Regulation of the Legal Profession: Consumer Focus and Engagement

Carolyn Bond and Gerard Brody

October 2016

Disclaimer

Carolyn Bond is a past co-CEO of Consumer Action Law Centre and is a member of the Victorian Legal Services Board. The opinions expressed in this article are the author's own and do not reflect the view of the Board. Gerard Brody is CEO of the Consumer Action Law Centre.

Table of Contents

Background

The objectives of the Legal Profession Uniform Law, which currently applies in NSW and Victoria, include:

> "enhancing the protection of clients of law practices…" and "empowering clients of law practices to make informed choices about the services they access and the costs involved."

Given these objectives, a strategic consumer focus must be a key part of the approach taken by regulatory authorities. While focusing on the conduct of the legal profession will also be important and necessary, the achievement of the Law's objectives will require a strong consumer focus.

In the area of legal profession regulation, there has been inadequate consumer focus by Governments and by the professional associations (which produce lawyer conduct rules). However, this paper is limited to the role of the regulator/s.

This paper begins by explaining how consumer focus and engagement strategies can increase the effectiveness of regulators. It then provides examples of different strategies and approaches which may be implemented to achieve these goals.

The paper concludes that many of these strategies could be applied to enhance the work of legal profession regulators and recommends the development of a policy on consumer focus and engagement.

Getting a balance between consumer and industry focus

Most regulators in Australia have the protection of the public, and often consumers, as a key objective. A significant level of regulator effort is focused on the regulated industry or profession, through licensing, monitoring and enforcement activities as well as educating, informing and engaging with the industry or profession. Of course, these industry-focused activities are expected to (and often do) contribute to better outcomes for consumers.

However, there is a risk that the regulator, particularly if regulating a narrow industry or profession, can become 'industry captive', given the predominant interaction is with the industry. There is also a risk that the regulator's approach is based on assumptions about the problems consumers experience, the causes of those problems, and what should be done to address them. Effective regulation often requires the regulator to question these assumptions and to have an increased understanding of the consumer perspective.

Why is consumer engagement and focus important for regulators?

The following are some issues that can form the basis for the work of the regulator, but where wrong assumptions can be made:

- The extent to which consumer complaints made to the regulator are representative of the types of problems experienced by all consumers in relation to the particular product/service;
- Problems that may be experienced by many consumers, which do not show up in complaints;
- The overall level of consumer problems being experienced;
- The key causes of consumer problems and disputes;
- Whether consumer education is likely to reduce problems and (if so) the type of education that may be effective;
- How documentation should be worded to help consumer understanding;
- How consumer psychology can impact on problems;
- Effective regulatory approaches based on understanding consumer behaviour;
- How consumer behaviour understanding/research could be applied to improve the effectiveness of regulation.

A better understanding of these matters could improve the regulator's ability to:

- Identify problems and risks;
- Take action to better protect consumers;
- Provide more effective education/information for consumers;
- Better design preventative activities;
- Provide effective guidance to industry based on how consumers behave/respond.

What does consumer focus and engagement mean?

A robust consumer focus and engagement strategy should mean that the culture of the regulator drives consideration of the 'consumer angle' in all aspects of its role. This involves bringing a strategic approach to the identification of problems as well as the planning of solutions. The regulator will be aware of how better consumer insights might improve regulation. This requires more than surveying consumers or holding meetings with consumer groups.

While the regulator's engagement with industry often requires a strategic approach, consumer engagement is even more challenging. There are often a range of 'contact points' for industry, such as peak bodies, which make engagement easier. Consumers are a much more diverse group and, in relation to legal services, there is no identifiable 'consumer voice'.

What does consumer focus and engagement look like?

As noted, consumer engagement can help a regulator to identify problems and risks. It can also help the regulator determine the most effective solution.

Consumer engagement is no different from much of the other work of regulators—strategies require careful planning to maximise the benefits from the activities. Therefore, approaches will differ depending on the type of regulator, the nature of the industry, and the types of problems being addressed.

