

Harnessing the demand side: Australian consumer policy

Stephen Hally-Burton, Siddharth Shirodkar, Simon Winckler and Simon Writer¹

This paper provides a brief overview of the history of consumer policy in Australia, in order to analyse the economic and other policy influences on the development of Australian consumer laws. The historical narrative illustrates the significance of economic principles to national and state consumer regulations. The paper also discusses the movement of consumer policy through various national policy institutions, and the emergence of consumer policy as an economic policy issue. Finally, the paper turns to the current consumer policy landscape, including opportunities for reform, and discusses the appropriateness of Treasury's wellbeing framework for analysing consumer policy issues in an economic context, in a way which recognises the ultimate goal of improving the wellbeing of consumers.

¹ The authors are from Competition and Consumer Policy Division, the Australian Treasury. This article has benefited from comments and suggestions provided by Jim Murphy, David Martine, James Chisholm, and the Consumer Policy Framework Unit. The views in this article are those of the authors and not necessarily those of the Australian Treasury.

Introduction

In May 2008, the Productivity Commission published a comprehensive review of Australia's consumer policy framework. In conducting its review, the Commission applied an economic framework to considering whether current and alternative consumer policy settings meet the objective of improving the wellbeing of the community as a whole. The Commission's report was positively received by both consumer and business representatives, and the subsequent debate has not been about whether the Commission applied the right analysis but on how its recommendations should be implemented.

For much of Australia's history the economic implications of consumer policy have played a subsidiary role, despite the manifest importance of consumers in markets. In 1998, consumer policy became part of the Treasurer's portfolio, along with competition policy, and formed part of an economic policy function that was concerned with improving the functioning of Australia's markets. Since then, some have questioned the appropriateness of locating consumer affairs within an economic portfolio.²

This paper examines the emergence of consumer policy as a national economic issue, in which consumer policy uses appropriate regulation to empower consumers to drive competition and make Australian product and service markets function well, to benefit consumers collectively and individually. In doing this, the paper looks at the development of Australian consumer laws from the earliest years of European settlement to the national approach represented by the *Trade Practices Act 1974* (TPA). It also looks at factors influencing the development of Australia's consumer laws, including conditions in the colonial economy, developments in the law in Britain and elsewhere, and the emergence of the consumer movement.

The paper then considers the shaping of Australia's consumer policy framework as it stands today, by charting the movement of consumer policy within government and the emergence of consumer policy as an economic policy issue. It highlights current reform opportunities in the world of consumer policy, and identifies the economic underpinnings of the policy analysis currently driving reform. The paper concludes by discussing how consumer policy fits within Treasury's broader policy framework, and how well-functioning markets operate to the benefit of consumers.

The evolution of Australia's consumer laws

Consumer laws have existed since the beginnings of settled human civilisation. One of the earliest and commonly cited examples is the Code of the Babylonian ruler

² See, for example, Wood (2000), p 42; Lenders (2004), p 5.

Hammurabi, written almost four thousand years ago, which sets out a series of laws regulating consumer transactions. Hammurabi's 108th law, for example, protects tavern-goers from paying too much for their drinks:

If the mistress of a beer-shop has not received corn as the price of beer or has demanded silver on an excessive scale, and has made the measure of beer less than the measure of corn, that beer-seller shall be prosecuted and drowned.³

While attitudes to the appropriate punishments for consumer law breaches may have changed, the concern of those laws to secure fair and efficient outcomes for consumers and ensure the harmonious operation of markets remains.

Consumer regulation as a blunt instrument

The early development of Australian consumer laws reflects similar motivations to those apparent in Hammurabi's Code, including ensuring fair weights, basic quality standards and fair prices. The approach taken by early Australian governments was often prescriptive in nature, and tended to focus on short-term concepts of fairness that did not take into account the longer term impacts on economic efficiency.

Regulation of markets in an infant colony necessarily involved meeting challenges rarely encountered by modern policy makers. Extreme scarcity, such as that faced by early colonial New South Wales, invited exploitation on a grand scale at the hands of the officers of the Rum Corps, who had obtained lucrative rights to import goods, process produce and hold agricultural land. Though such intervention would be controversial today, the obvious response to this exploitation in a tiny, developing market was to control prices, regulate quality and license suppliers, especially with respect to staples like bread and liquor.

An example of this dual concern with protecting consumers and developing a well-functioning market is the regulation of bread in early Australia. In 1797 NSW Governor John Hunter commissioned a review of the colony's bread-making industry. In response to this, Hunter's successor, Captain Philip Gidley King, regulated the composition of bread in 1800, with penalties of up to £5 applying to bakers breaching the regulations, and by 1804 bakers were licensed. Bread prices and quantities were directly regulated by 1825, and in 1835 legislation was enacted to regulate the production and sale of bread and to prevent adulteration.⁴ The comprehensive nature of bread regulation meant that it became a standardised product, with regulation in a

³ Johns (1904), p 52.

⁴ See Kingston (1994), pp 102-3; Miley (1987), p 2.

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similar form persisting until the end of the twentieth century.⁵ The effect of regulation initially intended to protect consumer interests was to minimise product variation and severely limit consumer choice.

Developing a more sophisticated approach to market regulation

The regulation of bread in colonial New South Wales shows the many, and often conflicting, motivations for governments to intervene in consumer transactions in ways that may now be regarded as perverse and unduly intrusive. This reflects the changing emphasis of consumer regulation on social outcomes, legal rights and economic development. While it is easy to dismiss such regulation as paternalist and unsophisticated, this ignores the other motivations for governments to regulate in such a way.

