

SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY ON CONSUMER POLICY FRAMEWORK

This submission welcomes the Productivity Commission's Inquiry. It commends the Productivity Commission on its Issues Paper for raising many important issues on the manner in which the patterns of consumption have changed and the repercussions that this may have for regulatory approaches.

This submission¹ does three things:

- Firstly, it examines the move to the market economy and the underlying basis of neo-classical economics which accepts the link between competition policy and consumer sovereignty. This section examines the influence of the different discourses, particularly behavioural economics, in the manner in which the role of the consumer and the role for consumer law is perceived today.
- Secondly, it studies the manner in which the moves to the market economy have transformed the state and the consumer and has made it necessary to reconsider the consumer as a regulatory subject and re-evaluate the design of consumer laws.
- Thirdly it evaluates the manner in which different jurisdictions have responded to this challenge. These developments all focus on the concept of consumer sovereignty via either consumer responsabilisation or supplier accountability. The regulatory space is now occupied by a myriad of parties including public and private bodies using a variety of strategies such including the traditional litigation route as well as resorting to individual blogs, all of which have the power of regulating the conduct of business.

Consumer Sovereignty – is the consumer really king?

Competition law and policy is now accepted as an essential tenet of a market oriented economy with many developing and transitional countries specifically adopting competition laws that mirror those in developed countries. The assumption that competition will be beneficial to the consumer makes competition law all the more palatable globally across all sectors of production. Privatisation of public monopolies such as telecommunications, electricity, water and other essential services, is being actively pursued across the world aimed at increasing competition in all sectors. However hand in hand with these changes has been a clear acknowledgement that market failure is common and competition does not guarantee that the consumer's interests are met, thereby requiring rigorous and often specifically targeted consumer protection laws. This section examines the link between competition and consumer welfare in theory before considering the traditional explanations for consumer protection laws. It then looks at the

¹ This submission is a version of a paper which was presented at the Consumer Law Roundtable in Sydney in September 2006.

more recent critique of neo-classical economics and its consequences for the design of consumer protection regulation.

Competition policy and consumer welfare are intrinsically linked in neo classical economic theory. While competition laws are seen as being directed at the supply side of the market whereas consumer protection laws are aimed at the demand side of the market. Broadly speaking the objective of competition law is to promote competition. In accordance with neo-classical economics, which provides the explanatory infrastructure for competition policy, promoting competition enhances efficiency in the market, which results in an optimal allocation of resources leading to increased consumer welfare. The consumer is seen as an active participant, using the price mechanism effectively to obtain goods or services.

A consumer fully armed with relevant information, who is articulate and rational is a necessary assumption of the neo-classical model and its importance has been long acknowledged. The empowerment of the consumer has been an important part of the *Trade Practices Act 1974*² and Commissioner Ron Bannerman in 1984 made the point plainly when he stated the ‘Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in a better position to do so.’³ More recently the importance of regulating cartels has been explained in terms of consumer protection and Graeme Samuel, the current Chairman of the ACCC has stated “To see the link more clearly, imagine the impact on consumers if businesses did not need to compete with each other for customers and were allowed to agree on what price they thought would be appropriate to charge’.⁴

Neo-classical economics acknowledges that market failures can result where the consumer is not equipped with sufficient information to participate effectively in the market, or where the consumer may be misled or deceived. Accordingly consumer laws have been focused on disclosure or on consumer protection. The disclosure regimes are directed at providing consumer sufficient information to make informed decisions and examples of this approach include the *Credit Act 1984* (NSW) and the *Corporations Act 2001* (Cth). On the other hand regulation can focus on remedies whereby the wrongful conduct by a trader is regulated with a remedy. This is evidenced by Part IV of the *Trade Practices Act 1974* (Cth) and the *Contracts Review Act 1984* (NSW).

In practice the link between competition policy and consumer welfare is not always evident, as illustrated by developments in many areas including that of the public monopoly reform context, where competition has been actively increased.⁵ In the telecommunications sector many have criticised the ability of the market to deliver services. There have been complaints by consumer groups that landline services, such as

² Haurp R, Govt sets up task force to groom consumer lobbyists, *The Australian Financial Review*, Monday May 28 1973, p 7 Also see: *The Australian Financial Review*, Monday June 18 1973, p 3.

³ TPC, Annual Report 1983-84, p 184

⁴ Graeme Samuels, ‘The foundations of good consumer protection policy: strong law, vigorous enforcement and the educated consumer’, (Speech delivered at the National Consumer Congress, Melbourne, 15 March 2007) 6.

⁵ See: Sylvan L, *Competition and Consumer Law Journal* 191

telephone would not be provided to consumers in the sparsely populated areas, if it were left to the private businesses making rational decisions based on costs and profits.

