

## **Submission to the National Human Rights Consultation**

15 June 2009

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**On placement at Consumer Action Law Centre**



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15 June 2009

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Dear Sir/Madam

**CONSUMER RIGHTS IN A NATIONAL HUMAN RIGHTS ACT  
SUBMISSION TO NATIONAL HUMAN RIGHTS CONSULTATION**

We welcome the opportunity to provide these comments on the National Human Rights Consultation to the Australian Government.

We further commend the government on its action to ensure this important issue for all Australians has been fully researched and due consideration has been given to all submissions received and all voices heard during the National Human Rights Consultation Community Roundtable sessions.

**About Us**

We are three La Trobe University law students in the 2009 Public Interest Law Practice course. We have completed this submission as part of our course placement at Consumer Action Law Centre in Melbourne, Victoria.

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. It provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

## What are Human Rights?

We recognise and support the need for high-level human rights to be enshrined in an Australian Human Rights Act, such as the right to life and liberty. However, our submission will focus on our belief in the need for consumer rights to be addressed in this significant document.

As stated in Article 1 of the *Universal Declaration of Human Rights*, “All human beings are born free and equal in dignity and rights”. One such definition that has been used to define human rights has been “the condition necessary for people to live lives of dignity and value.”<sup>1</sup> Human rights are rights that we are all entitled to because, put simply, we are human beings. These rights are inherent and apply to everyone, irrespective of nationality, sex, religion, place of origin or views one may have. The objective of human rights is to protect every individual and not just so-called “minority” groups. Such minority groups might include same sex couples, refugees, and disadvantaged consumers. Human rights should be applicable to every member of our society, including those that some may argue do not deserve protection. Human rights cannot be taken away; no one has the right to deprive another person of them for any reason whatsoever.

We believe human rights are indivisible and interrelated and as such all should be included within a national charter.

These rights are typically identified as belonging to three different categories:

### **1. First generation rights: Civil and Political**

*International Covenant on Civil and Political Rights (Ratified in 1980)*

The rights protected above include:

- The right to political participation
- The right to freedom of conscience and religion
- The right to freedom of expression
- The right to freedom of association
- The right to be free from torture
- The right to a fair trial
- The right not to be held in slavery.

### **2. Second generation rights: Economic, Social and Cultural**

*International Covenant on Economic, Social and Cultural Rights (Ratified in 1976)*

The rights protected above include:

- The right to an adequate standard of living
- The right to education
- The right to fair wages
- The right to safe working conditions

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<sup>1</sup> ACT Bill of Rights Consultative Committee, Parliament of the Australian Capital Territory, *Towards an ACT Human Rights Act* (2003) 10.

- The right to health care.

### 3. Third generation rights: Environmental, Cultural and Developmental rights

While these rights may not yet be part of the Universal Bill of Human Rights, they have each been recognised as a basic human right that should be protected alongside the first and second generation rights.<sup>2</sup>

- The right to live in a clean and protected environment
- The right to cultural development
- The right to political development
- The right to economic development.

However, one such category of rights that we believe must also be recognised in a national charter and fall under this category of third generation rights is that of Consumer Rights. These have often been overlooked in human rights discourse.

#### What are Consumer Rights?

A consumer is someone who buys or uses things (goods) or services. A consumer is also someone who uses the earth's resources such as water, land, oil, trees and the air. Consumer rights are important because everyone is a consumer.

The eight widely-recognised consumer rights are:

1. The right to satisfaction of basic needs
2. The right to safety
3. The right to be informed
4. The right to choose
5. The right to be heard
6. The right to redress
7. The right to consumer education
8. The right to a healthy environment<sup>3</sup>

As noted above, Consumer Action advances the interests of consumers, particularly low-income and vulnerable consumers. In such a context, we propose that such rights should be included in the National Human Rights Charter as arise in the context of Consumer Action's work.

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<sup>2</sup> Henry J. Steiner, Philip Alston and Ryan Goodman, *International human rights law in context: law, politics, morals* (3<sup>rd</sup> ed, 2007) 1247.

<sup>3</sup> See, eg, Consumers International, [www.consumersinternational.org/Templates/Internal.asp?NodeID=95043](http://www.consumersinternational.org/Templates/Internal.asp?NodeID=95043).

## Why do we need reform?

Now that we have defined 'human rights', it is important to understand what they mean to us and why they must be put into practice rather than being merely the subject of social discourse if they are to have any meaning for individuals in our community. These issues will be discussed in turn.

It is common knowledge that there are a number of sources which currently protect human rights in Australia including: our Federal constitution, various legislation and common law.

However, it has become more and more apparent, in particular in the past decade, that such sources do not provide adequate protection to Australians in general, in particular those who are vulnerable or disadvantaged in some way, including many consumers in their dealings with better resourced businesses. We will now outline the various protections and lack thereof which are in place in Australia:

### **Rights in the Australian Constitution**

#### Express rights:

Although the *Commonwealth of Australia Constitution Act 1900* (Cth) does not contain a Bill of Rights, it does guarantee some important civil and political freedoms. Most significantly:

1. s80 guarantees the right to trial by jury (although the High Court has severely limited the protection offered by this provision),
2. s116 provides for a range of religious freedoms, including the right to the freedom exercise of any religion,
3. s117 prohibits the imposition of 'any disability or discrimination' on account of State residence, the right to freedom from disabilities or discrimination on the basis of State residence; and
4. s41 provides the right to vote.

The constitution also protects two economic rights which include:

1. s51 provides the right not to have the Commonwealth acquire property, except on just terms;

2. s92 provides that 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.'

#### Implied rights:

The Constitution has been interpreted by the High Court to include some implied rights which have been narrowly defined, including the separation of judicial power from the executive and legislative arms of government. One would think that naturally any Human Rights Act would need to ensure such rights are maintained.

It is apparent that the few rights that are listed in the Constitution are ad hoc resulting in many basic rights missing the blanket of constitutional protection. This is obvious from a quick cross-reference between the Australian Constitution and other international instruments, such as the *Canadian Charter of Rights and Freedoms* 1982. For example, the text of the Australian Constitution does not include anything amounting to a freedom from discrimination on the basis of sex or race, and while the Constitution has been interpreted to impliedly protect freedom of political communication, it lacks a more general right of free speech.

#### **Legislation**

Legislation has been implemented in Australia at both the Commonwealth and State level that goes some way to providing protection of human rights. Some of these statutes have been implemented to ensure Australia complies with some of its International Human Rights obligations under International treaties (which will be discussed below).

Examples of Commonwealth Statutes that somewhat protect human rights include:

1. *Sex Discrimination Act 1984*, which to some extent implements the Convention on the Elimination of All Forms of Discrimination Against Women.
2. *Racial Discrimination Act 1975*, which to some extent implements the International Convention on the Elimination of All Forms of Racial Discrimination (1966).
3. *Disability Discrimination Act 1992* which to some extent implements the ICCPR and the Convention Concerning Discrimination in Respect of Employment and Occupation (1958).
4. *Human Rights and Equal Opportunity Commission Act 1986*.

