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ATTORNEY GENERAL
MINISTER FOR POLICE AND EMERGENCY SERVICES

MEMBER FOR MOLONGLO

Ian Gibbs
Assistant Commissioner
Consumer Policy Framework Inquiry
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

Dear Mr Gibbs

Thank you for providing the ACT Government with an opportunity to make submissions concerning the draft report on the Review of Australia's Consumer Policy Framework. I apologise for the delay in my response.

A submission from the ACT Government on the draft report is attached for your consideration. The submission supports most of the recommendations in the draft report. There are, however, a number of recommendations where I do have concerns and these are highlighted in the attached submission. I look forward to these concerns being addressed in the final report.

The contact officer for any queries in regard to this matter is the ACT Commissioner for Fair Trading, Mr Brett Phillips, who can be contacted on (02) 6205 5074.

Yours sincerely

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Attorney General

1.4.08

ACT LEGISLATIVE ASSEMBLY

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ACT GOVERNMENT SUBMISSION

To the Productivity Commission

Draft Report on the Review of Australia's Consumer Policy Framework

2008

**Authorised by
Simon Corbell MLA
Attorney General**

Introduction

The majority of the recommendations in the Productivity Commission draft report on the Review of Australia's Consumer Policy Framework Australia are supported or supported in principle by the ACT.

Enhancing "outcomes" for consumers from policy reform should include measures that support security of access to essential services and maintenance of sufficient product diversity to ensure disadvantaged and vulnerable households can access essential services (eg energy and utilities) that are appropriate to their needs (eg affordable credit).

Improved communication tools and processes are a critical component of consumer protection measures but need to be sufficiently diverse and targeted to ensure the needs of low income, disadvantaged and vulnerable households are considered in development of key messages and choice of delivery mechanisms.

The ACT supports in-principle development of a new nationally coherent consumer policy framework. However, the framework must provide all jurisdictions with capacity to legislate unilaterally in response to unique regional/local market differences.

The regulatory role in the consumer policy framework must also take into account the different needs of each jurisdiction. A single regulator may settle for the lowest common denominator rather than the adoption of national best practice and would not have knowledge of local needs. Transferring the regulatory functions to the Commonwealth for the new generic law (including product safety law) raises unacceptable risks for consumers, and more particularly, exposes disadvantaged consumers to unacceptable economic, social and personal safety risks. The ACT believes that local capacity to act must be operationally and legislatively retained to ensure an effective consumer protection regime.

The ACT believes that the development of a new national generic consumer law should proceed in a rationally co-ordinated manner. Further, the ACT believes that the Ministerial Council on Consumer Affairs (MCCA) is the most appropriate ministerial forum to undertake much of the work in this report.

The consultative, working model used for the development of defamation law in Australia might be a useful methodology for the Commonwealth/States and Territories, through MCCA, to adopt in relation to delivering a national generic consumer law and a regulatory regime which better matches the increasingly national and diverse nature of consumer markets.

Clarity in recommendations

Some of the recommendations in the report are written in such a way that a person with an economic background may have one interpretation, whereas non-economists may interpret the recommendations differently, and

importantly, potentially read them as proposing a regulatory framework based on zero risk. For example, Draft Recommendation 3.1 lists six operational objectives for consumer policy. Some of these objectives are neither achievable nor desirable from a regulatory perspective. For example, it is not possible to “prevent practices that are unfair or contrary to good faith” and policy should not be driven by this as an objective. Policy and regulation can, however, provide appropriate remedies for such conduct, which may discourage it from occurring.

While the introduction to the recommendation states the framework should “efficiently and effectively” aim to meet these objectives (and these qualifiers mitigate the issue above), these terms have a particular meaning to economists, which is not generally shared by others. It is therefore suggested that the recommendations be reviewed by the Productivity Commission with a view to ensuring that their intent is straightforward to a non-economic audience and terms such as “efficiently and effectively” are avoided or at least sufficiently explained.

ACT specific issues

The draft report includes criticism of the more stringent requirements in the ACT for increasing credit card limits on the basis that they do not appear to have materially affected the number of borrowers in arrears and in fact caused delays for those seeking advances on their credit cards in the aftermath of the 2003 bushfires. The first point is made by ANZ in its submission and reiterated by the Australian Bankers’ Association (ABA). The second argument is made solely by the ABA.

A straight out cross-jurisdiction analysis of persons in arrears on their credit cards does not take into account the particular economic and labour market conditions in the ACT. The figure E.5 shows that the data is volatile and its inconclusive nature should be acknowledged in the report.

The assertion that consumers were impacted upon by the bushfires is accepted in the report without question. However, the ABA provides no detail of the allegation and the issue was not raised with the ACT Government nor is it mentioned in the report of the ACT Bushfire Recovery Taskforce. If understood correctly, the issue of support for bushfire victims was as much related to the adequacy and availability of crisis support services, including Federal emergency supports, as it was about being able to quickly increase one's credit card limit.

Issues not considered in the report

The ACT notes that the report does not address a number of emerging consumer law issues including easy credit, overseas student scams, and insurance market overcharging. These matters should be considered as they are of great significance to consumers.

