



**Empowerment and Protection –  
updating Australia’s consumer policy framework**  
Speech to the National Consumer Congress 2007  
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Good morning. Before commenting on the Productivity Commission’s current review of Consumer Protection, I want to spend a moment talking about Consumer Action Law Centre. This is both because it is a relatively new organisation, and it is still very exciting to talk about it, but also because it provides the foundation for some of the comments I will make today.

Consumer Action is formed by the merger of Consumer Credit Legal Service and Consumer Law Centre Victoria, both of which have a long and proud history of research, advocacy and representation of consumers, particularly low income and disadvantaged consumers.

Consumer Action is campaign focused and has 18 staff. We assist 1000s of consumers each year through provision of information, advice and legal representation.

**The PC CP review – risks and opportunity**

The review provides an important and timely opportunity to reflect on our consumer policy environment and related questions – how have we as consumers changed, how has the marketplace changed and what have we learned?

We have not had such an opportunity for decades and much has changed in that time. Before turning to look at some of these changes, I want to mention a few of the positives and risks that are already apparent at this early stage in the review.

### *Positives*

- A pro-active PC, which started consultation it seems within hours of receiving the reference from the Treasurer. I am aware they have met with consumer and community organisations around the country as well as other stakeholders.
- Important issues are recognised in the Terms of Reference including challenges faced by disadvantaged and vulnerable consumers and the importance of consumer behaviour in markets. And the Issues Paper shows a clear appreciation of current issues affecting consumer policy.
- It provides an opportunity to take stock of societal and market changes and to update our framework.

### *Risks*

- Strong themes around cutting red tape and reducing compliance burden.
- We can all agree red tape and unnecessary compliance burden help no one.
- But what is effective and necessary regulation and what is red tape may be the subject of significant disagreement.
- Should not be driven by ideology (either pro- or anti-regulation).

## **Trends and developments**

So turning to some trends and developments – there are many:

- Globalisation of markets
- Privatisation
- Increasing use of market mechanisms
- Emergence of market driven problems
- Increasing levels of debt
- Emergence of industry based IDR and EDR
- Internet and other new technologies
- Sustainability
- Growing understanding of the importance of consumers in markets – that is, acknowledging actual consumer behaviour as compared to making assumptions about it and expecting change to fit those assumptions.

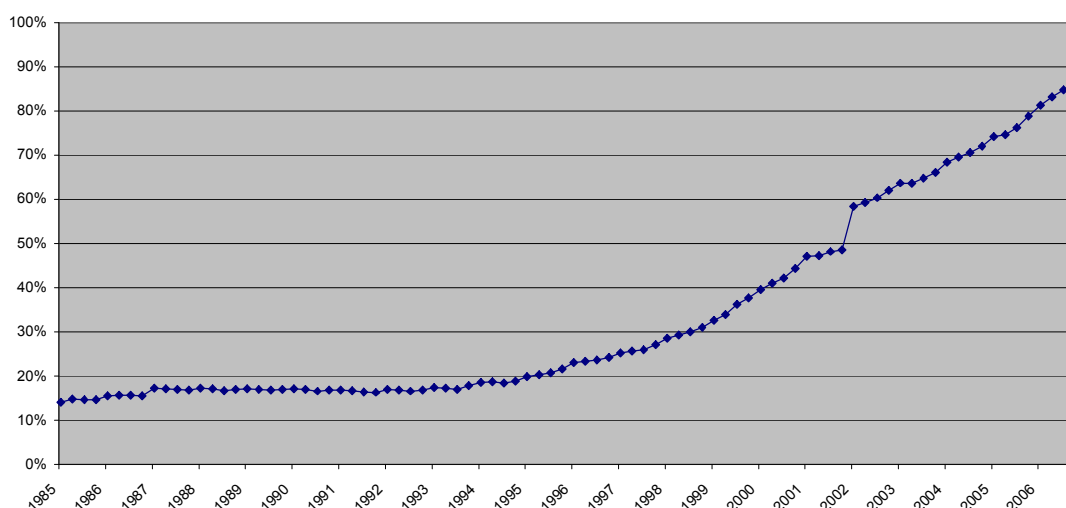
I would like to focus more closely on a few of these.

### **Trend - Increasing levels of consumer debt**

- Rising debt as a percentage of income
- Increase in personal bankruptcies
- Increase in foreclosures
- Increase in access to credit – low doc loans, 100% finance (and we are seeing the very real and potentially catastrophic impact where large numbers of consumers are unable to service their loans playing out in the US with the collapse of the 'sub-prime' lending market )
- Increases in credit card debt.

We are told from time to time that credit card debt is a 'small' component of consumer debt. To put our 'small' problem in context, the graph below illustrates very clearly an upward trend. It maps credit card debt as a percentage of annual average income using data from the RBA and ABS.

