

**PRODUCTIVITY COMMISSION INQUIRY  
CONSUMER POLICY FRAMEWORK**

**Submission by  
Robin M G Brown**

**PREAMBLE**

This submission mainly deals with basic and broad concepts, principles and ideas on consumer policy and consumer policy making many of which will already have come to the attention of or occurred to Commissioners. In large measure my purpose is to set these things out in a way that might aid commissioners making sense of a large and complex field. In all likelihood I have failed, but attempting seems worthwhile.

I am writing this having had the following experience:

- heading the Consumers Federation of Australia through most of the eighties
- working in the then TPC on executive interchange
- serving as a member of the governing or administering body of regulatory agencies of a number of industries including telecommunications, banking, insurance, travel services, direct marketing, food and pharmaceuticals
- serving a Council member of the ACA, as President of ACTCOSS, as a Director of the Foundation for Effective Markets and Governance (FEMAG)
- working as a consultant in consumer affairs

Some of this submission draws on work done on energy market regulation with other FEMAG colleagues for the Public Interest Advocacy Centre (PIAC) and I acknowledge PIAC's permission to use this material.

Discussions with and suggestions from two FEMAG fellow directors Allan Asher, former Deputy Chair of the ACCC and John Wood, former Director of the Federal Bureau of Consumer Affairs have contributed significantly, however the submission is purely a personal one.

**THE BASIS OF CONSUMER POLICY – THE CONSUMER RIGHTS**

I think little can be achieved in any discussion of consumer policy without some measure of common recognition of rights citizens have as consumers. A set of such rights were enunciated by President J F Kennedy in 1961. Hitherto there had not been such a clear statement of such rights. They were:

- The Right to Safety
- The Right to Choose

- The Right to Information
- The Right to be Heard

Following is a statement of the eight rights that have since been adopted by the international consumer movement.

1. **Access to essential goods and services**

The right to access to goods and services essential to life, health and wellbeing such as adequate food, clothing, shelter, health care, education and sanitation.

2. **Safety**

The right to be protected against the marketing or the provision of goods and services that are hazardous to life, health and wellbeing.

3. **Information**

The right to be protected against dishonest, misleading, inaccurate or incomplete information in advertising, labelling or any other communication means thus the right to be given all the information needed to make an informed choice.

4. **Choice**

The right access to a variety of goods and services at fair prices and standards either by the operation of competition or by regulation or public provision as necessary.

5. **Representation**

The right to have consumer interests effectively represented in the making and execution of public policy and in relevant processes of adjudication of laws and non-statutory regulations.

6. **Redress**

The right to compensation, through accessible dispute resolution processes as necessary, for goods or services that are substandard or overpriced or otherwise unfairly sold.

7. **Consumer Education**

The right to provision of the knowledge and skills necessary to be an informed consumer.

8. **Healthy Environment**

The right to live and work in an environment which is neither threatening nor dangerous and which permits a life of dignity and well-being

**The philosophical basis of policy to assure these rights or for regulation in the consumer's interest**

Regulation to protect the interests of consumers occurred in ancient civilisations long before Adam Smith wrote *The Wealth of Nations*, but perhaps he was the first to

place the consumer interest paramount:

“Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.”

This statement provides an underpinning for most of the eight international consumer rights.

Smith surely meant that public policy on or regulation of markets should promote the consumer's interest and never the producer's over the consumer's. It implies that producers should always be expected to act in the consumer's interest. Presumably Adam Smith thought it reasonable that a producer act in his own interest and in the interests of his employees, but only insofar as the interests of the consumer are served.

Things are not quite that straightforward as there is the public interest to be taken into account. It might therefore be more appropriate to suggest that producers must act, while acting in their own interests (shareholders in the case of corporations) and in the interests of their employees:

(A) in the interests of consumers of their products,

(B) in the present interests of the public, and

(C) in the future interests of the public.

Where these interests conflict (C) must take precedence over (B) which in turn must take precedence over (A).

In broad terms the consumer's interest lies, at minimum, in being dealt with fairly. The outcome of fair dealing must be the provision to the consumer of goods and services of fair standards and at fair prices. The recent European directive on fair dealing would seem to be based on this kind of thinking. The fairness of prices and standards are those common in a well operating market. Such a market might well result in prices being charged that allow for investment in R & D so that the interests of future consumers and perhaps the public at large can be served. However, I think that it would usually be the case that where there are externalities relating to the above noted B and C type interests regulatory intervention will be needed.

Many producers are now incorporated. Incorporation is a privilege society gives through the state and a privilege society protects by means of state institutions. It is arguable that a wider obligation than demanded of ordinary producers should accompany this privilege.

### **A rights or a markets approach?**

The foregoing implies that consumer policy should first serve the rights of citizens as

consumers, but of course it should seek to serve those rights as efficiently as possible. This means that no inefficiency in a market should be tolerated unless that inefficiency is related to assurance of a right.

Efficiency is of course about getting the most out of a resource. Getting the most out of a resource cannot be an end in itself. The concept of rights or equity is different in type from the concept of efficiency. I suggest that the former can be a social objective whereas the latter can only be a means to an objective.

## **Some Matters of Principle**

### **Risk**

In general those in a position to manage risks should be expected to do so and to pay for insurance cover for adverse events. This should be applied to consumer markets. For example, there has been argument over whether payments into the Travel Compensation Fund (the “insurance” for travel agent failure) should come from consumers or travel agents. As consumers can have no real capacity to manage the risk in question agents should be the payers. This way there is the potential of a positive feedback operating such that better risk management should reduce the payments needed. Of course ultimately such payments are usually likely to be reflected in the prices consumers pay, but it is justifiable that all consumers in a market pay to prevent catastrophic consequences for a few.

### **Essential goods and services – what are they?**

My departure point on this is the assumption that our community sees it as incumbent upon the state to ensure provision of or equitable access to a range of goods and services that are essential for its citizens’ survival, health and well-being, self-fulfilment and full and dignified community participation. In Australia security, education, and health care services, sanitation and to some extent emergency shelter, food and clothing are provided by the state relatively non-controversially. I think it can be argued that the range should also include the utilities services of energy, water, communications and public transport.

Clearly we utilise, or partly utilise, markets to deliver some of these goods and services, but not others. When markets or quasi-markets are utilised, because there are special characteristics on either or both the supply and demand sides and often externalities involved, interventions beyond basic market regulation are nearly always required. Ensuring equitable access over time and as social, ecological, technological and economic conditions change requires these regulatory arrangements to be adaptable. This means that care must be taken to provide for the weakest voices to be heard in the adaptation process.

### **Markets for all or for most**

With general fair-trading regulation some markets can be expected to work well for all

citizens except a small minority with psychological/intellectual impairments. Some markets require specific regulatory intervention to work at all. The question is should such intervention be designed to work for most consumers or for all besides the abovementioned minority. In my view we should never use special non-market interventions such as assistance programmes for particular groups, especially where that means continuing reliance on government expenditure, if a general intervention can be used. This is because of the political disempowerment of those required to ask for assistance.

