Introduction

Consumer policy has a long history. With evidence from ancient Rome that warranties were implied against latent defects, the appropriate framework for consumer protection and the policy that supports it, is not simply a topic of recent thinking. However, the current regime for consumer protection largely finds its genesis in the rise of the Industrial Revolution, increasing disposable consumer income post WWII, and the escalating production of goods and services for which defects were undiscoverable even by the most prudent of shoppers. However, it should not be forgotten that the original focus of what we now know as consumer law was not directed towards the consumer, but the merchant. It was not confined to consumer transactions, and extended to any contract involving the sale of chattels. This allowed the obligations of the merchant to be limited, or even excluded. In response the common law sought to ameliorate the advantages given the commercial operator. This saw courts develop principles dealing with misrepresentation, duress, undue influence, and unconscionability. But this was not enough. A flood of legislative reforms to assist consumers began post Second World War, and reached its zenith with the introduction of the Trade Practices Act 1974. State based reforms to assist have since followed. This has seen the introduction of a prohibition against deceptive and misleading conduct, statutory extensions to common law unconscionability, offences for a range of unfair practices, the implication of implied terms into consumer sales, strict liability for defective products, and greater remedial flexibility than that provided by the common law. Underlying much of this reform lay three fundamental points:

- A marked contrast between the bargaining position of vendor and purchaser;
- Information asymmetry; and
- An imbalance in the available resources for enforcement between the two parties.

Despite this extensive legislative scheme, or perhaps because of its complexity and ad hoc transmutation, consumer law has failed to adapt to many situations within the
consumer policy framework. Consumer law seems to have responded by establishing
processes which should support consumers in the role as purchaser and which should
improve the quality of the outcomes (e.g. improved disclosure should lead to better
decision making), but which in many cases doesn’t seem to have improved the consumers
decision making (i.e. Consumers are consumer or overwhelmed by disclosure, or choice).
Thus, even though the policy prescript may indicate that once the information is provided,
caveat emptor should prevail; empirical evidence may illustrate that adding more
information may worsen consumer outcomes. This failure has been brought about, or at
least exacerbated by the introduction of electronic commerce, the use of online auctions,
the shrouding of products (where many costs are disguised from the initial price – e.g.
premium services on mobile phones), changing technology and the increase in the range
of goods and services available. A further factor which has impacted is the recognition that
the traditional economic welfare paradigms that arguably served a goods-based consumer
model is less correctly predictive of consumer behaviour in the service oriented nature of
many modern consumables (e.g. gym memberships and Pay TV). This has seen
behavioural economics, and other aspects of industrial organisation theory move in and
challenge the traditional view of the consumer freely choosing to maximise their individual
welfare.

However at its heart, a consumer problem can simply be stated. What has caused the bad
bargain and led to the expectation of the consumer not being met? How can that matching
of consumer and producer expectations be more appropriately attained? Consumer law,
with its basis in the economic foundations of contract law, is a largely efficient process.
There is no doubt that the court should intercede where there are clear policy grounds –
such as duress or misrepresentation, but beyond this, freedom of contract should see an
outcome that maximises both consumer and producer satisfaction. If it is not efficient,
then the economic question is one of causality – why has the transaction not met this
standard. Today, however, the mass production of complex consumerables, the globalised
nature of this transacting, political priorities and Federal/State differences potentially lead to
a greater number of bad bargains. If this is correct, (and this is one reason why a national
publicly funded body is needed – to determine if it is correct) when and how is reform to
occur? In effect, when does the government intervene directly into the marketplace, or
when should its intervention be simply about empowering the consumer. In this context,
consider the following ten basic consumer principles put forward by the European Union,
(with the italicised points suggesting some improvements to our current regime (some of these fine tuning, others more substantive (see Issues Paper, 16)):

- Buy what you want, where you want;
- If it doesn’t work, send it back;
- High safety standards for food and other consumer goods;
- Know what you are eating;
- Contracts should be fair to consumers;
- Sometimes consumers can change their minds;
- Making it easier to compare prices;
- Consumer should not be misled;
- Protection while you are on holiday;
- Effective redress for cross-border disputes [and I would add here - access to justice issues].
Empowerment

Supply a competitive marketplace

Consumer empowered if onus on seller to prove that goods and services comply with these obligations when item has been purchased within 6/12 months. At present consumer must show that item is not of merchantable quality or fit for purpose.

Legislate to include a general provision that only safe goods be put into the marketplace, (obviously a matter previously rejected by the Productivity Commission). This would also give protection to those consumers vulnerable or disadvantaged.

