



Protecting consumer protections

**A submission regarding the national harmonisation of
Australian consumer laws**

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on consumer affairs

PIAC has specific expertise regarding consumer issues. It operates the Energy and Water Consumers' Advocacy Program (EWCAP), which is the peak body for energy and water consumers in NSW. PIAC's Chief Executive Officer, Robin Banks, is a member of the Australian Competition and Consumer Commission's (ACCC), Consumer Consultative Committee, and PIAC also has a dedicated position advocating for consumers health services in NSW.

PIAC welcomes the opportunity to provide further comment on the development of a national Australian Consumer Law (ACL), having previously made submissions to the Productivity Commission's Draft Report on Australia's Consumer Policy Framework, regarding the formulation of the ACL.

PIAC supports the ACL, as it provides benchmark rules and an opportunity to establish world-class consumer laws. Having these benchmarks promoted in every jurisdiction will help make consumer laws more accessible and ultimately should make consumers more informed of their rights.

However, PIAC's primary concern is to ensure that consumers are better off as a result of these laws, and do not lose rights through the development of the ACL.

In responding to the paper released on 17 February 2009 by the Standing Committee of Officials of Consumer Affairs (SCOCA): *An Australian Consumer Law: Fair Markets — Confident consumers* (the Paper), PIAC provides general support for the proposals laid out in the Paper. Where PIAC does not support a policy, an alternate policy approach has been recommended. A list of these recommendations can be found at the end of this submission.

2. Consumer standing in the Australian Consumer Law

2.1 Objective of the ACL

Neither competition nor consumer policy are ends in themselves. Both of these policies serve a broader objective of protecting consumer welfare. The objectives of the ACL should make this clear. This requires the readjustment of the proposed objective, as well as the title of the *Trade Practices Act 1974* (Cth) (the TPA), so that they focus on the outcome of consumer welfare, and not the mechanisms of competition or fair trading by which this may be achieved.

Highlighting this position, the Ministerial Council on Consumer Affairs (MCCA) published its recommendation (agreed on 15 August 2008) for the objective for the Australian Consumer Law:

To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.¹

In response to this, SCOCA suggested a more watered down objective for the Australian Consumer Law, being:

The object of this Law is to enhance the welfare of Australians through the promotion of competition and fair trading, and the empowerment and protection of consumers.²

PIAC agrees that SCOCA's suggestion is an improvement on the existing objective under section 2 of the TPA³, reflecting the concern of the MCCA for both the empowerment and protection of consumers. However, the wording of SCOCA's objective presents the protection of consumers as an afterthought to promoting competition rather than the priority of the Act, as recommended by the MCCA.

SCOCA's proposed objective also overlooks the importance of the term *effective* competition as opposed to *any* competition. Effective competition is that which effectively promotes the welfare of consumers.

PIAC therefore recommends that the Australian Consumer Law include the following objective:

To enhance the wellbeing of Australian consumers through the empowerment and protection of consumers, and the promotion of effective competition and fair trading.

¹ Ministerial Council on Consumer Affairs, Joint communiqué, 15 August 2008, available at <http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf>.

² The Standing Committee of Officials of Consumer Affairs (SCOCA), *An Australian Consumer Law: Fair Markets — Confident consumers* (2009) 11.

³ Section 2 of the *Trade Practices Act 1974* (Cth) states: 'The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'

2.2 Title of the Act

PIAC supports the Australian Government's proposal to rename the TPA in order to provide greater clarity as to the functions of the TPA. However, to reflect the objectives of the TPA and to further promote the wellbeing of Australian consumers, PIAC recommends the TPA be renamed the *Consumer and Competition Act*. This places the emphasis on consumers, the beneficiaries of the Act, rather than competition, the tool with which to achieve consumer wellbeing.

2.3 Definition of consumer

The different definitions of a consumer amongst the jurisdictions range from the very simple to the very complicated, with the most obscure definition being prescribed in the TPA. The definitions are made particularly complicated by the inclusion of differing exclusion provisions, coupled with exclusion exemption provisions.

