13 Scott Street,
Elwood,
Victoria 3184.

12th August 2004.

TransTasman Study
Productivity Commission
LB2 Collins Street east
Melbourne 8003

Dear Trans Tasman Study,

Australian and New Zealand Competition and Consumer Protection regimes

May I make a short preliminary response to your Issues Paper dated July 2004. I do so based on nearly thirty years experience in consumer related fields across both the private and public sectors. I have written extensively in the field. My short points are:

1. Consumer Affairs in Australia is effectively a concurrent responsibility. The Issues Paper would appear to have a bias towards Australian Federal legislation and mechanisms. I would urge the review to ensure that the role of the states and territories is fully considered.

2. Unlike the United Kingdom and EEC jurisdictions, Australia does not recognise the importance of ensuring that the consumer interest is at the centre of government policy making . Instead, Australia relies on competition law and policy to provide that perspective. That is a flawed approach. By way of back ground I refer you to the 2004 Melbourne presentation of (now Dame) Deirdre Hutton, Chair of the National Consumer Council of the UK when she delivered the revived *Ruby Hutchison Memorial Address.* See : *http://www.consumer.vic.gov.au/cbav/fairsite.nsf/5a5c2294e2ee3a664a25678a0013c2bd/ecd8a9502c055785ca256e5c0008f7db?OpenDocument*

In that presentation Dame Deirdre outlines most succinctly the pivotal role of a government funded National Consumer Council to provide an independent consumer policy focus that can provide well researched consumer advocacy and input to government policy making. It provides a necessary balance to the extremes of competition policy. Australia has no such mechanism. It should have.

Finally, I attach a copy of a short paper *Consumer Affairs: the Cinderella of government policy making*, that I published in 2003 ((2003) 28 Alt L. J. 182). It summarises what I perceive to be current shortcomings in the Australian consumer policy making arena.

Should I be able to assist further please do not hesitate to contact me.

Yours faithfully,

Simon Smith

CONSUMER AFFAIRS

The Cinderella of government policy making

Simon Smith

Consumer protection achievements of the 1970s have been undermined by shifts in favour of market regulation and withdrawal of state resources in the 1990s.

The 1970s are appropriately regarded as the high water mark in Australia for the development and implementation of consumer policy. At that time government took an activist role in leading developments on behalf of consumers consistent with the emergence in the 1960s of the international Charter of Consumer Rights.[1] Examples of that activism included:

- the establishment of state and federal consumer affairs agencies;
- the appointment of an ombudsman to monitor government departments;
- the emergence of freedom of information laws,
- the passage of federal trade practices legislation,
- the enactment of laws supervising insurance companies ending a century old cartel and;
- the funding of government and community-based legal aid organisations.[2]

As we enter the 21st century the consumer affairs scene in Australia has changed markedly. There has been a significant shift in political theory that favours the freedom of the markets over government regulation as the best way to protect consumers. At the local level this has seen a withdrawal of state resources and a consequent downgrading of ministerial influence. Ironically, given the 'free market' ideology, the role of state consumer affairs agencies has become dominated by licensing and business regulatory functions in areas such as real estate, tenancy and business names. This has left little scope for consumer research and policy development. State agencies have become reactive rather than proactive, for example by responding to the failure of the home warranty building insurance market or misbehaviour by real estate auctioneers.

Where proactive consumer policy research exists it mainly resides outside the state agencies amongst a number of affiliated government or independent organisations such as the Law Foundations, the Law Reform Commissions and boutique consumer advocacy groups such as the Consumer Law Centre in Melbourne and the Australian Consumers Association and the Financial Services and Consumer Policy Centre in Sydney.

Meanwhile, at the federal level there is no longer a Minister of Consumer Affairs and the Federal Bureau of Consumer Affairs has been disbanded. What remains of its functions have been relegated to a small unit within Treasury. Although the Commonwealth continues to participate in the annual meeting of the Ministerial Council on Consumer Affairs (MCCA)[3] this body can be viewed as part of the political administration of consumer affairs rather than an initiator of original and independent consumer research. As part of this withdrawal the federal government has also implemented a strategy of defunding consumer advocacy and peak groups such as the Consumers Federation of Australia (CFA).

