# Submission by Redfern Legal Centre on the

# PRODUCTIVITY COMMISSION
# Review of Australia's Consumer Policy Framework, Draft Report, Canberra, 2007

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**Contents** **Page**


| | | |
|---|---|---|
| 1. | About Redfern Legal Centre | 2 |
| 2. | Introduction | 4 |
| A. | Supported Draft Recommendations | 4 |
| B. | Draft Recommendations supported, with reservations | 6 |
| C. | Draft Recommendations not supported | 8 |
| D. | Draft Recommendations not commented upon | 10 |
| 7. | Final Comments | 10 |

**About Redfern Legal Centre**

Redfern Legal Centre (RLC) was the first community legal centre in NSW, and the second in Australia. It was established in March 1977.

RLC provides face-to-face and telephone legal advice by appointment, night and day Monday to Thursday, and by day only on Fridays. We provide emergency advice on demand, where necessary, and have specialised appointments for ATSI clients and for clients falling within each of the categories represented by the Services described below.

RLC provides a Credit and Debt Legal Service, a "general law" legal service, a Women's Domestic Violence Court Assistance Scheme, and a Tenants' Advice and Advocacy Service.

RLC's Credit and Debt Service provides free legal casework, including Court and Tribunal appearances, and legal advice, information and referral, to disadvantaged people and financial counsellors throughout NSW.

We give priority to people who cannot access the services of a private solicitor or obtain the assistance of the Legal Aid Commission. If it is apparent at an early stage that people are most appropriately referred to pro bono or commercial legal services, then this is done. In credit and debt matters, however, pro bono firms of solicitors often find themselves conflicted out of the proceedings because they represent the creditor banks and finance companies on the other side.

Another of our objectives is to promote and provide community legal education and community development projects.

RLC also examines and develops new models of service delivery. For example, a number of specialist community legal centres and advocacy services commenced operations as Redfern Legal Centre initiatives, in response to community need. Some of these services have become independent (e.g. Intellectual Disability Rights Service; Disability Discrimination Service; Redfern Legal Centre Publishing) and some have become State-wide programs in NSW e.g. the Women's Domestic Violence Court Assistance Scheme.

For many years, RLC's Credit and Debt Service has been active in a number of local, Statewide and national networks, including the Consumer's Federation of Australia; the Financial Counsellors Association of NSW (FCAN); the Australian Financial Counsellors Credit Reform Association (AFCCRA); the NSW Combined Community Legal Centres Group; and the National Association of Community Legal Centres.

Due to our position "at the coal face", we become aware of consumer problems at an early stage. This is also true of other community legal centres and not-for-profit financial counselling services. In addition, because we are a small and flexible operation, we can usually respond very quickly to adverse circumstances affecting our clients.

**Demand**

In 2005/6 RLC provided services to 3,720 clients and of these, 904 were credit and debt matters. ATSI clients comprised 10%, and CALD clients 48% of RLC's total clients. Fifteen per cent of our clients had a disability. We also provided 31 community legal education programmes during the year.

**Staff and Volunteers**

RLC's main office has 3.8 FTE employed solicitors, 1.8 of whom are with the Credit and Debt Service.

We also have an extensive volunteer program, with an average of 200 volunteers per year. Volunteers include law students and solicitors who work during the day, and four nights a week.

**Management Structure and Relationship with the Community**

Redfern Legal Centre is a public company limited by guarantee. There are six elected volunteer Company Directors. The day to day management of the Centre is delegated to the staff.

RLC has a strong and close relationship with its' local community. Some agencies have been instrumental in the establishment and continuing development of the Centre, most notably South Sydney Council (now Sydney City Council) which has consistently provided both financial and in-kind support.

## INTRODUCTION

Of the draft recommendations made by the Productivity Commission in its Draft Report, "Review of Australia's Consumer Policy Framework", (November 2007), we support many in part. In relation to a few we do not comment because we do not have sufficient time, resources, and hence knowledge; or prefer to leave responses to the organizations most affected.