Others have questioned the fundamentals of neo-classical economics and have queried the ability of the consumer to choose wisely in a market-oriented economy, when accurate information about costs and conditions are not free or easily available.⁶ In many markets, where goods are bundled with other goods or services, consumers have difficulties comparing the prices for the different bundles which are based on different fixed costs, variable usage costs, different prices of bundled items as well as different unbundling costs.⁷ This behaviour has been termed ‘manufactured confusion’ and is particularly strong in the telecommunications industry.⁸ This is particularly true of the financial services sector where consumers with little or no experience in investments are required to compare products, evaluate risks and make decisions about their superannuation and retirement savings. A significant portion of the enforcement work by the Australian Securities and Investment Commission is related to regulating such conduct and in 2005 – 2006 this regulator brought 35 proceedings against the Westpoint group for advice it had provided to investors and it also excluded 27 persons from the financial services industry for not ensuring that consumers using financial products and obtaining financial advice were treated honestly and fairly.⁹

More recently there have been criticisms about the underlying notions of consumer rationality as being too simplistic. Behavioral economists have queried the proposition that market failures result only from information failure and have proposed that market failures are caused by consistent biases in consumer behaviour¹⁰. There are numerous biases which have been recognized including the ‘endowment effect’ and ‘framing effects’. The ‘endowment effect’ is an attempt to explain the observed phenomenon that, irrespective of price, some consumers will be loyal to a particular supplier. Behavioral economists suggest that rather than approaching the market with a firm shopping list, consumers’ behaviour can be influenced by the environment in which the market transaction is taking place, where issues such as stress of changing suppliers may determine the decision.¹¹ The ‘framing effects’ problem is where consumer behaviour is influenced by the terms of the manner in which the choice is presented. For example a the decision to take up an insurance policy will illicit different takers depending on the manner in which the terms are framed. Framing the product in terms of the risks which may be incurred by not taking up an insurance policy will appeal to a different category

⁶ See the investigation of the Westpoint case: ASIC, “Urgent investigation of Westpoint” <http://www.asic.gov.au/asic/asic.nsf/byheadline/06-179+Urgent+action+in+Westpoint+investigation?openDocument> (Press Release, 5 June 2006) at 26 April 2007

⁷ Gans J “Protecting consumers by protecting competition’: Does behavioural economics support this contention?’ (2005) 13 Competition and Consumer Law Journal 3, 21

⁸ See: OECD, ‘Roundtable on demand-side economics for consumer policy: Summary report’ 2006, 11. This report also found that ‘manufactured confusion’ can also exist in industries where pricing can be simple for example gas, electricity and mobile phones.

⁹ Australian Securities and Investments Commission Annual Report 2005 – 2006, p3

¹⁰ OECD, ‘Roundtable on demand-side economics for consumer policy: Summary report’ 2006, 13

¹¹ *ibid*, p 14

of consumers than framing the product in terms of the gains that may result in taking up an insurance policy.¹² The insights of behavioral economists put in doubt the applicability of a 'one size fits all' consumer policy and suggest that different regulatory intervention strategies may be necessary for different markets.

Today it is generally acknowledged that competition does not lead to consumer welfare and that there is a need to carefully examine the manner in which consumer interests can be recognized and safeguarded. Further it is accepted that consumer laws may be used to achieve wider goals including negative impacts on the wider community via the regulation of harmful goods or product safety as well as the promotion of social justice such as the protection of vulnerable consumers from scams.¹³ Consumer laws although multi-purposed are aimed at empowering consumers and making the suppliers of goods and services accountable to these customers. Traditionally this has involved seeking a remedy in the Courts or Tribunals or making a complaint to the regulator such as the Fair Trading Commission. However shifts to a market orientated economy has brought a variety of other options which have developed in a specific ways in different sites.

Shifting Sands – shifts in the role of the state and nature of the consumer and consumption

The many changes in society and governance over the last three decades have sprouted a number of site specific strategies. The Trade Practices Act, often viewed as the cornerstone of consumer protection now co-exists alongside a host of other regulatory strategies. This section looks at the most important of these changes. There changes or shifts are reflected in three arenas, namely in the shifts in the patterns of consumption, the shifts in the nature of the consumer and the shift in the role of the state. These shifts are connected and determine the design of consumer protection regulation.

Since the passing of the *Trade Practices Act* in 1974, the market has changed rapidly. Three main changes are highlighted. The first important change is the evolution of the market from a local one to a global one. This has altered the manner in which the retail sector has evolved as well as the place of origin of many goods. No longer are consumers purchasing goods made nationally and today a majority of goods consumed are imported. The second change has been the accelerating increase in the number and amount of services consumed. Today services account for more than half of the consumption in many countries. Services are necessarily different to goods as they do not easily enable up-front comparisons or allow for the speedy rectification of defects. Consumer protection strategies have to acknowledge this and provide for effective remedies. A third challenge has been in the extraordinary increase in the number of electronic transactions which have altered the manner in which the consumer examines information about the product prior to purchase and how the consumer decides on the

¹² *ibid*, p 15

¹³ Productivity Commission Issues Paper p 13

purchase. Further the types of online fraud, scams and misleading conduct require different types of regulatory strategies.

The role of the consumer has also shifted. The regulatory state¹⁴ has brought about a change in the role of the individual from a citizen, consuming services provided by the government to a consumer, actively participating in the market economy. Although the market has been relied upon for allocating resources there has been a greater shift to a market oriented economy in the second half of the twentieth century.¹⁵ This is best illustrated by the manner in which the delivery of public services has been deregulated by creating quasi-markets in which service providers compete with each other and the consumer is given greater choice.

Traditionally where goods and services were provided by public monopolies, the citizen had by and large been passive, accepting the service rather than actively considering the available information and choosing the desired service. The government's exercise of power in this traditional scenario was constrained by the constitutional goal of legal accountability which took the form of administrative laws which had developed notions of accountability to safeguard the citizen. Political accountability provided another form of protection for the citizen. These constraints encouraged governments to make direct decisions about catering for the needs of certain vulnerable groups and they exercised this power in many ways including authorising public monopolies to provide such services. Examples include the provision of essential services like water, telecommunications and energy to all citizens as a human right, irrespective of cost. In making such decisions governments were aware that they were directly accountable to the electorate. Public agencies in turn were also accountable, usually in an indirect manner to the electorate via legislative or executive oversight and also accountable to the consumer via judicial review. The citizen remained passive and any active participation was often taken up by consumer advocates. They usually resorted to the formal channels such as appealing against the decisions of agencies in the Courts or via informal channels, by lobbying politicians and officials to take account of the specific needs of certain sectors of the electorate.