Complicated definitions are problematic as they can be overly prescriptive, and can make it difficult for consumers and courts to interpret the applicability of the consumer law provisions.

PIAC therefore recommends that for the purpose of the Australian Consumer Law, a simple and inclusive definition of consumers, be included. This could be constructed through the combination of definitions found in the New South Wales and the South Australian *Fair Trading Act*⁴, establishing the following definition:

- (1) In this Act, 'consumer' means a person who—
 - (a) acquires, or proposes to acquire, goods or services from a supplier; or
 - (b) acquires an interest in land, other than land used, or intended to be used, or apparently intended for use, for industrial or commercial purposes.
- (2) Goods or services referred to in subsection (1) must be acquired for end use, that is, they do not include goods or services acquired for re-supply.

This definition does not include a monetary threshold, as PIAC does not believe it is a necessary aspect of the definition of a consumer. A monetary threshold is a clumsy tool for targeting classes of consumers that should be excluded from the ACL. If set too high, it is ineffective, and if set too low it can unintentionally exclude certain groups of consumers from ACL protections. For example, consumers entering into expensive home building contracts could be unintentionally excluded from ACL protections.

In addition, monetary thresholds are liable to become out of date due to inflation (the current \$40,000 threshold in the TPA, set in 1995, would amount to over \$54,000 in current terms), yet would, under the proposed ACL amendment process, be difficult to adjust in the future (see section 3 of this submission).

PIAC's definition also does not contain an exclusion for business consumers as it is concerned about the detriment such an exclusion would have on small business and farmers. If the different jurisdictions are seeking to exclude certain classes of business consumers from ACL protections, then a definition should simply and clearly state who these consumers are.

PIAC also recommends that the definition of consumer be made part of any first tranche of legislation rather than delayed to a second tranche.

⁴ *Fair Trading Act 1987* (NSW) s 5; *Fair Trading Act 1987* (SA) s 3.

3. Harmonisation

PIAC stresses that the harmonisation of consumer law in Australia must not weaken existing consumer rights, nor make it more difficult to adapt to changes and new challenges in the market.

3.1 Application law model (ALM)

PIAC sees the benefits in utilising the ALM in the formation of nationally harmonised consumer law, particularly the fact that it circumvents the need for states to assign their powers to the Commonwealth under placitum 51(xxxvii) of the Australian *Constitution*.

However, PIAC is concerned that the implementation of the ALM could have a negative effect on the welfare of consumers by reducing the flexibility of a jurisdiction to respond to market conditions peculiar to that jurisdiction that are adversely affecting consumers.

The European Consumers' Organisation, the BEUC, articulated this concern during the European Union's process of harmonising consumer laws across the EU, arguing that:

It is indeed important that a real balance is achieved between what should be fully harmonised, and what should better respect the subsidiarity principle ensuring that member states can swiftly react and address national particularities and new practices in evolving markets. Only then would the EU contribute to making the Internal Market work better both for consumers and businesses.⁵

PIAC believes that the harmonisation of the ACL should take place without weakening the power of governments to swiftly react to new market practices evolving in particular states.

There are a variety of models that could be used to facilitate this aim. For instance, through the ALM, the ACL could set specific requirements or principles in certain areas that could not be altered by any single government, whilst setting minimum standards in other areas that allow jurisdictions to develop consumer protection practices over and above these standards. This form of law making was utilised in part in the national harmonisation of privacy laws

To avoid substantial differences developing between states regarding consumer laws, leading to practices such as forum shopping by litigators, any reforms could be reviewed on a regular basis, with a view to the national harmonisation of the laws, in accordance with the Inter-Governmental Agreement (see 3.1 of this submission).

This model would prevent the ossification of consumer legislation and the stifling of innovation in consumer protection measures by enabling single jurisdictions to test innovative laws before they were implemented nationwide, as occurred in Victoria with unfair contract law reforms.

3.2 Best Practice

PIAC supports the Paper's endorsement of using best practice consumer protection provisions in existing state and territory laws, in forming the basis of the Australian Consumer Law.

