

September 2007, edition 3

Welcome to the third edition of Consumer Action Law Centre's ebulletin, *consumer interaction*. Some of you will have noticed something of a hiatus since our last edition – it has been a busy time at Consumer Action.

Our joint nationwide campaign to stamp out unfair and unlawful penalty fees, launched with Choice on 19 June continues to gain momentum. In light of the responses by NAB and ANZ in particular, we look forward to hearing from the Commonwealth Bank, Westpac and St George as to what they will do address penalty fees beyond their concession account products. We of course welcome moves to ease the burden of penalty fees for consumer eligible for concession accounts, however, more needs to be done for other consumers.

Another key item on the calendar has been the Productivity Commission's review of Australia's consumer policy framework. Consumer policy has not been the subject of such a comprehensive review since introduction of the *Trade Practices Act* in 1974. In our view, whilst elements of the framework function very well, consumer policy has suffered overall from a lack of an overarching framework and commonly understood role and objectives.

We have seen the lasting impact a comprehensive and joined up approach can have when we look at the success with which National Competition Policy has been implemented, in particular in the last decade. Consumer policy, which is critically related to competition, would benefit from similar attention. As such Consumer Action has spent significant time considering approaches that can best deliver effective markets for consumers – markets that are competitive, fair and sustainable, whilst ensuring that the needs of disadvantaged and vulnerable consumer addressed. This is reflected in our submission to the Productivity Commission, which is discussed in more detail below.

Consumer Action has also made a second submission to the Productivity Commission, which specifically addresses the issue of unfair contract terms (UCT) regulation. UCT laws have been criticised on the basis that the costs of such regulation is likely to outweigh the benefits. Despite the fact that such criticism is generally made without evidence of the costs asserted, it has been persuasive in some circles. Consumer Action commissioned Dr Rhonda Smith of the University of Melbourne to undertake a cost benefit analysis of UCT regulation and the result of this work forms our second submission. Key findings of the work are that cost benefit outcomes change significantly when costs to competition of unfair contract terms are properly taken into account and that the actual costs and benefits resulting from addressing unfair contract terms depend in part on the

nature of the process to be employed, and that a national solution would minimise costs significantly.

And all this has occurred along side some significant staff developments at Consumer Action. Nicole Rich, our Director Policy & Campaigns, is spending a year in LA. Nicole is the recipient of the 2007 Victoria Law Foundation fellowship for community legal centre staff and will undertake research into US public interest and consumer advocacy models whilst she is there.

Gerard Brody is ably filling the role of Director Policy & campaigns in Nicole's absence. We have also welcomed Janine Rainer, Neil Ashton and Durga Pulendran to our policy team. Michael Hermitage and Gerald Cohen have joined Consumer Action's legal practice.

We welcome feedback on the information provided in *consumer interaction* as well as its design and layout. We also encourage you to forward the bulletin throughout your networks. To subscribe to *consumer interaction*, please email us at info@consumeraction.org.au with 'consumer interaction' in the subject line. Past editions of our ebulletins can also be found on our [website](#).

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Unfair penalty fees campaign

Consumer Action, in conjunction with [Choice](#), launched a nationwide campaign to stop banks and other financial institutions from charging penalty fees on 19 June.

In 2004, Nicole Rich authored a groundbreaking [research report](#) which found that penalty fees charged by Australian banks were penalties at law, and thus unlawful and unenforceable. Consumer Action and Choice are also concerned that these fees have a disproportionate impact on poorer consumers. Despite the Rich Report, penalty fees had not reduced since 2004, in fact in most cases they had increased significantly.

Many banks, credit unions and building societies hit consumers with a large penalty fee if they go over their credit limit, are late on credit card payments or fail to have enough

money in their account when a direct payment is due. These fees are way too high – on average around \$35, with some as much as \$50.