Government policy and regulation in the very early years of the Australian colonies was driven by the need to secure what were seen to be the necessities of British life and commerce, in an environment not immediately suited to providing them. The first governors of New South Wales were tasked with establishing a 'bridgehead' economy, and faced serious shortages of food and other supplies from the very beginning. For several decades 'the colony remained incapable of feeding itself or of surviving without continued large-scale support from the British government'.⁶ It was a battle against often harsh local conditions which, it must have seemed, could only be won by controlling the resources arriving from Britain and elsewhere.

The motivations of government regulation of consumer transactions in early Australia can be seen as fundamentally economic. They were concerned with allowing product markets to develop that did not exploit small and vulnerable localised consumer bases through monopolistic conduct and adulteration. The economic impact of such practices had been disastrous, leading the new colony to near ruin in the 1790s and again in the early 1800s. However, government farms could produce only 'miserable quantities of food'⁷, leading early administrators to the conclusion that regulated private enterprise was a much better hope for a sustainable colony than a completely controlled economy or an unregulated one with little trade between regions.

Regulation was also intended to go beyond immediate concerns, and allow for the development of domestic self-sufficiency for basic staples and also the eventual development of export markets for Australian agricultural commodities. This was a

5 In NSW the *Bread Act 1969* continued to license bakers and regulate – to some extent – times for baking and delivering bread, until its repeal in 1996 as part of the implementation of the National Competition Policy.

6 Boot (1998), p 78.

7 *ibid.*

particular concern in Australia in contrast with the pioneer experience in North America, where climatic conditions were much more conducive to a self-sufficient agricultural sector.⁸ Australian conditions made mixed farming difficult, and the consequent specialisation in production meant that, for the needs of the colony as a whole to be met, efficient trading markets had to be developed. The British colonists were able to transfer to Australia their capacity to operate within markets having specialised their production; a capacity they were developing over the course of the Industrial Revolution.⁹

Just as producers and consumers learned about specialisation during this period, so too did governments learn what regulatory concerns arise in such circumstances. Key concerns of early Australian consumer regulation were in breaking the power of monopolist cliques and in ensuring ongoing economic viability. In doing this, the concerns of the early governors went beyond the political, to embrace the maintenance of consumer confidence, by ensuring public order and public health. This meant that laws designed with a specific political purpose also served social and economic needs. For example, in an economy where barter played a significant a role in the absence of any fixed currency, ensuring the quality of tradeable goods such as wheat and rum provided compelling incentives for anti-adulteration laws.

Of course, the development of Australia's early consumer laws also took account of wider economic concerns. In the first half of the nineteenth century, colonial economies expanded and export industries developed; and these were considered 'an enterprise which would convert ... paupers into customers'.¹⁰ This was reflected in a desire to ensure better regulation of basic economic transactions. In doing this, colonial administrations had the benefit of drawing on British law and policy, which was increasingly interested in guaranteeing the effectiveness of daily transactions. For example, the Weights and Measures Act 1795 (UK) provided consumers and traders with much greater certainty about the quantity and quality of goods they were buying and selling, and NSW adopted legislation along the lines of the evolving British model in 1832.¹¹ While the standardisation of trade measurements has occurred throughout history, the 1832 Act marked a concerted attempt to give NSW consumers the confidence necessary for their effective participation in markets, both within NSW and as part of the British Empire.

8 Butlin (1994), p 108.

9 *ibid*, pp 106-9.

10 *Edinburgh Review*, January 1850, p 60, quoted in White (1981), p 32.

11 For a comprehensive history of weights and measures in Australia see Todd (2004).

Consumer regulation and the fairness of markets

While a trader dishonestly tipping his scales has always been regarded as a fraud, the attitude underlying most consumer regulation concerning supplier conduct remained, until reasonably recently, the adage of *caveat emptor*. Businesses were, in a sense, free to be unfair, and it was up to the discernment of the buyer to keep traders honest and accountable. The development of consumer regulation in Australia from the starting point of 'buyer beware' shows an increasing recognition that, as markets become more complex, the asymmetries of information between buyers and sellers increase. Efforts to standardise units of measurement are an early example of colonial governments addressing asymmetries of information. This, in turn, leads to a greater regulatory concern with the fairness of markets.

If fairness in the marketplace was a legitimate goal of government policy, perhaps the natural response of colonial governments was simply to keep unfair traders out of the market. Prohibiting undesirables from entering into various trades and professions was a way to limit less scrupulous behaviour toward consumers. Consequently, the nineteenth and early twentieth centuries saw legislation setting minimum qualifications for a wide range of trades and professions. In most cases, particularly in relation to trades, these standards were determined by governments directly, but in other fields, generally those engaged in by 'gentlemen' (like the law, medicine, accountancy, architecture, engineering and surveying), the profession was permitted to regulate itself.¹² Of course, this emphasis on broad fairness in the market had other consequences reflective of an imperfect appreciation of the economic impact of regulation, which could disadvantage consumers by stifling competition and limiting choice.

While regulation was commonly applied to aspects of consumer transactions concerning price, the quality of goods or the character of the supplier, these laws did not concern themselves with the fairness of specific consumer transactions and stopped short of specifying how a consumer contract should operate. The principle of *caveat emptor* remained true, and other than a limited range of formal requirements for certain types of contract, like those set out in the Statute of Frauds 1677, consumer contracts remained largely a matter of negotiation between consumer and supplier.