However, PIAC does not think it necessary to limit the scope of best practice provisions to Australian jurisdictions. Instead, PIAC recommends that the ACL include international best practice standards.

⁵ BEUC Work programme for 2009 [27] available at <<http://www.beuc.org>>.

For example, the European Union (EU) includes definitions and specific provisions for vulnerable consumers as part of the EU's Directive on Consumer Protections (the EU Directive).⁶ The EU Directive provides an alternative definition of a 'consumer', being any natural person who, in commercial practices, is acting for purposes that are outside his/her trade, business, craft or profession. It also provides provisions for consumer protection against aggressive commercial practices, and misleading omissions, and other issues that are currently not specifically covered by consumer protection laws in Australia.

Furthermore, the EU Directive was designed to cover a number of jurisdictions that had already established consumer protection laws. PIAC believes that the development of the ACL would benefit from investigations into the strengths and weaknesses apparent in the EU's experience in harmonising consumer laws amongst multiple jurisdictions. PIAC notes that this process has already begun with the Paper's discussion regarding the EU Directive's approach to distance and off-premises selling in the section on door-to-door trading provisions and upfront price contracts.

In addition, PIAC does not think it necessary to limit the scope of best practice provisions in ACL to the highest common denominator of existing laws. Whilst the term 'highest' is the right approach, the term 'common' suggests that the law must be a feature of more than one jurisdiction. This is an undesirable limitation as the best practice provision may have only been implemented in one jurisdiction.

For example, the Commonwealth's *Spam Act 2003* is not reproduced in any other jurisdiction. Furthermore, the Victorian *Fair Trading Act 1999* provides extensive grounds for a consumer to cancel an off-business premise sale (door-to-door trader).⁷ Although they are not mirrored in other jurisdictions, the Victorian laws are clearly best practice and PIAC strongly recommends they become part of the ACL. Applying the highest common denominator process in forming the ACL could see these excellent consumer protection provisions disappear from the legislative framework and a consequent reduction in consumer protections in Victoria.

PIAC urges that the test for legislative inclusion should not be based on the provision's popularity, but the effectiveness of the policy in promoting the welfare of consumers. PIAC therefore recommends that the Australian Consumer Law include any best practice provisions, irrespective of the number of jurisdictions they currently operate in.

3.3 Sustainability

In accordance with the general push by Australian governments to encourage sustainable practices in the law, PIAC recommends that sustainability considerations be included in any public interest test criteria contained in the ACL.

4. Amending the ACL

Developments are constantly taking place in the consumer market. As the Paper points out:

Consumers face rapidly changing markets, increased reliance on technology and a faster pace of innovation, all of which pose a significant challenge in ensuring regulation can keep pace.⁸

⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:01:EN:HTML>>.

⁷ *Fair Trading Act 1999* (Vic), Part 4, Division 2.

⁸ SCOCA, above n 2, 8.

The optimum consumer law is one that can adapt to reflect developments in the market and avoids becoming stuck in time. The ACL must include a mechanism allowing the implementation of progressive reforms, developed to enhance consumer welfare, and which take account of technological developments.

4.1 Inter-Governmental Agreement (IGA)

The process enabling the ACL to be amended will be outlined by the IGA, which is yet to be released for public consultation. As stated above, the amending process must allow reforms to improve consumer protection and respond to new market developments to be implemented free from undue obstruction. A reform mechanism that is too restrictive will entice jurisdictions to abandon the uniform ACL and develop separate reforms.

PIAC provides in-principle support for the model suggested in the Paper: that policy amendments be made with the agreement of the Commonwealth, plus three states and territories. This is the model most likely to achieve a balance between putting a stop to retrogressive reforms, yet allowing progressive reforms. However, PIAC will not endorse a model until it has analysed the exact wording as set out in the IGA.

4.2 Commonwealth's veto power

Due to the structure of the application model, whereby amendments to the ACL will be introduced by the Federal Government, any mechanism for amending the ACL effectively gives the Commonwealth a veto power over the wishes of all other states.

