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

This Submission responds to the Draft Report (DR) by the Productivity Commission (PC) received shortly before the Christmas/New Year’s break. Although it does not go far enough in some places, it is heartening that the DR already makes numerous reform recommendations for consumers, and largely agrees with points made in my previous Submission (dated 11 May, reproduced for convenience as my Appendix). I had argued that 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, my position was and remains that this Inquiry provides a welcome opportunity for the Australian Government finally to make up this lost ground, and harmonise consumer law and policy with the law of our major trading partners to restore some balance for consumers.

In this second Submission, I address certain general and specific points made in quite logical sequence by the PC in the lengthier Vol 2 of the DR, although I welcome the summary Vol 1 as this much more concise document is more likely to be read by busy newly-elected Ministers and other influential policy-makers. However, some of my points cannot be fully elaborated due to the tight time constraints set by the PC for Submissions. Since the PC must consult widely in an Inquiry like this (Vol 2 p14), I recommend that the deadline for further Submissions be extended and that more time be also allowed for follow-up consultations with stakeholders:

- (a) For example, on 28 February from 12.30-2pm my Law School is planning a free public lunch seminar by one of the world’s leading comparative consumer law and policy experts, Kent Law School Prof Iain Ramsay. We will specifically invite regulators and others to discuss your DR, and we cordially invite you to attend.
- (b) I also request a deferred or additional Public Forum in Sydney rather than the one you propose for 18 February (Circular CP4 of 9 January), which I cannot attend due to lectures in Tokyo.
- (c) I also seek permission to reproduce your DR’s “Key points” and draft Recommendations in the next issue of the monthly *Australian Product Liability Reporter*, for which I serve on the Editorial Board. The general edito, Adjunct Professor Dr Jocelyn Kellam, agrees that its many readers would be appreciate an opportunity to be informed and possibly respond. A major Review like this is too important to be rushed in this way, towards the end.

## **I. Why this Inquiry[?]**

### ***Impact on Policy*** (p8)

After usefully summarising the major changes to markets and the “policy environment”, this section needs to add that the consumer policy responses have already been strengthened in all our major trading partners. This is true particularly over the last decade, and despite (indeed, perhaps because of) economic deregulation and privatisation. The US has always been a leader, but developments in the EU are particularly noticeable and influential, eg in Japan recently.<sup>1</sup>

## **2. Overview of the current consumer policy framework**

### **2.1 Background** (p18)

You should also add the fact that there have been few significant amendments to the TPA and state FTAs since the early 90s. This is related to Australia’s shifting political environment, namely the pro-business agenda of the former Howard government. That exacerbated the collective action problems disproportionately experienced by dispersed consumers, compared to more organised business interests, in developing and implementing consumer policy. Collective action problems should be particularly evident to political economists, so an acknowledgement of them constitutes a noticeable omission in this DR.<sup>2</sup>

### **2.2 The current framework**

#### **Generic Legislation - *Variation across jurisdictions*** (p19)

The lack of legislative reform since the mid-90s, in turn, explains growing variation, especially as case law develops. Further, inconsistent law reforms nation-wide can exacerbate them. An example, which you need to add to your list here (cf pp137-40) are the ‘tort reforms’ since 2002 that have actually reined in consumer complaints, implemented in complex ways in the state and federal jurisdictions.<sup>3</sup>

#### **Enforcement** (p20)

Incidentally, not only the Federal Court, but also recently the Federal Magistrates Court, has jurisdiction over certain TPA matters (eg Part VA – strict product liability).

#### **Policy development** (p22)

In an Inquiry like this, the PC should more directly query why Australia– unlike now most advanced industrialised democracies (cf briefly p327),<sup>4</sup> as well as our own states– places

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<sup>1</sup> The consumer policy initiatives declared by new PM Fukuda are only the latest step in a process that has accelerated in Japan since the mid-90s. See *Japan Times* 11 February 2008 and (in Japanese) <http://www5.cao.go.jp/seikatsu/tenken.html>.

<sup>2</sup> For a concise overview of the theoretical and comparative literature, see eg the opening chapters of Maclachlan, Patricia L., *Consumer politics in Postwar Japan: the institutional boundaries of citizen activism* (Columbia University Press, New York, 2002).

<sup>3</sup> As detailed in Kellam, Jocelyn and Nottage, Luke, Happy 15th Birthday, T.P.A. Part V.A.! Australia’s Product Liability Morass, 15 *Competition and Consumer Law Journal* 26 (2007), being the published version of the Research Paper cited in your bibliography.

<sup>4</sup> Denmark is hardly an “exception”. New Zealand, for example, provides us a prominent example of a dedicated Consumer Affairs Ministry. And Japan is currently considering centralising consumer policy functions within the ever-stronger and more independent Cabinet Office.

responsibility for general consumer policy advice within the Treasury, rather than a dedicated Ministry. This creates a perception, at least, of a conflict of interest. After all, the primary role of the Treasury is save taxpayer dollars, especially in the short-term. The Treasury has few incentives to promote policies that may (or may not) generate longer-term net social benefits, such as consumer law reforms. The Treasury is also very interested in promoting business activity, which may be constrained (even for very good policy reasons) by consumer policy initiatives.