Simon Smith is a Melbourne based public interest lawyer who has worked extensively in the public and private sectors.
I acknowledge the most helpful comments of colleagues and friends within the consumer movement and Consumer Affairs Victoria. However, responsibility for the views expressed in this article is mine.

The result is that there is now no single lead agency for the development of consumer policy in Australia. Rather, the task is fragmented amongst a raft of sector-specific agencies such as the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investment Commission (ASIC) and under-resourced honorary bodies such as the Commonwealth Consumer Affairs Advisory Council (CCAAC). For its part, the consumer movement lacks resources, is disparate and unable to play a full role in consumer advocacy and policy development.

Clearly, there is at present in Australia a vacuum in consumer affairs policy making; a policy Cinderella if you will.

Accordingly, this article is predicated on the basis that well researched and proactive consumer affairs policy making and advocacy is an important part of public administration. It is in the community interest that government, business and the public fully understand the key consumer issues of the day. This article is also predicated on the view that government should facilitate the original research and advocacy that identifies emerging issues of consumer concern and their underlying causes thereby assisting business and government in their responses to these concerns. The following eight structural and policy areas are offered as part of a manifesto of reform needed in the consumer interest.

1. Re-establishment of a federal Consumer Affairs Ministry

A Minister for Consumer Affairs should sit at the federal ministerial table to ensure that the interests of consumers are appropriately championed. The abolition of the Ministry by the Howard Government in 1998 has led to the lack of a clear voice for consumers and the inevitable erosion of hard fought consumer protections in favour of sector-specific interests such as Treasury.[4] In a federal system the lack of a national focus and leadership is even more pronounced. Similarly, at the international level, Australia no longer has a coordinated consumer affairs focus to facilitate liaison with the consumer affairs portfolios of the OECD, the European Community or the United States.

Interestingly, the federal opposition can see the electoral advantage in providing ministerial recognition and coordination of consumer affairs. In 2003, the federal opposition created the shadow portfolio of Consumer Protection and Consumer Health.[5] With an ageing population there is a natural association of those two interests.

2. Establishment of a Consumer Policy Commission

Australia needs a national and independent consumer policy research centre. Such a centre would provide greater research continuity than is offered by the presently fragmented and under resourced consumer groups. Such a centre would enable the building of a critical mass of experience able to both initiate and sustain independent consumer research over a number of broad policy fronts. Such a centre would also provide a central point for government, business and consumer groups to consult with in ensuring rigorous consumer interest input into policy development. Importantly it would provide a natural focus for international participation on these issues.

An obvious model is the National Consumer Council in the United Kingdom. This Council identifies its mission as being 'to stimulate real change by championing the interests of consumers and by empowering them in their choice of sustainable goods and services' (see <www.ncc.org.uk>). While it receives core government funding it also garners objective business support and tenders for relevant external research grants. It maintains strong networks with consumers and consumer groups nationwide and internationally. It is significant that it has enjoyed bi-partisan political support for many years.

Alternatively, the Australian Law Reform Commission (ALRC) could be refashioned to become the Australian Law Reform and Consumer Policy Commission. This would give recognition to the fact that law reform in the consumer interest goes beyond 'black letter' law and must have an applied context. The appointment of two or more Commissioners (ideally one with a business background) with a consumer policy remit would be a cost effective use of an existing and effective research infrastructure.

3. The states should refer their consumer protection powers to the Commonwealth

The demands of the international marketplace require an effective and responsive legal framework, particularly now that consumer protection is a fundamental factor in business dealings. Unfortunately the 'founding fathers' who put together the constitutional framework did not see the protection of consumers and their interests as a necessary element of what they devised. The result is that we have a confusing and inconsistent mix of state and federal laws. There is duplication, artificiality and over prescription. This is more than an irritant to businesses operating in the national marketplace and to a population that is more mobile than ever before.

