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"Consumer Protection Laws in Australia – The Future"

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Table of Contents

Pages

1. Introduction and Context*

1.1 This paper considers a number of aspects of the proposed new national generic consumer law in Australia, which follows on from the Productivity Commission ("PC") review of the consumer policy framework.[1] In particular, the need for further consideration of proposals relating to unfair contract terms provisions and unfair conduct provisions are highlighted. The opportunity to reconsider the adoption of *cy-près* provisions should be taken prior to introduction of the new law in three years time.

Background

1.2 Laws that benefit, empower, or protect consumers in their dealings with suppliers of goods or services can be "generic" in nature or "industry-specific". In this context, "generic" laws are those that apply to all businesses or suppliers of goods or services. They can be regarded as setting or requiring a specified standard of conduct for all suppliers of goods or services. For example, that in supplying their goods or services, suppliers do not engage in misleading or deceptive conduct. By way of comparison, "industry-specific" consumer laws apply to suppliers of goods or services in a particular industry. For example, laws that benefit, empower, or protect consumers in their dealings with real estate agents or motor car traders. Industry-specific consumer laws can be efficient if they are targeted because they do not create a burden of unnecessary regulation on other industries. However, in some industry-specific consumer laws, there are also provisions that effectively mirror some provisions from the generic law.[2]

1.3 Other generic laws can also benefit or empower consumers in purchasing goods or services. For example, an ultimate aim of Australia's competition laws[3] is to

* We would like to acknowledge and record our appreciation of the assistance we have received from Mr Peter Hiland, Special Counsel, Compliance and Enforcement, Consumer Affairs Victoria.

[1] *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report, No. 45, 30 April 2008.

[2] For example, see section 84A *Motor Car Traders Act* 1986 (Vic); or clauses 5(2) and 5(3) of the *Code of Conduct for Agents and Sales Representatives* made under section 101 of the *Real Estate and Business Agents Act* 1978 (WA); or regulations 14 and 15 of the *Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation* 2001 (Qld).

[3] Principally, the provisions in Part IV of the *Trade Practices Act* and the *Competition Codes* of the States and Territories. [4] See the *Consumer Credit Code*, being the appendix to the *Consumer Credit*

benefit or empower consumers. However, their immediate objective is to promote competition between suppliers of goods or services by prohibiting specified forms of anti-competitive conduct. They do not directly regulate the relationship between the suppliers of goods or services and consumers. It is not doubted that, effectively, competitive markets provide significant benefits to and empower consumers. However, competition law is not the direct subject of this paper.

1.4 Laws that deal with particular methods of supplying goods or services such as e-commerce, m-commerce, telemarketing, or door-to-door sales can also be considered as generic in nature. They would apply to suppliers of goods or services from any industry who choose to promote or supply their goods or services by that method.

1.5 In Australia, suppliers of goods or services can be subject to obligations under both generic consumer laws and industry-specific consumer laws regarding their dealings with consumers. The Commonwealth TPA and State / Territory FTAs are generic consumer laws. The State and Territory *Consumer Credit Codes*,[4] which apply to the provision of credit for personal, domestic, or household purposes, are an example of industry or sector-specific consumer laws.

1.6 Australia's generic competition and consumer protection laws exist at both the Commonwealth level and the State / Territory level. At the Commonwealth level, they are principally in one Act of Parliament – the *Trade Practices Act* 1974. Essentially, the competition laws are in Part IV of the TPA ("Restrictive Trade Practices") and the consumer laws in Parts IVA ("unconscionable conduct"); IVB ("Industry Codes"); and V ("Consumer Protection"). However, the Commonwealth consumer laws for suppliers of "financial products" or "financial services" are in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act* 2001. In that sense, they can be regarded as industry or sector-specific laws. At the State and Territory level, they are in different Acts. The competition laws are in the *Competition Policy Reform Acts* and *Competition*

(Queensland) Act 1994 (Qld), which has been picked up and applied by the other States and Territories through the *Consumer Credit (New South Wales) Act* 1995 (NSW); *Consumer Credit (Victoria) Act* 1995 (Vic); *Consumer Credit (Tasmania) Ac*t 1996 (Tas); *Consumer Credit (South Australia) Act* 1995 (SA); *Consumer Credit (Western Australia) Act* 1996 (WA) and the *Consumer Credit (Western Australia) Code*; *Consumer Credit Act* 1995 *(ACT) and the Consumer Credit (Administration) Act* 1996 (ACT); and *Consumer Credit (Northern Territory) Act* 1995 (NT).

Codes of each State and Territory and the consumer laws in the *Fair Trading Acts* of each State and Territory. (New Zealand has the dual Act system too, with competition laws in the *Commerce Act* and consumer laws in their *Fair Trading Act*.) Further, at the State and Territory level, some have a dual Act arrangement regarding consumer law. One Act dealing with "institutional arrangements and issues" (eg. *Consumer Affairs Act* 1971 (WA)) and another with "conduct issues" (eg. FTA WA).

1.7 The legal effect of the single Act or dual Acts options is not likely to be different. Justice Mason, of the High Court of Australia, considered the relationship between the policy objectives of Part V of the TPA headed "Consumer Protection" and those underpinning Part IV of the TPA headed "Restrictive Trade Practices" and said:[5]

> "The object of Pt. V is to protect the consumer by eliminating unfair trade practices, just as the object of Pt. IV is to promote competition by eliminating restrictive trade practices. Knowledge of the history of the legislative proposals, of the legislation and of the controversy which has surrounded it might suggest that the dominant object of the Act is the promotion of freedom of competition. But examination and analysis of its provisions yields no acceptable foundation for this conclusion. The two Parts are independent and there is no direction that one Part is to be read subject to the other. Although they have to be read together as parts of the same statute, they might in other circumstances have been enacted as separate statutes with not very much difference in legal effect."

and

> "The statutory policy, as it seems to me, is that the interests of a consumer of goods or services will best be served when manufacturers compete vigorously without adopting restrictive practices and observe prescribed standards of conduct in their dealings with consumers."

1.8 The issue arises as to whether or not the new national generic consumer law should be in a separate Act? Also, given the aim of a (uniform) national generic consumer law and the aim of ultimately eliminating unnecessary industry-specific consumer laws and relying on universal coverage of the national

[5] *Parkdale Custom Built Furniture Pty Ltd* v *Puxu Pty Ltd*; (1982) 149 CLR 191 at p. 204; (1982) ATPR 40–307 at p. 43,786.

consumer law, what is the appropriate title for the law? A variety of options exist including, for example, "Consumer Protection Law"; "Fair Trading Law"; "Consumer Protection and Fair Trading Law". The word "Law" could be substituted with "Act" or "Code". Given the objective of universal coverage of the national law, the importance of the title of the law, in terms of community recognition, acceptance and application, may well be significant.

1.9 The Commonwealth, after the enactment of the Commonwealth *Trade Practices Act* in 1974, and also the States and Territories, both before[6] and after enactment of their Fair Trading Acts, have had a substantial involvement in the development and evolution of consumer policy and also in the application and enforcement of (the existing) consumer laws. This contrasts markedly with the relative non-involvement by the States and Territories in competition policy (after 1974 until the early 1990s) and in application and enforcement of competition laws at all.[7] Accordingly, there has been substantially different levels of involvement of State and Territory agencies and in their experience and expertise in the development and application or enforcement of generic consumer law as compared with their involvement in development and application or enforcement of competition laws.

1.10 Much of Australia's generic consumer law is broadly consistent (as the PC recognised[8]). A substantial amount of jurisprudence now exists in Australia interpreting, clarifying, and applying Australia's existing generic consumer laws, also in a broadly consistent way. The High Court of Australia, as the ultimate appellate court in interpreting the provisions of the TPA and an FTA, has acknowledged the agreement between State and Territory Ministers to use the consumer protection provisions of the TPA "as the basis upon which uniform legislation is to be developed".[9] It must also be borne in mind that Australia's model for enforcement of the generic consumer law incorporates both public and private enforcement. In fact, the vast majority of consumer protection cases under

[6] For example, through the various *Sale of Goods Acts*; and other Acts such as the *Misrepresentation Act* 1971 (SA) and the *Consumer Affairs Act* 1971 (WA).
[7] The States and Territories have conferred those functions and powers on the ACCC through their *Competition Policy Reform Acts* (Division 2).
[8] See PC report, p. 58.
[9] See *Houghton* v *Arms* [2006] HCA 59; (2006) 225 CLR 553 at pars [21] to [25] per Justices Gleeson CJ, Gummow, Hayne, Heydon and Crennan.

Part V of the TPA are private cases not involving the regulator.[10] Further, unlike enforcement of Australia's national generic competition laws which is practically limited to proceedings in the Federal Court of Australia[11] (and on appeal, the High Court of Australia) enforcement of the current generic consumer laws occurs through virtually all courts (State, Territory, and Federal) and even some Tribunals (for example, the Victorian Civil and Administrative Tribunal).

1.11 The aim of developing a national generic consumer law and eventual elimination of industry-specific consumer laws should be to retain the benefit of and build on, or enhance the body of case law regarding Australia's generic consumer law. That is, to refine the existing generic consumer law regulation model from the:

> *"similar laws*; multiple regulators and private enforcement (regulation); and multiple Courts and Tribunals model"

to the

> "*one law*; multiple regulators and private enforcement (regulation); and multiple Courts and Tribunals model."[12]

1.12 Related aims to developing a best practice national generic consumer law include making the existing laws simpler, more accessible, more efficient, and effective for consumers, businesses, and their advisers.

1.13 For Constitutional reasons, without a referral of State powers, to ensure there is universal coverage of the national generic consumer laws to natural persons, it is essential that there be State and Territory laws applying the agreed provisions of the national generic consumer law to "a person" rather than "a corporation". The

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[10] See for example the selection of cases regarding the misleading or deceptive conduct (section 52) or false or misleading representations (section 53) provisions of the TPA at pp 467–584 of *Miller's Annotated Trade Practices Act* 29th Edition, 2008 by Russell Miller, Thomson Lawbook Company 2008.

[11] Initially, jurisdiction over competition law cases under the *Competition Codes* of the States and Territories was exclusively conferred on the Federal Court of Australia (see section 150D of the TPA and [prior to repeal of various sections] Division 2 of the uniform State and Territory *Competition Policy Reform Acts*). However now proceedings under the *Competition Codes* can now be instituted in State Courts. Competition law cases under Part IV of the TPA are regarded as "Special Federal matters" and exclusive jurisdiction is conferred on the Federal Court of Australia to determine those cases. See section 86 of the TPA.