Draft Recommendations 3.1

The ACT supports in-principle the adoption of a common, overarching objective for consumer policy, particularly as the proposed consumer policy objective broadly reflects in practice, the existing goals and objectives of consumer law policy in the ACT and more generally, Australia wide.

Draft Recommendation 4.1

The ACT supports in-principle the adoption of a new national generic consumer law to apply in all jurisdictions enacted through applied template or uniform law arrangements. The development of a new national generic consumer law should examine the merits of including relevant provisions of trade practices legislation, relevant State/Territory case law and existing provisions of the State/Territory Fair Trading legislation to ensure that existing State/Territory consumer protection laws are preserved.

The Ministerial Council on Consumer Affairs (MCCA) would be the most appropriate forum to undertake responsibility for the development of the new national generic consumer law.

Draft Recommendation 4.2

The ACT supports in-principle the recommendation that the new generic consumer law applies to all consumer transactions, including financial services and that ASIC continues to regulate this industry reporting to the States/Territories. The merits of exempting financial disclosure subject to 'due diligence' from the misleading and deceptive conduct provisions of *Trade Practices Act 1974* should be considered through the MCCA process.

Draft Recommendation 4.3

The ACT does not support this recommendation, as there are significant local ACT considerations for consumer product safety protection and a clear need for local knowledge and a local presence in the ACT, which must be preserved.

Draft Recommendation 4.4

The ACT does not support the introduction of a single national regulator to enforce the new national generic consumer law. The ACT believes that responsibility for consumer law should remain at the local State/Territory jurisdictional level not the Commonwealth level, given the extent and diversity of regional/local differences and needs.

The ideal model would be for Commonwealth/States and Territories to better work towards the development of a harmonised, coordinated unitary system of core consumer law principles with capacity for the jurisdictions to accommodate unique regional/local market developments and differences.

Draft Recommendation 5.1

The draft report states that the occupational licensing area should be an early priority for review (page 27). This is argued on the basis that licensing has compliance and administration costs, can restrict entry into the market, and reduce competition.

In this regard the work of the COAG Skills Recognition Taskforce needs to be shown appropriate consideration by the Commission. COAG has directed that full and effective mutual recognition of occupational licences for all vocationally-trained occupations be established by 31 December 2008. As part of this work six priority occupations (electricians, plumbers, carpenters and joiners, bricklayers, refrigeration and air-conditioning mechanics, and motor mechanics) were the subject of a national mutual recognition declaration in February 2007. The Taskforce is also working in conjunction with industry towards the harmonisation of various occupational licenses across States and Territories.

In light of this work, the Commission should reconsider whether there is an imperative for further action in this area as part of the proposed COAG oversight review and reform program.

The argument put forward by the Commission that the existence of up to 40 occupational licences, which are required in only one or two jurisdictions, is evidence of inconsistency and the need for a national regime equally underscores the need for jurisdictional flexibility. The fact that certain occupations are licensed in only one or two jurisdictions reflects the diversity of economic activity and policy priorities across jurisdictions. For example, the ACT has no need to license maritime or primary industry related occupations. However, energy assessors are licensed in the ACT, unlike other jurisdictions, as the ACT in response to community wishes has a regulatory requirement that residential properties for sale must specify the assessed Energy Efficiency Rating (EER) of the dwelling. The licensing of assessors ensures community confidence in these ratings.

Draft Recommendation 5.2

The ACT supports in-principle the transfer of responsibility for the regulation of finance brokers and credit providers to a centrally co-ordinated regulatory body reporting to the States and Territories. The framework for the regulation of finance brokers and credit provider must continue to support consumers and must enable local issues to be dealt with.

Draft Recommendation 5.3

The ACT notes that the issue of a national energy consumer body is already being considered through the COAG/Ministerial Council on Energy process.

There are important local/regional consumer protection considerations and a clear need for local knowledge of the ACT energy environment, and a local presence in each State/Territory. The ACT notes that generally there is little support from other jurisdictions for a rapid movement to a national energy ombudsman scheme (or equivalent).

In the long-term, a convergence into a national scheme may be desirable, but scheme design is paramount. Some of the existing national schemes in other industries are not working well enough for them to be a model for energy consumer protection (for example, the Telecommunications Industry Ombudsman and the Banking Ombudsman). There is also the danger of

using the lowest common denominator in a convergence, rather than the adoption of national best practice.

Importantly, a national energy ombudsman, without a strong local presence, could result in less timely access for hardship protections – this is crucial in an energy market as disconnection can have life-threatening effects in the ACT.

The ACT notes that consumer protection in the national energy market from a national regulatory framework is proceeding through the Ministerial Council on Energy.

Draft Recommendation 5.4

Under the Australian Energy Market Agreement dated 2 June 2006, the Ministerial Council on Energy agreed that the Australian Energy Market Commission review the effectiveness of retail competition in electricity and gas retail markets in each jurisdiction (except Western Australia) with a view to removing price caps still applying in contestable retail energy markets – the review for the ACT is scheduled for 2010.