It is clear that these statutes do not touch on the protection of socio-economic rights, including consumer rights. The recent enactment of the Victorian Human Rights Charter as well as the ACT Charter has certainly provided a step in the right direction. These Acts extend to the protection of the following rights:

- recognition and equality before the law;
- right to life;
- protection from torture and cruel, inhumane or degrading treatment;
- freedom from forced work;
- freedom of movement;
- privacy and reputation;
- freedom of thought, conscience, religion and belief;
- freedom of expression;
- peaceful assembly and freedom of association;
- protection of families and children;
- right to liberty and security of person;
- fair hearing;
- rights in criminal proceedings;
- right not to be tried or punished

There no doubt appears to be a number of important rights, which are yet again failing to be protected, notably economic and social rights. Arguably, the Victorian Charter does somewhat provide the protection of an economic right, granting a citizen's 'right to housing.' However, the charter has failed to provide a systematic outcome for those who have relied on this provision when on the brink of eviction.

Of course, there is legislation in Australia that provides laws that cover the regulation and protection of consumers, including the *Trade Practices Act 1974* on a Federal level. One then might ask the question, why do we need a national charter? By protecting human rights through a national charter this is likely to lead to a more consistent development of human rights law. While the Commonwealth and the States hold concurrent legislative powers, having a national act would ensure every Australian is able to claim the same basic human rights.

Ultimately, by providing a national human rights charter that promotes and protects the different social and economic rights that are imperative for every consumer in Australia, this will provide a mechanism of ensuring that the legislature acts within the parameters of a national charter.

## Common Law

The courts have from time to time developed various common law principles pertaining to the protection of human rights. These include restraints on police, the right to a fair trial and prohibitions on trespass that indirectly and partially protect the right to privacy. However, yet again social and economic protections do not appear to be included.

## International Law

Australia has ratified two major international treaties that set out rights.

1. *International Covenant on Civil and Political Rights (Ratified in 1980)*
2. *International Covenant on Economic, Social and Cultural Rights (Ratified in 1976)*

Australia has been a party to the ICCPR for more than two decades,<sup>4</sup> being a signatory to these two international covenants. As Australia has signed and ratified the treaties mentioned above, this does not necessarily allow the treaties to be applied to our domestic law. The relationship between treaties and domestic law was outlined by Mason CJ and Deane J in Teoh's case:

*It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power, whereas the making and alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.<sup>5</sup>*

Instead, our Parliament has to pass legislation to make a human rights treaty part of Australian law.<sup>6</sup> Given that this step is incomplete, breaches of the covenants mentioned above result in a breach of Australia's international law obligations, not a breach of Australian domestic laws.

In order for these international provisions to be effective, they must be implemented into domestic law via legislation. This step is yet to be completed. Without completing this step, Australians are left with a mosaic of common law, constitutional and statutory rights. These

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<sup>4</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 146680 UNTS 999, entered into force 23 March 1976.

<sup>5</sup> *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 25.

<sup>6</sup> Human Rights and Equal Opportunity Commission, *Human Rights – what do I need to know?* Australian Human rights Commission <<http://www.hreoc.gov.au/letstalkaboutrights/info/index.html#Heading78>> at 15 April 2009.

rights need to be fused together in order to provide a comprehensive human rights framework.

In addition to these covenants, there are further rights, including consumer rights, that are not recognised and protected within these covenants. For this very reason, Australia's position on human rights are incomplete, obscure and in need of rectification.

Human rights can be found in international documents called 'declarations', 'covenants' and 'conventions' also known as treaties.<sup>7</sup> The term 'treaty' is defined in the Vienna Convention to mean 'a written international agreement between States governed by international law'.<sup>8</sup>

In addition to the two major international treaties mentioned above, Australia has also ratified the following treaties:

- *Convention on the Rights of Persons with Disabilities 2008*
- *Convention on the Rights of the Child 1990*
- *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1989*
- *International Convention on the Elimination of all forms of Discrimination against Women 1983*
- *International Convention on the Elimination of all forms of Racial Discrimination 1975*
- *International Labor Organisation Discrimination (Employment) Convention ILO 111 1973*<sup>9</sup>

Australia has also supported a number of Declarations – in particular, the *Universal Declaration of Human Rights*. Australia has also recently indicated that it will support the *Declaration on the Rights of Indigenous Peoples*.<sup>10</sup>

Amnesty International has conducted many surveys, which indicate that many Australians feel their rights are only partially protected given Australia's position within human rights legislation. A Nielsen telephone survey was conducted nationally for Amnesty International Australia from 18 to 25 February 2009 with 1,000 respondents aged 18 and over. The maximum margin of error for this survey is plus or minus approximately 3 percent. Below are some notable statistics:

- When asked to what extent their human rights are protected under Australian federal law, only 38 percent of respondents say their rights are protected completely.
- The survey shows that 54 percent believe their rights are only partially protected, and 2 percent feel their rights are not protected at all.

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<sup>7</sup> Ibid.

<sup>8</sup> Mark Jennings, *Practical Treaty Making: The Relationship Between Treaties and Domestic Law*, Department of Foreign Affairs and Trade [http://www.dfat.gov.au/treaties/workshops/treaties\\_global/jennings.html](http://www.dfat.gov.au/treaties/workshops/treaties_global/jennings.html) at 20 May 2009.

<sup>9</sup> Human Rights and Equal Opportunity Commission, above n 5.

<sup>10</sup> Ibid.

- "While the survey shows that a majority of Australians feel reasonably confident that their rights are protected, they clearly realise that the protection is fragile or incomplete, and should be enhanced through the introduction of a Human Rights Act," said Andrew Beswick.
- "Amnesty International believes a Human Rights Act that would guarantee national, uniform legal protection of the human rights of everyone living in Australia is the best way forward at this time," said Andrew Beswick.
- Research by Amnesty International Australia in 2006 found that 95 percent of people surveyed rated their rights as 'important'. More than 60 percent incorrectly thought that Australia already had a charter or bill of rights in place.<sup>11</sup> This is an alarming rate.

### What model should Australia adopt?

Australia is one of only a few developed nations without a Constitutionally entrenched Bill of Rights or a Human Rights Act. This leaves Australia with various options. Below we explore two model options - a Constitutionally entrenched and a legislative model.

#### Constitutional Model

This model is best highlighted in the US where a "Bill of Rights" has been embedded into their Constitution.

Firstly, the effect of this constitutional entrenchment ultimately allows the judicial arm of government to have the final say. Secondly, Parliament will be obliged to adhere to the constitutional entrenchment. Amendments can only be made by way of referenda under Section 128 of the Constitution,<sup>12</sup> which provides that amendment can only be achieved via referendum after it has passed through both houses of Parliament. History proves that such a process is difficult to pass, with only 8 out of 44 campaigns having successfully achieved this. Thirdly, it is highly likely that certain laws may become outdated which would be extremely difficult to amend should they be constitutionally entrenched.

