Australasian **Compliance** Institute

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SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

Via email: australianconsumerlaw@treasury.gov.au

An Australian Consumer Law: Fair Markets – Confident Consumers
Discussion Paper 17 February 2009

The Australasian Compliance Institute (ACI) would like to take the opportunity to thank the Department of Treasury and the Assistant Treasurer Mr Chris Bowen MP for providing an opportunity for ACI to make a submission in respect of Treasury's paper *An Australian Consumer Law: Fair Markets – Confident consumers,* dated 17 February 2009.

ACI is the peak industry body for the practice of compliance in Australasia. Our members are compliance, risk and governance professionals actively engaged in the private, professional services and Government sectors within Australia, New Zealand, Singapore, Thailand and Hong Kong. ACI is therefore uniquely placed to provide relevant and appropriate input to the preparation of a Regulation Impact Statement relating to proposed new consumer laws.

ACI continually works on behalf of its members, engaging with government to encourage balanced and pragmatic regulation and representing members with a clear and informed voice on the emerging challenges impacting our profession.

ACI enthusiastically supports Treasury proposals to harmonise and streamline national consumer laws. The consultation paper raises a number of issues and seeks comment upon a number of proposals. This submission will comment upon these areas in turn as well as drawing upon ACI's experience in a number of jurisdictions with respect to consumer law as well as the process of introducing new legislative regimes.

Once again ACI would like to thank the Department of Treasury and the Assistant Treasurer for extending this opportunity to comment upon the paper. Should Treasury require any additional information or seek clarification on the comments that appear in this submission, please do not hesitate to contact ACI on +612 9290 1788.

Yours sincerely,

Martin Tolar
CEO
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Australasian Compliance Institute

SUBMISSION OVERVIEW

Submission Structure

ACI's submission comprises two sections, namely:

- commentary on Treasury's detailed proposals covering the legislative context as well as summarising agreed COAG reforms and best practice reforms; and
- ACI's recommendations with respect to implementation and transition to new consumer law.

Attached as a separate Annexure to this submission is the list of Treasury questions contained in the paper accompanied with ACI's response.

Main Themes

ACI would like to take this opportunity to acknowledge the work of Treasury in developing and writing a comprehensive analysis of Australian consumer law and identifying the key areas to be addressed by new national legislation.

ACI notes that many aspects of the proposed new consumer law have already been settled by COAG. ACI's submission therefore focuses predominantly on identifying risks associated with how the new consumer law will be implemented and recommendations for mitigating those risks.

Regulatory Framework

- The collective oversight regulatory model chosen involves regulatory complexity and overlap and has been shown to be ineffective in the past. It will be critical for the State and Territory Fair Trading Agencies and the ACCC to continue to work together to ensure consistency of approach across different jurisdictions.
- The promise of harmonised laws will only be effective if regulatory supervision and enforcement practices are similarly harmonised.

Unfair Contract Terms

- ACI does not support the blanket prohibition of certain contract terms
- If unfair contracts legislation is introduced it should be limited to standard form contracts and not be extended to 'business to business' contracts
- ACI favours key principles to guide business about appropriate contract terms
- An unfair contracts prohibition that provides factors for the court to consider in determining 'unfairness' (a similar approach to that taken in relation to sections 51AB and 51AC) is arguably more flexible and preferable, rather than introducing a prescriptive approach banning certain terms into Australian trade practices law.

New Enforcement Powers

- ACI agrees that new enforcement powers would strengthen the overall legislative framework. This applies particularly to civil penalties and disqualification orders
- Proposals with respect to public warnings, substantiation notices and infringement notices however need to be developed further with a view to giving more certainty as to process. ACI would welcome further consultation and involvement in developing some of the 'operational' aspects of the new enforcement powers.

Product Safety Regime

- ACI supports Treasury proposals for a new product safety regime
- The new regime may impose additional resourcing requirements on the ACCC. Comments above in relation to consistency of approach between State and Territory fair trading agencies and the ACCC are particularly applicable to this joint administration model.

Consumer Definition

- ACI supports the proposal to standardise the definition of "consumer" in consumer protection laws
- The proposed expansion of the definition to include a wider range of circumstances should be avoided.

Implementation and Transition

ACI would welcome being involved with the implementation stream associated with 'operational issues'. ACI's detailed submission provides a number of recommendations associated with ensuring effective implementation and transition strategies are developed.

Each of the above areas is explored in more detail in ACI's detailed submission which follows.

I COMMENTARY ON DETAILED PROPOSALS

PART 1: CONTEXT

Consumer Policy 'Operational Objectives'

The paper describes six operational objectives that will support the overarching objective agreed by the Ministerial Council on Consumer Affairs (MCCA) in August 2008. ACI supports these operational objectives and considers them to be an appropriate set of principles to inform the process of developing the new law. It will however be important for the law and supporting regulations and guidance to include objective and transparent benchmarks or measures of the principles. For example, what may appear as 'proportionate, risk-based enforcement' to one group may not appear so to another. This will be particularly important given the number of regulators who will be sharing responsibility for oversight of the law.

Treasury's Proposed Regulatory Model

The regulatory model that has been proposed is reliant upon co-operation between the States and the Commonwealth and their various regulatory bodies. In this regard it is reminiscent of the original companies and securities framework in the days of the original Interstate Corporate Affairs Commission (ICAC) and National Companies and Securities Commission (NCSC) together with state based Corporate Affairs departments.

Those arrangements were described by some as a sort of co-operative federalism, complicated by the ramifications of the Australian Constitution and division of responsibilities. Under this system, despite a national scheme of laws, there were incidents of forum shopping, inconsistent approaches to enforcement, different legal outcomes and precedents, State based enquiries that crossed borders, examples of tribalism and a lack of cooperation and information sharing at an operational level.

This system was ultimately revised and resolved with the creation of the then ASC, now ASIC. The authors Bernard Mees and Ian Ramsay, in "Corporate Regulators in Australia (1961-2000): From Companies' Registrars to the Australian Securities and Investment Commission" write:

> "Despite the criticism of the NCSC which had appeared in the press in the late 1980s, it was clearly the unwieldy nature of the co-operative scheme, the structure of its supervisory council and the uneven regulatory records of state corporate affairs bodies which led to the federal Labour decision to abolish the state-based co-operative scheme. The ALP had a longstanding commitment to a single, commonwealth mandated commission and a federally founded body of corporations law. But despite the creation of a national securities body at the end of the 1970s, throughout the 1980s the larger state corporate affairs offices had continued to act as quite independent bodies, commissioning their own research into local (or even national) corporate concerns, issuing policy documents and pursuing other matters that seemed to go against the grain of a unified companies scheme."

ACI experience suggests that collective oversight and agreements often do not translate into operational effectiveness. The Treasury paper is not intended to focus on these issues but has asked for comment. A consistent message from our membership is that this revision of Australian consumer law is a significant opportunity to learn from the issues and models of the past.

Given the proposed model for the revised Trade Practices Act (TPA), it is critical that consumers and suppliers feel the impact of real coordination of activities and services across regulatory interfaces. It will therefore be imperative that the State and Territory Fair Trading Agencies and the ACCC continue to work together to ensure that divisions of responsibility and broader regulatory arrangements between counterparts resolves the issues seen previously, to ensure that consumer protection provisions are consistent in application and outcomes across jurisdictions.

Regulatory Cooperation

Chapter 5 of the Treasury paper discusses various implications for national, state and territory laws. This discussion is necessarily pitched at a high level and does not appear to explore the future operation of the regulatory 'architecture', for example:

- The division of administrative and compliance and enforcement responsibilities between national and state regulators, and consequential scope for generating efficiencies
- Protocols for information sharing between regulators
- Consumer dispute resolution processes and how they might interact with existing processes, and
- Approach to dealing with businesses operating nationally versus those operating within one state only.