The shift from a state-centered economy to a market-oriented economy changed this picture. Among other things it brought a marked shift in the way the individual citizen acts. No longer could the citizen remain a passive consumer. A market-oriented economy required them to be rational actors, gather information and actively participate in the market, demonstrating their presence by the choices they made. Expecting this sudden shift in the behaviour of consumers from passive citizen to active consumer is unrealistic particularly where the good or service is an essential commodity that has been delivered by the state to all, including the uneducated, the needy and the poor. The shortcomings of

¹⁴ See Majone, G. (1994). "The rise of the regulatory state in Europe." *West European Politics* 17(3): 77-101.

¹⁵ In the United Kingdom the move to the market oriented economy took place in the eighties whereas in Australia it occurred in the nineties clearly evidenced in the Competition Reform Act. Also see: M Wise, 'Review of Competition Law and Policy in the United Kingdom' (2003) 5(3) *OECD Journal of Competition Law and Policy* 57,

market forces in delivering good outcomes in all instances have to be thoroughly recognised. For example Ofgem (Office of Gas and Electricity Markets) in its review, highlights the importance of providing accurate and up to date information about retail prices to consumers as well as monitoring the giving of misleading information and sales to minors if the consumer is going to choose wisely.¹⁶

The Design of Consumer Regulation in the changing regulatory landscape

Reconceiving consumer regulation

The shifts in consumption patterns, the nature of the consumer and the role of the state, highlight the inadequacy of our existing consumer laws and policies which are a product of the seventies and which are focused on national regulation rather than global. Although there have been many efforts to either mould our existing laws to fit the changed circumstances or to pass new laws to meet the new issues that arise, these efforts have been piecemeal and often directed at specific sites. This inter-jurisdictional overlap which may sometimes be inconsistent¹⁷ comes at a cost both in terms of increasing regulatory burden and detracting from a coherent regulatory framework.

Iain Ramsay recognizes the multifaceted nature of consumer regulation when he states that ‘consumer law is an instrumental form of law, organized around achieving the goals of efficient and fair consumer markets’¹⁸ and that ‘contemporary consumer law is best conceptualized as the regulation of consumer markets and includes analysis of the relative role of public, private and self-regulatory techniques, the study of agency discretion and the problems of ensuring effective accountable rule making, standard setting and enforcement.’¹⁹ This is clearly a good description of the range of consumer strategies currently operating in Australia which includes government and non-government actors and relies of a range of strategies.

This submission proposes that the shift from citizen to consumer is central to developing a coherent analysis of consumer laws. The retreat of the state from providing direct regulatory interventions to facilitating indirect regulatory frameworks has been discussed elsewhere.²⁰ The retreat of the state from the provision of service to the maintenance of the market place beckons analysis. The literature on decentering provides the tools for this analysis. It proposes that regulation rather than simply being top down, becomes

¹⁶ Domestic Competitive Market Review 2004, Office of Gas and Electricity Markets, p 199 – 200

¹⁷ Inconsistencies exist in enforcement powers of regulatory bodies as well as in the definitions of door to door and telemarketing activities, pyramid selling schemes as well as harassment and coercion. See: ACCC, ‘ACCC outlines possible improvements in consumer protection’ (Press Release, 15 March 2007) <<http://www.accc.gov.au/content/index.phtml/itemId/782733/fromItemId/2332>> at 26 April 2007.

¹⁸ Iain Ramsay, ‘Consumer Law. Regulatory Capitalism and the ‘new Learning’ in Regulation, Sydney Law Review 2006, 2

¹⁹ Ibid

²⁰ See; Braithwaite j and Drahos P , Global Business Regulation, p 482

more a web of regulation flowing in numerous directions.²¹ No longer is the state the only one doing the regulating. Rather regulation has been delegated and comes from many sources. Thus industry is being regulated via a network of other industry members as well as policy makers, consumer groups and international organizations. The state too is being regulated by a host of sources including other strong nations, the Security Council, the WTO, global corporations and superannuation funds.²²

Consumer laws provide a good example of this decentering. They are all aimed at reconstructing the consumer as a regulatory subject and ensuring that the consumers are better able to exercise their sovereignty. However they are not limited to top down regulation. Some strategies have harnessed the concept of legal accountability and expanded it further in order to allow the consumer a voice and redress where necessary. These strategies are evident in the public enforcement of wrongs or the provision of complaints mechanisms as well requiring consumer representation in the development of industry codes of conduct.²³ Other strategies have focused on making the consumer more responsible²⁴ whereby education and information provision as viewed important in empowering the consumer with the necessary skills to participate in the market or as Ramsay has stated to have ‘a civilizing influence on markets’.²⁵

Design strategies: making business accountable and making consumers responsible

This submission reviews the variety of strategies that have been developed to find a place for the consumer particularly in light of the movements towards a market oriented economy. There is little uniformity globally and substantial varieties in regulatory frameworks exist. My discussion relies on a variety of examples from Australia, the United Kingdom and the European Union because of the similarities in legislative approaches of these jurisdictions and the timeframes during which the shift to the market economy has been taking place.²⁶ I have categorized these strategies as either redress strategies or empowerment strategies as seen from the table below and the discussion that follows.