The simplest solution to this problem is for the states to cede their power in this area to the Commonwealth by use of the reference power in the Constitution (s 51 (xxxvii)).[6] This would overcome the difficulties of referenda reform, although it is not without its own 'realpolitik'. Importantly, it is not necessary to have unanimous agreement amongst the states for referral to occur as the 1996 referral of industrial relations powers by the Kennett Government illustrates. For their part the states could continue to be frontline service deliverers in partnership with the Commonwealth. This works in other areas such as the federal use of state courts.

4. The Commonwealth should invoke federal power over consumer credit to ensure a nationally cohesive financial services scheme

Almost by the time that the states had actioned the *Uniform Credit Laws Agreement (1993)* as the Uniform Consumer Credit Code (1996) the model was out of date. In particular, the Wallis *Financial System Inquiry* (1997)[7] confirmed and expanded the role of the Commonwealth as the national regulator of the financial services sector. Since that time the Australian Securities and Investment Commission (ASIC) has emerged as the dominant financial services consumer protection regulator. Strangely, regulation of consumer credit remains with the states, having been reluctantly preserved for the states by Wallis on a 'trial' basis.[8]

Since Wallis, the pace of change in the financial services marketplace, especially credit, has been phenomenal. In

particular, the growth of the Internet as a sales channel has directly challenged the effectiveness of national consumer protection laws, not to mention state-based ones.

It is clearly no longer appropriate for the states to have the lead role in the regulation of consumer credit. The essence of the challenge lies with the cumbersome nature of the all state membership of the Code management structure, namely the Uniform Consumer Credit Code Management Committee (UCCCMC) and through it the Ministerial Council of Consumer Affairs (MCCA). The substance of the Code itself is not the issue, save for its increasing tendency to be less uniform as individual states respond to current challenges by taking their own initiatives in an effort not to be bogged down by the UCCCMC/MCCA process. The recent passage of the NSW legislation to rein in the excesses of finance brokers is an example of such unilateral action.[9]

Central policy and legislative control of consumer protection for all products and services in the financial services sector would enable prompt and consistent responses to the challenges of a dynamic marketplace. Clearly this is in the consumer interest.

5. The need for a National Product Safety Commission

The right to safe goods is one of the oldest and most basic of all consumer rights.[10] In Australia, although up-to-date statistics are difficult to come by, the annual number of product-related deaths and injuries and their cost to the community are similar to those relating to traffic accidents. However, this 'invisibility' of the importance of good product safety to the health of the nation — in both an economic and literal sense — obscures the reality that the product safety regime in Australia urgently requires renewal. Again a lack of central leadership is a key problem.

At the Commonwealth level there is a phalanx of agencies with an interest. For example, food is regulated through Food Standards Australia New Zealand (<www.foodstandards.gov.au>); non prescription pharmaceuticals through the Therapeutic Goods Administration (<www.tga.gov.au>); the Australian Competition and Consumer Commission (<www.accc.gov.au>) supervises the 26 mandatory product safety standards[11] registered under the *Trade Practices Act* 1974 (Cth) (but not the very many more voluntary standards); and product safety policy development resides with the small consumer unit in Treasury. There is no lead agency that coordinates, encourages and facilitates improvements. This is despite a 1995 recommendation by the Australian National Audit Office (ANAO) that the Department of Human Services and Health assume that role.[12]

At the state level all the consumer affairs agencies have a product safety remit, but resource and jurisdictional limitations has tended to see their activity focused around inspection and enforcement at the bottom end of the market such as the '$2' shops, annual audits of the contents of showbags and the almost traditional Minister's Christmas press release warning parents about 'killer toys'. It is unusual for such agencies to prosecute offenders. Inevitably, state agencies take a local rather than a national focus and rely for any national coordination on MCCA, which in turn suffers from a lack of participation by a lead agency at the federal level.

