

“Annexure B to ACMA Submission”

Excerpt from: *The consumer protection provisions of Part V of the Trade Practices Act 1974: Keeping Australia up to date*, A Report by the Consumer Action Law Centre, May 2008

5.6 Enforcement and redress mechanisms

In section 4.3.3 the enforcement and remedies provisions of Part VI of the Act were outlined. This noted that the overall model of the Act's enforcement regime was a mix of public and private remedies. This strength of this model is its flexibility and lack of reliance on just one group - consumers, businesses or the government -to enforce the consumer protection provisions of the Act.

However, while the Act's overall enforcement and remedies framework appears appropriate, there have been calls to improve specific matters to encourage more effective action by consumer protection enforcement agencies and/or more effective collective or representative consumer action.

The enforcement and remedies provisions do not themselves provide for substantive consumer protections and so they are not the focus of this report. Nevertheless, they are integral to the effectiveness (or otherwise) of the substantive provisions found in Part V (and Part IVA) of the Act. This report therefore concludes with some comments about the enforcement and consumer redress provisions in Part VI of the Act in light of international experience.

5.6.1 Enforcement provisions

At the most basic level, effective enforcement powers are important to ensure that the substantive consumer protection provisions are complied with and contraventions addressed. A recent report for the OECD on best practices in consumer protection enforcement regimes noted the inverse relationship between effective enforcement mechanisms and the level of government intrusion required in business activity - effective enforcement was a greater deterrent to non-compliance, reducing the need for more widespread inspection and government monitoring.⁵²⁰

The Act gives the government and particularly the ACCC various civil and criminal enforcement options to enforce the consumer protection

⁵²⁰ OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 9, citing the UK Hampton Report - see text at n537-538 below.

provisions of the Act. Also, anyone can seek an injunction against harmful conduct.⁵²¹ However, the current enforcement provisions do not always give the regulator adequate and effective powers to deter or stop conduct in breach of Part V, or Part IVA, of the Act. For example, as noted in section 4.3.3, the ACCC cannot seek monetary penalties or orders banning a person from acting as a director of a corporation as part of civil enforcement proceedings for a breach of the consumer protection provisions of the Act.

In its recent submission to the Productivity Commission inquiry into Australia's consumer policy framework, the ACCC suggested several improvements to the enforcement provisions of the Act:⁵²²

- Availability of civil pecuniary (monetary) penalties for breaches of certain consumer protection provisions, together with the availability of orders banning or disqualifying individuals from managing a corporation in appropriate circumstances;
- Ability to continue to use the statutory, compulsory information-gathering powers under section 155 of the Act until substantive proceedings are issued, even if proceedings for an interim injunction have been initiated (rather than a cease and desist power); and
- Power to issue substantiation notices – these are notices to a trader requiring them to provide proof to support a claim or representation made.

The OECD report into effective enforcement regimes lends some support to the ACCC's contentions. For example, it found that civil pecuniary penalties can be cost-effective in enhancing compliance with consumer protection laws.⁵²³ It also provided some support for banning orders, finding while imprisonment may be justified in the worst cases, a court order depriving the defendant of their ability to trade would be more cost-effective. Also, traders are likely to believe that a court would be more willing to impose this than a prison term.⁵²⁴

Comparing UK enforcement powers is also useful. In the UK, the *Enterprise Act 2002* plays a central role in that jurisdiction's competition and consumer protection framework. Part 8 of the *Enterprise Act* provides for a general enforcement procedure for consumer protection

⁵²¹ See text at n**Error! Bookmark not defined.-Error! Bookmark not defined.**
above.

⁵²² ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 91-117.

⁵²³ OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 51-52.

⁵²⁴ As above at 55-56.

laws, but this statute does not contain substantive consumer protection provisions itself – these are found in various acts and regulations, such as the Unfair Terms in Consumer Contracts Regulations 1999 discussed in section 5.4.1 or the Price Marking Order 2004 discussed in section 5.5.1. Part 8 operates by applying to ‘domestic infringements’ and ‘community infringements’, which are acts or omissions that ‘harm the collective interests of consumers’ and are a contravention of, respectively, UK domestic consumer protection laws (listed in an order made under the statute) or UK laws implementing EU directives.⁵²⁵

Part 8 of the *Enterprise Act* implements the EU Directive on injunctions for the protection of consumers' interests⁵²⁶ into UK law. The recitals to the injunctions directive show that it does not intend to affect the ability of individual consumers to take action for harm or loss caused by a breach of consumer protection laws, but provides a general mechanism to protect collective consumer interests by stopping unlawful practices.⁵²⁷ The directive gives the courts power to issue injunctions to traders to stop infringements, on the application of government consumer protection authorities.⁵²⁸ Member states may also choose to give other organisations that protect the collective interests of consumers the ability to apply for such injunctions.⁵²⁹

Part 8 of the UK *Enterprise Act* thus provides that enforcers under the statute may apply to the court for an ‘enforcement order’.⁵³⁰ An enforcement order, essentially an injunction, directs a trader to stop infringing conduct and refrain from engaging in it again.⁵³¹ There is also provision made for interim enforcement orders where it is ‘expedient that the conduct is prohibited or prevented...immediately’.⁵³² Enforcers and the court can both accept an undertaking from a trader to stop and not repeat the infringing conduct rather than apply for or make an enforcement order.⁵³³

⁵²⁵ *Enterprise Act 2002* (UK) ss.211-12. See also OFT, *Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act*, June 2003.

⁵²⁶ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

⁵²⁷ As above at recitals (2) and (3).

⁵²⁸ As above at arts.2, 3(a).

⁵²⁹ As above at art.3(b).

⁵³⁰ Part 8 replaced the previous “stop now” orders regime in the UK under the Stop Now

Orders (EC Directive) Regulations 2001, thus enforcement orders are still sometimes referred to casually as “stop now” orders.

⁵³¹ *Enterprise Act* s.217.

