

 	<p style="text-align: center;">2009 National Consumer Congress</p> <p style="text-align: center;"><i>Consumer Protection: New Challenges and Opportunities</i></p> <p style="text-align: center;">Peter Kell, Deputy Chairman 12 March 2009, Adelaide</p>
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Introduction

Good morning. I would like to thank the Minister for Consumer Affairs the Hon Gail Gago and the Office of Consumer and Business Affairs for hosting the 2009 National Consumer Congress and putting together an excellent program for this year's event.

It's an exciting time to be talking about consumer affairs in Australia as governments across the nation are embarking on a significant program to modernise consumer policy and consumer protection laws.

Since last year's Consumer Congress the Ministerial Council on Consumer Affairs (MCCA) has set out its agreement to '...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'.¹ The Council of Australian Governments (COAG) in October 2008 committed to a reform process that will provide a '...uniform and higher level of protection for Australian consumers'.²

The centrepiece of the consumer policy reform will be the introduction of a single national consumer law for Australia, based on the consumer protection provisions of the *Trade Practices Act 1974* (TPA), which is to be renamed the *Competition and Consumer Act*. This Australian Consumer Law will strengthen key consumer protection regulations in Australia.

The Australian Competition and Consumer Commission very much welcomes these consumer policy reforms. They will strengthen the national leadership role that the ACCC plays in regulating for fair and competitive markets. They will provide us with the powers to achieve better and more timely outcomes for Australian consumers, thereby delivering greater benefits to the community.

Importantly, the consumer protection reforms complement the reforms to Australia's competition regime in areas such as predatory pricing and cartel conduct. The reforms to both competition and consumer laws aim to ensure that traders and consumers can participate in fair and competitive markets.

¹ MCCA, Joint Communiqué, August 2008.

² COAG, Joint Communiqué, October 2008

In today's address, I'll outline some of new proposed consumer protection enforcement powers and why the ACCC believes these new powers are needed.

These include:

- Civil pecuniary penalties;
- Banning orders;
- Unfair contract terms;
- Substantiation notices;
- Infringement notices and public warning powers;
- Representative actions and redress for non-parties.

I'll also discuss the implications of Australian Consumer Law reforms for the current consumer protection regime, as well as the operational arrangements being developed for a 'single law, multiple regulator' environment.

Finally, I'll speak about the ACCC's work on informing consumers about their statutory warranty and refund rights and why this is an important issue for the ACCC. However first, I'll look into the recommendations of the Productivity Commission that culminated in the Australian Consumer Law reforms.

Challenges and Change in Consumer Markets

We have not seen a reform process of this scale in the consumer policy arena for many years. This reflects the scale of change in consumer markets over the last two decades and the higher expectations that consumers now have about how markets will work for them.

The Productivity Commission (PC) review of Australia's consumer policy framework clearly demonstrated the need for reform. In the PC's words:

In a number of respects, Australia's consumer policy framework is sound. It provides a broad platform for consumer protection for most products and services. But it has some systemic deficiencies which impair its effectiveness and which limit its capacity to adapt to emerging issues.³

The PC pointed to '...inconsistencies, gaps and overlaps in the law, and also in the enforcement of the law, arising from the inappropriate split of responsibilities between national, state and territory governments'. It also pointed to the current consumer policy regime's 'lack of responsiveness to changing market conditions'.⁴

What are some of these changing market conditions? We've seen:

- Consumers gain from the opening of markets and greater choice;
- The growth of online and mobile commerce;

³ Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, p17

⁴ Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, p17

- Consumers becoming integrated into the national and global marketplace.

The ACCC recognises that a modern, flexible and genuinely national regulatory system will help ensure the consumers enjoy the benefits from these changes while minimising unnecessary risks and costs. Such a system requires a well-equipped regulator. That is why the ACCC argued for significant reforms in our submissions to the Productivity Commission, including major reforms to our enforcement powers.

The Productivity Commission has identified its recommended changes to the consumer policy framework would generate additional benefits to the community in the order of \$1.5 to \$4.5 billion a year. This represents, on average, up to an additional \$542 a year for Australian households. The PC noted that there were few risks from the proposed policy reforms.

