

25 March 2008

By email: consumer@pc.gov.au

Consumer Policy Framework Inquiry
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Commissioners

Additional submission to Review of Australia's Consumer Policy Framework

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide this additional submission to the Productivity Commission's (the **Commission**) *Review of Australia's Consumer Policy Framework* (the **Review**).

Consumer Action has contributed to and endorsed the joint consumer submission to the Review's Draft Report, and has also contributed to and endorsed the submission from participants of the National Consumers' Roundtable on Energy. In addition to the comments that were made in those submissions, we would like to comment on four additional issues that relate to our comments from the Public Hearing of 11 February 2008:

- Consumer protection in the home building sector;
- Regulators' ability to obtain refunds on behalf of consumers;
- *Cy pres* orders; and
- A general provision relating to unfair practices.

Consumer protection in home building sector

We strongly support the Commission's draft recommendation 5.5 relating to improvements in consumer protection in the home building sector. The Commission has asked for further information about consumer experiences in the home building sector. Attached to this submission is a case study outlining the experience of a client of Consumer Action who pursued a home building complaint against a registered builder. The case study highlights particular problems with both the alternative dispute resolution mechanisms relating to home building as well as the compulsory builders' warranty insurance scheme.

Dispute resolution

We welcome the Commission's proposal for guaranteed access for consumers to alternative dispute resolution schemes in relation to building and renovation. However, simply providing access will not address consumer problems. In addition to providing access, it must be ensured that alternative dispute resolution (**ADR**) procedures that exist are adequate and that builders participate in them. The experience of Victorian consumers is illustrative in this regard.

In Victoria, consumers with a complaint about a builder can complain to Building Advice and Conciliation Service Victoria (**BACV**), which is managed jointly by Consumer Affairs Victoria and the Building Commission. The problem with dispute resolution at BACV, as demonstrated by the case study, is that builders do not have any incentive to resolve cases on a conciliated basis. This is especially the case for builders who have little concern for their reputation. Furthermore, the BACV has no capacity to enforce an outcome.

We welcome the Commission's proposal that there should be greater scope to de-register builders who do not meet performance standards. We believe this could be expanded, so that there is scope for de-registration or disciplinary actions for builders who do not participate in alternative dispute resolution procedures in good faith. Only if there is such an incentive to participate in conciliatory processes will builders actually attempt to resolve disputes in the low-cost alternative dispute resolution environment. Another mechanism that has been effective in other industry based ADR schemes is to charge members subject of a complaint on an escalating scale, thus creating incentive for early resolution.

If a complaint is unable to be conciliated by the BACV, a consumer has a right to make a complaint to the Victorian Civil and Administrative Tribunal (**VCAT**), either through the Domestic Building List or the Civil List. Usually, as in the case study example (attached), VCAT will attempt to mediate an outcome before any formal hearing. For similar reasons to those outlined above, our experience is that builders are unwilling to mediate outcomes through this process. Indeed, it is our view that the mediation requirement merely creates another 'hoop' through which a consumer must jump before they can have their complaint considered substantively.

Further, whilst VCAT is theoretically a cost free jurisdiction, the complex nature of building disputes has resulted in the increasing formality in the building list at VCAT, such that:

- legal representation is the rule not the exception;
- highly expert and technical evidence is required; and
- costs orders are not uncommon.

Each of these features render the VCAT increasingly 'court-like' with the resultant disincentives (financial and psychological) to consumers pursuing legitimate claims.

Home building warranty insurance

We strongly agree with the Commission's comments that, though a cost to them, home building warranty insurance offers little protection for consumers. In Victoria, home building warranty insurance is a 'last resort' scheme of insurance, whereby cover is only available if the builder is dead, insolvent or has disappeared. This has a number of impacts. First, cover is not available for more common problems, such as non-completion or poor quality work. This means that a consumer must pursue a claim through VCAT before any rights against the insurer accrues. Indeed, even if they are successful at VCAT, they must take further action to wind up a company in order to demonstrate 'insolvency' in accordance with the policy wordings. As the case study demonstrates, this process can cost consumers many thousands of dollars in legal costs. Such legal costs are not recoverable from the insurer. As such, many consumers do not pursue the insurer as it is uneconomical to do so.