⁵³² S. 218.

⁵³³ Ss.217(9), 218(10), 219.

Also in accordance with the EU directive, Part 8 provides that the OFT and local Trading Standards Services are 'general enforcers' able to apply for enforcement orders for all types of infringements.⁵³⁴ In addition, the Secretary of State may by order 'designated enforcers' who may apply for enforcement orders in respect of all or specific infringements as specified in the designation order.⁵³⁵ Various industry specific regulators have been designated, as has the UK Consumers' Association.

The enforcement orders procedure under the UK *Enterprise Act* does not, therefore, provide the OFT or other regulators with administrative powers to order traders to stop certain conduct. Instead, enforcement orders are similar to the undertakings and interim or permanent injunctions regime under the Australian Act, in that the regulator may accept undertakings or apply to the court, quickly if necessary, to stop harmful conduct in breach of consumer protection laws. In fact, the injunctions powers under section 80 of the Act are broader than the enforcement order provisions in the *Enterprise Act*, as discussed shortly below.

However, the UK government has already committed to implementing the Hampton Report in full.⁵³⁶ This considered the scope for reducing administrative burdens in the UK by promoting more efficient approaches to regulatory inspection and enforcement.⁵³⁷ The Hampton Report noted the need for regulatory penalties to take the economic value of a breach into consideration as otherwise businesses may face no effective deterrent for illegal activity. It recommended applying tougher and more consistent penalties where these are deserved.⁵³⁸

Further, the OECD report into effective enforcement regimes noted that there was no financial penalty for enforcement orders in the UK

⁵³⁴ Ss.213(1), 215(2). The Department of Enterprise, Trade and Investment in Northern Ireland is also a general enforcer.

⁵³⁵ Ss.213(2)-(4),(6)-(7), 215(3).

⁵³⁶ DTI, *A Fair Deal For All: Extending Competitive Markets: Empowered Consumers, Successful Business*, June 2005, at 21.

⁵³⁷ Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, March 2005.

⁵³⁸ As above at 6, 8, 38, 115-16. Interestingly, the Hampton Report did not specifically mention the issue of civil pecuniary penalties, although it supported effective financial penalties in court proceedings generally. However, it did specifically recommend that regulators also be able to impose administrative penalties, being penalties that do not first require court intervention, with provision for businesses to be able to appeal to the court: at 40-41, 116. The UK government introduced a Regulatory Enforcement and Sanctions Bill into parliament on 8 November 2007, which includes provisions in Part 3 to allow Ministers to confer on regulators the power to impose civil sanctions, including administrative monetary penalties.

(although they can be enforced by fine or imprisonment for contempt of court if not obeyed). The report found that more powers would add to the deterrent effect, particularly if the court was able to impose financial penalties in civil proceedings.⁵³⁹

This suggests that similar moves might be useful in the Australian context. Indeed, the MCCA has been considering introducing civil pecuniary penalties into the Act⁵⁴⁰. Its discussion paper on the issue suggested it would support this.⁵⁴¹ The CAV director, Dr David Cousins, recently re-stated that a civil penalty regime would give a more comprehensive set of remedies against unfair conduct.⁵⁴²

Canadian legislation is also interesting in this context. As discussed in section 5.3.4, Canada does not have market-wide national consumer protection laws at the national level. However, its *Competition Act* includes provisions against unfair trading that would be considered consumer protection provisions in other jurisdictions such as Australia.⁵⁴³ Some of these establish criminal offences, but Part VII.1 of the *Competition Act* also provides for 'administrative remedies' for several types of 'deceptive marketing practices', including false or misleading representations, bait and switch selling, and selling products above the advertised price.

These administrative remedies are equal to civil remedies in the Australian context, as they are imposed by the court⁵⁴⁴ after application by the regulator, rather than directly by the regulator or another administrative body. The administrative (civil) orders open to the court if a person is engaging in or has engaged in reviewable conduct are similar to those available under the Australian Act, such as an order not to engage in the conduct or similar conduct (a cease and desist order)

⁵³⁹ OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 44-45. It also noted that the Australian "probation order" power could add an attractive and effective option, allowing for orders that traders establish compliance and training programs.

⁵⁴⁰ See the MCCA website at www.consumer.gov.au/html/mcca_projects.htm.

⁵⁴¹ MCCA, *Civil penalties for Australia's consumer protection provisions: A discussion paper*, September 2005, at 13-17. The discussion paper also suggested more tentative support for banning orders, perhaps only when the court has already ordered another type of penalty: at 18.

⁵⁴² Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 29.

⁵⁴³ *Competition Act* (R.S., 1985, c. C-34). See text at **nError! Bookmark not defined.-Error! Bookmark not defined.** above.

⁵⁴⁴ The 'court' may be the Competition Tribunal, or the Federal Court or a provincial superior court, depending on where the application is brought: *Competition Act* s.74.09.

or an order for corrective advertising.⁵⁴⁵ However, the court may also order a person to pay 'an administrative monetary penalty, in such manner as the court may specify'.⁵⁴⁶

In other words, the equivalent of a civil pecuniary penalty is available in Canada for certain types of conduct that in Australia would constitute a consumer protection law contravention.⁵⁴⁷ Administrative monetary penalties have been successfully obtained in Canadian cases involving misleading advertising regarding the savings to be made in a sale and false and misleading claims about material features of a product.⁵⁴⁸

While civil pecuniary penalties are not available under the Australian Act, its injunctions powers are broader than the current enforcement order provisions in the UK *Enterprise Act* (or the cease and desist order available under the Canadian *Competition Act*). Section 80 of the Act allows for the court to grant an injunction 'in such terms as the Court determines to be appropriate'.⁵⁴⁹ The provisions state that injunctions to restrain conduct, for example, may be granted whether or not it appears that the person intends to engage again or to continue to engage in such conduct, whether or not the person has previously engaged in such conduct and whether or not there is an imminent danger of substantial damage to any person if they engage in such conduct.⁵⁵⁰

The Full Federal Court recently confirmed the broad scope of the injunctions powers in section 80 in the *Foster v ACCC* appeal.⁵⁵¹ The

⁵⁴⁵ *Competition Act* at s.74.1(1)(a),(b).

