

JOINT COMMUNIQUÉ

MINISTERIAL COUNCIL ON CONSUMER AFFAIRS MEETING FRIDAY 15 AUGUST 2008

The Ministerial Council on Consumer Affairs (MCCA) held its twentieth meeting in Hobart today. MCCA comprises Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading, consumer protection laws, trade measurement and credit laws.

Members of the Council are:

Hon David Llewellyn MHA (Chair, Tasmania)
Hon Chris Bowen MP (Commonwealth)
Hon Tony Robinson MP (Victoria)
Hon Linda Burney MP (New South Wales)
Hon Kerry Shine MP (Queensland)
Western Australia (in caretaker mode)
Hon Gail Gago MLC (South Australia)
Mr Simon Corbell MLA (Australian Capital Territory)
Dr Chris Burns MLA (Northern Territory)
Hon Judith Tizard MP (New Zealand)

Apologies were received from Dr Chris Burns MLA, Mr Simon Corbell MLA, the Hon Sheila McHale MLA and the Hon Judith Tizard MP.

MCCA's objective

MCCA's objective is to provide the best and most consistent protection for Australian consumers through its consideration of consumer affairs and fair trading issues of national significance and, where possible, development of consistent approaches to those issues.

MCCA's principal strategies

To achieve this objective, MCCA's principal strategies are to facilitate and encourage:

1. nationally coordinated and consistent policy development and implementation by all jurisdictions, including legislative consistency of major elements of consumer protection law and emerging policy issues (*Policy and Legislative Harmonisation*);
2. consistency of policy and enforcement decisions for the suppliers of goods and services within a national marketplace (*Consistent Enforcement*);
3. access to education and information for consumers and suppliers (*Education*);
4. co-operation and consultation on consumer policy between Australia and New Zealand (*Australia/NZ Co-operation*); and
5. research into consumer concerns and trade practices (*Research*).

MCCA is supported by a Standing Committee of Officials of Consumer Affairs (SCOCA).

MCCA considered a range of consumer issues in the context of these strategies. Outcomes of the meeting included:

Enhancing Australia's Consumer policy Framework: Reform Proposals

Today the Ministerial Council on Consumer Affairs (MCCA) agreed a series of proposals for far-reaching consumer policy reform. In doing so, the Ministerial Council responded to the Council of Australian Government's (COAG) request that the Business Regulation and Competition Working Group (BRCWG), in cooperation with MCCA, develop enhanced national approaches for Australia's consumer policy framework, drawing on the final report of the Productivity Commission (PC).

MCCA has taken this opportunity to build on its high-level commitments made in May 2008 and reach in-principle agreement on a range of policy initiatives designed to provide greater national consistency in Australia's consumer laws, their enforcement and the way in which those laws are developed. This represents a cooperative approach by the States and Territories to work with the Commonwealth to develop national reforms. The PC estimated that taking these steps could result in benefits to Australian consumers of between \$1.5 billion and \$4.5 billion a year.

In proposing these reforms, MCCA recognises that while Australia's current consumer policy framework has strengths, it is in need of significant improvements to overcome existing inconsistencies, gaps and duplication in Australia's consumer legislation and its enforcement. Australian consumers can benefit from consistent national coverage by a uniform national consumer law, and by coordinated enforcement action, providing them greater confidence in Australia's product and service markets. In this way, Australian governments can build on the structural market reforms of the past 15 years, to better enable consumers to drive competitive, efficient and well-functioning markets in future.

In agreeing to these proposals, MCCA seeks to build on its earlier agreement to introduce a new national product safety regulation and enforcement system, which was confirmed by COAG at its 3 July 2008 meeting, and also the agreement of the State and Territories to transfer their responsibilities for the regulation of consumer credit to the Commonwealth. The development of increasingly national consumer product and service markets means that Australian consumers will benefit from uniform national consumer policy, legislative and enforcement frameworks.

The Ministerial Council proposes that COAG consider the following reform proposals, which would form the basis of an enhanced consumer policy framework for Australia to be agreed by COAG at its 2 October 2008 meeting. These policy proposals have been developed through a process led by the Commonwealth, in which the States and Territories have been actively involved.