We note that the Tasmanian Government has recently abolished its compulsory builders' warranty scheme. While we do think that consumers should be protected when building works are defective or not completed, we do not think they should be forced to pay for an insurance policy that offers them no protection.

We believe that the compulsory builders' warranty schemes should be reviewed by an independent reviewer with the aim of making them operate efficiently and in the interests of consumers. We are aware of some work being undertaken by some state governments in conjunction with industry to develop a home building warranty insurers' code of practice.¹ Despite this work, we believe the problems with the current structure of home building warranty insurance schemes are significantly serious for the entire system to be reviewed as a matter of urgency.

Regulators' ability to obtain refunds on behalf of consumers

We continue to be concerned about the inability of regulators such as the Australian Consumer and Competition Commission (**ACCC**) and the Australian Securities and Investments Commission (**ASIC**) to obtain refunds for consumers affected by breaches of consumer protection laws outside representative action that names all affected consumers.

Refunds for consumers are an appropriate remedy for breach of consumer protection laws where there are a large number of consumers affected and the loss to each is relatively small. In an increasingly national economy where goods and services are mass-marketed, it is becoming more common for a business to be found to be involved in wrongdoing yet being able to retain profits obtained due to that wrongdoing. The cases of *Medibank Private Ltd v Cassidy*² and *ACCC v Danoz Direct*³ demonstrate that the ACCC is currently unable to issue representative proceedings on behalf of consumers, without naming every affected consumer in the proceeding.

¹ Victorian Government Response Progress Report, *Housing Regulation in Victoria: Building Better Outcomes*, Victorian Competition and Efficiency Commission, September 2007.

² (2002) 124 FCR 40.

³ [2003] FCA 1580 (287 August 2003).

We strongly welcome the Commission's recommendation that the new national generic consumer law should give consumer regulators the capacity to seek imposition of civil pecuniary penalties, including the recovery of profits from illegal conduct. However, it is our view that wherever practical consumers should be able to recover moneys outlayed a result of unlawful trade practices on the part of the trader. In many circumstances, while they have suffered quantifiable and significant losses individual consumers are not able to initiate legal proceedings to recover their losses (due to the cost of legal representation, and the fact that frequently the amount of harm suffered by consumers as individuals will be too small to warrant legal proceedings).

Class action proceedings in their current form do little to assist many individual consumers. Even where small consumers can join class action proceedings to recover losses, their ability to do so will often depend upon the commercial decisions of litigation funders. Due to the significant cost risks involved, independent consumer legal services like Consumer Action cannot easily launch representative proceedings on behalf of consumers at large.

We recommend that new national consumer law enable consumer regulators to obtain refunds on behalf of consumers from businesses that have breached the law. Frank Zumbo, in an article relating to small-business recovery of loss, has suggested that courts should be empowered to make 'class compensation orders', where the regulator has succeeded in proving a breach of the *Trade Practices Act 1974 (Vic) (TPA)*.⁴ Such orders would enable third parties (such as consumers or small business) to present a claim to a court appointed assessor within a specified period of time. We believe this proposal should be considered further as a way of facilitating consumer refunds.⁵

It is recognised that in some instances it will be possible to quantify consumer loss generally but impossible to individualise that loss to particular consumers. In this circumstance there may be more appropriate mechanisms than simply directing funds to consolidated revenue. This is discussed further below.

Cy pres orders

Even with effective powers for regulators to seek refunds, in some cases it may be difficult to identify consumers who have suffered loss, or the losses of each individual may be too small to justify the administrative cost in delivering the refund. It is nevertheless undesirable that the wrongdoers should profit from their misconduct or that there should be a loss to consumer welfare in these circumstances. Rectification of this flaw in the regulatory scheme could be achieved through use of *cy pres* orders or settlements.

⁴ Zumbo, Frank, *More classy way to recover loss*, Australian Financial Review, 26 February 2008, page 21.

⁵ Gerard Brody, Letter to editor – Class compensation order must be extended, *Australian Financial Review*, 29 February 2008.