²¹ See: Black, J ‘Decentering Regulation: The Role of Regulation and Self-Regulation in a “Post-Regulatory” World’, Current Legal Problems, 2001

²² See; See; Braithwaite j and Drahos P , Global Business Regulation, p 482-483

²³ See: Ayres, I. and J. Braithwaite (1992). Responsive Regulation: Transcending the Deregulation Debate. Oxford, Oxford University Press.

²⁴ Ramsay p 12

²⁵ Ramsay p 13

²⁶ The shifts in these jurisdictions have occurred since the 1970s.

Redress Strategies	Empowerment Strategies
Litigation by regulator	Information and education
Other forms of public regulation	Networks
Litigation by private parties	Other
Industry specific redress mechanisms	
Complaints avenues	
Responsive practices	

Table: Strategies aimed at finding a place for the consumer

Redress Strategies

These strategies are attempts at making the supplier of goods and services accountable to the consumer. They give voice to consumer's complaints either by using the traditional strategies of litigation or by using a variety of other more responsive strategies.

1. Litigation by regulator

Traditionally direct regulation in the form of litigation has been an important part of the work carried out by the independent regulatory agency and continues to be an important part of the work by the ACCC. Because litigation can be both time consuming and expensive, other strategies such as enforceable undertakings are becoming more important as an enforcement strategy for the ACCC.

In Australia, litigation occurs both at federal and state courts. Often, dependent on agency funding, the impact of such actions and the publicity associated with it can have a deterrent effect on the wrong doer as well as others engaged in similar conduct. At federal level the ACCC states it pursue those cases involving widespread consumer detriment or blatant contraventions and a lack of cooperation with the ACCC to satisfactorily resolve an issue.²⁷ In *Worldplay Services Pty Ltd v ACCC* the Court considered the issue of whether a scheme which operated outside the territorial boundaries of Australia because members of the Australian public were unable to gain internet access through Australian internet providers could be regulated. The Court declared that the global virtual gaming operations contravened the pyramid selling prohibitions of the *Trade Practices Act*.²⁸

²⁷ Graeme Samuels, 'The foundations of good consumer protection policy: strong law, vigorous enforcement and the educated consumer', (Speech delivered at the National Consumer Congress, Melbourne, 15 March 2007) 6.

²⁸ [2005] FCAFC 70 (6 May 2005). For other cases the ACCC has prosecuted include ACCC v Target [2001] FCA 1326 (25 June, 2001), ACCC v Chen [2002] FCA 1248 (8 October, 2002) and ACCC v Jurlique International Pty Ltd [2007] FCA 79 98 February 2007)

Not all cases proceed through to judgment and settlements are a common occurrence in litigated proceedings as demonstrated in the ACCC's action against StoresOnline International Inc.²⁹ Here the settlement reached included refunding aggrieved customers, providing a three day cooling off period for customers and paying the ACCC's costs.

Currently, the ACCC can only obtain consumer redress for large numbers of consumers where it has written consent from them.³⁰ The administrative difficulties and costs associated with locating such consumers prior to taking an action particularly given the global nature of markets has been a cause of concern for the ACCC which is seeking expanded powers.³¹ Such powers would be particularly effective where the loss sustained is small and deters the consumer from taking individual action. For these reasons I would support such an expansion of the ACCC's powers in this area.

2. Other forms of public enforcement

There are a wide range of enforcement techniques that can be used by the regulating agency. Because litigation can be both time consuming and expensive other strategies, most important of which is undertakings, are being relied on as a cost effective regulatory strategy.³² Section 87B, introduced in 1993, allows the ACCC to accept a written undertaking in connection with matters for which it has a power or function under the Act and it has used this power extensively in consumer protection matters. In 2005 – 2006, the ACCC accepted 54 undertakings of which 50 involved fair trading and consumer protection matters.³³ In Imperial Tobacco Australia Limited the ACCC accepted a court enforceable undertaking to remove 'light' and 'mild' descriptors from the cigarettes produced for Australian consumers, not to make claims about the health benefits of low-yield cigarettes when compared to high-yield cigarettes and to pay one million dollars to the ACCC to fund anti-smoking consumer education campaigns and programs

²⁹ ACCC, 'StoresOnline customers get \$679,000 in refunds after ACCC legal action', (Press Release, 2 February 2007) <<http://www.accc.gov.au/content/index.phtml/itemId/779638/fromItemId/2332>> at 26 April 2007.

³⁰ For example see the representation action brought by ACCC against Domaine Homes Pty Ltd, ACCC, 'Domaine Homes refunds \$1.9 Million GST to 260 new home buyers after ACCC Legal Action' (Press Release, 9 November 2001) <<http://www.accc.gov.au/content/index.phtml/itemId/87896>>

³¹ ACCC, 'ACCC outlines possible improvements in consumer protection' (Press Release, 15 March 2007) <<http://www.accc.gov.au/content/index.phtml/itemId/782733/fromItemId/2332>> at 26 April 2007 Also see the action taken by ACCC against Internet Australia Pty Ltd on behalf of customers, 'ACCC takes action against Free2aiR' (Press Release, 5 June 2002) <<http://www.accc.gov.au/content/index.phtml/itemId/88092>>

³² For a comprehensive discussion on enforceable undertakings see: Parker, C. (2004). "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings." *The Modern Law Review* 67(2): 209; Yeung, K. (2004). *Securing Compliance: A Principled Approach*. Oxford, Hart Publishing, Chapter 7.