The implementation of national consumer laws provides a unique opportunity to streamline and simplify the operation of the law, for the benefit of consumers and business alike. In ACI's view it will be critical for the expectation of more efficient and consistent consumer regulation to be met with reality as implementation nears. Therefore ACI strongly recommends that SCOCA gives early attention to the development of the regulatory 'operating model' to be implemented in conjunction with the implementation of the new law.

National Regulators and State-Based Fair Trading Regulators

Harmonisation of laws will only be effectively achieved if there is harmonisation of the enforcement regime at an operational level. Unless, where possible, there is clear and unequivocal delineation between the roles of the ACCC and the State-based regulators the potential exists for inconsistent interpretation and application of the law, which, in turn, renders compliance difficult, not to mention costly. These also have significant effects on the business community's perceptions of the appropriateness and fairness of the administration of the law, which in our experience has unfortunate ramifications on businesses willingness and capacity to comply with the law.

The choice of regulator should not be made based on whether a business operates in one state or nationally, nor should it be made on the basis of the type of business

conducted e.g. all confectionary manufacturers to be subject to regulation by the South Australian regulator.

Instead, the ACI suggests that the factors that regulators take into account when exercising their regulatory discretion across the range of legislation they administer, taking into account the nature, seriousness and extent of the breach and the circumstances of the companies and consumers involved, could be more clearly formalised and articulated by the State and Territory fair trading agencies and the ACCC.

Preferably, a pared-back version of the decision making process could be articulated by the agencies, as in our experience, if drafted in a way that requires companies to meet a high standard of compliance to receive regulatory consideration in the event of a breach, this provides a significant incentive for companies to act in a manner consistent with the public interest in the event of a breach.

Impact on Financial Services Laws

While consistency between the ASIC Act and the TPA is desirable, so is the need for consistency between the ASIC Act and other laws regulating the financial services industry, including the Corporations Act, the UCCC and the various regulatory instruments issued by ASIC. There have been instances of divergence between the ASIC Act and the TPA where this has been warranted such as the Federal Government's decision to amend the TPA with respect to component pricing requirements (section 53C) but not the ASIC Act (section 12DD). Therefore, in drafting the Australian Consumer Law, and the consequent ASIC Act equivalent, it is important to ensure that appropriate divergences between the two pieces of legislation due to policy decisions are maintained. While this may appear to conflict with the basic principle of one Consumer Law, it is just as important for the Consumer Law to be effective for the industries it is regulating.

Legal Considerations

ACI is conscious that the transition to an Australian Consumer Law will require redrafting of legislative provisions in the TPA and related State Legislation. These provisions have been the subject of much judicial interpretation and there are now established precedents. ACI is concerned that the redrafting necessary to achieve transition to an Australian Consumer Law will give rise to subtle changes of meaning that result in unintended changes in interpretation. Existing precedents may be invalidated. ACI therefore submits that the consultative process in relation to this transition must include further extensive discussion about the proposed terminology and structure for the new legislation.

The ACI also suggests that specific consultation on the business costs and benefits of the proposed legislation, when it is more clearly shaped, will be invaluable. A number of member submissions raised significant concerns as to the compliance cost implications of seemingly minor legislative drafting changes. A number of our members have advised of their willingness to consider and respond with detailed information that may enable governments to consider these issues, at an appropriate time and when sufficient information is available.

Disclosure Implications

Amongst other things, the consumer environment in Australia is characterised by a plethora of sale and contract documentation. Indeed there has been much comment and criticism centred on a view that the extent and content of consumer documentation has undermined the objective of well-informed customers. An example often cited in this context is the amount of information included in Product Disclosure Statements (PDSs) accompanying financial services transactions.

Treasury proposals for a new consumer law are suggestive of new and changed disclosure documentation, such as the introduction of standardised contracts, into transactions involving goods or services in trade or commerce. The business community at large would be concerned about potential flow-on effects of the introduction of new or standardised contracts and related documentation in this context. For example, any customer documentation or contracts that make reference to applicable consumer laws including the TPA would have had to be amended to reflect the new name of the TPA if the decision to change the name of the TPA is proceeded with. Whilst this may result in efficiencies over the longer term there exists a real potential for business to have to make mass-scale changes to other consumer documentation. This may be particularly so for financial services providers. Moreover, other regulatory change initiatives emanating from government that cover similar timelines may further exacerbate this issue.

ACI therefore recommends that SCOCA, in consultation with industry bodies, establish the disclosure and documentation implications of introducing new consumer law. This aspect should be considered early in implementation timeline and certainly before the end of calendar year 2009. An educative campaign outlining clear timeframes for implementation of the new law would also significantly assist businesses in complying with changes while minimising any unnecessary cost implications.

PARTS II (COAG'S AGREED REFORMS) AND III (BEST PRACTICE REFORMS)

Unfair Contract terms

Business to Consumer

ACI supports the philosophy that contract terms which cause a significant imbalance in the rights of consumers and business and which are not reasonably necessary to protect the legitimate business interests of the business supplier should be prohibited.

ACI also acknowledges that many of the types of terms referred to on page 31 of the paper can operate unfairly towards consumers and that some regulation of the same is required. ACI however cautions against the imposition of prescriptive and 'blanket' prohibitions, based only on a perceived likelihood of consumer detriment, without examining the differing circumstances and level of detriment in each case and to weigh this up against the costs to business, not just of compliance but also of the inability to achieve a level of certainty to which many of the terms are directed. There is considerable scope for these terms to introduce procedural requirements and regulatory costs on businesses which achieve very little in the way of consumer outcomes. Concerns were articulated by our membership that there could be a number of instances where the many (compliant traders and consumers) may be 'punished' (by excessive and proscriptive regulation) for the sake of the few (rogues).

For example, terms which require a consumer to acknowledge that they have read and understood a contract can, and should, operate to direct the business' mind to the state of the consumer's knowledge and understanding as well as directing the consumer's mind to the importance of the obligations he or she is assuming by entering into the contract. Where this applies to a standard form contract for, say, the purchase of a washing machine, the suggested cure would seem disproportionate to the malady. Such clauses play an important function in the creation and fostering of compliance within an organisation. Without such a clause, and absent a costly certificate from an independent third party attesting to the consumer's knowledge and understanding (which time alone may prohibit being obtained) business will have no certainty and the business of trade and commerce at the consumer level may grind to a frustratingly slow pace.

More broadly, ACI is not convinced about the need for prescriptive, procedural and detailed unfair contract terms legislation. Such legislation has the potential to increase business compliance costs significantly. In addition as time passes there will inevitably be organisations that 'find ways around' prescriptive regulation by introducing new terms and methods not otherwise envisaged at the time of drafting. This will tend to slow the delivery of the desired customer remedies and ultimately render the legislation ineffective and unsustainable in the medium to longer term, further adding to the costs of regulation and compliance.

The Productivity Commission has stated that "the evidence for exploitation of unfair terms is patchy". Similarly, the ACI is not aware of any empirical evidence, which indicates that the detriment caused by unfair contract terms is significant. In the absence of such evidence, it is difficult to justify the introduction of such legislation.

ACI would suggest that if unfair contracts legislation is introduced its application be limited to:

- Standard form contracts, and
- Situations where the supplier has invoked or threatens to invoke the contract term.