[12] By way of comparison, Australia's competition law regulation model is:
"*one law*; one regulator (ACCC) and private enforcement (regulation); and (initially legally, now practically) one Court and Tribunal (Federal Court of Australia and Australian Competition Tribunal) model".

decision of the High Court in *Houghton* v *Arms*[13] upholding the view that employees (as well as directors) engaging in prohibited conduct in the course of their employment may be liable as principal contraveners under State and Territory consumer laws may also be of value in trying to effectively deal with the continuing and perhaps growing phenomenon of use of phoenix companies.[14] That is, redress for consumers may be available directly from directors and senior managers who engage in the impugned conduct (contrary to the generic consumer law) in the course of their duties for a corporation, even if the corporation is put into liquidation.[15] Accordingly, direct application of the national generic consumer law to individuals (natural persons) remains critical.

1.14 The existing role played by State and Territory consumer / fair trading agencies in educating and achieving outcomes for consumers has been substantial. For example, in the 2007–2008 financial year, Consumer Affairs Victoria recovered more than $5.7 million for Victorian consumers through court orders and dispute resolution. (This represented a 24 percent increase on the $4.1 million recovered in 2006–2007.) Consumer Affairs Victoria's dispute resolution service conciliated 10,900 disputes last financial year, making it one of the largest alternative dispute resolution providers in Victoria. Consumer Affairs Victoria also undertook 7,900 independent inspections to try to resolve disputes between tenants and landlords.[16] This provides some insight into the value and effectiveness of at least one of the State agencies' role in the community. Similarly, for the 2006–2007

[13] (2006) 225 CLR 553.
[14] See for example, *"Creditors burned by rise of the 'phoenix companies'"* – The Sunday Age, 4 May 2008 at p. 5. Apart from the impact on creditors, the issue of the impact of "phoenix companies" on consumers purchasing goods or services and paying money to such companies and not receiving them or otherwise being victims of conduct in contravention of the consumer laws is a significant issue. The issue of obtaining redress for consumers from the people behind the companies that are sunk and preventing rogue or scam businesses restarting with a new legal identity remains an important challenge for consumer regulators.
[15] This would apply whether the company failure is part of the usual risks in a market economy or due to the deliberate intent of those behind the company to abuse the corporate form and improperly endeavour to take advantage of the privilege of limited liability.
[16] See *"Millions Recovered For Victorian Consumers"* Media Release, 23 September 2008 at website www.consumer.vic.gov.au.

year, the New South Wales Office of Fair Trading handled 34,000 disputes with over 85% successfully negotiated at an informal level.[17]

Productivity Commission report

1.15 The Productivity Commission conducted an inquiry and a systemic review of the consumer policy framework in Australia and released its final report over the period December 2006 to April 2008.[18]

1.16 The Productivity Commission's report has been reviewed and discussed.[19] For present purposes, it is sufficient to highlight the key points identified by the Commission in its final report. They were as follows:

> "1. While Australia's consumer policy framework has considerable strengths, parts of it require an overhaul.
>
> - The current division of responsibility for the framework between the Australian and State and Territory Governments leads to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making.
> - There are gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers.
> - These problems will make it increasingly difficult to respond to rapidly changing consumer markets, meaning that the associated costs for consumers and the community will continue to grow.
>
> 2. Addressing these problems will have significant direct benefits for consumers. Also by better engaging and empowering consumers and furthering the development of nationally competitive markets, reform will enhance productivity and innovation.
>
> 3. A set of clear objectives and supporting principles is required to anchor the future development of consumer policy.

[17] See *"A year in review 2006–2007 – Fair Trading: serving consumers and traders in New South Wales"*, New South Wales Office of Fair Trading, Department of Commerce, at website www.fairtrading.nsw.gov.au.
[18] See *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, 30 April 2008.
[19] See *"Productivity Commission – Consumer Policy Report"*, Paper by Dr D. Cousins, presented at Law Council of Australia, Business Law Section, Trade Practices Workshop, 5–7 September 2008, Fremantle.

- The overarching objective should be to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith.

4. A pressing need is to put in place institutional arrangements that are more compatible with the increasingly national nature of Australia's consumer markets and which will deliver more timely and effective policy change than the current regime.

   - In keeping with many of the other key policies governing commerce in Australia, greater responsibility for consumer policy development and enforcement should reside with the Australian Government.
   - The first step in this process should be the introduction of a single generic consumer law applying across Australia, based on the consumer provisions in the Trade Practices Act ("TPA"), modified to address gaps in its coverage and scope.
   - The Australian Government, through the Australian Competition and Consumer Commission ("ACCC"), should be responsible for enforcing the product safety provisions nationally, though possibly with scope for States and Territories to implement, time limited, interim product safety bans.
   - The remaining provisions should be jointly enforced by the ACCC and State and Territory consumer regulators, though individual States and Territories should have the option to refer their enforcement powers to the Australian Government.
   - The new law should include a provision voiding 'unfair' contract terms that have caused consumer detriment.
   - In addition to the enforcement tools currently in the TPA, it should provide for civil pecuniary penalties, banning orders and substantiation and infringement notices.

5. Responsibility for regulating the provision of consumer credit and related advice by finance brokers and other intermediaries should also be transferred to the Australian Government as soon as practicable, with ASIC as the primary regulator.

6. COAG, in consultation with the Ministerial Council on Consumer Affairs, should oversight a general reform program for industry-specific consumer regulation to:

   - identify and repeal unnecessary industry-specific consumer regulation, with an initial focus on removing regulations that apply in only one or two jurisdictions.
   - identify other areas of specific consumer regulation where divergent requirements and / or lack of policy responsiveness are particularly costly.
   - determine how these costs should be reduced, including explicit consideration of the case for transferring policy and, where appropriate, enforcement responsibilities to the Australian Government.

7. In addition:

   - Some particular regulatory requirements for consumer credit, utility services and home building should be modified.
   - Consumers' access to remedies where they suffer detriment from breaches of consumer law, should be enhanced by consolidating some ombudsman arrangements; streamlining small claims courts' procedures; making it easier for regulators to bring representative actions; and increasing funding for legal aid and financial counselling services.
   - Mandatory disclosure requirements should be improved by more 'layering' of the information provided to consumers and greater testing of its comprehensibility and relevance to them.
   - Subject to appropriate governance arrangements, there should be additional public funding for consumer advocacy and for policy related research, including to enable the establishment of a National Consumer Policy Research Centre.

8. Many of the Commission's proposals would benefit vulnerable and disadvantaged consumers, with some being primarily designed to assist these groups. However, for some groups, specific additional strategies may be required.

9. The proposed changes would also further the economic integration goals of the Australian and New Zealand Governments.

10. Though only very broad quantification is possible, the Commission's reform package could provide a net gain to the community of between $1.5 billion and $4.5 billion a year."[20]

Fixing problems created by a jurisdictional carve out of the TPA regarding financial products and services

1.17 The PC Report recommended[21] that the new national generic consumer law should apply to all consumer transactions including financial services. The Ministers agreed at the Ministerial Council on Consumer Affairs ("MCCA") meeting on 23 May 2008 to support a new national harmonised generic consumer law to apply in all Australian jurisdictions. Consistent with the "one law; multiple regulators" model and with the aims of making the laws simpler and more accessible, removal of provisions creating a jurisdictional carve out of "financial products" and "financial services" from the consumer protection provisions of the TPA[22] is required.

1.18 There would then be concurrent jurisdiction under the national generic consumer law for all consumer regulators. Inter-agency agreements and co-operation would achieve the objective of ASIC being the "primary regulator" for financial services and other similar objectives as agreed between the agencies or MCCA.

Concerns regarding application of TPA to "property investment advice"

1.19 A Green Paper on Financial Services and Credit Reform was released on 3 June 2008 by the Minister for Superannuation and Corporate Law, Senator the Honourable Nick Sherry. On the chapter dealing with "Property Spruikers", the

[20] The PC's attempt to estimate quantitatively the impact of its reforms was innovative and in the Commission's words "experimental, incomplete and clearly highly assumption-dependent." For example, a key assumption made was that the reforms proposed would reduce consumer detriment by 5 percent. This seemed to be based on an approach adopted in the UK to assess the impact of the Unfair Commercial Practices Directive in that country. Overall, the largest component of the estimated net gains for the community of between $1.5b and $4.6b, or an average of $2.8b a year, came from net avoided direct detriment for consumers, but substantial amounts also came from estimated productivity or innovation gains and transaction efficiencies. A relatively small amount came from reduced business compliance costs.

[21] See PC recommendation 4.2 at p. 79 of the report.

[22] For example, removing provisions like sections 51AAB and 51AF of the TPA.

Green Paper states[23] that the area of greatest concern to consumers is the way property spruikers deliver their advice. The major characteristics of property spruiking may include:

- high-pressure, fast-paced presentations that encourage people to make decisions there and then that they may otherwise not take;
- misrepresentation or exaggeration about the benefits of buying properties, including the overstating of property values, rental returns, and capital growth; and also
- aggressive or harassing behaviour.

The Green Paper states that property spruikers take advantage of regulatory gaps and inconsistency between fair trading laws, the financial services regime, and the real estate agent licensing regime administered by the states. Principally:

- there are no legislated codes of conduct within the industry;
- consumers have little or no recourse if they feel they have been deceived, misled, or cheated out of money; and
- Governments have limited powers to take action against problem operators.

It suggests that certain consumer protection legislation, including the TPA or the *ASIC Act*, ***may*** apply.

1.20 The reason for the use of the word "may" is not readily apparent. If the property investment advice is properly characterised as a "financial service", then the *ASIC Act would* apply. If it is not a financial service, then the TPA *would* apply. Further, as the Green Paper acknowledges, the State / Territory FTAs would also apply. There is no regulatory gap in that sense. If there has been identified some other respect in which the application of the TPA (or an FTA) to property investment advice is uncertain, then that needs to also be considered and, if necessary, fixed for the purposes of the national generic consumer law.

[23] See Green Paper Financial Services and Credit Reform – June 2008 (C'th) Chapter 5 at pp. 43–44.

Government response to PC report and reform proposals

Council of Australian Governments ("COAG") role

1.21 In the normal course of events, the Australian Government would respond formally to PC reports within six months and, would do so in close consultation with the States and Territories, given their extensive role in consumer policy. Final agreements on new arrangements could be expected to be ratified by COAG. However, COAG has taken a more active role in recent times in driving reform outcomes.