Consumer Protection Enforcement

Before I discuss some of the major elements of the Australian Consumer Law and their implications for the ACCC I'd like to run through some examples of recent ACCC enforcement activity. This will help highlight some of the ways in which the new laws will improve our regulatory capacity.

- The ACCC has taken action against companies about the accuracy of their green marketing claims. For example, the Federal Court found that GM Holden significantly overstated the environmental benefits of the measures it was undertaking to offset the CO₂ emissions from its Saab vehicles.
- The ACCC has been successful with a set of cases in the area of two-part advertising or 'was/now' advertising, with several cases concluded in the last few months, and many of them stemming from South Australia! They include matters before the Federal Court involving the retailers Harris Scarfe, Zamel's Jewellers and Ray's Outdoors, and a court enforceable undertaking from Moving Juice.
- The ACCC has also taken on a wide range of matters in the telecommunications industry such as misleading marketing of mobile premium services and pre-paid phone cards.

These examples of the ACCC's recent enforcement outcomes demonstrate that the TPA, administered by the ACCC, continues to deliver benefits to Australian consumers. However, in all of these areas the proposed new consumer protection provisions will *enhance* the ACCC's ability to obtain robust outcomes for consumers in a more timely manner. An example is the way in which the new substantiation powers, which I'll discuss later, will assist in assessing green claims.

Our ability to seek from the Court appropriate and proportionate remedies is limited, as is our ability to efficiently obtain compensation for affected consumers. In other words, while Australia's consumer laws have contributed to better market outcomes, there is scope for significant improvement to these laws.

I'd now like to turn to some of the specific changes proposed by the Australian Consumer Law reforms. I will focus my attention on the key provisions contained in the accelerated package of reform measures recently announced by the Minister for Competition and Policy and Consumer Affairs. These proposed new enforcement powers will strengthen Australia's consumer protection regime and enhance the ACCC's leadership role in regulating fair and competitive markets.

Civil Pecuniary Penalties

The introduction of civil pecuniary penalties for breaches of consumer protection provisions is an important and overdue reform. Most importantly, it will allow the ACCC to seek proportionate responses to breaches and will enable the ACCC to more effectively promote compliance with the law.

Where a breach of consumer protection provisions of the TPA occurs, the ACCC can only currently obtain an order for financial penalties by way of fines where it brings criminal proceedings. The ACCC has undertaken criminal enforcement proceedings in relation to breaches of Part V of the TPA and will do so in the future. However, criminal proceedings in general will only be appropriate in a small number of matters. Key issues include:

- The ACCC is concerned to ensure timely redress for consumers, which will generally not be possible with a protracted criminal investigation and prosecution;
- The nature of the evidence may not support a criminal conviction; and
- The complexity of a criminal investigation imposes additional resource costs on the ACCC and the DPP which limits the number of cases that can be taken and therefore the deterrent effect.

It is therefore arguable that too often traders who breach the law at present do not face proportionate penalties. The introduction of civil pecuniary penalties would bridge the existing gap between the civil measures currently available for breaches of consumer protection provisions, and the criminal penalty provisions.

Civil pecuniary penalties are already available in relation to breaches of competition provisions of the TPA, except for the boycott provisions. Breaches may result in penalties for corporations of up to the greatest of \$10 million or, where the value of the illegal benefit cannot be ascertained, 10% of turnover in the preceding 12 months. Breaches by individuals may result in penalties of up to \$500,000.

It is difficult to see why such penalties should not be available for significant breaches of the consumer protection provisions of the TPA. Indeed the ACCC believes that it is critical that appropriate consumer protection laws attract similar remedies – after all, compliance with the consumer protection provisions is as important as compliance with the competition provisions in promoting efficient markets and consumer welfare.

Banning Orders

The ACCC welcomes banning orders as an important component of the consumer law reforms.

Banning orders would restrict individuals from managing corporations or engaging in particular business activities. They are already a well recognised enforcement tool under the *Corporations Act 2001* (Cth) and have been introduced into the TPA in relation to certain breaches of anti-competitive conduct provisions. Subsection 86E(1) provides that, on application by the ACCC, the court may make an order disqualifying a person from managing corporations for a period that the court considers appropriate if two conditions are satisfied.