### 2.3 What happens in other countries?

Specific examples of “some countries” (p23) in each category, perhaps with a diagram illustrating the spectrum, would be helpful. More importantly, you should acknowledge the tendency among them to re-regulate in consumer issues since 1990s, despite overall economic deregulation.<sup>5</sup> This point is not developed either under “historical perspectives” and “recent convergence” in the associated Appendix C (pp326-7). Indeed, the “internal market” rationale for consumer legislation in the EU is increasingly balanced precisely by “consumer protection *per se*” (cf p327), evident also eg in the establishment of a specific Directorate within the Commission.<sup>6</sup>

In this section for example you observe that Australia largely follows NZ and the US, with the latter relying mainly on private consumer advocacy groups whereas the UK publically funds the National Consumer Council (p 24). The EU also significantly funds consumer participation for example in the ever more important processes of standard-setting for product safety, which the PC itself has identified as quite problematic in Australia.<sup>7</sup> Therefore you should highlight here as one more of the “problems to be addressed” (p24) the increased public funding of consumer stakeholder interests, along UK/EU lines. This would help address the collective action problems they disproportionately suffer. You can cross-reference to your section (pp 221-2) on “greater government support for consumer policy advocacy”, including its specific recommendation (discussed further below).

## 3. Objectives for a future consumer policy framework

### 3.2 Rationales for government intervention

I congratulate you for giving more recognition to the information processing biases etc (not just: information imbalances) found with increasing robustness by social

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<sup>5</sup> A similar broader trend world-wide is noted by Braithwaite, John and Drahos, Peter, *Global business regulation* (Cambridge University Press, Cambridge; Melbourne, 2000). Consistently with this in product safety and consumer credit in Japan, see Nottage, Luke, The ABCs of Product Safety Re-regulation in Japan: Asbestos, Buildings, Consumer Electrical Goods, and Schindler's Lifts, 15 Griffith Law Review 242 (2006) and Kozuka, Souichirou and Nottage, Luke, Re-regulating Unsecured Consumer Credit in Japan: Over-indebted Borrowers, the Supreme Court, and New Legislation, 07/62 Sydney Law School Research Paper <http://ssrn.com/abstract=1019392> (2007).

<sup>6</sup> I also query your listing of Japan, with the Netherlands, as one of “some countries” that “rely almost exclusively on consumers to enforce their own rights” (p23). In product safety for example, a distinctive tradition has been sometimes quite vigorous criminal prosecutions for “professional negligence causing death” (Nottage 2006, op cit; Nottage, Luke, 'Product Liability and Safety Regulation' in McAlinn, G (ed.) *Japanese Business Law* (Kluwer, The Hague, 2007) 221-62}. Administrative law combines with private law to regulate consumer credit (Kozuka and Nottage 2007, op cit). Indeed, later you summarise the OECD (p333) as placing Japan with the UK etc as relying on criminal justice penalties. However, it is true that Japan has *also* recently strengthened ex post private initiatives, eg in product liability and consumer contracting, as part of a broader program of deregulation and judicial reform since the mid/late-1990s.

<sup>7</sup> See my Submissions available on your website regarding that Enquiry. You should also add that your recommendations to improve this important aspect of consumer policy have not yet been implemented either.

psychologists and somewhat belatedly influencing the discipline of economics (p 33 and Appendix B). However, such biases do not lead only “consumers” to make decisions. For example, the “endowment effect” helps explain why *suppliers* tend to incorporate commonly used standard terms, even if they are unfair. *Policy-makers* are also not immune to behavioural biases. For example, they can also be susceptible to over-estimating costs (‘on-screen’) over benefits (‘off-screen’) when considering the implementation of reform.<sup>8</sup> In addition, you should emphasise – beyond the “framing effects” – how suppliers can more readily identify and manipulate behavioural biases that do afflict consumers. An example is the supply of consumer credit, especially credit card debt, resulting in pervasive overindebtedness.<sup>9</sup>

Now that you are more aware or open to the lessons of behavioural law and economics, moreover, you should revisit your recommendations in previous studies, particularly your 2006 Report on consumer product safety (cf chapter 8, which makes no reference back to chapter 3 or Appendix B).

### 3.3 Government intervention is not costless

You should qualify the categorical theoretical assertion that “most of these [intervention] costs will be borne by consumers in the form of higher prices, lesser choice and, to the extent that productivity is diminished, through lower incomes” (p37). Some of those consequences *may* result, but it is a complex theoretical and especially empirical issue. For example, although Japan added from 1995 strict liability PL for defective products (like the 1985 EC Directive and our 1992 amendments to TPA Part VA) there is no evidence of significant increases in consumer prices, despite considerable step-ups in claims, pro-plaintiff settlements and judgments.<sup>10</sup> The flow-on costs of better compensation and (especially) safety design or activities seem to have been minimal, and/or borne by company shareholders or employees rather than consumers. Therefore, government intervention certainly may not be *costless*, but it may also be *much less costly* than (simple) neoclassical economics predicts in abstract terms.

### 3.4 Objectives for consumer policy framework

I largely support Recommendation 3.1, to set an overarching objective for consumer policy by the government; but:

(a) Australians too deserve expressly a “high level of protection” against “the serious risks and threats that they cannot tackle as individuals”, as now in the EU (reproduced in Box 3.5 on p39). This is also a feature applied in the European 1992 Product Safety Directive, strengthened in 2001.