1.22 COAG initiated a significant National Reform Agenda, including a regulatory reform stream, at its 10 February 2006 meeting.[24] A number of consumer policy areas were specifically identified as target hot spots for regulatory reform under this initiative, including national trade measurement, building regulation, business names registration, personal property securities and product safety. A Business Regulation and Competition Working Group ("BRCWG") has been established by COAG to drive its regulatory reform agenda. The BRCWG is co-chaired by two Australian Government ministers, Tanner and Emerson. COAG accepted a reform agenda proposed by the BRCWG at its meeting on 26 March 2008, which included the development of a response to the PC's review of the consumer policy framework. A report back to COAG on this was scheduled for the 2 October 2008 COAG meeting. Specifically, COAG agreed that:

> "BRCWG, in consultation with the Ministerial Council on Consumer Affairs, will develop by October 2008 enhanced national approaches to improve the consumer policy framework, including legislative and regulatory structures, drawing on the final report of the Productivity Commission."[25]

Ministerial Council on Consumer Affairs

1.23 The MCCA has met on two occasions since the PC's report was released. Ministers have generally been keen to be seen to be responding positively to the report and to reach agreement on its recommendations.

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[24] Australia, Council of Australian Governments, Meeting 10 February 2006 Communiqué.
[25] Council of Australian Governments, Business Regulation and Competition Working Group, Implementation Plan Summary, at p. 11, Meeting 26 March 2008.

1.24 At its May 2008 meeting, MCCA Ministers committed to meeting the Council of Australian Governments' deadline of October 2008 for developing enhanced national processes to improve the consumer policy framework. Ministers also reached in principle agreements on a range of matters, including a common set of objectives for consumer policy; a national harmonised generic law based on the *Trade Practices Act* and amendments including unfair contract terms; joint enforcement of this law by the Australian, State and Territory Governments; national harmonised product safety regulation; and an improved framework for credit regulation. Officials were to further progress the details of these matters prior to the next meeting of MCCA.[26]

1.25 Further significant progress in reaching agreement on implementation of the PC's recommendations was made when the Ministerial Council met in Hobart on 15 August 2008. Ministers reached agreement on a series of proposals "for far reaching consumer policy reform". These proposals were for COAG to consider. They cover a national consumer policy objective, a national consumer law, unfair contract terms, enforcement of the national consumer law, consumer information, consumer research and advocacy, review of sector specific laws, and other matters for noting. The relevant aspects of the Joint Communiqué, issued by MCCA on 15 August 2008, is at Attachment 1.

COAG outcome

1.26 At its meeting in Perth on 2 October 2008, COAG "agreed to a new consumer policy framework comprising a single national consumer law". Relatively few details were provided to indicate whether the MCCA resolutions were accepted by COAG in full. However, the COAG communiqué indicated that the new law is to:

- be based on the *Trade Practices Act* 1974;
- draw on the recommendations of the Productivity Commission;
- draw on best practice in State and Territory consumer laws; and

[26] Communiqués released following the MCCA meetings can be obtained from the Council's website www.consumer.gov.au.

- include a provision regulating unfair contract terms.

COAG regards the new laws as delivering on its "commitment to a seamless national economy" and "providing a uniform and higher level of protection for Australian consumers and addressing weaknesses in existing laws". The relevant extracts of the Joint Communiqué issued by COAG, following its 2 October 2008 meeting, is at Attachment 2.

1.27 COAG's agreement to a new national generic consumer law is a noteworthy achievement. Given the world financial crisis, which became the key focus of the meeting, it was perhaps not surprising that the transfer of all credit regulation to the Commonwealth, which had in fact been agreed to at the COAG meeting on 3 July 2008, was given even more media prominence. Even more significant is the leadership (especially in the current troubled global economic times) that COAG is endeavouring to provide, by requiring that the new national generic consumer law is to provide, a "uniform and higher level of protection for Australian consumers" and to address identified "weaknesses in existing laws".

2. Key issues regarding the future scope of Australia's national generic consumer law

Unfair contract terms provisions

2.1 A large number of submissions to the PC supported the introduction of national unfair contract terms legislation. In general all major consumer and welfare groups, all State and Territory Governments, who expressed a view, and some significant industry players supported national unfair contract terms legislation. The latter generally saw this as a lesser evil to having disjointed State and Territory regulation. The PC accepted that there was a rationale and case for national unfair contract terms legislation. The specific form that this legislation should take was another matter. While unfair contact terms legislation has been part of the Victorian *Fair Trading Act* since 2003, the PC was extremely sensitive to the potential for this legislation to impose unwarranted costs on the community, despite the absence of evidence to this effect to date. The PC preferred a more circumscribed version of the legislation.

2.2 In its analysis, the PC emphasised that it saw unfair contract terms legislation as primarily an equity intervention. It did not acknowledge the impact this legislation may have on competition and in turn efficiency. Yet it is clear that some contract terms, so called "lock in" terms, can have very significant competition implications. This has been noted by, for example, a previous Chairman of the Office of Fair Trading and eminent economist, John Vickers.[27] The Victorian experience also is that terms can unreasonably lock consumers into contracts, for example by requiring excessive termination compensation, and thus limit the ability of consumers to switch to other more competitive options.

2.3 In 2004, the Standing Committee of Officials of Consumer Affairs ("SCOCA") issued a Discussion Paper on unfair contract terms which recommended the adoption of the Victorian model as the basis for national legislation. The Commonwealth were opposed to this.

[27] John Vickers, *"Economics for Consumer Policy"*, British Academy Keynes Lecture, 29 October 2003.

2.4 As the PC noted, any workable law in this area must define unfairness. In the Victorian legislation, which followed the European and UK approach, a contract term is unfair if:

> "contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties rights and obligations under the contract, to the detriment of the consumer."[28]

2.5 The legislation only covers consumer contracts and excludes terms which are expressly permitted or required by law. Credit contracts have been excluded, but the Victorian Government has recognised the need to remove this exclusion[29] and all jurisdictions and the PC agree there should be no carve out for credit contracts. Any duplication with the UCCC could be removed by amending the Code.

2.6 The PC suggested that there were good grounds for retaining the notion of good faith in the definition. This was despite the view of the then President of the Victorian Civil and Administrative Tribunal and judge of the Supreme Court, Justice Morris, who considered the term performed "an adjectival role" and did not amount to a separate element needing to be proved to establish a term was unfair.[30] This decision was important as the role of good faith has been the subject of judicial disagreement elsewhere and will no doubt continue to be the subject of much fruitless legal debate in Australia if it is retained in the legislation. Given the decision in AAPT, there would seem to be strong grounds to remove 'good faith' from the Act to avoid any uncertainty. The UK Law Reform Commission has also supported removal of good faith from the legislation in the UK.[31]

2.7 The issue of "good faith" in section 32W of Victoria's *Fair Trading Act* is also under consideration by the Supreme Court of Victoria in the *Jetstar Airways Pty Ltd* v *Free* case. In July 2007, in response to a complaint lodged by a consumer, Elizabeth Free, VCAT issued an order requiring Jetstar to pay Ms Free an amount of $600.93. The basis for this order was that a term of the

[28] Victoria, Fair Trading Act, section 32W.
[29] Victoria, Government response to the Report of the Consumer Credit Review, September 2006.
[30] *Director of Consumer Affairs Victoria* 2006 v *AAPT Limited* (Civil Claims) (2006) VCAT 1493, especially pars [31] to [48].
[31] United Kingdom, The Law Commission and the Scottish Law Commission, Unfair Terms in Contracts, Report February 2005, p. 40.

Jetstar travel conditions was found to be "unfair" in respect of section 32W of Part 2B of the *Fair Trading Act* 1999. The consumer had purchased two cheap (introductory) return tickets, Melbourne to Honolulu, one of these tickets was in the name of her sister. Six months later and two months before the flight, it transpired that the sister could not undertake the travel and Ms Free sought to transfer the ticket into her niece's name. Jetstar, however, required Ms Free to pay an administrative fee of $75.00 per sector to effect the change, as well as an additional amount of $600.93 to cover the price of the ticket as it was at that time. This latter amount was considered to be a windfall by the Tribunal member and the term of the contract which gave rise to it was considered to be unfair and thus void.

2.8 The case had been brought by the consumer to VCAT as a consumer-trader dispute under Part 9 of the Act. Under section 108(2)(d), the Tribunal has the power to declare a term of a contract to be void. This was the basis on which the term was found to be unfair in respect of section 32W. However, as far as a Part 2B is concerned, only the Director has the power to seek declarations and injunctions in relation to unfair terms. This jurisdictional issue is not part of the appeal to the Supreme Court. In reaching his decision, the Tribunal member essentially followed the precedents set by Justice Morris in the AAPT case in interpreting the unfair contract terms provisions.

2.9 Jetstar appealed the VCAT decision to the Victorian Supreme Court on the basis of claimed errors of law by the Tribunal member. The Director of Consumer Affairs is defending the appeal on behalf of Ms Free, in line with section 105 of the FTA. The appeal raises issues concerning the meaning and application of the Part 2B provisions and, in particular, challenges the view of Justice Morris as to the meaning and significance of the reference to good faith in section 32W. The appeal has been heard and a decision is awaited from Justice Cavanough.

2.10 In its draft report, the PC had proposed the use of an explicit public benefit test when it was alleged that contract terms were unfair. Such a test would be impractical in this context as it would impose excessive costs on the parties involved, would delay action and involve the courts in matters outside their traditional domain. Fortunately, the idea was dropped in the final report.

2.11 The PC recommended that the national law only cover non-negotiated contracts and that it also exclude from scope terms dealing with non contingent or upfront standard contract prices. It reasoned that negotiated terms were more likely to have been explicitly considered by the parties and that prices are clearly visible. The Victorian legislation does extend to cover negotiated contract terms and does not exclude core terms like prices.

2.12 Part 2B of the FTA differs from the UK law in these respects. There is some basis for the Victorian approach. First, there may well be instances where 'negotiated' terms and price terms are unfair given all the circumstances. For example, there may be aspects of the transparency of prices or the availability of alternatives which bring into question the fairness of prices in a particular case. Excluding prices or core terms from coverage, also does not necessarily mean that issues relating to such terms will not be subject to consideration by the Courts or Tribunals. Ultimately this would be a matter for Courts / Tribunals to decide. In this context, see the decision of the UK High Court in *The Office of Fair Trading* v *Abbey National PLC and 7 others*.[32]

2.13 Whether a contract term has been negotiated will no doubt be a key aspect of the circumstances to be taken into account in any consideration of fairness. Second, the exclusion of these terms may create loopholes for some suppliers who may, for example, engage in pseudo negotiations with consumers to escape coverage.

