



**HASBRO AUSTRALIA LIMITED**

**SUBMISSION IN RESPONSE TO TREASURY'S CONSULTATION PAPER:  
AN AUSTRALIAN CONSUMER LAW  
Fair Markets – Confident Consumers**

**24 March 2009**

## **1. Executive Summary**

- 1.1 Hasbro, Inc. is a leading supplier of children's and family leisure time products and services. It has a portfolio of brands and entertainment properties that provides some of the highest quality and most recognisable play and recreational experiences in the world. Hasbro Australia Limited brings to market a range of toys, games and licensed products, from traditional to high-tech and digital, under such well known brand names as FurReal Friends, Littlest Pet Shop, My Little Pony, Playskool, Spider-Man, Star Wars, Transformers, Monopoly and Trivial Pursuit. While the majority of our products are supplied through retailers and other resellers, Hasbro is very much a consumer-focused company.
- 1.2 We welcome the opportunity to respond and provide input into the Government's consultation paper, *An Australian Consumer Law: Fair markets – Confident consumers* (the Paper). Hasbro strongly supports the Government's aim of overcoming existing inconsistencies and duplications in order to provide a unified national approach for the protection of consumers.
- 1.3 However, while the goal of uniformity is to be welcomed, Hasbro is concerned that some of the proposals lose sight of their underlying aims and the specific problems which they purport to address. We are concerned that the implementation of these proposals may lead to unintended consequences, increased litigation and, ultimately, amendments being necessary down the track. This would be a poor result.
- 1.4 Hasbro believes that certain elements of the proposals are overly prescriptive and may result not only in excessive compliance costs but also in more, rather than less, regulatory complexity. We strongly encourage the Government to consider these particular aspects carefully, and to introduce safeguards and requirements where appropriate and necessary to ensure the best results from this important reform.
- 1.5 The proposals undoubtedly represent major reform in the important area of consumer protection. They will have wide-reaching impact and significant consequences if passed into law. It is critical that the desire to introduce reform quickly is properly balanced with the need to get the details right. In Hasbro's view, any substantive change or expansion of consumer laws should be properly targeted to the specific problem to be addressed, and should be based on sound evidence and subject to a thorough cost-benefit analysis and engagement from stakeholders, including industry.
- 1.6 This submission does not attempt to discuss all of the proposals outlined in the Paper but selects those which Hasbro believes raise significant concerns and which need particular care and consideration, namely:
- unfair contract terms;
  - the definition of "consumer";
  - enforcement powers;
  - non-party consumer redress; and
  - product safety.
- 1.7 We have also included our recommendations in respect of the proposal to change the name of the TPA, and in relation to the implementation process and timeframe.

## **2. Unfair contract terms**

- 2.1 Hasbro supports the aim of ensuring that consumers are protected and of promoting fair and effective competition in the market.

- 2.2 However, two aspects of the unfair contracts law proposal raise serious concerns:
- (a) the extension of these regulations to business-to-business transactions; and
  - (b) the banning outright of specified contractual terms (a so-called 'black list').

*Application to business transactions*

- 2.3 The consumer protections under the new national consumer law are intended to "*enhance individual consumer well-being*"<sup>1</sup>. To this end, one of the stated operational objectives of the national consumer law reform is "*to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage*"<sup>2</sup>.
- 2.4 Hasbro is concerned that the proposed reforms go beyond the intent and stated objectives of the national consumer law reform by including business-to-business transactions within the scope of the regulation of unfair contract terms.
- 2.5 Hasbro recommends adopting a similar approach to the Victorian model. The Victorian definition recognises that it is not necessary or appropriate to bring businesses within the scope of the regulation. Under the Victorian definition the regulation of unfair contract terms is restricted to contracts for the supply of "*goods or services of a kind ordinarily acquired for personal domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services.*" This would achieve the aim of protecting individual end-consumers, which we submit is the appropriate focus of the regulation of unfair contract terms.
- 2.6 In the alternative, if it is considered desirable to have one common definition of "consumer" throughout the *Trade Practices Act* (TPA), both for general consumer law purposes and for the purposes of this new unfair contracts regulation, then it is essential that the exclusion for "re-supply" in the definition of consumer be retained, and that the definition of consumer is not expanded to include goods or services used in a business context.
- 2.7 We note that businesses already have sufficient protection in circumstances where unfair contract terms may be used against them. The requirements of fairness have been set out in general statutes for consumer protection under the unconscionability provisions of s 51AA, 51AB, and 51AC of the TPA and mirror provisions in the *Australian Securities and Investments Commission Act* and State and Territory Fair Trading Acts.