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<sup>8</sup> See eg Sunstein, Cass R., *Risk and reason: safety, law, and the environment* (Cambridge University Press, Cambridge; New York, 2002)

<sup>9</sup> See eg Kozuka, Souichirou and Nottage, Luke, 'The Myth of the Cautious Consumer: Law, Culture, Economics and Politics in the Rise and Partial Fall of Unsecured Lending in Japan' in Niemi-Kiesilainen, J, Ramsay, I and Whitford, W (eds), *Consumer Credit, Over-indebtedness and Bankruptcy: National and International Dimensions* (Hart, Oxford, 2008) forthcoming, drawing on literature such as Harris, Ron and Albin, Einat, *Bankruptcy Policy in the Light of Manipulation in Credit Advertising, Theoretical Enquiries in Law* (2006) and Mann, Ronald J., *Charging ahead : the growth and regulation of payment card markets* (Cambridge University Press, Cambridge; New York, 2006).

<sup>10</sup> Nottage, Luke, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon, London, 2004); Nottage, Luke, 'Comparing Product Liability and Safety in Japan: Path-Dependent Globalization' in Scheiber, H and Mayali, L (eds), *Emerging Concepts of Rights in Japanese Law* (UC Berkeley - Robbins Collection, Berkeley, 2007) 159-184.

(b) Australians also deserve application of the “precautionary principle”, a refinement to proportionality under Art 8(2) of the revised Directive, at least in certain fields such as product safety. Originally derived from environmental protection, a key policy concern of our present government and citizenry, this principle should be added to “proportionate, risk-based enforcement” (p 42) and expressed along these lines:

“Policy intervention is justifiable where scientific evidence is uncertain but preliminary scientific evaluation indicates reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen.”<sup>11</sup>

### **3.5 Identifying and evaluating policy instruments**

The otherwise helpful Figure 3.1 (p 45) should be amended to correct a bias towards not proceeding with policy changes. Specifically, just as there is a step involving “periodic review” if the decision is reached to “proceed with policy”, there should be (a feedback arrow to) “periodic review”, even if less frequent, if the decision has been reached to “not proceed with policy”. After all, if the problem was serious enough to justify identification of its aspects and appropriate possible policy responses, then it may well become worse even if the interim conclusion is to not proceed with policy.

Lack of such an inbuilt express feedback loop in consumer policy processes in Australia, unlike other countries where a watching brief is more likely to be kept on certain issues, is probably another reason why few changes have been achieved since the mid-90s despite the increasingly complex consumer market environment identified in chapter 1. It would be simple to provide, for example, that if the PC undertakes a review (eg of product safety) it is required to reconsider the issue, even in a preliminary way, even if it recommends no major changes or its recommendations are expressly or impliedly rejected by the government.

## **4. Generic consumer legislation**

I generally support these Recommendations (pp 71-2):

4.1 New national generic consumer law, to be applied as a ‘template’ (like a uniform or Model Law) and based on the TPA, subject to the PC’s other recommendations (or my alternatives suggested in this Submissions –notably re definition of “consumer”, unfair contract terms, product safety). However:

- (1) I am quite pleasantly surprised by your view that “the worth of conducting ‘experiments’ in regard to the generic law is questionable. As economists, you will be aware of the mostly theoretical debate particularly in the US (especially re corporate law) that ‘competition’ among regulatory regimes (eg Delaware vs other states) leads to more efficient outcomes. Australia has a different (partly empirical) intuition, even in corporate law. I concur that collective action and other problems, as well as evident stasis in consumer law outcomes over the last decade, show that the regulatory competition argument is even more implausible in this field.
- (2) The template should not be ‘lowest common denominator’. Instead, it should adopt the generally higher standards proven to function effectively in Victoria, where legislation has been updated (eg unfair terms) or enforced (eg product safety) by an active regulator following careful studies.
- (3) A process and funding must be committed to ensure that the template is understood, implemented, monitored and periodically updated in all the

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<sup>11</sup> Cf eg COM (2000)1 at [http://ec.europa.eu/environment/docum/20001\\_en.htm](http://ec.europa.eu/environment/docum/20001_en.htm)

jurisdictions. My experience shows how difficult it is to update even uniform Arbitration Acts adopted in the mid-80s, despite some strong commercial interests for reform. It may be even more difficult to make such a system work for consumer law, although this may be alleviated by better public funding especially for consumer interests (see 2.2 and 2.3 above). There may be a warning here from the delays and other problems you correctly identify regarding the existing MCCA (pp 53-4): what funding has been received even by that governmental body?

4.2 Although I support extending such generic law to include financial services, primarily enforced by the more specialist ASIC rather than the ACCC, I question your sub-recommendation that “financial disclosures currently only subject to ‘due diligence’ [negligence-based liability] requirements should be exempted’ from the [TPA s52, strict liability] misleading or deceptive conduct provisions of the new law. The view of the Wallis Inquiry dating back to 1997, plus your concern that a stricter requirement now “might well lead to even longer disclosure documents” which would allegedly “increase costs for financial service providers and therefore prices for consumers” (p69) seems a flimsy basis for such a definite sub-recommendation. More research and consultation, in view of the new environment including Australia’s growing consumer debt problems, is required.