2.14 The PC also commented on the issue of safe harbours. The Victorian approach has been to negotiate with businesses and associations (where traders are willing and where there are standard industry contracts) prior to contemplating any Court / Tribunal action. A risk-based approach has also been taken with the focus being on addressing terms which raise serious concerns, not necessarily all terms that might breach the law. Legal action is only considered necessary in cases where concerns expressed by the regulator are ignored or not responded to adequately, as was the case with *AAPT Ltd*,[33] although we notice that the company has recently publicly disputed this point.[34] It may be that more

[32] [2008] EWHC 875 (Comm) delivered, 24 April 2008.
[33] *Director of Consumer Affairs Victoria* 2006 v *AAPT Limited* (Civil Claims) (2006) VCAT 1493
[34] See Australian Financial Review, 20 August 2008, Letters to the Editor, at p. 68, *"AAPT's consumer role"* by David Havyatt; and Australian Financial Review, 21 August 2008, Letters to the Editor, at p. 73, *"Consumer law effective in AAPT case"* by David Cousins; and Australian Financial Review,

information comes to light or other considerations arise in the future which could lead to the view that contract terms already reviewed should again be considered. The safe harbour given to suppliers under this approach is that the regulator will not take Court / Tribunal action without first raising concerns with the supplier (and giving the supplier an opportunity to address the Regulator's concerns).

2.15 The PC noted, in its report, that it would be sensible for the regulator to take account of existing codes aimed at ensuring fair contract terms and specifically referred in this context to the telecommunications industry. While accepting that existing codes may be useful guides, it must also be recognised that these have generally been developed by groups of suppliers. As a result of its work with mobile phone operators, Consumer Affairs Victoria ensured amendments were made to the Australian Consumer Information Forum Industry Guideline on Consumer Contracts so that it complied with the requirements of the Victorian law.

2.16 At their meeting on 15 August 2008, the Consumer Affairs Ministers agreed that the new generic law should include an unfair contract terms provision. They also agreed on significant features of this provision including:

- the term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and is not reasonably necessary to protect the legitimate interests of the supplier;
- a remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class). Detriment is not limited to financial detriment;
- It would relate only to standard form (ie. non-negotiated) contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not;
- It would exclude the upfront price of the good or service, using the approach currently adopted in regulation 6(2) of the United Kingdom's Unfair Terms in Consumer Contracts Regulations 1999; and

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25 August 2008, Letters to the Editor, at p. 59, *"Different recall in CAV's AAPT case"* by David Havyatt. Note, Part 2B of the *Fair Trading Act* 1999 only provides for declaratory and injunctive relief. No compensation was sought in the Application in the *AAPT* matter.

- It would require all the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.[35]

2.17 The proposed definition of an unfair term excludes reference to good faith. By referring to the broader interests of consumers in the reference to all the circumstances it seems to pick up the PC's concern that an unfair term in relation to a particular consumer may be desirable if it has the effect of benefiting other consumers.

2.18 The Ministers have proposed that terms found to be unfair would only be void for the contracts of the consumers or class of consumers subject to the detriment or substantial likelihood of detriment. There would be the potential for these consumers to seek damages for their detriment; and other remedies under the Trade Practices Act are to apply. Regulators could also take representative actions, including presumably, in line with the PC proposal on representative actions agreed to by the Ministers, for non-identified consumers who have suffered detriment or substantial likelihood of detriment to be included.

2.19 It is also proposed to have the capacity to "prescribe" certain terms that are, in all the circumstances, unfair. This follows the Victorian law but it would be the Commonwealth Minister to promulgate the regulation subject to any provisions of the inter-Governmental agreement, for example presumably relating to consultation. There is recognition of the need for guidance on enforcement, transitional arrangements and for a review of the law within seven years.

2.20 Overall, the proposal agreed to by Ministers has been very much influenced by the PC's recommendations, but it has been modified in a number of ways. Particularly, when account is taken of the need to only show substantial likelihood of detriment as well as the proposed representative action power, there may well not be a great difference in practice in the scope for regulators to challenge unfair terms than currently applies under the Victorian law. With many regulators and the prospect of private actions under this model, it seems inevitable that there will be significant activity in this area in years to come.

[35] MCCA Communiqué, 15 August 2008.

The Victorian unfair contract terms provisions – working out in the fitness industry

2.21 Fitness centres have been a persistent source of complaints to State and Territory consumer agencies over many years. In the 80's these complaints especially arose when centres went into liquidation leaving consumers who had pre-paid memberships, often for well more than a year, out of pocket. Hard sell tactics and crowded facilities were other concerns. Attempts were made over many years in Victoria to encourage industry self-regulation through voluntary codes of conduct to deal with these poor trading practices, but these attempts largely failed because of lack of effective trade association leadership and limited association coverage of industry members. This was despite repeated indications that the Government would look at more serious regulatory intervention if practices did not improve. Other jurisdictions introduced regulations to deal with industry practices causing concern.

2.22 Suppliers have been attracted to the industry by the prospect of obtaining guaranteed payment for client services through pre-paid, periodic memberships. With pressure to limit the period of pre-paid memberships, suppliers have pushed the concept of periodic customer direct debit payments as a more certain way to maintain income. Often these payments are made to third parties in contractual relationship with the fitness centre supplier. However, complaints have arisen when consumers have found to difficult to leave within their membership period without significant financial penalty and have had difficulty cancelling memberships, which are rolled over beyond the initial period.

2.23 Due to the high number of complaints, the nature of these complaints and the pressure for industry-specific regulation to fix the problem, the industry was selected by Consumer Affairs Victoria as an early target for consideration in relation to the fairness of contract terms. A review of many supplier standard contracts highlighted concerns about the looseness of drafting and the one-sided nature of contract terms which caused detriment to consumers in various ways, including by misleading consumers as to their rights and restricting consumers from relinquishing their memberships. Where unfair contract terms were identified by the Regulator, both the terms and the reasons why the Regulator believed they were unfair were brought to the attention of the suppliers and

amendments to these terms were negotiated. In a few cases, where suppliers refused to co-operate fully or at all in this process, action has been initiated by the Director in the Victorian Civil and Administrative Tribunal ("VCAT").[36]

Director of Consumer Affairs Victoria v *Craig Langley Pty Ltd* and *Matrix Pilates and Yoga Pty Ltd*

2.24 In February 2008, the Director sought declarations of unfairness and injunctions in relation to a range of contract terms used by Craig Langley Pty Ltd, the operator of a fitness centre located in the heart of Melbourne. Just before the case was heard, the operator transferred the business to another company, Matrix Pilates and Yoga Pty Ltd ("Matrix"). As Matrix intended to use the same standard terms contract as the previous operator, injunctions and declarations were also sought against this company. Accordingly, there are two considered judgments in this matter. In reviewing terms claimed by the Director to be unfair, the Tribunal Member (Vice President Judge Harbison) largely seemed to follow the lead of Justice Morris in interpreting the provisions of the Act. Issues discussed by Justice Morris concerning the relevance of the reference to good faith in the definition of an unfair term in section 32W of the Act were noted only. However, it was accepted that:

> "it was clear that Part 2B was not designed to duplicate the existing sections of the Act which prohibit misleading and deceptive conduct … [and] … not designed to duplicate the sections relating to the prohibition of unconscionable conduct."[37]

Her Honour also commented that:

> "the legislation was designed to protect consumers from unfair contracts, not to allow a party to a contract, who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile."[38]

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[36] *Director of Consumer Affairs Victoria* v *Craig Langley Pty Ltd* and *Matrix Pilates and Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482; and also [2008] VCAT 1332; and *Director of Consumer Affairs Victoria* v *Trainstation Health Clubs Pty Ltd* VCAT No. C5470 / 2007.
[37] *Director of Consumer Affairs Victoria* v *Craig Langley Pty Ltd* and *Matrix Pilates and Yoga Pty Ltd*, Proposed Orders and Reasons for Decisions, 17 March 2008, pars [47] to [48].
[38] Ibid., par [68].

However, in this case, it was found that none of the impugned terms had been individually negotiated and,

> "there had been no meaningful consent to the terms by the consumer."[39]

Her Honour also recognised the need to consider the impugned terms in the context of other contract terms so as to be,

> "satisfied that the unfairness is not cancelled out or ameliorated by the terms of the contract as a whole."[40]

2.25 Her Honour initially found that seven of the nine terms challenged by the Director were unfair. These terms in various ways sought to limit the liability of the supplier and discourage consumers from taking action to protect their rights. The terms ensured that the supplier received payments for the life of the contract irrespective of performance. Further, the terms enabled the supplier to extend the period of these contracts. One complaint to the Director, in particular, highlighted this issue. The consumer signed up to a 12 month membership and a direct debit arrangement whereby monthly payments were made to the supplier, via a third party, from her account. After a few months, she was unable to use the facilities as her employer relocated away from the Central Business District. She advised the centre of this but, nearly three years later, discovered that monthly direct debit payments were still being made from her account. The fitness centre then agreed to cancel her membership, but did not refund the payments made over the 20 months after the end of the 12 month membership period.

2.26 In addition to its findings on unfair contract terms, the Tribunal also found that the Membership Agreement contravened section 163 of the Act through its use of small print and terms which were not clearly expressed. These terms had the effect of transforming an apparently fixed term contract into a contract for an indefinite term, required actions of the consumer toward a third party who was not identified, and of disguising the amount of the penalty to be incurred by the consumer on termination of the contract.

2.27 In response to these proceedings, Matrix drafted a new set of agreements which purported to amend or remove terms previously found to be unfair. However, the

[39] Ibid., par [69].
[40] Ibid., par [71].

new contracts were again considered by the Director to contain unfair terms and terms which were not clearly expressed. The supplier was not prepared to amend these terms, which necessitated a further application to the Tribunal. This further action sought to make it clear to all businesses in the industry, no matter how small, that they needed to ensure proper legal advice was obtained when drawing up standard form contracts and that these contracts satisfied legislative requirements.

2.28 The alleged unfair terms fell into a number of categories – unilateral variation, third party involvements in the contractual terms, clauses which deal with what is to happen if the membership fee payable under the agreement is not paid by the consumer, terms relating to cancellation of the agreement, terms which sought to extend the contract past the minimum term and cancellation departure fees. Once again, the Tribunal concluded that many of the terms were not clearly expressed contrary to the requirements of section 163(3)(c) of the Act. While the documents were now of adequate font size, confusion and uncertainty were created by using undefined terms, ambiguous or inconsistent terms, by using the same terminology to mean different things, by using grammatically incorrect terms, and by using provisions that contradict fact and a provision that said that a non-party to the agreement was the recipient of consumer payments rather than the supplier.