Choice and Consumer Action launched www.fairfees.com.au as part of the campaign. The site assists consumers claim back their fees from banks. It also enables consumers to tell us about their experience with bank fees and encourages them to contact politicians to complain about banks' continued imposition of penalty fees. So far, more than 25,000 Australian consumers have downloaded letters seeking the return of penalty fees

Banks and politicians have also responded. Both St George and Citibank scrapped their deposit cheque dishonour fee. ANZ has recently reduced fees on over-the-limit credit card fees and penalty fees on transaction accounts for concession card customers. It is also allowing consumers to remove the ability to go over the limit of their credit cards or overdraw their transaction accounts on electronic or cash transactions (not including direct debit). Most significantly, the NAB has launched a mainstream account that is free of penalty fees. This is in addition to its concession card account, which has no penalty fees or monthly transaction fees. We would like to see more banks follow this lead.

Victorian Senator Steve Fielding has introduced a bill to the Senate that aims to ensure all fees and charges reflect a fair estimate of bank costs. The bill also boosts the power of the [Australian Securities and Investment Commission \(ASIC\)](http://www.asic.gov.au) to monitor penalty fees. The bill has now been referred to the [Senate Economics Committee](http://www.senate.gov.au), for inquiry. Consumer Action and Choice made a [submission](#) to the inquiry. We agree that ASIC should be given more power to monitor and enforce unfair penalty fees, including a direction to undertake a wide-ranging market inquiry to examine the fairness and legality of all bank fees. We look forward to the Inquiry's report, now likely following the Federal election.

We encourage readers of *consumer interaction* who have been charged penalty fees to logon to www.fairfees.com.au. Pro forma letters are available from that site for you to send to your financial institution to claim back penalty fees. The site is regularly updated with information about the campaign.

For more information about our campaign to stop unfair, excessive and probably unlawful penalty fees, please contact Gerard Brody, Director – Policy & Campaigns on 03 9670 5088 or at gerard@consumeraction.org.au.

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Productivity Commission inquiry into Australia's consumer policy framework

Consumer Action has made a substantial [submission](#) to the [Productivity Commission's current inquiry into Australia's consumer policy framework](#). The submission argued that Australia's consumer policy framework needs updating. Our submission had five main themes:

- The need for a flexible approach to regulation. In developing regulatory responses, we must select the right tool for the right job. We argued against the automatic preferencing of one regulatory tool over another (for example, self-regulation first). Rather, the emphasis should be on what is the minimum level of *effective* regulation.
- Ensuring consumer behaviour is taken into account in policy making. Consumers are a critical element of the competition equation and their behaviour matters. Behavioural economics can assist us to identify systematic departures from traditional notions of the 'rational maximiser'. Our consumer policy framework relies heavily on informing and educating consumers so that they can make rational choices and drive competition in markets. However, research has shown that too much choice can be demotivating and result in consumers using simple heuristics or "rules of thumb" when faced with more complex choices. This challenges the assumptions currently underpinning our framework and points to the need for a consumer protection framework that allows consumers to act with confidence in new and complex markets with consumer information and education one part of the policy response but not over-relied on.
- The needs of disadvantaged and vulnerable consumers. Sole reliance on the welfare system to assist disadvantaged and vulnerable consumers is inadequate. Solutions which operate 'in market' can and do work, especially where the tools are designed to be targeted rather than general. Examples include business hardship policies in utilities industries, where the business benefits have also been identified.
- Updating elements of consumer protection framework. Australia's consumer protection framework has fallen behind developments in other countries. For example, the UK has introduced market investigation powers, so that regulators are empowered to investigate and report on particular market failures. Regulators do not regularly undertake such investigations in Australia. Super-complaints powers are an additional example from the UK, whereby consumer organisations can take complaints about particular commercial practices or market failures for investigation by the regulator.
- The need for a strong consumer voice. Strong and effective consumer representation and advocacy is a very important element of the overall functioning of the consumer policy framework. Our submission argued that a national consumer research body be established, to undertake policy research activities for input into policy debates. We also argued that a well-funded and resourced peak consumer agency that represents consumer organisations from around Australia is needed to strengthen the consumer voice and represent consumer interests in policy development.

The Commission's Draft Report is now expected after the Federal election. There will be a further round of public hearings and a further chance to make submissions in response to the Draft Report. We will be responding to the Draft Report.

For more information about our submission to the Inquiry, please contact Catriona Lowe, co-CEO on 03 9670 5088 or at ceo@consumeraction.org.au.