In the late nineteenth century, a concern developed in Britain to ensure that all contracts adhered to certain basic principles of fairness.¹³ This led to the Australian colonies adopting legislation along the lines of the Sale of Goods Act 1893 (UK), which

12 Wood (2000), p 32.

13 For a brief history of judicial implication of terms into contracts on the basis of fairness see Seddon and Ellinghaus (2002), pp 1102-4. The Sale of Goods Acts essentially codified a number of earlier developments in the common law governing implied terms in contracts.

allowed consumers to expect certain elements of fairness when concluding contracts with businesses. The Sale of Goods Acts implied into consumer contracts conditions, for example, that goods supplied would be of merchantable quality, that goods delivered would correspond in quality with the sample or description provided to the purchaser, and that buyers had a right to inspect goods before accepting delivery. Their influence can still be felt in the implied warranties and conditions set out in the modern *Trade Practices Act 1974*.

While principles-based regulation focusing on fairness in consumer transactions had emerged, the blunt regulatory instruments of price control, quality regulation and occupational licensing did not disappear. They developed, in many cases, an explicit social policy justification intended to protect vulnerable consumers through economy-wide interventions. They are still with us today in many sectors, in one guise or another. That said, the introduction of explicit sale of goods legislation marked a shift from regulation focused on the identities of the parties to a contract or the subject matter of the contract, to a new emphasis on the contract itself and the process by which it was agreed. In this respect, regulation had found a new way to ensure consumers got what they paid for, without the need for explicit control over the specifics of business conduct. Regulation could offer consumers protection from unscrupulous business activities while preserving their freedom of choice, without the need for a huge number of specific interventions in markets.

A demanding demand-side: the emergence of the consumer movement

The development of Australian consumer law until the middle of the twentieth century occurred in the absence of any coherent or conscious advocacy of the consumer interest. Reforms were conditioned by external political considerations, such as breaking the power of specific vested interests, or a benign concern with ensuring that the form of consumer transactions met a specific standard. By the 1950s things changed, in keeping with the economic phenomenon of consumerism, driven by increases in the volume of world trade and the onset of cheap manufacturing. This led to a growing movement of consumers aware of their emerging rights, eager to see those rights extended, and ever vigilant of the challenges – physical and financial – facing them in a rapidly changing market.

Domestic concerns and consumer empowerment

The Australian 'consumer movement', as popularly understood, has its origins in various women's and housewives' associations formed in the 1900s. Australian women won the vote federally in 1902, and the Housewives Association of New South Wales, for example, encouraged them to use their right to effect positive changes for households as consumers. The goals of the Association included bringing

the producer and consumer closer together, so that the full food-value will be in the goods, and the price charged reasonable ... we believe the woman has the power to find the solution as far as her own home is concerned, by using her power as an intelligent citizen at voting time and demanding these reforms.¹⁴

These associations were concerned primarily with issues affecting their members in the day-to-day operation of their homes. On the one hand, they attempted a form of collective bargaining: negotiating with retailers for discounts for members. On the other, they actively engaged governments and producers on issues like food packaging and handling, and the purity or presence of additives in food products. They were interested in the nutrition of their members and their families, and used their significant numbers and buying power to influence governments on those questions. By 1935 the Federated Housewives Association of Australia (FHAA) had over 100,000 members.

Unsurprisingly for the times, the activities of these women's groups met with mixed responses from governments and society. While the Victorian Government held the FHAA president, Eleanor Glencross, in sufficiently high regard to appoint her to a Royal Commission into the high cost of living in 1925, other segments of society derided their ideas. The Retail Traders' Association of NSW complained regularly of the '[p]leas, demands, and sometimes threats from mushroom societies, associations, leagues and companies for special discounts for their members'.¹⁵ Popular derision for fledgling consumer groups probably arose because the serious consumer issues raised by these bodies 'tended to get lost among calls for less embarrassing underwear advertisements ... and demands for blinds on shop windows so that the dummies could be dressed in private'.¹⁶

Building on the early work of women's organisations, the consumer movement evolved quickly, with its focus expanding from food products and nutrition to textiles, manufactures, and the electrical household goods newly arrived on the market. Where the regulatory approach of governments might previously have been to demand all

14 Extracted in Kingston (1994), pp 104-5.

15 RTA (1932), p 5.

16 Kingston (1994), p 105.

garments be made of wool or leather rather than polyester or vinyl, consumer groups instead simply asked for informative labelling to allow household purchasing decisions to be made with the best information to hand.

New choices and new concerns: quality and safety

A keenly felt concern of early consumer advocates was ensuring product safety and quality. New and wonderful consumer products increasingly became available, which presented consumers with new choices, but also exposed them to new risks. In the post-war period, Australian manufacturing increased dramatically, and products that before the Second World War were regarded as luxuries became everyday household items.¹⁷ A wide choice poses a range of challenges for consumers: confusion about which to choose, concern about whether products are safe or fit for purpose. All of this serves to reduce consumer confidence and leaves consumers unwilling to participate in the market.

The *caveat emptor* principle only works when buyers have sufficient knowledge about the product to exercise proper caution, and in new product markets that knowledge can be difficult to obtain. Concern about product and manufacturing uniformity, safety and fitness for purpose of products available to both consumers and industry led to the formation in 1922 of the Australian Commonwealth Engineering Standards Association (ACESA, now Standards Australia). Voluntary and industry-based standards developed by ACESA and other groups were an effective and flexible alternative to direct government regulation, ensuring consumers knew what they could expect when purchasing products of certain types.