### Credit Card Debt as Percentage of Annual Average Income



We can see that in 1985 credit card balances were at 14.15% of annual average income. In November 2006, despite significant increases in annual average income, credit card balances were at 86.39%.

And this problem is commonly understated because we know that approximately two thirds of people pay off their monthly balance and the third that don't owe a lot more debt relative to income.

## **Development – market created problems**

Effective and competitive markets unquestionably deliver benefits to consumers.

However, it must also be acknowledged that left unchecked, markets can also create consumer problems. Take just one example – intermediaries. The PC Issues Paper touts intermediaries as a positive market response to increasing complexity of product and service choices.

We do not disagree about complexity! Nor do we disagree that intermediaries can play a useful role. But not where they are hopelessly conflicted . An intermediary cannot be said to be independent, let alone acting for a consumer, where their source of income is commission or other payments from a seller.

## **Development – attention to the role of consumers in markets and the importance of consumer behaviour**

Some have been aware of the importance of these issues for some time.

Ron Bannerman, the then Chairman of the Trade Practices Commission, said in the TPC's 1984 Annual Report:

'Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in a position to do so.'

Kahnmann and Tversky who received the Nobel Prize for economics in 2002 for their work in behavioural economics have been undertaking the work for decades.

So some have been on to the importance of these issues for some time – yet they have not made their presence felt in any systemic way in the making of consumer policy. We have an opportunity to change that. And we must - because if we are serious about competition we need to be serious about effective consumer protection. It is not a contest between market mechanisms and regulation.

This is not an easy task – but there are some positive signs.

- Important discussion and research is taking place in the OECD
- The NZ Ministry of Economic Development has produced fact sheets and guidelines *Behavioural analysis for policy – new lessons from economics, philosophy, psychology, cognitive science and sociology*.
- Research regarding why some markets work better for consumers than others is taking place, albeit in jurisdictions other than Australia.

### **Other roles of consumer protection**

As Ron Bannerman noted, *one* of the purposes of consumer protection is to help consumers to activate competition. We couldn't agree more – it is critical to enabling consumers to operate confidently and effectively. And that is not just about

finding new ways to deliver information to consumers (though that of course is important). Consumers can feel more confident to enter new markets if they know a base line of protection is available.

But consumer protection also does and should seek to deliver on other objectives. It can reflect our goals as a society beyond efficiency eg access to essential services and protection of the vulnerable. It can also assist to ensure that the benefits of competition are distributed.

### **Disadvantaged and vulnerable consumers**

This leads me to the issues facing disadvantaged and vulnerable consumers. There are a number of points to make about this group.

First, it is not necessarily a small group. All of us may be vulnerable at a particular time or in relation to a particular issue.

This is not to say that there should not be policy responses that target particular disadvantaged groups. For example there is evidence to show that some disadvantaged groups miss out on the benefits of competition and may even be worse off in some cases (eg Effectiveness reviews of energy competition in Victoria; rising services charges for basic telecommunications services).

Further we have also seen evidence that programs targeted at consumers with lack of capacity to pay for essential services have

not just paid off in terms of social responsibility, they have actually improved the bottom line eg Yarra Valley Water.

It is also important to recognise that problems experienced by disadvantaged and vulnerable consumers may also be signposts to broader consumer detriment. It is just that some consumers have more capacity to absorb detriment than others.

So depending on the nature of the issue either broad or targeted approaches may be preferable. This need for a diverse approach is a theme I will return to.

Before I do, I want to mention another strong theme that sits in the background to the PC review – the debate regarding industry specific versus general regulation.

### **Industry specific and general regulation**

There appears to be a theme running through the PC Issues Paper that suggests that industry self regulation drives inconsistency and duplication. Whilst this is undoubtedly the case in some arenas, in others, the availability of necessary targeted regulation can drive down compliance costs and improve certainty.

It should also be noted that industry specific regulation is not always driven by consumers and their representatives. It is often industry that calls for specific guidance on how a general principal may apply. Equally, governments may see virtue in a targeted and visible response to a problem.



In our view, there is a place for both industry specific and general regulation. Further, it is possible to identify circumstances in which it is more likely that industry specific regulation is appropriate.

These include:

- Essential services (for example we really don't want a number of payment methods mandated in our fair trading legislation. Equally, it is important that a range of payment options are available to access essential services).
- New markets (where consumers will be unfamiliar with the choices and may require extra levels of confidence to enter the market).
- Credence goods
- High risk products

### **So what does our environment and current trends say about approaches to CP?**

First and foremost we require a range of tools in the arsenal. No one policy tool is always the right response or should be preferred over another. It is a question of identifying the right tool or tools for the job and making sure the tool kit is maintained and updated.

Nor should application be linear. It should not always be necessary to try information and education, moving to self or co regulation and then to regulation. Nor should regulation be an automatic response.

These questions should not be driven by ideology of any colour, but by evidence.

