

## Consumer Protection

4 April 2008

Our Ref: 15580/2007 A522108

Enquiries: Gary Newcombe 9282 0602

Mr Robert Fitzgerald AM  
Presiding Commissioner  
Review of Australia's Consumer Policy Framework  
Productivity Commission  
PO Box 1428  
CANBERRA CITY ACT 2616

Dear Commissioner Fitzgerald

### **SUBMISSION IN RESPONSE TO DRAFT REPORT**

The Consumer Protection Division of the Department of Consumer and Employment Protection of Western Australia ("DOCEP") wishes to acknowledge the significant work of the Productivity Commission in producing its Draft Report on the review of the Australian consumer policy framework ("the Draft Report").

Attachment A sets out DOCEP's comments on each of the recommendations contained within the Draft Report.

I apologise for the lateness of these comments, however, they accurately reflect the views expressed to you in the teleconference held on 12 February 2008 involving you and other officers of the Productivity Commission and former Commissioner Patrick Walker and other senior officers of DOCEP. To this extent, this submission is intended to put those previously expressed views on the public record.

I would also note that, having read the Draft Report, DOCEP does not resile from any of the views put forward in its original submission dated 18 July 2007 to the Productivity Commission on this particular review.

In summary, DOCEP acknowledges the need for reforms to the existing Australian consumer policy framework and supports many of the Productivity Commission's 28 individual recommendations. In some cases, DOCEP believes the recommendations do not go far enough and that further change is warranted. DOCEP also has significant concerns about the impact which some of those recommendations would have on the effective administration of consumer policy in Australia.

DOCEP is also concerned that in criticising delays in the development of reforms to the existing Australian consumer policy framework through the Ministerial Council on Consumer Affairs, the Productivity Commission has ignored the role that the previous Commonwealth Government played in frustrating the attempts of States and Territories to achieve reform.

For example, the previous Commonwealth Government refused requests by the Western Australian Government for national regulation of finance brokers and property investment advisers and effectively blocked attempts to introduce national unfair contract terms legislation.

DOCEP supports the introduction of new national generic consumer law based on the consumer protection provisions of the Trade Practices Act but notes this Act has been left behind in terms of world best practice, with very limited amendment in the last decade. DOCEP believes that the content of new national law should be open to full debate with a view to establishing a best practice regime.

DOCEP supports the transfer of credit and finance broking regulation to ASIC, although DOCEP believes this should be accompanied by the transfer of regulation of debt collectors to ASIC and the introduction of national regulation of property investment advisers by ASIC. Transfer of functions to ASIC, while supported, would also need to be accompanied by service delivery guarantees to ensure that services to Western Australian consumers and businesses would not be diminished.

DOCEP is very concerned about proposals to make the ACCC the sole regulator of generic consumer law (including product safety), while leaving the States/Territories to administer industry specific law. DOCEP believes that the ACCC has not demonstrated a capacity to provide the same levels of service delivery at a local level as State and Territory consumer agencies. Contrary to the Productivity Commission's view, DOCEP believes that the proposed split in responsibilities between the ACCC and State and Territory consumer agencies will confuse business and consumers, because many issues raised under industry specific legislation also involve generic legislation, and will significantly increase the overall national costs of regulation.

DOCEP looks forward to the Productivity Commission's final report on this most important review and to working through the Ministerial Council on Consumer Affairs and the Standing Committee of Officials on Consumer Affairs to implement agreed reforms to the Australian consumer policy framework.

Yours sincerely

Anne Driscoll  
**COMMISSIONER FOR CONSUMER PROTECTION**

Attach

**PRODUCTIVITY COMMISSION REVIEW OF THE AUSTRALIAN CONSUMER POLICY FRAMEWORK DRAFT REPORT 12 DECEMBER 2007**

**WESTERN AUSTRALIAN DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION, CONSUMER PROTECTION DIVISION, RESPONSE TO RECOMMENDATIONS**

**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.*

**Response**

In principle, DOCEP does not oppose the creation of a common objective for consumer policy at the national and State/Territory level. However, the draft objective and supporting operational objectives have been developed by the Productivity Commission without discussion with stakeholders and that discussion needs to take place before there could be agreement on the precise wording.