At both levels of government the main tools used to encourage a product safety focus are 'back end' strategies such as bans, recalls (see <www.recalls.gov.au>) and prosecutions, with private sector lawyers increasingly filling an enforcement void with product liability and class actions. This reactive approach is to be contrasted with proactive initiatives in Europe and the United States. In both places product safety regulation is better resourced and more visibly located within government policy-making. Governments in Europe and the United States also give greater attention to 'front end' risk management and data collection in order to identify earlier, systemic risks. Interestingly, both were recommendations of the 1995 ANAO audit that have not been implemented in Australia.[13]

In Europe, for example, a central policy plank is the *General Product Safety Directive*,[14] which since 1992 has placed a positive obligation on suppliers in EU states to market only safe goods. This directive obliges producers *and suppliers* to monitor the safety of marketed products by, among other measures, introducing systematic procedures for assessing and investigating consumer complaints. Thus a supplier of pharmaceuticals is required to ensure that their packaging is safe in the hands of children. In Australia it took the 2000 ransom demand on Herron Pharmaceuticals to drive such a safety design change.

In the United States, general product safety is the responsibility of the independent and high profile Consumer Product Safety Commission (CPSC) (see <www.cpsc.gov>). One of the key activities of the Commission is the provision of the National Injury Information Clearinghouse, which disseminates statistics and information relating to the prevention of death and injury associated with consumer products.[15] At the same time, innovative CPSC proactive strategies include the legal obligation placed on manufacturers to report to the CPSC when any of its consumer products has been the subject of at least three civil actions filed within a two-year period.[16]

Australia needs a federal agency that can coordinate, encourage and facilitate policy development in the product safety arena on a national basis and that can provide an international point for liaison, in other words, a lead agency as suggested by the ANAO in 1995. The obvious model is the CPSC. Such an agency could encourage a cultural change in the way regulators and business approach product safety. The swing must be towards better front-end risk assessment, particularly in product design (and thus better standards), clearer obligations on suppliers through a *General Product Safety Directive* as part of a simplification of federal product safety law and smarter and more effective data collection.

6. The need for a National Personal Injury Compensation Scheme

Compensation for personal injury in Australia is an historical accident. It reflects the fact that the compulsory state schemes, first brokered by a strong labour movement in the early part of the 20th century, mainly sought to ensure compensation for people injured in the workplace and by the then new fangled automobile. To the extent that there is now a national system it is very much still underwritten by those compulsory schemes and they have not kept pace with changes in society. In 2003 the fees, benefits and eligibility criteria vary depending on what state or territory you are in when the injury occurs. In some places the scheme is based

on 'common law rights' and the need to prove fault, whereas in others 'connection' with the vehicle or the workplace is enough. This explains why at hospital casualty rooms, presenting patients are quizzed on whether they were in a car crash, injured at work or whether they have private hospital cover. If none of these apply then get to the back of the queue!

There are in excess of 16 different compulsory schemes operating in Australia, The duplication, cost inefficiencies and inequities that result are obvious. At the same time, however, most of the schemes exist outside the prudential control of the Commonwealth regulator, the Australian Prudential and Securities Commission (APRA), reflecting the fact that in 1901 the states were given the constitutional right to be involved in insurance. The collapse of the state building societies and state banks in the early 1990s demonstrates the risks of such a lack of central supervision.

With an ageing and mobile population the need for a national compensation scheme is greater. The key determinant for financial assistance for medical and hospital bills should be the fact that you are injured or ill, not what the cause was or which state you are in. A national no fault scheme would rationalise the myriad of state government and private sector schemes and insurance products and cut out the groups of lawyers and doctors who feed off them. It would also strike a better balance between first party insurance and an affordable universal safety net. As such it would also complement and support the national health system, Medicare.

This of course has been attempted before. In 1975 the Whitlam Government had a national compensation proposal, modelled on New Zealand's 'Woodhouse' scheme, before the federal parliament. The insurance industry, while unhappy, was reconciled to it. Were it not for the events of 11 November 1975, it is likely that the scheme would be the law today.[17]

In 2003 the real question is not whether a national compensation scheme is a good idea but rather, when and how? This is not to say that interested stakeholders won't resist. State governments, for example, are increasingly dependent on the large income streams that the compulsory schemes generate. However, like much market reform, a change of mind may result from the very real prospect that their unfunded liabilities that may well bring the schemes to the brink of collapse. Perhaps, a first step would be to expand the Terms of Reference of the current Productivity Commission enquiry that is examining possible national frameworks for Workers Compensation.[18]