Food labelling

National Unfair Contract legislation with this empowering the consumer and consumer organisations to challenge one-sided bargains. Operation of this will also improve overall market conduct.

Intervention

Part IV TPA Competition Policy Reform Legislation

Imply non-excludable terms such as merchantable quality and fitness for purpose (eg. S68 TPA).

Product Safety legislation

Improved labelling, e.g. GMO requirements; health claims.

Part 2B Fair Trading Act (Vic); European Union directive; Japanese reforms, NSW Standing Committee on Law and Justice, Report No. 32, ‘Unfair terms in Consumer Contracts’.

Figure 1

<table>
<thead>
<tr>
<th>Change of Mind</th>
<th>Compare Prices</th>
<th>Don't Mislead</th>
<th>Holidays</th>
<th>Cross – Border/Access</th>
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<tr>
<td>Empowerment</td>
<td>Exercise cooling off periods where available.</td>
<td>e.g. The introduction of comparison interest rates in credit legislation empowered the consumer.</td>
<td>Mandate default coverage required in certain scenarios advertised (e.g. exit fees from financial products) don't match the reality (e.g. quality</td>
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The Issues Paper poses the question. Is the Current Consumer Framework fundamentally sound? It is suggested that this can’t be answered unless the more seminal question is resolved – how do we as a society know when a consumer problem exists? Once this is identified, then is it possible to articulate a model from which the most appropriate regulatory response can be identified. Assisting these shaping questions is a detailed analysis by the UK Office of Fair Trading, which sought to identify a series of empirical indicators that would provide evidence (from the top-down) of particular sectors that represent significant consumer concerns. In undertaking this work, a number of information sources were accessed. These could be grouped as follows: industry information,
corporate information, external industry reports and private research organisation information (such as AC Nielsen). Regulatory information was also available (this including comprehensive analysis and reporting of consumer complaints). Thirty-two empirical indicators were identified, with it being possible for these to be clustered into nine categories:

- Barriers to entry;
- Productivity;
- Concentration;
- Profitability;
- Prices;
- Consumer complaints;
- Innovation;
- Switching Costs; and
- Others.

These factors provide a starting point for intervention, and when accompanied with a market-by-market analysis, and the input of extensive data (with consumer complaints (direct and indirect – e.g. industry ombudsman; consumer advocacy agencies\(^22\)) providing a rich source of evidence of how the participants are behaving), markets for investigation can be identified. From this, the methodology for investigation can then be chosen. As noted in the OECD report on Demand-Side Economics for Consumer Policy,\(^23\) “[t]he critical question at the centre of this discussion is what information and what analytical tools and methodologies should we focus on in order to strengthen our ability to take considered policy decisions which ensure that consumer interests are at the heart of competition and consumer policy decision making.”

**Having decided intervention is required**

Once a consumer problem is identified, how is it possible to decide what regulatory response is required. The following model\(^24\) seeks to assist in that process:

1. First, identify the relevant market and see if there are any competition law reasons as to why the consumer problem is not being corrected. It may simply be the case that the structure of the market can be corrected to redress consumer concerns. Examples of where this occurred are telecommunications and banking. Deregulation brought about a
greater range of services at a lower cost. However, deregulation can create its own consumer concerns, (i.e. supply into non-profitable regions)). Sylvan outlines this competition, consumer interface in more detail, with this link highlighting how improving competition outcomes may well exacerbate consumer outcomes. Therefore, in any response to a monopolistic, oligopolistic market, care needs to be taken to ensure that deregulation will not simply result in worse consumer outcomes.

Second, are there any factors that would impinge upon the consumer maximising her or his own welfare. The consumer may not be able to make an effective choice because disclosure is inadequate, or the industry standards lack strength. A response to this may well see greater levels of disclosure, the revision of standard form contracts (for which competition has failed to deliver competitive outcomes), or the imposition of industry codes of conduct (e.g. real estate agents). These measures simply seek to ensure that the economic paradigm is met – i.e. that the consumer is maximising their satisfaction. However, in considering this, behavioural economics may tell us that the consumer is not the rational agent so beloved of welfare economics and that he or she will not always maximise their own satisfaction. In doing this, he or she will be boundedly rational and undertake a limited number of searches prior to purchase. Consumers will also routinely exhibit a number of biases, such as imperfect self control, and inadequate assessment of risk when purchasing. They will also demonstrate an inability to understand and fully comprehend what is being disclosed; disclosure is not enough, it must be ‘good disclosure’. Behavioural economics therefore needs to be taken into account. In addition to this, a government may seek to impose consumer measures based on paternalism (e.g. controls on the sale of guns), or to redistribute wealth (e.g. price controls on pharmaceuticals, price controls on local telephone calls). In other words, the values relevant to consumer decision making, and the known behaviour of consumers must be articulated to demonstrate why the traditional economic model has been rejected or modified in the name of consumer protection. Nevertheless, the starting point should always be that consumers do maximise their own welfare – it is only when this is appropriately challenged that the basis of challenge must be understood.

