

# Chapter 2

## The consultative process

2.1 In the Second Reading Speech to the bill, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, stated that the reforms contained in the bill 'are the culmination of a long policy review and development process undertaken by the Australian government in close consultation with the states and territories'.<sup>1</sup> This chapter notes the major steps in that process.

2.2 On 11 December 2006, the then Treasurer, the Hon. Peter Costello MP, commissioned the Productivity Commission to investigate Australia's consumer policy framework, including its administration.<sup>2</sup>

2.3 On 30 April 2008, the Productivity Commission released the findings of its Review of Australia's Consumer Policy Framework. The inquiry found that parts of Australia's consumer policy framework 'require an overhaul'. In particular:

The current division of responsibility for the framework between the Australian and State and Territory Governments leads to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making. There are gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers.<sup>3</sup>

2.4 The report noted that these problems, if unaddressed, will lead to increased costs for consumers and the community. Accordingly, the Productivity Commission urged the need for new institutional arrangements more compatible with 'the increasingly national nature of Australia's national markets'. To this end, it argued that greater responsibility needed to rest with the federal government. And the first step in the process should be:

The introduction of a single generic consumer law applying across Australia, based on the consumer provisions in the Trade Practices Act (TPA), modified to address gaps in its coverage and scope.<sup>4</sup>

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1 The Hon. Dr Craig Emerson, Second Reading Speech, House of Representatives Hansard, 25 June 2009, p. 6981.

2 <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2006/133.htm&min=phc>

3 Productivity Commission, *Review of Australia's Consumer Framework*, Volume 1, April 2008, p. 2.

4 Productivity Commission, *Review of Australia's Consumer Framework*, Volume 1, April 2008, p. 2.

The Productivity Commission recommended that the generic consumer law include unfair contract terms with the following provisions:

- a term is established as 'unfair' when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract;
- there would need to be material detriment to consumers (individually or as a class);
- it would relate only to standard-form, non-negotiated contracts;
- it would exclude the upfront price of the good or service; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.<sup>5</sup>

2.5 On 26 March 2008, the Council of Australian Governments (COAG) agreed that its Business Regulation and Competition Working Group would develop an enhanced consumer policy framework in consultation with the Ministerial Council on Consumer Affairs (MCCA).<sup>6</sup>

2.6 On 15 August 2008, the MCCA proposed that:

...all Australian governments should agree to adopt a new national consumer law, which operates in all Australian jurisdictions and which remains consistent. This law should be based on the current consumer protection provisions of the Trade Practices Act 1974 (TPA) and also incorporate appropriate amendments reflecting best practice in state and territory legislation.<sup>7</sup>

2.7 The MCCA proposed that a national consumer law should include a provision that addresses unfair contract terms. It suggested the following features:

- the 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;

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5 Productivity Commission, 'Review of Australia's Consumer Policy Framework', *Productivity Commission Inquiry Report No. 45*, vol. 2, recommendation 7.1, p. 168. See also Paula Pyburne, Trade Practices Amendment (Australian Consumer Law) Bill 2009, *Bills Digest*, no. 19, 2009–10, 18 August 2009, p. 9.

6 *Explanatory Memorandum*, p. 8. The Ministerial Council on Consumer Affairs (MCCA) and its supporting bodies are responsible for considering consumer and fair trading matters and, where possible, developing a consistent approach to these issues. The membership of MCCA consists of the Australian Government, the governments of the States and Territories, and the New Zealand Government. The Working Group is one of seven established by COAG in December 2007. It is overseen by the Minister for Finance and Deregulation.

7 [http://www.consumer.gov.au/html/download/MCCA\\_Meetings/Meeting\\_20\\_15\\_Aug\\_08.pdf](http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf)

- a remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class). Detriment is not limited to financial detriment;
- it would relate only to standard form (i.e. non-negotiated) contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not;
- it would exclude the upfront price of the good or service, using the approach currently adopted in regulation 6(2) of the United Kingdom's Unfair Terms in Consumer Contracts Regulations 1999; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.<sup>8</sup>

2.8 The MCCA argued that where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment (or the substantial likelihood thereof), with suppliers also potentially liable to damages for that detriment, along with other remedies available under the *Trade Practices Act 1974*.