The Tribunal granted injunctions against Matrix,

> "whether by itself, its officers, employees or agents",

to the use of the terms identified as unfair,

> "or any terms to similar effect in any agreement, whether or not in writing and whether of specific or general use ..."[41]

2.29 Injunctions were also granted against the use of terms found to breach section 163(3)(c). Matrix was required to send each of its members a notice as specified advising of the outcome of the proceedings and the terms that had been made void.

2.30 The determination in this case should, if widely publicised, provide a strong pointer for all businesses in the industry to review the adequacy of their standard

[41] *Director of Consumer Affairs Victoria* v *Craig Langley Pty Ltd* and *Matrix Pilates and Yoga Pty Ltd* (Civil Claims) [2008] VCAT 1332, Tribunal Orders, pp. 9 to 10.

form contracts. Many of the concerns with the Matrix contracts reflected sloppy drafting, just as much as unfairness. Her Honour's final observations were significant in this regard:

> "The need for this second decision has come about because the Second Respondent has decided to ignore the ramifications of the first decision I handed down in this proceeding. In his correspondence to and conversations with the Applicant's representatives, Max Fiore, Director of the Second Respondent, has indicated a desire to not intentionally contravene the provisions of the *Fair Trading Act*. But it is not acceptable for a supplier to use terms which contravene consumer legislation, whether intentional or not.
>
> Suppliers must familiarise themselves with the contents of Part 2B of the *Fair Trading Act*. It is not acceptable for traders to simply rehash or cut and paste various inconsistent contract terms, or provide standard form contracts which ignore consumer legislation. This Tribunal is given power under Part 2B to intervene in consumer contracts for the benefit of consumers generally. It will not hesitate to use that power when asked to do so in appropriate cases, even when the amounts of money involved in any particular consumer contract are small. If a supplier wishes a consumer to be bound by a standard form contract, the supplier must ensure that the contract complies with the law."[42]

2.31 Judge Harbison's first decision in the *Craig Langley* matter[43] highlights that the Tribunal, in applying the provisions of Part 2B of the FTA, is mindful to appreciate the appropriate competition law and consumer law context of the *Trade Practices Act* and *Fair Trading Acts*. There is every reason to be confident that the same appropriate context would be considered and utilised for the unfair conduct terms provisions in the national generic consumer law.

Fitness industry contracts – an ongoing concern

2.32 The *Director of Consumer Affairs Victoria* v *Trainstation Health Clubs Pty Ltd*[44] matter has been heard by the Vice President of VCAT, Judge Harbison, in August 2008 and her Honour has reserved judgment.

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[42] Ibid., p 26.
[43] *Director of Consumer Affairs Victoria* v *Craig Langley Pty Ltd* and *Matrix Pilates and Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482.
[44] VCAT No. C5470 / 2007.

2.33 The fact that gym membership contracts are a current and continuing source of complaints to consumer agencies is highlighted by the following warning in August 2008 from the Honourable Linda Burney, as the New South Wales Minister for Fair Trading, who advised:

> "people [should] carefully read the contract before signing up for gym membership. … Fair Trading receives about 300 complaints against fitness centres each year.
>
> 'It's critical to read the fine print of any contract before you sign up.'
>
> 'I encourage people to try a casual membership (for example, one month or ten visits) before signing a contract which will lock you in for a long period. This will give you a chance to see if the fitness centre is right for you.'
>
> 'People should consider whether their living arrangements are likely to change in the next few months. The gym may not be as easy to access when they change jobs or move house, however they may still be locked into the contract.'
>
> 'Always read the fine print. Some contracts have very strict conditions and penalties for early cancellation.'
>
> 'Also, check if your fitness centre is a member of the industry peak body, Fitness Australia, as these gyms operate under a voluntary code of practice, which provides for things such as a cooling-off period'
>
> The code also allows for early termination of contracts in certain circumstances such as serious illness, however a cancellation fee may still apply."[45]

2.34 That warning was prompted by the Supreme Court of New South Wales judgment in *Fitness First* v *Chong*.[46] In that case, Fitness First successfully appealed an order made by Consumer Trader and Tenancy Tribunal Member Reid who had ordered that a $200 cancellation fee imposed by Fitness First and paid by Ms Chong should be waived. Associate Justice Harrison, applying the High Court's decision in *Toll (FGCT) Pty Ltd* v *Alphapharm Pty Ltd & Ors*,[47] held that Ms Chong was bound by the conditions of the contract where Ms Chong had admitted that she had signed the relevant documents. Ms Chong was, therefore,

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[45] See Media Release, 7 August 2008, *"Consumers reminded to check gym contracts before signing"*, at website www.fairtrading.nsw.gov.au/About_us/News_and_events/Media_releases/2008_media_releases/20080807_check_gym_contracts_before_signing.html.
[46] See [2008] NSWSC 800 (Harrison AsJ, delivered 7 August 2008).
[47] (2004) 219 CLR 165.

obliged to pay the $200 cancellation fee. Ms Chong's actual knowledge or otherwise of the terms of the contract was not relevant.

Public interest enforcement by Regulators only?

2.35 The role of the regulator in administering unfair contract terms legislation is critical under the Victorian model. The same would be true under the PC model. There is a requirement for a sophisticated analytical capacity, including not just legal analysis but also an economic analysis and commercial understanding of considerations underlying contracts. There is a need for good communication with suppliers and a willingness to negotiate sensible outcomes. The inclusion of unfair contract terms provisions in the national generic law will mean that all jurisdictional regulators will be able to enforce this legislation. There will then be significant challenges in ensuring close coordination is achieved between the regulators. The case for a well resourced, expert central administration of the unfair contract terms provisions is greater, perhaps, in this area than in some others, particularly given the national reach of most major contracts. The PC noted the need for implementation to be nuanced and for guidance to be made available. Both have been features of the Victorian approach. Another important feature of the Victorian model is that only the Director is given standing[48] to take action in relation to alleged unfair terms. There is no provision for private action to invoke the remedies available under Part 2B of the FTA. This is a critical safeguard against the inappropriate use of this legislation.

Ex-Ante (proactive, public) or *Ex-Post* (reactive, private) Model?

2.36 The PC suggested there were two broad models for unfair contracts terms legislation, the ex-ante model and the ex-post model. The ex-ante model, which it saw as being similar to the Victorian approach, gave the regulator the capacity to pre-emptively rule out unfair terms that could cause (future) detriment. The ex-post model, which the PC preferred, only enabled regulators to initiate action when a consumer or consumers had already suffered a detriment from an unfair

[48] See sections 32ZA, 32ZC, and 32ZD of the *Fair Trading Act* 1999 (Vic).

term. Then the unfair term would only be void for those consumers and not for other consumers subject to the contract.

2.37 The characterisation of the Victorian model as an ex-ante approach seems questionable given that the Director, generally, would only take Tribunal action in response to a complaint and does not have the power, independently of the Tribunal, to rule out any unfair terms. However, it certainly does have ex-ante elements in the sense of allowing terms to be challenged that may cause problems for consumers generally.

2.38 A pure ex-post approach may not be effective or efficient. It would seem strange that a standard form contract term judged by a Court or Tribunal to be unfair for one or a number of consumers would not also be considered unfair for other consumers subject to the same contract. Consumers, who were aware of their detriment and able to take action, could ask the Courts / Tribunals to assess the fairness of their contract terms. In effect there would be many cases required to deal with the same terms. Vulnerable and disadvantaged consumers, however, would be less likely to benefit from this process as they may not to able to take action at all. The old adage "prevention is better than cure" may be particularly relevant here, especially if phoenix company activity is likely to be involved.

What model for the unfair contract terms provision?

2.39 Overall, there seems to be two aims of regulating to prohibit unfair terms in consumer contracts.[49] First, to prevent the abuse of power possessed by the supplier of goods or services over their end consumer by virtue of market circumstances (including the level of competition between suppliers and the incentives for suppliers to compete on contractual terms in an industry, the use of standard form contracts on a take it or leave it basis with their very virtue of reducing transaction costs by not negotiating on an individual basis providing an opportunity for some suppliers to create significant imbalance in contractual rights and obligations to the detriment of the consumer). That is, to prescribe a statutory standard for contracting with consumers (or on another view to enhance the

[49] See *"Is there a need for Unfair Contract Terms Regulation in Consumer Protection Legislation in Australia?",* Paper by S. Bhojani, presented at the Centre for Regulation and Market Analysis and the University of South Australia 3rd Annual Trade Practices Workshop 21–22 October 2005.

statutory standard for contracting with consumers as currently reflected in the implied conditions and warranties provisions in the TPA and FTAs).[50] Secondly, to encourage or promote competition by preventing suppliers using unfair terms in contracts (such as lock in clauses, or onerous confidentiality obligations) to stifle competition and gain an unfair market advantage over more ethical suppliers.

2.40 The COAG decision of 2 October 2008, aside from indicating agreement to include a provision regulating unfair contract terms in a new national consumer law, provides no further details as to how this new law may look.

2.41 Despite the PC's concerns about the Victorian model, it is suggested that over the 5 years of their existence, the key features of the Victorian approach have been and are working well. They are worthy of reconsideration for the national generic consumer law. In particular, limiting the enforcement model to a public interest regulator only enforcement model – focusing on improving the standard of contracts; applying the provisions to consumer contracts only; and enabling the regulator to seek an advisory opinion from an appropriate independent Tribunal (which, in the context of a national generic consumer law, could be the Administrative Appeals Tribunal or Australian Competition Tribunal).

More unconscionable conduct cases or an unfair conduct provision?

2.42 A key issue is whether there is now a need for Australia's generic consumer law to contain a provision prohibiting "unfair conduct or practices". Regarding an "unfair conduct" provision, the PC has recommended waiting to see how the European Union's model concerning unfair business to consumer commercial practices as contained in its *Unfair Commercial Practices Directive*[51] develops and researching the evidence in support of such a provision.[52] Presumably, the PC means the "aggressive" practices aspect of the *Unfair Commercial Practices Directive*. The Directive seeks to apply across the European Union provisions dealing with "misleading" or "aggressive" practices, as well as containing a "Black List" of practices. The "misleading" practices and the "Black List" of practices contain matters which have been part of Australia's generic consumer

[50] For example, see Division 2 of Part V of the TPA and Part 2A of the Victorian FTA.
[51] Directive 2005 / 29 / EC of the European Parliament and of the Council of 11 May 2005.
[52] See PC Report, p. 141.

laws for many years. Also, the aggressive commercial practices part of the Directive focuses on "harassment, coercion, including the use of physical force, or undue influence".[53] In the Australian context, these terms are used in the context of the "unconscionable conduct" provisions. Accordingly, it is not clear that much will be achieved by deferring further consideration of a general unfair conduct provision at this time.