### **Evidence based approaches**

Of course evidence is critical and cost/benefit processes acknowledge this to a degree.

But evidence should be just that – we should no more assume compliance and other costs to business than we should benefit to consumers. And there are many elements of the cost/benefit equation we need to be *much* better at:

- Evidence should be required to de-regulate as well as to regulate
- We need to be better at counting the costs to consumers of the absence of regulation and at measuring benefits (even though these may be much less amenable to plotting on a graph or applying a dollar figure to). One way to do this may be to borrow techniques from other regulatory or policy processes. We see victim impact statements in the criminal law and environmental impact statements in the environment protection context. Perhaps it is time for consumer impact statements.

We cannot meaningfully measure costs or benefits without data – and the lack of data is a theme that comes up again and again in this context. It is simply not good enough to require cost/benefit analysis to be undertaken without addressing the critical shortage

of consumer data and indeed bodies charged with the responsibility to obtain it.

### **Consumer protection at a federal level**

Whilst we have seen some positive signs in recent items of a returning interest in consumer affairs, not least of which is the giving of the reference to the Productivity Commission, it is equally clear that there is much ground to claw back.

With no disrespect to the Parliamentary Secretary, a minister responsible for consumer affairs is not the same as a Minister *for* Consumer Affairs. And we have not had a Federal Minister for Consumer Affairs since 1998.

We have seen the defunding of consumer advocacy organisations even as more importance is placed on research and data in regulatory processes and consumers are exposed to more market based interaction than ever before.

We see the *Trade Practices Act*, once a world leader, falling behind initiatives developing both here at a State level and overseas. Examples include unfair contract terms legislation in Victoria and the UK, the development of general consumer protection standards in the EU, pro-active market investigation powers, super complaints and right of action for certain consumer organisations – these are just a few examples of developments.

Even basic amendments to the TPA have languished. In 2002 and 2003 we saw the decisions in *Medibank Private* and *Danoz Direct* respectively. Each of these decisions had a significant negative impact on the ACCC's ability to obtain redress for consumers. In *Medibank* it was established that the ACCC could not obtain specific performance of advertising promises for individual consumers unless it had obtained consents from the affected consumers. The decision in *Danoz* placed similar restrictions on the ACCC's ability to obtain refunds.

Since 2002 there have been no less than 21 Acts of Parliament amending the TPA, 15 since 2003. Yet the opportunity to amend these significant flaws in the TPA has passed by again and again. It should be remembered that this is not new regulation. They are amendments necessary to enable effective enforcement of existing regulation – thereby sending appropriate economic signals to businesses that breach the law (who otherwise may retain the profits gained through their unlawful conduct) and obtaining redress for consumers affected.

### **Institutional arrangements**

Before turning to a way forward for consumer protection, I want to spend a moment talking about institutional arrangements, specifically the Ministerial Council on Consumer Affairs and the Standing Committee of Officials in Consumer Affairs – and the need for speed.

The progress of policy through these institutions could fairly be described as glacial. Whilst we have much sympathy for the challenges involved in obtaining agreement across nine jurisdictions, we consider that there are simple initiatives that could be set in place to improve the ability to reach consensus. These include a commitment to smaller agendas, more work between meetings, out of session decision making and better resourcing of processes.

However, it must also be said that lack of progress cannot always be attributed to the challenges created by a federal system. To take just one example, we saw an agreement between all jurisdictions in relation to the regulation of finance brokers reached in September 2006. More recently we have seen media reports (presumably originating from government sources) suggesting a response is still 12 months away. This is plainly unacceptable.

### **A way forward**

So what, in Consumer Action's view, is the way forward for Australia's consumer policy framework? We consider there are four key elements (each relating to the others):

1. World class consumer protection

This notion includes both specific elements of reform (eg unfair contracts terms legislation, pro-active investigation of markets) as well as the need to supplement or update the lens through which we view consumer protection and

consumer policy (e.g. using thinking emerging in the behavioural economics field and recognising consumers' role in effective markets).

2. Improve our ability to analyse costs and benefits.

Independent research is a critical element in this, as is improving our ability to harness on-the-ground experience.

3. Strengthen the consumer voice

This means an independent and well-funded consumer movement. It also means that there is recognition that debates that impact on the consumer interest should have that interest represented at the table.

4. Much greater enforcement of existing law

There are many critical elements to achieving effective enforcement. A willingness to be pro-active on the part of regulators is clearly critical. Such an approach is more likely where there are adequate levels of resourcing and understanding of and support for the proposition that establishing the boundaries of the law is a worthy exercise in itself and that 'losses' can be policy wins in this context.

These elements will help us achieve the objectives of consumer policy – now and into the future: making markets work *for*

*consumers*, 'growing the pie' to fund our aspirations as a society and distributing fairly the benefits of those competitive markets.