



AN ADVERTISING INDUSTRY PERSPECTIVE
on
AN AUSTRALIAN CONSUMER LAW
FAIR MARKETS / CONFIDENT CONSUMERS
CONSULTATION PAPER

A submission to
SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury

This submission carries the endorsement of AMI on behalf of its 7,000 members



**AUSTRALIAN
MARKETING
INSTITUTE**

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Submitted by: Scott McClellan
Chief Executive Officer
Australian Association of National Advertisers

Overview:

As the peak industry body representing Australia's major advertisers and their industry partners in the \$30 Billion advertising & marketing communications sector, the Australian Association of National Advertisers welcomes the concept of a national standard of consumer law.

In this provision of a brief advertising industry perspective on the consultation paper *An Australian Consumer Law: Fair Markets - Confident Consumers*, AANA restates its 80-year-long commitment to promoting free and fair competition in the Australian marketplace, believing this to be in the best interests of consumers as well as responsible advertisers.

Further, AANA endorses the stated view of Assistant Treasurer and Minister for Competition Policy & Consumer Affairs, the Hon Chris Bowen MP that consumers can only benefit from a standardisation of laws and consistent national approaches to consumer protection.

Having demonstrated its commitment to consumer protection through the successful establishment of an effective advertising industry self-regulatory system, AANA believes that 'prevailing community standards'—as incorporated in its self-regulatory Codes—should be a central tenet of a standardised consumer law in regard to advertising and its enforcement across all States and Territories of Australia.

Background:

Formed in 1928, the Australian Association of National Advertisers has been the peak body of the Australian advertising industry for the past 80 years.

Over that period, AANA has promoted and protected the interests of the Australian advertiser community, and its membership has grown to include media, agencies and other service providers, making it a thoroughly representative industry association.

Among its many milestones, AANA is responsible for the establishment of the advertising industry self-regulation system now managed by the Advertising Standards Bureau in Canberra, and administered through the Advertising Standards Board and Advertising Claims Board.

Internationally recognised for its leadership in the setting and maintaining of advertising standards, AANA is represented on the Board and Executive Committee of the Brussels-based World Federation of Advertisers, where it contributes to discussion on digital developments in European Community and United States forums.

AANA believes the advertising industry self-regulation system should be recognised in Australia's current moves towards a standardised framework of consumer protection.

Comments:

While primarily concerned with the potential effects of legislation and regulation on Australia's \$30 billion advertising, marketing & media industry, as an advocate of responsible business practice, AANA takes a broader view of economic and legislative events and trends, and in response to particular references in the consultative paper *An Australian Consumer Law: Fair Markets - Confident Consumers*, offers the following observations and comments from an advertising industry perspective.

Productivity Commission Recommendations:

- 1 Australian governments should implement a new national consumer law, based on the consumer provisions in the *Trade Practices Act 1974*. The new law could be augmented in areas where the TPA does not provide adequate protection in particular generic issues and incorporate certain provisions from the state and territory Fair Trading Acts, where it is generally agreed that the TPA is not adequate.

AANA supports implementation of a new national consumer law based on the *Trade Practices Act 1974*, but believes further consultation with industry and consumer representatives should precede augmentation "*in areas where the TPA does not provide adequate protection in particular generic issues and incorporate certain provisions from the state and territory Fair Trading Acts (FTAs) where it is generally agreed that the TPA is not adequate.*"

While welcoming a standardisation of consumer law across all States and Territories, AANA believes the initiative would benefit from greater acknowledgement of the role industry self-regulation can and does play in consumer protection.

- 2 The new law should apply to all consumer transactions, including financial services, with the Australian Securities and Investments Commission (ASIC) retaining its role as the primary regulator for financial services.

AANA supports the view that a new national consumer law should apply to all consumer transactions, including financial services, but believes its implementation would be improved and associated costs reduced by distinct separation from the Australian Securities & Investment Commission, rather than allowing duplication or overlapping of responsibilities and/or powers.

- 3 Unnecessary or divergent sector specific laws should be identified with a view to repealing or harmonising them across jurisdictions where possible.

AANA supports this recommendation and would be a willing participant in a review process.