The early twentieth century also saw the liability of manufacturers for the safety and suitability of their products gain legal recognition. In the landmark American case of *MacPherson v Buick Motor Co*¹⁸, *caveat emptor* gave way to *caveat venditor* when Buick was found liable for an injury suffered by a driver of one of its (faulty) cars. In jurisdictions which looked to Britain for jurisprudential leadership, *Donoghue v Stevenson*¹⁹ in 1932 established the tort of negligence, and manufacturers around the world were put on notice that they had to have a care for the basic safety of their goods or else consumers could enforce their rights against them.

The privations imposed by the Second World War demanded tight regulation and rationing in most consumer markets. Consumer choice disappeared, but so too did the

17 White (1981), p 164.

18 *MacPherson v Buick Motor Co.* 217 N.Y. 382, 111 N.E. 1050 (1916).

19 *Donoghue v Stevenson* [1932] A.C. 56, the famous case of the Paisley snail in the ginger beer, was applied in Australia by the High Court in *Australian Knitting Mills Ltd v Grant* (1933) 49 CLR 114 and then by the Privy Council in *Grant v Australian Knitting Mills Limited* (1935) 54 CLR 49.

most excessive instances of consumer exploitation, as governments cracked down on any practice that diverted resources from the war effort, including profiteering. As the war neared its end, it was considered possible 'that after the war, when rationing was lifted, consumers would be too inexperienced and gullible to see through the smart operators who had been excessively constrained for too long'.²⁰ This no doubt raised the spectre of a long era of heavy government regulation to protect consumers from the ravages of free enterprise. As it happened, the consumer-conscious lessons of the Great Depression had not been forgotten during the war. It was the generation of new consumers immediately following the war, the first to relish the peacetime prosperity and make the most of a greater and increasingly inexpensive variety of consumer goods, which gave the consumer movement new momentum.

Developing the consumer voice

In 1959, the West Australian parliamentarian the Hon Ruby Hutchison MLC addressed a public meeting at Sydney Town Hall, which led to the foundation of the Australian Consumers' Association (ACA).²¹ The ACA was a different creature to the women's associations of the early twentieth century and was inspired by similar bodies overseas, including the British Consumers Association, founded in 1957, and the American Consumers Union. While housewives were well represented among the ACA's membership, the early members 'were mainly educated men and women, middle-class professionals, scientists, lawyers, [and] artists'.²² Its first chairman was Professor Roland Thorp, a pharmacologist at the University of Sydney who, inspired by the UK's *Which?* magazine, led the ACA into the field of product testing and published the results in the ACA's magazine *Choice*.

The 1960s were an exciting time for the consumer movement, in Australia and abroad. The ACA had 30,000 members by February 1962²³, and through *Choice* Australians became savvier consumers, aware of pitfalls in the marketplace, and conscious of trends in marketing and other corporate behaviour. *Choice* also, at a time when economics was by no means at the forefront of consumer advocacy, brought attention to the work of Australian economist Dr Persia Campbell who had been working on consumer issues in the United States for some decades. Dr Campbell's 1949 text, *The Consumer Interest*, while concentrating primarily on the American economy, emphasises the importance of facilitating 'wise choice at the market' to achieving beneficial market outcomes and higher standards of living for consumers.²⁴ Facilitating

20 Kingston (1994), p 106.

21 Wood (2000), p 35.

22 Kingston (1994), p 107.

23 *ibid.*

24 Campbell (1949), p 646.

informed consumer choice was – and remains – very much the objective of the consumer movement.

The ACA also brought a greater appreciation of consumer developments in other countries. In 1960, the ACA was a founding member of the International Organisation of Consumer Unions. In the United States, the consumer movement won the support of President Kennedy who, on 15 March 1962 (now Consumer Rights Day), spelled out to the US Congress four basic consumer rights: the right to safety; the right to choice; the right to information; and the right to be heard.²⁵ This so-called ‘Consumer Bill of Rights’ was later expanded and adopted by the United Nations General Assembly²⁶, and continues to enjoy wide support among consumer groups as the basis for consumer advocacy. In 1965, Ralph Nader published his famous exposé of known safety defects in American motor vehicles, *Unsafe at Any Speed*. Two future Commonwealth Ministers responsible for consumer affairs, Barry Jones and Barry Cohen, helped bring Nader to Australia in 1969²⁷, and with Nader came a new consciousness of consumer product safety issues. The combined effect of books such as this and the complaints of increasingly vociferous grassroots consumer organisations was to provide an impetus for a new wave of consumer protection legislation.

Consumer policy comes of age

Australian governments in the mid-1960s began to respond to the concerns of the consumer movement, particularly to concerns surrounding product safety and manufacturing defects. Victoria set up a Consumer Protection Council in 1965, advising the Attorney-General on consumer policy issues.²⁸ The Council was tasked with investigating matters of interest to consumers, ranging from the question of how often goat’s milk should be supplied to co-operative shops to more mainstream topics, and its inquiries were directed largely by those issues referred to it by the Attorney-General.

Four years later NSW enacted the more substantial *Consumer Protection Act 1969*, which Victoria drew upon heavily the following year, as did other jurisdictions shortly thereafter. The NSW Act established both a Council and a Consumer Protection Bureau, which acted in the role of ‘watchdog’ for the interests of consumers.²⁹ The Act also introduced consumer protection provisions such as a prohibition on false advertising, established minimum safety standards for the design and construction of certain goods, and prohibited collusion in tendering and bidding.