PIAC would support a mechanism that ensures the states and territories can seek changes to the nationally consistent law in situations where the Commonwealth is opposed; for instance, where policy changes proceed with the agreement of only the six states and the two territories. However, this is impractical as it is highly unlikely that the Commonwealth Government would introduce into the Federal Parliament legislative amendments that it does not support.

PIAC cautions that should the Commonwealth exercise its veto power in spite of unanimous state support for reform, the predictable outcome of this action would be the secession of states from the harmonised ACL framework, in order to implement the vetoed reform/amendment.

As such, some mechanism is needed to ensure that the majority (or more) of the states and territories are able to achieve harmonised reforms without Commonwealth support.

5. Unfair contract terms

The effect of unfair contract terms is to jeopardise the welfare of consumers and inhibit effective competition. PIAC therefore welcomes the proposed measures in the ACL to proscribe unfair contract terms. In recent years significant developments have been made to protect consumers from unfair terms, which the Paper recognises as being widespread in contracts, particularly in standard form contracts.

The inclusion of unfair contract terms will provide a much needed bolstering of the existing powers in the TPA particularly in relation to the prohibitions on misleading and deceptive conduct, and unconscionable conduct.

A detailed summary of PIAC's position on unfair contract terms can be found in the model consumer submission (to which PIAC contributed) made in response to Productivity Commission *Draft Report on Australia's Consumer Policy Framework*.⁹

5.1 Definition of an unfair contract terms

PIAC recommends that a definition of an unfair contract should be based on the objective of preventing practices that are unfair, contrary to good faith, or otherwise against the public interest.

In principle, PIAC endorses the Paper's proposed definition of an unfair contract term:

A term is 'unfair' when it causes a significant imbalance in the parties' rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier.

However, PIAC would prefer if the definition recognise that unfair contract terms unreasonably or unfairly distort consumer decisions, as is also considered under the US, EU, and UK models.

5.2 Detriment

PIAC has concerns regarding the proposed limitation that remedies be available to consumers only where the claimant has suffered detriment, or there is a substantial likelihood of detriment. Whilst this definition provides a remedy in the event there is only a substantial likelihood of consumer detriment, the Paper suggests that this must be more than a theoretical case of potential detriment.

PIAC does not believe that suffering detriment should be a requisite part of demonstrating a contract's unfairness. This requirement places the onus on individuals to show detriment and limits consideration of the detriment caused by the unfair contract across the market.

PIAC understands that quantifying detriment makes it easier to quantify the remedy. However, other remedies are available that do not rely on restoring a specified detriment suffered by a consumer. In particular, *Cy-Près* remedies could be made available to regulators or the relevant court. This will be discussed in more detail below at 6.2.

The proposed requirement of detriment will ensure that regulators remain reactive and not proactive. This is an inadequate provision to protect consumer welfare, and one that deviates from the regulatory framework of advanced consumer law protections, such as Victoria's, where regulators can identify a contract that contains unfair terms and act accordingly. As PIAC has argued in previous submissions to the Productivity Commission:

The whole purpose of the Victorian law is to make it possible for the regulator to easily prescribe terms that are unfair, thereby averting consumer harm and improving contracts throughout an industry. The capacity to proscribe terms as unfair also empowers the regulator to issue guidelines to inform business, and to negotiate the cooperative removal of unfair terms. The proscription powers allow the regulator to take a cohesive consistent approach to unfair terms. This approach is more efficient and less costly than the arbitrary, ad-hoc removal of unfair terms that would result if actual harm to consumers were required to be demonstrated.¹⁰

⁹ Care Inc Financial Counselling Service, CHOICE, Consumer Action Law Centre, Public Interest Advocacy Centre et al, *Model consumer submission in response to Productivity Commission Draft Report on Australia's Consumer Policy Framework* (2008) [15] available at <http://www.piac.asn.au/publications/pubs/sub2008033_20080331.html>.

¹⁰ Ibid.

