

## **Consumer Policy Framework - Issues for Discussion**

### *Personal background*

I am a regulatory practice consultant specialising in advising Government and industry on compliance with technical standards, auditing compliance programs and developing guides. I have held senior positions with consumer affairs/fair trading agencies in Australia (SA and NSW), England and Fiji. I am the author of '*Buying and Selling Organic Food*' published by SAI-Global in 2005. Current activities include auditing prices, trade measurement and product safety on behalf of independent supermarkets and representing the Consumers Federation of Australia on a number of Standards Australia committees (including electrical and food products).

*The following comments relate to, and should be read in conjunction with, the Productivity Commission's Consumer Policy Framework Issues Paper.*

### *The rationale for consumer policy*

Consumers today are just as vulnerable as in the 1970's, when many consumer laws (Trade Practices Act (TPA), State fair trading legislation) were originally introduced. Most of the 1970 legislation is still valuable today and many laws have been updated to suit the changing commercial environment.

The main rationale for Government intervention is to ensure that consumers (and small businesses) are not subjected to unfair trading practices and may be confident that products are as described and safe.

Although most consumers are empowered to make rational choices it is accepted they will not always do so. However consumers are continually required to assess a multitude of information and benefit from intervention to ensure that the information is not incorrect or misleading (eg consumers may make a purchase influenced by an attractive display on a fruit and vegetables stall. However their choice may be further influenced by the word 'organic' or 'produce of Australia' which may require intervention to ensure the statements are true).

Well informed consumers may drive outcomes in some areas by selective buying whereas others will be influenced by other factors such as price and convenience.

The Commission's Issues Paper states '..... , businesses have strong commercial incentives to ensure consumers are not adversely effected ... .' This is not always the case eg -

- Telstra has a captive Mums and Dads customer base but experience of some consumers shows the corporation does not always act in their best interests (eg Consumers assert Telstra broadband gives poor value for money and personal experience has highlighted inappropriate sales methods).
- Some superannuation providers are prompt in answering investment enquiries but slow in responding to complaints.
- A supermarket may be the only supplier in a particular locality.
- Consumers may not know they are subject of bad trading practices (eg short weight).

All intervention has a cost but I would argue that the cost of non-intervention is far more damaging to the economy and the ability of ethical businesses to trade fairly. Obviously there is a cost of complying with legislation. However consumers need to be confident that goods or services will be supplied as described and safe to use. Most consumers also seek value for money. For example- they do not want any hidden charges or fees; expect appropriate redress without argument when products fail and require the life of an electrical or mechanical product to be relative to the price paid.

Governments need to be able to quickly deal with trends and plan for future developments (eg a watching brief on overseas developments).

### *Market Trends and developments*

New developments that are likely to have material implications include-

- E-commerce - E-commerce has provided consumers with a greater variety of goods, suppliers and prices. There is a need for regulation similar to the European Directive on distance selling and the need to link with other countries supplying goods to facilitate reciprocal agreements. Some businesses pretend they are private individuals and/or hide behind false identities. Companies providing the facility should be required to take more responsibility for the traders they allow to advertise. There is already a significant role in 'disputed transactions' for financial institutions facilitating payment via credit card.
- Imported goods - Australia has moved from manufacturing goods to importing. Anyone can become an importer and without intervention consumers may be vulnerable to unsafe products and lack of warranty. China will manufacture to the standard set by the Australian importer. It is essential that products entering Australia are adequately policed both prior to entering the market place and prior to sale at retail or wholesale premises.
- Interactive television - the European experience in relation to telephone participation in interactive television quiz and 'select-a-winner' shows where viewers are subjected to greater than advertised telephone charges, failure to advise that winners have already been selected and viewers' inability to contact the television call centre is likely to become an issue in Australia.

It is as important to have clear and unambiguous contracts as standard form contracts. It is also important that sellers inform the consumer of matters that may materially effect their decision to purchase.

### *Disadvantaged and vulnerable consumers*

Government consumer agency call centres provide an important service to all consumers including disadvantaged and vulnerable consumers. In some agencies in the UK the follow-up service (contacting the supplier on behalf of the consumer) is only available to disadvantaged and vulnerable consumers. However an inability to distinguish between those of greater need means assistance is given more broadly. The universal approach, although more expensive, will have a greater success in targeting particular consumers whatever their capability.

Standards for electrical goods presently contain a disclaimer relating to disabled persons and children. There is currently a proposal in Europe to remove this from electrical standards so that designs take into account disabled persons and children. Whereas some electrical goods are clearly inappropriate for children or people with certain disabilities, children today have ready access to, and in many cases, use with parents consent, a number of electrical items including toasters, pop corn machines, computers, battery chargers and electric blankets. The use of the disclaimer has yet to be debated in Australia but is likely to be resisted by industry.

#### *Generic v industry-specific regulation*

There is a need to continue the mix between generic and industry-specific regulation. For example regulations prescribing specific forms relating to the car industry contain elements peculiar to that industry and which are important to the consumer's decision making process.

Part V of TPA and the State fair trading acts have valuable generic provisions which have been, and I suggest by necessity will be, further amended in order to cover new and developing commercial trends.

Part V of TPA and the State fair trading acts provisions are, in the main, principles-based i.e. truth in advertising. I understand a general principles regulation that all goods supplied should be safe is currently being discussed. The EU has a Directive that requires products supplied must be safe including second-hand goods. The Directive also lays down a framework for assessing safety. However there are also a number of specific regulations in relation to particular goods eg toys and electrical heaters. Experience indicates that specific regulations add value to a general principles regulation.