⁵⁴⁶ As above at s.74.1(1)(c). The maximum penalties are \$50,000 for an individual (\$100,000 for each subsequent order) and \$100,000 for a corporation (\$200,000 for each subsequent order).

⁵⁴⁷ In November 2004 the Canadian government introduced a bill to amend the *Competition Act* that would have increased the maximum administrative monetary penalties for deceptive marketing practices to \$750,000 for the first order and \$1 million for each subsequent order for an individual, and \$10 million for the first order and \$15 million for each subsequent order for corporations, however the bill did not pass: Bill C-19: An Act To Amend The Competition Act And To Make Consequential Amendments To Other Acts, introduced November 2, 2004. See also discussion on the opposition to the administrative monetary penalty provisions in Bill C-19 in Amanda Tait, *The Use of Administrative Monetary Penalties in Consumer Protection*, The Public Interest Advocacy Centre (Canada), May 2007.

⁵⁴⁸ See Amanda Tait, *The Use of Administrative Monetary Penalties in Consumer Protection*, The Public Interest Advocacy Centre (Canada), May 2007, at 25-26; Competition Bureau, *Sears deceptive tire marketing case*, media release, Ottawa, April 1, 2005, available at: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00180e.html; Competition Bureau, *Misleading gas-saving device ruling upheld*, media release, Ottawa, May 26, 2004, available at: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00266e.html.

⁵⁴⁹ *Trade Practices Act 1974* s.80(1).

⁵⁵⁰ S.80(4); see also s.80(5).

⁵⁵¹ *Foster v Australian Competition and Consumer Commission* [2006] FCAFC 21.

court held that once it has been established that the court may grant an injunction under section 80, the court has ‘the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly’.⁵⁵² The court upheld an injunction made at first instance that was, in its terms, very similar to a banning order, as it essentially restrained the defendant from being involved in any similar business for five years. The court said:

If the Court considers that a complete prohibition, whether permanently or for a specified period, on a respondent’s engaging in a particular field of commercial activity or industry is required to protect the public from conduct of the kind which constituted the contravention, s 80 is wide enough to support such a prohibition as a matter of power.⁵⁵³

This shows that the courts may agree with the ACCC in considering banning orders in the worst consumer protection cases.⁵⁵⁴ Without legislative power, it is not possible to impose a civil financial penalty unless the law is amended,. By contrast, civil pecuniary penalties and disqualification orders are available through the enforcement of the restrictive trade practices provisions in Part IV of the Act.⁵⁵⁵

In the US, broad injunction powers are also available. The FTC has two principal means of enforcing consumer protection laws such as the general prohibition on unfair or deceptive acts or practices. These are by cease and desist order through an administrative process, or by injunction through the courts.⁵⁵⁶ It prefers injunction for most consumer protection cases is by injunction, as it quicker and less cumbersome.⁵⁵⁷

⁵⁵² As above at §30, citing with approval Lockhart J in *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 256.

⁵⁵³ *Foster v Australian Competition and Consumer Commission* [2006] FCAFC 21 at §35.

⁵⁵⁴ The ACCC pointed out in its submission that while current section 80 does allow injunctions similar to banning orders, it is a much more complex matter to obtain them than if a clear power to issue a banning order were present: ACCC, *Submission to the Productivity Commission inquiry into Australia’s consumer policy framework*, June 2007, at 94-95.

⁵⁵⁵ *Trade Practices Act 1974* ss.76, 86E.

⁵⁵⁶ See FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrw.shtm.

⁵⁵⁷ See, eg, Timothy J. Muris, ‘Economics and Consumer Protection’, (1991-1992) 60 *Antitrust Law Journal* 103, at 108-110; FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrw.shtm; DTI, *Comparative Report on Consumer Policy Regimes: Country Reports - Australia, Canada, Denmark, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, European Union & Summary Table*, October 2003, at 179.

The injunctions power was introduced into the FTC Act in 1973 and authorises the FTC to seek preliminary or permanent injunctions from the court.⁵⁵⁸ This power has been interpreted broadly by the US courts and the FTC can obtain injunctions not only restraining specified conduct but also imposing other equitable ancillary relief to remedy fully any past violations, including requiring the payment of restitution to consumers or rescinding consumer contracts.⁵⁵⁹ However, it does not permit civil monetary penalties.

Taken together, these US provisions are therefore similar to the enforcement provisions in the Australian Act. The Act gives the court a broad injunctions power under section 80, together with powers under section 87 to make other orders to compensate for, or prevent, loss or damage to a party to the proceedings, including orders to rescind contracts.⁵⁶⁰ However, that the FTC can seek remedial orders on behalf of consumers without first obtaining their consent in writing, an important difference discussed in section 5.6.2 below.

The FTC's other principal means of enforcement is the administrative procedure set out in section 5 of the FTC Act, which allows it to make cease and desist orders. Under this procedure the FTC may issue a complaint setting forth its charges that a person is using an unfair or deceptive act or practice. The complaint is effectively a "show cause" notice asking why a cease and desist order should not be made against them for the alleged violation in the complaint.⁵⁶¹ The complaint must give at least 30 days' notice of a hearing to determine the matter.⁵⁶²

The matter may be resolved by consent order, but if the complaint is contested the matter is heard in a trial-like administrative hearing for the FTC.⁵⁶³ The administrative law judge decides whether to issue a cease and desist order or to dismiss the case. This decision may be appealed to the Full FTC. A final order of the Full FTC may then be appealed to

⁵⁵⁸ *Federal Trade Commission Act* s.13(b); 15 U.S.C. s.53(b).