A national consumer policy objective

Effective national consumer policy requires common adherence by the Commonwealth, the States and the Territories to a single national objective. With this in mind, the Ministerial Council proposes that all Australian governments should agree to a common, overarching objective for consumer policy based on the Productivity Commission's proposed objective: *'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.'*

Ministers further propose that this overarching objective should be supported by six operational objectives for consumer policy:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purposes for which they were sold;

- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.

A national consumer law

The keystone of the proposed enhanced national consumer policy framework is a single national consumer law, which represents best practice regulation. A single national consumer law will enhance individual consumer well-being, further assist in the development of a single national economy, reduce burdens on business and facilitate well-functioning markets, to the benefit of all Australian consumers and businesses.

The Ministerial Council proposes 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.

The Ministerial Council further proposes that:

- the new national consumer law should be developed by the agreement of all Australian governments and made law through an application legislation scheme, with the Commonwealth as the lead legislator and the States and Territories applying the new national consumer law (as amended from time to time) as part of their own laws;
- national consumer law provisions should apply to all sectors of the economy. However, Ministers also recognise that existing constitutional issues may mean that the financial services sector will need to retain a distinct legislative framework. In this regard, Ministers note the Commonwealth's position that there should be an ongoing commitment by the Australian Government to consistency between the national consumer law's provisions and consumer provisions in credit and financial services laws, to the extent that it is practicable to do so; and
- amendments to the national consumer law must be agreed by governments according to an Inter-Governmental Agreement, which will provide, among other things, for the amendments to be agreed by the Commonwealth plus four state and territory governments, of which three must be states, noting that these arrangements will require endorsement by COAG on 2 October 2008.

Unfair contract terms

As part of the proposed national consumer law, the Ministerial Council proposes that it should include a provision that addresses unfair contract terms. The provision should have 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;

- 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 (ie 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.

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*.

The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms, in keeping with the PC's recommendation that representative actions be improved.

The provision should also permit the prescription of certain terms that are, in all circumstances, considered to be unfair. This regulation making power would rest with the Commonwealth minister, who would prescribe terms in accordance with the national consumer law amendment process set out in the Inter-Governmental Agreement and the requirements of regulatory impact assessment.

The provision should be supported by national guidance on its enforcement, developed by the national and State and Territory regulators, in accordance with a process set out in the Inter-Governmental Agreement.

Transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts.

The operation and effects of the new provision should be reviewed within seven years of its introduction.

Enforcement of the national consumer law

In implementing a new national consumer law, the Ministerial Council recognises the importance of ensuring that enforcement arrangements can address the needs of all Australian consumers effectively, including the most vulnerable and disadvantaged. In this respect, Ministers are mindful of the findings of the PC, which concluded that current enforcement arrangements could be greatly enhanced.

To this end, Ministers propose that:

- enforcement of the national consumer law will be shared between the ACCC and the State and Territory offices of fair trading, supported by formal agreements between these enforcement bodies that cover arrangements for communication between them and the coordination of their activities;

- at the Commonwealth level, ASIC will have primary responsibility for the enforcement of consumer laws relating to financial services, and the States and Territories will retain their enforcement powers in this area, and ASIC will assume primary responsibility for enforcing national consumer credit laws; and
- all enforcement arrangements should be reviewed by COAG within seven years after the commencement of the new national consumer law.

The Ministerial Council also proposes that enforcement and redress powers for regulators should be enhanced under the national consumer law, as recommended by the PC and as previously agreed by the Ministerial Council, through the inclusion of civil pecuniary penalties, disqualification orders, substantiation notices and public warning powers and infringement notices (to the extent permitted by relevant Commonwealth and State and Territory laws and policies). Consumer regulators should also be able to take representative actions on behalf of consumers not party to court proceedings and have the power to gather evidence until substantive proceedings have commenced.

Ministers recognise the need for consistent and timely national information as a basis for improving the general understanding of existing and developing consumer policy issues. To this end, the Ministerial Council proposes that the consumer regulators should be required to report annually to it, in a nationally consistent manner, on common enforcement issues, or consumer issues arising from their enforcement activities.