4.3-4 Transfer of responsibility from state regulators to the ACCC for enforcing (a) consumer product safety requirements and, longer term, (b) the rest of the generic consumer law. However, again this is subject to the ACCC being charged and funded to carry out enforcement at least as actively as the (currently) ‘best’ state regulator. To assist in judging that, you should add an Appendix showing the funding, per capita, provided to each state regulator. You should also compare the funding provided at present to the consumer (not: competition) enforcement wing of the ACCC, and consider what organisational changes might be needed in the ACCC (at present, for example, only one of five Commissioners – Louise Sylvan – has a background primarily in consumer issues).

## **5. Industry-specific consumer regulation**

I generally support Recommendation 5.1, but it should be reworded and restructured more neutrally. The impression it gives is that industry-specific regulation is generally bad, creating a presumption that it should be repealed. This puts it too strongly. There are many areas where the probability and consequences of risks eventuating, even on a narrow cost-benefit analysis, clearly justify industry-specific action, instead of or in addition to generic regulation. In product safety, consider electrical goods or foodstuffs. In consumer credit, consider usurious and misleading payday lending, or credit card limit extensions. Yet, due to collective action and regulatory capture by dominant firms, sometimes such regulation is not strong enough (eg food tampering – except now in Queensland) or non-existent (credit card extensions – except now in the ACT).

In addition, one of your key points (p73) is that one problem with current specific regulation is that “some regulation appears to be primarily designed to protect existing businesses from competition, rather than assist consumers”. Where are the examples and systematic evidence to support that assertion (cf pp 79-80 on other problems)? Otherwise it appears more like an abstract proposition based on a Stiglerian public choice theory that (a) regulation is generally bad, and (b) where it exists it is because incumbent or stronger businesses use get it enacted or implemented for anti-competitive advantages over new entrants.

I generally support Recommendation 5.2 (responsibility over finance brokers and other credit providers transferred to ASIC). However, the case is not made out (p 91) for the sub-recommendation for lower standards re “other credit providers” (opt-in registration

rather than licensing; ASIC-approved industry-based consumer ADR, but not requirements of fitness or to disclose conflicts of interest). To prevent suppliers rebranding themselves and to simplify regulatory enforcement, the starting point should be similar standards. Relatedly, what is your basis (including quantification) for asserting that predatory lending etc comprise “relatively small scale problems in an overall sense” (p 89)?

Regarding property investment advice, I confirm from experience that there is considerable confusion even among the legal community about whether (and why) these services are only indirectly regulated by ASIC (primarily through property trust management). I therefore encourage you to consult more widely than the regulator(s) to make specific recommendations about this (p 95).

Also related to Credit, I suggest more references in the text to your Appendix E, and some firmer recommendations on the regulatory regime. Your DR was being completed as the sub-prime lending crisis in the US (p386) continues to escalate. As well as the direct effects noted, that market shows more pervasive problems in consumer credit business models worldwide. It underpins Japan’s recent stricter caps on interest rates (cf p395), although their predatory lending market appears almost as bad as the US and even worse than in Australia. Another reform for us to consider nation-wide that is being implemented in Japan and some US states, and partially now in the ACT, is a “suitability rule” (as long required in the retail supply of securities) requiring suppliers to assess ability to repay and not extend credit beyond that.<sup>12</sup>

I support Recommendation 5.5 (better and uniform protection for home warranty insurance, where there is defective construction etc and the builder becomes insolvent etc). Specifically, since the so-called insurance crisis has abated the scheme could revert from ‘last resort’ to ‘first resort’, and public supply of this (once more) lucrative business – as in Queensland – might be considered (p100). In addition, you should outline and consider the disparate rules – and, especially, enforcement – of insurance for owner-builders.

## **6. Supporting institutional changes**

I support Recommendations 6.1-2 (more role for federal government leadership, including greater voting power in MCCA). Note, however, my queries above about funding for MCCA and why the federal government should be represented by Treasury rather than a dedicated Ministry.

## **7. Unfair practices and conduct [including unfair contract terms]**

### **7.2 A general provision relating to unfair practices?**

This needs further consideration. You note that the US has used such a provision recently to address “emerging threats, such as spyware and unauthorised telephone billing” (p 111). Given the accelerating pace of technological and market transformations in consumer markets these days, as noted in your chapter 1, this is a very tangible benefit. Your reference to a “rulemaking frenzy” in the 1970s dates back to an era of less sophisticated regulators. We could expect the ACCC and the courts to apply and develop such a general provision responsibly, similarly to s52 on misleading conduct (despite prophecies that the skies would fall in, before and when that provision was first enacted). Even if this new provision proves “more conceptually neat than practically useful for consumers”, it should have major educative effects in the market. This is already the experience so far with the recent EU Unfair Commercial Practices Directive, although note that the main impetus for

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<sup>12</sup> Kozuka and Nottage (2007), op cit.

that was to supplement post-contract control (1993 Unfair Terms Directive) with a pre-contract phase misleading conduct prohibition.