It appears from the Treasury paper that the ACCC and consumers will be able to take seek remedies where the consumer can show "detriment or a substantial likelihood of detriment". This means that the ACCC and the consumer may be able to take action in relation to a standard term, which they believe to be unfair, but which the supplier is not seeking to invoke.

In the event that unfair contract terms legislation is introduced, it would be preferable to have a process for banning terms which are found to be unfair. In particular, a ban should be placed on contract terms which seek to deem that a factual situation exists when such a factual situation does not in fact exist.

By adopting a banning process, the amount of litigation, which may arise from the legislation, would be reduced.

In summary, ACI would like to emphasise that a balanced approach should be applied. Elements of a balanced approach might include:

- The development of a set of principles by policy makers which guide business about appropriate contract terms
- A small number of specific standard contract prohibitions, and
- A more broad based list of factors the court could consider when determining unfairness and hence reference to courts and case law to interpret the principles over time.

Business to Business

The extension of the prohibition on unfair contracts to standard form contracts entered into by business, on the basis that "their interests are essentially the same in respect of the potential for unfair contract terms" represents an overly simplistic approach to the issue and fails to recognise that business to business dealings frequently involve different considerations than business to consumer dealings. Unlike the ordinary consumer, business to business dealings, even those involving small business, will frequently occur against a background of experience in such transactions, if only from greater frequency and exposure to the same and will almost certainly more frequently involve access to, and reliance upon legal and other expert advice and assistance.

Agreed Reforms to Consumer Law Enforcement Powers

Civil pecuniary penalties

ACI supports the introduction of civil pecuniary penalties for contraventions of the consumer protection provisions. ACI believes that the introduction of pecuniary penalties will enhance compliance with the consumer law, particularly in cases where businesses engage in contraventions that are more blatant.

ACI notes that the introduction of civil pecuniary penalties for consumer protection matters will result in a parallel civil and criminal penalty regime. This type of regime may cause added complexity for businesses. Therefore, the ACI recommends that the ACCC and CDPP issue a guideline as to how the prosecutorial discretion will be exercised.

Disqualification orders

ACI supports the introduction of disqualification orders for individuals in particular circumstances. ACI believes that education rather than disqualification should be used as the primary means of ensuring that individuals do not continue to breach the consumer protection laws. However, disqualification should apply to individuals who have engaged in repeated illegal conduct in contravention of the consumer protection law.

Substantiation Notices

ACI notes that NSW, Victoria and Queensland have powers to issue substantiation notices. Delivered appropriately, such notices can be particularly valuable in terms of preventing businesses from making blatant and outlandish claims about their goods and services, particularly claims about miracle cures for illnesses and diseases such as cancer. However, because substantiation notices would effectively reverse the onus of proof and require the business making the claim to back it up, particular care needs to be taken to ensure that appropriate safeguards are included to guard against their abuse and to prevent them becoming a disincentive to business, particularly in terms of compliance costs.

The Treasury paper appears to take the current system into new territory without providing information as how and when the power would be invoked, and what regulatory restraints would be built in, for example giving business the chance to respond following initial enquiries. ACI received member submissions that articulated concerns that the ACCC and other regulators may use substantiation notices against businesses which are not engaging in blatantly misleading conduct. ACI believes that there needs to be a clear process whereby a business, which has been issued a substantiation notice, can challenge the decision to issue the notice through either administrative review or the courts.

ACI also recommends that the Government conduct a review of the use of this power by the regulators three years after its introduction to ascertain whether the power has been used appropriately.

Whilst acknowledging that the final form of the power is yet to be determined, ACI considers that the introduction of a relatively unfettered power which has the potential to lead to enforcement action in relation to the conduct that has given rise to the notice should not occur in the absence of a fully informed debate on the subject. Such debate should include consideration of:

- The circumstances in which such a notice can be issued (for example, can it be issued only on the basis of a complaint from a consumer, or should it only be issued on the basis of some evidence, and, if so, what type and amount of evidence?)
- For what conduct can such a notice be issued
- To whom can a notice be issued

- Should such a notice operate to reverse the onus of proof even though the legislation may not do so (eg allegations of misleading and deceptive conduct which do not involve representations as to the future must be established by the party making the allegation, not the party about whom the allegation is made)
- In what time frame must a notice be complied with
- What grounds will exist to challenge a notice and to whom must the challenge be made and in what time frame
- What protections exist for documents and information provided under compulsion of a notice, especially where they contain commercially sensitive material, and
- What provision will exist for reimbursement of costs in the event that a notice is found to be invalid or its issue unjustified.

Infringement Notices

ACI is concerned about the introduction of infringement notices in relation to what the paper describes as "substantive breaches". It would be inconsistent with Australian Government guidelines and with core principles of justice to introduce an infringement notice regime to any provision that does not have "physical elements on which an enforcement officer can make a reliable assessment of guilt or innocence"[1]. The misleading and deceptive conduct provisions depend on an assessment of the overall impression on a target audience: clearly this is a subjective issue. Section 52 of the TPA and its equivalents in state legislation therefore do not meet the above requirement and are unsuitable for an infringement notice regime.

Where issue of an infringement notice is required, the process should include the requirement for the notice to be considered by an independent body such as an administrative tribunal or court for adjudication where the affected businesses can raise objections, before issue.

The ACI is also concerned that a right to challenge the infringement notice in court may not be an adequate protection given the costs of litigation. Many smaller companies may not be able to afford contesting the infringement notice. This issue would make an administrative tribunal the more appropriate authority to deal with infringement notices.

ACI believes there may be a place for infringement notices in responding to "administrative breaches" such as a failure to comply with a mandatory product information standard, since these matters do have the requisite "physical elements on which an enforcement officer can make a reliable assessment of guilt or innocence". But even in these cases, the only apparent advantage appears to be administrative. In other words, the ACCC would be able to issue infringement notices and collect penalties without taking court action. Administrative convenience is not a sufficient policy justification for conferring this power on the ACCC.

No 'consultation questions' have been posed in relation to this issue, which leads to a conclusion that it is a *fait accompli*. If this is the case, then ACI urges Treasury to consult further on the content and impact of these proposals, the nature of the

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[1] *Guide to Framing Commonwealth Offences, Civil Offences, Civil Penalties and Enforcement Powers* , Commonwealth of Australia 2004, p.45

power, the conduct it may apply to, and the circumstances in which it may be exercised.

Public Warning Powers

ACI notes that every Australian state and territory currently has a public warning power. Therefore, in terms of ensuring uniformity, it is appropriate that the ACCC have the power to issue a public warning about a business.

ACI is concerned that such a power may be misused by the all regulators if it is invoked without exhaustive enquiries having been undertaken beforehand. The power also runs contrary to the idea that even businesses and individuals are be presumed to be innocent.

One way of reducing the potential misuse of this power is to give businesses clear rights to take an action against the regulator via the court system for damages in the event that they can establish that the regulator issued the public warning improperly. The risk of a legal action for damages will have the effect of concentrating the mind of the regulator prior to deciding to use this power.

Finally, the ACI also believes that the regulators should issue guidelines explaining how they will exercise any power to issue a public warning, or rather; the regulators should achieve a consensus position following industry consultation and collectively issue binding guidelines to this effect.

A National Regulatory Product Safety Regime

The ACI supports the proposed reforms to the product safety regime. It is important to have a national streamlined product safety regime so that there is no duplication of effort between Commonwealth and state regulators. Also limiting the state involvement to interim bans will give these agencies greater flexibility to respond quickly in banning dangerous products while minimising the incidence of disparate regulatory requirements and regulatory overlap.