⁵⁵⁹ FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrw.shtm; see, eg, *F.T.C. v. H. N. Singer, Inc.* 668 F.2d 1107 (9th Cir. 1982); *F.T.C. v. U.S. Oil & Gas Corp.* 748 F.2d 1431 (11th Cir. 1984); see also Timothy J. Muris, 'Economics and Consumer Protection', (1991-1992) 60 *Antitrust Law Journal* 103, at 108-110.

⁵⁶⁰ See text at **Error! Bookmark not defined.** above.12 00

⁵⁶¹ *Federal Trade Commission Act* s.5(b); 15 U.S.C. s.45(b).

⁵⁶² As above.

⁵⁶³ FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrw.shtm.

the courts.⁵⁶⁴ A final cease and desist order comes into force 60 days after it is made by the FTC, unless stayed pending the outcome of an appeal. Violations of final orders give rise to liability to pay civil penalties, which may be pursued through a further civil action in the courts.⁵⁶⁵

While the US regulator does, therefore, have cease and desist powers, the process for making a cease and desist order requires a proper hearing of the matter in question first - a similar process to applying for a court order - and is also subject to appeal to the courts. Further, the time for both the notice of an initial hearing and before a final order comes into force makes the process fairly useless in cases where the FTC wishes to act quickly to stop harmful conduct. However, this process does recognise a place, albeit limited, for civil penalties to be available for consumer protection violations.

The rationale for cease and desist powers is to allow the regulator to act quickly or immediately to limit or prevent harm to consumers by a breach of consumer protection laws.⁵⁶⁶ Administrative cease and desist powers, as opposed to court-imposed orders or injunctions, are therefore seen as quicker to impose, although the US model demonstrates that this is not necessarily so. By comparison, administrative powers to order a person to cease and desist from conduct are regarded as having a greater risk of error or injustice without court oversight.⁵⁶⁷

The Act does not give the ACCC administrative cease and desist powers. In the Australian context, however, both NSW and Victoria have consumer protection laws that provide cease and desist orders. These orders require a trader to stop carrying on business, as well as to cease and desist from specific conduct, so are effectively a banning order.

⁵⁶⁴ *Federal Trade Commission Act* s.5(b)-(k); 15 U.S.C. s.45(b)-(k).

⁵⁶⁵ *Federal Trade Commission Act* s.5(l); 15 U.S.C. s.45(l); see also s.45(m). The civil penalty is up to \$11,000 for each violation - if the violation is through a continuing neglect or failure to obey a final order, each day that this continues is a separate violation attracting a civil penalty. This provision also states that if such an action is brought to enforce a cease and desist order, the court may also grant mandatory injunctions and other ancillary equitable relief to assist in enforcement of the order.

⁵⁶⁶ See also OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 52.

⁵⁶⁷ See, eg, Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Report, January 2003 ("Dawson review"), at 101.

However, even these powers are limited. In NSW the regulator may issue an administrative “show cause” notice as to why a trader should be permitted to continue carrying on a business if the regulator is satisfied that the trader has breached consumer protection laws more than once. However, the regulator must then apply to the court to obtain a final order actually prohibiting the trader from carrying on a business and may only do so if it is of the opinion that the person is likely to engage again, or to continue to engage, in consumer law breaches.⁵⁶⁸ The Victorian laws provide a truer administrative power, as the regulator may issue a “show cause” notice if it has reasonable grounds to believe that the trader appears to have breached consumer protection laws. If there is no response, this notice makes it an offence for the trader to continue carrying on business. However, before it may issue the notice the regulator must also have reasonable grounds to believe that it is likely the trader will continue to engage in that conduct and that there is a danger that a person may suffer harm, loss or damage as a result of that conduct unless action is taken urgently, providing strict limits on the power’s use.⁵⁶⁹

In its submission to the consumer policy inquiry, the ACCC considered that its current ability to seek interim injunctions was working appropriately and allowed quick action when necessary. The ACCC did not consider that it required administrative cease and desist powers.⁵⁷⁰ This seems to accord with experience in other jurisdictions, particularly in the US.

However, it argued for an amendment to allow it to continue to use its section 155 information-gathering powers until substantive proceedings are issued, even if proceedings for an interim injunction have been initiated. This proposed amendment relates to the consideration of cease and desist powers.

However, initiating court action for an interim injunction may trigger the end of its section 155 compulsory information-gathering powers. This is so even if the ACCC is still investigating a matter, and has taken the early court action to obtain an interim injunction to prevent ongoing or further potential harm while investigations continue.⁵⁷¹ This dilemma

⁵⁶⁸ *Fair Trading Act 1987* (NSW) ss.66A, 66B.

⁵⁶⁹ *Fair Trading Act 1999* (Vic) s.106B. Under s.106B(6) the trader may apply to VCAT for a review of the decision to issue the notice.

⁵⁷⁰ ACCC, *Submission to the Productivity Commission inquiry into Australia’s consumer policy framework*, June 2007, at 105-07.

⁵⁷¹ Attempting to use the section 155 power to obtain information from a party after the ACCC had commenced court proceedings against that party was held to constitute contempt of court in *Re: Brambles Holdings Limited And: Trade Practices Commission and Ronald Moore Bannerman* (1980) 44 FLR 182. However, this issue has not been conclusively determined: see *Pioneer Concrete (Vic) Pty Ltd v Trade*

either deters taking early action to prevent harm, or undermines the ability to pursue successful action seeking more permanent remedies. Thus, while the ACCC agrees that its section 155 information-gathering powers should cease once substantive proceedings in a matter have been issued and information exchange is properly regulated by the court, it wants these powers to continue until that time, even if it initiates interim proceedings.

If the rationale underlying both provisions is accepted it follows that the second should not undermine the first. An amendment to allow a limited extension to section 155 to allow its use after interim proceedings have been, but before substantive proceedings are, issued would prevent further undermining. The ACCC's argument therefore appears correct.