#### **7.4 Misleading conduct**

You should also further consider introducing “a more explicit comprehensibility provision in the national generic consumer law ... that required appropriate divulgence of disclaimers and clarity generally” (pp 114-5). Problems of incomprehensibility are not limited to unfair terms, or even clear misrepresentations/misleading conduct qualified by a disclaimer (as in *Butcher* (2004) 21 ALR 357, Box 7.1), even though often related. A particular problem in consumer contract forms in Australia is a raft of complex standard terms drafted by suppliers that, in effect, attempt to displace as much as possible (shaded in the Table below) the TPA Pt V Div 2 minimum statutory warranties (which you discuss, confusingly, only in 8.2 under “defective products”), followed by a small clause saying eg “these terms do not derogate from rights under the TPA or other mandatory law”. One aim is to limit liability for supplies primarily to other businesses (as opposed to “true” or individual consumers) for goods that are not ordinarily acquired for personal or household use (Rows/situations 2 and 3 below). This is because the combination of TPA s4B’s definition of “consumers” and s68A generates these implications:



Row/ Situation	Transaction value?	Goods/services ordinarily for personal use?	Consequence
1	<\$40,000	Yes	Non-derogable warranties (even in supplies to other corporations!)
2	<\$40,000	No	Warranties derogable if “reasonable” under s68A
3	>\$40,000	No	No statutory warranties anyway
4	>\$40,000	Yes	Non-derogable warranties (even in supplies to other corporations!)

The terms derogating from the statutory warranties also apply if the transaction otherwise falls outside the definition of consumers pursuant to s4B(1)(a)(ii) proviso, namely acquisition of “goods [not: services!] for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land”. However, the practical effect of this sort of contract extends beyond such business-to-business transactions. “True” consumers read all the terms limiting the supplier’s rights, usually without really understanding them and/or only after a dispute arises, but understandably fail to appreciate the little clause that preserves their TPA rights if they have received goods or services ordinarily for personal use (Rows/situations 1 and 4 above).<sup>13</sup> So they end up thinking they have much more limited or no rights at all, and give up pursuing claims for unmerchantable and non-fit goods or negligently supplied services.

Yet this sort of contract is probably not misleading conduct under s52 vis-a-vis such true consumers. Even though, as you note, silence (or, even under common law, a half truth) may be misleading, there is probably no positive legal duty on suppliers to spell out all consequences to them. Further, it would be difficult to argue for the unfairness of these contract terms (in themselves, absent eg some irregularity in the negotiation *process* typically needed to render the contract unconscionable etc), if the TPA indeed allows for some derogation, albeit primarily for business-to-business transactions and subject to the s68A reasonableness test. Thus, one solution would be to enact a broader “comprehensibility” requirement.

“Consumer education” is clearly insufficient given the complexity for individuals of the Act and the contract drafting. So is relying on voluntary improvements in standard forms drafted by suppliers, since even the big ones persist in using this sort of contract, despite increasingly professing Corporate Social Responsibility (beyond the letter of the law). Perhaps the ACCC could try to get some to take the lead in redrafting their contracts in more consumer-comprehensible terms, especially in problem industries (retailing, construction supplies, finance, telecommunications, rental cars etc), but if that has little impact then legislative reform would be justified.

## 7.5 Unfair Contracts Legislation

<sup>13</sup> Courts have now construed “personal use” quite widely, but ironically also for the benefit of some of Australia’s largest corporations. See notably *Bunnings v Laminex* [2006] FCA 682.

I generally support Recommendation 7.1 calling for a new provision in the generic consumer law voiding unfair terms, but on a less restrictive basis (namely, instead on the basis of the well-functioning Victoria's Fair Trading Act amendments in 2003 or at least the 1993 EC Directive). This is because, as noted by you (p 120-1 and Appendix D) and many Submissions (including my own – attached, referring also to my Submission to the NSW Legislative Council's review of this issue):

- (a) “notionally ‘unfair terms are commonplace in Australian contracts not covered by the Victorian legislation’” – and, in our experience, commonly invoked by suppliers especially in the well-known problem sectors. The UK study cited (p120) shows annual benefits of \$300m pa from improvements in consumer contracts there, which would clearly outweigh the costs to government and surely even the costs to business of redoing their contracts along the new guidelines. Your suggestion that suppliers might have competed to improve unfair terms anyway is unrealistic: many commentators have observed that this hardly ever happens (eg Prof Zumbo, and various Victorian studies).
  - i. Also, drawing on behavioural economics for example, contract terms and negotiation processes can be imagined that would exploit heuristics and other psychological or informational factors to overwhelming favour credit suppliers. Unsurprisingly, features largely match the contracts and conduct we find in the marketplace, eg in credit card contracts. If we accept that this is not an accident, and that at least some suppliers develop their business model to actually take advantage of this situation, then this provides an alternative ‘quantifiable’ way of measuring likely consumer detriment.
- (b) existing unconscionability rules are “very costly, slow and uncertain”, with case law increasingly going against “true” consumers (possibly because the courts are faced by claims, sometimes support by the ACCC, brought by small against larger businesses);
- (c) if no action is taken at the national level, NSW and other states will probably enact legislation anyway, not necessarily identical to the Victorian model.

Specifically on your recommendations as to the contours of a generic law provision, however:

- (1) A legislative requirement that the regulator prove each time “an overall public benefit from remedial action” is too strict. It is not required in Victoria, the EC, Japan (under its Consumer Contracts Act 2000) or indeed any other consumer contracts legislation in Australia to my knowledge. It should be a “good practice guideline”, at most, as it probably is already in Victoria. Otherwise the regulator will hardly ever be able to act. Alternatively, the burden of proof should be on the suppliers to prove that the regulator has *not* produced an overall public benefit in the particular circumstances.
- (2) Your requirement that the unfair terms be voided only for contracts of consumers subject to detriment (who could also then sue for damages) is also too strict. It is also not required in other countries, where “abstract” control allows regulators (guided by good regulatory practice) to address the most serious problems before they escalate even further. You note that drafting would be needed “to avoid the slowness and costs besetting applications of s51AB [TPA consumer unconscionability]” (p125), but it has hard to see how this could be achieved. You suggest that Federal Court class actions might be option for consumers (p124), but to my knowledge there have been none under s51AB, only a few representative actions brought by the ACCC in lieu of individual claimants. This issue of *ex ante*

(pro-active, public) vs ex post (reactive, private) controls is similar to that facing defective products (discussed below at 8.3<sup>14</sup>).