The ACI notes that if the ACCC is to become the lead regulator (for policy and/or for enforcement) in this area it is likely to need additional, and somewhat niche, staff resources. Development of mandatory product safety and information standards and bans is a complex task and consideration of the skill sets that will need to be maintained by the ACCC in future is warranted. Similarly, investigating product safety violations involves specialist knowledge of testing techniques, for example, the use of probes in testing cradles for compliance with the relevant standard. The role of state fair trading agencies enforcing this area of law into the future under the joint administration model proposed is also not to be forgotten.

Reforms to TPA and FTA Definitions

'Consumer' Definition

The ACI supports the proposal to standardise the definition of "consumer" in consumer protection laws. The current situation of having significantly different definitions of the term "consumer" in consumer protection legislation should be remedied.

However the proposed expansion of the definition of "consumer" to cover a wider range of circumstances, such as goods used in business contexts, or to apply to other predominantly business activities or contexts should be avoided. This is particularly important if the unfair contract provisions are to be enacted in a form which absolutely prohibits certain contractual terms. The circumstances of a business, even a small one, may differ greatly from that of a consumer. Take, for example, the suggested prohibition on terms allowing a supplier to repossess goods where such goods cannot be removed without causing damage to the consumers' premises. It may be quite disproportionate a remedy to remove a bench top stove from residential premises, as opposed to the removal of the same goods from the tea room in an office of a business.

If the definition of consumer is to be extended then consideration will need to be given to each and every application of the same so as to ensure that the rights of business are not disproportionately affected by the same.

Reforms to Provisions Dealing with Unfair Practices

ACI comments on some of the specific questions raised in the Treasury paper are contained in the attached Annexure.

Australasian **Compliance** Institute

II IMPLEMENTATION OF AND TRANSITION TO NEW CONSUMER LAW

Introduction

The Treasury paper describes at page 12 an implementation process divided into five streams. Of particular relevance to ACI is the stream devoted to 'operational issues, including enforcement, education and compliance'. In this context ACI would welcome early consultation with SCOCA members with a view to partnering with SCOCA and others on the development of appropriate implementation and transition strategies.

ACI's recommendations with respect to implementation, based on members' experiences in implementing both large and smaller scale regulatory change, are discussed further below.

ACI Regulatory Implementation Recommendations

The Treasury paper includes an indicative time line and process for implementation of new / amended consumer laws.

Our experience suggests that any significant change to laws such as those proposed in the paper requires:

- A well-structured and practical implementation process
- An appropriate transitional period, and
- That these laws will also be subject to amendment over time, as the regulator and industry experience evolves[2].

This implementation process for any law should cover a number of areas including:

- Formal regulator guidance to business and consumers
- Dissemination of information related to the changes so that business and consumers are made aware of the changes and how they will be impacted
- Education, especially for business about what the new or amended laws mean, and the expectations and obligations that will be imposed upon them
- Development of an enforcement regime including an appropriate transition period
- Close liaison between the regulator and business, particularly in the early stages of implementation
- Encouragement for the development by business of internal compliance arrangements, and
- Encouragement of compliance with both the spirit and intention of the law.

The transitional implementation should include a formally publicised timetable of how the national regulator / co-regulators will treat the implementation, including various stages of compliance. For example, an implementation timetable may include disclosure of:

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[2] For example, in Australia, both the Financial Services Reform Act (part of the Corporations Act) and Anti-Money Laundering and Counter-Terrorist Financing Act (AML/CTF Act) have seen a number of amendments since their initial implementation.

- The regulator's enforcement intentions over the early periods of the law, such that initial and unintentional instances of non-compliance, or instances with limited or no consumer detriment, will be subject firstly to education and discussion, rather than formal regulatory action[3], and
- When the transition from education to enforcement is likely to occur.

Formally communicating the transitional process provides both national and state-based fair trading regulators and regulated entities the opportunity for regulatory certainty and at the same time allows for the orderly transition from one regulatory regime to another.

Regulator Guidance

ACI believes that specific guidelines should be issued by the various regulators on how they will interpret and implement the new legislation. This will require co-operation between the regulators and will also require some definitive delineation of the various roles to be played by the regulators.

Of key importance in ensuring that these proposed new consumer laws are appropriately implemented and managed by business is a clear understanding by them of the role and expectations of the regulators when enforcing the law. This is of particular importance in the context of the paper recommending the introduction of new enforcement powers and provisions. To this end, the ACI suggests in addition to the consumer legislation, there should be a series of formal public Policy Statements developed and released over time to support the legislation. The ACCC has previously issued information of this nature, albeit in the form of guides. Our membership has indicated that guides lack sufficient certainty and Policy Statements would provide greater comfort and certainty to business.

These Policy Statements could give specific guidance to business by:

- Explaining when and how the ACCC and state regulators will exercise its powers under the Consumer Law
- Explaining how the ACCC and state regulators interpret the Consumer Law, and who will be 'lead interpreter'
- Describing the principles underlying the regulatory approach, and
- Giving practical guidance (for example, by giving business practical examples of how they may be able to meet their obligations).

To ensure the maximum benefit for business, these guidance documents should be made available on the website of the ACCC and other appropriate regulators.

These Policy Statements should provide business with a clear understanding of the expectations and obligations to be placed upon them, while providing sufficient flexibility to allow for a practical and efficient compliance regime. It is expected that, in addition to a series of 'generic' Policy Statements applying to all regulated businesses, the ACCC may also need to consider the development of specific Policy Statements for those areas and/or industries that may face particular issues or risks.

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[3] It is recognised that serious and/or intentional non-compliance (for example in relation to 'hard core' matters) can still be subject to formal regulatory action even during the transition period.

ACI notes that ideally the ACCC and State and Territory Fair Trading agencies would also consult with ASIC before issuing such Policy Statements to maintain consistency between the ASIC Act and the TPA to the extent that consistency is appropriate.

While formal in nature, these Policy Statements should be sufficiently flexible to allow the ACCC and State / Territory fair trading agencies to revise, adapt and if needed, remove specific guidance based on changes to Government policy, regulator and/or business and consumer expectations.

ACI suggests that Policy Statements on the following areas may be of benefit:

- Internal compliance – how to build programs and arrangements (referring to AS3806-style arrangements)[4]
- Enforcement – how the regulators will approach the enforcement regime
- Education – what the regulators considers should fall within and outside the legislation in terms of actions and undertakings. This could assist in providing regulatory certainty, as businesses need to know what kind of activities the regulators will target. Once again, this may take the form of guidance rather than a Policy Statement, and
- Dispute resolution - how the various regulators will approach a matter, including process of resolution, negotiation and decision making.

Education and Awareness

ACI is of the view that the Government via MCCA and SCOCA will need to dedicate resources to the education of:

- The business community with respect to the new obligations they will face, and
- Consumers to ensure they are informed as to the extent of the changes and how the new consumer protection provisions will operate.

This should minimise confusion and potentially "nuisance" or inappropriate complaints and actions.

Proposed Enforcement Framework

Transition Period

Treasury would appreciate that with any new piece of legislation it is important to give businesses an appropriate transition period, both before final introduction of the law, and in respect of formal regulatory intervention, to allow for the development of appropriate compliance controls and to enable business to 'learn' the new laws.