³³ ACCC, Annual Report 2005-2006, p 45

concerning low-yield cigarettes.³⁴ Such enforcement techniques have been effectively used in a number of consumer cases.

3. Litigation by private parties

Market-oriented economies function well where there is continuous monitoring of the participants in the market by others. There is a growing role for the private enforcement of any unlawful activity including anti-competitive conduct and other illegal practices such as the manufacturing of unsafe goods.³⁵ However such actions are only likely to proceed where the compensation awarded is greater than the costs incurred from the litigation. Many consumer actions involve small losses and do not proceed to the Courts.³⁶

Consumer groups are likely to be better placed to privately enforce such conduct on behalf of aggrieved consumers. Funding is essential if consumer groups are to participate in enforcement and policy debate. The European Union has moved to provide financial support to European consumer organisations promoting the interests of the consumer at community level.³⁷ This is a clear recognition of the important role performed by such representation and participation.³⁸ Such support would be of benefit for consumer groups in Australia.

In Australia the place for class actions in competition regulation particularly where there are many people afflicted, their individual losses are small and the expenses involved with litigation are high.³⁹ Litigation funders are now providing funding for such actions and pay all the legal fees and disbursements in the case, including the costs of the other party in the event of the case being lost.⁴⁰ Funding of this nature will be beneficial in increasing private enforcement of the market.

³⁴ Re Imperial Tobacco Australia Limited, (7 November, 2005)

³⁵ See Yeung K, Privatizing Competition Regulation, (1998) 18(4) Oxford Journal of Legal Studies 581-615

³⁶ Ramsay, op cit, p34 points out that customers have rarely been able to harness private law to have systemic effects.

³⁷ See EC Notice 2003/C 132/04, *Call for Applications for Financial Support for the Activities of European Consumer Organizations: Actions Providing Financial Support to European Consumer Organizations in 2004 under Article 2(b) of Decision No 283/1999/EC.*

³⁸ For the manner in which consumer bodies participate in enforcement see Section 47B of the *Enterprise Act 2000* (UK).

³⁹ Such expenses can include costs associated with experts' reports, costs of collating evidence, investigation costs, solicitors fees as well as the costs involved in obtaining documents and statements.

⁴⁰ See: Aitken L, 'Litigation Lending' after *Fostif*: An Advance in Consumer Protection or a Licence to 'Bottomfeeders'?' [2006] 28 Sydney Law Review 171; IMF (Australia) Ltd, 'Release to Australian Stock Exchange (ASX)' (Press Release, 16 April 2007)

<<http://www.imf.com.au/announcements/pdf/New%20Funding%20AWB%20-%2016%20April%202007.pdf>> at 26 April 2007

4. Industry Specific Redress mechanisms

These strategies can be seen as de-centering dispute resolution by moving this function away from state bodies to private actors. Such mechanisms can be mandated by legislation or included into codes of conduct. They are generally funded by the industry itself.

Many jurisdictions have opted for industry specific regulators, which allows for the concerns of consumers of specific goods and services, to be aired. Some of these attempts appear to reproduce a miniature version of the administrative accountability systems that actively regulate the provision of goods and services provided by the state. An example is the telecommunications industry ombudsman in Australia, established in 1993, by the Federal government. This is an industry funded body which deals with complaints that consumers have not been able to resolve with their telephone or internet company. The telecommunications industry ombudsman will only get involved if previous attempts to resolve the complaint with the provider have failed.⁴¹ This ombudsman has the power to make binding decisions up to the value of \$10,000 and recommendations up to the value of \$50,000.⁴² The Energy and Water Ombudsman in New South Wales provides a free dispute resolution mechanism for all energy customers. Approximately 40% for complaints to this ombudsman relate to credit issues where customers in financial trouble cannot meet their bills and face disconnection of supply.⁴³ The other complaints cover a broad range of matters including energy marketing and contracts, billing disputes, compensation claims and the impact of network infrastructure on consumers and their property.⁴⁴ Industry specific regulators in the United Kingdom including the Office of Water Services and the Office of Gas and Electricity Markets are required to consider the interests of the consumer in their decision-making. energywatch is an independent gas and electricity watchdog set up by the *Utility Act 2000* which states its goal is to 'protect and promote the interests of present and future energy consumers'. Besides providing advice energywatch has also represented consumers in making complaints as well as referring consumers to more appropriate bodies for further assistance and grants. It has resolved over 62000 complaints in 2005 – 2006.⁴⁵

Codes of conduct have been an important self regulatory strategy Australia. These strategies can be viewed as decentring of enforcement from the public sector to the private sector. Their popularity has increased as deregulation has filtered to many sectors including for example the financial markets. Such codes deal with consumer

⁴¹ See: <http://www.tio.com.au>

⁴² See: Telecommunications (Consumer Protection and Service Standards) Act 1999

⁴³ See: Clare Petre, 'Energy and water ombudsman: A valuable alternative for consumers' (Oct, 2006) *Law Society Journal* p 37

⁴⁴ *ibid*

⁴⁵ ACCC, 2005-2006 Annual Report

issues as they incorporate redress mechanisms.⁴⁶ For example the Code of Banking Practice for Australian Bankers' Association includes a clause that requires banks to act fairly and reasonably. The Banking and Financial Services Ombudsman can consider disputes about a financial service provided by a member bank or an affiliate for amount less than \$280000. The Ombudsman can either pursue the dispute or refer it to an other organization. It can also organize a conciliation conference between the parties as an alternate method of dispute resolution. The Annual Report for 2006 reports that Consumer Finance is the predominant category where disputes arise and that the Ombudsman has over 6,000 disputes over the year. Likewise the Financial Planning Association Code of Ethics provides that a member shall perform professional services in a manner that is fair and reasonable to clients, principals, partners, and employers and shall disclose conflicts of interest in providing such services.⁴⁷ The continued use of industry specific mechanisms is necessary although regulatory duplication and confusion for business requires careful monitoring.