The ACCC's other argument was to amend the Act to give it substantiation powers. Its submission gives a good outline of substantiation powers both in other Australian jurisdictions and in the US, UK and Canada. However, it is noted that some form of this power is widely available in these other jurisdictions.⁵⁷²

The ACCC prefers having the power to require substantiation of claims as an investigatory tool, to be contrasted with the US approach that considers it an unfair practice under the FTC Act if advertisers are unable to provide reasonable substantiation for claims. Despite the ACCC's preference, introducing a general prohibition on unfair trading conduct into the Act, as recommended in section 5.3, would potentially address this issue as has occurred in the US.

As a final matter, the ACCC in its submission did not discuss the issue of other interested parties taking enforcement action for breaches of the consumer protection provisions of the Act.

The EU injunctions directive specifically recognises that it can be useful to give organisations with an interest in consumer protection, other than government regulators, with enforcement powers.⁵⁷³ This is no doubt influenced by the fact that some EU member states have a consumer protection model that involves little government intervention and relies

Practices Commission (1982) 152 CLR 460 at 467-8 per Gibbs CJ, 475 per Murphy J, 475 per Brennan J; see also *Re: Kotan Holdings Pty Ltd and Big Rock Pty Ltd and Colin Saul Rockman And: Trade Practices Commission* (1991) 30 FCR 511 at 515-16, 521.

⁵⁷² ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 108-115.

⁵⁷³ See text at n526-529 above.

instead on private actions by consumers or other businesses.⁵⁷⁴ Indeed, in their national laws transposing the EU injunctions directive, several member states have chosen to give enforcement rights mainly to non-government bodies rather than government regulators.⁵⁷⁵ However, even in the UK the Consumers' Association has become a 'designated enforcer' under the *Enterprise Act*, able to apply for an enforcement order in respect of all types of infringements.⁵⁷⁶

The OECD report into effective enforcement regimes also noted that whether consumers, competitor traders or other third parties may contribute to public law enforcement in a country varied depending on that country's legal culture. However, in terms of an overall approach to the issue, the report considered that giving third party enforcement rights could be a cost-effective way of increasing the deterrence value of consumer protection laws, as it action was more likely to be taken against a trader.⁵⁷⁷

Even so, enforcement action by third parties is unlikely to provide a major source of enforcement activity. This is due to the costs and risks of court action, particularly for public-interest organisations with limited funds. The UK DTI comparative study of consumer policy regimes, for example, noted that:

...it is clear that there are some possible substitutes in terms of who undertakes enforcement but these tended to be of a limited nature. Provision of funding to consumer groups to take legal action, rather than the state becoming directly involved, generally resulted in only marginal involvement by such bodies as they were wary of the potential costs to themselves of launching litigation.⁵⁷⁸

In Australia, section 80 of the Act already allows anyone, including consumers and public interest organisations, to seek an interim or permanent order from the court against a trader engaging in conduct in breach of the consumer protection provisions of the Act.⁵⁷⁹ However,

⁵⁷⁴ Such as Germany, Italy and the Netherlands: see **nError! Bookmark not defined.** above; DTI, *Comparative Report on Consumer Policy Regimes*, October 2003.

⁵⁷⁵ See EC, *Commission communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Article 2 of this Directive*, 2006/C39/02, 16 February 2006.

⁵⁷⁶ The Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005, Order No. 917, came into force 22 April 2005.

⁵⁷⁷ OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 57-58.

⁵⁷⁸ DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 18.

⁵⁷⁹ See text at **nError! Bookmark not defined.-Error! Bookmark not defined.** above.

experience in third party enforcement has been limited, partly due to costs. While actions for injunctions sought by business competitors have fared slightly better, at least in terms of interim injunctions,⁵⁸⁰ this report is aware of only five cases brought by public interest applicants under section 80 for injunctions for breaches of consumer protection provisions of the Act. Without commenting on the substantive merits of these cases, the outcomes were as follows:

- *Phelps v Western Mining Corporation Ltd*:⁵⁸¹ the applicant, concerned about uranium mining in Australia, sought injunctions against members of the Australian Uranium Producers Forum for alleged misleading and deceptive advertisements published on the subject of uranium mining, nuclear power, and other energy sources. While in the reported case the applicant successfully established standing to bring the action under section 80, the applicant later dropped the action due to lack of funds.⁵⁸²
- *Glorie v WA Chip & Pulp Co Pty Ltd*:⁵⁸³ the court held that the statements complained about were not misleading or deceptive.
- *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*:⁵⁸⁴ following several complaints about a misleading statement made in tobacco advertising, the TPC accepted an undertaking from the Tobacco Institute to publish a corrective advertisement in return for no further action. However, the applicant wanted undertakings as to future advertisements, and when not forthcoming initiated action for injunctions against the Tobacco Institute restraining future breaches of the Act. Following lengthy proceedings, the applicant successfully obtained declarations, however, the court declined to make the injunctions, holding that they were too difficult to frame.
- *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd*:⁵⁸⁵ the applicant was an association incorporated especially for the proceedings, whose members were persons involved in organisations concerned about cigarette smoking and its effect on

⁵⁸⁰ See, eg, *Commercial Bank of Australia Ltd v Insurance Brokers Association of Australia* (1977) 16 ALR 161; *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* (1981) 37 ALR 391; *Michael Edgley International Pty Ltd v Ashton's Nominees Pty Ltd* (1979) 26 ALR 419.

⁵⁸¹ *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183.

⁵⁸² See Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, 46, at 57.

⁵⁸³ *Glorie v WA Chip & Pulp Co Pty Ltd* (1981) 39 ALR 67.

⁵⁸⁴ *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 81 ALR 701; (1988) 84 ALR 337; (1991) 98 ALR 670.