PIAC recommends that in formulating a definition of detriment, for the purpose of seeking remedies under the Australian Consumer Law, the following principles be incorporated:

- 1) Remedies be available where the claimant shows detriment, including a substantial likelihood of detriment, to an identifiable consumer.
- 2) The regulator/court be empowered to make appropriate remedial orders in the event of that it finds a party has included unfair contract terms that have caused or have the potential to cause detriment to consumers across the market.
- 3) Detriment not be limited to financial detriment.
- 4) A claimant or consumer be permitted to be an individual or a class.

5.3 Standard form and negotiated contracts

PIAC is concerned that the exemption of negotiated contracts from the provision of unfair contract law will act as a potential loophole for suppliers to use to avoid prosecution from unfair contract law. This is because it is not always clear whether a contract is a standard form, a negotiated contract, or a mixture of both.

For example, tenancy agreements generally contain a standard form section, setting out legislatively prescribed obligations, followed by an annexure containing the negotiated costs and obligations of the parties. It is unclear whether the annexure would be covered by unfair contract protections found in the ACL.

PIAC supports the recommendation that the onus of proof be on the supplier to prove that a contract is not a standard form contract. The key test in satisfying this proof should be whether there have been genuine negotiations between the contracting parties in relation to the term.

The appropriate body to determine this 'genuine negotiation' test is the relevant regulator which could use its discretion to accept whether a non-standard term is fair because it was brought to the consumer's attention in a clear, simple and comprehensible way.

On this issue, regulatory discretion rather than legislative exclusion would avert the risk of the exclusion being used as a loophole by suppliers to avoid regulation and frustrate the spirit of the ACL.

5.4 Up-front pricing

The exclusion of up-front pricing provisions from unfair contract laws has undertones of the common law doctrine of *caveat emptor* (buyer beware), which acted as a restriction on a consumer's access to redress from unfair transactions. Consumer law has, quite appropriately, moved away from the *caveat emptor* model, as the law's emphasis is now on ensuring a consumer's welfare and promoting effective competition.

The exclusion of up-front pricing provisions from unfair contract laws is based on the presumption that up-front prices are not complex and that consumers always understand the terms presented to them. However, in many industries, up-front pricing is set out with a range of complex variables and terms such as 'included value' and 'excluded value', leaving the consumer little chance of understanding exactly what the upfront price includes, or the consequences of failing to pay it on time.

For example, energy contracts lay out up-front costs using terms like 'consumption per kilowatt hour', 'Time-of-Use' consumption and 'inclining block tariff'. These terms cannot fairly be construed as plain language.

The proposed exclusion of up-front pricing provisions does not provide certainty as to whether particular terms can be considered unfair. For example, a situation may arise where a contract that has upfront pricing in a standard contract, for instance, in the form of a monthly mobile phone price cap, but also has unreasonable penalty fees included in the contract. In this instance, it is unclear whether the unreasonable penalty fee becomes part of an upfront price, and therefore subject to exclusion, or if it is reviewable by the regulator.

In this respect, a blanket exclusion of up-front prices provisions from unfair contract laws does not serve the interest of consumer welfare, nor does it provide certainty to businesses in drafting standard contract terms.

To avoid this predicament, PIAC recommends that the regulator or courts have the freedom to determine whether the up-front price provision is easily understood, or should be construed as unfair. At the very least, emphasis should be placed on the requirement that any exclusion of up-front pricing provisions must first satisfy the test that the up-front price is clearly expressed in plain language.

5.5 Opt in/ Opt out provisions

Opt in/opt out provisions of contracts seek to permit suppliers or service providers to make unilateral amendments to contracts.

Whilst opt in/opt out provisions allow consumer transactions to operate efficiently in many cases, PIAC believes that the inclusion of these terms can often make contracts unfair, and at the least do not seek to obtain the explicit informed consent of a consumer before altering a contract.

PIAC considers that with the formation of the ACL, there is an opportunity for consumer laws to adopt subsection 32X(d) of the *Fair Trading Act 1999* (Vic), which provides guidance as to when opt in/opt out provisions are in the public interest and legal, or are unfair and illegal.

5.6 Mock Auctions

PIAC does not support the exclusion of the legislative provisions regarding mock auctions from the ACL. As it is highly likely that these provisions are in fact responsible for the reduced incidence of mock auctions, the exclusion of these provisions could provide an opportunity for the return of the practice of mock auctions. There is also no apparent disadvantage to their inclusion.