5. Complaints

Allowing consumers the opportunity to make complaints has always been acknowledged as a way of checking the level of compliance in the market. Such complaints are usually made either in order to obtain redress or information on rights. Complaints are heard by a number of bodies including the central regulator the ACCC⁴⁸, non government organizations as well as industry associations which incorporate complaints mechanisms as part of their Codes of Conduct. In Australia organizations like Consumersonline⁴⁹ and Choice⁵⁰ also provide consumers with information on the avenues and process for complaints.

Clearly establishing a complaints system is not an end in itself. It alone does not provide redress. It is only the first step in setting up a resolution mechanism which addresses the complaints and negotiates a solution. The effectiveness of such mechanisms for vulnerable consumers has been queried. In the case of aged care, doubts have been raised on the ability of the consumers who are in a vulnerable position with few, if any, alternate sources of supply, to make complaints against the providers of the aged care.⁵¹

⁴⁶ See for example: Code of Banking Practice; Credit Union Code of Practice; General Insurance Code of Practice; General Insurance Brokers' Code of Practice; Financial Planners Code of Ethics and Rules of Professional Conduct; Internet Code of Conduct; Consumer Credit Code and Electronic Funds Transfer Code of Conduct.

⁴⁷ Financial Planning Association, Code of Ethics, (2003)

<<http://www.fpanet.org/member/about/principles/Ethics.cfm>> at 24 April 2007.

⁴⁸ The ACCC receives complaints via telephone and email and in 2005 – 2006 it received a total of 75,319 such complaints. See: Annual Report 2005-2006, p 39

<<http://www.accc.gov.au/content/item.phtml?itemId=764868&nodeId=ed40d21da9996d4c556e36d1572c7298&fn=ACCC%20annual%20report%202005-06,%20pages%20i-148.pdf>> 26 April 2007

⁴⁹ Consumersonline, 'Steps for consumers in making a complaint'

http://www.consumersonline.gov.au/content/publications/CFactSheets/resources_fs_5.asp at 24 April 2007

⁵⁰ Choice, Complain successfully,

<[http://www.choice.com.au/viewArticle.aspx?id=101817&catId=100405&tid=100008&p=1&title=Complain+successfully+\(archived\)](http://www.choice.com.au/viewArticle.aspx?id=101817&catId=100405&tid=100008&p=1&title=Complain+successfully+(archived))> at 24 April 2007

⁵¹ See: Sandra McCullough, 'Aged Care: A Victorian perspective on complaints handling and the enforcement of consumer rights' (2002) Alternate Law Journal 60

In an attempt to strengthen the voice of the consumer in competition, the United Kingdom legislation allows for super complaints. The *Enterprise Act 2002 (UK)* sets up the Office of Fair Trading to enforce competition and consumer protection. Super complaints can be made to the Office of Fair Trading or another suitable body⁵² by designated consumer bodies when it thinks that a feature or a combination of features of a market is, or appears to be, detrimental to consumer interests. Super-complaints are defined in section 11 (1) as a complaint by a designated consumer body that any feature or combination of features of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers. Only the Office of Fair Trading has the power to consider effects of markets within the UK. Evidence is considered by the Office of Fair Trading which then takes the necessary work to determine the extent of the alleged problems and is required to publish its response within 90 days. Responses include market studies which are conducted where it appears that the market is not operating in the interests of the consumer and where alternate action such as sanctions do not appear to be appropriate. The aim of this process is to enable consumer bodies to bring instances of market failure and consumer detriment to the attention of the regulator.

In 2001 The Office of Fair Trading received a super-complaint from the Consumers' Association alleging that there was a failure by dentists to comply with the guidelines provided by the British Dental Association and there was little redress offered to consumers. Following a market study and a government action plan the Office of Fair Trading launched a consumer campaign titled "Your guide to private dentistry". This was followed in 2006 with the establishment of the Dental Complaints Service by funding from the General Dental Council to allow consumers to resolve complaints arising from private dental services. The provision of such a process represents an attempt at ensuring that consumers can enlist support in seeking redress and making the suppliers of goods and services accountable. The possibility of introducing such a mechanism may have benefits for Australia.

6. Responsive practices

A regulator that is responsive to all participants in the market, whether they are suppliers or consumers, is important in establishing and nurturing responsive practices between businesses and consumers. Developing deliberative practices in the arena of consumer law will necessarily involve an important role for actors representing consumer interest both nationally and globally. A regulator's legitimacy is enhanced by a variety of factors including societal consensus which may be attained by encouraging deliberation whereby participants can develop shared understandings and beliefs which will enhance the capacity of the actors for action when faced with the challenges.⁵³ The Australian

⁵² Other suitable bodies include those that may have concurrent duties to the Office of Fair Trading. Examples include the Director General of Telecommunications, the Gas and Electricity Markets Authority and the Civil Aviation Authority.