2.9 In September 2008, the Working Group considered the MCCA's proposals and recommended that COAG agree to a single national consumer law.

2.10 On 2 October 2008, a meeting of COAG agreed to establish:

...a new consumer policy framework comprising a single national consumer law based on the *Trade Practices Act 1974*, drawing on the recommendations of the Productivity Commission and best practice in State and Territory consumer laws, including a provision regulating unfair contract terms. The new national consumer law will deliver on COAG's commitment to a seamless national economy by providing a uniform and higher level of protection for Australian consumers and addressing weaknesses in existing laws. The new policy framework will improve consumer law enforcement powers, reduce compliance costs for business and increase access to information regarding dispute resolution and consumer issues.<sup>9</sup>

2.11 On 17 February 2009, the Standing Committee of Officials of Consumer Affairs (SCOCA) released an information and consultation paper entitled *An Australian Consumer Law: Fair markets—Confident consumers*.<sup>10</sup> The purpose of the paper was to:

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8 [http://www.consumer.gov.au/html/download/MCCA\\_Meetings/Meeting\\_20\\_15\\_Aug\\_08.pdf](http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf)

9 Council of Australian Governments, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-10-02/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm)

10 The Standing Committee of Officials of Consumer Affairs is a subcommittee of the MCCA and consists of all chief executive officers of consumer protection agencies.

- explain how the national consumer law will be developed;
- explain the nature and scope of COAG's agreed reforms to create the national consumer law and, in some limited circumstances, seek views on specific aspects of those reforms; and
- seek views and explore options for augmentations and modifications to existing generic consumer protections which are based on best practice in existing state and territory laws.<sup>11</sup>

2.12 Treasury received 102 submissions in response to its consultation paper.<sup>12</sup>

2.13 On 11 May 2009, a consultation paper entitled *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms* was released. It included the exposure draft of the unfair contract terms provisions in the Australian Consumer Law, and in relation to financial services and attracted 96 submissions.<sup>13</sup>

2.14 On 8 May 2009, a draft text of the Intergovernmental Agreement (IGA), which coordinates the application of the Australian Consumer Law, was endorsed by the Ministerial Council on Consumer Affairs. As part of this IGA, any amendment to the national law will require agreement by other jurisdictions.<sup>14</sup>

2.15 On 24 June 2009, the Trade Practices Amendment (Australian Consumer Law) bill was introduced into the House of Representatives and referred to this committee the following day. Several submitters to this inquiry also made submissions to the February and May 2009 consultation papers.

2.16 The Consumer Action Law Centre, the largest specialist legal practice in Australia, has commented: '[R]egardless of one's views on the content of the Bill, it cannot be said that consultation on national UCT [unfair contract terms] regulation for Australia has not occurred'.<sup>15</sup>

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11 Treasury, An Australian Consumer Law—Fair Markets, Confident Consumers, *Consultation paper*, <http://www.treasury.gov.au/contentitem.asp?ContentID=1484&NavID=014>

12 Submissions, An Australian Consumer Law—Fair Markets, Confident Consumers, *Consultation paper*, <http://www.treasury.gov.au/contentitem.asp?ContentID=1501&NavID=014>

13 Treasury, An Australian Consumer Law—Fair Markets, *Consultation on draft provisions on unfair contract terms*, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1537>

14 [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-07-02/docs/IGA\\_australian\\_consumer\\_law.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf)

See also Paula Pyburne, Trade Practices Amendment (Australian Consumer Law) Bill 2009, *Bills Digest*, no. 19, 2009–10, 18 August 2009, p. 11.

15 Consumer Action Law Centre, *Submission 19*, p. 2.