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Casework Outcomes

Rent-to-buy car

Our client entered into an agreement with Dale Motors of Dandenong, a licensed motor car trader, to rent a 1988 Ford Laser. Our client agreed to pay a lump sum of \$2,000 plus \$80 per week for 33 weeks. Title of the vehicle was only to pass to her after all payments had been made. As a Centrelink recipient, our client could not afford to meet her obligations and returned the vehicle. Dale Motors attempted to enforce the contract against her.

Consumer Action wrote to Dale Motors, alleging a number of breaches of provisions of the *Motor Car Traders Act 1986 (Vic)*, that the contract contained unfair terms contrary to the *Fair Trading Act 1999 (Vic)* and that it had failed to comply with its obligations under the *Consumer Credit (Vic) Code*. The matter settled with the trader agreeing to pay \$1,600 to our client, which comprised of the amount paid by our client less the amount required to rectify damage she had caused to the vehicle.

Bank Inaction and exploitation

Our client, who has an intellectual disability and a mental illness, inherited some \$16,000 from her father. Her brother took her into a Bank, where he told the bank officer that our client wanted her savings transferred into an account for which he was joint signatory. After a lengthy discussion, but without speaking to our client separately or requiring that she get independent advice, the Bank allowed the transaction to proceed. The brother gambled away the entirety of our client's savings.

Consumer Action sought the reimbursement by the Bank of the lost monies, submitting that the Bank should have taken more care in ensuring our client understood and agreed to the joint account. The Bank refused that demand initially and we escalated the complaint to the Banking and Financial Services Ombudsman. The Bank has now agreed to repay the money lost, including an amount equivalent to interest which would have accrued.

Advanced Medical Institute

Consumer Action has assisted a client who purchased a form of impotency treatment from Advanced Medical Institute. The treatment was ineffective and unpleasant. AMI hadn't fully informed our client before purchase that they required him to take a range of treatments, including self-injection.

Consumer Action assisted the client to make an application to the Victorian Civil and Administrative Tribunal (**VCAT**), alleging a number of breaches of the *Fair Trading Act 1999* (Vic). Our client succeeded at VCAT and Consumer Action provided him with additional advice about enforcing the order in his favour. The client has now obtained a refund of monies paid by AMI.

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National Energy Market Reforms

The [Australian Energy Market Commission](#) (**AEMC**) is currently undertaking a review of the effectiveness of competition in Victorian retail energy and gas markets. The review follows a commitment from all state and territory governments to phase out retail pricing regulation once competition can be shown to be effective.

Consumer Action has made a detailed [submission](#) to the AEMC [Issues Paper](#). We submit that competition can bring about positive outcomes for consumers, but that:

- competition is not yet effective in Victorian energy markets, primarily due to market failures on the demand side;
- there are significant problems with the structure of the energy market which impede competitive outcomes;
- the consumer safety-net arrangements that operate in Victoria actually encourage effective demand side participation.

In the submission, Consumer Action argues that consumers still struggle with complexity and confusing information about energy offers. There is no evidence that consumers sufficiently understand the tariffs and contractual conditions offered to them, and there is some evidence that many consumers are in fact worse off after switching. This is exacerbated by poor marketing practices, which are primarily through door-to-door and telephone sales. We argue that in the context of high pressure sales such as door-to-door marketing, consumers rarely make rational, welfare-maximising decisions, which give marketers appropriate signals about the types of products and services desired by consumers.

In relation to the market structure, we note that increasing levels of vertical integration among incumbent retailers (that is retailers owning generation capacity) has increased their market power as well as barriers to new entry. We are also concerned that the market structure is enabling industry to push risk related to increasing wholesale energy price spikes onto consumers – an example of this relates to the withdrawal of retailer Energy One from the market, leaving consumers liable to pay extra fees and charges to maintain supply. Passing such risks to consumers will also result in inefficiencies and impede competitive outcomes, as the industry is obviously far better placed to deal with risks in wholesale energy markets.

Finally, our submission identifies that the logic underpinning the review – that retail pricing regulation should be removed where competition is effective – fails to understand the important role that pricing regulation plays in the Victorian market. We note that Victoria does not actually have a retail price cap. Instead the consumer safety-net operates primarily as a default option so that consumers who are less able to exercise rational and informed choice can still access services at a fair and reasonable price. As such, the safety-net arrangement actually promotes competition, by encouraging effective demand side responses through the provision of default options.

