



Dr Luke Nottage
Senior Lecturer
Co-Director, Australian Network for Japanese Law

Direct Line: +61 2 9351 0210

173 – 175 Phillip Street
Sydney NSW 2000
Australia
DX 983, Sydney
Facsimile: + 61 2 9351 0200
Email: luken@law.usyd.edu.au
Web: www.law.usyd.edu.au/anjel

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Submission to the Productivity Commission's Inquiry into Australia's Consumer Policy Framework (<http://www.pc.gov.au/inquiry/consumer/>)

This Submission argues consumer policy has been losing its way in too many areas in Australia, particularly over the last decade (Part I). In product safety (Parts II and III), consumer contracts (IV) and access to justice (V), this transformation has been largely to the detriment of consumers. By contrast, the changing world economy has prompted reforms in our major trading partners, particularly Japan and the EU, to expand protections for consumers despite much economic deregulation in other spheres. In sum (VI), therefore, this Inquiry provides a welcome opportunity for the Australian Government to make up this lost ground, and harmonise consumer law and policy to restore some balance for consumers.

I. Overcoming Perverse Legacies in Economics and Consumer Policy

I commend the Australian Government and its Productivity Commission (PC) for undertaking this Inquiry. As a researcher and lecturer specialising in comparative consumer law, especially product safety and contract law, one attraction in immigrating in 2001 to Australia (from New Zealand via Japan) was the fine tradition in consumer law and policy painstakingly developed in this country since the 1960s. Regrettably, one of the pioneers in this endeavour, the late Professor David Harland from Sydney Law School, is probably turning in his grave. Australia seems to be slipping from leader to laggard, as I have had to explain when contributing recently to multi-national studies recently for the OECD (consumer contracts),¹ the European Commission and Japan's Cabinet Office (consumer access to justice).

As this Submission will illustrate, in too many areas (including also product safety regulation and product liability law) there is no longer any cohesive vision of consumer protection, nor the will and resources to implement it. Instead, legislatures have added causes of action that might benefit consumers, but in such a confusing way that this probably remains to their long-term detriment. More recently, reacting to perceived excesses of the consumer protection impulse of the 1960s and 1970s, more laissez-faire politicians and supporters steeped in neoclassical economists have begun to roll back access to justice and substantive rights for consumers, but again without reasoned debate.

Thanks in part to such economists, most now agree that older and more extreme claims of market imperfections justifying strong forms of government intervention to protect consumers are too crude, potentially harming consumers themselves (eg strict price controls or monopoly/state suppliers of too many goods and services) as well as actual or

¹ OECD Project DTSI CP(2006)8 on Reviewing Approaches for Improving Consumer Contracts.

potential competitors. But the other extreme view, that all can always be left to markets, is equally crude – yet surprisingly pervasive. Key tenets of the Chicago School – (a) markets always work due to narrowly self-interested rational behaviour, (b) the ideology of “freedom” is paramount, and (c) “only facts speak” – lead to debatable empirical conclusions and even more debatable policy recommendations.² In Australia at present, the doubtful legacy of this School manifests itself in an enormous burden of proof being placed on those seeking to maintain some ground rules for the proper functioning of markets involving consumers – let alone those seeking to *add* new ground rules as those markets evolve, for example as information technology and e-commerce develop.³

More insidiously, the legacy leads to an unwillingness to engage in the comprehensive rethink of simple models and policy-making implications that is demanded by the evidence assembled by social psychologists and experts in “behavioural law and economics”. Even more surely than implied in the PC’s Issues Paper (January 2007) for this Review, this shows that individuals routinely do *not* act as rationally as neoclassical economists and liberal politicians have been blithely asserting for decades. Well-demonstrated common biases or “heuristics” include the “self-serving” or over-optimism bias (believing that we are more able than we actually are), and the “availability” bias (believing things because they are more prominent, eg due to media attention). Although such biases are found among professionals, whom we might think are less likely to suffer from them, they are also likely to be pervasive among individual consumers.⁴ They should be easily incorporated into, respectively, stronger controls over consumer over-indebtedness, and misleading advertising.

