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AN INTRODUCTION TO THE AUSTRALIAN CONSUMER LAW

Standing Committee of
Officials of Consumer Affairs

Forum for Consumer and Business
Stakeholders

27 November 2009
Melbourne

Thank you for the opportunity to speak with you today, and thanks also to the Chair of SCOCA, Anne Driscoll, and the Director of Consumer Affairs Victoria, Dr Claire Noone, for hosting this event.

The Australian Consumer Law is the largest overhaul of Australia's consumer laws in 25 years. It will introduce a single, national consumer law that will apply consistently in all Australian jurisdictions.

Today, I will talk about the development of the Australian Consumer Law, explain what the Law will include and how it is being implemented.

The benefits of a single national law

The benefits of a national approach to consumer law have been apparent for some decades. Indeed, there was a largely successful attempt to implement consistent consumer laws in the 1980s through a template legislation scheme based on Part V of the *Trade Practices Act 1974*.¹

But, the benefits of this consistency were short-lived, and since then individual governments – and I include the Australian government – have all pursued their own improvements to consumer laws, leading to divergence, duplication and complexity. The net result is that businesses and consumers are not able to fully understand their rights and obligations under the law, which leads to costs – in terms of time, money and reduced confidence in markets.

These developments are understandable – governments face pressures to address specific concerns every day and the answer is often to do something.

¹ For a brief history of consumer policy in Australia see S Hally-Burton, S Shirodkar, S Winckler and S Writer (2008) *Harnessing the demand side: Australian consumer policy* 4 Economic Roundup 91, Australian Government, Canberra (<http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1451>).

However, the consequences of such unilateral action by individual jurisdictions – for both businesses and consumers – are not always fully appreciated.

Consumers, markets and regulation

At the Australian Treasury, our mission is to ‘improve the wellbeing of the Australian people’ and, to do this, Treasury applies a ‘*Wellbeing Framework*’ that includes aspects such as the opportunities and freedom people have, the availability and distribution of choices to them, and the risks and complexity they face.

These principles are not remarkable in themselves, and reflect the sorts of issues that all policymakers – at all levels of government – consider. What these considerations do make clear, however, is that, to the extent that there is a balance, it is not between competing sectoral interests, but between the degree to which a policy decision does or does not enhance the wellbeing of Australians.

In considering consumer policy, this approach is reflected in the national consumer policy objective: ‘*To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.*’

Consumer policy and the Australian Consumer Law

I now want to turn to some of the specifics of the Australian Consumer Law and the reform process we are now engaged in.

In Australia we have – as the Productivity Commission found – a largely effective regime of consumer laws.² But the PC also found that these laws, through their complexity, duplication and inconsistency, can inhibit improvements in the wellbeing of Australians. They increase costs for consumers by making them pay for the inefficiencies that they impose on businesses. They also reduce consumer confidence in making choices, asserting their rights and seeking redress when things go wrong.

Through their complexity, these laws have a negative effect on competition, innovation and efficiency in the economy. Australians spent \$655.13 billion (excluding dwellings) in 2008-09³, which clearly shows the potential negative effect on consumers' from a legal framework that does not support these consumption decisions.

The PC has attempted to quantify the benefits that could flow from a national approach to consumer policy and suggest they could amount to \$1.5 billion to \$4.5 billion per annum.⁴

What are we replacing?

In considering the move to a single law, it is worth considering the complexity that it will start to replace.

At the moment, Australia's general consumer laws consist of 13 Acts which cover the same broad subject matter, including two national laws in the form of the consumer provisions of the *Trade Practices Act 1974* and the *ASIC Act 2001*

² Productivity Commission (2008) Vol. I p.2.

³ Australian Bureau of Statistics (2009) Series ID A2302254W Households Final Consumption Expenditure, 5206.0 *Australian National Accounts: National Income, Expenditure and Product*.