When a non-market intervention is the only practical mechanism, it must be more efficient than the general regulatory option and we must have good confidence that the target group can be reached. We must also have good confidence that this intervention is politically sustainable over time. Ideally, such an intervention would be locked in with legislation.

### **Markets and minors**

Our legal system treats minors as not capable of fully mature rational decision-making. Economic theory and market regulation is based on the notion of consumers being rational maximising agents. There seems to be no justification for allowing promotion/advertising/selling of products to minors except in very limited circumstances where we can be very confident that they will not be able to make choices that are to their detriment. Of course it is argued that parents control purchasing by minors, but parents know this control is very limited. Sweden has prohibited all TV advertising aimed at children under the age of 12 since 1991 and it is now seeking similar regulation throughout the EU.

### **DEFINING CONSUMER POLICY**

Consumer policy is not defined for the inquiry. It could be defined very broadly as any element of public policy that establishes state institutions and/or requires state actions that affect the interests of citizens as consumers of goods and services however supplied.

It could be more narrowly defined as public policy which affects final consumers' access to (availability and price) and standards (including risk level) of any good or service and consumers' capacity to make informed rational choices. If we consider consumption to include the consumption of goods and services however they are provided then this definition includes those provided at no direct charge by any of the three sectors of production: public, private and community.

A yet narrower definition would restrict consumption to acts in trade or commercial

exchange; that is those involving valuable consideration being given directly by the consumer for the good or service. That is the consumer must make a decision to part with a portion of their wealth for the good or service.

For present purposes this narrower definition will be adopted. However, it would seem reasonable to suggest that standards regulated for trade or commercial exchange should be adopted in respect of goods and services supplied otherwise. Consumers of goods and services which are produced as a result of some communal payment system (taxation) should enjoy the same rights.

Using this definition consumer policy can be divided into three main subsets:

- 1. policy to empower consumers to act in their own interests,
- 2. policy to provide for protection of consumers and action on their behalf in circumstances where, for one reason or another they are not able to fully prosecute their interests, and
- 3. policy to ensure, as far as possible, consumers benefit from competition so that efficiency gains make standards as high as possible and prices as low as possible.

The labels for these three subsets might be:

- Consumer empowerment policy
- Consumer protection policy, and
- Competition policy

Consumer empowerment policy relates mainly to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> consumer rights.

Consumer protection policy relates mainly to the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and to some extent the 8<sup>th</sup> consumer rights. In broad terms it is policy relating to the standards of goods and services and to conditions directly affecting the trade between buyer and seller.

Competition policy relates mainly to the 4<sup>th</sup> consumer right though it affects most other rights.

Although competition policy has been the subject of much review and reform in recent years, in my view there is much left to be addressed particularly in markets such as banking, professional services, real estate services, utilities to name but a few in which there appears to be a continuing producer surplus. It is my view that the Commission should not spend effort on the substance of this subset of consumer

policy mainly for reasons of practicality. However, it is necessary for the Commission to consider the interaction between competition research, advocacy and policy making structures and processes and those relating to the other two subsets of consumer policy.

All three consumer policy sub-sets relate to the 1<sup>st</sup> consumer right. Other policy areas, notably social, health, education and environment, are particularly important for assurance of the 1<sup>st</sup> and 8<sup>th</sup> consumer rights.

### **Investors**

There are significant problems at present for small investors. They are not consumers, but they are frequently in no better a position to make sound choices than are consumers in many markets. Public policy for small investors should be similar to that for consumers in terms of the protections and information provided and programmes of education.

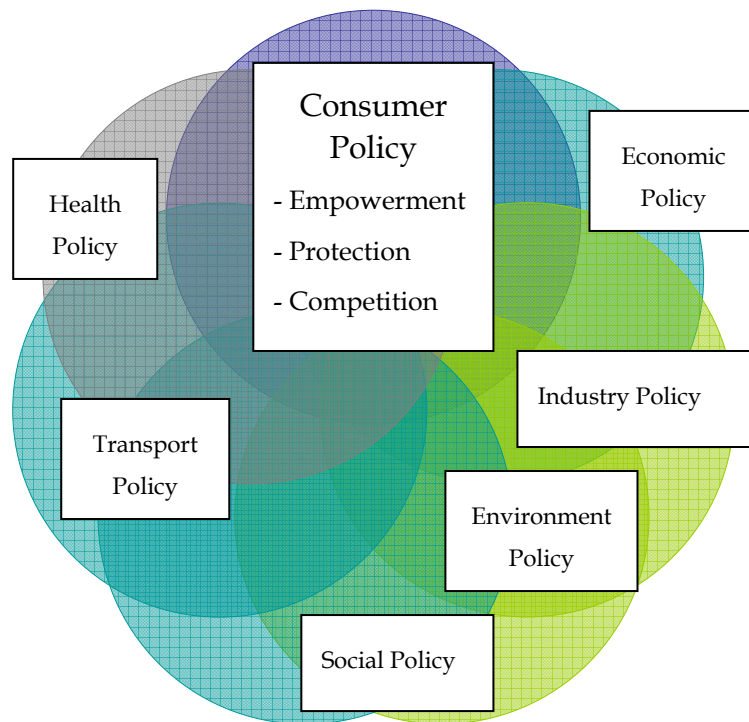
Small investors are very frequently if not invariably purchasers of investment advice. As such they are consumers whether payment is direct or by commission and consumer policy should obtain.

### **Small business**

Owners and operators of small businesses in making purchases for their businesses are usually in no better a bargaining position than consumers and should be defined as consumers for the purposes of consumer policy.

### **The parameters of consumer policy and interaction with other policy areas.**

There are always large areas of overlap between areas of public policy which of course is the why interdepartmental committees, cabinet coordination processes and whole of government approaches are frequently needed to make sound public policy. Consumer policy has more overlaps than most policy areas. Perhaps only defence policy is outside its circle. The diagram below illustrates this. Clearly a large part of the consumer policy role in government is informing other policy makers about the consumer interest, e.g. through consumer advisory bodies or consumer impact statements.





## WHAT POLICY IS REQUIRED

The consumer in the 21<sup>st</sup> century in Australia is confronted with

- more markets in part due to services formerly provided by governments being privatised
- increasing complexity of many products and customisation thus greater information search and other transactions costs thus a trend to dependence on agents and intermediaries
- many services being supplied from outside our national border

Policy development has failed in the past decade or so to cope with these changes. In particular we need progress in the following:

- information to consumers in more manageable forms such as standard form contracts with recognition of limitations of information
- therapeutic goods regulation to keep up with changing technology and needs and attitudes
- food standards especially on labelling and balancing the consumer interest against the producer interest which currently dominates
- regulation to cope with new developments in financial services especially to improve the performance of the finance profession (This still young profession needs much more intervention to bring its standards up to scratch)
- product safety
- Federal uniformity or harmonisation of regulation

It is useful to think in terms of a spectrum of regulatory intervention as depicted in the box below.