6. Enforcement and Remedies

Adequate, accessible and effective means must exist to combat unfair commercial practices in order to enforce compliance with the provisions of the ACL in the interest of consumers. Without enforcement measures that lead to remedial justice for consumers, the ACL will not protect or advance consumer welfare.

6.1 Access to enforcement Agencies or Tribunals

A variety of forum models exist to provide remedial justice for consumers, including Tribunal (for example, the Consumer Trade and Tenancy Tribunal (CTTT)), Statutory Authorities (for example, the Australian Human Rights Commission (AHRC)), Regulatory (the Australian Competition and Consumer Commission (ACCC)), and Judicial (for instance, the Federal Court).

An effective national consumer law system requires an effective and accessible remedial forum that offers appropriate resolutions for consumers. The forum must be as accessible for low-income consumers as it is

for any other consumer, provide timely resolutions of disputes, and ideally have expertise in local market conditions.

Currently, the federal bodies that determine consumer law disputes, the Federal Court and Federal Magistrates Court, do not offer a feasible dispute resolution forum for the majority of consumer complaints. This is due to the high cost of court fees, lawyer fees, and the risk of cost orders against unsuccessful consumer complainants.

Some state jurisdictions offer a more accessible forum for dispute resolution. For instance, in New South Wales, the CTTT provides consumers with an affordable dispute resolution forum by having low application fees, restrictions on costs orders, and a relaxed approach to the rules of evidence. However, the CTTT also faces considerable challenges in providing a workable consumer dispute resolution system because of resource limitations.

The ACCC mechanism deals with systemic issues that affect competition and the market, but does not provide an attractive option for individual consumers to resolve their complaints.

Under current consumer regulatory arrangements and under the proposed framework of the ACL, there is an absence of a national, uniform and low-cost forum giving consumers access to affordable and timely redress. In order to rectify this issue, PIAC believes that existing state and territory based dispute resolution forums could be utilised under the ACL. Each forum would be required to adhere to the uniform provisions proposed, and to minimum standards in relation to access to appropriate dispute resolution processes to be developed through further consultation and set out in the ACL. Uniform standards regarding costs and fees would also need to be developed and be applied.

Alternatively, PIAC recommends the establishment of a national government authority designed primarily to receive and resolve consumer law complaints and disputes across Australia. Based on a similar model to the AHRC, the authority would receive and process consumer complaints, dealing with issues with expertise and dedicated resources. The authority's mechanisms could limit or avoid court costs and legal fees and the authority would also be able to promote conciliation or alternative dispute resolution where appropriate.

In addition, the authority would operate in conjunction with existing forums, such as the Federal Court. Whilst the authority would hear disputes at first instance, having a hierarchy of remedial forums would enable any consumer, whose complaint is not adequately resolved, to have recourse to a higher forum, such as a federal court or tribunal.

An alternative approach would be to have jurisdictional thresholds between the different forums. For example, the authority could have jurisdiction for matters up to a certain monetary threshold of, say, \$40,000. The Federal Magistrates Court would hear disputes involving claims ranging between \$40,000 and \$100,000, and the Federal Court would hear any matters in excess of \$100,000.

This system could help resolve the issues surrounding the inclusion of a monetary threshold in the ACL's definition of a consumer, as discussed at 1.3 in this submission, although it would require the regular review of threshold values and variation in accordance with inflation.

6.2 Non-Party access and Cy-près remedies

Access to remedial justice in consumer law is often limited by the disproportionate cost—in both financial and human terms—of legal and administrative action. Barriers of information, demographic and socio-economic factors may also prevent affected consumers from accessing remedies under the ACL.

For example, vulnerable consumers, such as those with certain disabilities, mental illnesses and those with chronic health problems, often fall victim to unfair contracts or practices prohibited under consumer law. However, these consumers may have a limited capacity, or a disinclination, to mount a private action seeking redress through the ACL.¹¹

Facing additional barriers to redress, disadvantaged and vulnerable consumers may be less likely to make a complaint. Therefore, PIAC recommends a proactive approach to consumer protection and strongly supports the inclusion in the ACL of provisions allowing consumer regulators, and appropriate others, to seek orders from the court providing redress for persons who are not parties to the particular action.