2.43 The Directive uses two cumulative defining criteria to identify "unfair commercial practice". First, the practice must be contrary to the requirement of professional diligence, as defined.[54] Secondly, the practice materially distorts, or is likely to materially distort, the average consumer's economic behaviour.[55] These requirements and context are quite foreign to the Australian approach. The *Unfair Commercial Practices Directive* in Europe will operate in a different context than Australia. For example, the impact of this law in the UK is likely to be much greater than it would be in Australia, given that Australia has had in place for a much longer period: misleading and deceptive conduct provisions; prohibitions against harassment and coercion; and unconscionable conduct incorporating undue influence. It is at the margin that an unfairness law in Australian will have an impact. In this regard the experience of the USA seems more pertinent.

2.44 Under section 5(a)(1) of the Federal Trade Commission Act in the USA, unfair or deceptive acts or practices in or affecting commerce can be declared unlawful. The Federal Trade Commission is, however, unable to declare an act or practice unfair unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition".[56] While the unfairness provision has been subject to different and more controversial interpretations in the past, the application of it has been reasonably settled since the Commission's

[53] See Article 8 and Article 9 of the *Unfair Commercial Practices Directive*.
[54] "Professional diligence" is defined in Article 2 of the Directive as "the special skill and care which a trader may reasonably be expected to exercise, commensurate with honest market practices and/or general principle of good faith in the trader's field of activity".
[55] Article 2 of the Directive provides that " 'to materially distort the economic behaviour of consumers' means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise."
[56] USA, Federal Trade Commission Act, section 5n.

Policy Statement of 1980,[57] which was essentially codified in the Act in 1994. It has in recent years enabled the Commission to deal with numerous practices not considered deceptive. According to a previous Director of the Bureau of Consumer Protection,

> "unfairness, unlike deception allows the Commission to attack situations- like widespread unilateral breach of contract, or the cramming of unauthorised charges onto phone bills- where there is widespread consumer injury, but where deception simply does not fit. Further, unfairness, unlike deception, allows the Commission to balance the benefits and costs of the challenged behaviour. This approach allows the Commission to provide strong consumer protection against marketplace abuses without prohibiting related conduct that is beneficial to consumers".[58]

2.45 Other issues that the unfairness law has been able to respond to include predatory lending practices, unauthorised credit and debt charges, television marketing to children, alcohol advertising to young adults, disclosure of private information obtained through deception or dubious methods and practices like pagejacking and mousetrapping affecting internet users.[59] Thomas Leary, then a Commissioner with the FTC, highlighted the important role of the unfairness law in relation to emerging issues.

> "The flexibility and adaptability of unfairness makes it suitable to combat the new permutations of fraudulent behaviour that the internet is likely to spawn. Even here, however, I doubt that it is necessary to break new ground – historically unfairness has been used to control 'new high-tech' frauds, sometimes as a gap-filler until a specific regulatory scheme is adopted."[60]

To the extent that an unfairness law can prevent undesirable practices from spreading in the marketplace, it may help to obviate the need for additional regulation entirely, which is an important aim of current policy.

2.46 The general concerns of small business about perceived unfair conduct toward them by big business provide a further important rationale for introducing a general unfairness law to cover both consumer and business transactions.

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[57] Federal Trade Commission, Policy Statement on Unfairness, 17 December 1980.
[58] J. Howard Beales, "The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection", 30 May 2003, p. 7, at website www.ftc.gov/speeches/beales/unfair0603.htm.
[59] Thomas B. Leary (Commissioner FTC), "Unfairness and the Internet", 13 April 2000, at website www.ftc.gov/speeches/leary/unfairness.shtm.
[60] Ibid.

2.47 Further, it should also be noted that the call for an "unfair conduct" provision in Australia has been made for some time.

Unfair conduct and small business

2.48 Concerns about unfair conduct by big business towards small business have been persistent over many decades and continue to be evident today despite significant actions taken by Governments to try to address them. These actions include the development of codes of conduct covering specific areas, such as franchising and petroleum marketing, and specific laws and codes covering retail tenancy. Special dispute resolution measures have been put into place in a number of jurisdictions and small business commissioners have been appointed. Considerable emphasis has been placed on information and education provision for small business. Amendments to the general law affecting business conduct have also been made. In particular, statutory unconscionable conduct provisions have been added to the Trade Practices Act[61] and extended beyond mere codification of the common law. More recently, largely in reaction to the perceived ineffectiveness of unconscionable conduct provisions, the law covering misuse of market power has also been amended to try to facilitate actions being taken to protect small business.[62] This, in turn, has raised significant questions about the purpose and direction of the competition laws. Part 1V of the Trade Practices Act has generally been seen primarily as promoting competition and efficiency, not protecting competitors and the fairness of market transactions.

2.49 The concerns of small business, which fundamentally reflect inequalities in bargaining power between large and small firms, were found to have substance, and to have severe economic and social consequences.[63] The fact that they persist indicates that the measures taken to address them have not been seen to be adequate. The main focus of these measures has been on unconscionable conduct, not conduct that was just unfair. Arguably the bar has been set too high by the legislators and it has therefore not been able to deal with much of the conduct

[61] Section 51AC.
[62] Section 46(1AA) the so called "Birdsville" amendment.
[63] In particular, see the Report by the House of Representatives Standing Committee on Industry, Science and Technology (Reid report), Finding a Balance: towards fair trading in Australia, May 1997.

which is of day to day concern to small business. It has been ineffective in setting a new norm of business conduct in Australia which is in line with the value placed by much of the community on fairness in commercial dealings.

2.50 The Swanson Committee in 1976 in its report "Trade Practices Review Committee, *Report to the Minister of Business and Consumer Affairs*" at paragraph 9.56, noted that it had received submissions recommending the adoption of a provision which would declare unlawful, unfair methods of competition, and unfair and deceptive acts or practices in or affecting commerce. The Committee rejected a call for a prohibition of "unfair conduct". In the Committee's view, such a provision could result in considerable uncertainty in commercial transactions.

2.51 20 years later, in 1997, the Reid Committee report "*Finding a Balance Towards Fair Trading in Australia*", Chapter 6, paragraph 6.73, called for a repeal of the unconscionable conduct provision section 51AA and that it be replaced with a provision to the following effect:

> "A corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair."

2.52 The Reid Committee considered a number of options for broadening the unconscionability provisions then in the Act to cover commercial transactions. Whilst generally supportive of broadening unconscionability to include harsh or oppressive conduct, as had been favoured by the Swanson Committee in 1976,[64] it was concerned that this may not have much impact on the approach of the courts to the matter. It favoured a different approach which would "give a clear signal to the courts that something else was intended". It favoured a broader standard, specifically recommending that 'a corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair". The Committee noted that the:

> "word 'unfair' has the strong advantage of being widely understood, being part of the every-day moral vocabulary of all Australians. Indeed, fairness is the social value central to the maintenance of social cohesion and the legitimacy of the social

[64] Australia, Trade Practices Review Committee Report, pars [9.56] to [9.63], August 1976.

system. It has the added advantage of directly addressing the problem as it is usually articulated".[65]

The Committee was confident that the courts would be able to respond adequately to this new standard over time. It supported the standard being underpinned by statutory guidelines and approved codes of conduct. These would help to reduce uncertainty. It seemed confident that behaviour change by businesses would occur to ensure the standard was generally satisfied.

2.53 The Committee was clearly of the view that the unfairness test should cover both procedural and substantive unfairness. It was not just concerned with conduct but also with outcomes. The Committee's recommendation clearly also covered conduct leading to the establishment of a contract and the terms of contracts. The Committee's recommended amendment to the legislation is shown in Box 1.

2.54 The response to the Committee's report was the introduction of a further provision prohibiting unconscionable conduct in business or commercial transactions – section 51AC of the TPA. This retained the focus on unconscionable conduct but incorporated many of the factors the Committee had suggested the courts may have regard to in assessing whether conduct is unfair, including the requirements of any applicable industry or other code. The provision covers both the supply and acquisition of goods and services in business transactions.

Box 1 – Reid Committee recommendation for an unfair conduct provision

Recommendation 6.1 of the Report of the House of Representatives Standing Committee on Industry, Science and Technology (Reid Committee), Finding a Balance, May 1997.

The Committee recommends that Part1VA of the *Trade Practices Act* 1974 be amended by repealing the existing section 51AA and incorporating a new provision proscribing unfair conduct in commercial transactions. The section should read as follows:

[65] Reid report, p. 179.

Unfair conduct

New section 51AA

(1) A corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair.

(2) Without in anyway limiting the matters to which the Court may have regard for the purposes of determining whether a corporation has contravened sub-section (1) the Court may have regard to:

(a) the harshness of the result;

(b) any influence or pressure exerted on or any tactic used against a person by the corporation or a person acting on behalf of the corporation;

(c) whether or not a person has suffered from any disability;

(d) whether or not there was a disparity in bargaining power between the parties;

(e) whether or not, as a result of conduct engaged in by the corporation, a person was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(f) whether or not the other person was able to understand any documents;

(g) the amount for which, and the circumstances under which, a party could have acquired identical or equivalent goods or services from a person other than the corporation;

(h) the extent to which the conduct of the corporation is consistent with its conduct towards other persons who have entered into transactions or commercial relationships with the corporation that are the same as, or substantially similar to, the transaction or the commercial relationship between the corporation and the other person;

(i) the requirements of any code of practice applying to participants in the area of trade or commerce in which the corporation is involved and which have been approved by the Australian Competition and Consumer Commission in accordance with section 51AAA;

(j) the extent to which the corporation has made prior disclosure of any of its intentions affecting the interests of the other party and of the risks involved to that other party;

(k) in relation to a contract, the extent to which the corporation was prepared to negotiate with the other person in relation to the terms and conditions of the contract; and

(l) the good faith of the parties.

(3) A corporation shall not be taken for the purposes of this section to engage in unfair conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purposes of determining whether a corporation has contravened sub-section (1):

(a) the court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

2.55 A further 10 years later, the Economic and Finance Committee of the South Australian House of Assembly in its report "*Franchises*" published on 6 May 2008, states at page 44 as follows:

> "The fact the TPA does not provide a definition of the term "unconscionable conduct" appears to represent a challenge for the ACCC, the agency responsible for enforcement of the prohibition. While the ACCC is responsible for developing and testing the law in this area, the understanding of the provision remains very limited ten years after its introduction. However, as some witnesses pointed out, the reason for that lack of success may be the original construction of the provision and a lack of guidelines pointing to the intended meaning of the term "unconscionability". Many of those who contributed to the inquiry also stressed that the uncertainty surrounding the meaning of unconscionability makes litigators and lawyers very reluctant to rely on section 51AC as a chosen cause of action. The inability to resort to any other similar provision creates a situation where

businesses are denied legal remedies in disputes that often severely impact their interests."