We therefore believe that a Constitutional Model may not be the ideal alternative for Australia.

<sup>11</sup> Ibid.

<sup>12</sup> *Commonwealth of Australia Constitution Act 1900* (Cth) s 128.

## **Legislative Model**

A legislative model, as an ordinary act of parliament, in contrast to the above constitutional model, offers much more flexibility in terms of amending laws to keep up with the changing values and mores of society. Under a 'legislative model' the human rights statute would be interpreted by the courts and, if required, be amended by Parliament. This is preferable as Parliament is able to better reflect changes of community norms and offer flexibility, whereas Constitutional entrenchment is much more rigid.

Secondly, the 'legislative model' upholds the basic principle of separation of power as well as maintaining the sovereignty of Parliament. The judicial arm of government is responsible for interpreting statutory law and does not have the authority to strike down laws that violate human rights. Rather, we suggest a mirror provision of s36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The legislative model has been implemented by other nations and states such as the New Zealand, the United Kingdom, Victoria and the Australian Capital Territory (ACT).

### Criticisms of a Legislative model

Many critics believe that a Federal Charter will give rise to judicial activism and ultimately strip power from elected parliamentarians and place it in the hands of unelected judges. It is therefore believed that a Federal Charter will give too much power to the judges. Some critics say that questions of human rights are better decided by disinterested parliamentarians rather than judges who may impose their own personal opinions and interests when deciding a case.

However, under the ACT's *Human Rights Act 2004*, the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the UK *Human Rights Act 1998*, the courts must, as far as practicable, interpret laws in a way that is consistent with protected rights.<sup>13</sup> One must keep in mind that a judge's role is already to interpret the legislation and apply to words of the statute to any given case. As a neutral unelected judge, it is not likely that personal interests will conflict with the interpretation of statute. Secondly, a judge's primary role is to interpret and apply the law as it is written by those who are accountable to the electorate. Thirdly, even if a judge were to incorrectly apply the legislation to any given case, there is a right to appeal the decision in a higher court of the same hierarchy.

## **Proposed model and features**

We believe that the following features of existing legislative and common law models should be incorporated into a national Charter of Human Rights.:

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<sup>13</sup> Philip Lynch and Phoebe Knowles, *Engaging in the Debate* (2009) 10.

### *The New Zealand Bill of Rights Act (1990)*

- s3 states that the Act applies to acts done by the legislative, executive and judicial branches of the New Zealand, or to a person or body performing a public function, power or duty imposed by or pursuant to law. This incorporates private organisations when they are exercising any public duties.
- s5 states that the onus on proving that the limitation on any particular right is reasonable lies with the relevant government body imposing the limit. This must be within “reasonable limits that may be demonstrably justified in a free and democratic society.”
- Such remedies established by the New Zealand courts should be imported to the Australian Human Rights Act, such as the exclusion of evidence obtained in breach of the Act, the issuance of a stay of proceedings, a declaration of incompatibility, sending the decision back for reconsideration and finally the award of monetary compensation.<sup>14</sup>
- The award of monetary compensation for breach has been used in relatively few cases in New Zealand, following the trend of judges in the United Kingdom who have shown a “marked reluctance...to use damages as a remedy for breaches of the Act.”<sup>15</sup> It would follow that while the option to award monetary compensation for a breach of the Act existed it would not likely be a commonly used remedy in Australia under a federal charter.

### *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

- Part 3 (except ss38 (3) and 39(3))  
Requires statements of compatibility to be made by the member if Parliament proposing to introduce the Bill into a House of Parliament, that a failure to comply with the previous does not effect Commonwealth law, that a Joint Committee be established to pass each Bill under scrutiny to ensure each is compatible with the Charter.
- Parliament may override the Act or provision of the Act if expressly done so, only in exceptional circumstances, and a statement to that effect must be made prior to the third reading of the Bill.
- So far as it is possible to interpret the Charter consistently with other Acts it shall be done so, with a referral to the High Court of Australia should it arise that a declaration of incompatibility may be made and the relevant Minister must respond within six months to any declaration of incompatibility.
- The provisions contained within the Charter shall be binding only upon public authorities, with the exception of the consumer rights which are required to

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<sup>14</sup> Spencer Zifcak and Alison King, *Rights, Wrongs and Remedies: An Australian Charter?* (2009) 31.

<sup>15</sup> Geoff, McLay, ‘Damages for Breaches of the New Zealand Bill of Rights: Why Aren’t They Sufficient Remedy?’ (2008) 2008 *New Zealand Law Review* 333, 333.

be ending upon private entities as well as public authorities for them to have any meaningful effect.

- Further, we recommend that the charter be attached to another statute when bringing an action, however, we also recommend that the remedies available in New Zealand as devised by their court should be available in Australia.

We also consider that part three of the Victorian Charter almost in its entirety should be reflected in a National Charter of Human Rights where it embodies the common features found in almost all legislative model charters in the West.

### What types of rights should be protected?

We propose to follow the consumer rights model adopted by US President John F Kennedy in 1962 and later expanded, as we believe that the eight basic human rights underpin the necessary consumer rights that require scrutiny in Australia. These eight basic human rights are explained in detail further below.

1. *The right to satisfaction of basic needs*
2. *The right to safety*
3. *The right to be informed*
4. *The right to choose*
5. *The right to be heard*
6. *The right to redress*
7. *The right to consumer education*
8. *The right to a healthy environment*

#### **1. The Right to satisfaction of basic needs**

Consumers have the right to basic goods and services which guarantee survival. This includes adequate food, clothing, shelter, health care, education and sanitation. These rights lay a foundation for a life of human dignity. We note that South Africa's constitution provides for these rights in the Bill of Rights (save the right to clothing).

Article 25 of the *Universal Declaration of Human Rights*, adopted in 1948 by the Member States of United Nations, recognises the right to an adequate standard of living. Further, Article 8 of the *International Covenant of Economic and Social Rights* states that ‘all beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water and energy for cooking, heating and lighting.’

It is apparent that such rights are pre-requisites for the realisation of all other human rights. We believe that if at all any consumer rights are to be considered in being implemented in our proposed Federal Charter, such rights must be given utmost priority, as we believe that the full realisation of civil and political rights without the enjoyment of rights pertaining to basic needs is impossible. Despite legislative provisions in the *Trade Practices Act* and in the corresponding state *Fair Trading Acts*, it is apparent that low-income and disadvantaged consumers are still suffering and in many circumstances are not adequately protected by existing legislation. Because electricity and gas are essential services with no practicable substitutes, market failure in the energy retail industry is a serious social problem.

Below is a case study and provides an example of non-compliance with this right:

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#### **Case study 1:**

Helen, a sole parent with one child, had her water supply restricted in October 2003 after she failed to maintain payments of \$20 per fortnight, which was too high for her to afford. The water authority has originally demanded payments of \$50 per fortnight. Helen found the water authority rude to deal with and felt it would not listen to her when she tried to explain her financial difficulties.