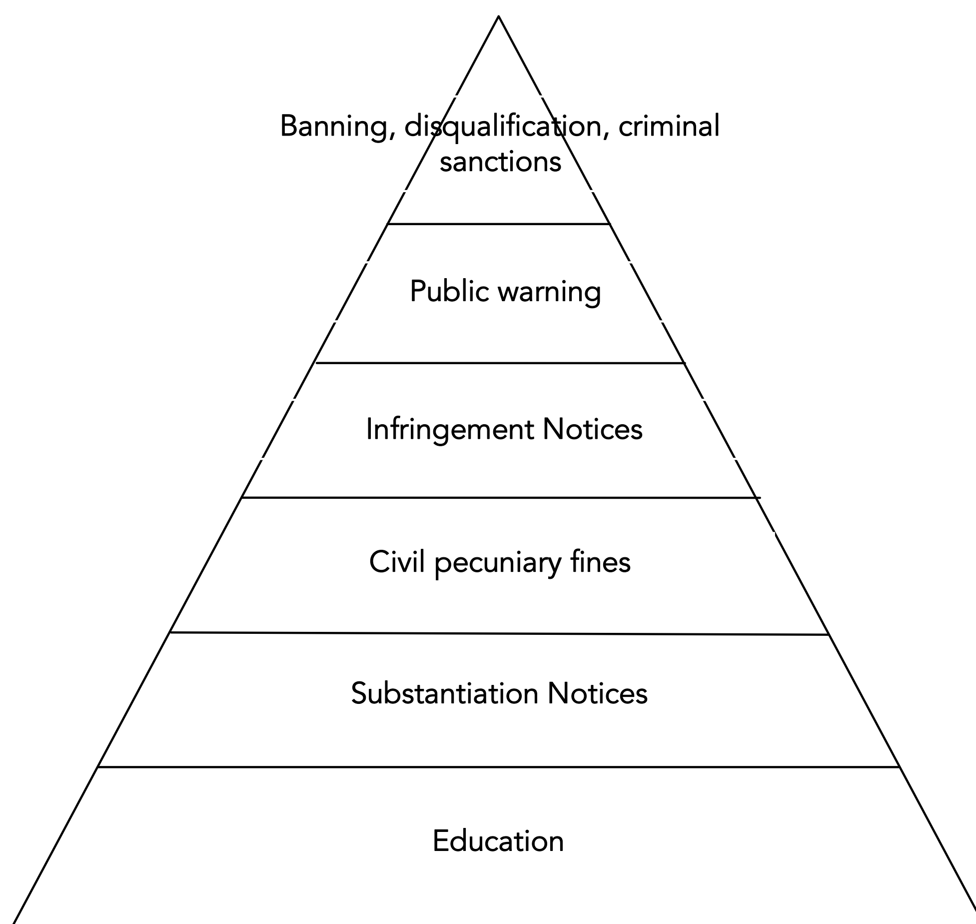
As noted earlier, ACI suggests that a transition period will be required after introduction of the new Consumer Law, at least insofar as the legislation contains new prohibitions with which business (in various states and territories or national) has no familiarity. This transition period should also be used for the further education of

[4] As per the ACCC's Corporate and Small Business Guides to Compliance Programs.

businesses and consumers, and to provide an opportunity for businesses to appropriately implement and embed the related compliance controls.

In the early stages of implementation, the Treasury and regulators should focus on providing advice and education to regulated businesses in the event of, particularly, unintended or 'minor' breaches of the new Consumer Law. Formal regulatory action, such as those proposed in the Consultation paper, should be considered as a last resort, or in the event of wilful non-compliance or serious breach of the law.

It is ACI's experience that the large proportion of businesses make genuine attempts to comply, and these efforts should be encouraged, rather than punished. The following 'regulatory pyramid' provides a representation of how the enforcement regime might work. It should be noted that ACI has adapted this pyramid to reflect the proposed legislative framework.



At the base of the pyramid is the largest portion of the regulated population, being those who are making genuine efforts to comply, or who may sometimes inadvertently breach the law. In this instance, the efforts of the regulator should be focused upon education, rather than formal enforcement during the transition period.

Moving higher up the pyramid is that smaller population who may either be making insufficient efforts to comply, or who have previously received advice and assistance

from the regulator, but haven't changed their ways. At this point, a substantiation notice may be required. In the event that non-compliance is established the regulator might impose an appropriate civil penalty or fine.

Those areas of public warning, banning, disqualification and criminal sanction should be reserved for cases where businesses are engaging in wilful non-compliance, where they have failed to improve their compliance with the legislation despite previous warnings, or where serious breaches of the law have been established.

This 'regulatory pyramid' framework may be applied at any stage of the life of the proposed Consumer Law by the regulators and not just within the transition period. Education remains a viable tool throughout the life of the enforcement period, especially where breaches are minor and inadvertent.

We understand that each of the regulators is familiar with these concepts. The ACI notes, however, that this legislative harmonisation project provides a significant opportunity for Australian consumer protection regulators to refine and nationalise their approaches to the administration of the harmonised law.

Industry Liaison & the Spirit of the Law

ACI has raised the issue of industry liaison on a number of occasions, as our experience across a number of international jurisdictions is that the more engaged a regulator is with the entities it regulates, the more harmonious an outcome that is produced. As a practical matter, there is often a difference between the law as written and the aims of legislators when the law is drafted. As a result, it is important to encourage regulated entities to comply not only with the written law, but also with the spirit with which it is intended.

It is therefore important that the Australian Government, supported by the regulators, provides clear statements of intent throughout the legislative process and subsequent implementation. These statements of intent can be articulated through such means as:

- Explanatory speeches within the legislature as the laws are being passed
- An 'explanatory memorandum' released with the draft legislation. This explanatory memorandum would fulfil a similar requirement to the public consultation paper, but with direct reference to the actual legislation, and
- Clear and concise Policy Statements.

By providing this clarity of purpose throughout the process of legislative approval and beyond, the Australian Government will be well placed to ensure that the required regulatory outcomes are achieved.

ACI believes that much of this clarification can best be achieved via liaison with industry and other relevant parties. This may also include business and consumer organisations, consumers directly, consumer advocates, peak bodies etc.

Australasian Compliance Institute

ANNEXURE
ACI Responses to Questions Raised on Treasury Consultation Paper

CHAPTER 5

Treasury Question

Should the TPA be renamed? If so, what name should it have, if not the *Competition and Consumer Act*?

ACI Response

ACI supports the philosophy underpinning a proposal to rename the TPA. ACI supports the philosophy underpinning a proposal to rename the TPA. However, in practice this will necessitate changes to every contract or other document that an organisation has produced or training program that refers to the TPA to refer to the new title to the Act. As noted previously in this submission, the cost and magnitude of doing this would be substantial.

It is recommended that there be scope for transitional provisions to permit documents to be updated as they are reviewed in the normal course of an organisation's need to update documents to deal with other regulatory changes.

In relation to Treasury's specific question, possible alternatives to the name proposed in the paper include:

- Consumer Protection and Competition Act (CPCA)
- Competition and Consumer Protection Act (CCPA).

Competition is about maximising the use of resources by giving consumers' choices in the prices and varieties of goods and services. Consumer protection is about maximising the utility of resources by ensuring that consumers are offered safe and value for money choices. On this basis the name Australian Competition and Consumer Protection Law is most appropriate as it reflects the combination of these elements.

CHAPTER 6

Treasury Question

Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the Australian Consumer Law.

ACI Response

Introduction

ACI supports the philosophy that contract terms which cause a significant imbalance in the rights of consumers and business and which are not reasonably necessary to protect the legitimate business interests of the business supplier should be prohibited. Any contract terms which impose one sided or unreasonable terms on either consumers or suppliers are unfair. The terms described in the chapter typically involve one sided terms in favour of suppliers and unreasonable terms on

consumers. ACI therefore supports the limitation of such a prohibition to standard form contracts only.

However, while ACI supports the identification of specific types of contractual terms which may be regarded as unfair it does not support the absolute prohibition of each of the terms described in Chapter 6. Moreover, the outright banning of certain clauses in standard contracts may not be fair in all circumstances. The reasons supporting that view for each of the specific contractual terms described in Chapter 6 are set out below.