2.56 The Australian Senate has launched an inquiry to determine whether or not the statutory definition of unconscionable conduct in the *Trade Practices Act* needs to be reformed as follows:

> "On 15 September 2008, the Senate referred the following matter to the Senate Economics Committee for inquiry and report by 3 December 2008:
>
> > 'The need to develop a clear statutory definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974* and the scope and content of such a definition.'
>
> Currently, sections 51AA, 51AB, and 51AC of the TPA prohibit 'unconscionable conduct' but the expression is not defined in the Act. The Courts have been reliant on case law to guide their rulings under these sections. The Act refers to matters to which the Courts may and may not have regard in determining whether there has been unconscionable conduct."

2.57 In the context then of yet another review by a parliamentary committee of the unconscionable conduct provisions of the *Trade Practices Act*, it seems appropriate to reconsider the case for a general provision in the act to prohibit unfair conduct. This would be a provision that dealt with business to business conduct as well as business to consumer conduct in the same was as the general section 52 misleading and deceptive conduct provision does. As discussed above, the arguments for a general provision of this kind were considered in detail by the Reid Committee. As the Committee noted at the time,

> "there needs to be a recognition the Australian commercial environment is no longer conducive to fair competition because of high levels of concentration in many industries – including retailing. It is naive to expect small business to survive unrestrained 'competition' without some form of protection from the worst excesses of the exercise of economic power".[66]

In the decade or so since the Reid Inquiry, there have been further increases in industry concentration which further highlights the importance of the issue.

[66] Reid report p. 135.

2.58 The wording adopted by the Commonwealth Parliament for an unconscionable conduct in business transactions provision regarding financial services has raised the bar for establishing a contravention too high for the regulator. In the *ASIC* v *National Exchange*[67] case, a Full Court of the Federal Court described the conduct of National Exchange Pty Ltd and Mr Tweed as not being in good faith and could properly be described as predatory and against good conscience. Nevertheless, the Court held the conduct did not satisfy all the elements of section 12CC of the *ASIC Act*.

2.59 The Courts have adopted a high threshold for establishing that conduct is unconscionable for the purposes of section 51AA of the TPA. For example, in *ACCC* v *Samton Holdings Pty Ltd*,[68] Justice Carr referred to the characterisation of unconscionability as a species of equitable fraud. His Honour said:

> "I mention equitable fraud because I think that it is helpful, when assessing particular conduct in particular circumstances, to keep in mind that if there is a scale by which to measure unreasonable behaviour by one person towards another, unconscionability is towards the extreme end of that scale."

2.60 It would seem that the need for a generic provision prohibiting "unfair conduct" is related to the effectiveness or ineffectiveness of the "unconscionable conduct" threshold adopted by Australian Parliaments. The PC report acknowledges this itself saying that:

> "[t]he prohibition of unconscionability in the generic legislation represents a general prohibition of unfairness, but usually only for unfairness that crosses a high threshold of severity."[69]

2.61 If the terms "unconscionable" and "unfair" are not used as terms of art, but rather are meant to convey their ordinary English meaning,[70] the difference between the two seems to be as follows:

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[67] See *ASIC* v *National Exchange Pty Ltd* [2005] FCAFC 226 at pars [26] to [50] per Justices Tamberlin, Finn and Conti.
[68] (2000) ATPR 41–791 at p. 41, 401 pars [82] to [83].
[69] PC report p 140, paragraph 7.2.
[70] See for example *Cameron* v *Qantas Airways Limited* (1995) ATPR 41-417 at pp. 40,633 to 40,634 (per Beaumont J); and *Qantas Airways Limited* v *Cameron* (1996) ATPR 41-487 at p. 42,068 (per Davies J) and p. 42,085 (per Lindgren J with whom Lehane J agreed); *ACCC* v *Simply No-Knead (Franchising) Pty Ltd* (2000) ATPR 41-790 at pp. 41,380 to 41,381 (per Sunberg J); *Hurley* v *McDonalds Australia Ltd* (2000) ATPR 41-741 at pp. 40,584 to 40,585 (per Heerey, Drummond &

> "**Unconscionable** – 1. unreasonably excessive; 2. not in accordance with what is just or reasonable; 3. not guided by conscience, unscrupulous."[71]

and

> "**Unfair** – 1. not fair*; biased or partial; not just or equitable; unjust; 2. marked by deceptive dishonest practices."[72]
>
> * "**Fair** – 1. free from bias, dishonesty, or injustice; 2. that is legitimately sought, pursued, done, given, etc.; proper under the rules."[73]

2.62 The difference in meaning tends to support the view that the choice of the word "unconscionable" rather than "unfair" has raised the bar or threshold for establishing a contravention.

2.63 As noted above, there has been a historical call in Australia for a provision with a lower threshold than unconscionability. Such provisions are being used internationally. Given the continuing concerns about the adequacy of the unconscionable conduct provisions, the time has come to determine the appropriateness of a generic provision on prohibiting "unfair conduct" with suitable statutory guidance and safeguards – either in substitution for the existing unconscionable conduct provisions or in addition to them.

Improving access to the national consumer law and enhancing outcomes for consumers

Representative actions

2.64 Provisions allowing for representative actions on behalf of consumers whether or not they are parties to the proceedings[74] need to be considered and determined. Issues in drafting such provisions would include the need to give notice of such actions, the form of the notice, and whether individual consumers could "opt out"

Emmett JJ); *ASIC* v *National Exchange Pty Ltd* [2005] FCAFC 226 at pars [30] to [33] (per Tamberlin, Finn, and Conti JJ); and *ACCC* v *Keshow* (2005) ATPR (Digest) 46-265 at p. 52,554 at pars [97] to [99] (per Mansfield J). Also note, the paper entitled *"Unconscionable Conduct?"* by the Honourable Justice Paul Finn delivered at the CRMA 4th Annual Trade Practices Workshop 2006.

[71] See Macquarie Dictionary, Revised Third Edition 2001, at p. 2037.

[72] See Macquarie Dictionary, Revised Third Edition 2001, at p. 2045.

[73] See Macquarie Dictionary, Revised Third Edition 2001, at p. 670.

[74] See PC report recommendation 9.5.

from such proceedings or pursue their own proceedings. Even if consumers could not "opt out" of such representative proceedings, could particular consumers pursue defendants in private actions for recovery of loss or damage, etc, that they suffered above and beyond that suffered by most customers?

2.65 Also relevant here is the PC recommendation[75] that the Commonwealth Government assess the desirability of clarification or amendment of relevant legislation *to facilitate private class actions* under or in respect of the new national generic consumer law. This is consistent with the aim of enhancing the "*one law*; multiple regulators and private enforcement (regulation); and multiple Courts and Tribunals" model referred to earlier.

Establishing a statutory trust fund to benefit consumers

2.66 To provide a higher level of protection for consumers as COAG intends and to address weaknesses in existing laws and improve consumer law enforcement powers, it is suggested that there is a need for the Courts, or perhaps even the Regulators, to be expressly empowered to establish a trust fund. The need for such a trust fund is two-fold.

2.67 First, as a fund to hold compensation for consumers obtained by a Regulator, but where such consumers have not been identified prior to the Court order being made. The compensation moneys would be held in the trust fund until affected consumers make a claim. An illustration of some of these matters can be seen from the case of *Commissioner for Fair Trading* v *Rowland Thomas & Ors*.[76]

2.68 Also relevant in this context would be matters such as *Medibank Private Ltd* v *Cassidy*[77] and *ACCC* v *Danoz Direct Pty Ltd*.[78] Both cases raise the important issue of the Court's power to make an order for refunds for the benefit of a person not a party to the proceeding. Leaving that issue aside, the *Medibank Private* case

[75] See PC report recommendation 9.4.
[76] [2004] NSWSC 479.
[77] (2002) ATPR 41–895 see at pars [6], [7], and [10] and *ACCC* v *Cassidy* (2002) ATPR 41–867 at pars [7], [8], and [39]. Note also *ACCC* v *Danoz Direct* [2003] FCA 881 – which involved the sale of about 100,000 fitness system units with a total value of around $16 million.
[78] (2003) ATPR (Digest) 46–241 and [2003] FCA 881, and see *"Difficulties over refunds for consumers a 'concern': ACCC"*, Media Release 023/04, 26 February 2004 at website www.accc.gov.au.

which, for example, involved allegations of "no rate increases" representations which could have involved $90 million in payments to some 300,000 persons who acquired Medibank's health insurance products during the relevant period. The *Danoz Direct* case involved a $165 product sold to 94,000 consumers in Australia (an overall expenditure of around $15.5 million).

2.69 In the ACCC and Telstra Service Net Wiring Maintenance Plan matter[79] which was resolved out of court and involved refunds up to about $45 million to about 1.5 million telephone customers. The particular circumstances of that matter did not require a trust fund to be established. In other matters, such an outcome may not be as readily achieved without some sort of trust fund – established without the matter going to court.

2.70 Secondly, to ensure that contraveners do not profit from their contravening conduct, the Courts would be empowered to order payment of specified amounts into a trust fund. The law could specify the uses, such as consumer law or policy-related activities, to which such funds could be utilised. PC recommendation 10.1 of recovering illegal profits is directly relevant here. That is, going beyond the recovery of illegal profits to utilizing such money for appropriate public consumer purposes.

2.71 The suggestion here is for statutory mandated powers for establishing a trust fund. However, in establishing the scope of such provisions, a valuable paper by Dr Ruth CA Higgins entitled "The Equitable Doctrine of Cy–Pres and Consumer Protection", which formed Annexure 1 to the Australian Consumers Association Submission[80] to the Dawson Inquiry on the "Review of the Competition Provisions of the Trade Practices Act", is worth consideration in this context. In particular, such consideration may assist in formulating the appropriate statutory provision which could pick up elements of the equitable doctrine of *cy-près* as necessary to achieve the legislative objectives.

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[79] See ACCC Media Release 132 of 1996 "$45 million refund for telephone customers" issued on 17 September 1996 at website www.accc.gov.au/content/index.phtml/itemId/86818/fromItemId/621784.
[80] See website www.tpareview.treasury.gov.au/content/home.asp at *"Public Submissions"* – Submission No. 105, Australian Consumers' Association – Attachment 1.