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A right to access a minimum amount of water and energy sufficient for personal and domestic needs should ensure that disconnections or restrictions do not occur when consumers experience incapacity to pay. By providing this right, public authorities would be restricted from disconnecting for non-payment due to financial difficulties or in the alternative would be required to follow specific procedures before disconnection is permitted.

## **2. The Right to Safety**

Products offered on the market must not pose a risk of physical harm to any individual. It is apparent that soon, most of the products we purchase in Australia are actually going to be products from another nation, such as China. Given that majority of our products will be manufactured overseas and imported into Australia, there must be legislation at Federal level to protect the safety of consumers. It is crucial to acknowledge the consumers' right to

safety at a national level as it can be used as a benchmark for assessing the fairness and quality of laws, regulations and practices.

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## **Case study 2:**

### **Nanotechnology**

Nanotechnology is developing rapidly and can be found in confectionary packaging, bottle coatings and is also used to enhance the flavour and texture of food, as well as the extending shelf-life of foods. Nanotechnology is also contained in cosmetic products such as lipsticks, foundations and anti ageing products by big brand companies.<sup>16</sup> Currently, nanotechnology is used in invisible sunscreens, which is a potentially very useful invention; however, whether this enhancement is safe inside the human body is questionable. Products offered on the market must not pose a risk of physical harm to any individual.

It is evident that nanotechnology has great potential but the safety of the product is currently unknown. Consumer magazine *Choice* believes nanotechnology is already used in around 800 products.<sup>17</sup> Currently no regulatory standard in food products governs the requirement of nanotechnology-contained products. *Choice* is reported as saying, "Food Standards Australia New Zealand (FSANZ) does not require manufactured nano particles to be specifically labelled and the consumer body is calling for an overhaul of nanotechnology regulation in the food industry."<sup>18</sup>

### **The need for further tests**

Recent scientific studies have raised concerns about the potential for nano materials to cause damage to human cells and tissues.<sup>19</sup> As technology is rapidly enhancing the way we conduct our lives and the foods we consume, the Australian Food Standards Code must also complement this area of rapid scientific development.

Food consumption is a fundamental requirement for life. The way in which the microscopic particles react at a nano size inside the body has not been studied and tested thoroughly enough for products to line shelves. Experiments need to be conducted in order to guarantee to consumers that human tissue and cells will not be affected by consuming nano particles. Without this level of assurance, products containing nano particles should not be on the market as it will infringe consumers' right to safety. No one knows the effects of using nanotechnology in cosmetics and creams.<sup>20</sup> Test-tube studies have shown that nano

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<sup>16</sup> Georgia Miller, 'Science of the small may carry big risk', *The Age*, 28 March 2009.

<sup>17</sup> Rachael Brown, 'Fears Nanotechnology Rules Not Tough Enough', *ABC Radio AM Saturday*, 28 March 2009.

<sup>18</sup> Choice, 'Food Safety & Nanotechnology – No Small Issue' (Paper presented at the Nanodialogue – Nanotech and Food Regulation Conference, Melbourne, 25 March 2009).

<sup>19</sup> *Ibid.*

<sup>20</sup> Miller, above n 15.

particles commonly used in cosmetics and sunscreens can damage DNA and cause serious cellular damage.<sup>21</sup>

### **Bodies who have expressed concern**

The Australian Office of Nanotechnology, which oversees the authority, and develops nanotechnology policy, thinks Australia's regulations are tough enough.<sup>22</sup> We should not have to wait for a public outburst on toxicity claims before we take steps to scrutinise the implications particles of a nano size can do to our bodies.

Choice Magazine is calling for:

- Safety assessments carried out by FSANZ to specifically address the new potential risks posed by nano materials.
- All food containing manufactured nano particles to be specifically labelled.

The ACTU is calling for:

- Closer scrutiny of the nanotechnology industry which has been triggered by a study revealing that one particles shares some characteristics of asbestos fibres and has had a similar effect to them when tested on mice.<sup>23</sup>

The 2008 NSW Legislative Council Parliamentary Inquiry into Nanotechnology recommended:

- Labelling regulations and Safe Work Australia is conducting research on the implications of the technology.<sup>24</sup>

Unions are demanding:

- Urgent regulation of the nanotechnology industry, citing mounting evidence that some tiny particles used in products such as sunscreens and cosmetics could be harmful as asbestos.<sup>25</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> Brown, above n 15.

<sup>23</sup> 'Small is Beautiful, but it could also be dangerous', *The Age* (Melbourne), 15 April 2009.

<sup>24</sup> Ibid.

<sup>25</sup> Dan Harrison, 'Unions Call for Action to Oversee Nanotechnology,' *The Age* (Melbourne), 14 April 2009.

### Case study 3

#### Dangerous Toys

There have been incidents where children have been exposed to potentially harmful toys. The question here is who bears the onus of proving safety? Are the parents ultimately responsible for examining the safety of a product for their children? Or as a nation do we expect that imported toys are to comply with the national safety standards? A recent report<sup>26</sup> suggests that little can be done by way of preventing the sale of potentially harmful children's toys. Effectively, this highlights a concern, that companies manufacturing these potentially harmful toys are not accountable to the safety of their potential buyers.

Part VA of the *Trade Practices Act* governs 'Liability of Manufacturers and importers for defective goods'. Dangerous toys fall within the definition of a defective product. Under s75AJ, it explains what can be done when a manufacturer cannot be identified. 'China is responsible for most of the unsafe goods on Australia's recall list, including toxic toys'. In addition, the world's cheap workshop produces 80 per cent of the toys imported into Australia but only those for children under the age of three undergo mandatory testing.<sup>27</sup>

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### 3. The Right to be informed

Every consumer reserves the right to make informed decisions before entering into an agreement. Consumer Action has dealt with numerous cases that give rise to the concept that not every consumer believes they have been provided with adequate or correct information to be able to make an informed choice. Every consumer has to right to be protected from misleading and false advertising.

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### Case study 4:

#### Fixed Rate Loans

Unaware of "terms"

Too often consumers are unaware of the implications of entering into a fixed rate loan and the drawbacks when the interest rates decrease. Where the Reserve Bank declares a drop in interest rates, some consumers believe that their interest rate will also decrease. Little do they know, such a transition will cost a potentially huge amount if they need to pay exit fees

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<sup>26</sup> Hannah Martin, 'Alarm over danger toys,' *The Sunday Mail*, 27 March 2007.

<sup>27</sup> Janet Fife-Yeomans, 'Aussies at risk from unsafe imports,' *The Daily Telegraph*, 16 August 2007.

to transfer to a variable rate loan. A lack of consumer awareness is evident. In order to honour a consumer right to be informed and make informed decisions consumers themselves must be educated of the implications and differences between a variable and fixed rate loan.