In addition, the proposal could be seen as ignoring the political realities in a federal system. Each government within the federation is elected to pursue a particular political agenda. Part of that agenda will involve consumer policy. Governments are unlikely to be, and indeed - if contrary to election policies - should not be bound by conflicting objectives developed for the purposes of uniformity.

#### **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.*

#### **Response**

DOCEP would support the creation of a new national generic consumer law to replace the existing consumer protection provisions of the Trade Practices Act and the various State/Territory Fair Trading Acts. However, DOCEP would not support this law being based on the existing consumer protection provisions of the Trade Practices Act simply amended to reflect the Productivity Commission’s recommendations.

While the Trade Practices Act is a useful starting point for debate on the content of the new law, it should only be a starting point. The Trade Practices Act represented international best practice when introduced but it has fallen well behind international best practice and the best provisions of State/Territory Fair Trading Acts. This is particularly so in the area of remedies such as cooling off periods and substantiation orders.

In addition, the Productivity Commission’s recommendations for amendments are not all supported, nor can they be considered exhaustive as the Productivity Commission has not turned its mind to all of the relevant issues.

DOCEP would, therefore, support a new national generic consumer law, however, the opportunity of establishing a new national, uniform law should be used to re-establish a best practice framework. The debate on the content of this new Act should be led by MCCA acting under the auspices of COAG.

Of course, it should be noted that the concept of uniform national generic consumer law is not new – this is what was achieved when the States and Territories first introduced their Fair Trading Acts in the late 1980s. At the time these Acts mirrored the consumer protection provisions of the Trade Practices Act.

The more significant question is how to maintain uniformity. The Productivity Commission has recommended the template model be used (although the Commission's ultimate preference for a single Commonwealth Act, based on a referral of State powers, is noted).

Template legislation has not generally been supported in Western Australia by the non-Labor parties. DOCEP believes that MCCA is best placed to examine various models for achieving on-going uniformity.

DOCEP intends undertaking further specific work, including obtaining expert independent legal advice, on the possible structure and content of a suitable new national generic consumer law to inform this important national debate.

#### **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*

#### **Response**

DOCEP agrees with this recommendation

#### **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.

#### **Response**

DOCEP does not agree with this recommendation.

At a meeting held in April 2007, COAG agreed that the States and Territories would develop a uniform approach to consumer product safety within 12 months. It is the view of the States and Territories that the COAG decision precludes the single law/single regulator model advocated by the Commission. MCCA is meeting on 23 May 2008 with the intention of agreeing on a model for product safety reform that meets all the Commission's concerns. DOCEP believes this proposal should be allowed to proceed.

Under this model, harmonised product safety laws would continue to be administered by the individual State/Territory consumer agencies.

DOCEP shares the concerns of all other State/Territory consumer agencies that the ACCC would not match existing levels of administration of product safety laws at the local level, particularly in regional areas.

#### **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.*

*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.*

#### **Response**

DOCEP does not support this recommendation.

DOCEP does not support the ACCC assuming responsibility for enforcing the proposed new national generic consumer law.

The ACCC, based on experience and its own policies, does not provide, and has not demonstrated interest in providing, the same service levels to consumers or businesses in Western Australia that DOCEP provides. DOCEP has an existing regional office network in Western Australia. DOCEP investigates all complaints received. The ACCC investigates less than 5% of complaints received.

DOCEP receives approximately 150,000 telephone enquiries a year. The ACCC receives approximately 58,000 telephone enquiries Australia-wide per year.

The changes to the ACCC, both in terms of policies and resources, necessary to reflect the current level of services to Western Australian consumers and businesses provided by DOCEP would be very significant.