For the sake of ease, we have divided the categories broadly into four groups, as set out below:

A. Support. B. Support with reservations. C. Do not support. D. Do not comment.

### A. Supported Draft Recommendations

We support those elements of the Draft Recommendations ("D.R."s) listed below:

D.R. 3.1

the adoption of common overarching and operational consumer policy objectives, including that such policy framework should prevent practices that:

are unfair;

meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage; and

provide accessible and timely redress where consumer detriment has occurred.

D.R. 4.2

The proposed new generic consumer law should apply to all consumer transactions, including financial services. ASIC should remain the primary regulator. (There is another part of this D.R. that we *do not* support – see also under C. below).

D.R. 5.2

Responsibility for the regulation of finance brokers and other credit providers should be transferred to the Australian Government and ASIC, but the UCCC should be retained.

D.R. 5.4
Obviously, we support the proposal that disadvantaged consumers have access to utility services at affordable prices, but the question of what is affordable varies with the income and expenses, to say nothing of other circumstances, of the consumer. Further, we are not satisfied that Community Service Obligations necessarily devolve into best, or even good, practice.
Accordingly, at this stage, we support such proposals as may be adopted from time to time by the National Consumers Roundtable on Energy (which includes the (NSW) Public Interest Advocacy Group).

D.R. 7.1
There should be included in any generic consumer law, a provision addressing unfair contract terms.
We strongly support this recommendation. Of course, the devil is in the detail (see also below, at C, D.R. 7.2)

D.R. 9.1
We agree that the ACCC should provide an enhanced national web-based tool for guiding consumers to the appropriate dispute resolution body, as well as providing "other consumer information".
It occurs to us that the ACCC should consult with consumer advocates (including credit and debt solicitors and advocates at Community Legal Centres) regarding what consumer information should be provided. A lot of information of this kind is already provided on community legal centre websites – for example see www.rlc.org.au/credit and debt & /our services.

D.R. 9.3
We agree that there should be greater consistency across small claims court and tribunal processes, including common higher ceilings for claims and equal availability of fee waivers for disadvantaged consumers. We are not quite sure what "uniform subsidy rates for consumers seeking redress for small claims" (p.69, Vol. 1) means.

D.R. 9.5
There should be a provision in the new consumer generic law that allows consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.

We strongly support this recommendation, because we find it extremely difficult to run actions in for example, the NSW Supreme Court, due to the resources required.

D.R. 9.6

Of course, we support increased funding for consumer legal aid services and financial counselling services… that are used principally by vulnerable and disadvantaged consumers, and particularly where those funds are used in to assist credit and debt legal services supplied by community legal centres (pp. 50, Vol.1 and 240 Vol.2)

D.R. 10.1

Consumer regulators should have the capacity to impose civil pecuniary penalties; ban offenders; and issue [evidentiary] notices and infringement notices.

However, this proposal rings alarm bells for the writer. (See also C. D.R.10.2)

D.R. 11.2

It would be interesting to read the results of any of the proposed evaluations by Governments of the effectiveness of consumer information and education measures. We should note that for many years now, our Credit and Debt Service has been running educational programmes on credit and debt-related matters, and has obtained evaluations from course participants.

D.R. 11.3

There should be additional funding to support research on consumer policy issues; the operating costs of a representative national peak consumer body; and the networking and policy functions of consumer groups.

**B. Recommendations Supported, with reservations**

We support, with the reservations discussed below, the following Draft Recommendations:

D. R. 4.1

The Draft Report recommends the adoption of a new national generic consumer law, enacted through "template" law. The Report says

"Unless otherwise appropriate, the new law should be based on the consumer protection provisions of the Trade Practices Act". (p.63)

It is our view that the consumer protection provisions of the Trade Practices Act cannot be adopted as a new national generic consumer law, without significant simplification. As we mentioned in our last submission to the Commission, the Act has been amended a great deal since its enactment, and has become ridiculously complex. It has been used in recent years by corporations to attack one another, rather than for its original purpose, which was to protect consumers from corporations.