⁵³ See: Hall and Soskice, p 11- 12

experience in effecting National Competition Policy has been widely seen as acknowledged as encouraging such deliberation.⁵⁴

In Australia there has developed a culture of consultation with consumer groups on important issues as evidenced by the important role occupied by consumer groups in the seventies. The Australian competition regulator is not specifically mandated to represent any particular interest group. Rather it represents the public and its primary role is the promotion of competition. Although there is no specific role for consumers in its decision making process, the ACCC clearly acknowledges its role in consumer regulation as witnessed by the appointment a leading Ms Sylvan a consumer advocate Deputy Commissioner in the competition agency. However responsive practices can only develop if the agency is imbued with the culture of consultation. Although not without its critics, the ACCC sees value in developing responsive practices as demonstrated by its dealings with Cadbury Schweppes. The ACCC accepted the voluntary reporting of resale price maintenance activities by Cadbury Schweppes with a retailer and the subsequent investigation and implementation of a compliance program that followed.⁵⁵ Enforceable undertakings provide a site to encourage dialogue and deliberation between consumers, consumer groups and the corporation whose alleged conduct is being scrutinised. Parker has identified that enabling affected consumers to be represented in the negotiation of enforceable undertaking is desirable both from a restorative justice viewpoint and regulatory accountability perspective.⁵⁶

Empowerment Strategies

These strategies are aimed at facilitating greater active participation by the consumer with the provision of information and strategic networking. They rely on the responsabilisation of the consumer whereby citizens will become responsible consumers by acquiring information, developing their capacity to understand this information and use this information in making market choices.⁵⁷

7. Information and education

Consumer sovereignty assumes that the consumer has access to information in order to exercise rational choice. However there are many problems with this assumption. The example of 'manufactured confusion' discussed earlier, is the practice in many industries, is aimed at increasing profits and market share and it detracts from the assumption that

⁵⁴ Morgan, B. (2003). *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification*. Hants, England, Ashgate Publishing Limited, p 10-11

⁵⁵ 'ACCC praises voluntary reporting from Cadbury Schweppes' (Press Release) <http://www.accc.gov.au/content/index.phtml/itemId/779300/fromItemId/2332> at 26 April 2007

⁵⁶ Parker, C. (2004). "Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of enforceable undertakings." *The Modern Law Review* 67(2): 209.

⁵⁷ See: Ramsay, op cit, p 13

the consumer may have a powerful presence. Regulatory responses recognize both the frequency of market failure as well as the general failure of neo-classical economics to explain consumer behaviour. Whereas some of these responses mandate the provision of specific information, other responses adopt a general approach aimed at making the consumer much more cautious.

Some jurisdictions have chosen to create specific bodies charged particularly with examining the consumers' position in a particular industry sector. The *Utilities Act* in the United Kingdom created energywatch that has the powers to produce advice about consumer matters in a number of forms including providing consumers with relevant information, as well as publishing any information that it thinks appropriate. Energywatch has been successful in airing consumer grievances about deciphering gas and electricity bills and general business practices. It has been involved in developing best practice billing standards among industry participants and in overseeing a voluntary code of practice for companies providing price comparison services that allow consumers to compare the price of gas and electricity suppliers and switch if they consider appropriate. Provision of such information is essential if the consumer is to make a rational choice

Other strategies have included a general centre which can provide help information and direction. The ACCC has produced 83 publications during the 2005-2006 financial year aimed at providing consumer s information on product safety and compliance programs.⁵⁸ One such booklet was on understanding petrol pricing including answers to frequently asked questions such as the reasons for the fluctuations in petrol pricing, which was undoubtedly a response to the tremendous consumer anger and dissatisfaction about petrol pricing⁵⁹ Another strategy has been the campaign to develop awareness against scams which took many forms including pyramid selling schemes, advance fee fraud and fake investment schemes.⁶⁰

8. Networks

Liaison networks between the ACCC and other national regulators such as ASIC as well as networks between the ACCC and the Fair Trading offices have existed for some time.⁶¹ Globalisation has necessitated the development of international networks of regulators.⁶² The ACCC has stated that international cooperation and coordination on

⁵⁸ ACCC, 2005-2006, Annual Report , p 7

⁵⁹ ACCC, 'Understanding petrol pricing' (Press Release, 30 August 2005)
< <http://www.accc.gov.au/content/index.phtml/itemId/706620>>

⁶⁰ ACCC, 'Scams target you! Protect yourself' (Press Release,)
<<http://www.accc.gov.au/content/index.phtml/itemId/781936/fromItemId/2332>>

⁶¹ See: Samuel, p 7 (speech)

⁶² See; I Maher, 'Competition Law in the International Domain: Networks as a new form of governance', (2002) 29 Journal of Law and Society 111

competition and consumer protection is a key priority⁶³ and has been coordinating its guidelines and enforcement strategies through the International Competition Network in the areas of cartel detection and enforcement as well as merger clearances all of which have a global dimension.⁶⁴ The International Consumer Protection Enforcement Network has been important in coordinating consumer regulation and developing best practices among regulators. The role of the EU has also been growing over the last decade and the EU harmonization project in consumer law has been particularly influential in developing models of consumer protection in numerous areas including product safety and unfair contract terms.⁶⁵

Such networks are becoming more important for consumer organizations. Drahos and Braithwaite have noted that NGOs have the least influence in shaping business behaviour in global markets and have pointed to a number of strategies for NGOs to intervene successfully in regulation.⁶⁶ One successful group has been Consumers International which operates in 115 countries and engages in a concerted campaign including producing education packs, issuing a newsletter and providing links to national consumer organizations.⁶⁷ Within Australia the role performed by Choice has been important in providing consumers with informed advice about goods and services in the market place. It is a well regarded organization that has successfully lobbied suppliers and regulators to improve standards. It maintains a website providing information on consumer rights and fact sheets on specific categories of goods and complaints.⁶⁸ The role of such groups in regulation requires acknowledgement and the development of good relations between the regulators and such organizations is important.