#### *Enforcement and redress issues*

In recent years there has been a reduction in the number of persons employed across Australia who enforce consumer legislation. Unless legislation is enforced standards will drop and ethical traders will be competing in a partial market. Although the ACCC has a very high profile staff numbers are fairly small in relation to the scope of the TPA, lengthy and complex investigations undertaken and to counter the considerable resources that are available to companies not wishing to comply or defending actions.

The decision to take action through the courts in relation to prosecution or injunction may be effected by the cost of such action (eg to date there have been no prosecutions in relation to the term 'organic' partly through the lack of definition but also because of the cost of establishing a case). The decision to appeal against a court verdict will also be effected. Some State /Territory consumer affairs agencies have very small budgets which could influence decisions involving commencing major investigations, prosecution or challenging court decisions.

At State level, apart from NSW, there is very little monitoring in relation to price, trade measurement, product safety and credit. There appears to be insufficient enforcement staff to ensure that consumers and small business are adequately

protected. There are licensing regimes in all States but there is little point of having a licensing system unless it is vigorously enforced.

Each State/Territory currently charges a fee for service in relation to testing weighing instruments. This is unique in relation in the provision of a consumer protection service and appears to detract from the overall enforcement of trade measurement and packaging regulation (eg resources are focused on collecting testing fees instead of checking for short measure and testing packages).

#### *Self and non-regulatory approaches*

Self regulation has a limited effect. To be effective self regulating organisations need to have nearly 100% of their industry as members. In SA the Motor Traders Association has only 40% of eligible members as actual members.

Education campaigns are a valuable tool but have a limited life. They can be effective for highlighting specific issues of consumer detriment.

There are very few industry codes supported by legislation.

Consumer advocacy – apart from some legal aid programs consumer groups do not receive state or Federal funding. The Australian Securities and Investment Commission provide a small grant to the Consumers Federation of Australia (CFA) to produce a newsletter. The Consumer Association of SA previously had a Government grant of \$28,000 which has been withdrawn. This has severely limited their ability to provide consumer advocacy, education or independent policy.

Standards Australia provides funding for CFA representatives on Standards Committees. However I understand Standards Australia which was formerly partially funded by State and Federal Governments has had significant funding withdrawn. Regulators frequently take up technical standards in regulation but, apart from supplying representatives, appear unwilling to contribute. The continued development of standards is essential in terms of consumer protection and, in addition, assists industry competing in local and world markets.

I believe it would be beneficial to consumers to establish a national consumer advocacy scheme independent of, but financially supported by, Government to redress the balance which currently favours industry. There is also a greater need for research into consumer and market behaviour. This could be achieved by consumer groups (adequately funded), independent surveys and feedback from agency enforcement staff. Adequately staffed enforcement agencies are in a very strong position to monitor trading trends and direct resources.

#### *Jurisdictional responsibilities*

State agencies are in the best position to provide consumer advice and take action in relation to redress matters. The enforcement issue is more complex and is skewed by the lack of enforcement officers in some State /Territory agencies. The ACCC appears to focus on high profile cases. This includes a number of important and landmark matters which show recalcitrant companies that action will be taken. However the ACCC does not appear have sufficient staff to conduct adequate routine monitoring or investigate a reasonable level of complaints. The hypothesis that State agencies or

the ACCC and State agencies work together by each taking up different matters based on factors such as type of offence, degree of seriousness and scope of investigation is flawed due to a number of practical factors including unequal resources, differing priorities and lack of specific or formal guidelines.

There is a need for greater cooperation between individual State agencies, and between State agencies and the ACCC in dealing with companies trading across State boundaries including the ability to interview on the others behalf and legally exchange intelligence. There also appears to be a lack of cooperation as to the approach to be taken in administering similar legislation. I support proposals that I understand are currently being discussed with regard to the Commonwealth taking over trade measurement and product safety legislation.

Industry would also benefit from an Australia wide licence for specific trades. Licence criteria is accepted nationally but I understand it is necessary to pay a fee in each state of operation.

New Zealand is less easy to accommodate having a different cultural enforcement base and often different priorities to Australia (eg NZ is currently negotiating with China to have electrical equipment tested for safety in China. The current proposal does not appear to allow for auditing in NZ. Currently a range of electrical products imported or manufactured in Australia are required to obtain a certificate of approval in Australia prior to supply). However NZ is an important trading partner and it is beneficial to commerce and Governments that similar legislation and enforcement is employed.

#### *Gate-keeping and review arrangements*

Measuring the effectiveness and cost of consumer regulation is a difficult area. Each agency can easily measure the cost of its enforcement strategy and put a guesstimate on the cost to industry but has difficulty in establishing meaningful indicators against which to measure the effectiveness of enforcement strategies.

Larger commercial organisations are able to cost measures put in place to comply with specific legislation. However calculating the cost to the community as a whole is problematic. Product safety, electrical regulation and similar may be costed in terms of injuries and death.

There is a need for constant review of legislation to ensure its continued necessity and appropriateness.

#### *Regulatory and oversighting bodies*

Consumer regulators do not have the appropriate resources as already commented upon above.

Enforcement powers vary from State to State and also vary between legislation in some States (eg an enforcement officer may have different powers in relation to the seizure of goods under different Acts administered by the same agency).

The skill of enforcement officers varies between individual States/Territories. A national approach to training enforcement officers has been discussed on several

occasions in the past but has not advanced. The UK has a degree level training scheme which ensures a specific level of enforcement and legislative knowledge and also assists in a uniform approach to enforcement in each jurisdiction.

Enforcement officers should have input into policy making but where officers are both enforces and policy makers experience indicates one or the other suffers.

Enforcement and advocacy should be clearly separated within an agency so as to avoid any perceived or real coercion to resolve issues.

The separation of administration of competition policy from consumer policy is an interesting idea and should be investigated. It has been suggested in the past that the ACCC focuses on competition policy to the detriment of its consumer responsibilities.

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