The Ministerial Council recognises that consumer law enforcement bodies need to share information in order to provide comprehensive enforcement coverage. To this end, it proposes that all Australian consumer regulators consistently participate in the AUZSHARE complaints database.

Consumer information

The Ministerial Council also recognises that consumers must access a range of consumer law enforcement bodies and other bodies providing consumer assistance and advice. In keeping with the PC's recommendation, the Ministerial Council also proposes that the Commonwealth would work in consultation with State and Territory governments to develop an enhanced national web-based information tool for guiding consumers to the appropriate dispute resolution body, as well as providing other consumer information. It should be subject to consumer testing to ensure that it is easy to use and has the appropriate content.

Consumer research and advocacy

Ministers recognise the importance of evidence-based policy, supported by robust research and effective stakeholder advocacy. To this end, Ministers propose that the Commonwealth will work with the States and Territories to further develop the effectiveness of consumer representation and consumer policy research nationally.

Review of sector specific laws

The Ministerial Council notes the Productivity Commission's recommendation that the BRCWG, in consultation with MCCA, should oversee a process to identify unnecessary or divergent industry-specific consumer regulation with a view to repealing or harmonising it across jurisdictions where beneficial, and that the BRCWG has commenced a process to do this.

Other issues for noting

In making these proposals, the Ministerial Council also notes that a number of other areas of consumer policy are being considered and developed as part of other processes:

Ministers note that implied warranty and condition laws, including a consideration of 'lemon' laws, require review (as agreed by the Council on 23 May 2008), and further note that, as a part of the incorporation of these provisions into the national consumer law, further steps should be taken to educate consumers and business as to their rights and responsibilities by Australian governments.

Ministers note that the Commonwealth Attorney-General is considering initiatives to improve access to justice for all claimants in Commonwealth courts, including consumers, and agrees that the Commonwealth will work with the States and the Territories to consider enhancements to the procedures of small claims courts and tribunals so as to create greater national consistency for consumer law actions, as well as considering the need for changes to arrangements for class actions in the Federal Court of Australia.

Ministers note that SCAG is currently considering legal aid policy and funding in the context of COAG's new framework for Commonwealth-State relations.

Ministers propose that Australian governments should review the effectiveness and consistency of alternative dispute resolution (ADR) schemes both within and across industry sectors throughout Australia.

Progress on other recommendations

Ministers also propose that COAG should note that:

- the Australian Government is working with the States and Territories to implement a new product safety system in line with COAG's decision in July 2008 and that this process will be completed by mid-2010; and
- the Ministerial Council's National Education and Information Advisory Taskforce is currently pursuing an evaluation of the effectiveness of publicly available consumer information.

Implementation

Ministers have given preliminary consideration to the issue of implementing these reforms, and have agreed an indicative implementation plan to propose to the BRCWG, with a proposed date for completing the policy development and implementation process by the end of 2011. Ministers recognise that there is a need for much of the detail of these proposals to be further developed as part of the policy development and implementation process and further note that individual jurisdictions are already engaged in discussions to identify the scope of this work.

Update on Consumer Product Safety Reform

MCCA noted that at its meeting on 3 July 2008, the Council of Australian Governments endorsed the model for reform of product safety regulatory arrangements that was recommended by MCCA at its May 2008 meeting. The revised regulatory arrangements will be implemented by mid-2010.

MCCA recognised the significant work undertaken to harmonise existing bans and standards.

National Trade Licensing

Ministers expressed support for a national system of occupational licensing underpinned by cooperative State and Territory legislation.

A national licensing system will introduce uniform requirements across Australia and will allow businesses and individuals to move seamlessly between jurisdictions without the need for multiple

licences. Some of the first occupations to move to the proposed national system will be electricians, property agents, plumbers and builders.

Ministers noted that the Chair of MCCA would write to the COAG Skills Recognition Steering Committee requesting that it consult with State and Territory Consumer Affairs Ministers on the proposed model for national licensing and the Intergovernmental Agreement.

MCCA Governance

Ministers have agreed that they will review the role, function and governance arrangements of the Ministerial Council to ensure the successful delivery of an enhanced national consumer policy framework.