

DISCUSSION DRAFT: REVIEW OF NATIONAL COMPETITION POLICY REFORMS

**Submission by the Centre for Credit and
Consumer Law, Griffith University**

December 2004

1. About the Centre for Credit and Consumer Law

The Centre for Credit and Consumer Law is an academic centre, hosted by the Griffith University Law School.

The Centre for Credit and Consumer Law was established in March 2004 as a source of expertise, and a centre of excellence, on credit and consumer law issues. The Centre's overall objective is to promote a fairer, safer, and more efficient marketplace, particularly for low income and vulnerable consumers.

The Centre was established to produce high quality research, relevant to current policy issues, and advocate for reforms to law, policies and practices from a consumer perspective. It also creates linkages with consumer, community, government and industry groups to further its overall objective.

The Centre for Credit and Consumer Law is funded by the Queensland Government's Consumer Credit Fund (administered by the Office of Fair Trading) and Griffith University.

Introduction

The Centre for Credit and Consumer Law is pleased to have the opportunity to provide comments on the Productivity Commission's Discussion Paper *Review of National Competition Policy Reforms*.

The Discussion Paper covers a broad range of issues related to the impact of National Competition Policy on the Australian economy and community. However, due to time and other constraints, these comments focus primarily on the proposals in the Discussion Paper relating to consumer protection policy, on pages 216 – 218 of the Discussion Paper.

The comments in this submission are endorsed by the Consumer Credit Legal Centre (NSW).

Review of consumer protection regulation

The Discussion Paper proposes the establishment of a national review of consumer protection policy and administration in Australia. We broadly support this proposal.

As is noted in the Discussion Paper, the competition provisions of the *Trade Practices Act 1974* (Cth) ('TPA') have been the subject of frequent reviews and amendment in recent years, including through the National Competition Policy Review itself and the more recent Dawson enquiry.

In contrast, while there have been amendments and additions to the consumer protection provisions of the TPA, the basic framework of these provisions has not been the subject of any comprehensive review since 1975.

Given that we have now celebrated the 30-year anniversary of the TPA, this limited attention to the framework provisions means that there is a risk that Australia is falling behind in developments in consumer protection law, when compared to other developed countries.

The consumer protection provisions of the TPA also form the basis of the consumer protection provisions in State and Territory legislation, as well as being mirrored in the *Australian Securities and Investments Commission Act* 1989 (Cth) ('ASIC Act') in relation to financial services.

The TPA provisions thus have formed the backbone of consumer protection regulation in this country.

However, in some cases, the TPA provisions are falling behind developments in the States and Territories. For example, Victoria has introduced provisions prohibiting unfair contract terms into its *Fair Trading Act*.¹

It is therefore vital that the TPA provisions are regularly reviewed so that they are appropriate to the modern marketplace; take into account the market developments that have occurred since the original enactment of the TPA; and reflect the increasing knowledge about consumer behaviour.

Some of the important factors that should be reflected in a modern framework consumer protection law in Australia include:

- The increasing level of cross-border trade in consumer goods and services. While this can provide many benefits for consumers, it also poses particular challenges for consumer protection regulation and policy. Key issues for policy makers to grapple with in ensuring that Australian consumers are protected in a global market include: identifying and locating the trader; disclosure of information about the goods/service and the price (and any taxes); exercising refund rights; fraud and security issues in relation to electronic payment mechanisms; laws governing the transaction; and dispute resolution, including appropriate forums.²
- International trade agreements, including the *General Agreement on Trade in Services*, and their impact on consumer protection policy. Measures need to be taken to ensure that compliance with international trade obligations does not come at expense of a weakening of consumer protection measures in Australia.

¹ Part 2B *Fair Trading Act* 1999 (Vic).

² See for example, Standing Committee of Officials of Consumer Affairs (2004) *Online shopping and consumer protection: Discussion Paper*.

- Our improved understanding of how markets work, and how consumers behave in the real world, including the appropriate role of disclosure as a consumer protection tool.
- Developments in consumer protection policy in other comparable countries.
- The potential for consumer policy to have a broader role than has traditionally been the case. For example, to what extent could or should consumer policy in Australia deal with issues of sustainable consumption and/or fair trade, beyond rules that ensure that labelling is not misleading or deceptive?³
- The need for consumer protection regulators to have access to a wide range of remedies, in order to fashion a response to a consumer protection breach that adequately reflects the impact on the individuals affected and the community more broadly. While there has been some expansion in this area in recent years (including, for example, the introduction of enforceable undertakings and community service orders), there has also been some case law that has had an adverse effect on developing creative approaches to remedying consumer protection contraventions.

