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Mr Robert Fitzgerald
Presiding Commissioner
Productivity Commission
GPO Box 1428
Canberra City
ACT, 2601

Email: consumer@pc.gov.au

4th March 2008

Dear Sir,

**Re: Review of Australia's Consumer Policy Framework
Productivity Commission Draft Report**

National Legal Aid (NLA) represents the Directors of the eight Australian State and Territory Legal Aid Commissions. This submission reflects the views of each Legal Aid Commission.¹

National Legal Aid welcomes the opportunity to provide a submission in response to the draft report issued by the Productivity Commission. Implementation of the report's recommendations will assist vulnerable and disadvantaged consumers throughout Australia. We particularly welcome the recommendation concerning funding of legal aid services to assist vulnerable and disadvantaged consumers. This is consistent with NLA's policy of providing civil law services to support Australians at risk of social exclusion due to poverty or other special circumstances².

We note the breadth of the report. We isolate our submission to areas that impact directly on Legal Aid Commissions' client base, that is, disadvantaged and marginalized people whose rights and interests need protecting.

While funding has restricted legal aid commissions' casework services in the consumer law area, we have significant experience of the problems vulnerable and disadvantaged consumers face through the provision of our community legal education, legal information, legal advice and minor

¹ The Legal Aid Commission of New South Wales will also make an individual submission

² National Legal Aid, 2007 *A New National Policy for Legal Aid in Australia* available at http://www.nla.aust.net.au/res/File/PDFs/nla_policy-11-07.pdf

assistance services. In addition, we see many clients in our family and criminal law practices who have significant consumer problems but to whom we can only offer limited assistance due to our funding constraints. The timely provision of legal help can do much to prevent, or alleviate, the severe effects of credit and debt problems which are not addressed.

We agree with the observation in the report that the pool of vulnerable and disadvantaged consumers is increasing with increased complexity of markets and demographic change. Failure to provide legal help can entrench experience of social exclusion. This inevitably results in economic cost to the community and damages social cohesion.

We agree that there is little to be gained by narrow definitions of vulnerability or disadvantage. However we would like to make some comment about the consumer experiences of people living in poverty. Our work assisting people who have entered into “sub-prime” financial transactions illustrates that people living in poverty are locked out of efficient markets. In essence:

- They have limited consumer choices
- There is often a desperate need to enter into transactions to provide for their basic needs (housing, transport, education, health).
- They participate in the section of markets which consumers with more choices avoid,
- Market based solutions do not emerge to meet their needs.

For these people to be assisted, the policy response by government must be sophisticated, multi-faceted and flexible enough to address emerging issues swiftly.

In this context, we support draft recommendation 3.1 and in particular the operational objective relating to the needs of vulnerable and disadvantaged consumers. We submit that the objective of “proportionate, risk-based enforcement” should be read so that the term “proportionate” relates not just to the monetary value of transactions, but also the impact on vulnerable and disadvantaged consumers of failure to take enforcement action.

We support a national generic consumer law as proposed in draft recommendation 4, but make no comment about the identity of the regulator other than to submit that it is essential that the regulator be properly resourced. Inadequate resourcing of the regulatory function renders the underlying legislative regime irrelevant to most vulnerable and disadvantaged consumers who are rarely able to take action themselves to enforce their rights.

We submit that caution should be used in identifying “unnecessary regulation” as envisaged by draft recommendation 5.1. Our success rate assisting vulnerable and disadvantaged consumers is much higher where we are able to rely on breaches of clear and specific regulatory provisions. Our clients face many barriers in taking action based on general provisions relating to misleading or deceptive conduct or unconscionability. In our experience, the fact that specific legislation exists in only one or two jurisdictions is not an indicator that it is unnecessary. In fact it is more likely to be an indicator of the

responsiveness of the regulator in that jurisdiction to an emerging market problem.

In relation to other parts of draft recommendation 5, we support the retention of specific regulation for consumer credit and a national system of regulation of finance brokers and other currently unregulated credit providers which is tied to participation in an approved ADR scheme. We also support specific regulation in the areas of energy, water, telecommunications and home building.

We also believe that specific regulation is necessary to protect vulnerable and disadvantaged consumers in a range of other areas. We consider that specific legislation is warranted and will continue to be warranted in a range of situations.

We make no comment in relation to the specific elements of draft recommendation 6 other than to agree that it is desirable for portfolio responsibility for consumer policy to be visible, effective and influential.

We support regulation of unfair contracts, however we have some reservations about the effectiveness of draft recommendation 7.1. The suggested recommendation would give fertile ground for lengthy litigation between industry providers and regulators with vulnerable and disadvantaged consumers left with unsafe contracts and little recourse to resolution.

There needs to be a cost effective mechanism (such as a notice to show cause why a term ought not be deemed unfair) to encourage regulators to respond adequately when a number of consumer complaints are received about a particular industry contract. It is unwieldy for consumers to have to prove material detriment in order to trigger relief under any proposed unfair terms protection.

We support draft recommendations 8 relating to defective products.