⁴ Productivity Commission (2008) Vol.II, p.323.

and eight state and territory *Fair Trading Acts*,⁵ plus – in three jurisdictions – another three more laws which deal with generic consumer protections.⁶ There are also some general consumer provisions in another eight state and territory laws about the sale of goods.⁷

The current system is complex enough for consumers and businesses, without even considering specific regulations made under each Act, guidelines and licensing requirements.

Based on a count of substantive consumer provisions, the Australian Consumer Law will replace at least 850 sections in these Acts, not including many of the ancillary enforcement and other provisions that support them. As an economist, and one that has only recently moved into this area of policy, I am often stunned by the ability of lawyers and legislation to introduce complexity in to what appear to be readily straightforward ideas.

Every jurisdiction also has a wide range of sector-specific consumer protection laws, designed to address the needs of individual economic sectors, extending from the regulation of hairdressers to electricity retailing.⁸ These other laws are up for consideration in this process – and I will talk about that later – but the first step in reforming our consumer laws will be the implementation of the Australian Consumer Law.

⁵ The NSW *Fair Trading Act 1987*, the Victorian *Fair Trading Act 1999*, the Queensland *Fair Trading Act 1989*, the SA *Fair Trading Act 1987*, the WA *Fair Trading Act 1987*, the Tasmanian *Fair Trading Act 1990*, the ACT *Fair Trading Act 1987* and the NT *Consumer Affairs and Fair Trading Act 1990*.

⁶ The WA *Consumer Affairs Act 1971*, the SA *Consumer Transactions Act 1972* and the ACT *Fair Trading (Consumer Affairs) Act 1973*.

⁷ The NSW *Sale of Goods Act 1954*, the Victorian *Goods Act 1958*, the Queensland *Sale of Goods Act 1896*, the WA *Sale of Goods Act 1895*, the SA *Sale of Goods Act 1895*, the Tasmanian *Sale of Goods Act 1896*, the ACT *Sale of Goods Act 1954* and the NT *Sale of Goods Act*.

⁸ See PC (2008) Vol.II p.20ff.

The Australian Consumer Law

Let's turn to the Australian Consumer Law itself.

Back on 2 October 2008, the Council of Australian Governments agreed to the creation of an Australian Consumer Law⁹ based on the recommendations of the Ministerial Council on Consumer Affairs,¹⁰ which would include:

- a single national law for consumer protection and fair trading, based on the existing consumer provisions of the *Trade Practices Act*;
- a national unfair contract terms law;
- a national product safety regulatory system; and
- further reforms designed to enhance the operation of the law which draw on best practice in existing state and territory laws.

Governments are also examining a national approach to the rights consumers have when they buy goods and services, and their conditions and warranties.

The Law will introduce nationally consistent rules for business and trading practices, product safety obligations and the conduct of business-to-consumer transactions, including consumer contracts. These rules will apply to all businesses, and will apply throughout Australia.

The Australian Consumer Law will be enacted as a schedule to the *Trade Practices Act 1974*, which itself will be renamed as the more apt *Competition and Consumer Act 2010*.

⁹ See (2008) COAG *Communiqué* - 2 October 2008 at http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm.

¹⁰ See MCCA (2008) *Communiqué* - 15 August 2008 at http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf.

Key elements of the Australian Consumer Law

Let me expand a little on some of the key elements of the Australian Consumer Law.

The structure of the law

As recommended by the Productivity Commission¹¹, the existing provisions of the *Trade Practices Act* will be the ‘stepping off’ point for the new Law. As part of this process the existing provisions of the Act dealing with unconscionable conduct, unfair practices, pyramid selling, enforcement powers, penalties and remedies and definitions will form the core of the new Law.

Unfair contract terms

The introduction of a national unfair contract terms law has received intense scrutiny and led to considerable debate.