If, for pragmatic political reasons (ie to pacific business interests), the new generic legislation is to be more restrictive than the current Victorian model, then I recommend beginning by restricting it (as in the EU) to standard-form, *non-negotiated* contracts.

## 8. Defective products

### 8.2 Merchantable quality and fitness for purpose [and other statutory warranties]

This section should be moved to chapter 7. These TPA Pt V Div 2 minimum warranties for consumers are not restricted to merchantable quality etc (others related to compliance with description etc), and merchantability/fitness is not restricted to safety (it also encompasses other features such as quality etc). And they relate to the issue of disclaimers etc discussed above at 7.4.

Substantively, however, I endorse your Recommendation 8.1 that consumers *and suppliers* be re-educated about these statutory rights, and that enforcement action be taken regarding extended warranties. In addition, however, there must be re-education and enforcement against retailers – beyond those who don't take advantage of ignorance by selling extended warranties – who often try to fob off buyers by claiming that they owe no duties whatsoever to consumers, telling them to claim only against the manufacturer (ie under TPA Pt V Div 2A). This happens a lot, at least in Sydney, so the Office of Fair Trading and ACCC should talk to their counterparts in NZ, where this practice is much less widespread.

### 8.3 Product liability [and safety regulation] arrangements

I support Recommendation 8.3 requiring the government 'to monitor any possible impact of the recent civil liability reforms on the incentives to supply safe products'. However, the word *possible* should be changed to *probable* impact. As even Justice Ipp now acknowledges (p 140), the statutory tort law reforms he spearheaded from 2002 have significantly affected plaintiffs' access to justice, possibly more than anticipated. This is especially true of product liability claims, hardly considered in the reform debates and implementation. Our research suggest very few new product liability filings and, relatedly and more obviously, a complex legal "morass" of legislation and case law developing largely independently of the 1985 EC Directive framework that originally inspired the 1992 Part VA reforms to the TPA.<sup>15</sup> Suppliers will be aware of the declining credibility of product liability filings in Australia, which have never been large anyway, mainly due to problems of access to justice even under a strict liability ex post compensation regime. It is surely no coincidence that Australia has seen some of its largest ever recalls in recent years.

I generally support Recommendation 8.2 but urge more far-reaching reforms to Australia's now antiquated TPA Pt V Div 1A regime for regulation of unsafe products, as indicated in my other Submissions and publications.<sup>16</sup> As mentioned above, if you are taking more

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<sup>14</sup> See also now Nottage, Luke, 'Product Safety' in Howells, G, Ramsay, I and Wilhelmsson, T (eds), *Handbook of International Consumer Law and Policy* (Edward Elgar, Cheltenham, 2008) forthcoming (manuscript version available on request).

<sup>15</sup> Kellam, Jocelyn and Nottage, Luke, Happy 15th Birthday, T.P.A. Part V.A.! Australia's Product Liability Morass, 15 *Competition and Consumer Law Journal* 26 (2007).

<sup>16</sup> See also eg now Nottage, Luke, Product Safety Regulation Reform in Australia and Japan: Harmonising Towards European Models?, *Yearbook of Consumer Law* 429 (2008) and Nottage, Luke, Consumers Beware! Product Safety Regulation Reforms in Japan, Australia and Europe, *New Zealand Law Journal*

seriously behavioural economics (and Braithwaite's regulatory enforcement pyramid: cf eg p180), and in light of ongoing reforms (eg in Japan late 2006) and major product failures in Australia and world-wide (eg toys etc from China) then you should now be more ambitious than reproducing here your 2006 Report recommendations (p142). Specifically:

1. Since ever fewer product liability claims are being filed (including no class actions, to my knowledge, in recent years) related to the effects of tort reform since 2002, requiring suppliers to report serious product-related injuries only if multiple settlements or a successful claim is too slack and therefore will have little effect on suppliers. The revised EU and Japanese regimes do not set such a high extra hurdle. It might make sense only in the US, where for unique reasons there remains a very high level of PL filings.
2. Since "further reforms to civil liability laws" (p145) seem very unlikely for several years, even under the new Government, a separate General Safety Provision (as in the EU) should be added as well.
3. The "precautionary principle" (introduced at 3.2(b) above) should guide risk assessment in triggering remedial action in this field, and indeed related fields under generic consumer legislation.

Finally, you note the "significant body of opinion supporting the introduction of a no-fault system of dealing with personal injury claims" (p 137 n 4), as retained in NZ since 1976 despite a wave of neoliberal reform there from the mid-80s, but that this issue was set outside the Terms of Reference for the Ipp Report that generated Australia's reforms restricting tort claims from 2002. You are therefore perfectly placed to give more consideration to this alternative than the present general remarks about the theoretical possibility of "significant moral hazard problems" and some old 2001 data on the unfunded liabilities under the NZ scheme. There is much more sophisticated and recent theoretical and empirical literature readily available.<sup>17</sup>

## 9. Access to remedies

I support all five Recommendations. Re 9.5 in particular, amendments to the TPA to give the ACCC powers (like ASIC) overriding the judgment of *Medibank* [2002] FCAFC 290 are long overdue. The delay is indicative of Australia's fading priority for consumer law initiatives in recent years.