Cy pres is a legal doctrine, meaning literally “as near as possible”, and in effect it enables compensation to be aggregated and refunded to a cause that relates to the needs of the affected consumers generally. In this way, compensation is achieved without requiring inefficient processes to identify and refund every affected consumer.

In the late 1980s, the Consumer Credit Legal Service in Victoria objected to the licensing of a large finance company on the ground that the company was engaging in dishonest and unfair selling practices – namely representing to consumers that they were required to obtain consumer credit insurance when the take up of such insurance was in fact voluntary. The circumstances of the case made it impossible to identify (for the purpose of compensation) every single consumer who may have been wronged by the finance company (ie consumers who but for the representation would not have taken out consumer credit insurance). The solution was to compensate consumers at large under the doctrine of *cy pres*. The *cy pres* solution resulted in the finance company paying \$2.25 million into a fund to establish a centre that would advocate for, and work in the interests of, Victorian consumers. Accordingly, the Consumer Law Centre Victoria (**CLCV**) was established in 1992 with a core-funding base independent of government. CLCV was one of the two services that merged to form Consumer Action in 2006.

Other examples include:

The Vitamin Cartel case, Canada

17% of the settlement amount was given to consumer and trade associations on behalf of indirect buyers who could not be specifically identified.⁶

Bokusky v Edina Realty, 1993 Minnesota

Where a defendant had a conflict of interest in acting for both buyer and seller in the sale of land. The court ordered residual funds to be paid to Southern Minnesota Regional Legal Services and the Fund for the Legal Aid Society amongst other nonprofit organisations.

Bletsch's Estate, 25 Wis.2d 40, 130 N.W.2d 275 (1964)

Jack Bletsch left his entire estate to his wife and daughter if they survived him and to the Masonic Home for Crippled Children in Illinois if they did not. Both his wife and daughter predeceased him and there was no Masonic Home for Crippled Children in Illinois. The court ordered that the estate be distributed to Shriner's Hospital for Crippled Children in Illinois.

In our view, the new national consumer law should allow for compensation for consumers by way of *cy pres* orders or settlements. When consumers have suffered loss as a result of market failure, and that loss cannot be apportioned back to those

⁶ Maurice Blackburn Cashman, International Class Actions Conference Sydney, 25-26 October 2007.

consumers, it is appropriate that the money is directed to a purpose that serves the interests of consumers. Such powers should not be limited to educational initiatives (as is arguably presently the case with the TPA provisions relating to community service orders). Rather a wide suite of options could be available including research, provision to organisations that aggregate and represent the interests of consumers or litigation funding for public interest matters. This research representation and advocacy ought to lead to fairer marketplaces which ultimately should lead to fewer consumers suffering loss in the first place.

A general provision relating to unfair practices

In the Draft Report, the Commission noted a broad provision against unfairness (along the lines of the EU *Unfair Commercial Practices Directive*) is attractive because it can avoid prescription of specific types of unfairness and does not need to be continually adapted as new commercial expressions of unfairness are discovered. However, the Commission also noted that there is little evidence that there are major gaps in Australian consumer laws and, as such, did not recommend introducing such a general provision.

We contest the assertion that there is little evidence about such major gaps. Our Centre regularly deals with complaints about business conduct which may not involve misleading or deceptive conduct or unconscionable conduct, but may be unfair for consumers. Two examples are provided below.

Business models which seek to exploit customers' behaviour – the case of private car parks

Consumer Action has received numerous complaints from consumers who have been 'fined' by private car parks for failure to obtain and/or display a parking ticket. This occurs in circumstances where the parking is generally free for an amount of time (generally at least two hours). . . Most consumers who are issued payment notices and complain to our Centre instruct us that they utilised the car parks for less than the allowed free parking time.

The situation is compounded by the fact that:

- Such pay and display car parks are usually in proximity to supermarkets, and are parking areas that previously operated without the requirement to obtain a ticket.
- There is no boom gate system in operation that would require consumers to obtain a ticket prior to entry.

Private car parks do not have the power to issue fines – fines can only be issued pursuant to statute. Instead, they issue payment notices (which look like fines) demanding liquidated damages for breach of contract. The conduct is arguably not misleading as the payment notices do not include the word 'fine', but use 'demand for payment'.