⁵⁸⁵ *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004.

public health. The proceedings were framed as a class action, with the applicant bringing the action on behalf of smokers and public health organisations. The applicant alleged that the respondent tobacco companies promoted the sale of cigarettes while remaining silent about, concealing or making false statements about their addictive properties and the health problems linked to smoking and had thus engaged in misleading and deceptive, and unconscionable, conduct under the Act. The applicant sought declarations and injunctions, and compensation orders under section 87. The Federal Court ordered that the applicant provide security for costs in the sum of \$300,000, and the application was dismissed when the applicant was unable to do so.⁵⁸⁶

- *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*.⁵⁸⁷ the applicant sought declarations and a mandatory injunction compelling the publication of corrective advertising against Macquarie, which managed two investment trusts, one of which included as an asset a toll road project in Sydney. Macquarie had published a prospectus inviting the public to buy units in the trusts with a statement about the likelihood of traffic volume increasing in the future, alleged to be misleading by the applicant. The High Court confirmed that the applicant could bring the application, even though it had no personal interest in the matter. However, the application was eventually dismissed as the Federal Court ordered that the applicant provide security for costs in an amount over \$200,000, which the applicant was unable to do.

While the extent of third party enforcement actions will probably only ever be limited,⁵⁸⁸ it still has an important role to play which may be undermined by these costs difficulties. The OECD report into effective enforcement regimes noted that third party enforcement rights:

⁵⁸⁶ See ACCC, *Response to Senate Motion 1031 (24 September 2001): Tobacco*, April 2002, at 23.

⁵⁸⁷ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616; [2000] FCA 918; [2000] FCA 1140; [2001] FCA 1603.

⁵⁸⁸ In terms of concerns about third party enforcement rights leading to an undesirable flood of litigation, the costs constraints are probably a sufficient answer, but see also Justice Deane's comments in *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183 (at 189): 'The argument that [section 80] would... "open the floodgates of litigation" strikes me as irrelevant and somewhat unreal... Unreal, in that the argument not only assumes the existence of a shoal of officious busybodies agitatedly waiting, behind "the floodgates", for the opportunity to institute costly litigation in which they have no legitimate interest but treats as novel and revolutionary an approach to the enforcement of laws which has long been established in the ordinary administration of the criminal law.'

...can also – and this may not be a trivial consideration - provide a (minor) constraint on corruption.⁵⁸⁹

Corruption in this sense refers to problems of industry-capture or lack of appetite by the regulator to act, rather than overt inducements by improper means such as bribery. Nevertheless, it is a real concern and remains one reason why an overall enforcement and redress model with a mix of public and private remedies may be preferred.⁵⁹⁰ For similar reasons, a model including the option of enforcement action taken by bodies other than the government regulator may give an important and appropriate check against possible regulator inactivity. However, to be effective, the problems around costs, particularly for public interest actions, need to be addressed.⁵⁹¹

A inquiry into civil justice by the Victorian Law Reform Commission is considering, amongst other matters, ways to address the barriers to class and public interest litigation caused by the large expense involved in bringing such actions, the risk of an adverse costs order and the difficulties in meeting security for costs requirements. It has proposed that Victoria establish a new Justice Fund to act to pay for worthy civil claims.⁵⁹² While the outcome of this inquiry remains to be seen, a similar inquiry into such issues under the Act would be timely.

Recommendation 8 – Introduce a civil penalty and banning order regime for consumer protection contraventions

Introduce a civil penalty and banning order regime into the Act for contraventions of the consumer protection provisions.

The civil penalty regime should provide for civil pecuniary penalties and disqualification orders in certain circumstances, as are currently available for breaches of Part IV of the Act.

⁵⁸⁹ OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 57-58.

⁵⁹⁰ See text and notes at **Error! Bookmark not defined.-Error! Bookmark not defined.** above.

⁵⁹¹ In the Canadian province of Alberta, consumers and consumer organisations may also take action seeking declarations or injunctions against a supplier who has engaged in an unfair practice, but the provisions explicitly provide that the court may order that security for costs be furnished: Alberta *Fair Trading Act* (R.S.A., 2000, c. F-2) s.17.

⁵⁹² Victorian Law Reform Commission, *Civil Justice Enquiry: Summary of draft civil justice reform proposals as at 28 June 2007: Exposure draft for comment*, June 2007, at 48-54.

Recommendation 9 – Amend the ACCC’s section 155 information-gathering powers so they can be used after the start of interim proceedings but before the start of substantive proceedings

Amend the Act to clarify the unclear position at case law about the ACCC’s ability to use its section 155 compulsory information-gathering powers in relation to a party once court proceedings have begun against that party.

Allow the ACCC to continue to use its section 155 powers in relation to a party until substantive proceedings in a matter have been begun against that party, even if interim proceedings have been taken against the party.

Recommendation 10 – Conduct an inquiry into means to alleviate costs associated with third party enforcement actions under the Act

Conduct an inquiry into ways to address the obstacles to the commencement and maintenance of enforcement actions under the Act by third parties, particularly class and public interest actions, posed by the expense of court action, the risk of adverse costs orders and the difficulties of meeting security for costs orders.

5.6.2 Consumer redress provisions

The Act provides a mix of public and private remedies for breaches of the consumer protection provisions. While the public enforcement remedies aim to deter, stop and/or punish harmful conduct, the private remedies aim to provide redress to persons, particularly consumers, who have been adversely affected by conduct in contravention of the Act.

The OECD recently adopted a Recommendation on Consumer Dispute Resolution and Redress.⁵⁹³ The OECD recommendation was the result of several years work by the OECD Committee on Consumer Policy on developing a best practice framework for effective consumer dispute resolution and to redress mechanisms that could be applied by all member countries, for both domestic and cross-border transactions. This work included a study of member countries’ different dispute resolutions frameworks.⁵⁹⁴

⁵⁹³ OECD, *OECD Recommendation on Consumer Dispute Resolution and Redress*, 12 July 2007.

⁵⁹⁴ As above at 5.