In particular, PIAC agrees with the statement in the Paper that:

... a new non-party redress power will improve the ability of the courts to respond to situations where a large number of consumers are affected by a contravention of the consumer law.¹²

PIAC recommends that the redress power mentioned should take the form of *cy-près* powers, which would allow a court to order appropriate remedies when it is impossible or impracticable to give effect to the remedy desired by the wronged party, or it is not possible or reasonable to identify all those affected by the wrong. In these situations the court can order alternative remedies to as near effect as is possible to restore consumers to their position prior to the breach of the ACL.

The Victorian Law Reform Commission has outlined the appropriate conditions where the court should have power to order *cy-près* type remedies.¹³ These include where:

- there has been a proven contravention of the law;
- a financial or other pecuniary advantage ('unjust enrichment') has accrued to the person or entity contravening the law as a result of such contravention;
- a loss suffered by others is able to be quantified;
- it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.

Cy-près remedies present a variety of ways in which consumer welfare can be advanced. Firstly, under a *cy-près* remedy, consumers can enjoy indirect compensation. Alternatively, *cy-près* remedies can order that a trust fund be established, for the benefit of all consumers, with the funds being used to educate consumers about protections available to them under the ACL. These would be attractive alternatives to ineffective cost remedies and would assist consumers in making informed choices, and bolster competition by restricting unfair or uncompetitive practices.

¹¹ The ACCC Consumer Consultative Committee has made special recognition of the obstacles facing disadvantaged and vulnerable consumers by establishing the Disadvantaged & Vulnerable Consumers Program, which tracks complaint records made by disadvantaged consumers. The reports of the ACCC to the Consumer Consultative Committee indicates that the numbers of disadvantaged and vulnerable consumers accessing the ACCC's processes remain low and significantly lower than their numbers in the general community.

¹² SCOCA, above n 2, 52.

¹³ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008), [533] available at: <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Civil+Justice/LAWREFORM+-+Civil+Justice+Review:+Report>>.

6.3 Super-complaints

PIAC notes that the Paper provides no discussion on the standing of super-complaints in the ACL. Super complaints allow authorised complainants to make complaints on behalf of consumers across the market, thus avoiding the time-consuming, expensive and inefficient process of requiring a multitude of consumers to seek individual redress on a single widespread issue.

With their expertise and resources, Super-complainants can identify systemic issues affecting consumers, and seek to rectify the problem through the appropriate forum.

Super-complaint mechanisms have found success in countries such as the United Kingdom. For example, Consumer Focus Scotland has been granted statutory powers to investigate consumer complaints if they are of wider interest, the power to conduct research on behalf of consumers, and the ability to make an official super-complaint about failing services.

PIAC recommends the adoption of super-complaint mechanisms into the ACL. Public organisations representing consumer interests, such as the Consumer Action Law Centre, the Australian Consumers Federation and PIAC, would be appropriate bodies to be deemed authorised super-complainants by the ACL.

6.4 A national consumer organisation

Despite the Productivity Commission's findings that there is a need for a national peak consumer body, funded by government, PIAC notes that there is no discussion in the Paper regarding the establishment of such a body. A national consumer body would have responsibilities of research and advocacy on behalf of consumers and is essential for the maximisation of benefits derived from the new consumer policy framework.

In light of this, PIAC recommends that a national peak consumer body be established, with sufficient funding to be able to independently research consumer issues and undertake systemic advocacy on behalf of consumers, particularly low-income or disadvantaged consumers.

6.5 Substantiation notices

PIAC supports the use of substantiation notices by regulators. In PIAC's experience, these notices have led to just outcomes for consumers. However, substantiation notices can often be rendered unenforceable without Super-complaints.