## Spectrum of Regulatory Intervention

### SORI

Essential general regulatory requirements:

- basic companies regulation;
- consumer protection regulation; and
- competition regulation.

However, where:

- access to goods or services is essential to survival or to the sound functioning of a just or fair society; or
- consumers could be exposed to risks to health or safety or to financial risks

there is also a need for market specific regulation, namely:

- market substituting mechanisms;
- information standards;
- product standards;
- licensing;
- product bans and recalls.

The more important products are or the greater the risks then the tighter is the regulation that is warranted.

### **General or market specific regulation**

Reliance on general often means reliance on slow court processes to determine the application of the law to particular market circumstances. Market specific regulation can be more efficient. There is debate on whether regulation should be by means of statute or delegated instruments. In my experience the latter can be more responsive to market realities if it is developed by means of a tripartite government, industry and consumer movement process – see the discussion under the third point in the extract quoted in the next section.

### **Licensing**

The following extract from the report on energy market regulation I co-authored with other FEMAG colleagues for PIAC refers particularly to energy markets, but the points have application to other markets.

*6.3.12 Theoretically it may be possible to cover all of the special regulatory requirements of energy markets by adding energy market specific provisions to the Trade Practices Act and Fair Trading Acts and by mandating energy market codes under those acts or by making rules under the National Electricity Law or National Gas Law and that licensing need*

*only be used to regulate for technical and environmental standards as proposed in the Gilbert and Tobin/NERA paper. We think that the license process, however, significantly assists achievement of regulatory compliance for the following reasons.*

- *First, the initial licence granting allows a process of assessment of companies prior to market entry. The Gilbert and Tobin/NERA paper suggests this is a barrier to entry. We found no convincing evidence that license systems have been or are barriers to entry nor that other approaches would deliver good compliance outcomes, including for codes for consumer protection, any more efficiently. Our consultations with regulators suggested very strongly that that companies actually find the licensing process valuable. It is seen as more efficient to go through such a process and to get the business plan right, especially including internal compliance systems, than it is to find a mismatch between regulation and the business plan after entry and to go through a retrofitting exercise. The value of codes and guidelines to companies is that that they obviate much work on internal compliance systems*
- *Second, a license is an asset. When this asset is under any kind of threat the bank financing the licensee is interested. The extra compliance pressure this provides may well be quite valuable. This would be of general importance if all companies were privately owned.*
- *Third, a license system can be much more responsive to changing market conditions resulting from economic, social and technological changes. Altering a license condition such as by way of revising a code with which the license requires compliance is much more readily done than getting changes to legislation. One of the reasons the Gilbert and Tobin/NERA paper argues that legislative instruments are preferable to administrative instruments is the legislative process results in greater precision because of a more rigorous drafting process. We are not sure of the basis of this assertion. Our experience is that consultations on draft administrative instruments are usually comprehensive. In fact the consultation processes used also usually allows scrutiny by interested members of the public. Indeed codes are often developed by stakeholder committees. We also note that legislative instruments run the risk of last minute (sometimes late night) unexpected amendments. Even if a legislation instrument has precision when enacted, we reiterate that conditions can change faster than it can be amended.*
- *Fourth, non-statutory ombudsman schemes are given life by license conditions. This was overlooked the Gilbert and Tobin/NERA paper.*
- *Fifth, having licenses that provide for consumer protection gives the licensing agency a role in achieving consumer protection regulatory compliance. This means that three agencies, the licensing agency, the*

*complaint/dispute ombudsman and the fair trading agency (either state/territory or ACCC), with somewhat different roles can work collaboratively to achieve the highest compliance levels. We have been advised of the effectiveness of such a tripartite approach in a number of jurisdictions. It is conceded by regulators that three agencies with an interest in consumer protection are effective in keeping them all at best practice.*

### **Non-statutory regulation**

I think the experience of non-statutory regulation in Australia has been generally positive. Such regulation can take any of the following forms:

- Government based/required - for example by license condition
- Industry based/required – a condition of membership of an industry association
- Community sector based/required – can be effective in markets where there is significant community awareness of issues such as fair trade and sustainable forestry certification schemes

Non-statutory regulation is usually at its best when all three sectors collaborate from the beginning in the design and running of the regulatory scheme. Schemes should meet benchmark standards. The appendix is a set benchmarks for industry based dispute resolution schemes prepared by John Wood.

### **Paying for regulation**

Statutory regulation can be funded from general revenue or from levies on producers such as license fees. Non-statutory regulation is invariably funded by producers. Funding from producers is normally passed on in prices to consumers so the choice is funding by citizens at large or consumers in a particular market. My view is that it is normally appropriate, unless there are significant public interest externalities for the cost of regulation of a particular market to be contained to that market as moral hazard effects are reduced.

### **International issues**

Consumer policy is an international activity and Australia should be an active participant in intergovernmental and other appropriate forums in

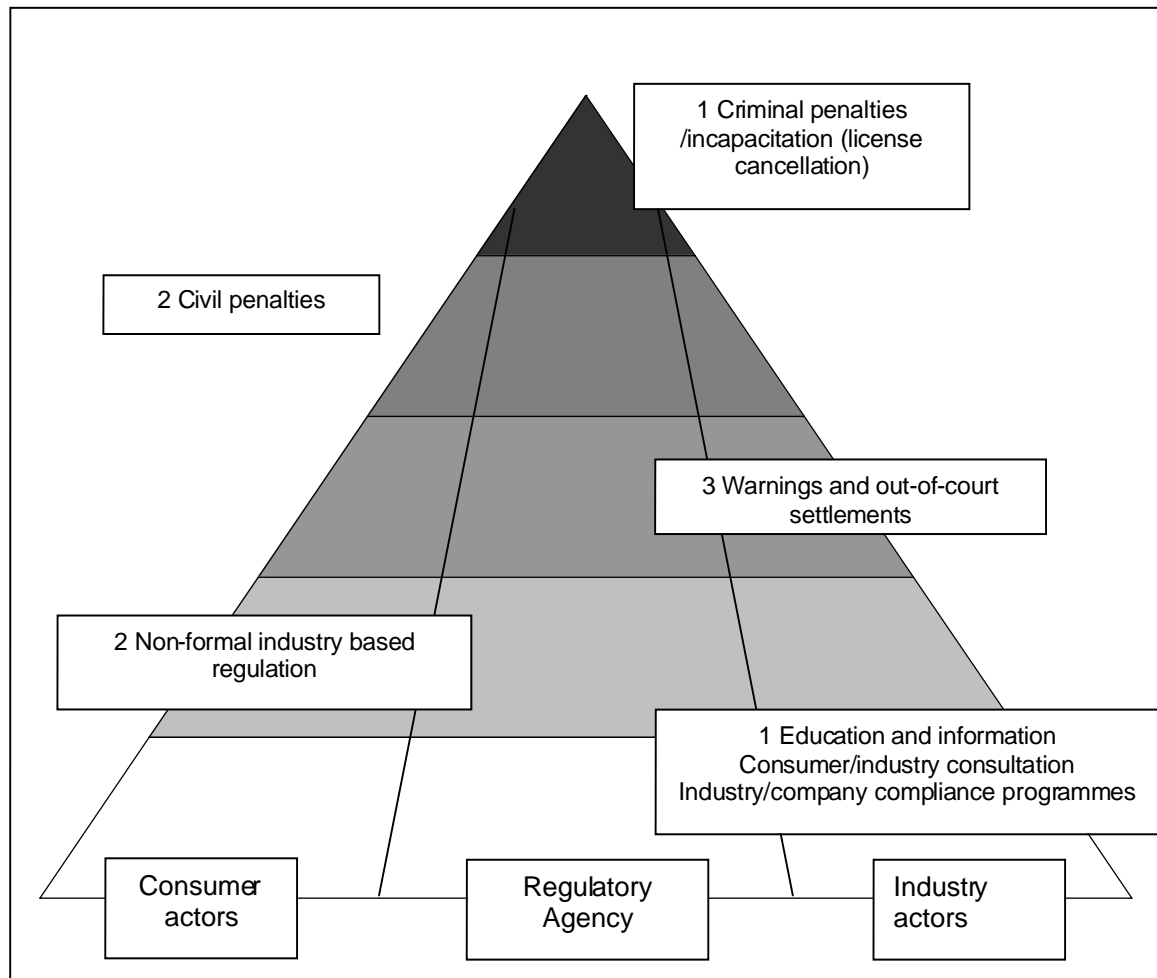
- the development of supra national standards and regulation
- collaborative enforcement, and
- regulatory harmonisation