The recommendation sets out a three-pronged framework for best practice consumer redress, with each of the three categories of measures 'complementary and mutually reinforcing'.⁵⁹⁵ The three categories are:

- Dispute resolution and redress mechanisms for consumers acting individually

These measures should include low cost and easily accessible procedures that do not require legal help, and that provide for the resolution of disputes on an individual basis and for redress where appropriate. Alternative dispute resolution services and simplified court procedures for small claims are given as examples.

- Dispute resolution and redress mechanisms for consumers acting collectively

These measures recognise that individual consumers cannot always pursue the resolution of their individual disputes, but collective dispute resolution and redress procedures may make it more practical and efficient, so will be more feasible.

Examples given include class or representative proceedings (with an individual consumer as lead plaintiff), representative actions by consumer organisations and actions by consumer protection enforcement authorities on behalf of harmed consumers.

- Mechanisms for consumer protection enforcement authorities to obtain or facilitate redress on behalf of consumers.

These measures expand the collective action principle that apply to actions by government enforcement agencies on consumers' behalf. Recommended examples include powers for consumer protection enforcement authorities to seek orders for consumer redress as part of civil or criminal proceedings, and/or to act as representative party in taking action for redress.

Australia compares well with these best practice principles. Its enforcement and redress model, and the Act, together with supporting legislation and other measures, provide all three types of dispute resolution and redress mechanisms. The Act itself provides for individual rights of action for consumers under section 82, while consumers also have access to state-based small claims or consumer courts or tribunals, the class action procedure available under the Federal Court's rules or, in many cases, industry-based alternative

⁵⁹⁵ As above at 9-11.

dispute resolution schemes.⁵⁹⁶ Also, any person, including a consumer organisation, may seek an injunction against harmful conduct⁵⁹⁷ and the ACCC can also seek orders on behalf of consumers if they consent in writing to such proceedings.⁵⁹⁸

However, the OECD recommendation highlights some areas for improvement, particularly with collective redress, as the Act does not contain provisions allowing for collective redress to consumers other than through general class action. First, the Act does not allow the ACCC to seek redress for consumers other than identified, individual consumers who have provided consent to the ACCC's application on their behalf in writing before the application is made.⁵⁹⁹ Secondly, a representative proceeding for consumer redress taken by a consumer or a public interest organisation (as opposed to a class action where they are the lead plaintiff) is not possible.

The OECD recommendation recognises the important role that the regulator can play in obtaining redress for consumers, given the difficulties that individuals can face on their own..⁶⁰⁰ The OECD report into effective enforcement regimes added that while this can be justified on fairness grounds, it can also enhance enforcement outcomes:

...adding a compensation order to a financial penalty or other sanction may serve to enhance compliance, since it can give an adequate value to [the overall penalty], if the other sanction alone cannot achieve this; and at relatively low additional administrative cost, that of ensuring that the consumer is paid the compensation.⁶⁰¹

The ACCC's submission to the Productivity Commission inquiry into Australia's consumer policy framework argued for amendments to the enforcement provisions of the Act, as discussed in section 5.6.1, and also detailed the difficulties it faces in seeking redress for consumers under the current provisions of the Act. The submission compared the Australian situation with powers in the US, Canada and New Zealand.⁶⁰²

⁵⁹⁶ See text at n**Error! Bookmark not defined.-Error! Bookmark not defined.** above.

⁵⁹⁷ But see the discussion at text at n579-592 above.

⁵⁹⁸ See text at n**Error! Bookmark not defined.** above.

⁵⁹⁹ *Trade Practices Act 1974* s.87(1B).

⁶⁰⁰ See, eg, Michael J. Trebilcock, 'Rethinking consumer protection policy', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, 68 at 77-78; DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 18.

⁶⁰¹ OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 54.

⁶⁰² ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 100-104.

The issue is canvassed in some detail in that submission.⁶⁰³ However, the problem arises mainly because, under section 87 of the Act, the court can only make orders for the benefit of parties to the proceedings and the ACCC can only bring proceedings on behalf of consumers (effectively making them “parties”) if they consent in writing beforehand.

This can be compared with the situation in the US. As discussed in section 5.6.1, if the FTC seeks an injunction from the court to restrain unfair or deceptive acts or practices, it may also seek equitable ancillary relief, including redress for consumers (whether named or not).⁶⁰⁴ In Australia, the Full Federal Court has expressly rejected such a construction of the section 80 injunctions power, as section 87 exists and limits the power of the court to make compensatory orders.⁶⁰⁵

The Act needs to be amended to allow the ACCC to seek orders for redress for affected consumers as part of other proceedings taken under the Act, for example under section 80. Such orders should be available without requiring consumers to be parties to the proceeding. Making of orders for consumer redress would of course remain subject to court oversight.

The second issue identified above was the inability of a consumer or a public interest organisation to bring a representative proceeding under the Act for consumer redress. Even if the Act was amended to facilitate representative proceedings like this,, similar constraints in relation to third party enforcement actions are likely to limit the use of such provisions,⁶⁰⁶ in particular, costs concerns would hinder representative proceedings from being initiated and maintained.⁶⁰⁷

Nevertheless, a representative proceedings mechanism would provide an additional means for consumer redress, albeit used perhaps only occasionally. As with third party enforcement actions, this would provide another potential check on regulator inactivity. The UK government also recognised its value in the 2005 UK consumer policy

⁶⁰³ See also the discussion in the Consumer Action Law Centre’s *Submission to the Productivity Commission Inquiry into Australia’s Consumer Policy Framework*, June 2007, at 98.

⁶⁰⁴ See text at n556-559 above; see also Timothy J. Muris, ‘Economics and Consumer Protection’, (1991-1992) 60 *Antitrust Law Journal* 103, n12 at 108 and at 110 for cases in which consumer redress was ordered.

⁶⁰⁵ *Medibank Private Ltd v Cassidy* [2002] FCAFC 290 at §32.