7. The need for a rethink on the effectiveness of industry-based alternative dispute resolution schemes.

Alternative dispute resolution (ADR) schemes in Australia first emerged in the 1970s/1980s in the area of neighbourhood and family disputes. Developed as alternatives to a legal system perceived to be slow, costly and inaccessible, the early ADR schemes were originally community based, although the ADR techniques, particularly mediation, soon 'mainstreamed' to the court system and the legal profession.[19]

In the late 1980s the combination of market failures, privatisations and demutualisations saw the development of industry-based ADR 'ombudsmen' as a key device to protect the consumer interest. The consumer movement, after initial reservations, supported these mechanisms as viable alternatives to the legal system. Government supported them as they shifted the cost away from the taxpayer. Industry reluctantly obliged under threat of legislation.

Since that time industry-based ADR's have become almost a doctrine of faith amongst governments and regulators. They are also growing like 'topsy'. Now a decade old, the key schemes, such as the Australian Banking Industry Ombudsman, are in effect large multi-million dollar monopoly businesses. Unlike the court system, they remain outside the direct supervision and scrutiny of parliament. This increasingly raises issues of whether these 'private justice' systems are indeed cost effective, accessible and whether they do indeed provide 'justice'.

It is not possible to fully test whether these industry-based ADR mechanisms do indeed provide a timely, affordable and accessible alternative to the court system. The annual reports of the schemes are not audited (financials excepted); few such mechanisms benchmark the performance of member companies in a transparent way; industry tightly controls the terms of reference of such schemes; and there is no publicly accountable examination of the quality of their outcomes. The 'agreement' of industry not to challenge decisions of ombudsmen and the 'invisible' escalating costs to member companies resisting claims through the schemes undermines claims about the 'success' rates of such schemes.

The ability of the consumer movement, to both push the ADR standards forward and to challenge publicly the objectivity of such schemes, is increasingly compromised by the participation of key consumer advocates on the governing bodies of such schemes and the growing dependence of consumer movement activity on such resources. It may be that the concept of the nominee Director from special interest groups is no longer appropriate and the better approach is to appoint independent Directors. Certainly, this would be consistent with current thinking on good governance and it would widen the pool. There is no reason why ADR schemes should be outside this debate.

It is important that consumers are provided with confidence in the justice system, even if a particular scheme is industry based. Not only is there a case for the consolidation of such schemes, particularly regarding financial services, but there is also a growing need for such schemes to be more accountable. It may well be time for these schemes to come back under parliamentary scrutiny. This is the case with the Financial Ombudsman Service in the UK (see <www.financial-ombudsman.org.uk>).

8. The need for more accountable public reporting by the nation's consumer protection agencies

If compliance with state and national fair trading laws is a core objective of consumer affair agencies around Australia, then one important measure of their success will be the visible enforcement actions by these agencies. In theory their records should provide a valuable basis for assessing both the quantity and quality of such performance over any given period of time. Such assessment is important not only to demonstrate that rogue traders will be brought to account but also so that systemic challenges can be promptly identified and strategically managed.

The ability to analyse and interpret the enforcement data of state and federal consumer affairs agencies is, however, severely hampered by the lack of commonality in their public reporting. For example, in 2001-2002 it is difficult to get an accurate picture of enforcement activity by the ACCC. The Annual Report of the ACCC provides no tabular summary of prosecutions or civil proceedings initiated by the ACCC. Nor does it provide a tabular summary of the matters in which the ACCC intervened. The preferred reporting style is an introductory summary followed by individual case notes. Thus in 2001–2002 the ACCC was 'involved' in 110 matters in the courts and the ACCC instituted proceedings 'in over 60 matters'.[20] It is not possible to reconcile these figures against the case summaries or to obtain a precise understanding of the legal basis for the action or for the result.