Australia should also play a large role in assisting the capacity development of developing countries in consumer policy and administration. This should be done anyway, but there is a national interest in having those countries able to participate in

necessary cross border regulatory enforcement. Besides such assistance being given to governments it must also go to civil society so that advocacy can be effective.

## The Compliance Pyramid

Policy development should be informed by the compliance pyramid model. The diagram below depicts a typical pyramid. The number of levels and the activities at each level will vary from regulatory regime to regulatory regime. The idea of course is that the bulk of effort and activity occurs at the base of the pyramid and this diminishes towards the top.



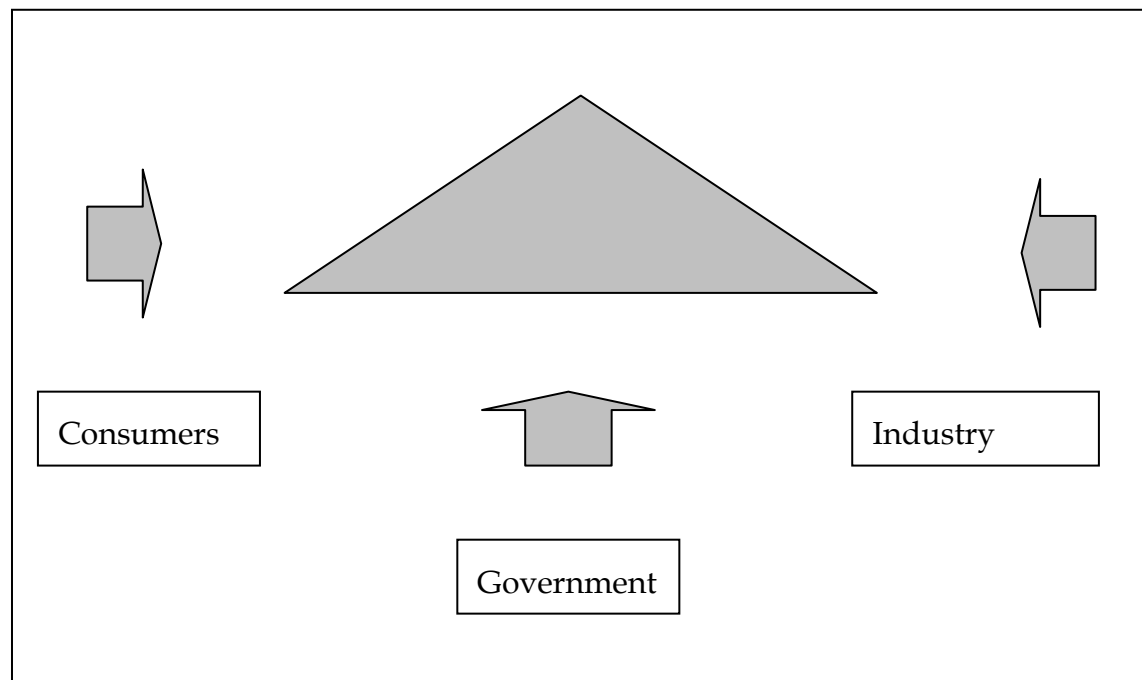
Under all regulatory regimes there is considerable scope for both consumer actors and industry actors to contribute at the base level. Individual consumers can contribute by drawing a company's attention to marketplace problems. Industry associations and companies can do much in the way of compliance programmes and complaint handling. Consumer organisations work with industries and companies and can distribute information to consumers.

In some regulatory regimes there is scope for both consumer and industry actors to contribute right up to the top level. The effect of this contribution from consumer and industry actors is of course to broaden the pyramid, to increase the activity at the lower levels, thus reducing the need for activity at the higher levels and making the regulatory regime more effective and efficient.

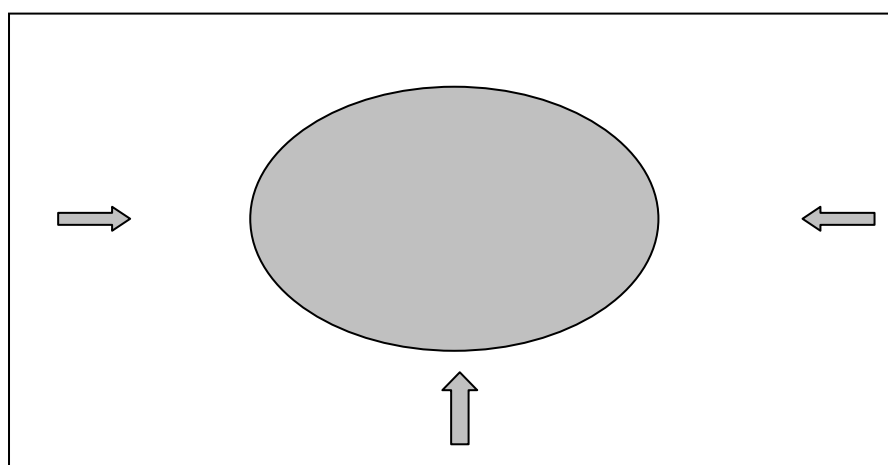
For regulatory regimes to be fully effective the top level has to be and be seen to be

real. This does not mean it has to be utilised, but a real potential for utilisation is necessary. In the end the government of the day must make it clear that it is prepared to back up the regulatory agency involved.

With clear government commitment and support and with clear commitment and support from both industry and consumers (or citizens in respect of public interest issues or workers in respect of worker protection) the regulatory/compliance pyramid can be at its broadest and most effective and efficient as depicted in the diagram below.