25 Marsden (1996), p 15.

26 UN General Assembly Resolution 39/248.

27 Wood (2000), p 39.

28 Consumer Affairs Victoria (2005).

29 Sutton (1971), p 44.

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At the Commonwealth level, attention was still very much on the supply side of the marketplace. Sir Garfield Barwick QC, when Attorney-General, pushed for the regulation of competition, given the immense detriment anti-competitive practices caused to the Australian economy.³⁰ The Menzies Government introduced the *Trade Practices Act 1965*, which contained limited provisions dealing with collusion, and the McMahon Government introduced a broader *Restrictive Trade Practices Act 1971*³¹, but the notion that safeguarding the interests of consumers could also assist the operation of the market had not yet been reflected in national regulation.

A comprehensive new approach: the *Trade Practices Act 1974*

The election of the Whitlam Government in 1972 brought new impetus to the recognition of the role of consumers in ensuring effective markets. Under the guidance of the Attorney-General, Senator the Hon Lionel Murphy, it enacted consumer legislation, along similar lines to the state fair trading legislation but with a more ambitious scope, and emphatically linked the interests of consumers with the competitive operation of markets by combining consumer protections with competition law in the *Trade Practices Act 1974*.

In presenting the Trade Practices Bill to Parliament, Senator Murphy declared the *caveat emptor* principle dead. So great was the imbalance between buyer and seller, so sophisticated were new marketing techniques, so intricate were business transactions that 'the consumer needs protection by the law and this Bill will provide such protection'.³² Though framed as an appeal against large businesses taking advantage of individual consumers, this justification for protection engages with the nature of transactions in which consumers take part and recognises the asymmetries inherent in many of those transactions. Attorney-General Murphy also drew the link between anti-competitive practices and the consequent harm that these cause to the interests of consumers, showing the close connection between consumer and competition policies so as to secure efficient market outcomes.

The Government considered federal legislation necessary because of the limitations of a series of inconsistent state laws, which had limited operation. State laws do not easily apply to businesses operating across jurisdictions, are subordinate to any valid inconsistent Commonwealth legislation, and are not suitable for ensuring nation-wide uniformity of legislation. By the same token, the TPA is subject to constitutional limitations on the Commonwealth's legislative power, and is framed only to apply to

30 ACCC (2004), p 7.

31 For a brief overview of the development of competition policy during this period, see Kenwood (1995), pp 88-91.

32 Australian Senate, Debates, 1973, vol. 57, p 1014.

corporations in trade or commerce, or non-incorporated entities operating across jurisdictions.

By the early 1970s there was an increasing tendency to national markets, particularly as competition laws challenged the prevalence of anti-competitive state-based marketing arrangements. In this environment, the TPA introduced new and far-reaching consumer protections, including the widely applicable prohibition on 'misleading and deceptive conduct' found in section 52. This was a clear statement of the primacy of a new kind of regulation, not concerned with just the form of consumer transactions, but with their substance.

Innovation and excitement: consumer affairs in the 1970s

The introduction of national legislation also meant the appointment of a responsible minister. The Hon Bill Morrison MP was appointed the first federal Minister for Consumer Affairs in 1975. With a national profile, there came an increased interest from the press and the public on consumer issues. Consequently, with a split in responsibilities between state and Commonwealth governments, in the period after the introduction of the TPA there developed 'a sporadic competition ... to have the most progressive consumer affairs agenda'.³³ An early example of this desire to be different was the creation of the first stand-alone Department of Consumer Affairs in NSW in 1976, distinct from the NSW Government's legal and economic policy agencies.³⁴

The introduction of the TPA, in an environment where national product and service markets were becoming increasingly common, might have led to pressure for uniform national laws. The opposite occurred. Policy competition between States and also with the Commonwealth led to divergence in the nature and extent of consumer protection from jurisdiction to jurisdiction. Increased uniformity, including in areas related to consumer affairs such as food quality, was one of the principal drivers behind the Federation in the late nineteenth century³⁵, yet by the end of the 1970s the Australian consumer policy landscape was as fragmented as imaginable. Though the Trade Practices Commission (TPC, the forerunner of the Australian Competition and Consumer Commission (ACCC)) was achieving national consumer protection outcomes unknown in the pre-TPA era³⁶, there was still no effective framework guiding uniform consumer policy across Australia.

33 Wood (2000), p 37.

34 Miley (1987), p 22.

35 Wood (2000), at p 39, attributes an 1852 call for uniformity in the food sector to Sir Henry Parkes.

36 For example, the \$100,000 fine imposed on Sharp Corporation for misleading and deceptive conduct in *Hartnell v Sharp Corp of Australia Pty Ltd* (1975) 5 ALR 493.

With the election of the Hawke Government in 1983 came renewed efforts to unify competing consumer laws. The Commonwealth enacted major amendments to the TPA, increased funding to the Australian Federation of Consumer Organisations, and established the Federal Bureau of Consumer Affairs.³⁷ The 1980s also saw the establishment of the Standing Committee of Consumer Affairs Ministers (SCOCAM; now the Ministerial Council on Consumer Affairs), whose regular meetings were designed to encourage uniformity in consumer law across jurisdictions. Despite this renewed enthusiasm, uniformity was not achieved.

Ever-changing markets

Just as the advent of electrical consumer goods and increasingly exotic manufactures created momentum for safety and quality regulation in the 1920s and 30s, the rapidly changing nature of Australian markets in the latter half of the twentieth century continued to influence consumer policy thinking. The pace of technological and industrial development has not slowed, and regularly introduces consumers to complex markets where effective choices are not as easily made.