Given the Productivity Commission's view that State and Territory regulators such as DOCEP should retain responsibility for industry specific laws but not the generic consumer law, there is very little scope for complimentary savings in expenditure at the State level to off-set the additional resources required by the ACCC.

Not only would the Productivity Commission's proposal result in an increase in overall costs of regulation, it would also serve to reduce, rather than increase, effectiveness.

In practice many enquiries and complaints involve both generic and industry specific laws. Often the most effective redress for an industry specific matter (eg a motor vehicle complaint) will be under generic law, not the industry specific law. The separation of responsibility for the administration of generic and industry specific laws would create new problems in coordination and cooperation between the ACCC and DOCEP (problems that would be reflected in other jurisdictions) and work against the concept of a one-stop shop for consumers and businesses.

Implementation of this recommendation would also limit the State Government's capacity to achieve redress for West Australians.

While the Productivity Commission has attempted to assess the net benefits of its recommendations in Chapter 14 of its draft report, this assessment does not appear to have taken into account the duplication of costs that would arise under this particular recommendation.

In addition, it is apparent from the draft report that the Productivity Commission did not receive any direct evidence through submissions of additional costs to businesses in Australia of complying with variations in generic law (or its administration). Indeed, at page 59 of the draft report, the Commission notes:

*"The costs of complying with variations in generic law should not be overstated. In particular, it is not clear whether even the more significant differences would necessarily require tailored compliance strategies. Anecdotally, many businesses comply with consumer laws by simply adhering to ethical standards. This would in general see them comply with almost all existing generic provisions. Further, it may sometimes be possible to minimize costs by complying with the most stringent provision rather than tailoring compliance to the different requirements in each jurisdiction."*



DOCEP believes that this recommendation should be subject to a specific cost-benefit analysis before receiving any further consideration.

Finally, implementation of this recommendation would require referral of constitutional power from the State to the Commonwealth, which is understood to be contrary to existing Western Australian Government policy.

### **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.*

### **Response**

DOCEP does not oppose this recommendation, however, it is noted that a wholesale national competition policy review has been conducted of existing industry-specific legislation within the last decade. While this review process might have been conducted for a different purpose than that promoted now by the Productivity Commission, the national competition policy review process did require each Act to be subject to a cost-benefit analysis.

In any event, Western Australia has only two Acts not affected by other proposed reforms that impose regulation not in place in more than one other jurisdiction – the *Hairdressers Registration Act 1964* and the *Motor Vehicle Repairers Act 2003*. The introduction of the *Motor Vehicle Repairers Act* was a specific election commitment of the Gallop Government, which was elected in 2001. While both the *Finance Brokers Control Act 1975* and the *Credit (Administration) Act 1984* impose licensing arrangements that are unique to Western Australia, both these would be affected by the proposed transfer of jurisdiction to the Commonwealth.

Again, the Productivity Commission does not appear to have costed this recommendation. Reviews of legislation are not cost neutral and they divert limited existing resources away from achieving existing priorities.

DOCEP does note that the Commonwealth and Western Australia are joint chairs of the newly created COAG Business Regulation Working Group, which has been formed to review levels of business regulation. The work of this Working Group, under the broader COAG reform agenda, would seem to have overtaken this recommendation of the Productivity Commission.

## **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.*

## **Response**

DOCEP supports this recommendation. Although Western Australia now has very robust regulation in place for both credit providers and finance brokers, it is recognised that a national market for these services exists and that they are both very closely related to existing functions discharged by ASIC.

DOCEP, however, notes that the recommendation should go further and that, in order to provide a complete and effective single national regulator of financial services, ASIC should also takeover regulation of debt collectors and Commonwealth regulation of property investment advisers should be introduced.

Debt collection is a significant aspect of the credit market and one in which significant consumer (and business) detriment can occur. There has also be a clear move in Australia away from localised debt collection businesses to national businesses operating across borders.

Despite having no specific legislative responsibility for debt collection, both the ACCC and ASIC have recognised problems in this market and have introduced national guidelines for debt collection.