Where tripartite commitment is weak or lacking the pyramid structure collapses and the regulatory agency is limited to relatively ineffectual activity in the middle levels as represented in the diagram below.



## **STRUCTURES AND PROCESSES FOR MAKING AND IMPLEMENTING POLICY**

For continuing sound development of consumer policy and its implementation re-development of national institutional measures is required. Thankfully Australia's ACCC, rightly the envy of many other countries, continues to be a strong institution. I do not agree with Telstra that it is too strong. What we need are:

1 A statutory consumer policy council with members appointed by the Ministerial Council on Consumer Affairs

- which can give a national focus for consumer policy research and analysis
- which can influence the work programs of the many relevant organisations with research/analysis resources
- which has some capacity to undertake or commission its own research/analysis, and
- which can provide whole of government policy advice

2 A minister dedicated to consumer policy and a skilled, semi-autonomous federal agency for consumer policy development, coordination and implementation and administration of consumer support programmes.

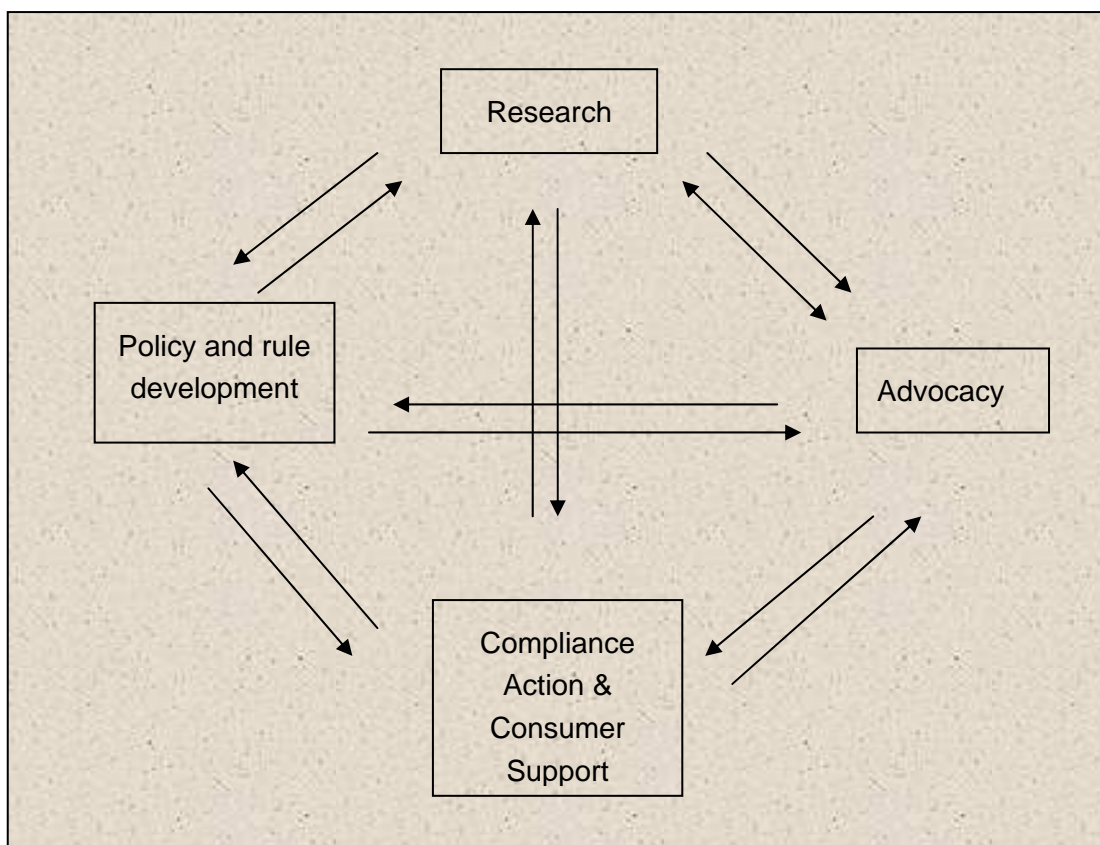
3 Effective support, including general (untied) grants-in-aid, for consumer and other relevant civil society organisations to contribute to policy development and participate in regulatory processes.

In my experience outcomes that meet the tests of equity and efficiency for consumers and the public interest, that is, the best mix of market forces and regulatory or other intervention, will not be achieved if any of the four following interdependent activities is lacking:

- Research and education and information
- Advocacy
- Policy and rule making
- Compliance action & consumer support:

There must be two-way inter-action between all four and the process must be continual and continuous as depicted in the diagram below as the process of change in the characteristics of markets rarely pauses.





The main functions that need to be performed in respect of these four areas of activity are as follows:

#### **Research and education and information**

- research and analysis of the market sector – both supply and demand sides;
- collection of data on the performance of the market sector;

#### **Advocacy**

- producer advocacy
  - consumer advocacy
    - for policy and/or regulatory reform
    - regulatory decisions – tariff approvals etc;
    - for improved administration of regulation;
    - individual cases;
    - for improvements in companies' services
    - public interest advocacy for sustainability
- for ordinary consumers

- in relation to or for disadvantaged consumers

### **Policy and rule making**

- policy development
- rule/regulatory instrument development and review;
- review and reform of regulation of the market sector;

### **Compliance action & consumer support:**

Education, information, compliance programmes, rule enforcement, dispute resolution

- education and dissemination of information to consumers;
- education and dissemination of information to suppliers;
- industry association and company level programmes for compliance with regulation and for continuing consumer service improvement
- administration of general regulation for consumer protection and competition and for worker protection and environment protection;
- administration of market sector regulation;
- collection of complaints/disputes;
- independent mediation/conciliation and arbitration of complaints/disputes; and
- management of particular cases (e.g. hardship cases)

There are many options in terms of allocation of performance of these functions to different agents and many may be undertaken by more than one stakeholder.

All these functions are integral to the effective operation of a market.

### **Research and education and information**

In my view there is an inadequate capacity in this area particularly in terms of our knowledge of how consumers are coping with 21<sup>st</sup> century markets. For example we do not know for a number of markets whether sufficient consumers are undertaking information searches so that the demand side is making competition work adequately. We are also not taking advantage of the large amount of data that many community based consumer service organisations have to inform policy development.

Research is a major function of the UK's National Consumer Council and it has a particular requirement to research the needs of disadvantaged consumers. Australia needs such a body as a statutory entity. An Australian consumer policy council should cooperate and collaborate with a number of other bodies, but it should have a particularly close working relationship with the National Competition Council. For any market it is necessary to analyse both how well competition is operating, but the most

efficient and certainly the most equitable results will not be achieved if there are information asymmetry or other consumer problems. Joint reviews by the two councils would therefore often be valuable. Cross membership would be appropriate. It would be necessary for each council to be in control of its own budget however. A consumer policy council as a counterpart to the National Competition Council with equivalent status would help to ensure we get the balance right in continuing reforms to Australian markets.