On a more general level, ACI considers that an outright prohibition which, in effect deems such terms to be "in all the circumstances" unfair, not only prevents any consideration of the circumstances in which such terms are agreed between the parties (which may not be unfair) but also places an unfairly onerous burden on business.

ACI considers that the more appropriate approach would be to for the legislation to identify specific factors as being factors which a Court may have regard to in determining whether a contract term is unfair (in a manner similar to that currently found in sections 51AB and 51AC of the Act).

Discussion on specific terms highlighted in the Treasury paper

As the Consultation Paper indicates, the relevant clauses can be fair in some circumstances and not in others which leads to the conclusion that a term cannot be adjudged per se unfair, but must be considered in its context. Examples of supposed unfair contract terms are provided in the Consultation Paper yet some cases do not consider the relevant context. ACI therefore does not support an absolute prohibition as suggested in the paper, nor its extension to business to business contracts.

Terms retaining title for suppliers in goods that cannot be removed from consumers' premises without damage; terms allowing suppliers to repossess such goods

An absolute prohibition of these terms is simplistic and does not take into account factors such as:

- The fact that such clauses only operate until payment is made at which time title passes to the consumer. In other words, the consumer has had the benefit of the goods on credit in circumstances where the business supplier has no security other than the right to repossess the goods
- The prohibition does not take into account the size of the damage involved and its relationship to the monies owed to the business supplier. For example, it is conceivable that a business supplier who has sold a painting to a consumer for a substantial sum would be unable to repossess that painting if by doing so it left a mark on the consumer's wall or required removal of screws leaving small holes in the wall, and
- As described in section above, the disruption caused by repossession of goods from a business may not be of the same nature as that caused to a consumer.

Terms denying the existence or validity of pre- and post-contractual representations made to consumer; 'entire agreement' terms; terms deeming something a fact

These terms play an important part in directing the minds of both consumers and businesses to the nature and terms of the bargain into which they are entering. Where there has been any unfair or misleading conduct, it is established law that the existence of such clauses will not operate as an automatic defence to a claim.

Terms under which consumer acknowledge that they have read or understood the contract

The reason for this sort of acknowledgement is to try to motivate the consumer to read the document. If a consumer sees this statement above a signature clause for instance, it should encourage them to actually read what they are signing. For this reason, ACI thinks these clauses are helpful from a consumer viewpoint. A potential side effect of a banning them could result in it becoming standard practice for all customers to seek legal advice before contracts are signed or accepted. This would increase the costs to the customer. This would also severely impact on consumers in remote locations as they may not have ready access to legal advice. Overall, ACI is not clear on how banning this term would protect the customer.

Conclusive evidence terms

ACI notes that banning the use of conclusive evidence terms will result in higher costs for business and consumers by putting the onus on business to prove disputed matters.

Terms denying pre-contractual and post contractual representations

A clause stating that the contract is the whole agreement is intended to avoid confusion, particularly where there have been various options discussed before the deal is done. If a consumer is misled to believe that they will get more generous terms than in the written document, the rules about misleading conduct adequately protect the consumer. These clauses should not be banned, given that they can be helpful and the customer would have a right to compensation where the supplier has been misleading.

Terms that unlawfully limit a supplier's liability or unlawfully exclude an implied term

Existing legislation already makes it clear the extent to which statutorily implied terms may be excluded and the extent to which liability can be limited. ACI is not convinced that additional protections are required. If an exclusion or limitation is lawful, it should not be banned.

Flat or fixed early termination fees

ACI does not agree that a flat early termination fee cannot represent the genuine pre estimate of the loss. The fee, for instance, may be less than the actual loss or may be calculated to represent the least loss for the relevant period. To know whether the fee is an appropriate estimate of the loss, one needs to check the underlying calculation. Further, this proposal appears at odds to UCCC which allows for early termination fees to be charged without restricting how they should be calculated. ACI considers that it is reasonable to calculate these fees as a flat or fixed rate which is then able to be simply disclosed to the customer at the contracting stage, rather then providing the consumer with a complex formula that they then need to interpret to determine the anticipated cost.

Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred

The UCCC currently sets out provisions for enforcement expenses that can be charged or passed on to customers. While a general term in the manner stated might be adequate where sector specific legislation addresses this issue, legislation should prevail in the event of any inconsistency.

Terms mandating arbitration or mediation

This is intended to ensure matters are resolved quickly and cheaply. If arbitration fails, the parties can proceed to litigation. In many industries, suppliers are required to belong to external dispute resolution schemes specifically to ensure that there is an inexpensive way to resolve disputes. It therefore seems counterproductive to side step these arrangements which are specifically set up to help consumers.

Additionally, standard form contracts in business to business transactions should be carved out from the unfair contract terms provisions.

Treasury Question

How can the interests of a business be safeguarded in the formal requirements for a national public warning power?

ACI Response

The issue of a national public warning against a supplier could have serious, long term consequences for its reputation and viability. Given this gravity, it would be reasonable for such a decision to be confirmed by an objective, third party such as a court before proceeding. Judicial review would ensure that there were sufficient grounds to justify this action and that the punishment matched the crime.

ACI submits that a public warning should not be issued where:

- A business has resolved the problem and adequately compensated affected consumers (where applicable) or has undertaken to do so; or
- A business is in the process of working through a resolution of the matter with the relevant regulator.

ACI does not agree that it is appropriate for immunity to be provided from legal action where inaccurate statements are made about a company in public warnings. While ACI appreciates the importance of warning consumers as soon as possible, our concern is that businesses would not be adequately able to clear their names if such reports are subsequently determined to be unfounded.

CHAPTER 9

Treasury Questions

Are there reforms other than those covered in Chapters 10 and 11 that could be included in
the Australian Consumer Law, based on existing best practice in existing state and territory laws? In making a suggestion, please address the following questions:

- What is the nature of the problem facing consumers that the suggested reform will address?
- What is the appropriate policy response to address these consumer issues, including non-regulatory approaches?
- What benefits would result from this change and can these be quantified?
- Is the suggested change appropriate for inclusion in a law which applies generic

consumer protections on an economy-wide basis?

ACI Response

The paper appears to have failed to address remedies for consumers.

The problem facing consumers is obtaining adequate compensation for the losses that they suffer from unfair market practices and unsafe products and services. The appropriate response to these consumer issues is to employ administrative tribunals to investigate, arbitrate and decide on complaints and to impose civil remedies which compensate consumers for losses. The benefits from this change would be that consumers would be able to obtain cost effective remedies for the harm caused to them and that suppliers would be discouraged from using unfair practices and providing unsafe products and services. The change could fit a generic consumer protection by establishing policies and processes for handling consumer complaints through administrative tribunals operated by state administrations.

CHAPTER 10

Treasury Question

Should the scope of the TPA's existing definition of 'consumer' be expanded to cover a wider range of circumstances, such as goods used in business contexts?

ACI Response
Consumer protection focuses on products and services consumed for personal, domestic or household use because these consumers are the most vulnerable. This is consistent with other consumer protection legislation, including the UCCC. Expanding the definition to include goods used in business contexts introduces consumption for profit purposes. Individuals operating businesses are generally considered to be better informed, have more resources to seek redress and have a body of contract law which governs their transactions.

For these reasons it would be a misuse of limited consumer protection resources to expand the definition of consumers to include businesses.

Treasury Question

Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings?

ACI Response

As both of these types of entities involve business undertakings, they should not be included in a new definition of consumers for the reasons given above.