Third, having established the market and the values and consumer behaviour sought to be protected in the name of consumer protection, what regulatory measure can deliver the benefits at the lowest cost. In identifying this it is necessary to work with the institutions in that industry. That is, will self-regulation work, should there be enforceable codes of conduct, should the product be banned, or will a warning serve to protect consumer autonomy but allow low cost disclosure.
Specific Matters

The difficulty in establishing the framework cannot be underestimated, but within this framework there are a number of specific matters which could be addressed and which would then feed into the building this framework. In effect, I see these changes as assisting the development of the model, and not necessarily flowing from its inception.

Establishment of a National Consumer Council

There is no doubt that consumer law has not attracted the same level of analysis as compared with the rich jurisprudence of competition law, a point noted by Louise Sylvan. This research vacuum is simply the result of any significant private incentive to do it. For this reason, the public purse must fill the void, and in doing so, bring together the resources, input and guidance from the disparate consumer centres that presently exist around Australia. This central facility is the key to effective consumer policy. A body such as this will better harmonise and coordinate consumer policy across all jurisdictions. (see Issues Paper, 7). For example at the moment, there is no consensus on what is a consumer transaction, whether the implied consumer warranties should exist at the State level, It can also work to identify the two key components presently missing in consumer policy – how do we know when something is wrong, and what model can be used to work through the problems.

Introduction of national unfair contracts legislation

This has been recently canvassed by the New South Wales Standing Committee on Law and Justice. The conclusion of that Committee was to enact unfair contracts legislation similar to that already in place in Victoria. That is a recommendation that I strongly endorse. Applying this issue to the model previously outlined identifies why interventionist legislation is necessary.

First, despite very competitive industries (e.g. telecommunications, package holidays, gym memberships, online auctions), consumers are still bound to agreements where there appears to be little competition on the terms of the agreement, despite there being fierce competition on price. In effect, the competitive marketplace has failed to deliver genuine competition on the terms of any contractual agreement. Competition law reforms will not fix the consumer problem.

Second, mandating some form of disclosure is unlikely to assist the consumer in these instances. For example with online purchases, the evidence of behavioural economics
would be that the ‘box’ is simply checked indicating an understanding of the terms and conditions, without them being read. It would be a rare occasion that these would be studied in depth, the consumer recognising that he or she would probably not understand the terms and conditions, and second, they are offered on a take it or leave it basis. The consumer has little interest, particularly given the size of most consumer transactions to become aware of the fine print – by contrast the seller has an economic incentive to maximise its position through the standard form contract that it offers to a large number of people. Resources are misallocated as either the consumer is not getting what they want, or there is economic surplus passing from the consumers to the producers. Welfare economics or distributive reasons support intervention.

Third, the least cost regulatory measure is to allow contracts to be challenged by a regulator (such as in Victoria), with this quickly working to achieve a more efficient balance in the contractual provisions. Alternative options such as prohibiting standard form contracts is inherently inefficient, as is requiring negotiation on all terms. Furthermore, industry specific contractual provisions have a limited focus. By contrast, the initial evidence from Victoria replicates what has happened in Europe. Standard form contracts will be quickly rewritten to reflect the reasonable expectations of both consumer and producer. Measures such as this will empower the consumer, while at the same time offering protection to the disadvantaged and vulnerable, without needing to find some definition of what constitutes vulnerable or disadvantaged (see Issues Paper, 7).

**Reconsideration of Enforcement Mechanisms**

A recent OECD study on the effectiveness of enforcement regimes for consumer policy, included in this was a case study of Australia) illuminated a number of issues associated with the enforcement of consumer law and policy within Australia. This report recognised that there were a number of enforcement approaches – they could be summarised as follows (with the following table indicating the variety of approaches taken in a number of jurisdictions:

1. Jurisdictions which extensively monitor and then rely on criminal sanctions;
2. Jurisdictions which monitor but then rely on proceedings within the civil courts;
3. Jurisdictions which monitor, with the regulator then having the capacity to impose administrative penalties;
4. Those jurisdictions which rely on an official such as an Ombudsman; and
Jurisdictions with little monitoring and reliance is imposed on individual consumers and consumer advocates.