Such a council should have funds to also commission research from people and organisations with particular expertise. RegNet at the ANU is one such organisation.

### **Advocacy**

While broad agreement can usually be achieved amongst a range of views on the other three elements, the resources they consume and the manner in which they should be performed, there is often controversy on advocacy.

While the research on a market might be comprehensive, policy and rule makers and regulators are likely to hear more about aspects and perspectives relevant to the interests of those whose livelihoods are involved in the market than about aspects and perspectives relevant to the interests of consumers or to the public interest. It is the costs and benefits of advocacy that determine this. In the extreme, policy and rule makers and regulators can be captured by producer interests.

Getting citizens in general to advocate their interests or pay up to have their interest represented as consumers of a good or service or beneficiaries of a clean environment is much harder. The benefits of participation in advocacy are often seen to fall well below the costs. This is largely due to the “collective action problem” described by in 1965 by Mancur Olson. So, where public policy and regulation should reflect a diffuse public interest, members of the community at large will, not unreasonably, question why they should devote a lot of time and energy with everyone else “free riding” on their efforts.

Of further concern is the fact that many people in disadvantaged groups in the community are in any case disempowered in advocacy. For a range of reasons they are unable, or find it very difficult, to engage in participation processes available.

Regulatory arrangements need to be adaptable. This means that care must be taken to provide for the weakest voices to be heard in the adaptation process.

The increasing globalisation of public policy formation is problematical. Compromises from national positions often occur at international forums. Such compromises are more likely to be in favour of producer interests because members of national delegations to forums are rather more likely to be exposed to the

advocates of producer interests than consumer movement advocates.

Advocacy can be seen as occurring both extra and intra state. Extra state advocacy is provided by:

- The consumer movement and other community sector interests
- Industry and industry organisations
- Academics
- Professional bodies
- Industry ombudsman and other external dispute resolution administrators. Because these agencies have so much information on what is really happening in the market they make important contributions to advocacy. However, it is somewhat constrained, as they must be careful to maintain their status as impartial umpires between producers and consumers.

Intra state advocacy is provided by the agency charged with consumer policy development and other interested agencies. It has been provided by consumer advisory committees in various forms over the years. The effectiveness of these committees has been rather dependent on the personalities of their members and chairs. A statutory consumer policy council would play a much more effective intra state advocacy role.

With a modest grant-in-aid to fund a small secretariat in Canberra the Consumers' Federation of Australia was an effective advocate. It needs to be funded again so that consumer advocacy can be better coordinated nationally and the consumer interest can be injected into the Federal policy making processes.

### **Policy and rule making**

In my view the only two real contenders for the location of this function are Treasury or AG's and I think the advantages of the latter outweigh those of the former. In Treasury a market efficiency approach will always dominate. In AG's, provided that an overly legalistic approach can be avoided, a good balance between a rights assurance approach and an efficiency approach can be achieved. The operation in the eighties and early nineties of the Federal Bureau of Consumer Affairs (FBCA), a semi-autonomous agency in the AG's portfolio, was particularly successful. The fact that there was usually a minister with dedicated or significant responsibility for consumer policy was also important. Cabinet access through the Attorney-General was effective as the AG is under much less pressure to listen to the special pleadings of producer interests, with the exception of lawyers, and thus able to look to the broad consumer and public interest.

### **Compliance action & consumer support**

Should consumer and competition regulation be fused or split? There is a problem of giving balanced attention to

- big issues involving big powerful players – mergers, takeovers, cartels etc
- issues that are small, but affect many small players
- issues that affect few small players, but severely

This seems to be a very difficult management task perhaps in part because big powerful players can make more noise than small players. Some suggest that the only way it can be achieved is by splitting the agency. My view is that on balance the advantages of a fused agency in terms of synergies and the value of understanding competition, consumer protection and empowerment issues in a particular market outweigh the disadvantages. I suggest that consideration be given to having an ACCC commissioner with statutory responsibilities for the consumer protection/empowerment functions. Giving a commissioner a clear obligation to see that the necessary action in this area is taken and reported on would influence the ACCC's priority setting.

There are problems in other areas of compliance action. There can be prioritising difficulties in mixing regulatory responsibility for product safety and product information. For example food contamination issues can take over from non-urgent less readily assessable issues which could have more significant health affects such as food label breaches. This is where a strong agency such as the former FBCA can play a useful role.

In regard to consumer support again there is a need for an FBCA type body to play a leading role and a consumer policy council would make a significant contribution.

## Appendix

# BENCHMARKS FOR INDUSTRY BASED DISPUTE RESOLUTION SCHEMES

## 1. Accessibility

### Principle

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

### Purpose

To promote customer access to the scheme on an equitable basis.

### Key Practices

#### *Awareness/Promotion*

1.1. The scheme<sup>1</sup> seeks to ensure that all customers of the relevant industry are aware of its existence.

1.2. The scheme promotes its existence in the media or by other means.

1.3. The scheme produces readily available material in simple terms explaining:

- how to access the scheme;
- how the scheme works;
- the major areas with which the scheme deals; and
- any restrictions on the scheme's powers.

1.4. The scheme requires scheme members<sup>2</sup> to inform their customers<sup>3</sup> about the scheme<sup>4</sup>.

1.5. The scheme ensures that information about its existence, procedures and scope is available to customers through scheme members:

- when a scheme member responds to a customer's complaint; and
- when customers are not satisfied in whole or in part with the outcome of the internal complaints mechanism of a scheme member, when the scheme member refuses to deal with a complaint, or when the time period within which the internal complaints mechanism<sup>5</sup> is expected to produce an outcome has expired, whichever first occurs.

1.6. The scheme promotes its existence in such a way as to be sensitive to disadvantaged customers or customers with special needs.

### *Access*

1.7. The scheme seeks to ensure nation-wide access to it by customers.<sup>6</sup>

1.8. The scheme provides appropriate facilities and assistance for disadvantaged complainants or those with special needs.

1.9. Complainants can make initial contact with the scheme orally or in writing but the complaint must ultimately be reduced to writing.<sup>7</sup>

1.10. The terms of reference of the scheme are expressed clearly.

### *Cost*

1.11. Customers do not pay any application or other fee or charge before a complaint is dealt with by the scheme, or at any stage in the process.

### *Staff Assistance*

1.12. The scheme's staff have the ability to handle customer complaints and are provided with adequate training in complaints handling.

1.13. The scheme's staff explain to complainants in simple terms:

- how the scheme works;
- the major areas it deals with;
- any restrictions on its powers; and
- the timelines applicable to each of the processes in the scheme.

1.14. The scheme's staff assist complainants to subsequently reduce a complaint to writing, where complainants need assistance to do so.

### *Use*

1.15. The scheme's processes are simple for complainants to understand and easy to use.

1.16. The scheme provides for a complainant's case to be presented orally or in writing at the determination stage, at the discretion of the decision-maker.