6.6 Public warning powers

Consumer law litigation can often take a long time to be finalised. A notice issuing a public warning can offer a more timely and effective approach in attempting to minimise contraventions of consumer law, and success with the power has been found in the United Kingdom's energy sector in changing industry practices that were detrimental to consumer welfare.

PIAC contends that this power does not have to be considered a 'naming and shaming' provision, but rather it is a tool to provide relevant information to consumers, enabling them to make informed choices.

However, due to the negative impact public warning announcements can have on named businesses, announcements should be made cautiously, and be justified with evidence. Therefore, PIAC supports the Paper's proposal for an inclusion of a public interest test safeguard to accompany public warning powers in the ACL.

7. Summary of recommendations

Recommendation 1

That the objective of the Australian Consumer Law be to enhance the well-being of Australian consumers through the empowerment and protection of consumers, and the promotion of effective competition and fair trading.

Recommendation 2

That the Trade Practices Act be renamed the Consumer and Competition Act.

Recommendation 3

That the Australian Consumer Law include the following definition of a consumer:

- (1) *In this Act, 'consumer' means a person who:*
 - (a) *acquires, or proposes to acquire, goods or services from a supplier; or*
 - (b) *acquires an interest in land, other than land used, or intended to be used, or apparently intended for use, for industrial or commercial purposes.*
- (2) *Goods or services referred to in subsection (1) must be acquired for end use, that is, they do not include goods or services acquired for re-supply.*

Recommendation 4

That the amended definition of consumer be included as part of any first tranche of legislation rather than delayed to a second tranche.

Recommendation 5

That the application law model be made more flexible to ensure innovations in consumer policy are not stifled.

Recommendation 6

That the Australian Consumer Law include provisions reflecting international best practice provisions, irrespective of the number of Australian jurisdictions in which they currently operate in.

Recommendation 7

That the objective of unfair contract terms be to prevent practices that are unfair, contrary to good faith, or otherwise against the public interest.

Recommendation 8

That in formulating a definition of detriment, for the purpose of seeking remedies under the Australian Consumer Law, the following principles be incorporated in the Australian Consumer Law:

1. *Remedies be available where the claimant shows detriment, including a substantial likelihood of detriment, to an identifiable consumer.*
2. *The regulator/court be empowered to make appropriate remedial orders in the event of that it finds a party has included unfair contract terms that have caused or have the potential to cause detriment to consumers across the market.*
3. *Detriment not be limited to financial detriment.*

4. *A claimant or consumer be permitted to be an individual or a class.*

Recommendation 9

Exclusions for up-front pricing provisions from proscribed unfair contract terms be dependant on the regulator being satisfied that the up-front price provision is clearly expressed in plain language.

Recommendation 10

That opt in/opt out contract terms be regulated by the Australian Consumer Law in a fashion similar to subsection 32X(d) of the Fair Trading Act 1999 (Vic).

Recommendation 11

That further work be undertaken on establishing the fora in which consumer complaints can be addressed. That two options (at least) be considered to determine the most effective and accessible means of providing timely and cheap dispute resolution for less complex consumer complaints and of providing an effective and accessible mechanism for ensuring systemic issues are resolved with appropriate consideration of the consumer impacts of challenged conduct. The two options to be considered are:

- 1) *Amending existing state and territory consumer complaint resolution mechanisms to ensure a consistent approach across all jurisdictions that meet minimum standards in relation to access to appropriate dispute resolution processes, and in relation to costs and fees.*
- 2) *The establishment of a national government authority designed primarily to receive and resolve consumer law complaints and disputes across Australia. Based on a similar model to the AHRC, the authority would receive and process consumer complaints, dealing with issues with expertise and dedicated resources. The authority's mechanisms could limit or avoid court costs and legal fees and the authority would also be able to promote conciliation or alternative dispute resolution where appropriate.*

Recommendation 12

That non-party remedies be incorporated in the Australian Consumer Law, including powers allowing cy-près remedies to be granted.

Recommendation 13

That a super-complaints mechanism be incorporated in the Australian Consumer Law.

Recommendation 14

That a national consumer representative organisation be established with the task of researching consumer issues and advocating on behalf of consumers.