This can be achieved by, for example, the government funding ASIC to present educational lessons to consumers who are about to enter into a loan. On the other hand, many consumers who feel their right to be informed has been infringed are of a lower-income, non-English speaking or educationally disadvantaged background. These consumers are not well equipped with the financial terminology used by banks and the English language contained in loan settlement contracts. A possible solution here would be to appoint 'interpreters' so the consumer is able to understand the implications of the contract BEFORE signing any relevant documentation.

We believe that a basic right to be informed by companies would ensure better outcomes, and this right should be embedded into a human rights charter at a federal level.

## **Case study 5:**

### **Door-to-Door sales**

The Victorian *Fair Trading Act 1999* protects the rights of Victorians in situations of door-to-door sales. However, many vulnerable people are entering into contracts without realising the implications of the terms and conditions because they feel either pressured to sign, or they simply do not understand the process. Direct marketers, including door-to-door marketing, operate across a number of industries, including energy, education and telecommunications.<sup>28</sup> Therefore the scope for improper transactions to occur is very broad.

### **Non-English Speaking Backgrounds**

Where a door salesperson knowingly convinces a person who has minimal understanding of the English language, chances are they do not know what they are signing and possibly cannot afford to keep up with the payments. In addition, consumers of such a background are unaware of their rights under fair trading legislation. Some vulnerable consumers are unable to say no to direct marketers, while others are simply being deceived in order to gain a sale.

*"A man from a limited English speaking background signed a form with a door-to-door salesperson with the intention to get rid of him. He had no idea that he had authorised to cancel his account with TRU Energy and consequently open an account with AGL. After two months of discussions, AGL cancelled his account and waived all fees and charges. It is*

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<sup>28</sup> See, eg, Consumer Action Law Centre and Financial & Consumer Rights Council, *Coercion and harassment at the door: Consumer experiences with energy direct marketers*, November 2007.

*believed that the consumer had not been given the opportunity to provide informed consent.*<sup>29</sup>

### **Ways to circumvent the problem**

In order to limit the abuse suffered by vulnerable consumers, there should be relevant human rights provision so they have an adequate 'right to be informed'. This would then require governments and companies to provide for a requirement such as; the presence of an interpreter before entering into any contract; or a "Fact Sheet" outlining main elements of the contract written in a foreign language that the consumer can understand.

By allowing for an interpreter, the consumer will be able to better understand the product and make an informed decision on whether they believe the product and its payment to be suitable given their financial position. On the other hand, if the interpreter requirement will cause delays or prove to be too costly, another alternative would be a requirement to have a "Fact Sheet" outlining the product and terms of the contract in the foreign language that is familiar to the consumer

Consumer Action has already begun informing consumers through their campaign in 2007 where a 'Do Not Knock Sticker' was established, whereby ignoring this sticker was regarded as a breach of law for unsolicited door knocking. However, to ensure consumers are fully aware of their rights and obligations more can and should be done.

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## **4. The Right to Choose**

Consumers should generally have a variety of products and goods to choose from based on personal taste, quality or price. The right to free choice among products means that individuals should be able to decide which product, from a variety of options provided by many companies and businesses, they choose. Simply put, whether an agreement exists or not between a consumer and a business operator, obligations exist upon employees of banks and various business organisations including salespeople to assure, wherever possible, access to a range of products and services at competitive prices that meet consumer needs, and in those industries in which competition is not workable and government regulation is substituted, an assurance of satisfactory quality and service at fair prices.

There is legislation that exists that prohibits anti-competitive behaviour and regulates the behaviour of monopolistic businesses, however, there is no general right which enables a consumer to choose without the vulnerability of being misled. Pricing and labelling methods have provided major concern. Consumers cannot choose properly if they are misled by a headline claim. If a headline claim is what narrows the choice between

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<sup>29</sup> Ibid 62.

competing businesses and products, the consumer may not have the time to go back and start from the beginning if the headline claim proves to be false or misleading. What can often be the case is that the consumer does not find out. The business making the claim attains an unfair advantage to the consumers' disadvantage.

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## **Case study 6:**

### **Unit pricing in supermarkets**

There are many examples of where consumers are not able to make an informed judgment and get value for their money when shopping due to poor information about value. For example, many consumers might believe that opting for a larger tin of dog food will ultimately save them money than buying more of the smaller tins. In reality, when the weight and price of the dog food tins are compared mathematically, this may not be the case. A CHOICE test found:

*...the unit price of the 1.2 kg of Pedigree dog food works out at 22% more expensive than the same product in the smaller-sized tin. How many people would opt for the larger quantity, assuming they'd save money? If supermarkets displayed the price per kg, you'd know their respective prices were \$2.21 per kg and \$1.81 per kg.<sup>30</sup>*

Due to the growing concern about the lack of unit pricing in Australia and customers' inability to choose accurately and fairly, a new pricing system has now been proposed by the Federal Government. The new pricing system follows the recommendations outlined in the Australian Competition and Consumer Commission's (ACCC) grocery inquiry report and requires the display of a product's cost per standard unit of measure.

On the whole, it seems that consumer law reform in the area of unit pricing is well overdue in Australia. Although the Government's announcement of mandatory national unit pricing is welcomed, it is important to note that such a move ought to have been implemented a long time ago. Unit pricing systems have been adopted in the US and Europe for some time now, and it seems that unit pricing saves shoppers time and money. Displaying the cost of food per unit would allow for a consumer to be able to make a reasonably informed choice, hence upholding a consumer's right to choose. For this reason, we believe that the Right to Choose for consumers should be adequately protected by being embedded into a Federal Human Rights Act.

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<sup>30</sup> CHOICE, 'Is bigger cheaper?', CHOICE website, August 2008, [www.choice.com.au/viewArticle.aspx?id=105590&catId=100567&tid=100008&p=1&title=Is+bigger+cheaper%3f](http://www.choice.com.au/viewArticle.aspx?id=105590&catId=100567&tid=100008&p=1&title=Is+bigger+cheaper%3f).

## 5. The Right to be Heard

The right to be heard plays a vital role in allowing consumers effective and adequate access to justice at both a state and a federal level.

### Case study 7:

#### Introduction of Commonwealth Consumer Credit Laws

In Victoria, the Victorian Civil and Administrative Tribunal (VCAT)<sup>31</sup> provides accessible and low cost access to justice. VCAT's jurisdiction extends to hear many disputes such as: purchase and supply of good, residential tenancies and discrimination. In Victoria, disputes about consumer credit are also currently taken to VCAT. Consumers are able to lodge a claim for a small fee and appear in VCAT as a self-represented individual. NSW also has a similar tribunal called the Consumer, Trader and Tenancy Tribunal that offers cost effective access to justice for consumer credit related disputes. On the other hand, Queensland does not have an established specialist consumer tribunal, which leaves consumers with no option but to commence proceedings in the Magistrates Court for disputes below \$50,000.<sup>32</sup>

#### Potential Jurisdiction Issues:

Currently the new Commonwealth consumer credit laws threaten the effective operation of specialised bodies such as VCAT as its jurisdiction cannot extend to hear and determine federal laws. This raises concern for consumers and how access to dispute resolution could be limited as the new Commonwealth laws may force consumers to resort to the Federal court system. The filing fee in the Federal Magistrates Court is currently \$374. Evidently, access to justice in the Federal court system is effectively expensive and time consuming.