Generally, activities that might be undertaken include:

- Meeting with representatives of consumer advocacy and community groups that have relevant experience;
- Sharing information with consumer advocacy and community groups that are unaware of the role of the regulator;
- Undertaking research about the extent of problems – information about consumers who don't complain and the type of problems they experience;
- Undertaking research based on complaints data;
- Taking the outcomes of available consumer behaviour research into account when designing the provision of information to consumers or when designing an approach to a problem;
- Testing or evaluating the effectiveness of interventions, from the consumer perspective.

Examples of consumer focus/engagement activities

Identifying and supporting consumer and community organisations as a valuable source of complaints

Many consumers don't complain to a regulator, and those that do complain may not be representative of the types of problems being experienced. Regulators would benefit from working with community organisations to identify potential complaints which may highlight issues that tend to not be raised in complaints made directly to the regulator. This could involve identifying organisations that may see evidence of misconduct but may not be aware of the role of the regulator.

This is most evident in disadvantaged communities. For example, financial counsellors within an indigenous agency played a key role in reporting rental companies, leading to ASIC action.[1]

[1] Financial Counselling Australia, ' ASIC Action Against Rental Companies Highlights the Critical Role of Financial Counsellors' (Media Release, 6/2/14).

Community legal organisations appear to have been the main source of complaints about debt collection undertaken by lawyers to the Legal Services Commissioner (LSC) in Victoria. In the *Sampson* case, which involved a lawyer sending thousands of misleading notices seeking repayment of debts on behalf of a video store client, four of the five matters presented as evidence came from an Aboriginal community legal centre in Alice Springs.[2] The tribunal determination also stated that a previous complaint was made by a community legal centre in Victoria.

This case is instructive when it comes to the dangers of assessing consumer detriment through complaint numbers. The LSC received few individual complaints but this masked a wide-spread problem.

A further example relates to car repair lawyers. While some complaints are made direct to the LSC by consumers themselves, many of the consumers who suffer harm as a result of the conduct of car repairers, car hirers and related lawyers, don't see the problem as primarily a professional conduct problem.[3] Where complaints are made, they are generally made by community legal centres who are well-placed to understand the role of lawyers.

Apply consumer behaviour research where applicable

There is significant research on consumer behavior available that can be used to inform effective regulation. In designing a response to consumer dissatisfaction in the telecommunications market, the Australian Communications and Media Authority commissioned a report[4] which examined:

> "the extent to which insights stemming from behavioural economics can contribute towards explaining the drivers of consumer dissatisfaction that are manifesting in consumer complaints. The report also highlights how these insights can assist in identifying operational policy and regulatory measures to facilitate best/good practice customer service and complaints-handling within the (tele)communications sector"

While this report focused on the telecommunications industry, it illustrates how consumer behavior research can be applied to explaining and addressing particular consumer problems.

---

[2] *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177

[3] ABC Television, 'Suncorp reports spike in smash repairers car-napping vehicles and holding owners to ransom', News, 5 November 2015 (Josie Taylor) <http://www.abc.net.au/news/2015-11-05/suncorp-sees-rise-in-car-napping-vehicles-held-for-ransom/6914588>.

[4] Patrick Xavier, *Behavioural Economics and Customer Complaints, A report prepared for the Australian Communications and Media Authority (ACMA) in connection with the public inquiry "Reconnecting the Customer"*, (ACMA, 2011).

Undertake research

In 2003, ASIC undertook research jointly with consumer group CHOICE, on the quality of financial advice.[5] The research involved shadow-shopping, where genuine consumers were engaged to obtain financial plans. The plans were analysed by experts, uncovering both good practices as well as substantial problems.

More recently, ASIC undertook research on the problem of the sale of expensive, and often unnecessary, insurances through car dealers.[6] Sub-titled "Why it can be hard to say no", the research identified the state of mind of consumers who had bought theses insurances. It found that consumers who had been shopping around for cars suffered from 'decision fatigue' and that dealers were able to overload them with information at key points, making it more likely that the consumer would purchase a low-value product.

