

PRODUCTIVITY COMMISSION

REVIEW OF AUSTRALIA 'S CONSUMER PROTECTION FRAMEWORK.

SUBMISSION.

The Australian Consumer Affairs Environment.

Prior to 1974 States and Territories had the exclusive legislative regimes for consumer protection. These were patchy, fragmented and had no overall strategy.

Consumer Affairs agencies were very much of the Ombudsman style, primarily handling individual complaints Little was done about the systemic problems that would send a general compliance message to the business community and protect consumers and ethical businesses. The approach was very much a band-aid approach, though well intentioned.

In 1974, the Trade Practices Act was introduced; initially resulting in great hostility from the States and Territories but over time the TPA, and its administrator, has been very well accepted. In fact the State and Territories in the early 1980's adopted mirror versions of what we know as Part V of the Trade Practices Act.

It is illustrative to look at the early days of the Trade Practices Act and its administrator, the then Trade Practices Commission- now ACCC

The new TPC was very active in consumer protection enforcement and very successful. Even so, its very first two cases, both heard in the then Industrial Court in Melbourne in early 1975, were a mixed bag.

The Commission won one and lost one. In both cases the Commission sought to remedy market place problems and in the successful case obtained compensation for a substantial number of consumers.

Even then the new Commission had the tension of looking at systemic problems yet also having to help individual consumers. The Commission still has that problem. However, its goal is primarily to move whole markets to comply with the law and to maximize consumer welfare.

It is often assumed that the competition provisions of the TPA were the lever for the successful development of the TPC. That is only partly right. It is certainly what gives the Commission leverage now. However, what made the Commission initially acceptable, and I suspect what made it the great regulatory survivor, was its consumer protection role. A role that it took to with a vengeance and it made Part V work.

The Commission was one of the first regulatory agencies that focused on the market place, one of the first agencies that issued guidelines, both general and industry specific, and took an active role in compliance strategies to overcome market problems. Strategies aimed largely at business, rather than consumers. That latter role was left to State and Territory consumer affairs agencies.

The underlying focus of the Commission was to seek market based outcomes and it approached all its work on an outcomes strategy. This did not happen immediately.

It happened for a variety of reasons including the fact that its competition role forced it to look at broad outcomes.

Even so, the Commission had major obstacles. Its Part V offences were criminal, although there was a civil alternative but with no penalty. The criminal path was difficult and generally the Commission started to move away from that. It aggressively started to use injunctions and related remedies. That is largely still the case today. The extensive use of injunctions was both a practical and cultural. In its approach the Commission was seeking market place outcomes including compensation .It was not focused on punishment.

Anyone looking at a TPC/ACCC Annual Report would see that approximately two thirds of its cases, including enforceable undertakings, are consumer protection matters although the concept of consumer protection has to a large degree been broadened to include business protection.

Without its consumer protection role, the ACCC would be severely weakened in the eyes of the community. The TPC/ACCC has also been helped from time to time by an apparent weakness in State and Territory agencies in taking action to stop systemic problems in areas that were their jurisdiction. They left a void. That void has been filled, albeit reluctantly, by the TPC/ACCC.

Further the consumer protection role of the ACCC was dramatically heightened during the introduction of the GST, when the ACCC had a time limited role to prevent price exploitation. That role has since ended but some of the community expectation of the role of the ACCC still remains.

It is accepted that the TPC/ACCC has some enormous advantages, namely its independence, strong law and good political support. The TPC had enormous vitality and a good skill base in its staff. Having said that, apart from the independence, State and Territory agencies could have the same attributes. In fact today many State and Territory agencies have better legislative enforcement powers than the ACCC.

We now live in a regulatory mature society, business wants compliance, business wants action against those who do not comply, and business wants common rules and common administration. Business wants transparency. Consumers expect all of the above.

Business and consumers want a seamless consumer protection jurisdiction across the country That seamless model exists to some degree but very much because of the ACCC. It should not be left to the ACCC.

In 1976, there was a Commonwealth/ State Agreement on consumer protection administration.⁹ The relevant Commonwealth Minister at the time was the current Prime Minister. That agreement is still largely followed, albeit sub consciously, but I would suggest it needs to be reassessed.