In order to rectify this concern, the establishment of an effective low cost, informal and flexible judicial forum is fundamental at a federal level. It is unfair and unethical to expect consumers experiencing consumer credit disputes to access justice through the normal Federal court system as this will most definitely hinder their access to justice, which should be an individual right. The Federal Courts fit within the meaning and perception of the traditional court system which is an ineffective means of handling consumer credit issues as it will most likely: cause case back log, delay the court process, result in costly litigation and carry the expectation that legal representation may be necessary. Without alternative mechanisms for resolving disputes, many consumer disputes will simply go unchallenged and consumers will not be able to be heard on legitimate disputes.<sup>33</sup>

Accessing the state or territory courts is not an effective means of accessing justice for consumers. For example, in disputes concerning home mortgage foreclosure:

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<sup>31</sup> *About VCAT* (2008) VCAT < <http://www.vcat.vic.gov.au/CA256DDB0022825D/page/About+VCAT?OpenDocument&1=10-About+VCAT~&2=~&3=~> > at 10 May 2009.

<sup>32</sup> Nicola Howell, 'Consumer issues in the implementation of a national consumer credit law' (Briefing paper; Ensuring access to justice, QUT School of Law, March 2009) 3.

<sup>33</sup> *Ibid.*

*“It is simply unrealistic to expect a consumer with a legitimate hardship variation claim to also defend and counter-issue on this question in the expensive Supreme Court jurisdiction”<sup>34</sup>.*

This further reiterates the importance of introducing a specialised credit tribunal at a federal level because access to courts has proven to be inefficient in credit related matters.

## **Consequences**

If no steps are taken in order to provide a specialised forum to deal with consumer credit related disputes at a federal level, then ultimately our fundamental right to be heard is jeopardised. Consumers will be reluctant to access justice with the fear of overbearing litigation fees and intimidation of the Federal court system. This will inevitably lead to a reduction in the number of credit related disputes being heard which raises concern, as many cases will go unchallenged. If our right to be heard is not catered for within our legal system, then ultimately the government is not inclined to act on behalf of consumers needs.

Within the eight consumer rights mentioned above, the right to be heard plays a vital role in allowing consumers effective and adequate access to justice at both a state and federal level.

## **Rectifying the issue - Introduction of a Federal Specialised Credit Tribunal**

In order to rectify this concern, the establishment of an effective low cost, informal and flexible forum is fundamental at a federal level. With a guaranteed right to be heard in a National Human Rights Act, the Government would be required to create a new court forum, equivalent to VCAT or the NSW tribunal, to hear consumer credit disputes under the new Commonwealth laws.

## **6. The right to redress**

Every consumer whose rights have been breached under the Charter should have the access to justice to claim a right of redress. Many consumers lack sufficient financial and educational levels to recognise their right to access the legal system and gain redress. The principle established in Article 10 of the *Universal Declaration of Human Rights* states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.”<sup>35</sup>

Further, the right of entitlement to a fair and public hearing is mirrored in several other international and domestic charters, including:

- *Canadian Charter of Rights and Freedoms*, s11 (d).

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<sup>34</sup> *Ibid.*, 8.

<sup>35</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art 10.

- *Human Rights Act 2004 (ACT), S21(1)*
- *Charter of Human Rights and Responsibilities Act, s24(1)*

In the most recent review by the UN on Australia's human rights standards by the United Nations Human Rights Committee, it "notes with concern the lack of adequate access to justice for marginalized and disadvantaged groups."<sup>36</sup> This may be interpreted as to include consumers, whereby disadvantaged consumers who are most likely to suffer breaches of their consumer rights are denied the right to a fair and public hearing because their socio-economic status denies them the opportunity.

We believe that establishing a low-cost tribunal, similar to VCAT and other state tribunals, which would have jurisdiction over breaches of consumer rights, would increase access to justice to ordinary Australians, for most of whom redress would mostly seem impossible. Not only would this allow for the so often promised fair and public hearing that so many Australians are in practice denied, it would also help Australia to ensure it fulfils its international obligations by following the recommendation by the United Nations Human Rights Committee's finding that the Australian government "should take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people."<sup>37</sup>

Alternatively, we believe that should a Commonwealth level tribunal be established for hearings of alleged breaches of this legislation, it should be able to hear consumer claims as well. However, should this not be established we believe that state level tribunals, such as the Victorian Civil and Administrative Tribunal or the ACT Civil and Administrative Tribunal, should be granted jurisdiction to hear consumer claims stemming from the charter and to make corresponding orders.

## **7. The right to consumer education**

Consumers should have the right to be aware of basic consumer rights and responsibilities to be able to make informed choices about goods and services. As was raised by many people in attendance at the Human Rights Consultation Community Roundtable in Melbourne on 14 April, 2009, education about people's rights is the key to ensuring a rights culture is established in Australia. This would then ensure that people are aware of their rights and are able to make informed decisions regarding them.

Consumers have a basic right to education in regards to their rights and responsibilities in entering transactions and without proper knowledge and understanding any agreement would be morally unconscionable. The EU has taken note of this important right and has, as

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<sup>36</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights : consideration of reports submitted by States parties in accordance with article 16 of the International Covenant on Economic, Social and Cultural Rights : replies by the Government of Australia to the list of issues (E/C.12/AUS/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Australia (E/C.12/AUS/4)*, 31 March 2009. E/C.12/AUS/Q/4/Add.1. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/49f81fb72.html> [accessed 3 May 2009].

<sup>37</sup> Ibid.

part of the Consumer Affairs Commission, established 'The Europa Diary' to help students between the ages of 15 and 18 learn about their rights and responsibilities. Over 2.8 million copies have been used amongst 18 000 schools throughout the EU.<sup>38</sup> However, in Australia many consumers, adults and children alike, remain ignorant of their rights and have been taken advantage of by various traders. This is especially true of the following cases:

### **Door-to-door sales**

In the state of Victoria there are currently many cases seen at Consumer Action where a consumer's lack of education about their rights has resulted in the signing of unfair contracts, leading to debt, being pursued by creditors and even threats against people and property for repayments. However, should a consumer be educated about their rights and responsibilities in regards to not only door to door sales but in many other situations, then many people would be spared the hardships and the government spared the cost of legal advice for consumers, if only they were educated about their rights. This may have prevented many consumers from entering unfair and inappropriate agreements due to ignorance.

In the state of Victoria the statute regulating the activities of door-to-door sellers is the *Fair Trading Act 1999* (Vic). By providing basic education to consumers about their rights, people would be much more aware of their power to decline offers and even require such sales people as to leave the premises, as many people are afraid and apprehensive of such aggressive sellers that are known to exist.

