reform, should be used to achieve uniform consumer protection legislative reform.

2.8 The Senate Committee released a report which endorses uniformity in consumer law with respect to consumer warranties.[12] They recommended harmonisation of the legislation within Australia, and the legislation between Australia and New Zealand, governing non-excludable implied warranties in consumer contracts. Differences identified between the legislation of the various Australian jurisdictions included a lack of express provisions, differences in the definitions of 'consumer' and differences in certain aspects of implied warranties. These differences increase the costs for firms operating within Australia and make it more difficult for consumers to understand and enforce their rights. The Senate Committee submitted that the same mechanism used for the Competition Codes should be utilised to achieve national harmonisation of the regulatory framework for implied warranties. Further, the Senate Committee noted areas of regulatory inconsistency within consumer protection laws. These included the areas of consumer contracts, unsolicited marketing and telephone marketing, door-to-door sales, trade promotion and third party trading stamps. They recommended that the Government enlist the Ministerial Council of Consumer Affairs to explore a national harmonisation of consumer protection legislation regarding these areas. The Senate Committee's recommendations for uniformity support the Trade Practices Committee's objectives.

3. Elements of consumer protection law reform

3.1 The Trade Practices Committee envisages that a set of intergovernmental agreements and supporting legislation similar to that which successfully underpinned competition law reform could be adopted to achieve the desired harmonisation of consumer protection law. If this approach was adopted, it might lead to the promulgation of the following agreements and supporting legislation:

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[12] House of Representatives Standing Committee on Legal and Constitutional Affairs, *"Harmonisation of legal systems within Australia and between Australia and New Zealand"*, The Parliament of the Commonwealth of Australia, November 2006, Canberra

(a) *Consumer Protection Principles Agreement,* which would identify the key principles to be adopted in consumer protection law reform;

(b) *Consumer Protection Code Agreement,* which would commit to:

(i) enshrining a fresh code of consumer protection (modelled on Part V TPA), which would initially be promulgated under the TPA but then applied in each State and Territory by an application statute; and

(ii) each State and Territory repealing the relevant provisions of their respective Fair Trading Acts; and

(c) *Consumer Protection Policy Reform Acts,* which would enact the relevant code of consumer protection in each State and Territory of Australia.

It is submitted that the above mechanism, and its constituent elements, provide a sound platform to "better harmonise and coordinate consumer policy across jurisdictions".[13]

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[13] *Review of Australia's Consumer Policy Framework*, Productivity Commission Circular, 14 December 2006

APPENDIX 2

TRADE PRACTICES COMMITTEE'S SUBMISSION TO THE STANDING COMMITTEE OF OFFICIALS OF CONSUMER AFFAIRS DATED 2 DECEMBER 2005