The efficacy of State and Territory regulation of debt collection is also under threat from the national approach of debt collection businesses in Australia. Recent senior counsel advice received by DOCEP is to the effect that the Western Australian *Debt Collection Act 1964* will not apply to situations where a debtor resident in Western Australia is the subject of debt collection action in the nature of telephone calls, email or letters which originate in another jurisdiction. The reason for this is that the “demand” (which is the basis of the application of the legislation) is made in the jurisdiction in which the telephone call was made or the email or letter was sent, not in the jurisdiction where the demand is received.

Effective redress would depend on the regulator in the jurisdiction in which the debt collector was based, taking action even though the debtor is not within that regulator’s jurisdiction.

This advice severely undermines the existing State-based regulation. Similar problems are likely to apply in other jurisdictions.

Although proposals are in train to address this issue, DOCEP believes a national approach would be the most effective and is warranted, especially given the intrinsic connection between debt collection and the provision of credit.

DOCEP has noted that the Productivity Commission has chosen to make no recommendation with regard to the regulation of property investment advice. The Commission’s stated reason (at page 95 of the draft report) is that to make such a recommendation would be “...premature prior to any changes in the location of the responsibility for the regulation of real estate that might ensue from the broader proposed review process.”

With respect, DOCEP believes that this reasoning is flawed and that the Productivity Commission has not adequately considered this issue.

DOCEP does not believe that the regulation of property investment advice is, or should be, tied to the regulation of real estate agents. Regulation of real estate agents at a State and Territory level is concerned with a licensing regime to determine who should become, and stay, a real estate agent or sales representative. The regulation does not extend to all real estate related transactions. In addition, and significantly, the mere provision of property investment advice will not require a person to become a licensed real estate agent. In DOCEP’s experience, most property investment advice is not given by licensed real estate agents and this is particularly true of the most problematic advice which is given during the course of highly promoted investment advice seminars which are conducted around Australia.

Any proposal to tie the regulation of property investment advice to real estate licensing regimes is misguided.

Indeed, if real estate licensing regimes were expanded to capture the mere provision of investment advice, difficult questions would arise as to when matters fell within the jurisdiction of State and Territory based regulators or ASIC, as property investment advice is not necessarily a clear cut matter and it can often be bundled with alternative investment advice.

DOCEP's view is that the Productivity Commission was correct when it stated at page 95 of the draft report that:

*“(I)n a general sense, it is not immediately apparent why advice on investment in say shares falls within ASIC’s remit but advice on property investment does not. For many consumers the two forms of investment will be substitutes and/or both form part of their investment portfolio.”*

The Commission's draft report goes on at page 95 to argue against this initial position:

*“However, the defining characteristic of financial investments subject to the ASIC Act is that funds must be provided to a third party to manage on an investor’s behalf. This on-going relationship arguably gives rise to a different set of consumer protection issues to those involved in receiving one-off investment advice in regard to the purchase of an investment property. The challenges for a consumer in monitoring the performance of third party managers is the most prominent example.”*

DOCEP questions this analysis on two grounds – firstly it assumes that property investment decisions are “one-off” decisions and secondly DOCEP believes that there is an equal challenge for consumers in being able to assess the quality of property investment advice.

DOCEP would urge the Productivity Commission to reconsider its approach to the regulation of property investment advice and include regulation of that advice in a package of credit and investment related regulation that should be vested in ASIC.

DOCEP also would prefer that all credit providers be subject to licensing by ASIC, rather than the creation of a new category of registration for those credit providers not already required to be licensed by ASIC.

The establishment of a separate registration scheme to be administered by ASIC would create administrative inefficiencies. The Productivity Commission's draft report notes at page 90 that around 90% of personal lending is provided by firms which are already subject to the financial services regime.

DOCEP has experience with credit provider licensing (Western Australia is the only State in which all credit providers are required to be licensed) and it is an effective tool in regulating the industry and obtaining relevant data.