In other words, proper credit is now due to the intuitions of economists and consumer policy makers of the 1960s and 1970s who developed certain consumer protection policies that now can be justified on reformulated or alternative economic grounds (newly identified “information asymmetries” and the like). The burden of proof should remain on those seeking to dismantle such protections on more extreme neoclassical grounds. Some credit should also be given to the older generation of welfare economists who highlighted the more structural or macro-level problems in consumer markets, even if we are now rightly sceptical about direct price controls or the like – due to new *evidence* as well as new theories as to their impact. In particular, Australian policy-makers now must take into account our decade-long economic boom, at least in some states, piggy-backing on the world commodities boom. It is unsurprising that firms seem now to take their consumer customers less seriously in such an environment, since they can move on to new and expanding business with different customers in a growing economy.⁵ By contrast, for

² In Japan too, for example, see Craig Freedman and Luke Nottage, “You Say Tomato, I Say Tomahto, Let’s Call the Whole Thing Off: The Chicago School of Law and Economics Comes to Japan”, Macquarie University Centre for Japanese Economic Studies Research Paper 2006-4, at http://www.econ.mq.edu.au/Econ_docs/cjes/research_papers/2006-4_Freedman_Nottage.pdf >.

³ This parallels the scepticism of the present Government about climate change (“Delayed Reaction”, *Sydney Morning Herald*, 24-5 March 2007, pp 25 and 30): “policies were largely rejected if the business advisors [PM] Howard trusted could mount a convincing argument against them”.

⁴ See eg Ross Gittens, “Use Your Head Before You Leap to a Conclusion”, *Sydney Morning Herald*, 6-8 April 2007, p 32. For an example of such perverse heuristics at work among lawyers, see Nottage, Luke, Who’s Afraid of the Vienna Sales Convention (CISG)? A New Zealander’s View from Australia and Japan, 36 *Victoria University of Wellington Law Review* 815 (2005).

⁵ Consider eg a recent issue of *Choice* magazine (April 2007), from what used to be known as the Australian Consumers Association. It illustrates a tendency to identify more and more consumer law issues, as opposed to technical/price comparisons of products. For example, it reports on inadequate follow-up on a safety issue with strollers dating from November 2005 and an ACCC investigation of problematic claims by providers of broadband services (p 5), five out of 11 other strollers tested failing the Australian Standard safety test (pp 52-5), an example of “cheeky marketing” of eggs in packets of 10 rather than 12 (p 6), more general reluctance of Australian supermarkets to display unit pricing to allow informed comparisons (even when chains do this in markets like the EU where mandated: pp 8-9), problems in reverse mortgage contracts sampled (pp 13-7), loopholes in the Government’s proposal that financial advisors hold PI insurance (p 56),

example, jurisdictions like Japan that have stagnated over much of the last decade have implemented a much more vigorous and cohesive program of consumer protection regulation.⁶

In other words, although economics has certainly moved on since the 1960s and the 1970s, it has also moved on from the laissez-faire economics of the 1980s and 1990s. The Australian Government now has the opportunity to take seriously the latest lessons from this discipline, especially behavioural law and economics, to judge fairly the pros and cons of maintaining, expanding or decreasing protections in various areas currently afforded to consumers.⁷ In doing so, it should also consider the lessons and tendencies of trading partners like Japan and the European Union (EU), where deregulation of many markets has been proceeding yet consumers have generally been afforded more protections.⁸ Presumably their economists are not that foolish either. Arguments for minimum regulatory standards and enforcement may also be plausible based on contemporary economic theory (although anathema to diehard Chicago School economists) as well as broader normative grounds, as was convincingly shown by Ayres and Braithwaite in their “Responsive Regulation” model. Anyway, the Government may need to go beyond economics since it is ultimately a *democratic* institution, and also because regulation theory these days increasingly goes beyond instrumentalism to consider broader “governance” concerns.⁹

II. Consumer Product Safety Regulation

Problems persist, however, in updating economic thinking and going beyond economics where necessary. A good example to begin with is product safety regulation reform. Prompted by some high-profile cases, an influx of potentially unsafe goods (especially from China) and reactions from other major trading partners, the PC recently reviewed Australia’s reactive regime dating back to the 1970s. But its final Report discounted the “responsive regulation” model. The PC asserted that there was insufficient evidence presented to move to a system where firms have the duty to supply only safe products (as in the EU since 1992) and have to disclose all serious product-related accidents (as in the EU, the US and – since law reform in November 2006 – Japan).¹⁰

Yet, until at least an information disclosure requirement is added in Australia, harmed consumers and consumer groups will never be able to provide more than “anecdotal” evidence of a serious product safety problem. Australian regulators will also be reluctant to act. If they don’t act often, they risk losing human and financial resources tailored to even occasional enforcement actions. Diminishing credible threats of serious sanctions, such as bans and mandatory recalls (rare anyway), mean less chance of firms cooperating in maintaining product standards.¹¹

and a list of “recalls and bans” which may now be incomplete because “nowadays there are so many product recalls” (p 57).