Other issues that need to be considered in a broad review of consumer policy include:

- The impact of carve-outs from framework consumer protection legislation, and the risk that it can lead to gaps, inconsistencies and/or confusion for consumers. The ‘carve-out’ of financial services from the consumer protection provisions of the TPA is one example.
- The differing and complementary roles of Commonwealth, State and Territory Governments and consumer protection agencies need to be considered and re-examined in a context when many suppliers of consumer goods and services are national companies, or operate in more than one Australian jurisdiction.

A wide-ranging review of the consumer protection provisions of the TPA is well overdue.

Any review, however, would need leadership from the Commonwealth Government. However, this has been somewhat lacking in recent years. Instead, it has largely been left to the State and Territory Governments to take up a leadership role in relation to many important areas on consumer protection policy that have national implications, including regulation of unfair contract terms;⁴ property investment advisers;⁵ and finance and mortgage

³ In a paper prepared for the National Consumer Council (UK), Bush (2004) found greater evidence of consumer empowerment and consumer demand driving developments in relation to the organic food (p 16) and ethical consumption (p 17) markets. The level of consumer empowerment in these markets compared favourably with that in the utilities (p 11) and financial services (p 18) markets: Janet Bush (2004) *Consumer empowerment and competitiveness: a report prepared for the National Consumer Council*.

⁴ See Standing Committee of Consumer Affairs Officials (SCOCA) (2004) *Unfair Contract Terms: A Discussion Paper*.

⁵ See Ministerial Council on Consumer Affairs (2004) *Regulation of Property Investment Advice: Discussion Paper*.

brokers.⁶ To the extent that this process of reviewing the NCP reforms and identifying areas for further work can encourage the Commonwealth Government to take a leadership role in relation to consumer policy, this is to be welcomed.

Competition policy and consumer protection policy

The Discussion Paper notes (at p 216) that there are complementary aspects of competition and consumer protection regulation. This is reflected in the fact that both consumer protection and competition provisions are included in the TPA, and the regulator (the Australian Competition and Consumer Commission) has both consumer protection and competition responsibilities. Indeed, the objective of the TPA is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”.

As a general rule, competitive markets benefit consumers, and consumer protection laws, particularly laws prohibiting misleading or deceptive conduct, both protect consumers from unfair practices and promote more competitive markets. And consumers can activate competition, for example by switching to better offerings in the marketplace.⁷

The Discussion Paper notes that competition is not an end in itself, and this is a view that is expressed by many commentators.⁸ However, the Discussion Paper, and the proposal on page 218 suggests that consumer protection policy is a subset of competition policy, in the sense that the costs and benefits of consumer protection regulation must be weighed against the assumption that increased competition will always be in the interests of all consumers and is the primary goal.

We have had the benefit of reading the submission to this Review by the Care Financial Counselling Service, and fully support the comment in that submission that ‘consumer protection ... must be properly recognised as a priority in its own right’.

The need for a recognition of consumer protection as an equal priority falls from both the limitations of competition in protecting consumers and the limitations of a market failure approach to protecting consumers.

To start with the latter, traditional economic approaches suggest that regulation of markets, including consumer protection regulation, is only needed if there are market failures. However, the traditional notion of a market failure does not include many scenarios that lead to consumer detriment, including practices that take advantage of vulnerable or disadvantaged consumers simply because those consumers have, or believe they have, no other option for supply.

⁶ See Ministerial Council on Consumer Affairs (2004) *National Finance Broking Regulation: Regulatory Impact Statement Discussion Paper*.

⁷ Louise Sylvan (2004) *A Global View of Consumer Issues: Then and Now*, Esther Peterson Lecture, ACCI 50th Anniversary conference, April 2004, p 7.

⁸ Ibid. p 4.

In the consumer credit market, for example, the emergence of fringe and payday lenders, with very high – and arguably inappropriate or exploitative – interest rates, fees and charges, and unfair or onerous terms and conditions, has occurred despite vigorous competition between credit providers. There is some evidence that many of the customers of these fringe providers are aware, on at least some level, that these products are not necessarily good value or safe, but nevertheless believe that the transaction is their only option.⁹

Currently accepted theories of market failures and competitive markets also result in a heavy reliance on informed consumers to improve market efficiencies and consumer outcomes. Information disclosure then becomes a key consumer protection mechanism. However, the limitations of disclosure as the sole or primary regulatory tool are beginning to be recognised, given:

- low levels of literacy in some parts of the community;
- increasingly complex and detailed contracts and arrangements; and
- considerable variation in product offerings, making it difficult, if not impossible, to compare ‘apples’ with ‘apples’ and choose the best deal.