⁶⁰⁶ See text at n577-588 above.

⁶⁰⁷ See also Anthony J. Duggan, ‘Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective’, in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers’ Access to Justice*, Cambridge 2003, 46, at 56-58.

strategy, committing to introducing representative actions for consumers. The UK government stated:

Sometimes going to court is the only way for consumers to get justice, but some consumers may not feel capable of doing so. We intend to introduce representative actions for consumers. We will consult further on how this might be done, in particular to avoid inadvertently creating a compensation culture and to avoid businesses facing spurious claims. We expect that only certain organisations would be allowed to bring a representative action and it might be necessary, for example, for pre-approval to be obtained from a court before proceeding.⁶⁰⁸

Further consultation on implementing representative actions in the UK is now occurring. The UK government prefers representative actions to be brought by designated bodies on behalf of named consumers, as opposed to on behalf of consumers at large.⁶⁰⁹ While representative actions by designated organisations are a different proposition from seeking consumer redress by a government regulator in the course of other enforcement proceedings, the Australian experience with this limitation in section 87 suggests it may undermine the UK initiative to facilitate representative actions.

A contrasting approach is now being considered in Victoria. The Victorian Law Reform Commission's civil justice inquiry is proposing that Victorian courts be given the express power to order *cy pres* remedies, initially in class actions only, but with scope to consider extending the remedy outside the class action context in light of practical experience.⁶¹⁰

Cy pres remedies allow the court to make an order for compensation "as near as possible".⁶¹¹ In other words, if affected individuals and/or individual amounts of loss cannot be practicably identified for the purposes of restitution, the ability to make a *cy pres* order allows the court to order the payment of restitution to compensate as near as possible, for example by requiring payment to a cause that benefits the affected individuals generally. This also ensures that a wrongdoer does not retain the profits from breaking the law merely because it is too

⁶⁰⁸ DTI, *A Fair Deal For All: Extending Competitive Markets: Empowered Consumers, Successful Business*, June 2005, at 18.

⁶⁰⁹ DTI, *Representative Actions in Consumer Protection Legislation: Consultation*, 12 July 2006, at 9-10.

⁶¹⁰ Victorian Law Reform Commission, *Civil Justice Enquiry: Summary of draft civil justice reform proposals as at 28 June 2007: Exposure draft for comment*, June 2007, at 43-47.

⁶¹¹ See also Consumer Action Law Centre, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 100-101.

difficult to identify specifically each and every victim of the wrongful conduct. In other words, the availability of *cy pres* remedies is another cost-effective means of enhancing the deterrence effect of laws.⁶¹²

For example, the Victorian Law Reform Commission's proposed guidelines for the exercise of a *cy pres* remedies power in Victorian class action proceedings are:

(a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage ('unjust enrichment') has accrued to the person or entity contravening the law as a result of such contravention (c) a loss suffered by others is able to be quantified and (d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.⁶¹³

Such a remedy is particularly apposite to the consumer protection context, where it is often difficult to identify specific consumers affected by a trader's breach even though it is clear that the trader has profited from their conduct. Further, the cost of administering the refunds of small amounts to large numbers of consumers often outweighs the benefits being refunded, making individual restitution unfeasible without a way of aggregating the restitution. *Cy pres* would also be an appropriate remedy to accompany any new power for the ACCC to seek orders for consumer redress as part of enforcement proceedings, for cases where it would be impossible to identify specifically affected consumers.

In Canada, a bill introduced in late 2004 to amend the *Competition Act* included proposed amendments to expand the orders available to the court in cases in which a trader contravened the provisions against making representations to the public that are false or misleading in a material respect.⁶¹⁴ The first new order proposed was to allow the court to order the trader to pay an amount in restitution, to be distributed among the consumers who bought the products the subject of the representations, in any manner and on any terms that the court considered appropriate. The second new order would allow the court to make residual *cy pres* orders, empowering it to designate a not-for-profit organisation in Canada that benefited persons affected or likely to be affected by the conduct, or any other person or organisation considered

⁶¹² See Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, 46, at 56.

⁶¹³ Victorian Law Reform Commission, *Civil Justice Enquiry: Summary of draft civil justice reform proposals as at 28 June 2007: Exposure draft for comment*, June 2007, at 43.

⁶¹⁴ *Competition Act* (R.S., 1985, c. C-34) s.74.01(1)(a).

appropriate, to receive unclaimed or undistributed funds from the restitution. The bill did not pass, however, because of controversy over other elements.⁶¹⁵

The precise details of any *cy pres* mechanism to be inserted into the Act would need to be drafted carefully, thus a further inquiry into how such a mechanism could and should operate would be appropriate, similar to the inquiries being made by the Victorian Law Reform Commission. While it is difficult to achieve consumer redress in cases where it is impossible to make refunds to individual consumers, this does not mean this should be abandoned.⁶¹⁶

Recommendation 11 – Enable the ACCC to seek orders for consumer redress as part of other enforcement proceedings under the Act

Amend the Act so the ACCC to seek orders from the court for redress for affected consumers as part of other proceedings taken under the Act, for example under section 80.

Such orders for consumer redress should be available without the need for the consumers to be parties to the proceeding.

Recommendation 12 – Conduct an inquiry into the potential for the introduction of representative action and *cy pres* remedies provisions into the Act

Conduct an inquiry into the potential for improved consumer redress provisions to be inserted into the Act.

The inquiry should consider possible mechanisms to allow for consumer representative actions and to allow the court to make orders for *cy pres* remedies in appropriate cases.

⁶¹⁵ Bill C-19: An Act To Amend The Competition Act And To Make Consequential Amendments To Other Acts, introduced November 2, 2004. See also n547 above.

⁶¹⁶ See Katy Barnett, 'The Uneasy Position of Unjust Enrichment after *Roxborough v Rothmans*', (2002) 23 *Adelaide Law Review* 277, 288.