Whilst, through SCOCA/ FOTOAC there is a co-ordination of sorts there do not seem to be mechanisms in place to ensure the seamless nature of national consumer protection administration. I often hear the State and Territory consumer affairs agencies saying if you refer something to the ACCC it is not pursued and vice versa. The reason being very much that there are different priorities and of course there is the inevitable resource issue.

State and Territory fair trading laws largely mirror the consumer protection provisions of the Trade Practices Act. - albeit there are some important differences and the cracks in the mirror are increasing. Hence the States, Territories and the Commonwealth must increasingly work out sensible administrative arrangements.

The ACCC gives priority to consumer protection matters of national significance or those that adversely affect large numbers of people. Such issues do not necessarily relate to the traditional consumer but to breaches of Part V of the TPA which is essentially a code of ethical conduct to protect all purchasers and to ensure that no business gets a competitive advantage through unlawful behavior.

The ACCC's work links the competition and consumer protection issues leading to an overall increase in consumer sovereignty

The ACCC states in its Corporate Plan that it will continue to select its Part V (consumer protection) priorities according to whether or not:

- the conduct in question is multi-State, national, or international;
- significant detriment is involved;
- ACCC involvement has the potential to have a worthwhile national educative or deterrent effect; and
- a significant new market issue, for example resulting from economic or technological change, has arisen.

Aspects of the current regime.

When looking at framework issues in consumer protection I suggest that the following considerations need be kept in mind as lessons of history or administration but they do not necessarily hold anyone to ransom.

- Essentially Australia has been well served by its consumer protection regime but there is time for a holistic reassessment.
- Our Federal system of Government and who can best deliver certain aspects of consumer protection.
- The fact that much of the current laws were introduced piece meal over the years with little overall plan.
- In the early 1980's the State mirrored the Federal law.
- Unlike NCP the States administer their mirror laws.
- Consumer protection at the Federal level is not confined to traditional consumers but moves heavily into business to business transactions.
- The so called definition of the consumer is a mess and not only varies between jurisdictions but within the TPA.
- Consumer protection is no longer a trendy political issue but now an integral part of our legal fabric.
- Consumers are likely to be more interested in getting assistance than what the law is and who administers it.
- The Commonwealth Government traditionally has avoided licensing regimes but has moved into that in financial planning.
- It is important to keep the self enforcing capacity of the TPA and other legislation. Too often the law is only seen in terms of the regulatory agencies.

- Most Fair Trading agencies spend a lot of resources on dispute resolution.
- There are also a substantial number of industry specific agencies and ombudsman, both public and private bodies that handle consumer issues.
- There are three essential facets of consumer protection law and administration, First, broad market conduct regulation, second, industry specific license based regimes, third dispute resolution.

Some specific issues.

The following are some brief snapshots on relevant issues. A

maturing framework

With the maturing of consumer affairs as part of government' intervention in the marketplace, should governments speed up the move for governments to focus on keeping the market fair and ethical and leave dispute resolution to the individual consumer and advocacy groups and others.

That being the case regulators should be given all the appropriate powers to influence the market and to move fast to meet new or expected problems.

To do that the following needs to be considered,

- More intelligence to identify emerging issues and historical evaluation of past activities needs to be undertaken.
- Substantiation powers in relation to advertising are necessary.
- Infringement notices to be part of the armory.
- Review of Unfair contract powers.
- Powers for the court to make broad reaching compensation orders.

It is essential that all agencies have the same powers. The Commonwealth has lagged in recent times due a perceived reluctance for the Commonwealth Parliament to give agencies such as ACCC or ASIC too much power and powers that effectively involve a reversal of onus.

Such reluctance seems to have disappeared with GST laws and Work Choices and the Commonwealth Government needs to look at the tools ASIC and ACCC have when compared with State agencies. There may also be some perceived constitutional limits re the Commonwealth but again when need be such issues seem to be able to be overcome.

Post Sales legislation.

Currently the post sales law is a mess, there is sale of goods, manufacturer's warranties and product liability laws. There is Federal law and State law.