In any transfer of functions from DOCEP to a Commonwealth agency, DOCEP would argue for a commitment from the Commonwealth to maintain the same level of resourcing for that function. DOCEP currently applies 19.4 FTEs to administration of credit and finance broking functions in Western Australia.

### **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.*

### **Response**

This recommendation relates to matters outside the Minister for Consumer Protection's portfolio. In Western Australia, these matters fall within the responsibility of Energy Safety. However, it should be noted that Western Australia is not a participant in the national energy market.

### **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.*

### **Response**

This recommendation relates to matters outside the Consumer Protection portfolio. Telecommunication is the responsibility of the Commonwealth Government. In Western Australia utility price caps fall within the responsibility of the Economic Regulation Authority.

## **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.*

## **Response**

The Productivity Commission's discussion of protection for home builders is based on the situation in New South Wales and Victoria and in apparent disregard of the position in Western Australia.

The building industry in Western Australia is also quite different to that in other States, with a highly concentrated building industry, one in which the three local based largest builders are the three biggest builder in Australia.

In Western Australia the term "warranty" is not used, rather the term "home indemnity insurance" is used. The scheme in Western Australia has always been a "last resort" scheme, unlike those in some other jurisdictions which started out as a "first resort" scheme. The Building Disputes Tribunal's jurisdiction extends to both workmanship and contractual issues and it provides many of the protections the Commission has recommended.

While DOCEP would be willing to provide the Productivity Commission with more specific detail in relation to the situation with home indemnity insurance in Western Australia, DOCEP believes it is sufficient at this point to ensure that the Commission is aware of jurisdictional differences in relation to this product so that generalised recommendations are not made in the Commission's final report.

DOCEP also notes that on 19 March 2008 the Senate established a separate inquiry into what the Senate referred to as "Australia's Mandatory Last Resort Home Warranty Insurance Scheme". This inquiry is to be undertaken by the Senate Standing Committee on Economics.

DOCEP will be making a submission to this inquiry.

### **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*

### **Response**

Other than in relation to credit, debt collection and property investment advice, DOCEP does not support the transfer of greater responsibility for the consumer policy framework to the Commonwealth.

DOCEP also does not resile from its original submission that the ACCC's functions in relation to consumer protection and competition policy should be split.

However, DOCEP supports proposals to make consumer policy more visible at the Commonwealth level and notes the appointment of a Commonwealth Minister for Competition and Consumer Policy.

### **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.*

### **Response**

DOCEP does not support this recommendation.

As noted, subject to credit, debt collection and property investment advice, DOCEP does not support the transfer of greater responsibility for the consumer policy framework to the Commonwealth. As a consequence, there is no basis for increased Commonwealth voting rights at MCCA.

The recommendation would effectively give the Commonwealth Government the right of veto over MCCA decision-making.

### **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.*

### **Response**

DOCEP supports national uniform unfair contract terms legislation based on the existing Victorian legislation and the Western Australian Cabinet has given in principle approval to the drafting of legislation to mirror the Victorian legislation.

It is not clear to DOCEP why the Productivity Commission has not supported the extension of the existing Victorian unfair contract terms legislation on a national basis.

Many nationally operating businesses operate in Victoria and have already become familiar with that legislation. Extension of the existing legislation would involve minimal disruption to business and all stakeholders could rely on experience learned in Victoria. This would not be the case with new unfair contract terms legislation.

It is also highly unlikely that Victoria, in the absence of compelling evidence, would water down its existing unfair contract terms legislation to match that recommended by the Productivity Commission. The Commission's recommendation establishes the environment for the creation of dis-uniform unfair contract terms legislation in Australia. DOCEP would regard this as highly undesirable.



DOCEP also notes that the Productivity Commission's draft report comments that:

- (a) national unfair contract terms legislation would reduce the risk of jurisdictions adopting their own varied provisions (page 120); and
- (b) business has not identified major costs associated with the introduction of unfair contract terms legislation in Victoria (or the United Kingdom or European Union (page 122)).

