Submission on Review of Australia's Consumer Policy Framework Draft Report

1. There are three aspects of the draft report that I would like to comment on.

2. First, the draft report nominates the ACCC as the authority best placed to regulate the proposed generic or uniform law. Whilst that seems reasonable, I could find no detailed analysis of the successes and failures of the ACCC or ASIC or the relevant state authorities. There is more to this than just a matter of resourcing.

3. The ACCC has had recent serious and costly litigation losses (e.g. against petrol stations in the Ballarat region for collusion). Was that due to insufficient investigative powers? The recent ALRC review of legal professional privilege suggests a push to further limit evidence available to investigative authorities.

4. The ACCC may or may not be having some success against the big cartels but the more insidious incremental abuse seems to me to be flourishing.

5. A classic example in my view occurs in the big supermarkets. I and others have done an informal survey over the past few years of discrepancies in what the checkout docket says and what was thought to be purchased. Errors occur not in-frequently probably of the order of 0.1% of purchase amount spent over a given period. The "errors" result from checkout staff inputting details from wrong fruit varieties for example, mislabeled shelf items and similar things that can be put down to the actions of staff.

6. What makes this very limited survey of interest is that about 95% of these "errors" benefit the supermarket. If they were true errors the figure would be around 50%. That is statistically significant. It seems likely that staff are being told to engage in conduct that supports practices (management no doubt consider it good business practice) that could fall foul of consumer protection legislation. They get away with it because individual amounts are so small that they go unnoticed or are considered not worth disputing or when disputed are fobbed off as minor errors and corrected.

7. It could mean a bonus to the supermarkets of 0.09% in checkout takings resulting (possibly) directly from anti-consumer law activities. Over thousands of stores and billions of dollars gross takings, it is not insignificant. Still it would not get a look in under the scheme in the draft report for enforcement priority dependent on consumer financial loss. The proposed representative actions might assist however.

8. Phone companies, banks and others have similar "good business practices" that are detrimental to consumers but the example given makes the point.

9. Another area of concern is anti-competitive activities within professions such as doctors and lawyers, where control of career and professional advancement, and work and income, are both in the hands of persons who are effectively competitors with their own financial pressures. The opportunities to manipulate the market place are significant.

10. The absolute classic, in my experience, was the treatment of some highly educated and qualified and dedicated overseas trained doctors. I recall contacting the ACCC (or predecessor) about that issue and thinking afterwards what a waste of time and effort. Things have since improved but it was the Australian consumers of professional medical services that lost out, in my opinion.

11. At least one overseas trained doctor tried the legal system arguing discrimination, but he may not have been the best plaintiff available. The proposed consumer law representative actions could have assisted those doctors, if available then, to receive justice.

12. Although I believe representative actions have problems and can be unfair on defendants, those proposed in the draft report in the consumer law context. might be useful. A basic requirement that a core number of participants (say 8) be available, all of whom can show evidence of arguable cases, should be required before the action could proceed as a representative action.

13. Secondly, recommendations including additional civil and administrative remedies, better reporting, streamlining access for consumers and other areas are of interest only, in my view. Personally I support civil penalties that take the wrongly obtained profits. These recommendations show that the inquiry established a need to improve the existing position in these areas.

14. However, my view is that the inquiry really needed to seek much more specific detail about current disputes and complaints handled by ACCC, ASIC, states fair trading offices and industry based regulatory authorities. That material should have been actively sought and incorporated into the draft report. I presume that these organization would have published annual reports and similar documents, and internal materials that could and should have been made available for the present inquiry in the interests of openness and transparency of public authorities. Auditors reports and intra-departmental performance reviews may also exist. Surveys of complainants are of limited value because they could be expected to reflect the outcome of the complaint.

15. There seems to me little point in claiming under-resourcing and a need for additional remedies unless those claims, mainly by the authorities themselves, are solidly backed up by data.

16. Lack of resources, if proven to be a factor, is not a very good excuse for poor performance or unsatisfactory outcomes such as not pursuing soundly based complaints or inordinate delays in running cases or handling disputes, if such problems exist.

17. A more justifiable request by these authorities might be for greater investigative powers although present powers seem to me to be reasonably wide. I note again the push to reduce such powers in, for example, the recent ALRC inquiry into legal profession privilege.

18. Protracted and expensive litigation by authorities, that ultimately fails, is a waste of resources and damages the authorities' reputations. The aim, I think, is to protect consumers and competitors, not to get an organization in breach of TPA or FTA or other Acts at any cost, however unpleasant a settlement might seem.

19. Thirdly, in relation to industry based authorities a question of composition of panels and boards within those authorities needs serious consideration. No doubt broad guidelines are found in relevant legislation but in real practical terms who actually decides what applications or expressions of interest are shortlisted to go to the minister? Are they junior administrative officers? Or personnel officers more used to employing office staff for example, rather than filling a panel or board vacancy with the best available person or providing a fair balance between consumers and industry? These bodies are only as good as their members. I have had dealings in relation to registration boards and review panels (and other such bodies) that might suggest selection unfairness or inappropriateness. Clearly by their nature such bodies are potentially self-correcting because competent members can compensate for incompetent ones to a degree. However, people with the appropriate knowledge and expertise should be included. Perhaps the inquiry should have looked in detail at things like that.

20. The questions raised in the draft report as to whether consumers are properly informed about and using the available remedies are only the first issue. The inquiry seems to have largely failed to address the follow-up questions of whether or not complaints are being efficiently dealt with by appropriate regulatory authorities and if so then are the correct outcomes being achieved, which are fair to both sides.

21. In summary, with respect, in relation to remedies and enforcement, in my view the inquiry should have more rigorously addressed the present functioning of the regulatory authorities and bodies involved before recommending changes.

I F Turnbull
Barrister

5 February 2008