Information disclosure in consumer markets does not work as effectively as might be hoped because information is provided too late in the decision making process; and/or in an environment in which a range of distracting sales techniques are visited upon the consumer, or where there is simply no time or space provided to review the information in any meaningful way. Also, in many cases, the information provided is irrelevant or incomprehensible.

And even well-informed and sophisticated consumers can fall victim to scams and unscrupulous operators.¹⁰

Unfair contract terms are another example of where a disclosure focus does not result in good outcomes for consumers. The fact that credit providers and other suppliers are required to provide consumers with a copy of a contract before it is signed has not, in practice, lead to competition between providers for fairer terms in consumer contracts.

Instead, the reality of consumer contracting is that in many cases suppliers can, almost without restriction, include terms in the fine print of contracts that substantially disadvantage the consumer. Consumers do not generally shop around for contract terms.¹¹ Contracting through standard-form, massed produced documents also mean that there is little scope for any bargaining on the terms.¹²

A more sophisticated and developed approach is therefore needed to deal with the role of information disclosure in a broad and effective consumer policy framework.

⁹ For example, Dean Wilson (2002) *Payday lending: a research report*, for Consumer Law Centre Victoria.

¹⁰ As is shown in Australian Securities and Investments Commission (2002) *Hook, line and sinker: who takes the bait in cold calling scams?*

¹¹ Standing Committee of Consumer Affairs Officials (SCOCA) (2004) *Unfair Contract Terms: A Discussion Paper* p 17.

¹² Ibid. p 16-17.

There is also considerable literature now on consumer behaviour and behavioural economics, which suggests that the ‘rational consumer’ who features in competitive market theories in fact has features and characteristics that are unlikely to be found in many consumers in the real world. The findings from behavioural research therefore need to be incorporated into any review of consumer policy and its interaction with competition policy.

Studies of consumer behaviour, for example, show that despite fierce competition between suppliers in some markets, consumers have been found to be very reluctant to change suppliers. ‘Switching costs’ can drive this reluctance, whether the barriers to switching are deliberate, incidental, or imagined.¹³ In a study for the National Consumer Council in the United Kingdom, Bush found little evidence of empowered consumers, switching to more competitive offerings in the utilities¹⁴ and financial services¹⁵ markets.

In addition, many consumer protection policies are not primarily about competition. Prohibition of unconscionable conduct, undue harassment or the provision of unsolicited credit cards does not necessarily lead to a more competitive market. Instead this type of conduct is prohibited to meet community expectations of appropriate business standards.

For example, Sylvan (2004) suggests that there are three types of consumer protection rules: “equitable rules”, “sensible society rules”, and “market conduct and information rules”, and that only the last of these can be clearly seen as directly competition-enhancing rules.¹⁶

These are not the only types of consumer protection rules. For example, “cost control rules”, for example, provisions that limit the amount of interest that can be charged on a consumer loan, might be another type of consumer protection rule. These rules may in fact reduce competition in a market, by limiting the price/quality trade-offs that suppliers and consumers are able to make. However, these rules might bring other benefits for consumers and the community more broadly.

Competition policy and competitive markets alone do not deal adequately with the various types of consumer protection rules, particularly those rules that are designed to protect consumers who might be vulnerable to unfair practices.

Finally, it is important to note that competition between suppliers does not necessarily operate to the benefit of consumers. For example, so-called ‘reverse competition’ between professional advisers, where suppliers compete to encourage brokers or advisers to recommend their products over their competitors, can result in higher prices for consumers and/or the supply of inappropriate products and services.¹⁷

¹³ See for example, Bush (2004) op.cit. p 10, 12.

¹⁴ Ibid. p 11.

¹⁵ Ibid. p 16.

¹⁶ Sylvan (2004) p 6.

¹⁷ See for example, *Call for new laws to protect against unhealthy competition*, Radio National AM transcript 29 March 2004, available at www.abc.net.au/am/content/2004/s1076015.htm.

And there are some suggestions that consumer empowerment and competition provides benefits primarily for the young, the well-educated, and those on higher incomes.¹⁸ This can lead to ‘differential marketing’, and greater price discrimination and poorer treatment for consumers on lower incomes, or consumers who are seen as unattractive customers for other reasons.¹⁹

Any review of consumer policy and administration should therefore be conducted within a framework that has consumer policy as a priority goal.