- 4 A provision should be incorporated into the new law that addresses unfair contract terms. The PC's preferred approach was that the provision would relate only to standard form contracts, exclude up-front prices from consideration and require all circumstances of the

contract to be considered. A term would be unfair when it causes significant imbalance in the parties' rights and obligations and would, if exercised, result in material detriment to consumers.

AANA supports the Productivity Commission's stated approach.

- 5 The Responsibility for enforcing the consumer product safety provisions of the new law in all jurisdictions should be transferred to the Australian Government and undertaken by the Australian Competition and Consumer Commission (ACCC).

AANA supports this recommendation on the basis of a complete transfer of responsibilities as referenced.

- 6 The remainder of the new law should be jointly enforced by the ACCC and state and territory consumer regulators. Individual States and Territories should have the option of referring their enforcement powers for all of the new law to the Australian Government with enforcement undertaken by the ACCC.

AANA would prefer a declared division of responsibilities or total transfer of such responsibility to the ACCC at the point of implementation of the new law, believing an ad hoc approach would add considerably to compliance expense ultimately counting to the cost rather than benefit of consumers.

- 7 New enforcement powers and remedies, including civil pecuniary penalties, disqualification orders, substantiation notices, infringement notices, public warning ('naming and shaming') powers and redress for non-parties.

AANA is generally supportive of this recommendation but believes such new enforcement powers should be determined and declared before promulgation of the new law.

- 8 The new enforcement arrangements should be independently reviewed, with explicit consideration of the costs and benefits given to the case of moving towards a single national regulator model. A single national consumer regulator should be considered if the review finds evidence of differing enforcement practices or divergence of jurisdictional regulation.

AANA endorses this recommendation.

Additional Observations:

Within the Chapter of the Consultation Paper on why Australia needs a new national consumer law, the Productivity Commission makes the point that: *“The trend towards national consumer markets means that consumers will, despite purchasing the same products from the same businesses, receive different levels of protection. Furthermore, the burden imposed by divergent and complex regulatory requirements will grow for businesses, and by acting now to reduce complexity and divergence, these reforms will make a significant contribution to the development of a seamless national economy.”*

AANA supports the Productivity Commission’s view that consumers should enjoy a uniform level of protection across the country and that, properly managed; the provision of such uniformity might help offset the ever-increasing burden on business of divergent and complex regulatory requirements.

The Chapter also notes that: *“While there is a high degree of commonality in Australia’s various generic consumer protections at the national and state levels, there remains variation in consumer protection legislation, policy approaches, enforcement intensity and practices and redress options between all Australian jurisdictions. COAG’s agreed reforms are designed to overcome many of these problems. “*

AANA makes the point that overcoming problems inherent in variations in consumer protection legislation, policy approaches, enforcement intensity and practices, together with redress options, will best be achieved by a total transfer of consumer protection to a single entity with national responsibility.

The Chapter also notes that: *“Business compliance costs are increased by the need for suppliers to comply with multiple regulatory regimes, and to operate in even slightly divergent regulatory regimes. Even where there are no actual differences in regulation, suppliers can still incur legal costs to ascertain their obligations across jurisdictions. These costs are passed onto consumers in the form of higher prices. “*

AANA supports uniformity of regulation in respect of advertiser access to and advertising content of advertising and marketing media.

Currently such national uniformity is provided only through the self-regulatory system devised by AANA and now managed through the Canberra-based Advertising Standards Bureau and Advertising Standards Board.

Given the cross-border reach of standards applying to all manner of media, these ASB operations and their reliance on national codes promulgated by the Australian Association of National Advertisers could be advantageously referenced within the new consumer law, as is already Australian Communications & Media Authority [ACMA] practice with the Children’s Television Standards

While the Chapter recognises that *“consumers face rapidly changing markets, increased reliance on technology and a faster pace of innovation, all of which pose a significant challenge in ensuring*

regulation can keep pace,” AANA believes it also deserves recognition that rapid change in market conditions applies equally to business sectors serving those consumers.

It follows that business is equally impacted by the noted fact that: *“Any potential for complexity and duplication in policy making serves to impede the ability of regulation to keep pace with change.”* It further follows that *“COAG’s agreement to ... streamline policy making procedures, and overcome issues that may have served to delay effective responses to issues in the past”* should take account of measures allowing business to more effectively and efficiently service the interests of their consumers.