It is suggested that the ALRC be given a reference to look at a uniform post sales regime and most probably as uniform State law to overcome any constitutional problems. There is no need for it to be Federal. The post sales provisions of the TPA have done what was intended and introduce non excludable post sales protections.

Definition of "consumer"

Again the definition of "consumer" varies among the States and the Commonwealth and even within the TPA.

The market conduct provisions of the TPA whilst headed Consumer Protection are not confined to consumer transactions.

The post sales provisions do relate to consumer sales yet the definition of "consumer" moves very much into small business dealings.

Does the nature of the transaction matter? Is it not the behavior that matters? Maybe the remedy differs depending on the type of consumer, such as section 68A of the TPA? Query whether there should be any such threshold relating to the nature of the customer?

National approach

A national approach is essential in relation to the market conduct laws and post sales, not so important in the licensing areas.

However that does not necessarily mean one national agency. In my view that would be unworkable but serious consideration should be given to having a co operative Federal /State/ Territory/ NZ body, such as a Council ,made up of the heads of the relevant bodies and an independent chair which oversees consumer affairs in Australia, who commissions research and reports on overall progress. It will have a role to foster harmonization and to audit the member organizations annually.

Cross border and distance selling.

This has been an issue for a long time.

Co operation arrangements and so on are fine but in order to properly attack the problem the law needs to be altered to make the financial intermediary involved part deemed to be part of the transaction. Along the lines of the linked credit provider concept that already exists in sale of goods legislation.

This will on the one hand force financial intermediaries to be more careful to whom that give a merchant account and secondly give the consumer a point of seeking redress where the trader is out of reach.

Financial services sector.

Following legislative change in 1999, responsibility for consumer protection in most financial services markets now lies with the Australian Securities & Investments Commission (ASIC). The ACCC and ASIC have entered into a Memorandum of Understanding and work closely together.

The current regime with the ACCC being taken out of consumer protection in financial services is not what the Wallis Committee recommended. Wallis recommended joint jurisdiction and then an MOU to work out a sensible administration. That should be re visited to avoid the existing anomalies and problems involving mixed transaction where part is ASIC jurisdiction and part is ACCC.

NZ

Australia and NZ are effectively one market and serious consideration should be given to almost merging the Commissions or at least the back offices. The laws are similar and there should be full information sharing.

Legislation will soon be introduced into the Federal Parliament to facilitate this sharing.

In addition to NZ some more formal co operation and assistance arrangements should be considered for PNG and Fiji and eventually some other Pacific States.

Disadvantaged consumers

In various ways we are all disadvantaged in the modern complex marketplace, with more distance selling, more bundling and greater power of the sellers.

I doubt that the law needs to differentiate between types of sellers but regulatory agencies may in selecting what matters to pursue.

Effectiveness of TPA/FTA

The TPA and the largely mirror FTA's have been a very successful tool to protect consumers and to raise ethical standards in the market place but these generic laws do in limited circumstances need to be supplemented by industry specific laws or codes.

Co regulation and self regulation.

This is an essential part of our consumer protection framework and I suggest needs further development if Governments withdraw from some aspects of consumer protection such as dispute resolution.

However performance of the co regulatory or self regulatory schemes varies and any oversight body should assess the performance of such schemes as well. See earlier comments re an oversight Council.

Regulators - conflicts

On the face of it, it would appear that Commonwealth and State consumer agencies cover the same field. However sensible administration has prevailed and there is little conflict. There are regular referrals of matters between each. There are regular agreements on who can best handle particular issues.

However there is an issue of frustration and that is the handling of referrals between agencies. I suggest that referrals are deemed to be priority matters for all and be treated like the super complaint concept in the UK.

There have been the occasional conflicts between competition considerations and consumer affairs. However these have invariably been resolved and competition issues must be taken into account by consumer protection administrations. The fusion of these roles in the ACCC is a valuable safeguard both in the consideration of competition interests and consumer interests. In any case well informed consumers are a critical part of the competitive process and a competitive market benefits consumers.

HANK SPIER

Note.

This submission is a personal one and does not necessarily convey the views of any client or organisation that I am involved with.