There should be one law for corporations which wish to sue one another, and a different law to protect consumers from unscrupulous and immoderate practices by corporations and businesses (whether small or large).

D.R. 4.4

We are not sure that the ACCC (rather than another body) should assume the enforcement of functions currently performed by State Fair Trading Offices, although if this were to occur, we would strongly support the recommendation that there be enhancements to the ACCC's reporting requirements to ensure that consumer policy issues, including those arising at the local level, received appropriate attention.

We agree that consumers must have access to State and Territory consumer tribunals and small claims courts, but do not comment on the remainder of this draft recommendation.

D. R. 5.1

We are wary of a review of industry-specific consumer legislation by CoAG, but not because we have any concerns about CoAG itself. Rather, with various State and Territory Attorneys General pursuing the objectives of their own jurisdictions (as they rightly should), the possibility of a lowest common denominator rather than best practice response, looms large.

D.R. 5.2

We believe that finance brokers should be subject to more stringent regulation than merely requiring them to participate in ADR schemes.

D.R. 9.2

We agree that there should be a common monetary limit on consumer disputes which can be considered by ADR schemes involving financial services.

This recommendation also says that there should be effective and properly resourced ADR mechanisms to deal with all consumer complaints not covered by industry ombudsmen. The ADR schemes themselves will of course say that they should be properly resourced, and we certainly agree with this.

However, we are not sure whether ADR schemes in NSW should be expanded.

There are quite a number of ADR schemes already in NSW, including those run by the Courts themselves. For example, there are the Consumer Trader and Tenancy Tribunal; community justice centres – which are different to community legal centres; community legal centres, which could be described as de facto a.d.r. schemes (for example our credit and debt solicitors spend enormous amounts of time negotiating with credit providers, telco, and energy suppliers); and two State Ombudsmen.

D.R. 9.3
Although we support that part of recommendation 9.3 which proposes that small claims courts and tribunals should be able to make judgments about civil disputes based on written submissions, we suggest that care needs to be taken that consumers have the right to an oral hearing or interlocutory proceeding at any time, and not merely at the commencement of action (as averred to in the Draft Report at p.165, vol.2).
Further, at least one of our credit and debt solicitors finds that appearances in Local Court matters, even hearings, can take less preparation time than written submissions for consumers appearing on their own before the CTTT.

## C. Draft Recommendations not supported

D.R. 4.2

We are *strongly against* the proposal that financial disclosures currently only subject to "due diligence" requirements should be exempted from the misleading and deceptive conduct provisions of the proposed new law. It is our experience that directors of both regulated and fly-by-night companies can engage in misleading and deceptive conduct, and negligent behavior. Examples with which our clients have had experience are the Henry Kaye group, and another director who was ultimately dealt with by ASIC.

D.R. 5.4

We *do not* support the removal of price caps applying to telcos and energy services. It seems that the Commission believes that this will be balanced by the implementation of other mechanisms such as Community Service Obligations and supplier-provided hardship programs. With respect, it is not clear to us that these latter proposals will alleviate the additional burden. It is our experience that existing CSO's and supplier-provided hardship programs are inadequate to redress most imbalances in an efficient way. For example, in a recent case at our Centre involving an old age pensioner, it took six months, and a multitude of letters and phone calls, to have a clearly faulty gas bill reduced from about $150.00 to $85.00.

On another point which is perhaps a r4eason for this Recommendation, if the Commission is concerned that retention of retail price caps may lead to market manipulation through price-fixing by energy providers, surely this should be addressed by ASIC.

D.R. 7.2
We do not support the section of draft recommendation 7.2 that says there should be a capacity for industry or business to secure approval for "safe harbour" contract terms that would be immune from action under unfair contract provisions.

First, why *should* industry and business have this right? It may be that the Commission sees this as the quid pro quo for the imposition of a prohibition on unfair contract terms.