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### **Case study 8**

A gentleman of a non-English speaking background was pressured by an Optus door-to-door sales representative into signing a 24-month contract for an unnecessary mobile telephone service to get them to leave his front door. Due to the lack of basic consumer education this man paid startling exit fees to terminate his contract, when all that was required to prevent this hard-sell from occurring was a basic knowledge that after suffering one hour of such selling the salesperson was required to gain permission to remain on the premises. However, because this gentleman was unaware of this the sales representative remained to push his product until the victim felt that the only way to rid himself of this salesman was to sign a document presented to him. Unfortunately, this man was unaware of his right to redress in such a situation and unwittingly paid a large fee he should not have to have paid.

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By providing basic education to consumers, this would prevent many people from making very costly mistakes through ignorance, especially in such trying times as these for consumers, especially the disadvantaged in low-income areas targeted by unscrupulous companies.

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<sup>38</sup> *Interested in your rights as a consumer* (2009) Consumer Affairs  
<[http://ec.europa.eu/consumers/citizen/my\\_rights/more\\_en.htm](http://ec.europa.eu/consumers/citizen/my_rights/more_en.htm)> at 27 May 2009.

## Debt collection

Further to the door-to-door case described above, it has become commonplace for consumers to be pressured, bullied and unfairly abused into paying debts that may or may not be legal. Under the *TPA* s60 a corporation shall not use “physical force, undue harassment or coercion” in the recovery of a debt, protecting consumers from debt collection agents who are overly persistent in their attempts to recover a debt. Similarly, s12DJ of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) a person contravenes the section if they use the above force, harassment or coercion in connection with the supply or possible supply of financial services to or by a consumer.

Especially in the current economic climate, which is likely to persist for some time yet, consumers have a right to receive education in relation to their basic rights. In the current climate, the number of people with debts is increasing and increased accounts for debt collection will necessarily follow too. By educating consumers as to their rights and obligations in relation to debt collectors many people would be able to save money and further, to ensure a check is kept on businesses that may operate outside their legal bounds.

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## Case study 9

Consumer Action is currently representing a woman who was being chased aggressively by a debt collector in regards to a debt on-sold by a major bank, after her credit card fell into arrears after losing her job (like so many Australians now) and she had to undertake carer’s duties for her ailing mother. The client says she was “frightened by some of the conduct and felt embarrassed that ACMS would contact her friend.”<sup>39</sup>

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Should a consumer education program have been undertaken by the Commonwealth and State governments to educate consumers, being all people, about their own rights under the law then perhaps such disastrous cases as these may have been avoided. If only the regulations regarding door-to-door sales were publicised to the public then perhaps the gentleman would not have been harassed into signing a document simply to be left in peace, and perhaps this lady should have been made aware of her rights in dealing with her bank when struggling to pay her debt. By preying on consumers’ fears and anxieties for peace and privacy these companies have gained unfair profit and damaged people’s lives.

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<sup>39</sup> Carolyn Bond (Co-CEO Consumer Action Law Centre) 2009, *Debt Collector ACMS sued for harassment and coercion*, Media Release, Consumer Action Law Centre, Melbourne, 13 March 2009.

We suggest that consumer education should be included in the school curriculum, where teachers would be educating students on real-life consumer practices, and where each student would be guaranteed to use this information on a regular basis.

By ensuring the right to consumer education was included in a national charter for human rights as a consumer provision then, as a compliment to the right to be informed, the government would be required to provide adequate consumer education to all Australians. The Government might find it would also be able to save more money in the end by empowering consumers with knowledge rather than dealing with the fall-out once the damage has been done.

## **8. The right to a healthy environment**

The right of consumers to live and work in a healthy environment, unthreatened for current and future generations, must also be addressed as a human right to be included in a national charter. There are currently various acts monitoring the state of the environment to the health of a consumers' environment, including Environmental Protection and Occupational Workplace and Safety legislation. These pieces of legislation provide only basic coverage and must wait for the government to take further steps to ensure the creation of a sustainable environment.

Given the current state of the environment, it has become imperative for nations to act in the face of overwhelming evidence that unless governments act now to reduce carbon emissions and each nation's global footprint, it would be selfish to consider one's own interests and ignore those of future generations.

*The United Nation's Guidelines for Consumer Protection* devised in 1999 argues "informed consumers have an essential role in promoting consumption that is environmentally, economically and socially sustainable." This is repeated in the Stern Review on the Environment, published in 2006, which recognises that action is required now to prevent unrepairable damage and to take minimal steps would "slash global economic growth by up to 20 per cent."<sup>40</sup> While the Rudd government has taken steps towards protecting the environment, such as ratifying the Kyoto protocol, consumers as citizens have a right to a healthy environment. Businesses and public authorities must be held accountable to consumers for the manner in which their production further affects people's lives. Industrialisation has achieved massive feats and developments since the nineteenth century however, this has come at the cost of our natural resources, which we have come to realise are finite and we must find sustainable alternatives.

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<sup>40</sup> Sarah Clarke, *\$9 trillion the cost of global warming* (2006) *The World Today* at 1 May 2009.

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## Case study 10

One such example of consumers not being adequately protected and their environment being drastically degraded was illustrated last year in Victoria where residents of 250 homes on the Brookland Greens estate in Cranbourne were evacuated due to dangerous levels of methane gas in their homes.

The consumers of Brookland Greens, the home and business owners, who purchased their homes in good faith that their environment would be healthy and safe, were evacuated beginning on 11 September 2008. CFA members discovered readings of methane concentrations of up to 60 to 65 per cent, where concentrations of only five to 15 per cent would be sufficient to be regarded as explosive.<sup>41</sup> This breach in safety occurred after VCAT allowed for an extension of the planned estate to build within the 200 metre buffer zone between it and the Stevenson Road tip in Casey, Victoria, although the tip was still releasing approximately 1300 cubic metres of methane gas into the atmosphere per hour, despite the efforts of the CFA and Casey Council to contain it for two years. Families have so far received assistance relocating, however, further stress has been placed on families' immediate health if small children or pregnant women are impacted.<sup>42</sup> Should there have been a provision in a national charter at the time requiring the tribunal members to consider the right to a healthy environment as added weight during the application process, perhaps the buffer zone would have remained and such an emergency not have occurred.

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Further, sustainable consumption requires consumers to take responsibility for their waste. In such a capacity, we support decisions to implement schemes that require shoppers to pay for plastic bags. For example, the pay for plastic scheme at Target stores is beginning on 1 June 2009. Target stores have announced the impending removal of all plastic bags from their stores, allowing consumers to purchase a compostable bag for a cost of 10 cents each or a reusable enviro-bag at a cost of one or two dollars depending on the size.<sup>43</sup> Such a move by a national corporation demonstrates the recognition by business that people must be responsible for their environment, where plastic bags currently make up 20,700 tonnes of landfill every year, approximately 3.76 billion bags, in Australia alone.<sup>44</sup> This startling amount is devastation to our environment and requires massive amounts of crude oil in their production, as well as other dangers to wildlife and the clogging of Australia's waterways. We believe that despite this cost to the consumer, there is a responsibility to be

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<sup>41</sup> Chris Mallon and Peter Strachan, 'Angry Brookland Green residents demand answers of methane fears,' *The Cranbourne Leader*, 16 September 2008.