More regulators are using consumer research to inform strategic priorities. For example, ASIC has a strategic intelligence team which applies "behavioural economics to improve consumer or market outcomes or applying data analytics to identify and understand emerging trends and risks."

Document testing

Some regulators 'test' disclosure or information-based solutions before adopting them. For example, ASIC tested consumer responses to the design of superannuation information:[7]

> "The response to the dashboard, while positive overall, depended on many factors, including each participant's self-reported level of financial awareness. The testing highlighted how sensitive people were to small changes in the design and terminology, which highlighted the need for consistency of information and presentation from superannuation funds."

Another example from the same industry involved reframing superannuation statements to disclose a member's balance in terms of the income it would give them in retirement, rather than just a total accumulation. This makes a superannuation balance more relevant to a member because they can immediately see whether their current level of super is enough to give them a comfortable retirement.

---

[5] Australian Securities and Investments Commission, *Report 1-, Survey on the quality of financial planning advice* (February 2003) <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-18-survey-on-the-quality-of-financial-planning-advice/>.

[6] Australian Securities and Investments Commission, Report 470 – Buying add-on insurance in car yards (February 2016) <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-470-buying-add-on-insurance-in-car-yards-why-it-can-be-hard-to-say-no/>.

[7] Australian Securities and Investments Commission, 'Results of consumer testing for the choice product dashboard and further detail about consumer estimators' (Media Release, 11/12/15). <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-378mr-asic-releases-results-of-consumer-testing-for-the-choice-product-dashboard-and-further-detail-about-super-estimators/ >.

When industry super fund Cbus ran a trial sending 20,000 members statements indicating a retirement income stream amount, 97 per cent of members approved of the statement and Cbus registered a jump in engagement compared to the control group, including 12 per cent of members raising contributions and 10 per cent changing investment options.[8]

Consulting with Consumer/ Community Organisations

While consumer or community organisations can be a valuable source of consumer complaints to the regulator, not all organisations will make complaints unless they clearly understand the role of the regulator and the potential outcomes of complaints. As well as lodging complaints, these organisations can also be a source of valuable information and ideas, as a result of their interaction with disadvantaged consumers and policy work.

Delia Rickard, Deputy Chair of the ACCC, explains:

> "Community Legal Centres such as the Consumer Action Law Centre are a critical ingredient if regulators like ASIC and the ACCC are to do our work well. Such services are often the first place disadvantaged consumers go to with their problems. Consequently, these centres are frequently the first to identify emerging issues causing real detriment to vulnerable sectors of our community. This is particularly the case where centres combine financial counselling and legal services and integrate case work, research and policy development so that they can promote long term reforms.
>
> Centres such as Consumer Action that combine these skills are in a position to analyse their cases, identify systemic conduct (such as poor practices by debt collectors or equity stripping by fringe mortgage brokers) and present the necessary information to regulators, industry and governments. Their work regularly results in regulators taking on major litigation (such as the ACCC's current actions dealing with Door to Door sales in the energy sector) as well as real changes to industry conduct and significant law reform. In short, such centres are essential part of our consumer protection regime."

There are some challenges in consulting effectively with community and consumer organisations.

Most organisations have limited resources and funding. Many are funded to work with particular clients—usually low income and disadvantaged people. Some areas of consumer concern receive specific funding, in recognition of the impact on disadvantaged people. Examples are credit, telecommunications, and energy. However, compared to industry

[8] Association of Superannuation Funds of Australia, *The future of Australia's Super: A New Framework for a Better System* (November 2014), [3.6].

bodies, these community organisations have very limited resources. In most cases the regulator should be prepared to provide resources to facilitate the consultation.

If regulators wish to consult with these groups, the regulator should be able to demonstrate a commitment to consumer engagement, and avoid “token” consumer consultation. Regulators should be prepared to feed-back to the groups what action has been taken as a result of the consultation.

What do we know already about consumer behaviour?