1.17. The scheme provides for complainants to be supported by another person at any stage in the scheme's processes.

### *Non-adversarial Approach*

1.18. The scheme uses appropriate techniques including conciliation, mediation and negotiation in attempting to settle complaints.<sup>8</sup>

1.19. The scheme provides for informal proceedings which discourage a legalistic, adversarial approach at all stages in the scheme's processes.

### ***Legal Representation***

1.20. The scheme discourages the use of legal representatives before the decision-maker<sup>9</sup> except in special circumstances.

1.21. The scheme provides the opportunity for both parties to be legally represented where one party is so allowed.

1.22. The scheme provides for the scheme member to pay the legal costs of complainants where the scheme member is the first party to request to be legally represented and the decision-maker agrees to that request.

### **Footnotes**

1 The 'scheme' refers to a dispute resolution scheme run by an industry to resolve complaints by customers about businesses within that industry. The type of scheme which is set up will differ according to the size and nature of the relevant industry.

2 'Scheme members' refers to those businesses which participate in a customer dispute resolution scheme.

3 The term 'customer' is used to refer to consumers who purchase goods or services from scheme members.

4 This key practice relates to general promotion of the existence of the scheme by scheme members. The circumstances in which individual customers are required to be informed about the scheme is dealt with in key practice 1.5.

5 An 'internal complaints mechanism' refers to the system set up within a business to handle complaints by its customers.

6 Maximising access to the scheme could include measures such as providing toll free telephone access for consumers/complainants.

7 In most cases the staff of a scheme will help a complainant reduce a complaint to writing where the complainant requires assistance to do so.

8 While the focus of the scheme is mainly on alternative dispute resolution, it also has the function of arbitrating disputes which cannot be resolved by alternative means. The alternative dispute resolution techniques listed here are used before arbitration is considered. Initially, customers are encouraged to discuss their complaint with the scheme member and use any internal



complaints mechanism that is available. Schemes are then encouraged to attempt to settle complaints before they get to the decision-maker. The scheme does not have to use all of the listed alternative dispute resolution techniques nor in this particular order, but the ones cited in this key practice are recognised techniques.

9 The 'decision-maker' refers to the individual, panel of individuals or other entity which is responsible for the final

## **2. Independence**

### **Principle**

The decision-making process and administration of the scheme are independent from scheme members.

### **Purpose**

To ensure that the processes and decisions of the scheme are objective and unbiased and are seen to be objective and unbiased.

### **Key Practices**

#### *The Decision-maker*

2.1. The scheme has a decision-maker who is responsible for the determination of complaints.

2.2. The decision-maker is appointed to the scheme for a fixed term.

2.3. The decision-maker is not selected directly by scheme members, and is not answerable to scheme members for determinations.<sup>10</sup>

2.4. The decision-maker has no relationship with the scheme members that fund or administer the scheme which would give rise to a perceived or actual conflict of interest.

#### *Staff*

2.5. The scheme's staff are not selected directly by scheme members, and are not answerable to scheme members for the operation of the scheme.

#### *Overseeing Entity*

2.6. There is a separate entity set up formally to oversee the independence of the scheme's operation.<sup>11</sup> The entity has a balance of consumer, industry and, where relevant, other key stakeholder interests.

2.7. Representatives of consumer interests on the overseeing entity<sup>12</sup> are:

- capable of reflecting the viewpoints and concerns of consumers; and
- persons in whom consumers and consumer organisations have confidence.

2.8. As a minimum the functions of the overseeing entity comprise:

appointing or dismissing the decision-maker;

recommending or approving the scheme's budget;

receiving complaints about the operation of the scheme;<sup>13</sup>

recommending and being consulted about any changes to the scheme's terms of reference;

receiving regular reports about the operation of the scheme; and

receiving information about, and taking appropriate action in relation to, systemic industry problems referred to it by the scheme.

### ***Funding***

2.9. The scheme has sufficient funding to enable its caseload and other relevant functions necessary to fulfil its terms of reference to be handled in accordance with these benchmarks.

### ***Terms of Reference***

2.10. Changes to the terms of reference are made in consultation with relevant stakeholders, including scheme members, industry and consumer organisations and government.

### **Footnotes**

10 Where the decision-maker consists, for example, of a panel of individuals, only the chair, or the individual who controls the decision-making process, is required to be independent of industry or consumer interests and be appointed by the entity which oversees the independence of a scheme's operation. Where the decision-maker consists of more than one individual, the chair ensures the independence of the decision-making. This allows for the relevant industry to be represented on the decision-making entity, as long as a balance between consumers and industry is maintained.

11 An example of an entity which formally oversees the independence of a scheme could be a council or other body usually consisting of an independent chair, consumer member or members, industry member or members and, where relevant, other stakeholder members or members. Smaller industry sectors or those with few complaints may not have the ability or need to devote large resources to setting up such an entity. Other types of overseeing entities are not

precluded as long as they allow for the relevant independence or a balance of competing interests.

12 Suitable consumer representatives can be ascertained by a number of methods, including the relevant consumer organisation providing a nominee, advertising for representatives, or the relevant consumer affairs agency or Minister responsible for consumer affairs nominating a representative. Suitable industry and other stakeholder representatives can be sought from the relevant industry association or stakeholder respectively.

13 The receipt of complaints about the scheme's operation (by the entity which oversees the independence of a scheme's operation) does not extend to receiving appeals against the determinations of the decision-maker.

### **3. Fairness**

#### **Principle**

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

#### **Purpose**

To ensure that the decisions of the scheme are fair and are seen to be fair.

#### **Key Practices**

##### *Determinations*

3.1. The decision-maker bases determinations<sup>14</sup> on what is fair and reasonable, having regard to good industry practice, relevant industry codes of practice and the law.

##### *Procedural Fairness*

3.2. The scheme's staff advise complainants of their right to access the legal system or other redress mechanisms at any stage if they are dissatisfied with any of the scheme's decisions or with the decision-maker's determination.

3.3. Both parties can put their case to the decision-maker.

3.4. Both parties are told the arguments, and sufficient information to know the case, of the other party.

3.5.Both parties have the opportunity to rebut the arguments of, and information provided by, the other party.

3.6.Both parties are told of the reasons for any determination.

3.7.Complainants are advised of the reasons why a complaint is outside jurisdiction or is otherwise excluded.

### *Provision of Information to the Decision-Maker*

3.8.The decision-maker encourages but cannot compel complainants to provide information relevant to a complaint.

3.9.The decision-maker can demand that scheme members provide all information which, in the decision-maker's view, is relevant to a complaint, unless that information identifies a third party to whom a duty of confidentiality or privacy is owed<sup>15</sup>, or unless it contains information which the scheme member is prohibited by law from disclosing.

### *Confidentiality*

3.10.Where a scheme member provides information which identifies a third party, the information may be provided to the other party with deletions, where appropriate, at the discretion of the decision-maker.

3.11.The scheme ensures that information provided to it for the purposes of resolving complaints is kept confidential, unless disclosure is required by law or for any other purpose specified in these benchmarks.

3.12.Parties to a complaint agree not to disclose information gained during the course of any mediation, conciliation or negotiation to any third party, unless required by law to disclose such information.