An examination of the annual reports of all state consumer protection agencies tells a similar story. For example, the Queensland Department of Tourism, Racing and Fair Trading in 2001–2002 provided no statistical breakdown of its court or tribunal based enforcement activities and under a broad category entitled 'Dispute resolution' baldly suggested the value of sums recovered on behalf of consumers without providing any context or reference.[21]

At present there is no consistency in style or content between agencies. Rather, the emphasis would appear to reflect local priorities. The national strategic interest is missing.

The Commonwealth should be playing a leadership role in developing a common enforcement proceedings reporting matrix. This would also provide an opportunity for a re-examination and possible reconciliation of the enforcement priorities of the various enforcement agencies beyond the bland descriptions of Memoranda of Understanding.

Finally

If the consumer interest in Australia is to be properly championed then it is clear that a fresh start needs to be made in the manner that federal and state governments approach the development of consumer affairs policy. The above 'manifesto' of structural and policy suggestions is not a definitive list. Rather, it is intended to stimulate debate and a renewal of focus. Presently, Australia is out of step with developments in related areas in Europe and the United States. If we are to remain not only competitive as a nation but a safer, fairer and confident community, then we need to take seriously the protection of the consumer interest and to find new ways of doing things. Pivotal is the need for the federal government to show leadership. This may mean giving priority to the national over the sectional interest. The framers of the constitution could do that in 1901. It would be nice to think we could do the same 100 years later. Cinderella is ready to come in from the cold.

References

1. First enunciated by President John Kennedy on 15 March 1962, the original rights were to safety, to be informed, to choose and to be heard.
2. For a selected history of many of these initiatives see Simon Smith, *In the Consumer Interest: A Selected History of Consumer Affairs in Australia 1945-2000* (2000).
3. See further <www.consumer.gov.au>
4. Interestingly, John Howard's first ministerial appointment was as Minister for Business and Consumer Affairs in the 1975 Fraser Government. Similarly, the first shadow portfolio of Peter Costello was as Shadow Minister for Corporate Law Reform and Consumer Affairs 1990–1992.
5. Currently held by Alan Griffin MHR.
6. This was a 1987 recommendation of the Advisory Committee on Trade and National Management. See AGPS *Report to the Constitutional Commission,* 1987, Canberra.
7. *Financial System Inquiry Final Report,* AGPS (1997) (Chairman: Stan Wallis).
8. Wallis recommended (recommendation 6) that the Code be independently reviewed for its cost effectiveness and uniformity after it had operated for two years. This has not happened, n 7, 33.
9. *Consumer Credit Administration Amendment (Finance Brokers) Act 2002* (NSW).
10. See above, n 1 and also Wood, J, 'Government Involvement in Consumer Affairs', in Simon Smith (ed), *In the Consumer Interest: A Selected History of Consumer Affairs in Australia 1945-2000* (2000) 29.
11. This includes standards for such diverse goods as baby walkers; balloon blowing kits; disposable cigarette lighters; ramps for motor vehicles and toys for children under three.
12. Australian National Audit Office, *Risk Management by Commonwealth Consumer Product Safety Regulators,* Report No 12, (1995).
13. Australian National Audit Office, above, n 12.
14. See generally <www.europa.eu.int/comm/consumers/cons_safe/prod_safe/gpsd/index_en.htm>.
15. In Australia data collection is very under resourced. An existing agency is the Research Injury Data Centre based at Flinders University. See further <http://www.nisu.flinders.edu.au/index.php>.
16. See generally <http://www.cpsc.gov/sec15.html>.
17. For a brief description of the 1975 proposal see Simon Smith, 'General Insurance: The Unfurling of the Umbrella of Protection' in Simon Smith, *In the Consumer Interest: A Selected History of Consumer Affairs in Australia 1945-2000* (2000) 66.
18. See <http://www.pc.gov.au.inquiry/workerscomp/index.html>.
19. See above n 2 esp P. Condliffe, 'The Rise of Alternative Dispute Resolution' 149.
20. Australian Competition and Consumer Commission*, ACCC Annual Report 2001–2002* (2002) 29.
21. Queensland Government, *Department of Tourism, Racing and Fair Trading Annual Report 2001-2002* (2002) 21.