Australia’s Office of Best Practice Regulation has published a useful guide for policy makers of common behavioural factors that affect consumer choice.[9] These factors can be used to improve the design of initiatives or regulations to help consumers better assess relevant information, or ‘nudge’ them towards making a desirable choice. Recognising the importance of this body of knowledge, in late 2015 the Turnbull Government established the Behavioural Economics Team of the Australian Government.[10]

The behavioural factors which affect choice can broadly be categorised as follows:

Loss aversion: people would rather not lose than win.

Reference point: people may evaluate changes relative to some reference point, rather than objectively. Examples include:

• Priming – people’s behaviour may be impacted if they are first exposed to certain sensations.

• Anchoring – people use an initial reference point in estimating values.

• Salience – consumers are drawn to what seems relevant to them.

The implications of loss aversion, reference point and time inconsistency:

• Default choice – consumers may ‘go-with-the-flow’.

Time inconsistency: people change their minds over time. Examples include:

• Hyperbolic discounting – people may change their valuation of goods and services over time.

• Procrastination – important decisions may be delayed.

Social factors: choice can be impacted by the choice of others, including through:

• Social norms – people are influenced by the actions of those around them.

• Ego – consumers behave in a way thfat supports the impression of a positive self-image.

• Messenger – consumers are influenced by who communicates information.

Additional factors, including:

[9] Department of Finance and Deregulation, *Influencing Consumer Behaviour – Improving Regulatory Design* (Australian Government, 2013) <http://ris.dpmc.gov.au/2012/12/18/obpr-research-paper-influencing-consumer-behaviour-improving-regulatory-design/>.

[10] Scott Ryan, *Designing effective and innovative public policy in a complex environment* (Speech delivered to ANU Crawford School, HC Coombs Policy Forum Public Policy Conference, 23 November 2015) <http://scottryan.com.au/media/speech-anu-crawford-school-hc-coombs-policy-forum-public-policy-conference>.

• Endowment effect – consumers may disproportionately value what they possess.

• Status quo bias – consumers may be averse to change.

• Mental accounting – consumers may be inconsistent in valuing money.

• Heuristics – people may use mental short-cuts when making choices.

• Affect – emotions can be powerful in shaping consumer behaviour

Appendix A includes some further discussion of these concepts and some outcomes of research by Consumer Action and other organisations that may be relevant to the regulation of the legal profession.

Conclusion

Unlike ACCC, ASIC and Fair Trading offices, legal regulators are regulating a profession, not industry participants. However, from the consumer's point of view the types of problems they experience don't differ significantly from those with other industries.

Unfortunately, while some positive steps have been taken, legal profession regulators have been slow to identify the benefits of consumer engagement and consumer research in identifying and addressing risks. This is perhaps a reflection of the token attention paid by Governments and by the legal profession to understanding the consumer dimension to legal profession regulation. While consumer interests are represented on governing bodies of regulators,[11] this has been so far insufficient to drive a strategic consumer focus within these bodies.

The change required is a cultural one. The proposal of this paper is for legal profession regulators to adopt a consumer engagement strategy which goes beyond market research or *ad hoc* consultation with some consumer groups. A successful strategy should commit a regulator to seeking information about consumer issues that don't appear in complaints, to consider the consumer 'viewpoint' in all its work and to better apply consumer research in addressing problems.

Useful Links

Solicitors Regulation Authority (UK), *Consumer Engagement and Strategy Action Plan*

https://www.sra.org.uk/sra/strategy/sub-strategies/consumer-engagement-strategy.page

Financial Ombudsman Service Australia, *Consumer Engagement Strategy*

https://www.fos.org.au/custom/files/docs/consumer-engagement-strategy.pdf

[11] *Legal Profession Uniform Law Application Act 2014* (Vic) s35(3)(b).

NSW Government – Better Regulation Division, *Stakeholder Engagement Strategy*

https://www.maa.nsw.gov.au/__data/assets/pdf_file/0005/90545/Better-regulation-stakeholder-engagement-strategy-8267.pdf

Consumer Affairs Victoria, *Consumer Confidence Market Experience Survey*

https://www.consumer.vic.gov.au/resources-and-education/research

Appendix – Some behavioural biases and research

Over confidence bias

In simple terms, this is a bias in which an individual's confidence in a conclusion is greater than the accuracy of the conclusion. People can be overconfident in their own judgments, in their own performance relative to others, in the certainty of your own beliefs. Research has found that 80% of people believe they are better than the average driver.