In the meantime, and related to 9.4 regarding an assessment of the quite complex system of class actions that Australia has developed since 1992,<sup>18</sup> the ACCC should occasionally become a representative party in class actions. Because it is an opt-out system, this would help get around the TPA s80 problem highlighted by *Medibank*. Perhaps the ACCC has never done so due to cost implications. But if so, imagine the problems facing individual consumers, or an organization like Choice (Australian Consumers Association, which has also never been a representative party in class actions). Compare also the initiatives underway in Japan (albeit limited so far to injunctions claims for unfair contract terms, under the revised Consumer Contracts Act), and especially in European jurisdictions as well as the EU level to facilitate collective redress mechanisms beyond the Injunctions

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(2007).

<sup>17</sup> Beginning eg with the special issue 35(4) the Victoria University of Wellington Law Review (2004), available via [www.austlii.edu.au](http://www.austlii.edu.au)

<sup>18</sup> See also my National Report for the 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](http://ec.europa.eu/consumers/redress/reports_studies/inded_en.htm))

Directive eg by allowing accredited consumer organisations to more easily bring representative proceedings.<sup>19</sup>

As also mentioned in my original Submission (appended), the government should also clarify the juristic basis of the myriad of industry-association based ADR schemes now operational in so many fields (cf pp 154-2). Are they governed by simple contract law, the arbitration law, or administrative law? The answer provides different practical implications including standards of review for error of law, appointment and duties of the dispute resolvers, and who can complain about such matters.

Finally, I query your conclusion that “there would be little additional value in introducing a UK-style super-complaints mechanism” (p171), especially if you are only envisaging a “modest” funding increase for consumer advocacy groups (discussed next – indeed, this section might more logically be found or at least cross-referenced in chapter 10 or 11.

## **10. Enforcement**

### **11. Empowering consumers**

### **12. Vulnerable and disadvantaged consumers**

I generally support these chapters’ recommendations, especially on better regulatory enforcement options (implying also better resourcing). However, I query why 11.3 recommends that ‘the Australian government should provide *modest* additional funding’ to support research and consumer interests (including a new peak body for consumers). Consider how much the Government already provides for Standards Australia, increasingly dominated by business interests and otherwise problematic, as your own 2007 Report concluded.

## **13 Other considerations for the future framework [including economic integration, e-commerce, and small business]**

### **13.1 Trans-Tasman economic integration**

I urge you to consider and compare not only NZ, but also (tying in more to Appendix C) major economies with which we already have a Preferential Trade Agreement (notably, the US) or are negotiating one (notably, Japan). It is even foreseeable that a business law harmonisation agreement may be superimposed with such countries, too. Focusing just on NZ, which increasingly seems to follow Australia’s lead, makes it less likely that economic integration will be seen as a further reason for enacting the Recommendations you make or that instead I propose here.<sup>20</sup>

### **13.3 Small business considerations**

I am also quite surprised at your ready acceptance of some tendencies to extend generic TPA (and sometimes state FTA) protections from “true” consumers to small businesses. Surely small businesses face distinctly less intensely or fewer “same issues as individual consumers, particularly relating to unequal bargaining power and the lack of resources to effectively negotiate contracts” (p259). Despite this, for (a) *end-use* purchases of goods from other corporations that are either (i) simply worth less than \$40,000 (quite a large sum) or (ii) exceed that limit yet are ordinarily for personal etc use, and (b) for *any* services purchases subject to either (i) or (ii), they get the same non-derogable statutory warranties under TPA Pt V Div 2. Very large and sophisticated corporations take

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<sup>19</sup> See [http://ec.europa.eu/consumers/redress/collect/index\\_en.htm](http://ec.europa.eu/consumers/redress/collect/index_en.htm) .

<sup>20</sup> Incidentally, TPA Pt V Div2A also protects owners of goods, not just the original purchaser (cf p247).

advantage of these provisions, to a degree probably not intended by the legislator.<sup>21</sup> Secondly, “small” businesses entering into a transaction now worth up to \$10 million (a very large sum, beyond the scope of almost all true small businesses) enjoy an even longer laundry-list of factors facilitating unconscionability complaints under s51AC than available to consumer under the older and shorter s51AB. Thirdly, you do not mention that strict liability for unsafe (and therefore unmerchantable) goods is available directly against manufacturers for certain business (as well as true consumer) claimants under Pt V Div 2A, albeit not Part VA.<sup>22</sup>

As your DR often notes outside this “small business” part, such minimum terms and safety standards may come at a cost. A particular concern for consumers is that suppliers pass on to them as well the extra high prices needed to cover their additional liability exposure to small business claimants (ie they don’t price discriminate between the two groups; consumer cross-subsidise the small businesses, who may not be so small at all). You should acknowledge this theoretical point, although like all economic theory it must be tested empirically. Do firms in fact readily pass on costs to consumers related to different levels of liability exposure (or eg instead do shareholders just suffer slightly lower profits?), and with what degree of price discrimination and sophistication? Can consumers benefit nonetheless because of the much higher incentive/deterrence effects created by “small” businesses being able to sue, compared to less well-resourced individual consumers? Actually, my studies (above) of Japan’s Product Liability Law of 1994 suggest that prices did not rise and/or were not overly cross-subsidised by consumers, despite expanding coverage from the EC model to allow firms to sue for “business” consequential loss. Consumers probably have benefited from better safety standards being implemented partly in response to the potential for – and in fact some – filings by businesses, as well as consumers. But this is my informed guess, and different issues or conclusions may follow minimum contract (rather than tort) standards.