These are:

1. The Court has ordered the person to pay a pecuniary penalty for a contravention of Part IV; and
2. The Court is satisfied that the disqualification is justified.

Such powers would be an important addition to the ACCC's toolkit in relation to serious breaches of consumer protection provisions as well as providing consistency with similar penalties for breaches of the competition provisions. Banning orders have been particularly useful when addressing problems that arise with "repeat offenders" in breaches of consumer law.

Unfair Contract Terms

The introduction of a national Unfair Contract Terms (UCT) provision will provide the ACCC with greater capacity to address *systemic* unfairness problems in consumer markets.

UCT legislation is intended to address situations where terms in a standard form contract create a significant imbalance in the rights and obligations of the supplier and consumer to the detriment of the consumer, and it is not reasonably necessary to protect the legitimate interests of the supplier.

One of the significant aspects of the UCT provision is that it provides for a focus on *substantive* unfairness in consumer markets. It will allow the ACCC to address detriment in markets where consumers typically cannot bargain or vary the process of sale or contract formation. These contracts are now a feature of consumer life – hire cars, gym memberships, mobile phones.

This reform is not an attempt to restrict the efficient use of standard form contracts, which are an important way of providing goods and services in modern markets. Rather, it provides a more effective regulatory mechanism for ensuring that such contracts are fair.

In fact UCT prohibitions can improve both the fairness *and* competitiveness of markets. The terms in contracts that are typically regarded as unfair often serve to embed sub-optimal market outcomes and lead to a 'lowest common denominator' approach by suppliers. An example is the inhibiting effects of 'lock-in' terms and termination costs on switching and competition.

The UCT provision prohibitions will only be applied where *detriment or a substantial likelihood of detriment* can be demonstrated. This will enable the ACCC to address cross-market problems where appropriate.

The UCT provision will provide the ACCC with an important tool to address problematic conduct in consumer markets and improve certainty for business. Together with our state and territory counterparts we will develop guidance for industry and consumers in this area. We are currently working on the provision of such guidance, drawing in particular on the experience of Consumer Affairs Victoria.

Substantiation Notices

At present, the ACCC does not have a specific provision under the TPA to require a trader to *substantiate* a claim or representation – such a power will be an important addition to our enforcement toolkit. This power does exist in some state jurisdictions and is also present in the US and Canada.

The ACCC does have some powers to obtain materials to substantiate claims through the use of its s155 powers. However, a s155 notice may only be issued if the ACCC has *reason to believe* that a person is capable of furnishing information relating to a matter that constitutes or may constitute a contravention of the law. In many cases where potential wrongdoing is not evident, and consumers cannot identify post-purchase that they have been misled, it may not be possible to issue a s155 notice.

Substantiation notices will provide a rapid way to identify whether an alleged misrepresentation is true or not in the course of an investigation. After all, it is reasonable to expect that traders and suppliers will be able to provide material or point to evidence that supports the claims they make. It will also provide an avenue for legitimate businesses to back up their claims and stand out from those businesses that cannot.

It is important to note that the cases where the misleading elements are not as easy to determine – in other words where the substantiation power is more likely to be required – are also likely to be the cases where consumers will be more readily deceived.

Examples include

- Two part (“was/now”) advertising claims
- Food and health claims
- Environmental claims
- Product Safety claims
- Business opportunities

A power to issue substantiation notices will enable the ACCC to undertake initial investigations in a greater number of matters, and also to deal with these matters more quickly and efficiently.

Infringement Notices and Public Warning Powers

Another addition to the ACCC’s toolkit will be infringement notices. The new law will include a power to issue such notices for breaches of consumer protection provisions. This provides the ability to more efficiently deal with smaller matters that warrant a regulatory response. One potentially productive area for the ACCC may be in relation to certain product safety breaches.

Public Warning powers will also become part of the Australian Consumer Law. At times in consumer market regulation a rapid warning to the public is the best way of delivering protection.