*Black list of banned terms*

- 2.8 Hasbro has serious concerns about this aspect of the proposed new model. The banning of particular contract terms goes beyond the aim of providing a framework and guidance for identifying unfair terms, and runs the risk of simply getting this part of the law wrong.
- 2.9 The concept of unfairness, by its very nature, must be considered in all the circumstances. COAG acknowledges the need to consider unfairness in context in agreeing that the new legislative model will "*require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected*"<sup>3</sup>. Equally, it acknowledges the need to take supplier-side considerations into account when it states that the "*inclusion of the phrase 'it is not reasonably necessary to protect the*

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<sup>1</sup> Paper, at page 103

<sup>2</sup> Paper, at page 103

<sup>3</sup> Paper, at page 34

*legitimate interests of the supplier' is designed to ensure that, when applying the test, the question of the business's reasons for including a provision in a contract is addressed*<sup>4</sup>.

- 2.10 The general principles of the model therefore recognise that the question of whether or not a particular term is 'unfair' depends on the context of its use and the surrounding circumstances. Given this, the proposal to ban certain terms outright is an entirely inappropriate over-reach and likely to lead to results which are, themselves, unfair. Further, the use of a black list is so far untested and would be completely premature and overly prescriptive at this early stage of the law.
- 2.11 The Paper sets out a list of terms which it suggests might be appropriate for a black list. We submit that none of these terms should be considered inherently unfair, but rather may in certain circumstances operate unfairly. Examples from the list which we suggest are widely used in a fair and reasonable manner are retention of title clauses, entire agreement clauses, and acknowledgements by consumers that they have read or understood the contract. Indeed the latter is currently an express requirement under the Franchising Code of Conduct, albeit not in a contractual form.
- 2.12 Neither the UK nor the Victorian model make use of a black list approach. In the UK, a 'grey list' of indicative factors is used. In Victoria, while the legislation retains the power to employ a black list approach, no terms have been identified as banned outright. Rather, the model again includes a list of indicative factors which may be taken into account by a court, along with other matters, in determining whether the term is an unfair term.
- 2.13 If it is deemed necessary to provide additional guidance as to when a term may be unfair, then rather than banning terms outright, the appropriate course would be to follow the examples of the UK and Victoria. A grey list achieves the aim of additional guidance whilst still allowing proper and due consideration of the surrounding circumstances.
- 2.14 Hasbro also recommends that the definition of unfair contract terms should include the phrase "*in all the circumstances*". This phrase is used in the Victorian definition and is also used in the TPA in respect of unconscionable conduct.

#### *Compliance costs and transitional arrangements*

- 2.15 The Productivity Commission considered that the compliance costs resulting from the introduction of an unfair contracts law "*are likely to be small*"<sup>5</sup>. However, it does not appear that any proper cost-benefit analysis has been carried out. Such an analysis is essential given that the impact of this proposed new regulation is so far-reaching. The introduction of this new regulation will mean that businesses across Australia will have to review their contract terms. For many, it will mean amending their standard contracts which may be used with hundreds of customers.
- 2.16 If the new regulation is to proceed, a suitable transitional period must be permitted to allow businesses to modify their contracts. We suggest a period of at least 12 months should be envisaged.

### **3. Definition of "consumer"**

- 3.1 The existing definition of "consumer" in the TPA should not be expanded to cover a wider range of circumstances.
- 3.2 In particular, the existing definition should not be expanded to include goods or services used in a business context. Businesses currently benefit from consumer protection laws in

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<sup>4</sup> Paper, at page 30

<sup>5</sup> PC Report 2008. II. Annexure D at page 435

transactions where they are dealing as a consumer (ie. as the end-consumer of the goods or services). This existing model has operated effectively over the years. There is no evidence that this definition needs to change.