<sup>42</sup> *Ibid.*

<sup>43</sup> Target, *Target to cease offering plastic shopping bags nationally from 1 June 2009*, Media Release, Coles Group Ltd, 1 May 2009.

<sup>44</sup> *Say NO to plastic bags fact sheet*, Clean Up Australia <<http://www.cleanuptheworld.org/PDF/au/plastic-bags---revised-household-version.pdf>> at 1 May 2009.

borne by all and this recognises that consumers play a role in maintaining their healthy environment.

The right to a healthy environment is one that must be upheld by private business, government and consumers alike. The state of the environment is such that everyone must act now in the interests of sustainable consumption or the consequences for future generations will be terrible. We believe that such a right enumerated in a national human rights charter would ensure that all are held to this standard and can be taken into bearing for all future legislation and decisions regarding the health and safety of the environment.

### **A single general consumer right to be protected**

Although we believe that the eight consumer rights should be incorporated in a national human rights instrument, as an alternative if the Consultative Committee decided that to include all eight consumer rights would not be practicable then we believe that a single general principle that embodies consumer rights should be included. While we believe that all eight rights as discussed above are ideal and each very important, they may impose responsibilities the government would be unwilling to bear at such a time. In that case, we believe that a single general provision should be included. This is because we feel that consumer rights, as being the rights of all people, are very important. Although we currently have various forms of consumer protection legislation, to include a consumer protection provision in a national charter would reassure people that in our contemporary society all their interests were protected. As applying to all people from all aspects of Australian life, everyone is a consumer at some stage and as such, it is imperative that we are respected and protected from less than adequate standards.

While the inclusion of consumer rights within the context of human rights may not be widely considered, they have in fact been included in important international rights documents:

- *The Charter of Fundamental Rights of the European Union* (2000/C 364/01) is one example of a key model for a single provision to protect consumer rights. Ch IV, Art 38 states

“Union policies shall ensure a high level of consumer protection.”

However, there is further weight to suggest it would be useful to select a single provision for a consumer right to be included in a national charter. The EU provision has not only survived the constant revision of European Community legislation, it has actually been upgraded in *The Amsterdam Treaty* where the impetus was strengthened from “contribute to” to, now, a “ensure a high level of” of protection.

This provision was inspired from Article 153 of the *Treaty Establishing the European Community*, which states,

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.
3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:
  - (a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;
  - (b) measures which support, supplement and monitor the policy pursued by the Member States.
4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).
5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

This important treaty established the internal market of the European Union and brought together the three pillars forming the community. The inclusion of a consumer protection article in such a document highlights what an important and basic requirement it is, as without consumers there is no market.

Such is the same for the Australian economy because without a consumer base there is essentially no economy. To include a general consumer protection provision in our national charter would ensure the importance of consumers and the reliance the economy has on them, whilst the generalist nature would ensure consumer rights are not limited in a way that proscriptive and named rights may be found to effect.

A single provision such as that in Article 38 of the *European Charter of Fundamental Rights*, drawn from Article 153 of the *Treaty Establishing the European Community*, has formed the basis for a much wider network of consumer legislation from the European Parliament and European Council. However, this has not proven unmanageable for the European Court of Justice or member-states own jurisdictions in hearing consumer matters.

Over 490 million consumers in Europe have come to represent nearly half of all European Union Gross Domestic Product.<sup>45</sup> With such a large-scale economy and such a massive consumer base a 'high level' of protection is certainly required for these people. By

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<sup>45</sup> Meglena Kuneva, *Consumers are the key players in the European community* (2009) Consumer Affairs <[http://ec.europa.eu/consumers/index\\_en.htm](http://ec.europa.eu/consumers/index_en.htm)> at 27 May 2009.

establishing an EU-wide Consumer Affairs Commission the EU government has recognised the necessities of their electorate and has moved proactively to support them. From such a provision not limited in its generality, this ten word provision has allowed for the successful development and implementation of consumer law in the EU.

We believe that a national human rights charter would carry the same connotations of enshrined values and basic building blocks of society and the economy, and as such, a general provision, non-limiting, deserves to be included to represent all the consumers of Australia, if no specific consumer rights are included.

### **What happens when rights are breached?**

Given that human rights are an integral aspect of our lives, we believe that consumers should be able to readily access legal avenues to remedy a breach of their human rights.

#### **a) Courts**

Firstly, we recognise that the judiciary can play an active role by working together with the separate arms of government. The judiciary is responsible for interpreting legislative provisions in a way that is consistent with the purpose of the relevant Act and the intentions of parliament. Whilst access to the courts is a right for all consumers, in reality only a minority of consumers may ever exercise this right. Those who are finally able to exercise their right are those with greater resources, high value claims or significant pro bono support. We support court remedies but also acknowledge that a traditional means of access to justice can be a limitation to many.

#### **b) Tribunals**

To overcome this limitation, we believe that access to Alternative Dispute Resolution (ADR) models is fundamental to the operation of a Human Rights Act at a federal level. ADR has proven to be a cheaper, informal and inexpensive form of redress and is particularly useful where the court system is inaccessible due to its formalities and also substantial costs. For example, a tribunal jurisdiction could be created to hear federal human rights matters. The main reason is that commencing litigation is often costly and time consuming in the Federal Court system and as a result many cases will go unchallenged. For example, in Victoria the Anti-Discrimination Division of VCAT hears and determines complaints referred to it by the Victorian Equal Opportunity and Human Rights Commission under the *Equal Opportunity Act 1995* (Vic) and also the *Racial and Religious Tolerance Act 2001* (Vic). We also recognise that appeals are fundamental on questions of law, which would be directed to the Courts.

## Conclusion

As proposed above we hold that Australia should enact a national human rights charter, enshrining not only the first and second-generation rights but should also incorporate those rights of consumers. While we recognise there is already much legislation regarding consumer rights in Australia, we believe that consumers' rights as an important fundamental part of our rights framework and the development of our nation, should be included in a national charter. Legislation currently enacted may only go so far but by including the eight consumer rights, or in the alternative a single general principle, this would ensure no gaps in protecting consumer rights and also cover consumers' responsibilities. To fail to include consumer rights in a national charter would also be a failure to recognise that the Australian economy is founded and reliant upon consumers. By enshrining their rights in a document with such profound connotations, the Government would distinguish their importance and ensure all consumers were protected under a broader base.

Overall, we believe the Commonwealth should enact a National Human Rights Act and ensure consumer rights are included in such an important document.

Should you have any queries regarding this submission, please do not hesitate to contact Nicole Brooks, Margarita Ntostas or Ilksen Yokus, through contacting Nicole Rich at Consumer Action on 03 9670 5088.

Yours sincerely

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**On Placement at Consumer Action Law Centre**