9. Other

There are a variety of other institutions that can take the lead in bringing consumer issues to the fore and provide redress. Here I want to briefly mention the role of two such institutions namely the media which is an established and identifiable institution, and secondly and more nebulous role of blogs as consumer regulation.

The importance of the media as a political force has been widely acknowledged.⁶⁹ The influence of the media in increasing awareness or bringing about policy change cannot be underestimated as demonstrated by the proposed sale of Snowy Hydro Limited. In 2006

⁶³ ACCC Annual Report 2005 – 2006 p 6

⁶⁴ *ibid* p 6-7

⁶⁵ Ramsay , p 16

⁶⁶ Braithwaite J and Drahos P , *Global Business Regulation*, p 612

⁶⁷ For information on the organization see: <<http://www.consumersinternational.org/>>

⁶⁸ For example, see; “Lobbying for great scrutiny of drug advertising; A review of copyright legislation regarding consumer bought music and videos.

<<http://www.choice.com.au/defaultView.aspx?id=102314&catId=100165>>

⁶⁹ ‘Changing the ACCC guard’ in *Australian Financial Review* of 2 April 2003 p 62; McCran T, ‘Rap over Fel’s knuckles – Trade Practices review gives him a sole goodbye gift’ in *Daily Telegraph* 17 April p 59.

See The Dawson Enquiry’s recommendations and the recommendation to include a media code; Also see; Schudson M, *The News Media as Political Institutions*, (2002) 5 *Annual Review of Political Science* 249.

the Federal government and the two state governments of New South Wales and Victoria, which held shares in the enterprise, proposed the sale of the Snowy Mountains scheme, which was to yield substantial funds. The publicly-funded Snowy scheme, constructed between 1949 and 1974, was one of the largest engineering projects undertaken in Australia using immigrant labour from over 30 countries. There was significant opposition to the proposal including loss of electoral support particularly from the National Party as well as proposed constitutional challenges to the sale. A prominent opponent was Alan Jones, host of a Sydney radio station 2GB who was able to harness this disenchantment, resulting in 29,000 telephone calls critical of the government's proposal.⁷⁰ His influence was clearly noted in Parliament when it was stated that 'We should all acknowledge that Alan Jones and others in the media played a vital role in this about face'⁷¹ The proposal was dropped in June 2006.

There is a large amount of discussion on the internet about the quality of goods and services. These blogs contain information and discussions of diverse quality and can reach a expansive global audience.⁷² This discussion can have the effect of transforming politics and placing pressure on corporations and governments. They are also used by the e-savvy consumer as a tool to obtain information and compare products. Discussion will often include personal experience and provide other options for consumers to consider. They have the advantage of transcending national boundaries and creating, albeit random, bank of information.⁷³ Although unpredictable in its reach and effect, this will be a way in which consumers will make decisions in the market.

Conclusions

As the role of the state and the nature of the consumer and consumption have changed, so to does the design of consumer regulation have to change. As discussed able the reconstructing the consumer as a regulatory subject has to involve making the supplier of goods and services accountable and making the consumer responsible. The Australian

⁷⁰ NSW, Parliamentary Debates, Legislative Council, 7 June 2006, 712, 721 (Robert Brown); Also see:

⁷¹ NSW, Parliamentary Debates, Legislative Council, 7 June 2006, 712, 730 (Ian Cohen); Also see NSW, Parliamentary Debates, Legislative Council, 7 June 2006, 712, 721 (Robert Brown) and NSW, Parliamentary Debates, Legislative Council, 7 June 2006, 712, 715 (Melinda Pavey).

⁷² See: W L Bennett, 'Branded Political Communication: Lifestyles Politics, Logo Campaigns, and the Rise of the Global Citizen', In M Micheletti A Follesdal and D Stolle (ed) *The Politics Behind Products*, New Brunswick, NJ, Transaction Books forthcoming.

⁷³ See; on the comparison of airline services:ez_guru_net 'Jetstar Ripoff' <<http://au.messages.yahoo.com/news/travel/1449?p=2>>, at 26 April 2007; on the decision by Schweppes to cut 15mL from the size of its drinks bottles see: L Archer, 'What a fizzer' <http://blogs.news.com.au/news/yoursay/index.php/news/comments/what_a_fizzer/P60/> at 26 April 2007; on the services provided to foreign students by universities 'Overseas Students' <http://blogs.theage.com.au/yoursay/archives/2006/03/overseas_studen.html at 27 April 2007; on petrol pricing see: 'Are we paying too much for petrol' <http://blogs.drive.com.au/2006/07/are_we_paying_too_much_for_pet.html> at 27 April 2007

experience of adopting site specific regulatory strategies where called for, as well as the development of responsive practices by the ACCC in a number of its dealings reflect a recognition of these factors. However there is undoubtedly duplication of regulation causing regulatory confusion and excessive burden on business. There has also little recognition given to the variety of empowerment strategies which are developing globally. The experience of the European Union in harnessing and funding consumer groups abilities to participate in regulation as well as the move in the United Kingdom to equip consumer groups to make super complaints are worth noting. Further the role of the regulator in developing responsive practices and nurturing consumer groups in the process of regulation is essential.