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<th>Model/</th>
<th>Australia</th>
<th>Belgium</th>
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<th>UK</th>
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Table 1: Comparison of enforcement regimes in a number of jurisdictions
The Australian approach is represented by the following pyramid:\[38\]

In terms of remedial flexibility and regulatory input, Australia is represented well. However, consideration could be given to the imposition of administrative fines (subject to administrative review), the imposition of civil penalties for consumer offences,\[39\] as well as the generic option of suspending relevant business licences (such as can presently occur in some professions, e.g. medical/legal/real estate). These could only serve to increase the remedial smorgasboard, and given the confidence and integrity within the Australian judicial system, additional options available to the decision makers arguably serve no harm.
Access to Justice

There is no doubt that access to justice remains a pivotal factor and policy concern of consumer protection. Given the small size of many transactions, the consumer, unless provided with a relatively cheap and easy means to resolve the dispute will simply wear the loss. Many measures have been taken to address this, most notably small claims courts, tribunals, industry ombudsman and less formal dispute resolution mechanisms. One particular option should be canvassed, and which would provide a cost-effective way to redress consumer concerns is to allow private agencies the capacity to bring representative consumer complaints (e.g. with unfair terms in contracts). For example in Australia, this could work with an organisation such as Choice, subject to the approval of the ACCC, being given the right to institute proceedings on behalf of a class of consumers.

Conclusion

Consumer policy is a much more complex beast than it was 20 years ago. The virtual marketplace is rapidly replacing the physical, with economic growth tied inexorably to the consumer, rather than the producer. For this reason, it is imperative the consumer policy meet the needs of flexible, mobilised non-site specific community. This requires that the time for intervention must be clear – there must be a signal that an issue is pending or occurring. From this point, and then through the application of a generic model, consumer problems can be identified and then resolved to the betterment of the economy. It is also suggested that pending this development that a number of specific matters can be addressed - first, the establishment of a national body to activate consumer policy and through this, harmonisation of consumer policy; the modification of the monopoly created by the standard form contract; the enhancement of remedial flexibility, and improving access to justice. By these measures, consumer policy can meet the challenges of this century and not merely respond to the last.

* Senior Lecturer, University of Tasmania. Some parts of this paper are extracted from L. Griggs, “Intervention or Empowerment – choosing the consumer law weapon”, (copy held with author); L. Griggs, “The interrelationship of consumer values and institutions to the vendor’s duty of disclosure”, (2005) APLJ Lexis 19.


2 Section 4B Trade Practices Act 1974: “a person shall be taken to have acquired particular goods as a consumer if, and only if:
   
   i) the prince of the goods did not exceed the prescribed amount ($40,000); or

   ii) where that price exceeded the prescribed amount – the goods were of a kind ordinarily acquired for personal, domestic, or household use or consumption or the goods consisted of a commercial road vehicle;

   and the person did not acquire the goods…for the purpose of resupply…or [for] transforming them…”
Productivity Commission: Consumer Policy Framework

4 Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40
5 Johnson v Buttress (1936) 56 CLR 113; [1936] HCA 41.
7 Fair Trading Act 1987 (NSW); Fair Trading Act 1999 (Vic); Fair Trading Act 1989 (Qld); Fair Trading Act 1987 (SA); Fair Trading Act 1987 (WA); Fair Trading Act 1990 (Tas); Fair Trading Act 1992 (ACT); Consumer Affairs and Fair Trading Act 1990 (NT).
8 Section 52 Trade Practices Act 1974.
15 This was of course the seminal argument of A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Printed for W Strahan and T Cadell, 1776.
22 But note the cautionary note by D. Tennant, ‘Australia’s desperate need for a National Consumer Council’, mimeo, 1-9 at 6: “Because of the roles [consumer advocacy and service agencies] they play and the consumer contacts they have these services are a rich source of information, providing a window on current and emerging market failures or sharp practices. Valiant efforts are made at connecting this information across jurisdictional and regional boundaries, but the services are neither structured nor resourced for undertakings of that type. Where there used to be peak bodies like the Consumers’ Federation of Australia funded to coordinate the interchange of consumer information and the preparation of policy and law reform comment, they are now well meaning, overworked volunteers who struggle to keep the organisations afloat.”

See generally D. Tennant, 'Australia’s desperate need for a National Consumer Council, mimeo (copy held with author).


For example a number of jurisdictions (Tas, ACT, Qld, SA, Vic, WA) have no equivalent to Part V, Division 2A). There does not appear to be any logical reason why people in different States have different rights.


For the full table, see OECD, above n 36 at [52].


This has been under active consideration. Ministerial Council of Consumer Affairs, Civil Penalties for Australia’s consumer protection provisions, Discussion Paper, September 2005.