The proposed law is based on the recommendations of the Productivity Commission and on the law which has been in place in Victoria since 2003.¹² The Bill before Parliament has received extensive scrutiny and debate, and it reflects this and the lessons drawn from the application of similar laws for the past six years in Victoria and for the past 10 years in the United Kingdom.

Enforcement powers, penalties and remedies

The Australian Consumer Law will include a single suite of enforcement powers, penalties and remedies for breaches of consumer laws. These will carry across the existing enforcement powers, penalties and remedies found in the

¹¹ Productivity Commission (2008) Vol.II, p.62.

¹² Productivity Commission (2008) Vol.II, Chapter 7; Victorian *Fair Trading Act 1999, Part 2B*.

Trade Practices Act – such as criminal sanctions for the most serious breaches of the law, injunctions, damages, and others.

The Law will also introduce a new set of enforcement powers, which commonly exist at the state and territory level, but which will become consistent for the first time and will be used by all Australian consumer agencies. These include:

- civil pecuniary penalties;
- infringement notices allowing for minor infringements to be dealt with through the payment of small sums;
- disqualification orders, banning individuals from managing corporations or from engaging in specific forms of conduct;
- public warning notices, allowing for consumer agencies to warn the public about specific traders;
- substantiation notices, allowing consumer agencies to seek substantiation of claims made in trade or commerce; and
- consumer redress orders, allowing non-party consumers to obtain redress for breaches of the Law.

These new powers will allow for consistency in consumer law enforcement, improve outcomes for consumers and provide more certainty for businesses.

Product safety

The Australian Consumer Law will implement a national product safety legislative and regulatory regime, as agreed by COAG in July 2008.¹³ This will provide for a more integrated approach to the enforcement of product safety laws, and will be reflected in the enhanced role of the ACCC in this area. Of course the States and Territories will remain intimately involved, in the enforcement of product safety laws, and ensuring the protection of the public.

Statutory conditions and warranties

Ministers have agreed to examine the effectiveness of the current laws about statutory conditions and warranties. To this end, the National Education and Information Advisory Taskforce undertook a detailed quantitative and qualitative study of the experience of Australian consumers with these laws.¹⁴

The conclusions of that report are concerning: indicating a widespread lack of understanding about consumers' rights and businesses' obligations, undermining the effectiveness of these laws.

The Commonwealth Consumer Affairs Advisory Council has also undertaken a review of these laws, informed by NEIAT's work, including a wide-ranging consultation process.¹⁵ It has made recommendations for reform, and these will be considered by the Commonwealth, state and territory ministers at their meeting next week.

¹³ See http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm.

¹⁴ See NEIAT *National Baseline Study on Warranties and Refunds* (2009) SCOCA, Melbourne (<http://www.treasury.gov.au/contentitem.asp?ContentID=1666&NavID=037>).

¹⁵ See CCAAC (The Treasury) *Consumer rights: Statutory implied conditions and warranties* (2009) Australian Government, Canberra (<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1586>).

The work of NEIAT and CCAAC represents a model for consumer policy: by informing its development with a detailed empirical and policy more generally; by examining the nature and impacts of market issues; and by allowing policymakers to identify and address actual consumer problems, and not the perception of one.

Reforms based on best practice in state and territory consumer laws

Lastly, the Productivity Commission recommended that the Australian Consumer Law should be enhanced by reference to best practice in existing state and territory consumer laws.¹⁶

Over the past year, consumer policy officials have undertaken a detailed review of consumer laws, to ensure that the Australian Consumer Law can include provisions which enhance the way in which it works, drawing on the extensive policy development and enforcement experience of States and Territories.

Implementing the Australian Consumer Law

The Australian Consumer Law will be implemented in two stages¹⁷ and will commence on 1 January 2011, as agreed by the Commonwealth, States and Territories at COAG in November 2008.¹⁸

The first implementation Bill

In June of this year, the Australian Government introduced a Bill¹⁹ to:

¹⁶ Productivity Commission (2008) Recommendation 4.1.