There is current provision for such warnings in relation to product safety under Section 65B of the TPA. For example in November last year, a warning was issued by the Minister for Competition Policy and Consumer Affairs about the potential risks for small children arising from personal fitness treadmill machines.

There are benefits associated with formal warning notices, especially around the timeliness of action that can be taken to alert consumers to market risks such as the growth of scams. However, the Australian Consumer Law consultation paper has quite rightly raised the issues of safeguards for business and statutory immunity in the design of such a provision.

Representative Actions and Redress for non-parties

At present there are significant limitations on the ACCC’s ability under the TPA to obtain redress for consumers. The Federal Court’s decision in *Cassidy v Medibank Private Ltd*⁵ placed constraints on the ACCC’s ability to obtain compensation for consumers that are not named in proceedings. This is a particular problem in cases involving large numbers of consumers and/or consumers who may not be readily identified.

While the ACCC has some options to help deal with cases involving multiple consumers these are limited and some are very resource intensive.

⁵ [2002] FCA 315

Enforceable undertakings (s87B) may provide some scope to deliver compensation to consumers via negotiated settlement. However, the ACCC believes it is also necessary that a cost-effective and appropriate legal framework is in place that will ensure the court can adjudicate on contested matters while also enabling all relevant affected consumers to obtain redress.

The new law will provide the ACCC the ability to seek orders from the court to provide redress for consumers who are not parties to particular legal action. This is particularly relevant as the current limitations disproportionately impact on vulnerable and disadvantaged consumers, who are not likely to be aware of court processes. The changes will improve regulatory effectiveness by allowing the ACCC to more efficiently deal with matters that impact on multiple consumers, which is one of the key aims of a national economy-wide regulator as well as assist the most vulnerable consumers.

Other Reforms – Product Safety and ‘Best Practice’

I'll now briefly cover some other changes proposed for the consumer protection regime. There is a major reform program underway in the area of Product Safety. As with the broader consumer protection regulatory framework the ACCC will have a major leadership role to ensure a more nationally consistent and effective product safety regime.

There is also a set of so-called ‘best practice’ reforms that will be part of the Australian Consumer Law. Today I have focused on the major law reform proposals that have been announced as part of a ‘first tranche’ or accelerated package of reforms, but I want to emphasise that the ‘second tranche’ of best practice reforms will also bring important changes to the ACCC’s regulatory powers. The following examples should give you an indication of the way in which the second set of reforms will potentially expand the ACCC’s powers:

- Possible changes to the Pyramid Selling prohibitions that currently exist under the TPA may make it easier to prosecute those running such schemes;
- The inclusion of a provision regulating door-to-door selling – at present states and territories have provisions addressing this activity, and it is proposed that such provisions are harmonised and included in the Australian Consumer Law.

There are also reforms to consumer protection provisions that have already been introduced and will bolster the ACCC’s ability to deliver better market outcomes. For example, the ‘clarity in pricing’ reforms will enable consumers to get a clearer picture of the price they will pay in advertising. Unit Pricing will significantly assist consumers to compare and save in their daily grocery shopping.

Cooperation between Consumer Protection Agencies

It is important to note that the consumer policy reform program is not just about legislative change. The reform process also envisages enhanced cooperation between consumer protection agencies and improvements in areas such as information sharing. Enforcement of the national consumer law will be shared between the ACCC and the State and Territory offices of Fair Trading.

The reforms will facilitate greater collaboration between the ACCC and its state and territory counterparts, delivering greater consistency and certainty for consumers and businesses across Australia. The new model has been characterised as 'single law, multiple regulator', and the ACCC is currently working with state and territory agencies on the most effective arrangements for interagency cooperation.

I'm pleased to say that this work on interagency cooperation is already underway. Consumer protection agencies met earlier this week in Adelaide as part of a program to map out the arrangements to support the consistent administration of the new law. And I've mentioned some areas today where the ACCC and state and territory counterparts are already working together, such as on the development of guidance on Unfair Contract Terms law.

The ACCC will also refresh its existing formal agreements with other consumer protection agencies to better reflect the requirements of the new national consumer law and consumer policy framework.

