

12 March 2008

Review of Australia's Consumer Policy Framework
Productivity Commission
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Canberra City ACT 2616

Email: consumer@pc.gov.au

Dear Sir/Madam,

I am pleased to enclose a submission prepared by the Australian Consumer Law Group of the Law Council of Australia on the Draft Report on the Inquiry into Australia's Consumer Policy Framework.

Due to time constraints, this submission has not been considered by the Directors of the Law Council of Australia.

Yours faithfully,



Bill Grant
Secretary-General.

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

The Productivity Commission

**Submission by the Australian Consumer Law Group of the
Legal Practice Section of the Law Council of Australia**

12 March 2008

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Australian Consumer Law Group (**ACLG**) of the Law Council is a special interest group of the Legal Practice Section. The Australian Consumer Law Group takes a specific interest in legal developments affecting consumers and liaises with other government and non-government bodies involved in consumer law.

Objectives for Consumer Law

The ACLC supports draft recommendation 3.1 and the necessity for Australian governments to 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.

The efficacy of the six operational objectives will, however, be dependent to a large extent on the definition of key terms. The suggestion that the consumer policy framework should “meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage” must be carefully considered. “Vulnerability” as a consumer does not necessarily equate with poverty or lack of education. Within the finance industry, for example, many investors and participants in investment schemes may be relatively well-off individuals, but be naïve in respect of certain aspects of investment, financial practice and the operation of contract law.

Ultimately, vulnerability and disadvantage will logically follow where one of the parties to a transaction, for whatever reason, is not on an equal footing with the other party. This may be because of lack of knowledge about a particular product, weakness in financial position or otherwise. The definition of vulnerability and disadvantage must relate to the person’s position in the transaction viz-a-viz the other party rather than their position in the community as a whole.

A New National Generic Consumer Law

The ACLC agrees that the “harmonisation” of consumer law would be an important and useful development for both business and consumers with the following qualifications.

First, “harmonisation” should not be reduced to the adoption of the lowest common denominator. Recommendations associated with misleading or deceptive conduct, unfair products and defective products should be part of the template adopted on a national basis.

Secondly, the ACLC is not persuaded that it is necessary, for the long term interests of consumers, that the new national consumer law be enforced by the Australian government and undertaken by the Australian Competition and Consumer Commission. The enforcement of State based legislation by a national body may be problematic. Often, a State based enforcement agency will be more attuned to the particular problems arising within the jurisdiction. The ACLC is not convinced that the Commonwealth, as an enforcement agency, is better placed than State based organisations.

Industry Specific Consumer Regulation

The ACLC agrees that a review and reform program for industry specific consumer regulation that would identify and repeal unnecessary regulations would be useful. Similarly, the responsibility for regulating finance brokers and other credit providers might appropriately be transferred to the Australian government with the regulatory requirements encompassed within the regime for financial services administered by ASIC.

The concern the ACLC has is ensuring the strict regulation of the finance and consumer credit industry. If a healthy and strong protective regulatory regime were put in place, the ACLC would have no difficulty with those regulations being monitored and enforced by the ASIC.

The ACLC specifically supports draft recommendation 5.5 that the Australian government should take early action to provide better and uniform protection for those having a home built or renovated, including guaranteed access for consumers to alternative dispute resolution mechanisms and a revamping of compulsory builders warranty insurance to ensure that it is of genuine value to consumers and the consumers understand the product.

Unfair Contracts

The ACLC agrees that a new provision should be incorporated in the new national generic consumer law that voids unfair terms in standard form contracts. The ACLC favours an unfair contracts model based on the current Victorian legislation. The legislation prevents the use of unfair terms in a very broad range of circumstances. The notion that there be an evidential shift so that the consumer must demonstrate “material detriment” is not supported. To require the consumer to prove material detriment in order to obtain relief shifts an unnecessary burden when, in the first instance, the obligation should be on the supplier to demonstrate that the contract is not “unfair”.

Defective Products

The ACLC agrees that 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 generic consumer law. In addition, the ACLC supports an obligation on 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 ACLC supports the consideration of “sunshine in litigation” where confidentiality is prohibited in claims in respect of defective products are settled out of court, particularly where the products are used by children. The Commission should consider whether, in some circumstances (where the settlements are multiple or single) suppliers should disclose settlements and whether confidentiality should be prohibited.

Access to Remedies

The ACLC agrees that the Australian government should investigate the financing of private class actions and the further review of the entitlement to pursue class actions or representative actions.

Individual consumers are significantly disadvantaged under current legislation. For the most part, consumers can only bring meaningful claims for compensation in circumstances where they form part of a class action. This particularly relates to financial claims. The Australian government should review current class action and financing mechanisms to ensure that the courts' systems and processes do not become so technical and overbearing that consumers are precluded from pursuing a class action against corporations.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.