All this deserves further consideration, even though I can see the political attractiveness of at least maintaining the current TPA consumer protections for small businesses. However I share your wariness, albeit for these somewhat different reasons, about taking this opportunity to *extend* consumer protections to small businesses even on an industry-specific basis.

#### **14 How big would the net benefits be?**

I applaud this quantification of the net benefits of your proposed reform package, although there are other ways to gauge empirically various likely costs and benefits (eg 7.5(a)(ii) above, and wideranging qualitative/survey studies – largely lacking in Australia, compared eg to Prof Genn’s work in the UK). Too often nowadays there is a built-in bias demanding limited types of “quantifiable data” that, because of the complexity of consumer marketplaces and institutional frameworks, tends to conclude that a case is not made out for any major pro-consumer reforms – the burden of proof always being on those demanding those reforms. For their micro-economists to (conservatively) estimate net gains of A\$1.5-4.5b is a refreshing outcome, demanding a response this time from the government.

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<sup>21</sup> Consider eg *Bunnings v Laminex* [2006] FCA 682 and *PNSL Berhad v Dalrymple Marine Services Pty Ltd* [2007] QSC 101.

<sup>22</sup> Consider a manufacturer supplying a TV (clearly 'ordinarily for personal use' - so within s74A(2)(a)), eventually acquired by a 'consumer' (at least in terms of the s4B definition: ie for less than \$40,000 and not for 'resupply'), which explodes (showing it is unsafe/unmerchantable) *and burns down that person's office equipment* (such consequential 'damage or loss' under s74D is not restricted to true consumer goods 'ordinarily for personal use' - cf 75AF(c) in Pt VA, which is modeled on the 1985 EC Product Liability Directive).

Meanwhile, I look forward to further opportunities to contribute to this important Inquiry.

Yours sincerely

**Luke Nottage**

## Appendix: My original Submission (No 61) dated 11 May 2007

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),<sup>23</sup> 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 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.<sup>24</sup> 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.<sup>25</sup>

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

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<sup>23</sup> OECD Project DTSI CP(2006)8 on Reviewing Approaches for Improving Consumer Contracts.

<sup>24</sup> In Japan too, for example, see Craig Freedman and Luke Nottage, “You Say Tomato, I Say Tomahito, 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](http://www.econ.mq.edu.au/Econ_docs/cjes/research_papers/2006-4_Freedman_Nottage.pdf)>.

<sup>25</sup> 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”.



from them, they are also likely to be pervasive among individual consumers.<sup>26</sup> 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.<sup>27</sup> By contrast, for 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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> Presumably their economists are not that foolish either. Arguments for minimum regulatory standards and enforcement may also be plausible based on contemporary

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<sup>26</sup> 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).

<sup>27</sup> 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), and a list of “recalls and bans” which may now be incomplete because “nowadays there are so many product recalls” (p 57).

<sup>28</sup> 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.

<sup>29</sup> 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).

<sup>30</sup> 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).

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.<sup>31</sup>

## 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).<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> 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

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<sup>31</sup> 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.

<sup>32</sup> 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>.

<sup>33</sup> Consider the problems with baby strollers, highlighted for many years by *Choice*.

<sup>34</sup> 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).

<sup>35</sup> Ramseyer, J. Mark, *Products Liability through Private Ordering: Notes on a Japanese Experiment*, 144 *University of Pennsylvania Law Review* 1823 (1996).

Review by the PC – and especially several Submissions including my own – have highlighted serious problems with Australia’s main standard-setting body.<sup>36</sup>

### 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.<sup>37</sup>

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.<sup>38</sup> 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, 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.<sup>39</sup>

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.

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<sup>36</sup> See <http://www.pc.gov.au/study/standards/>.

<sup>37</sup> 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.

<sup>38</sup> See Sarumida, op cit; and Nottage, Luke, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (RoutledgeCurzon, London, 2004).

<sup>39</sup> 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](http://www.ssrn.com).

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.<sup>40</sup> 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” generate another legal morass, with the old-fashioned NSW legislation creating a gap in consumer protection that its Legislative Council is now recommending plugging.<sup>41</sup>

As with product liability, these laws need to be drastically simplified and harmonised, based on balanced economic and other legitimacy grounds.<sup>42</sup> 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

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<sup>40</sup> 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](http://www.ssrn.com) (2007).

<sup>41</sup> See

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

<sup>42</sup> 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.

(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.<sup>43</sup> 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).<sup>44</sup> 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 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).<sup>45</sup> 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

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<sup>43</sup> Kellam and Nottage, above note 17.

<sup>44</sup> [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 \(28 August 2003\)](#).

<sup>45</sup> 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](http://ec.europa.eu/consumers/redress/reports_studies/inded_en.htm)).

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**