Not only are markets becoming more complex, they are becoming more national in scope. Businesses trading within only one jurisdiction are increasingly rare, as are consumers with little interaction with jurisdictions outside their own. Today, almost half of all goods and services are supplied by businesses operating in more than one State or Territory, and the number of businesses operating in all Australian States and Territories has increased rapidly even over the last five years.³⁸

The Australian marketplace is sufficiently accessible for firms, as a rule, to achieve the sorts of economies of scale that make a national operation viable. Australian consumers' needs and access to information do not vary significantly from one State to another. Consumers also have access to an increasing variety of imported consumer products which are unlikely to find markets in only one State, as well as to the suite of consumption opportunities afforded by the development of the Internet.

Consequently, the last decades of the twentieth century saw national efforts at reform and deregulation to deal more appropriately with what is recognised to be a single, national economy. Significant progress was made in areas such as corporations and financial services laws, and the National Competition Policy ensured the supply side of the national economy was subject to uniform regulation. By 1987 the national nature of the Australian marketplace was sufficiently well recognised for an advisory committee to the Constitutional Commission to recommend the States hand over their

³⁷ Wood (2000), p 39.

³⁸ The Productivity Commission (2008) reports an increase in the number of businesses operating in all jurisdictions of over 70 per cent since 2003 (pp 51-2).

consumer protection powers to the Commonwealth.³⁹ However, despite this recommendation and subsequent competition policy reform, the consumer's role in the national marketplace remained subject to regulations varying between jurisdictions.

Consumer policy in national public policy institutions

Changing perspectives: finding a home for consumer policy 1974-1998

While many States have had departments dedicated to consumer policy and enforcement for forty years, the public administration of consumer policy at the Commonwealth level has shifted over time. This reflects, in part, differing ideas about how consumer policy issues should be approached, and from what perspectives these issues are best viewed.

A concern for social justice and for basic legal rights has long formed part of the consumer movement's perspective on consumer policy issues.⁴⁰ This view is primarily concerned with the protection of consumer's rights and balancing the respective powers of consumers and businesses. In this respect, it was a response to the growing sophistication of the way in which businesses operated and dealt with consumers in an increasingly national market for consumer products and services. However, other policy perspectives have had a significant impact on the development of consumer policy over time, with social, legal, business and economic concerns all having a greater or lesser influence on governments. This changing policy perspective has influenced governments in how they have located consumer policy within the wider policymaking environment, and the institutions they have created to administer the consumer law.

The Whitlam Government established the TPC to administer and enforce the TPA in 1974. Prior to the establishment of the TPC, and the similar bodies at state level, the consumer law was enforceable primarily by consumers themselves, often through the Sale of Goods Acts, which had simply extended the civil remedies available under the law of contract. This new regime involved the state in safeguarding the interests of consumers, through a framework which considered it necessary to apply penal sanctions to unfair behaviour rather than merely provide avenues for consumer redress. One early 1970s commentator contended,

If a choice has to be made between imposing penal sanctions or providing civil remedies ... the former must prevail, for the fact is that if the enforcement of the

³⁹ Wood (2000), p 42.

⁴⁰ See Brown and Panetta (2000).

law is left to the individual, most of the evils which the legislation is aimed at would go unchecked.⁴¹

Allowing the TPC to act in the interests of consumers recognised that the costs of private action may outweigh the benefits for individual consumers, and that the state can play a role in coordinating private interests to secure efficient outcomes. While it is not clear that criminal action is always to be preferred over achieving timely redress for wronged consumers, it remains an important aspect of the consumer policy framework that the consumer law can be enforced not just through private action but by regulators.

Ministerial responsibility

When the TPA was enacted in 1974, ministerial responsibility for consumer policy rested with the Attorney-General. This reflected Attorney-General Murphy's role in the development and enactment of the TPA, as well as the continuity of administration of the previous trade practices legislation. In 1975 the Whitlam Government created the post of Minister for Science and Consumer Affairs responsible for the development of consumer policy, with his own department. Nevertheless, the Attorney-General retained primary responsibility for the administration and amendment of the TPA, which in no small part was due to his department's expertise in the development of trade practices law.

In 1976 the Fraser Government appointed the Hon John Howard MP as Minister for Business and Consumer Affairs, with his own department, and he took over full responsibility for the TPA. The creation of a new department, which considered the needs of both business and consumers, reflected a view that consumers and businesses had common interests and raised similar policy issues for governments to address. At the time, consumer groups were critical of this coupling on the basis that business interests would always prevail under this sort of arrangement.⁴²

Still, the question of what might be the best location for consumer policy within the Commonwealth bureaucracy was not yet settled. In 1982 the Fraser Government returned responsibility for consumer affairs to the Attorney-General. On coming to office in 1983 the Hawke Government appointed a Minister for Home Affairs and the Environment, the Hon Barry Cohen MP, whose portfolio responsibilities included consumer affairs. However, by 1984 consumer policy was once again the responsibility of the Attorney-General, now Senator the Hon Gareth Evans, and this is where consumer policy remained until 1996.

41 Sutton (1971), p 65.

42 Brown and Panetta (2000), p 14.

In 1996, the Howard Government included consumer policy within the responsibilities of the Minister for Industry, Science and Tourism, who was assisted by a designated Minister for Small Business and Consumer Affairs, the Hon Geoff Prosser MP. This back and forth between various government departments reflected the difficulty governments had in pin-pointing the exact role of consumer policy, not to mention the shifting public prominence of the issue. In 1998, consumer policy was moved again to form part of the responsibilities of the Treasurer, the Hon Peter Costello MP, along with competition policy. In this regard, the Treasurer was generally assisted in this matter by a minister outside of Cabinet. This transfer provided opportunities for improved coordination in the development of policy advice on issues impacting on consumers and helped ensure that the competition and consumer policy provisions were more closely aligned.⁴³

The emergence of consumer policy as an economic policy issue

In the 1990s Australian governments became increasingly concerned with the importance of well-functioning markets for improving productivity and economic growth. Governments both pursued supply-side reform to improve market efficiency – most notably as a consequence of the Hilmer Report⁴⁴ – and had regard for the potential interaction between consumer laws, broader market regulation and consumer welfare. Indeed, the ultimate objective of the National Competition Policy reforms was not simply achieving structural reform, but enhancing consumer welfare through more efficient markets and improved competition.