### **Footnotes**

14 The term 'determinations' is used to refer to the final decision made by the decision-maker when determining a complaint. The term 'decisions' is used to refer to the decisions made by the scheme's staff.

15 Where a duty of confidentiality or privacy is owed to a third party in relation to information sought by the decision-maker, the scheme members can seek the permission of the third party to release that information to the decision-maker in full or with deletions as appropriate.

## **4. Accountability**

### **Principle**

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.<sup>16</sup>

### **Purpose**

To ensure public confidence in the scheme and allow assessment and improvement of its performance and that of scheme members.

### **Key Practices**

#### *Determinations*

4.1. The scheme regularly provides written reports of determinations<sup>17</sup> to scheme members and any interested bodies for the purposes of:

- educating scheme members and consumers; and
- demonstrating consistency and fairness in decision-making.

4.2. Written reports of determinations do not name the parties involved.

#### *Reporting*

4.3. The scheme publishes a detailed and informative annual report containing specific statistical and other data about the performance of the scheme, including:

- information about how the scheme works;
- the number and types of complaints it receives and their outcome;
- the time taken to resolve complaints;
- any systemic problems arising from complaints;
- examples of representative case studies;
- information about how the scheme ensures equitable access;
- a list of scheme members supporting the scheme, together with any changes to the list during the year;
- where the scheme's terms of reference permit, the names of those scheme members which do not meet their obligations as members of the scheme;<sup>18</sup> and
- information about new developments or key areas in which policy or education initiatives are required.

4.4. The annual report is distributed to relevant stakeholders and otherwise made available upon request.

### **Footnotes**

16 Systematic industry problems can refer to issues or trends arising either out of many complaints about one scheme member or out of many complaints (which are essentially similar) about more than one scheme member.

17 Written reports of determinations can consist of a concise summary of a decision-maker's determination and reasons for so determining. They do not necessarily need to include all the evidence, arguments and reasoning of each complaint. It is not envisaged that written reports would be provided of all determinations made by the decision-maker. The determinations which are reported should be left to the decision-maker's discretion. It is not envisaged that written reports would necessarily be provided of other decisions (apart from determinations) made by the scheme.

18 The scheme should state in its terms of reference whether it will disclose the names of schemes members which do not meet their obligations under the scheme. Examples of where a scheme member does not meet its obligations under the scheme will include where it does not provide information as and when requested, or where it does not comply with a determination made under the scheme.

## **5. Efficiency**

### **Principle**

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

### **Purpose**

To give customers and scheme members confidence in the scheme and to ensure the scheme provides value for its funding.

### **Key Practices**

#### ***Appropriate Process or Forum***

5.1. The scheme deals only with complaints which are within its terms of reference and have not been dealt with, or are not being dealt with, by another dispute resolution forum<sup>19</sup> and:

- which have been considered, and not resolved to the customer's satisfaction, by a scheme member's internal complaints resolution mechanism; or
- where a scheme member has refused, or failed within a reasonable time, to deal with a complaint under its internal complaints resolution mechanism.

5.2. The scheme has mechanisms and procedures for referring relevant complaints to other, more appropriate, fora.

5.3. The scheme has mechanisms and procedures for referring systemic industry problems, that become apparent from complaints, to relevant scheme members.

5.4. The scheme excludes vexatious and frivolous complaints, at the discretion of the decision-maker.

### *Tracking of Complaints*

5.5. The scheme has reasonable time limits set for each of its processes which facilitate speedy resolution without compromising quality decision-making.

5.6. The scheme has mechanisms to ensure that the time limits are complied with as far as possible.

5.7. The scheme has a system for tracking the progress of complaints.

5.8. The scheme's staff keep the parties informed about the progress of their complaint.

### *Monitoring*

5.9. The scheme sets objective targets against which it can assess its performance.

5.10. The scheme keeps systematic records of all complaints and enquiries, their progress and their outcome.

5.11. The scheme conducts regular reviews of its performance.

5.12. The scheme's staff seek periodic feedback from the parties about the parties' perceptions of the performance of the scheme.

5.13. The scheme reports regularly to the overseeing entity on the results of its monitoring and review.

### **Footnote**

19 Complaints which have been made to one scheme but are found to be more appropriately dealt with by another scheme can be dealt with by the latter scheme. It is where a complaint has been substantially considered by one scheme that a complainant is discouraged from forum-shopping.

## **6. Effectiveness**

### **Principle**

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

### **Purpose**

To promote customer confidence in the scheme and ensure that the scheme fulfils its role.

### **Key Practices**

#### *Coverage*

6.1. The scope of the scheme and the powers of the decision-maker are clear.

6.2. The scope of the scheme (including the decision-maker's powers) is sufficient to deal with:

- the vast majority of customer complaints in the relevant industry and the whole of each such complaint; and
- customer complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of customer transactions in the relevant industry.<sup>20</sup>

6.3. The decision-maker has the power to make monetary awards of sufficient size and other awards (but not punitive damages) as appropriate.

#### *Systemic Problems*

6.4. The scheme has mechanisms for referring systemic industry problems to the overseeing entity (where referral to the scheme member or members under key practice 5.3 does not result in the systemic problem being adequately addressed) for appropriate action.

#### *Scheme Performance*

6.5. The scheme has procedures in place for:

- receiving complaints about the scheme; and
- referring complaints about the scheme to the overseeing entity for appropriate action.



6.6. The scheme responds to any recommendations of the overseeing entity in a timely and appropriate manner.

### *Internal Complaints Mechanisms*

6.7. The scheme requires scheme members to set up internal complaints mechanisms. 21

6.8. The scheme has the capacity to advise scheme members about their internal complaints mechanisms.

### *Compliance*

6.9. The scheme has mechanisms to encourage scheme members to abide by the rules of the scheme. 22

6.10. The determinations of the decision-maker are binding on the scheme member if complainants accept the determination.

### *Independent Review*

6.11. The operation of the scheme is reviewed within three years of its establishment, and regularly thereafter, by an independent party commissioned by the overseeing entity.

6.12. The review, undertaken in consultation with relevant stakeholders, includes:

- the scheme's progress towards meeting these benchmarks;
- whether the scope of the scheme is appropriate;
- scheme member and complainant satisfaction with the scheme;
- assessing whether the dispute resolution processes used by the scheme are just and reasonable;
- the degree of equitable access to the scheme; and
- the effectiveness of the terms of reference.

6.13. The results of the review are made available to relevant stakeholders.

### **Footnotes**

20 Because the loss arising from the determination of a complaint may vary according to the industry concerned, the benchmarks do not specify a monetary limit above which complaints are excluded from the scheme.

21 The Standards Australia Standard on Complaints Handling AS 4269-1995 can assist scheme members to set up appropriate internal complaints mechanisms.

22 Mechanisms for encouraging scheme members to abide by the rules of the scheme could include contractual obligations which a scheme member enters into when joining the scheme or naming in annual reports or otherwise those scheme members which do not abide by the rules of the scheme.