⁶ Neoclassical economists might predictably retort that it is because of such re-regulation that Japan has stagnated, but its very different macro-economic circumstances are surely more important.

⁷ A recent and balanced assessment of other market failures justifying contemporary consumer protection policies can be found in chapter 1 of Howells, Geraint G. and Weatherill, Stephen, *Consumer protection law* (2nd ed., Ashgate, Aldershot, Hants, England ; Burlington, VT, 2005).

⁸ A useful resource will be the Handbook of International Consumer Law, forthcoming later this year from Edward Elgar (and for which I have accepted an invitation to write the Product Safety chapter).

⁹ Ayres, Ian and Braithwaite, John, *Responsive regulation: transcending the deregulation debate* (Oxford University Press, New York, 1992). Compare also Nottage, Luke, 'Commercial Regulation' in Smits, J (ed.) *Encyclopedia of Comparative Law* (Edward Elgar, Cheltenham, 2006) 135-44.

¹⁰ See <http://www.pc.gov.au/study/productsafety/> (including two Submissions by me), and Nottage, Luke, Responsive Re-regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan, 2006-5 University of Tokyo Soft Law COE Discussion Paper at <http://www.j.u-tokyo.ac.jp/coelaw/COESOFTLAW-2006-5.pdf>.

¹¹ Consider the problems with baby strollers, highlighted for many years by *Choice*.

In addition, the market usually cannot provide adequate incentives to monitor and supply safe products, unless there is a small likelihood of risk combined with small harm.¹² Japan tried a market mechanism for other types of consumer goods by encouraging industry associations to develop their own safety standards so firms could have their goods certified, and then get insured by a related insurer at least for capped personal injury damages. One (Chicago School) professor acclaims this voluntary system as optimally efficient, provided payouts are made on a no-fault basis.¹³ However, this ignores the facts that (a) only a small proportion of product types are volunteered for certification, (b) hardly any consumers know (ie are informed) about the bundled insurance, (c) there is no evidence that payouts are made on a no-fault basis (if anything, interview data suggests insurers decline payouts for “misuse” by consumers etc), and relatedly (d) the numbers and amounts of payouts are minimal. Taking a leaf out of “public choice” theory: it is therefore more plausible that industry developed the scheme, in this limited way, to prevent the more direct regulation of consumer product safety that has only been applied more rigorously across the board in Japan since 2006. In Australia, moreover, another Review by the PC – and especially several Submissions including my own – have highlighted serious problems with Australia’s main standard-setting body.¹⁴

III. Product Liability

Such Chicago School economists also tend to object to product liability regimes, especially strict liability regimes, since these bundle “insurance” in a colloquial sense (compensation payouts to consumers, typically under tort law) with all products. Suppliers are surmised to pass on these potential costs (“premiums”) in the form of higher prices, thus depriving poor consumers of products which might be unsafe but which they would rather risk having at the lower price they could afford, and/or pricing some firms out of the market. However, other economists reach different conclusions, preferring strict liability precisely to force manufacturers to internalise costs of accidents, to reduce adjudication costs and so on for courts and parties (compared to proof of fault), and so on. Generally, since they generally require private individuals to enforce them through (expensive) court action or threaten realistically to do so, product liability rules are useful for products which end up having a high likelihood of risk and high expected damages.¹⁵

Such arguments were well canvassed by the Australian Law Reform Commission (ALRC) in 1989 when it successfully advocated, despite subsequent industry opposition and a legislative compromise back to the 1985 EC Directive model, the introduction of stricter civil liability on manufacturers of unsafe goods.¹⁶ However, although Part VA was added to the Trade Practices Act (TPA) in 1992 and federal class actions were introduced that same year, the first substantive ruling from the Australian Courts came only in 1998 in the *Glendale* case brought by the ACCC. Since then, there have only been two dozen or so judgments. Although this is high compared to the EU and (to a lesser extent) Japan, which have similar regimes to Australia, our case law is confusing and hardly refers to those overseas judgments or related commentaries. As well as (perhaps growing) parochialism, part of the problem appears to be that some consumers (or, more precisely, their lawyers) have instead brought product defect claims before the courts under other parts of the TPA (s52 “misleading conduct”, or Part V Div 2A – contract rather than tort). The current “legal morass” is made worse because Australia’s statutory “tort reforms” since 2002,

¹² Sarumida, Hiroshi, Comparative institutional analysis of product safety systems in the United States and Japan: alternative approaches to create incentives for product safety, 29 Cornell International Law Journal 79 (1996).