We consider that access to effective remedies remains one of the most significant issues for consumers, particularly for vulnerable and disadvantaged consumers. We support draft recommendation 9.1 but only if another layer of 'referral data' is developed with substantial consultation with the ADR, disability and consumer advocacy sector to ensure optimal access for vulnerable consumers.

In relation to recommendation 9.2 and extending the jurisdiction of the Telecommunications Industry Ombudsman (TIO), we support a single entry point for all consumer complaints relating to telecommunications. For example if a complaint is made against a Pay TV provider that includes content and billing issues, the billing component of the complaint could be dealt with by the TIO and the content complaint by ACMA but the response to the complainant be managed by one body.

In relation to hardware complaints where the products are not provided by the telecommunications providers the proposed expansion would mean that all businesses selling and producing phones, modems, televisions etc would need to be members of the TIO. Currently complaints about the quality of hardware that are not part of a bundled service are dealt with by the State Departments of Fair Trading and or the Australian Competition and Consumer Commission as regulators for the state based Fair Trading Acts and the Trade Practices Act.

In our view the systems in place for consumers to take complaints to those bodies and take legal action in Small Claims or Consumer Tribunals provides adequate protection. If the TIO were to accept those complaints, the effectiveness of the TIO in dealing with the provision of telecommunication services might well be diluted. However if the hardware is provided as part of a bundled service to the consumer then the TIO should continue to have a role in resolving disputes concerning the provision of that hardware.

We support the further integration of financial ADR services and the expansion of financial ADR schemes to include all corporations providing credit. Our concern is that the integration of the financial ADR schemes not result in the dilution of consumer protection to take into account the lowest common denominator.

It is critical that consumers have a single entry point for complaints and that for consumers consistent decisions are made regardless of the financial ADR scheme they are accessing.

A common monetary limit on consumer disputes is desirable but needs to be based on an analysis of the appropriate upper limit to discourage commercial interests from accessing ADR rather than an attempt by industry to limit their exposure to consumer complaints.

We support draft recommendation 9.3. However, we consider that allowing decisions based on written submissions will be of assistance to most vulnerable and disadvantaged consumers only if there are services available to assist them to make their submissions. The level of assistance required often extends beyond that usually available from legal aid commissions and community legal centres and therefore its success is dependant upon the adoption of draft recommendation 9.6.

We support draft recommendations 9.4 and 9.5. In particular we note the value to vulnerable and disadvantaged consumers of action by the regulator which provides them with individual redress.

As previously stated, we support draft recommendation 9.6 which is consistent with the view of NLA that additional funds are required to assist Australians at risk of social exclusion due to poverty or other special circumstances, with a range of civil law services including with consumer problems.

We support all of the enforcement mechanisms described in draft recommendations 10.1 and 10.2. We note that to be effective, regulators require not just the power but also the systems to gather information about trends so that effective enforcement action can be taken swiftly as well as sufficient resources to take action. Regulators need legislative requirement to action systemic breaches of legislation and codes of practice. This means that where one or a small number of complaints indicates the likelihood of a large number of affected consumers, EDR schemes and consumer advocacy bodies should be able to flag such matters as a potential systemic breach and the regulator must take action to remedy the likely breach. For instance, the action may be to approach the industry provider for an undertaking that the breach will stop, affected consumers notified and if appropriate, compensation made available.

We support draft recommendation 11.1. Casework experience suggests that consumers have limited ability to read and understand disclosure especially if it contradicts verbal communication which they are more likely to listen to and trust. More research is needed into behavioural economics to assess how information can be effectively disseminated. Clearly information is only relevant to consumers at point of sale and general education programs and financial literacy is less effective for vulnerable and disadvantaged consumers unless it is targeted through face to face consultations when the information is critical (ie. When receiving assistance from a financial counsellor).

Our casework experience is that the availability of accessible remedies is more important to vulnerable and disadvantaged consumers than detailed information provided at the time of sale.

Finally we make comment on Chapter 12 of the draft report. We agree that many of the recommendations will be of direct benefit to vulnerable and disadvantaged consumers and we support the use of specific strategies and action plans to address the needs of particular disadvantaged groups.

From our casework experience the following measures are important to protect vulnerable and disadvantaged consumers:

- A strong role for the regulator who is resourced to take action in relation to serious breaches of the regulatory framework
- Low cost, accessible, fast and fair remedies for individual consumers which includes access to ADR schemes
- Broad national generic legislation which covers most markets
- A unfair contracts regime which allows the regulator to prohibit terms in contracts that disproportionately allocate risk if there are case examples of detriment to consumers.
- Specific legislation which applies to markets for complex and high value products and to markets or sections of markets for basic goods and services which are exhibiting market failure (i.e. there is an inappropriate producer surplus at the expense of consumers and the price of goods or services far exceeds the cost)

- Adequate funding for legal aid services to assist vulnerable and disadvantaged consumers.

We thank you for the opportunity to make this submission.

Please do not hesitate to contact us if you require any further information or wish to discuss any aspect of this submission with us.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'H. Gilmore'.

Hamish Gilmore
Chairperson
National Legal Aid