Treasury Question

Should a new definition of 'consumer' cover commercial vehicles or vehicles purchased for a predominately commercial purpose?

ACI Response

As purchase of commercial vehicles involves business use, they should not be included in a new definition of consumers for the reasons given above.

Treasury Question

Should a new definition of 'consumer' retain the monetary limit of $40,000 or should the limit be increased? If it were increased, what would be an appropriate amount?

ACI Response

The key determinant of whether or not a person is a consumer is what use is made of the product of service. A consumer purchases products and services for personal or domestic use. Non consumer purchases are for resale or resupply or for use in a business. The value of a purchase is therefore not the determining factor and could be excluded from the definition.

If however a decision is made to keep a monetary limit there is an argument that the prescribed amount be increased from $40,000 to a higher amount given that this prescribed amount has been in place since 1995. ACI notes that the prescribed amount would have increased to approximately $54,000 if inflation were taken into account. Accordingly, an increase of the prescribed amount to $55,000 would seem appropriate.

Treasury Questions

Should a new definition of 'consumer' exclude any purchases for business purposes, regardless of the existence of monetary limits? Alternatively, should business consumers be entitled to protections available under the Australian Consumer Law, such as implied conditions and warranties?

Should a new definition retain the exclusion in relation to 'resupply'?

Are there other approaches to the way that 'consumer' can be defined?

ACI Response

For the reasons given above the definition of consumer should exclude purchases for business purposes and should retain the exclusion in relation to supply. Business consumers have the benefit of professional advice from lawyers or accountants in undertaking business ventures and are therefore better placed to ensure their interests are protected.

Another approach to defining a 'consumer' is to look at the substance of market transactions. Any market transaction involves a buyer and a seller who make an exchange for value. Each is entitled to protection from abuse or exploitation by the other party to the transaction. In this context it does not matter whether the purchaser is a business or not or whether the use is private or domestic. While all buyers and sellers would be entitled to consumer protection, the remedies available to them could vary depending on their size, wealth and bargaining power. A means test approach could ensure that publicly funded consumer protection went to those in most need while the same consumer protection laws could apply to all buyers and sellers.

Treasury Question

Are there any other definitions currently used in the TPA in relation to consumer protection issues that require modification to improve their operation?

ACI Response

ACI has no further comments.

CHAPTER 11

Treasury Questions

Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different door-to-door sales regulation? If so, please provide evidence of this.

Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?

ACI Response

Door-to-Door Sales

The ACI believes that door-to-door sales legislation should be introduced into the Australian consumer law. There is also a need to standardise the various legislation so that there is greater consistency. In this regard the new law should seek to achieve international best practices. Therefore, the European Commission's Consumer Rights Directive may serve as a guide to formulating door-to-door legislation. ACI supports a 14 calendar day cooling off period.

Door-to-door sales should be subject to stronger, targeted regulation as they are unsolicited and may pressure consumers to make hasty or improperly informed decisions. The aspects of the current regulation which the provision should reflect include:

- Restricting the times of door-to-door sales
- Setting a reasonable cooling off period for door-to-door sales
- Giving consumers the right to opt out of door-to-door sales through the use of "no hawker" or equivalent signs.

Treasury Questions

Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different telemarketing regulation? If so, please provide evidence of this.

Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?

ACI Response

Inconsistent provisions between the different regulators have increased the regulatory burden, necessitating an awkward process which covers off multi-jurisdictional sets of requirements. Inconsistent legislation results in increased costs to the business of staff training and audit requirements. A national approach would provide consumers with certainty and clarity.

Telemarketing sales should be regulated as they are unsolicited and may pressure consumers to make improperly informed decisions. The aspects of the current regulation which the provision should reflect include:

- Restricting the times of telemarketing sales
- Setting a reasonable cooling off period for telemarketing sales
- Giving consumers the right to opt out of telemarketing sales through registering with 'Do Not Call Register'.

Treasury Question

Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined above?

Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?

ACI Response

The ACI does not support the proposed changes to section 53. It believes that if the goal is to create generic and standard prohibitions then more specific provisions should not be introduced into consumer law.

Section 53 applies to representations that relate to the supply or promotion of goods and services in all circumstances and in all sectors of the economy. This broad and inclusive provision would cover the practices highlighted in the Victorian and New South Wales legislation. Specific situations which can change over time should be dealt with in regulations. For that reason there is no need to augment section 53. The need for sections 53A and 53B could be questioned on the same grounds.

Treasury Questions

Is section 64 of the TPA effective in its current form?

How could it be improved for inclusion in the Australian Consumer Law by reference to existing state and territory approaches or otherwise?

ACI Response

Section 64 requires a person to have reasonable cause to believe that there is a right to payment for unsolicited goods or services or making an entry in a directory. The Victorian and New South Wales legislation involves tests to determine whether or not reasonable cause to believe exist in certain circumstances. The limitation of these approaches is that other means such as telephone subscriptions exist which are not covered. Specific situations could be dealt with in regulations. On this basis, section 64 is effective as it can cater for any circumstances.

Treasury Question

Should the Australian Consumer Law include a provision regulating third-party trading schemes? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

ACI Response

The ACI is not aware whether third party trading schemes raise significant consumer protection issues. However if the goal is to make consumer law a national standard, then it appears sensible to include such laws in the new consumer law. ACI and others would benefit from further information from the various state consumer protection regulators about the scope of any consumer detriment arising from third party trading schemes.

ACI members would support centralising current regulations, opposed to the current regime of variations between the states. If third party trading is thought to be a feature of consumer life, it should be covered by the new law and supersede all current state and territory laws for consistency (given that many such schemes are national in their operation).

More broadly, third party trading schemes which are not genuine, create false expectations through misleading representation. On this basis the Australian Consumer Law should include a provision regulating third-party trading schemes. A key consideration in current regulatory approaches which could be used to assess these schemes is whether or not rewards are reasonably available i.e. accumulated and accessed. These requirements should be specified in regulations which can be changed as required to deal with new forms of these schemes.

Treasury Question

Should mock auctions continue to be prohibited? If so, should the Australian Consumer Law include a provision prohibiting mock auctions? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

ACI Response

ACI does not believe that mock auctions should be specifically prohibited in legislation. Generic consumer protection provisions should be adequate to deal with any issues arising from mock auctions. Accordingly, ACI submits that existing specific provisions should be repealed.

Treasury Questions

Do businesses operating across Australia use different terms and conditions for lay-by sales depending on whether there is regulation? If so, please provide examples of these terms and conditions.

Does the level of complaints about lay-by sales received by such businesses vary across jurisdictions depending on the existence of regulation?

Should the Australian Consumer Law include a provision regulating lay-by sales? If so, should this provision reflect the current regulatory approaches used in NSW, Victoria and/or the ACT?

ACI Response

ACI is not aware of the scale of any consumer protection issues which may arise in relation to lay-by sales. ACI would benefit from further information from state regulators about the extent of any consumer detriment arising from lay-by sales.

ACI does however accept the potential for suppliers to impose unreasonable terms upon consumers in a lay-by sales environment and that absence of any regulation in this area is a gap. Unreasonable terms could involve lay-by charges and periods, and cancellation policies and charges.

Treasury Question

Should the Australian Consumer Law modify the existing form of section 54 of the TPA along similar lines to section 16 of the Victorian FTA?

If an approach like that in section 16 of the Victorian FTA were adopted, should a 'reasonable time' be defined? If so, what would a reasonable time be?

ACI Response

ACI would support centralising current regulations and think it is helpful to harmonise the state and TPA provisions. In particular having to apply for competition permits in each state is particularly onerous.