Disclosure of conflicts of interest can increase consumer trust

Rather than making consumers more wary of advice, disclosure of conflicts can have the opposite effect. While focused on medical services, one research report found that disclosure by providers of conflicts of interest, could actually increase the consumer's trust in the provider's recommendation.[12]

The problems with relying on consumer recall

Decision making is complex, and we often don't know exactly why we make particular decisions.

Consumer behaviour researchers often refer to the difficulties of researching consumer decision-making after the decision has been made. For example:

> An important component of post purchase evaluation is the reduction of any uncertainty or doubt that the consumer might have had about the selection. As part of their post-purchase analyses, consumers try to reassure themselves that their choice was a wise one; that is, they attempt to reduce post-purchase cognitive dissonance. [13]

The Australian Communications Consumer Advocacy Network commissioned research to help the organisation contribute constructively to reviews of telecommunications industry customer information obligations.[14]

A key finding of the research was that the more confident a customer is of their ability to comprehend a contract, the less likely they are actually able to recall the details. This demonstrates the problem of relying on a consumer's belief that they understand a contract to satisfy any requirement that the consumer provide informed consent.

---

[12] Sunita, S., The Paradox of Disclosure, New York Times, 8 July 2016, available at: <http://www.nytimes.com/2016/07/10/opinion/sunday/the-paradox-of-disclosure.html>.

[13] Schiffman, L.G., and Kanuk, L.L. 2000. Consumer Behavior. Seventh Edition. New Jersey: Prentice Hall, 457.

[14] Paul Harrison, Laura Hill and Charles Gray, *Confident, but Counfounded: Consumer Comprehension of Telecommunications Agreements* (ACCAN, 2016).

Lack of knowledge may not be as important as being able to accurately assess our level of knowledge.

ASIC undertook research based on consumers who had complained to ASIC about being contacted in relation to a particular type of investment scam.[15] The report noted that "Investors and non-investors were of similar age, educational background, and proportion owning shares." About 50% of those interviewed invested in the scam. A similar proportion of accountants invested as didn't invest (7.7% and 8.8%), suggesting that the level of financial education did little to prevent a poor decision.

While ASIC notes limitations to its research (it only surveyed 80 people, and they were all people who had complained to ASIC) it found that "According to the findings in this report, some consumers underestimate their own lack of knowledge about investing."

Even those working closely with consumers can form incorrect assumptions about the causes of consumer problems

Over many years Consumer Action Law Centre received complaints from consumers who had bought expensive educational software after a high pressure presentation in their homes, often committing to credit contracts of $10,000. Most of the clients were on low incomes, they were likely to have lower than average education levels and a significant number were from non-English speaking backgrounds. It was initially assumed that these factors contributed to the fact that they had signed up to these unfair contracts.

Consumer Action worked with Dr Paul Harrison, from Deakin University, to research the "influence of psychological and context factors in consumers' decision making when choosing to purchase goods and services (and associated credit) from an in-home seller, focusing on in-home sellers of educational software."[16]

The research did not find any socio-economic factors (such as income or education level) that influenced whether or not the consumers purchased the products. The only factors found to influence the decision of the consumer were "trust in the salesperson, and the consumer's attitude toward the school system significantly influenced the decision to purchase the software"

The report also identified the psychological techniques used in the sales process and illustrated why cooling-off periods may not be effective for these consumers.

---

[15] ASIC, Report 15, Hook line and sinker, who takes the bait in cold calling scams, June 2002.

[16] Harrison, P., Massi, M., and Consumer Action Law Centre, 2010, 'Shutting the Gates: An analysis of the psychology of in-home sales of educational software', < http://consumeraction.org.au/policy-report-an-analysis-of-the-psychology-of-in-home-sales-of-educational-software/>.