At the time, the decision to move consumer affairs to Treasury was the subject of criticism from some consumer advocates on the basis that ‘the culture’ of an economic policy department would not favour consumer interests.⁴⁵ However, in considering the placement of consumer policy within government, an important factor is the analytical framework adopted by the agency, and the alignment of consumer policy with other areas of policy affecting the operation of markets. Economic policy is fundamentally concerned with consumer wellbeing.

From a policy perspective, consumer affairs is concerned with the way in which consumers operate in markets and the degree to which governments will, or will not, intervene to protect their interests. This is, essentially, an economic issue. This is not to say that other issues have a greater or lesser role to play in the policy development process, but it is a recognition that poorly designed consumer protections may ultimately do more harm to consumers than good. Treasury’s central involvement in

43 Treasury Annual Report, 1998-99.

44 Report by the Independent Committee of Inquiry into a National Competition Policy for Australia, August 1993.

45 Wood (2000), p 42.

developing the new national consumer law, agreed by the Council of Australian Governments (COAG) on 2 October 2008 and which will include a provision addressing unfair contract terms, highlights the fact that an economic policy agency is not by its nature opposed to increasing protections for consumers. Rather, entrusting consumer affairs to an economic agency such as Treasury ensures that consumer issues are analysed within a context which recognises the broad economic consequences of consumer protection measures. For this reason, we avoid rushing 'to employ consumer protection tools, because these often lessen consumer autonomy and power, and that would obviously run counter to [the] broader goal of consumer empowerment'.⁴⁶

On its election in 2007, the Rudd Government retained consumer and competition policy as a Treasury portfolio responsibility, and appointed the Hon Chris Bowen MP as Minister for Competition Policy and Consumer Affairs. Since that time, consumer and competition issues have assumed an increased profile, driven in large part by the impact of current economic circumstances on consumers, which have given consumer issues a greater prominence than they have had in the recent past.

The future of Australian consumer policy

In 2005, the Howard Government received the report of the Taskforce on Reducing Regulatory Burdens on Business (the Banks Taskforce), which was set up to identify and recommend solutions to deal with the problems associated with imperfectly designed and applied regulation in the Australian economy. The Banks Taskforce concluded that there was duplication of consumer regulation across Australian jurisdictions and regulation was inconsistent across States, making compliance difficult for businesses trading nationally. With this in mind, it recommended that the Council of Australian Governments, through the Ministerial Council on Consumer Affairs, undertake a comprehensive review of the Australian consumer policy framework.

The Productivity Commission's Review of Australia's Consumer Policy Framework

In April 2008, the Productivity Commission presented its *Review of Australia's Consumer Policy Framework* to the Australian Government. The Commission concluded that Australia's consumer policy framework has considerable strengths, but also that there is considerable room for improvement. Many of the inefficiencies and problems associated with Australia's consumer laws are derived from the split between national and state and territory responsibilities. This causes a range of problems in terms of creating regulatory duplication in some areas, gaps in others and policy inertia, all of which lead to inconsistencies in policy and enforcement, and weaknesses in the redress

⁴⁶ Henry (2007), p 16.

options available to consumers. The Commission also recognised that rapidly changing markets meant policy and enforcement agencies would struggle to address consumer problems, and that the costs of doing nothing would increase.

The Commission recommended an ambitious reform agenda to harmonise generic consumer laws and better coordinate enforcement, which also recognised the ongoing interest, expertise and capability of Australia's States and Territories in consumer policy and enforcement. To this end, the Commission recommended the development and implementation of a new national consumer law, based on the TPA, which draws on the Commission's recommendations and, where there is general agreement that the TPA is not adequate, relevant state and territory laws. To support this new law, the Commission also recognised the need for a wider range of enforcement powers, to allow for more proportionate responses to consumer law breaches and also greater coordination of enforcement between the ACCC and the state and territory consumer law enforcement agencies. The Commission also highlighted the importance of improving the ways in which consumers can access information, advice and assistance with consumer issues, through greater institutional coordination and improvements to dispute resolution mechanisms.

Australia's new consumer policy framework

On 2 October 2008, COAG agreed to a comprehensive consumer policy framework reform program based on the Productivity Commission's recommendations. This package of reforms will address a range of systemic consumer policy issues, including:

- the need for a **coherent objective for consumer policy**, with all Australian governments agreeing to the following common objective for consumer policy: 'To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly';
- the need for **national legislative consistency** in generic consumer law, to be achieved by means of a new national consumer law, which will be based on the current consumer protection provisions of the *Trade Practices Act 1974* (TPA) and will also incorporate appropriate amendments reflecting the Commission's recommendations and best practice in state and territory legislation. The new law will also be consistent across all industries, to the extent practical;
- the need for **effective policy development and decision making frameworks**, which will be achieved through the adoption of a cooperative application law scheme, to be amended by agreement of the Commonwealth plus four State and Territory governments (of which at least three must be States), and greater COAG supervision of the implementation of reforms;

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- the need for **more effective and consistent enforcement**, to be achieved through a range of proportionate enforcement powers, and a greater commitment to cooperation and communication by enforcement agencies; and
- the need for **enhanced engagement with consumers**, which will be progressed by a more coherent approach to providing consumers with useful and timely information and improved dispute resolution procedures.