Section 54 prohibits suppliers, in connection with the supply of goods or services, from offering of gifts, prizes or other free items with the intention of not providing them or of not providing them as offered. This broad and inclusive provision would cover the issues highlighted in the Victorian legislation. Defining a reasonable time for the supply of free items is a valid method of assessing regulating these offers. These supply times should be specified in regulations which can be adapted to different goods and services and can be amended as required for changing circumstances.

Treasury Question

Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law?

ACI Response

There would appear to be some confusion as to the extent to which section 51A 'works' with respect to deeming of future matters and in this context ACI would welcome a fuller consultation process with respect to this aspect of the law.

If section 51A of the TPA is extended to false representations (i.e. conduct prohibited under section 53 of the TPA) a supplier will be deemed to have made a false, misleading or deceptive representation about a future matter, in breach of

that section unless it produces evidence to the contrary. By reason of section 75AZC of the TPA, breach of section 53 is a very serious matter as it involves a criminal offence. Reversal of the onus of proof in such matters flies in the face of established criminal law principles and should not be permitted.

Treasury Question

Should the provisions of section 51A of the TPA be amended to further clarify their relationship with the accessorial liability provisions of the TPA?

ACI Response

The decision in *ACCC v Global Prepaid Communications Pty Ltd* showed the potential for accessorial arrangements to enable section 51A to be evaded. On this basis the provisions of section 51A of the TPA may need to be amended to clarify their relationship with the accessorial liability provisions of the TPA

However, a fuller consultative process should be undertaken to set out why an extension would be warranted. There is a danger that too many third parties might be unwittingly involved as accessories to a representation by a corporation, e.g. advertising agencies, newspapers etc. If they have a potential exposure to liability, it makes it too hard to do business.

Treasury Question

Are the current pyramid selling provisions in the TPA effective? How could they be improved?

ACI Response

The current pyramid selling provisions in the TPA have limited effect because they focus on participant and recruitment payments and do not deal with non-payment benefits such as reductions in the prices of goods and services. The provisions could be improved by adopting the approach in the Victorian legislation which includes:

- Payments for assisting or enabling participants to be promoted within the scheme
- Payments for providing participants with or enabling them to be provided with training, facilities or other services, and
- Goods or services supplied under the scheme that bear no reasonable relationship to their value.

Treasury Question

Should the claimant in an action relating to accepting payment without intending to supply be required only to prove that the supplier failed to supply the goods after accepting payment?

Should a maximum limit be imposed on the amount or percentage of the purchase price that may be taken as a deposit for goods that have been ordered, but not yet delivered?

ACI Response

Proving the intent of a supplier to provide goods or services is not an objective test and therefore would be difficult to prove. In contrast, failure to supply goods or services after receiving payment is an objective test. In the latter case, the question arises as to what is a reasonable period in which to provide goods or services before the supplier has defaulted. A reasonable approach to this issue would be to consider the agreed delivery date as the deadline. If delays occur they could be catered for through a new, agreed delivery date.

A maximum should be set on the amount or percentage of the purchase price that may be taken as the deposit for goods that have been ordered but not yet delivered. The amount or percentage will vary depending on the type of good or service taking into account the ability of the supplier to resell the good or service if necessary. It should be sufficient that it displays the good faith of the consumer but not so high that the consumer funds are tied up when the consumer has not received the good or service. As an example a deposit could cover the cost of materials up to a limit of 25% of the purchase price.

Treasury Question

Is there a need to introduce a specific provision into the Australian Consumer Law to provide that a supplier must not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices?

ACI Response

The Discussion Paper appears to confuse the rationale for a provision like Section 40 of the NSW Act with the requirements for two-price advertising as recently articulated in *ACCC v Prouds Jewellers Pty Ltd* [2008] FCA 75. It is true that this decision requires the representation of a previous price to be accurate, and for that price to have been offered for a reasonable period of time, but the decision in relation to "Was/Now" pricing is not the conduct towards which Section 40 of the NSW Act is directed.

ACI contends that the existing provision regarding misleading representations as to price (Section 53(e) *TPA*) is adequate to deal with the relevant conduct. Adding additional legislative complexity could add to compliance costs and might result in unintended consequences.

Treasury Question

Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

ACI Response

ACI is unconvinced that new broad consumer protection legislation is the appropriate mechanism to introduce all-industry requirements with respect to minimum standard documentation and prefers for such matters to be resolved by specific industry codes and relevant regulators.

If a disclosure that is required to be given by law is illegible or ambiguously worded or presented, it would not be an effective disclosure and presumably a court would see it as having failed to meet the requirement for such disclosure (on the same grounds that a disclaimer is only enforceable if it is clear, legible and unambiguous).

UCCC sets out the information that must be provided to consumers for lending to consumers, including the font size that must be used. ACI does not believe that it is necessary to include such provisions.

Treasury Question

Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

ACI Response

Without access to suppliers' addresses in documents, statements or advertisements, consumers are unable to make effective inquiries about suppliers and their bona fides or to make contact where necessary to pursue consumer issues. Currently regulatory approaches include requiring suppliers to provide the name and physical address of the person publishing a document, statement or advertisement and where the business is licensed or registered, to provide the relevant registration number.

ACI considers that the need for contact details to be provided is adequately addressed by other legislation relating to specific documents in respect of which such disclosure should be required. Therefore, if the Consumer Law is to include

such a provision, it should be consistent with existing requirements – e.g. disclosure requirements regarding prospectuses, product disclosure statements, competitions.

Therefore, the Australian Consumer Law should include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements to afford similar protections, but not to the extent that it creates additional unnecessary costs for business.

Treasury Question

Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

ACI Response

Access where required to an itemised bill would enable consumers to check, if necessary, and confirm whether or not the supplier has delivered the good or service which was ordered and/or paid for. Itemised bills are not needed and not required if consumers are satisfied on inspection with the good or service received. The Australian Consumer Law should include a provision relating to the provision of an itemised bill on request so that consumers have this facility where required.

Treasury Question

Should the Australian Consumer Law include a provision requiring a supplier to return replaced parts along the lines of section 162 of the Victorian FTA?

ACI Response

In many cases consumers do not require the return of replaced parts and would find it an imposition. At the same time, consumers should have the right to the return of removed parts if preferred, as it provides evidence of replacement.

ACI has been advised by a member that a general requirement to make provision for the return of replaced auto parts would cause significant compliance costs and should not always be encouraged for environmental and safety purposes.

Most responsible auto repairers make arrangements for the safe and environmentally sustainable disposal of waste. In some cases this waste is "prescribed waste" that must be handled in accordance with regulations of State or Local Authorities. For example, it would be inappropriate to return used brake pads that contain asbestos.

ACI notes also that members associated with the insurance industry have expressed concern that used parts returned to consumers in accordance with such a requirement might be returned to service by consumers who are unaware of the safety requirements.

The conduct that this proposed provision is intended to prevent can be adequately addressed through application of existing consumer protection laws.

Treasury Question

Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

ACI Response

It is an anomaly that consumers are protected from liability for receipt of unsolicited goods but not unsolicited services. It is a fundamental requirement that a consumer has ordered or agreed to the supply of a good or service before liability can exist. On this basis the Australian Consumer Law should extend the current application of section 65 of the TPA to services.

Under Section 51A of the TPA, a supplier will be deemed to have made a false, misleading or deceptive representation unless it produces evidence to the contrary. This approach enables dishonesty or recklessness to be established without an admission of guilt from suppliers which can be difficult to prove. If the same approach was applied to section 65 then a supplier will be deemed to have provided unsolicited services unless it produces evidence to the contrary. This approach will put the onus on suppliers to obtain sufficient evidence of consumers' choices before providing goods and services.