- 3.3 If the definition of "consumer" in the TPA were to be changed, the impact for businesses must not be under-estimated. Changes to the TPA's liability regime would have far-reaching implications for business-to-business transactions and for insurance arrangements. Businesses would be required to review the liability provisions in their existing contracts. At the same time, expanding the definition as contemplated in the Paper would not appear to afford any greater protection to individual (non-business) end-consumers. Given that the principle focus of the current reform process is (or should be) the protection of those individual end-consumers, there seems to be no sound basis for changing the definition. Indeed, a cost-benefit analysis would seem to mitigate strongly against it.
- 3.4 In response to the specific questions raised in the Paper:
- 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? NO
  - Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings? NO
  - Should a new definition retain the exclusion in relation to 'resupply'? YES

#### **4. Enforcement powers**

- 4.1 The Australian Consumer Law is to include a range of additional, duplicative enforcement powers for consumer regulators. Hasbro's view is that the consumer regulators already possess sufficient powers for addressing breaches of the law. The Productivity Commission itself notes that there is "*little in the way of hard evidence provided by participants on the magnitude of the problems caused by gaps in the availability of enforcements mechanisms*"<sup>6</sup>.
- 4.2 Hasbro believes that adding to the existing range of enforcement tools may lead to additional compliance costs for businesses. There is also an increased potential for regulatory error, particularly in respect of those powers which would not be subject to court-based oversight. In the absence of any solid evidence as to the need for additional, duplicative powers, we are concerned that this area of the proposed reforms extends beyond the stated aims of addressing inconsistencies and introduces significantly increased regulation without properly weighing up the benefits and costs of doing so.

#### *Substantiation Notices*

- 4.3 Consumer regulators already have extensive powers to extract documents and evidence from companies, and there is no evidence of the need to no introduce additional, duplicative powers. In particular, at the national level, the ACCC has extensive powers under section 155 of the TPA.
- 4.4 The introduction of this new power may have significant compliance cost implications for businesses. These costs are likely to be greater if proper restrictions are not placed on the exercise of this power. For instance, it must not be the case that regulators use the power to go on fishing expeditions which would require the recipient to undertake significant internal audits at excessive and unjustified cost. Similarly, it should not be the case that regulators, through their best practice guidelines, effectively require businesses to hold evidence in a specific form on file in all cases.

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<sup>6</sup> PC Report 2008. II, at page 223

- 4.5 If the power is to be introduced, Hasbro recommends that, in order to avoid its abuse, the following safeguards be included:
- the scope of its operation should be restricted in a similar way to the current section 155 power under the TPA – ie. the regulator must have 'reason to believe' that a person is capable of furnishing information relating to a possible contravention before issuing a notice. The ACCC should be required to have some factual basis as the justification for issuing the notice.
  - the scope of the notice should be limited to the specific breach in question.

#### *Public Warning Powers*

- 4.6 There is no evidence of the need or benefit to consumers of introducing this power. The Productivity Commission noted that the range of existing mechanisms appear to deliver similar informational outcomes to public warning notices, but with the added safeguard of court-based oversight.
- 4.7 Under the existing regime, consumer regulators, including the ACCC at the national level, can obtain orders from the Court for corrective advertising. The ACCC also makes extensive use of media releases to publicise actions taken against firms alleged to have breached consumer law.
- 4.8 The Productivity Commission stated that it "*remains sceptical about the intrinsic merit of including public warning notices*"<sup>7</sup> and recommended that this proposal be the subject of further examination and consideration. It noted that the Victorian regulator, which currently enjoys such a power, issued only five notices in the period 2005-2006<sup>8</sup>.
- 4.9 If, in spite of the Productivity Commission's recommendation for caution, the Government insists on proceeding with this new power, it is critical to include appropriate safeguards for business.
- 4.10 We recommend that the following safeguards are included at a minimum:
- a public interest test with a high threshold must be applied
  - there should be a requirement that the conduct in question represents a serious breach of consumer law
  - there must be no immunity for regulators who make use of the power. Holding regulators accountable will be a critical means in which to prevent abuse of the power. Businesses who are subject to potentially inaccurate or defamatory statements should not have their rights of redress weakened.

#### *Infringement Notices*

- 4.11 Hasbro agrees with the stated intention that these notices be used as a cost-effective manner of dealing with minor offences. At the same time, it must not be the case that they are open to abuse by regulators, for instance, as a revenue generating tool.
- 4.12 To prevent abuse of this power, we recommend that the following safeguards be incorporated:
- a maximum monetary amount should be imposed
  - there should be no ability to impose multiple infringement notices for one and the same breach

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<sup>7</sup> PC Report 2008. II, at page 249

<sup>8</sup> PC Report 2008. II, at page 250

- there should be no ability to impose separate fines on successive days, or to accumulate interest on a daily basis.