Despite this, it is nevertheless unfair to raise revenue from consumers who merely forget or do not realise they are required to obtain a ticket. The fines are generally

around \$60-\$80 and the amount payable increases if it is not paid within a certain period of time (usually 14 days).

We have made representations to the companies involved that fair business practices could involve the installation of a boom gate, which would require a consumer to obtain a ticket on entry. As with other car parks, payment could be made upon exit depending on how long the consumer used the car park. This would be a fairer and more equitable way in which to ensure the cost of running the car park is spread across all consumers. This proposal has been rejected by the businesses concerned.

High pressure sales – the case of door-to-door sales of educational software

Consumer Action has also received many consumer complaints about the tactics of door-to-door salespeople selling educational software. Commonly, consumers are approached in a shopping centre and asked for their contact details (perhaps through a competition). A sales consultant then contacts the consumer to make a presentation in their home. Once in the consumer's home, the salesperson will often use high pressure sales tactics to convince the consumer to buy the program or software. Some of the tactics that are commonly used include:

- implying that a parent is neglecting their children or damaging their chances at future success if they do not purchase their products;
- testing the consumer's child and telling them that they are underperforming and will suffer without the assistance of the program (despite the salesperson not being a teacher);
- asking a series of questions where the answers are obviously 'yes' and which make consumers feel that they need the product for sale;
- praising the amazing yet unrealistic benefits of the product;
- trying out a consumer's sympathy by claiming that they are one sale short of either losing their job or winning a prize;
- claiming that the consumer has wasted the salesperson's time and money by listening to their sales presentation, if they then say that they are not interested in buying the product;
- calculating the price, then offering a discount if the consumer signs that day;
- spreading the cost over 12 or more years of schooling, and emphasising the weekly cost of the product; and/or
- after the demonstration, the sales person repeatedly contacting the consumer.

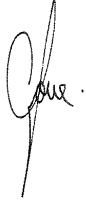
We are also aware that in many circumstances, the salesperson will not discuss the price of the software, or the terms of the credit contract to purchase it, until after the consumer has signed the contract.

It is our view that this sort of business conduct, especially when it is sold to low-income and vulnerable consumers, is unfair and should be proscribed at law. A general prohibition on unfair trading could address such diverse behaviour as outlined above and remain responsive as new examples emerge.

Should you have any questions about this submission, please contact us on 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'Lowe'.

Catriona Lowe
Co-CEO

A handwritten signature in black ink, appearing to read 'Gerard Brody'.

Gerard Brody
Director Policy & Campaigns

Attachment – Case study of consumer complaint relating to home building warranty insurance

The below case study demonstrates a number of failings with building dispute resolution and Home Building Warranty Insurance. Issues raised by this case include:

- The dispute has lasted four years, without a satisfactory resolution;
- The builder rejected all attempts to conciliate the matter at Building and Conciliation Victoria;
- Proceedings in the Victorian Civil and Administrative Tribunal were drawn out and expensive, resulting in an order in favour of our client of over \$63,000;
- Independent costing of our legal services showed that over \$88,000 costs were incurred in relation to the matter;
- The order remains unsatisfied, requiring our clients to seek to wind up the builder's company in order to claim on Home Building Warranty Insurance (estimated to cost an additional \$4,000 - \$15,000);
- Had our clients not had free legal assistance, and if they were successful in winding up the company, they would still be out of pocket as the Home Building Warranty Insurance does not cover legal costs (that is, they would have spent \$92,000 - \$103,000 to recover \$63,000); and
- Other consumers have unsatisfied claims against the builder, which won't be satisfied until someone spends the money to wind up the builder's company.

Problem

In 2002, our clients purchased a demountable home (the **dwelling**) for \$3500 from a developer named Jim Buckley. The developer referred our clients to Classic Period Homes (**CPH**), as a company that would assist our clients to remove, transport and re-erect the dwelling onto their Cohuna property. Our clients met with Brendan John Clune, a director of CPH in Malmsbury on 15 August 2002, to select a home and to discuss the proposed building work.