Self-regulation and co-regulation

The Discussion Paper suggests that any review should focus on the scope for self-regulatory and co-regulatory approaches. However, there has been considerable discussion on the scope of self-regulation and co-regulation in consumer policy. This includes a weighty report by the Taskforce on Industry Self-regulation, completed in 2000.²⁰

In addition, it is clear, at the level of the Commonwealth Government at least, that, in those cases where there is a market failure or demonstrated need to intervene to achieve a particular social objective, self-regulation is considered the *preferred* method of intervention in consumer markets.²¹

We would therefore disagree with the comment in the Discussion Paper that there has been ‘insufficient attention given to the scope for self-regulatory and co-regulatory approaches’.

From a consumer perspective, it is clear that self-regulation initiatives are successful in only very limited circumstances, and that in fact, experience has shown that, in some markets, greater weight often needs to be given to more interventionist mechanisms to achieve consumer policy objectives.

Regulatory responsibilities and administrative arrangements

Consumer protection responsibilities are shared between Commonwealth, State and Territory governments. For the most part, this has worked well, with enforcement activities occurring at all levels of government.

However, there are some anomalies and difficulties. For example, penalties and remedies vary considerably between jurisdictions, and, over time, the uniform nature of the broad consumer protection provisions has begun to be whittled away.

¹⁸ Bush (2004) op.cit p 21.

¹⁹ Bush (2004) op.cit. p 23.

²⁰ Taskforce on Industry Self-Regulation (2000) *Industry Self-Regulation in Consumer Markets*, available at http://www.consumersonline.gov.au/content/SelfRegulation/finalreport_taskforce/default.asp

²¹ Department of Industry Science and Tourism (1999) *Codes of Conduct Policy Framework* p 3.

A broad review of consumer policy could usefully examine the current division of responsibilities for consumer protection regulation, with a view to developing a framework that would minimise duplication and inconsistencies.

One option might to develop uniform rules, incorporated into a single regulatory instrument, with each jurisdiction having responsibilities for enforcement (similar to the Uniform Consumer Credit Code, but with Commonwealth involvement as well). However, the experience with the Consumer Credit Code shows that there are some risks with this approach; particularly in relation to the inevitable delay when it comes to amending the rules.

Of course, the difficulties of getting agreement on a broad set of uniform rules should also not be underestimated.

Developments in consumer policy in other jurisdictions

As noted above, consumer protection policy in Australia has been relatively stagnant in recent years, at least in relation to the broad framework principles. This is in stark contrast to other comparable countries, many of who have expended considerable effort in developing consumer protection approaches to deal with the changing and increasing challenges in consumer markets.

For example, members of the European Union have implemented regulations or legislation that prohibits unfair terms in consumer contracts;²² and the European Union is also exploring options for imposing a general prohibition against unfair commercial practices.²³

Australian consumer policy has perhaps been a leader in some areas in the past, for example, the development and sophistication of industry-based dispute resolution schemes. However, it has lagged behind when compared to our European counterparts in ensuring that the framework rules are appropriate for the modern marketplace.

A review of consumer policy could therefore usefully consider some of the more progressive developments in consumer policy from the European Union and other jurisdictions.

Funding consumer research and policy

Integral to a review of consumer protection policy should also be consideration of the current funding arrangements for consumer policy, and the potential for the establishment of an independent National Consumer Council to undertake research on national consumer issues and ensure that the interests of consumers are taken into account by decision makers. For example, where change to law, policy or practice is needed, a National Consumer Council would develop and promote practical policy solutions that safeguard the interests of consumers.

²² *Directive on Unfair Terms in Consumer Contracts* (93/13/EEC).

²³ See http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm.

The promotion of consumer protection should be given a higher profile and greater resources within Government. In particular, the provision of Government resources should more accurately reflect the benefits to the Australian community of informed, protected and confident consumers.

Currently, most consumer organisations are primarily casework agencies, and have limited capacity to undertake detailed research and policy work. An independent National Consumer Council, modelled on the National Consumer Council in the United Kingdom²⁴ would be a much needed addition to the consumer protection landscape in Australia.

Conclusion

In our view, a review of the broad framework for consumer policy in Australia is well overdue, and we support in principle the proposal outlined on page 218 of the Discussion Paper. However, for consumers to gain real benefits from any review, the review must:

- treat consumer policy as a policy goal in its own right;
- recognise the limitations of competition theory and practice in protecting consumers, particularly vulnerable consumers;
- acknowledge the limitations of self-regulatory and co-regulatory approaches as a solution for many consumer policy issues;
- examine the scope for greater support of consumer policy, research and advocacy, through the establishment of an independent National Consumer Council; and
- be supported by leadership from the Commonwealth government.

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²⁴ For information about the scope and role of the UK National Consumer Council, see www.ncc.org.uk.