## **5. Non-party consumer redress**

- 5.1 Hasbro believes that the current mechanisms for dealing with consumer complaints are sufficient. In particular, the ACCC at the national level currently has a cost-efficient and effective tool in its use of court-enforceable undertakings under section 87B of the TPA. Through these undertakings, the ACCC is able to obtain redress such as refunds for broad classes of affected consumers. There is no evidence to show that referring these issues to court, rather than continued use of the ACCC's administrative processes, is necessary or that it would achieve any better results.
- 5.2 If, however, the Government proceeds to bring in this new power, Hasbro believes that consumers should at least be given the choice of opting-out of the regulator's representative action. In the interests of certainty, it would also be important that consumers covered by the representative action could not subsequently bring separate proceedings against a business in respect of the same alleged contravention.

## **6. Product safety**

- 6.1 Hasbro strongly supports the move towards national harmonisation of product safety regulation and enforcement. In particular, Hasbro welcomes the aim that all consumer regulators will apply the regulations in a consistent manner.
- 6.2 However, Hasbro is concerned that the reforms in this area have already been decided without consultation with industry. Principles of fairness and the need to get this right require the implementation of a process for industry consultation and engagement going forward.
- 6.3 Hasbro believes that the current reform process is an opportunity to introduce an effective mechanism for industry consultation and input. The Paper itself concedes that the Commonwealth, unlike some other jurisdictions, lacks a product safety advisory committee. We believe that such a committee would bring valuable insight and experience, as well as practical input to the reform process.
- 6.4 Our recommendation, consistent with that of our industry association, the Australian Toy Association, is that a temporary Reference Group be established immediately to assist SCOCA during the implementation process through to end 2010. This should then be replaced with a permanent product safety consultative committee. The composition of the committee should include fair and balanced industry representation, including those with technical, legal and commercial expertise.
- 6.5 Hasbro also recommends that the "*independent review body*"<sup>9</sup> which is to take over the ACCC's current role of holding conferences in respect of bans and recalls, should include an industry representative.
- 6.6 In addition to the goal of consistency in product safety regulation, Hasbro submits that this reform process is an opportunity to improve its clarity and accessibility. For too long consumers and many businesses have struggled to understand the overly technical language used in the regulations. A plain English approach should be adopted and the regulations and standards should be drafted accordingly. Not only will this benefit consumers, but it will improve the level of overall compliance by businesses.

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<sup>9</sup> See Paper, at page 56

## **7. Name change for the TPA**

- 7.1 The proposal to change the name of the TPA appears to overlook the significant cost and burden that this would entail. For example, businesses would be required to review and amend their contracts; government stakeholders would have to review industry codes. Other documents such as compliance training materials would also need review and amendment.
- 7.2 Because of the significant burden it would impose, without any significant corresponding benefit, Hasbro does not support the proposal for a name change. Increased costs would also be inconsistent with the Assistant Treasurer's stated aim of providing cost savings to business.

## **8. Next steps in the reform process**

- 8.1 Hasbro reiterates its support for a unified national approach to consumer protection policy across Australia.
- 8.2 However, while the goal of uniformity is to be welcomed, Hasbro is concerned that some aspects of the proposals, if not carefully thought through, may lead to undesirable outcomes. We are concerned that the implementation of these proposals in their current state may lead to not only unintended consequences, but also unwarranted and excessive compliance costs, increased litigation and, ultimately, amendments being necessary down the track.
- 8.3 The proposals undoubtedly represent major reform in the important area of consumer protection. They encompass many substantive areas of the current regime and will have wide-reaching impact and significant consequences if passed into law. It is critical, in these circumstances, that the reform process provides sufficient time and opportunity for the views of all stakeholders to be shared. The desire to introduce reform quickly must not be at the cost of getting it right.
- 8.4 This is particularly pertinent in the case of the unfair contract terms proposal which has been earmarked for fast-tracking by the Government. Certain aspects of the proposal raise real concerns and run the risk of simply getting it wrong. This risk can be avoided, and an effective improvement to consumer protection laws can still be achieved, but only if a full and proper assessment is carried out up front.
- 8.5 Many of the proposals included in the Paper are addressed at a high level, with much of detail absent or yet to be determined. Hasbro recommends that an additional round of consultation be included in the timetable once this detail has been developed and prior to draft legislation being released. Stakeholder views should also be sought on the draft provisions of the new laws as they are made ready.
- 8.6 Hasbro believes that timely and meaningful consultation will not only enable the exchange of best practice solutions, but will allow unintended consequences to be identified and rectified up front. The result will bring the Government a step closer to achieving its aim of bringing genuine improvement, efficiency, certainty, and overall "best practice" into consumer protection policy in Australia.