The recommendation that ensuring that disadvantaged consumers continue to have sufficient access to utility services at affordable prices should be pursued through transparent and targeted mechanisms is agreed to. It should be noted that the ACT currently undertakes its assistance to disadvantaged energy consumers in a targeted and transparent fashion.

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.

In the ACT, the Essential Services Consumer Council facilitates the resolution of, and determines unresolved complaints about, utility services – electricity, gas, water and sewerage. Utility services for disadvantaged consumers continue to be provided to persons suffering financial hardship in the ACT.

The ACT supports the current ACT arrangements including a franchise tariff for those who do not enter the competitive market and fair consumer protection, such as currently exists in the ACT in the Consumer Protection Code, for those who enter market contracts. The current ACT market is a good illustration of how competition can work reasonably well within a regulated framework.

The ACT also notes the major move in the United States of America (USA) back to price regulation and the comparative data that shows that electricity prices have increased more in those USA states that removed price regulation in comparison with those states that continued regulation.

Draft Recommendation 5.5

The ACT already has in place adequate consumer protection for home builders and people renovating their homes including alternative dispute

resolution mechanisms, provision to de-register incompetent builders and compulsory builders' warranty insurance.

Draft Recommendation 6.1

The ACT supports in-principle this recommendation, but only as it relates to the transfer of power for the regulation of finance and mortgage brokers and credit providers.

Draft Recommendation 6.2

The ACT does not support this recommendation on the basis of its lack of support for the transfer of power for the regulation of a new national generic consumer law policy framework generally.

Draft Recommendation 7.1

The ACT, through the MCCA process, has supported in-principle the introduction of unfair terms in contracts legislation. MCCA, through the Standing Committee on Consumer Affairs (SCOCA), set up a working party of which the ACT is a member, which has developed a model law for unfair terms in contracts based on the Victorian and United Kingdom approach, with some refinements.

The ACT supports in-principle the inclusion of a new provision in the new national generic consumer law, which protects consumers from unfair terms in contracts, based on the model law developed by the MCCA/SCOCA working party.

Draft Recommendation 8.1

The ACT supports raising awareness among consumers and suppliers about statutory rights and responsibilities in the consumer law and where appropriate taking enforcement action against misleading marketing and sale of extended warranties.

Draft recommendations 8.2 and 8.3

The merits of these recommendations should be included on the MCCA agenda for consideration and action, where appropriate.

Draft Recommendation 9.1

The ACT supports this recommendation in-principle. The ACT, through the Office of Regulatory Services, is a participant of AUZSHARE.

Draft Recommendation 9.2

The merits of this recommendation should be included on the MCCA agenda for consideration and action, where appropriate.

Draft Recommendation 9.3

The ACT court system has a different process configuration to other jurisdictions, but consideration could be given to examining this proposal as against ACT specific issues.

It is unclear how the introduction of uniform subsidy rates for consumers seeking redress for small claims would result in improvements in the small claims court and tribunals.

Equal availability of fee waivers for disadvantaged consumers is already available in the ACT, 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, would increase costs and delays in justice in the ACT.

Draft Recommendation 9.4

The ACT supports this recommendation in-principle.

Draft Recommendation 9.5

This recommendation should be placed on the MCCA agenda for consideration and action, where appropriate.

Draft Recommendation 9.6

The ACT notes that there is limited funding for individual consumer advocacy through legal aid and financial counselling services, even for vulnerable and disadvantaged consumers. While services such as these could always be expanded, the report does not provide adequate evidence that there is *insufficient* funding in *all* jurisdictions.

The ACT also notes that case-by-case litigation is an inefficient method for achieving broad consumer protection outcomes. Case-by-case litigation tends to benefit a single consumer or seller or manufacturer rather than dealing with underlying systemic problems. Litigation should be the last resort. However, the ACT supports systemic measures, particularly systemic regulation, as the preferred means of regulating efficient market behaviour.

Draft Recommendation 10.1

The ACT supports in-principle this recommendation, noting that these matters are on the MCCA agenda for consideration.

Draft Recommendation 10.2

This recommendation should be placed on the MCCA agenda for consideration and action, where appropriate.

Draft Recommendation 10.3

The ACT believes that reporting of this type of regulatory/enforcement intelligence can be achieved through informal agreement and cooperation between the jurisdictions rather than by legislative coercion.

Draft Recommendation 11.1

The ACT supports in-principle this recommendation noting that the proposal should be placed on the MCCA agenda for consideration and action, where appropriate. This recommendation could be redrafted to provide guidance on when, and to what degree, information disclosure requirements should be imposed.

Draft Recommendation 11.2

The costs of funding such a cross-jurisdictional evaluation would be very costly for a small jurisdiction like the ACT. The ACT believes that the Australian Government is better placed to fund this project.

Draft Recommendation 11.3

The ACT supports the proposal for the Australian Government to provide appropriate funding to support research into consumer policy issues, a national peak consumer body and networking and policy functions of consumer groups.