Our clients instructed CPH to make several variations to the dwelling. They entered into an agreement with CPH to transport the dwelling for \$5000 on 31 August 2002 and a home building contract for \$58 000 on 31 August 2002. Our clients did not obtain independent legal advice prior to entering the agreement and the contract. During the negotiations, our clients dealt with variously Brendan Clune, Joan Piechatschek (a salesperson), Werner Piechatschek (the builder) and Curtis Piechatschek (son of the builder).

Around this time, Brendan Clune and Joan Piechatschek came to our clients' home in Cohuna, and thereafter visited the block. A basic plan of the dwelling was provided to our clients, however as it was not to our client's specifications, our clients contacted Brendan Clune and stated that if the plans were not redrawn they would exercise their rights to exit the contract within the cooling off period.

Our clients sold their existing home in Cohuna on 22 August 2002 and rented a house in Cohuna from 26 September 2002 to 20 December 2005.

The dwelling was delivered to the block in three pieces on 28 October 2002, however building work did not begin on the dwelling until 5 December 2002, two days before the building contract was meant to be completed. At this stage our clients' were compelled to live in a tin shed on the Cohuna block, their rental agreement having ended. During this time, our clients made several telephone calls to CPH to discuss the delays.

The builders left the site on 3 February 2003 and our clients' began working on the house, painting and installing the bathroom and kitchen etc. Within a few days of the builders leaving the dwelling, our clients noticed that screws in the ceiling were pulling on the ceiling plaster. Our client's advised Werner Piechatschek and his son Curtis Piechatschek of their discovery. Werner Piechatschek advised that the plumber and electrician had caused the problems by working in the roof and stated that he would charge our clients \$50 per hour to fix the problem. Our clients continued to live in the shed on the land in conditions of extreme heat until 27 March 2003, when they received a certificate of occupancy. Our clients made payments to the builder of \$54,550.

A number of serious problems with the dwelling have manifested since its construction. Our clients obtained a number of reports which indicated that the dwelling has serious structural problems relating to the foundations and the pitching of the roof. Preliminary quotes estimated that repairs to the dwelling would cost from \$50,000 to \$70,000. There were also significant departures from the agreement made with our client and from the plans.

As a result of the defects the Gannawarra Shire issued a building notice on the dwelling on 12 November 2004, which remains in force. Our clients are unable to conduct rectification work to the dwelling due to lack of means.

Attempts to resolve

Our clients attempted to resolve this matter by making complaints to Consumer Affairs Victoria (**CAV**). In October 2003, the clients lodged a Domestic Building complaint with the Building Advice and Conciliation Victoria (**BACV**) and an inspection of the dwelling was completed in December of 2003. This inspection revealed serious defects and required the CPH to rectify those defects. The Building Commission attempted to contact the builder to no avail and CPH rejected all attempts to conciliate the matter.

CPH and Brendan Clune have been the subject of criminal proceedings in the Heidelberg Magistrates Court, issued by the Building Commission.

In July 2006, CPH issued proceedings in VCAT seeking orders that our clients pay \$16 965 as payment for variations to the home building contract. Our clients filed a defence stating that the variations that were being claimed were included in the original contract price. They also lodged an \$80 000 counterclaim.

Around September 2006, CAV referred the matter to the Consumer Action Law Centre (**Consumer Action**). Consumer Action obtained the pro bono assistance of a barrister, Mr Andrew Kincaid to attend a mediation of the matter. The October 2006 mediation of the matter was unsuccessful.

Despite CPH having made the application to VCAT, CPH did not actively prosecute the matter and the proceedings were characterised by delay and continual breaches of VCAT orders on CPH's behalf. As a result of CPH's failure to serve an expert report, their application was dismissed and the counterclaim was fixed for hearing on 2 July 2007. On that date, the matter settled and a deed of settlement was drawn up. CPH defaulted on the reasonable terms of settlement and we applied to have the matter reinstated.

The matter was successfully reinstated and on 17 October 2007, VCAT awarded \$63,666 to our clients in damages, plus \$7,639.92 interest. An indemnity cost order \$88,265.65 was also made.