¹⁷ The Hon CE Bowen MP (2009) *Australian Consumer Law - The Future* Address to the Monash Centre for Regulatory Studies, 17 February 2009
<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2009/001.htm&pageID=005&min=ceb&Year=&DocType=1>.

¹⁸ See COAG (2008) *National Partnership Agreement to Deliver a Seamless National Economy* (http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/index.cfm).

- set up the Australian Consumer Law as a schedule to the *Trade Practices Act*, to be applied by the Commonwealth and each State and Territory;
- deal with unfair contract terms in consumer contracts; and
- enhance the range of enforcement measures available to the ACCC and ASIC in enforcing consumer laws.

The provisions setting up the Australian Consumer Law will let jurisdictions apply it prior to the 1 January 2011 deadline set by COAG. The unfair contract terms provisions are now proposed to commence on 1 July 2010 and the new enforcement powers, penalties and remedies will commence as soon as the Bill is passed, and these will form the basis of the new common powers to be included in the Australian Consumer Law.

The second implementation Bill

In early 2010, the Government will introduce a second Bill to:

- complete the implementation of the remainder of the Australian Consumer Law, which will be based on the existing consumer and enforcement provisions of the *Trade Practices Act*;
- implement a new national framework for product safety; and
- enhance the Australian Consumer Law, by making changes which draw on best practice in existing state and territory laws.

Once this legislative process is completed at the national level – which we hope will be by mid-2010 – each State and Territory will then enact an application

¹⁹ See <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4154%22>.

law, which will make the Australian Consumer Law a law of that jurisdiction and repeal its own consumer laws of general application.

The Australian Consumer Law is then required, according to agreed COAG timeline, to commence on 1 January 2011 along with the required supporting enforcement and compliance framework.

The Australian Consumer Law in practice

The commencement of the Australian Consumer Law is not the end of the story, and on 2 July 2009, COAG agreed to an *Intergovernmental Agreement for the Australian Consumer Law*²⁰ which will govern the way in which the Law is amended, administered and enforced in the future.

Changing the Law

Amendments to the Law will be made in accordance with a process set out in the Intergovernmental Agreement. For a change to be made, the Commonwealth plus four jurisdictions – three of which must be States – must agree after a regulatory impact assessment, to the extent relevant changes cover any amendment to the text of the Law and any regulations made under it.

Enforcing and administering the Law

The Agreement also makes provision for the enforcement and administration of the Law. It sets out high-level commitments by Australia's consumer agencies on the way they will work together to administer and enforce the law, including formal cooperation arrangements and national guidance.

²⁰ See http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/index.cfm#regulatory and http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf.

This will be discussed in more detail by Marcus Bezzi from the ACCC shortly, but will be guided by a Memorandum of Understanding between all Australian consumer agencies and our New Zealand counterparts, which is in the final stages of development.

The Intergovernmental Agreement codifies a range of requirements when considering policy proposals. And it requires a review of the Law and its enforcement within seven years of its commencement. It also contemplates a ‘second-wave’ of reforms, which will focus on rationalising and harmonising state and territory sector-specific consumer laws.

The new framework will also be supported by a reinvigoration of MCCA’s processes, which is very much being led by our current chair Ann Driscoll, reflecting our new approach to consumer policy.

Conclusion

We are fast approaching the time at which the Australian Consumer Law will be completed. In this process we have benefited from the views of many stakeholders, for which we, and our SCOCA colleagues, are grateful. And of course we will consult further on the detail of provisions in the coming months.

The Australian Consumer Law represents an opportunity for a new approach to consumer policy, drawing on the widest range of consumer policy and enforcement experience and expertise. We can introduce a consistent approach to consumer law and policy, enabling all Australian consumers to enjoy the benefits of consistent rights wherever they may be, and allowing all Australian businesses to obtain greater efficiencies through a single, simplified national law. In this way, it will enhance the wellbeing of all Australians.

Thank you.