Accepting that, *“given the dual national/jurisdictional dimension of consumer regulation in Australia, the law will be legislated by the Australian Parliament, and each State and Territory will apply the nationally agreed law,”* AANA urges that this should be required under the inter-Governmental Agreement to occur simultaneously, or otherwise to provide exemptions from penalty from existing State regulation intended to be overtaken by the new consumer law to avoid an unnecessary impost on the business sector that could create short-term costs flowing through to consumers reducing the perceived if not real value of long-term benefits.

In relation to the stated intent of the new consumer law, AANA notes this as:

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

This directly aligns with AANA’s longstanding objective of ‘free and fair competition’ and its promotion of consumer confidence, and is thus applauded.

AANA believes the stated intent might benefit from a reference to the consumer benefits of product choice as well as price competition in the Australian market in order that this consideration is carried through all aspects of development of the new consumer law.

Operational Objectives

In further relation to the support of the overarching objective through six operational objectives for consumer policy, AANA makes the observations indicated overleaf:

- 1 to ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition;

Recognition of the role of advertising and marketing communications in providing information necessary to informed choice is requested.

- 2 to ensure that goods and services are safe and fit for the purposes for which they were sold;

Recognition that consumers carry responsibility for their employment of goods and services in accordance with advice that may be incorporated in advertising and marketing communications materials.

3 to prevent practices that are unfair;

Recognition that fairness is a principle (supported by AANA) requiring definition in relation to advertising and marketing practices.

4 to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;

Recognition that advertising and marketing communication is generally targeted at the broader community and that while AANA Codes might be a suitable vehicle for prohibiting the targeting of consumers who are most vulnerable or at the greatest disadvantage, the principle is subjective and deserving of definition at least by example.

5 to provide accessible and timely redress where consumer detriment has occurred;

Recognition that redress where detriment might be reasonable determined to have occurred would need to be appropriate to the circumstances, and that commercial as well as consumer interests should be considered in the determination of what is reasonable in relation to accessibility to and timely redress of any claimed detriment suffered by consumer or commercial interests.

6 To promote proportionate, risk based enforcement.

Recognition that in addition to being proportionate, enforcement should be consistent across the country.

AANA notes the stated SCACA objective “...to enhance the welfare of Australians through the promotion of competition and fair trading, and the empowerment and protection of consumers,” and requests recognition of the requirement for a policy framework, beyond the proposed consumer law, that promotes and supports competition and fair trading, accepting that this is essential to the empowerment and protection of consumers.

In relation to the proposed timeline, AANA supports the timetable as listed, but again requests that national application of the new law should be conditional on the enactment by all States of enabling legislation.

Summary:

Representing the rights and responsibilities of responsible Australian advertisers since 1928, and having designed and delivered a world-class system of advertising industry self-regulation to the advantage of Australian consumers and the economic and social benefit of the broader community,

the Australian Association of National Advertisers is generally supportive of a new national consumer law, but has some concerns.

As referenced in the body of this submission, the concerns relate mainly to the manner of development and implementation of the principles and processes outlined in the consultation paper *An Australian Consumer Law: Fair Markets - Confident Consumers*.

With a declared interest in the promotion and protection of consumer confidence in business generally and advertising and marketing communication particularly, AANA believes a national standard of consumer law, with a single point of reference, to be the option most beneficial to all contributors to Australia's national economy.

Acknowledging circumstances requiring some regulatory involvement of State Governments and their bureaucracies, AANA urges consistency across all jurisdictions, together with uniformity of legislative drafting and promulgation ahead of practical implementation of the national consumer law.

AANA believes the advertising industry self-regulation system should be recognised in Australia's current moves towards a standardised framework of consumer protection.

AANA supports the Productivity Commission's view that consumers should enjoy a uniform level of protection across the country and that, properly managed; the provision of such uniformity might help offset the ever-increasing burden on business of divergent and complex regulatory requirements.

Finally, in addition to its willingness to speak to points made within this response to the consultation paper *An Australian Consumer Law: Fair Markets - Confident Consumers*, AANA offers its advertising and marketing experience and expertise, together with the associated resources of its Secretariat, to the further formal and informal consultation indicated to be undertaken in relation to the draft provisions of the Australian Consumer Law.

Scott McClellan
Chief Executive Officer,
Australian Association of National Advertisers

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