Unsurprisingly, the CPH has not satisfied these orders. Our clients are aware of a number of other decisions of VCAT for substantial awards of damages against CPH that are also unsatisfied. At one stage it appeared that another victim of CPH, who has obtained an order for damages of \$137,102 plus costs, would instruct his solicitor to wind up Classic Period Homes. The costs of doing so has proved prohibitive and at this stage his solicitor does not have instructions to proceed any further.

Our clients are only able to claim under their Builders Warranty Insurance if the builder is "dead, insolvent or disappeared". As such, Consumer Action is considering undertaking proceedings to wind up Classic Period Homes.

Our clients are concerned that CPH continue to operate unscrupulously. They are also aware that persons involved in CPH have begun trading under the name "Heritage House Removals". This has been confirmed by the Building Commission.

Our clients

Our clients are a married couple in their early 40s.

The wife has suffered from breast cancer and has had a double mastectomy and chemotherapy. In October 2005, she underwent an hysterectomy. In September 2006, she had a lump removed from her leg. She is medicated for stress and has doctor's certificates that recommended that she not attend VCAT proceedings. She has been recently diagnosed with secondary cancer and is awaiting information on surgery and treatment options.

The husband used to work as a truck driver, but he was injured in a workplace accident in 2003 and has not been able to return to work since then. He also suffers

from an irregular heartbeat, and is medicated for that condition. Their sole source of income is the Disability Support Pension and they have limited assets.

Winding up a company under insolvency

Winding up a company in insolvency is a costly and technical process. As our clients are indigent, they cannot do this without free legal assistance.

The process they would be required to follow to claim under Builders Warranty Insurance would be as follows:

File the VCAT order in the County Court. This involves filing a certified copy of the order and an affidavit stating that the amount has not been paid. There is no charge for filing the order and the affidavit. Once filed, the order becomes a judgement debt.

Serve a statutory demand under section 459E(1) of the *Corporations Act*, specifying the debt and requiring the company to pay within 21 days.

Apply to the Federal Court for the company to be wound up if the creditor does not comply with the statutory demand. The application should be within 3 months of the non-compliance with the statutory demand. The filing fee of \$735. Application is by originating process, stating the relevant sections of the *Corporations Act* and the relief sought with a supporting affidavit. The Application must attach a copy of the demand, set out the particulars of services and the failure to comply with the demand.

Notice of the application must be served on the company. An advertisement also needs to be placed in newspapers in accordance with the rules. The Federal Court will then list the matter for hearing within 4 to 8 weeks, but not longer than 6 months after the application is made.

Find a liquidator to consent to be appointed, in advance of the hearing.

At the hearing of the matter, if the application is successful, the Court will appoint the nominated liquidator. Until a liquidator is appointed, the person making the application prosecutes the proceedings at their own cost. The remuneration of the liquidator is set by a resolution of the creditors or the Court. The liquidator is generally paid out of the assets of the company. If the assets are not sufficient for payment of the liquidator and the creditors are unable to pay, the liquidator may apply to an ASIC fund for remuneration.

The cost of such an application is approximately \$4,000 to \$15,000 depending on the complexity of the matter and if it is defended.

Conclusions

Our clients have had to defend and prosecute time consuming and potentially very costly legal proceedings had they not obtained pro bono assistance through Consumer Action and the Victorian Bar Legal Assistance Scheme to seek redress from CPH. To

obtain damages of \$63,666, \$88,265.65 in legal costs were incurred. If our clients had not sought our assistance, they would have either settled for a lesser amount or dropped their complaint completely. Our clients are aware of other victims of CPH who have had to agree to orders that they pay the spurious claims of CPH, because they were unable to fund their defence.

In order to claim under their Building Warranty Insurance, our clients are now required to make an application to the Federal Court to have the company wound up, which will take a minimum of 4 months and at a cost of \$4,000 to \$15,000.

If successful in their application to wind up CPH, they will then need to make a claim to their insurance company, which will take further time and expense.

Even if our clients were successful and had not had pro bono assistance or our support, our clients would still be out of pocket as the insurance policy does not allow for the payment of their legal costs.