Warranties and Refunds

The Minister for Competition Policy and Consumer Affairs has today announced that the Government has tasked the Commonwealth Consumer Affairs Advisory Committee with a review of the warranty and refund provisions of the TPA and associated state and territory legislation. This demonstrates an ongoing commitment to reform in consumer protection law.

The ACCC welcomes this review as a means of determining how these provisions can be improved, including consideration of the ability of regulators to effectively enforce the law and raise industry compliance levels. These are important provisions, and their contribution to consumer welfare I would argue is sometimes underestimated.

Of the many thousands of consumer complaints the ACCC receives each year more than 10 per cent relate to warranties and refunds. State and territory consumer agencies also receive large numbers of complaints around this issue and it has been an area of focus in several jurisdictions. The ACCC will continue to liaise with state and territory agencies in our approach to improving market outcomes in this area.

In the meantime, it is important that consumers get the maximum benefit out of their existing rights. In this regard, today I am pleased to announce that the ACCC is targeting the area of warranties to improve consumer outcomes.

We are today releasing a substantially revised *Warranties and refunds: a guide for consumers and business*.

This booklet is the ACCC's comprehensive guide to consumers' rights and businesses' obligations under the TPA. It also contains important information about steps consumers can take to negotiate resolutions with businesses and highlights practices that may be misleading.

We are also actively looking to target enforcement action where market conduct warrants such an approach. In this regard, we are writing to key industries identified by our consumer complaint statistics as generating disproportionate problems in this area and putting them on notice of their obligations.

The ACCC holds increasing concerns that too many businesses are not well versed in their obligations to consumers and are too quick to equate a consumer rights with those provided in express or voluntary warranties rather than the statutory protections afforded by the TPA. This appears to be a particular problem with high-end electrical products, an area in which consumer complaints are growing.

The ACCC is also concerned that too many consumers are not aware of their rights – impacting on their ability to assert their position with a trader and making less than informed decisions on choices over the acquisition of products like extended warranties.

Because there is a power/information imbalance, the ACCC takes a particularly dim view of businesses that put obstacles in the way of consumers asserting their rights.

I note that the ACCC is not able to pursue individual consumer claims. The warranty provisions imply rights into the contracts between the consumer and the business and are matters that the consumer need to take up through the appropriate court or tribunal. However, the ACCC can and will take action where businesses clearly deny or misrepresent the existence of consumer warranty rights.

This may arise, for example, where businesses:

- use signs or adopt policies that represent 'no refunds';
- take a blanket approach to denying claims;
- mislead consumers over the value of extended warranties beyond those provided at law.

The ACCC is currently conducting specific investigations following consumer complaints and where concerns are substantiated will not hesitate to take action.

Conclusion

The TPA, administered and enforced by the ACCC, has delivered many benefits to Australian consumers over many years. But changes in consumer markets, together with increasing expectations in the community, support the need for major reforms in the area of consumer protection regulation. The consumer policy reforms will significantly strengthen the consumer protection leadership of the ACCC and deliver further benefits to the Australian community.

These reforms will also provide for greater collaboration between the ACCC and state and territory consumer protection regulators and the strengthening of these relationships under the 'single law, multiple regulator' model. This will provide greater consistency and certainty for consumers and businesses across Australia and will lead to better consumer protection enforcement outcomes.

It is important to understand that these reforms to the consumer protection regime have the same overall objectives as the recent reforms that have been undertaken or are proposed for the competition provisions of the TPA, such as those relating to cartel conduct. Ultimately the reforms to both the competition and consumer provisions of the TPA aim to make markets fairer and more competitive.

The Australian Consumer Law reforms will also provide the ACCC with regulatory tools and enforcement options that will allow us to be more flexible, targeted and efficient in our regulatory work. They will enable to the ACCC to more easily obtain appropriate penalties for misconduct and redress for consumers.

There are considerable challenges in the current economic environment in improving consumer confidence, but these improvements to the ACCC's enforcement toolkit will allow us to deliver on the aim of 'a uniform and higher level of protection for Australian consumers' that underpins the consumer policy reform program.