2.72 A disappointing aspect of the PC's discussion was its lack of support for adding *cy-près* type provisions to the civil regime.[81] These provisions would enable a court to order that gains from illegal conduct be dispersed to activities benefiting consumers generally, when it is not possible to identify those particular individuals who have been adversely affected by the illegal conduct. An example of this applies in Victoria in credit legislation where civil penalties arising from breaches of the Uniform Consumer Credit Code ("UCCC") have been able to be paid into a trust fund for use in education and research on credit matters.[82] The PC, said it saw some merit in *cy-près*, but that it was "concerned that they would be administratively cumbersome and may also be a source of dissonance among competing advocacy interests".[83] Neither issue appears to have been significant with the credit scheme which has operated successfully in Victoria for many years.

2.73 Assistance in formulating the necessary statutory provisions and legislative guidance may also be available from the *Proceeds of Crime* legislation. Unlike that legislation, however, the aim here would be for the monies to either go back to the victims of the unlawful conduct or be used to further public consumer policy / law objectives rather than going into consolidated revenue.

[81] See Ruth CA Higgins, *The Equitable Doctrine of Cy-Pres and Consumer Protection*, Annex 1 to Australian Consumers' Association submission to Review of Competition Provisions of the Trade Practices Act 9 (Chairman Dawson), January 2003.
[82] Victoria, Part 5A Credit (Administration) Act 1984.
[83] Productivity Commission, Review, p. 240.

3. Conclusion

3.1 The agreement to establish a single national generic consumer law in Australia based on the TPA and drawing on the recommendations of the PC and best practice in State and Territory consumer laws, including a provision requiring unfair contract terms, is a significant milestone in consumer policy in Australia. This agreement affords a real opportunity for Australia to once again establish a world-class consumer policy framework.

3.2 Unfair contract term provisions will be a critical element of the new law given the growing significance of standard form contracts. The Victorian legislation has been demonstrated to be effective – enabling the Regulator to be proactive in protecting consumers, but also providing certainty and balance for business. The adoption of a new model for unfair contracts terms is questionable given the success of the Victorian scheme to date.

3.3 In developing the new generic law, further serious consideration should be given to introducing a general prohibition against unfair conduct. Little will be achieved by delaying this consideration and its importance is heightened by continuing concerns about the efficacy of the unconscionable conduct provisions of the current generic laws.

3.4 Effective enforcement of consumer laws at the international, national, and local levels will continue to be of paramount importance to consumers and businesses. Enhanced provisions for representative actions and private class actions; the use of trust funds; and *cy-près* actions should be part of the enforcement took kit.

Attachment 1

Extracts from Joint Communiqué of the Ministerial Council on Consumer Affairs Meeting on 15 August 2008

"Enhancing Australia's consumer policy framework: Reform proposals

Today the Ministerial Council on Consumer Affairs ("MCCA") agreed a series of proposals for far-reaching consumer policy reform. In doing so, the Ministerial Council responded to the Council of Australian Government's ("COAG") request that the Business Regulation and Competition Working Group ("BRCWG"), in cooperation with MCCA, develop enhanced national approaches for Australia's consumer policy framework, drawing on the final report of the Productivity Commission ("PC").

MCCA has taken this opportunity to build on its high-level commitments made in May 2008 and reach in-principle agreement on a range of policy initiatives designed to provide greater national consistency in Australia's consumer laws, their enforcement and the way in which those laws are developed. This represents a cooperative approach by the States and Territories to work with the Commonwealth to develop national reforms. The PC estimated that taking these steps could result in benefits to Australian consumers of between $1.5 billion and $4.5 billion a year.

In proposing these reforms, MCCA recognises that while Australia's current consumer policy framework has strengths, it is in need of significant improvements to overcome existing inconsistencies, gaps and duplication in Australia's consumer legislation and its enforcement. Australian consumers can benefit from consistent national coverage by a uniform national consumer law, and by coordinated enforcement action, providing them greater confidence in Australia's product and service markets. In this way, Australian Governments can build on the structural market reforms of the past 15 years, to better enable consumers to drive competitive, efficient and well-functioning markets in future.

In agreeing to these proposals, MCCA seeks to build on its earlier agreement to introduce a new national product safety regulation and enforcement system, which was confirmed by COAG at its 3 July 2008 meeting, and also the agreement of the State and Territories to transfer their responsibilities for the regulation of consumer credit to the Commonwealth. The development of increasingly national consumer product and service markets means that Australian consumers will benefit from uniform national consumer policy, legislative and enforcement frameworks.

The Ministerial Council proposes that COAG consider the following reform proposals, which would form the basis of an enhanced consumer policy framework for Australia to be agreed by COAG at its

2 October 2008 meeting. These policy proposals have been developed through a process led by the Commonwealth, in which the States and Territories have been actively involved.

A national consumer policy objective

Effective national consumer policy requires common adherence by the Commonwealth, the States and the Territories to a single national objective. With this in mind, the Ministerial Council proposes that all Australian Governments should agree to a common, overarching objective for consumer policy based on the Productivity Commission's proposed 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.'

Ministers further propose that this overarching objective should be supported by six operational objectives for consumer policy:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purposes for which they were sold;
- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.

A national consumer law

The keystone of the proposed enhanced national consumer policy framework is a single national consumer law, which represents best practice regulation. A single national consumer law will enhance individual consumer well-being, further assist in the development of a single national economy, reduce burdens on business and facilitate well-functioning markets, to the benefit of all Australian consumers and businesses.

The Ministerial Council proposes that all Australian Governments should agree to adopt a new national consumer law, which operates in all Australian jurisdictions and which remains consistent. This law should be based on the current consumer protection provisions of the *Trade Practices Act* 1974 ("TPA") and also incorporate appropriate amendments reflecting best practice in state and territory legislation.

The Ministerial Council further proposes that:

- the new national consumer law should be developed by the agreement of all Australian Governments and made law through an application legislation scheme, with the Commonwealth as the lead legislator and the States and Territories applying the new national consumer law (as amended from time to time) as part of their own laws;
- national consumer law provisions should apply to all sectors of the economy. However, Ministers also recognise that existing constitutional issues may mean that the financial services sector will need to retain a distinct legislative framework. In this regard, Ministers note the Commonwealth's position that there should be an ongoing commitment by the Australian Government to consistency between the national consumer law's provisions and consumer provisions in credit and financial services laws, to the extent that it is practicable to do so; and
- amendments to the national consumer law must be agreed by Governments according to an Inter-Governmental Agreement, which will provide, among other things, for the amendments to be agreed by the Commonwealth plus four state and territory Governments, of which three must be states, noting that these arrangements will require endorsement by COAG on 2 October 2008.

Unfair contract terms

As part of the proposed national consumer law, the Ministerial Council proposes that it should include a provision that addresses unfair contract terms. The provision should have the following features:

- the term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier;
- a remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class). Detriment is not limited to financial detriment;
- it would relate only to standard form (ie. non-negotiated) contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not;
- it would exclude the upfront price of the good or service, using the approach currently adopted in regulation 6(2) of the United Kingdom's *Unfair Terms in Consumer Contracts Regulations* 1999; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment (or the substantial likelihood thereof), with suppliers also potentially liable to damages for that detriment, along with other remedies available under the *Trade Practices Act* 1974.

The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms, in keeping with the PC's recommendation that representative actions be improved.

The provision should also permit the prescription of certain terms that are, in all circumstances, considered to be unfair. This regulation making power would rest with the Commonwealth minister, who would prescribe terms in accordance with the national consumer law amendment process set out in the Inter-Governmental Agreement and the requirements of regulatory impact assessment.

The provision should be supported by national guidance on its enforcement, developed by the national and State and Territory regulators, in accordance with a process set out in the Inter-Government Agreement.

Transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts.

The operation and effects of the new provision should be reviewed within seven years of its introduction.

Enforcement of the national consumer law

In implementing a new national consumer law, the Ministerial Council recognises the importance of ensuring that enforcement arrangements can address the needs of all Australian consumers effectively, including the most vulnerable and disadvantaged. In this respect, Ministers are mindful of the findings of the PC, which concluded that current enforcement arrangements could be greatly enhanced.

To this end, Ministers propose that:

- enforcement of the national consumer law will be shared between the ACCC and the State and Territory offices of fair trading, supported by formal agreements between these enforcement bodies that cover arrangements for communication between them and the coordination of their activities;
- at the Commonwealth level, ASIC will have primary responsibility for the enforcement of consumer laws relating to financial services, and the States and Territories will retain their enforcement powers in this area, and ASIC will assume primary responsibility for enforcing national consumer credit laws; and

- all enforcement arrangements should be reviewed by COAG within seven years after the commencement of the new national consumer law.

The Ministerial Council also proposes that enforcement and redress powers for regulators should be enhanced under the national consumer law, as recommended by the PC and as previously agreed by the Ministerial Council, through the inclusion of civil pecuniary penalties, disqualification orders, substantiation notices and public warning powers and infringement notices (to the extent permitted by relevant Commonwealth and State and Territory laws and policies). Consumer regulators should also be able to take representative actions on behalf of consumers not party to court proceedings and have the power to gather evidence until substantive proceedings have commenced."

Attachment 2

Extracts from Joint Communiqué of the Council of Australian Governments Meeting on 2 October 2008

"Preamble

The Council of Australian Governments ("COAG") held its 23rd meeting today in Perth. The Prime Minister, Premiers, the Chief Minister of the Northern Territory and the President of the Australian Local Government Association, were joined by Commonwealth, State and Northern Territory Treasurers. Australian Capital Territory ("ACT") officials attended as observers against the background of the forthcoming ACT election.

…

Financial Regulation and Consumer Protection

COAG has been pursuing regulatory reforms to enhance market stability and to ensure appropriate protection of consumers, the need for which has been heightened because of global market instability.

COAG agreed to an implementation plan for the regulation of remaining areas of consumer credit. This follows COAG's earlier decision that the Commonwealth would assume responsibility for the regulation of mortgages, mortgage broking, margin lending and all remaining areas of consumer credit, such as pay-day lending and financial counselling services.

…

COAG also agreed to a new consumer policy framework comprising a single national consumer law based on the *Trade Practices Act* 1974, drawing on the recommendations of the Productivity Commission and best practice in State and Territory consumer laws, including a provision regulating unfair contract terms.

The new national consumer law will deliver on COAG's commitment to a seamless national economy by providing a uniform and higher level of protection for Australian consumers and addressing weaknesses in existing laws. The new policy framework will improve consumer law enforcement powers, reduce compliance costs for business and increase access to information regarding dispute resolution and consumer issues.

The Productivity Commission has estimated the economic benefits of the framework at between $1.5 billion and $4.5 billion a year.

…"