For more information about Consumer Action's work in relation to national energy market reforms, please contact Gerard Brody, Director Policy and Campaigns, on 03 9670 5088 or gerard@consumeraction.org.au.

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Consumer Representatives on Standards Australia Committees

The Consumer Action Law Centre is funded to recruit and support [Consumers' Federation of Australia \(CFA\)](#) representatives on Standards Australia technical committees. These committees develop and review a wide range of product and process related standards.

Over the past two months representatives have been active in a range of Committees working on issues such as sustainable buildings, standards for portable soccer goals and reviewing the standard for prams and strollers following the ACCC decision to introduce mandatory safety requirements from July 2008. CFA representative Deni Greene continues her work on the International Social Responsibility Working Group, travelling last month to London for an Editing Committee meeting. Heather Grain, who represents the CFA on the very active IT-014 Health Informatics Committee, has just been appointed Chair of her Committee – a strong recognition of her commitment and leadership within the group.

Representatives needed:

Representatives are currently needed for the following Standards Australia Technical Committees:

- MB-004 **Business Governance**, which is currently looking at guidelines for probity in decision-making and procurement and fraud and corruption control.
- TE-007 **Human Exposure to Electromagnetic Fields**.

If you are interested in representing the Consumers' Federation of Australia on a Standards technical committee or would like more details about CFA's Standards Project please contact Jo Higginson, Standards Coordinator on (03) 9670 5088 (Mon, Wed, Fri) or jo@consumeraction.org.au. CFA representatives attending Standards Australia committee meetings act in a voluntary capacity and are reimbursed for their travel expenses.

New Standards Australia Committee for Organic and Biodynamic Products

CFA representative **John Furbank** reports on the Committee for Organic and Biodynamic Products, which was established earlier this year.

The Standards Australia Committee FT-032 – Organic and Biodynamic Products was established earlier in this year, it is about to hold its second meeting. Its brief is to develop a national *Australian Standard for Organic and Biodynamic Products*, which will be a major point of reference for the Australian organic and biodynamic industry.

Currently the Australian Quarantine and Inspection Service (**AQIS**) regulate Australian organic and biodynamic exports by means of a co-regulatory arrangement with seven accredited certifying organisations. The system is underpinned by Commonwealth Export Control Orders which make it illegal to export organic produce without a certificate showing compliance with the *National Standard for Organic and Biodynamic Produce*.

Certifiers apply the *National Standard* as a minimum and in addition may certify to their own standards. Compliance with the *National Standard* is audited by AQIS accredited certifiers. The use of certifiers' standards has led to an assortment of industry standards. The *National Standard* is only mandatory for the export market and offers little protection for the domestic market. It is mainly an industry standard for food producers and processors and provides insufficient guidance to retailers.

In 2006 the Organic Federation of Australia and the Organic Industry Export Consultative Committee requested Standards Australia to develop a standard for Organic and Biodynamic Produce. Following a survey of interested parties, Standards Australia agreed to develop a new standard.

The main purpose of the first meeting was to establish the terms of reference and strategy to progress the Standard. Initially the Committee's brief was to develop an organic and biodynamic food standard however the Committee agreed that the document be broadened to include animal feed and skin and health products. Currently the labels of many 'organic' hair and body washes, body lotions and hair gels need a meticulous study to establish what proportion of the ingredients are actually organic and, of those, which, if any, have been certified.

The Committee agreed to use the *National Standard* as a base document for the new *Australian Standard* building on it to include requirements for primary production, transport and storage, preparation, packaging and 'marketing' which would encompass retail and restaurants.

The *Australian Standard* will also include definitions and removal of ambiguity of terms used in the industry; specify the products covered and state the requirements to demonstrate traceability to assist third party certification. The *Australian Standard* will establish labelling

requirements and will include specific reference to the certification process but will not mandate certification as a requirement.

Once published the *Australian Standard* may be used by Government enforcement agencies such as the ACCC and State/Territory fair trading and health departments.

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