¹³ Ramseyer, J. Mark, Products Liability through Private Ordering: Notes on a Japanese Experiment, 144 University of Pennsylvania Law Review 1823 (1996).

¹⁴ See <http://www.pc.gov.au/study/standards/>.

¹⁵ Sarumida op cit. By contrast, product safety regulation enforced ultimately by public authorities is best suited where there is a high likelihood of risk but small likely harm.

¹⁶ See Sarumida, op cit; and Nottage, Luke, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon, London, 2004).

designed primarily to restrict pure negligence suits (eg against public authorities), have spread in complex ways to close off (already infrequent) TPA claims by consumers for personal injury caused by defective products.¹⁷

Thus, although superficially or in the short term it may seem disadvantageous for consumers, it seems likely that they too would benefit from abolishing Part V Div 2A (as recommended by the ALRC in 1989) and s52 for personal injury claims (achieved in 2006 but with almost no public debate). This would diminish complexity and therefore transaction costs, as well as allowing courts and jurists to appreciate more clearly the underlying rationales and corresponding principles of TPA Part VA. However, consumers also should be entitled to have policy-makers consider openly whether it makes sense – in terms of economics and broader community expectations – to close off Part VA claims by extending “tort reform” caps and damages designed primarily (and controversially) for different types of tort litigation.

It must also be borne in mind that recent empirical comparisons confirm that although substantive law reforms expanding PL have quite small direct effects, particularly in terms of lawsuits and judgments, they do make some difference particularly further down the “dispute resolution pyramid” (eg on out-of-court claims and settlements, and possibly insurance practices). Indirectly, too, such reforms have probably underpinned (a) some heightened media attention to consumer safety problems and (b) greater access to legal advice and dispute resolution forums, which empirical studies in Europe and the Asia-Pacific suggest generate greater impact.¹⁸ Conversely, making PL law more confusing and less credible is likely to lead to some direct detriment to consumers, but also to diminish opportunities for balanced media attention to product safety problems.

Restoring levels of consumer product safety, particularly as more potentially unsafe goods come into Australian markets, therefore demands concerted reform. Australian product safety regulation and access to justice, as well as substantive PL law, need to be revised preferably as a comprehensive package. This will maximise chances of clarifying the law and re-educating all involved – firms, politicians and officials, consumers, the media, and other stakeholders.

IV. Consumer Contracts

This is another area where Australia got off to a reasonably good start in the 1970s, and has maintained some momentum, but has lost its way. “Unconscionable bargains” can now be challenged under three different provisions of the TPA. However, one is for “small” businesses (now defined as those involving transactions of up to \$3 million!), and another only adds more flexible relief for consumers – referring them back the background common law developed by the judges as to what triggers such relief. To make matters more confusing, different parts of the TPA attempt to more directly regulate certain unfair contract terms by imposing minimum statutory warranties (s68) in transactions involving “consumers” (defined in s4B to include transactions between businesses if less than \$40,000!). For other types of unfair contract terms, unlikely to be captured even by the TPA prohibitions of unconscionable conduct unless some “procedural” unfairness is present in the pre-contractual negotiations, consumers have to look to disparate state legislation (Contracts Review Act (1980) NSW; more recent amendments to the Fair Trading Act (Vic) modelled on a 1994 EC Directive, in turn influencing Japan’s Consumer Contract Act 2000). The different criteria and definitions of “consumer”

¹⁷ Kellam, Jocelyn and Nottage, Luke, Happy 15th Birthday, T.P.A. Part V.A.! Australia’s Product Liability Morass, forthcoming *Competition and Consumer Law Journal* (2007), also forthcoming as a Sydney Law School Research Paper via www.ssrn.com.