In these circumstances, DOCEP believes the Productivity Commission's recommendation should be amended to supporting the national introduction of unfair contract terms legislation in accord with that in force in Victoria.

DOCEP would only support, with one exception, the model of unfair contract terms legislation recommended by the Productivity Commission if it received unanimous support from all other jurisdictions and was the only basis on which national uniform unfair contract terms legislation could be introduced.

DOCEP does not support at all the concept of so-called "safe-harbours" under which certain businesses could obtain an exemption from unfair contract terms legislation. Such a concept would be anti-competitive, in that it would detract from an even playing field, and potentially be of significant detriment to consumers and small businesses because it could only serve to protect a contract term that is otherwise in all respects unfair.

### **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.*

### **Response**

DOCEP supports this recommendation and notes that awareness of warranty issues is already covered in its consumer education programs. DOCEP is also always looking for opportunities for appropriate enforcement action in relation to misleading marketing. This area has been an operational priority for DOCEP since 2006.

## **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.*

## **Response**

DOCEP supports this recommendation.

A baseline study of product safety in Australia has been carried out under the auspices of MCCA.

## **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.*

## **Response**

DOCEP supports this recommendation

## **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.*

## **Response**

DOCEP supports this recommendation and notes that it participates fully in AUZSHARE.

## **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.*

## **Response**

DOCEP supports improvements to alternative dispute resolution arrangements for consumers and, in principle, supports this recommendation.

In relation to a national energy and water ombudsman, it should be noted that, due to distance, Western Australia represents a stand alone market for both utilities and any national scheme would need to provide a similar level of service to Western Australian consumers as that provided by the existing Western Australian energy ombudsman.

### **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.*

### **Response**

This recommendation falls outside the Consumer Protection portfolio. In Western Australia these matters are the responsibility of the Attorney General.

### **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.*

### **Response**

DOCEP supports this recommendation.

### **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.*

### **Response**

DOCEP supports this recommendation.

### **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.*

#### **Response**

DOCEP supports this recommendation.

### **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.*

#### **Response**

DOCEP supports this recommendation, while noting that there are a number of other additional regulatory tools which should be included in any new generic consumer law.

### **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.*

#### **Response**

DOCEP supports this recommendation.

### **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.*

#### **Response**

DOCEP supports this recommendation.

### **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.*

#### **Response**

DOCEP supports the general thrust of this recommendation and supports initiatives to ensure that disclosure regimes are effective.

In this regard, DOCEP notes that the Western Australian Centre for Advanced Consumer Research is undertaking a three year PhD scholarship study of the effectiveness of disclosure regimes.

DOCEP also notes that, in relation to credit disclosure, SCOCA has agreed to the Uniform Consumer Credit Code Management Committee commissioning research, by an independent consultant, into pre-contractual disclosure with the goal of developing a disclosure model which addresses the needs of consumers.

## **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.*

### **Response**

DOCEP supports this recommendation.

SCOCA has established a national taskforce of consumer education officers to improve co-ordination of information and education measures.

## **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.*

### **Response**

As far as it goes, DOCEP supports this recommendation. However, DOCEP maintains its support for a new national consumer research organisation along the lines of the UK's National Consumer Congress.

The thrust of the Productivity Commission's recommendation is simply to provide "modest additional funding" to support specific consumer research and to support networking and policy functions of existing consumer groups.

It is not clear what quantum the Commission might have in mind when referring to "modest additional funding". The Commission has also not identified who might undertake this research. One significant benefit of establishing a new research body is that such a body would accumulate expertise in consumer research. Simply funding research, without the development of this expertise, is likely to dissipate the value of research funding. Based on operational experience which the Productivity Commission does not have, DOCEP does not share the Commission's optimism that there are sufficient existing organisations able to take on this research function.

DOCEP also believes that before the concept of an Australian equivalent to the UK's National Consumer Council is dismissed, there should be a separate cost-benefit analysis done of such a model compared to the decentralised model proposed by the Productivity Commission.

A522108