For example, the Commission talks a great deal about "opportunistic consumers" taking advantage of unfair contract terms where these might be deemed to exist (see pp. 118, 119, 122, 124), without citing any evidence that such consumers even exist, let alone that they hatch plans to take such "opportunities". (If such consumers did exist, their plans would verge on fraud, i.e. criminality. Crime is usually a matter for the Police, not for consumer policy). In the writer's experience of 14 years at the coal face of consumer representation, there has only been one consumer who *might* have been trying to "take advantage of" an unfair contract term to try to get out of a contract. Most disadvantaged consumers don't even think about whether a contract term is unfair; they tend to focus on unfair practices, or more often, the fact that since they signed the contract, they have fallen on hard times.

The Draft Report acknowledges that "there is no significant evidence of detriment for business from implementing unfair contracts legislation in Victoria, the United Kingdom, and the European Union generally"

(p.126). We concur. The Contracts Review Act, NSW, has not led to business detriment as far as we are aware.
However, the Commission then says that it seeks a prohibition of the *detrimental use* of unfair contract terms, rather than the *existence* of unfair contract terms. With respect, this is offensive**,** and sends a very bad message to the purchaser or prospective purchaser. The message is: "We can say what we like". How can a prospective purchaser know that this doesn't mean the seller can also do what they like? Suppose a contract had a clause saying "we will charge you fifty times the cost of the service you have just purchased, if you end this contract more than a month early". This would send a message to consumers that big business can get away with anything. Ironically, if such a law is passed, it may have the effect of bringing unfair contract terms to the forefront of consumer concerns, to the detriment of big business.

D.R. 10.2

This Recommendation says (in summary) "An appropriate authority should consider the merits of giving consumer regulators power to gather evidence after an initial application for injunctive relief has been granted".

The deliberations and findings of such a review could be a Pandora's box. It could be argued that on the one hand, such evidentiary powers could be used in the manner of secret police, but on the other, that once injunctive relief has been granted, the regulator has embarked down the normal interrogatory/discovery-type procedure. The difference is that where a regulatory authority is operating in such a way, it is not necessarily bound by common law, or other rules by which Courts are bound.

**D. Draft Recommendations not commented upon**

We do not comment on Draft Recommendations 4.3 (responsibility for enforcing product safety provisions), 5.5 (home building and renovations), 6.0 (institutional changes), and 8.0 (defective products and product safety).

**Final comments**

It seems that events may have overtaken some of the detail in the Draft Report (although the writer did not read all 500 pages, and so may have missed significant detail. If this is so, she apologises).
For example, the Draft Report Summary says "…competition policy reforms have put downward pressure on prices " (p.4, Vol.1). In fact, as most people who do the food shopping for their households know well, food prices keep going up, not down. Similarly, the Report says that

there is a wider range of products now available (p.6, op. cit.). In the writer's area, at least, there is a smaller and smaller range of food products available at local shops, year by year. Although there is a large range of products available at supermarkets, many people have difficulty both getting to and from supermarkets if they don't have transport, and also carrying home what they have bought.

The Draft Report says that "technological change has, via the Internet, given consumers better access to information on goods and services" (p.6, op. cit.). Many, if not most, of our clients do not have the Internet.
It also says "[consumer] policies commonly put a premium on the interests of vulnerable and disadvantaged consumers even if this imposes some costs on other consumers" (p.7, op. cit.). With respect, it is the writer's view that this is a furphy often put forward by big business. For example, business complained immensely about compliance costs when the Credit Acts were amended to become the Uniform Consumer Credit Code, but it is not apparent that the cost of compliance went up. In fact, the cost of credit (i.e., the "costs on other consumers") went down, and the costs to financial lenders did not appear to go up – rather, they made huge profits. (Those corporations which have gone bust in the last couple of years have not done so because they spent too much money trying to comply with the law. They have in fact gone bust because they have engaged in unethical and criminal activity, or with reckless disregard for existing law and ethics).

On a positive note, however, the Draft Report states "An....information-related gap in the current arrangements is the lack of capacity to …share the many lessons learned by … frontline consumer organizations (including community legal centres …) ….there would be benefits from disseminating such knowledge both to staff in individual frontline agencies, and in policy advocacy agencies …" (p.231).

We would be most happy to do so.

End.
Penny Quarry