¹⁸ Kellam, Jocelyn and Nottage, Luke, Europeanisation of Product Liability in the Asia-Pacific Region: A Preliminary Empirical Benchmark, Sydney Law School Research Papers, forthcoming via www.ssrn.com (2007).

generate another legal morass, with the old-fashioned NSW legislation creating a gap in consumer protection that its Legislative Council is now recommending plugging.¹⁹

As with product liability, these laws need to be drastically simplified and harmonised, based on balanced economic and other legitimacy grounds.²⁰ Although a particular consumer may be able to gain the upper hand over a supplier by drawing on the diverse principles in play, and achieve a victory in court or a good negotiated settlement, it is more likely that a reasonably well-advised and better resourced supplier will be able to befuddle the consumer complainant. That seems even more likely in light of the easily-ascertained fact that, in Sydney at least, even larger corporations quite often flout their minimum implied warranty obligations. Many retailers insist that only manufacturers owe such (safety, quality and other) obligations, and many manufacturers insist they are only liable for express warranties that they may have offered to consumers.

V. Consumer Access to Justice and Enforcement

The fourth and final area where more attention is needed is access to justice and enforcement. Problems here probably exponentially expand those in the previous three areas, as well as many other fields of consumer law in Australia.

Class actions in federal Courts since 1992 and more recently in Victoria are increasingly not an option for smaller personal injury claims, even though the ALRC's report originally recommending class actions emphasised their efficiency advantages (even for defendants) precisely in such smaller claim situations.²¹ Since the *Glendale* judgment in 1998, the ACCC has not brought a PL case in lieu of an injured consumer, nor joined in a PL class action.

The ACCC also has recently struck a legislative impediment to addressing misleading conduct or breach of contract by suppliers where the harm to individual consumers is small, although collectively very large. Courts have held that an amendment to TPA s80 in 1977 means that injunctions obtained by the ACCC cannot include compensation orders to non-parties (eg refunds).²² This means that prior consent must be obtained from each plaintiff before the ACCC can bring suits instead of them, but the small amounts at stake for each make this impossible in practice. The ACCC has called for law reform to give it powers to combine compensation orders with injunctions, like Australia's securities regulator, but the politicians have dragged their feet. Apart from generic class actions and in contrast to the systems being implemented or investigated in EU member states and Japan, Australia lacks a regime tailored for organizations other than the ACCC, such as accredited consumer organizations, to bring damages claims on behalf of groups of consumers.

Particularly in small claims, therefore, a growing number of consumers are likely to turn to the burgeoning industry-association based "ombudsman" dispute resolution schemes. However, these are not designed efficiently to aggregate collective interests. Also, despite regulators providing some minimum standards for these schemes, there are some remarkable uncertainties surrounding such schemes. In particular, it is unclear whether the

¹⁹ See

<http://www.parliament.nsw.gov.au/prod/PARLMENT/Committee.nsf/0/99D3B2CE26A40F9CCA2571D90018D245>, including my Submission.

²⁰ Griggs, Lynden, *The [Ir]rational Consumer and Why We Need National Legislation Governing Unfair Contract Terms*, 13 *Competition and Consumer Law Journal* 1 (2005); and further his Submission (No 18) to the present Inquiry.

²¹ Kellam and Nottage, above note 17.

²² [Medibank Private Ltd v Cassidy \[2002\] FCAFC 290 \(13 September 2002\)](#) para 25ff; [Australian Competition Consumer Commission v Danoz Direct Pty Ltd \(ACN 003 546 709\) \[2003\] FCA 1580 \(28 August 2003\)](#).

dispute resolution processes are governed by administrative law principles (natural justice binding the scheme/association and the industry member), or arbitration law (binding the association/adjudicators, industry member and consumer – once they opt in, and even though not bound by the outcome), or simply contract law (binding all three relevant parties).²³ Since different implications follow and the Courts have not given us a clear ruling on such a hugely busy dispute resolution sector, legislative intervention is necessary here too.

VI. Conclusions

As mentioned at the outset, Australian consumer law – “in books” and “in action” – has been allowed to slip for too many decades in too many areas, to the detriment of consumers more than firms. It urgently needs to be reassessed from first principles, in light of current thinking in economics but also many other disciplines, and then reformulated comprehensively to maximise its impact on all involved. In doing so, however, Australia needs also to become more open to developments in the laws, practices and community expectations of major trading partners such as Japan and the EU. This will be hard, because we had become accustomed to them coming to us for inspiration; but it is now time to learn also from them.

Yours sincerely

Luke Nottage

²³ See my National Report on Australia for European Commission Project SANCO 2005/B/010 "An analysis and evaluation of alternative means of consumer redress other than individual redress through ordinary judicial proceedings" (at http://ec.europa.eu/consumers/redress/reports_studies/inded_en.htm).