The Productivity Commission calculated that these reforms could provide significant economic benefits to the Australian community.⁴⁷ In addition, they will provide considerable administrative benefits and savings, providing a more streamlined policy process and more effectively coordinated consumer law enforcement. In developing the reforms – which have been widely welcomed – an economic policy framework has been applied, with the nature of the reforms, their impacts and their costs and benefits assessed in an economic context, but also with regard to the wide range of other relevant political, social and other factors.

Economic analytical frameworks for consumer policy

Adam Smith in the *Wealth of Nations* (Book IV, Chapter VIII) noted that:

Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident that it would be absurd to attempt to prove it.

More recently, Sir John Vickers (2003) has pointed out that ‘uninformed [consumer] choice is not effective choice, and without that there will not be effective competition’.⁴⁸ While the role played by competition laws in contributing to the efficient operation of markets is well recognised, ‘consumers also need policy protection to ensure they can exercise effective choice. Such interventions empower consumers to drive the market and activate competition’.⁴⁹

This link between consumer wellbeing and well-functioning markets is now uncontroversial, and the link in policy terms between supply-side regulation, in the form of competition policy, and demand-side interventions, in the form of consumer policy, is commonly accepted as a valid framework within which to develop policy, where previously it was regarded as groundbreaking when the TPA was enacted.

47 The Productivity Commission estimated its ‘reform package could provide a net gain to the community of between \$1.5 billion and \$4.5 billion a year’. Review of Australia’s Consumer Policy Framework, Volume I, p 3.

48 Vickers (2003), p 5.

49 Henry (2007), p 13.

The economic paradigm simplifies how markets work into the following proposition: a market is an efficient means of allocating resources if it is highly competitive, information is symmetric, there are no public goods, transaction costs are nil and there are no externalities in consumption or production. This is a perfect market, and any deviation from this proposition results in a market failure.

The problem is that no market is perfect, and in all markets there is likely to exist one or more of these failures. Most markets are not highly competitive, information is often asymmetric, public goods exist, transaction costs are usually positive (and associated with imbalances in bargaining power) and there are significant externalities in both consumption and production. The function of consumer policy in an economic context is to provide insight on the issues surrounding the purchase and use of consumer goods and services.

Effective economic analysis is characterised by an ability to take a multidisciplinary approach, so as to consider the economic paradigm in the context of the prevailing legal and social framework. For example, governments are increasingly looking at the implications of psychological factors on consumer decision making. Behavioural economics draws on insights from psychology to better understand the behaviour of individuals, firms and regulators in an economic system.

A more sophisticated approach to consumer policy making also allows policy makers to design policies more accurately, to respond in a more focused way to the needs of consumers actually suffering some form of detriment, rather than applying crude solutions to entire markets. This has been a common regulatory problem, and has led to considerable distortions in markets that ultimately serve to harm the wider interests of consumers.

Of course, simply applying specific solutions to specific groups of consumers can also lead to problems. For example, consumer policies designed to benefit disadvantaged consumers may not be effective in achieving that end, as businesses will often pass on the costs of regulation to all consumers. By applying a framework that takes into consideration economic, social and behavioural effects, and which endeavours to quantify those effects, policy makers are in a better position to implement effective policy solutions which avoid these common problems.

All consumer policy tools affect how markets function. Depending on how they are designed and implemented, these regulations can improve the economic efficiency of markets, or place considerable restrictions on market interactions. Generally speaking, overly restrictive consumer policy can discourage new entrants from entering into the market and reduce the overall level of competition and consumer choice. However, in some cases, the public policy imperatives driving regulation permit governments to impose considerable distortions in markets, for example the regulation of food and

product safety. However, analysis of the impacts of consumer regulation on economic efficiency (which necessarily includes an assessment of the impact on consumers both individually and collectively) is an important discipline on consumer policy makers, so as to ensure that policies are well understood in both their application and their impacts, even if the primary drivers of policy are non-economic.⁵⁰

Treasury's approach to consumer policy thinking

As an economic policy agency, Treasury's mission is to improve the wellbeing of the Australian people by providing sound and timely advice to the government, based on objective and thorough analysis of options, and by assisting Treasury ministers in the administration of their responsibilities and the implementation of government decisions.⁵¹ In doing this, Treasury seeks to apply a series of basic principles to policy making called the Wellbeing Framework. The Wellbeing Framework is drawn from widely recognised economic principles, but also allows for a consideration of non-economic concerns and issues in the policy development process. It 'is a grassroots statement of [Treasury's] mission, encompassing market, non-market, material and intangible components'.⁵²

50 Price (1977), p 100.

51 Treasury (2008)

52 Henry (2007), p 3.

Treasury's Wellbeing Framework

The Wellbeing Framework comprises five elements against which public policy issues can be assessed:

- the opportunity and freedom that allows individuals to lead lives of real value to them;
- the level of consumption possibilities available to the community over time. This includes both market and non-market goods and services such as voluntary and community work, the quality of the physical environment, health and leisure;
- the distribution of these consumption possibilities, including among different groups within society, across geographical regions and across generations;
- the overall level and allocation of risk borne by individuals and, in aggregate, by the community; and
- the level of complexity confronting Australians in making decision about their lives.

Source: Treasury, *Who we are and what we do* (2008).

In common with other significant public policy issues, effective consumer policies impact on all elements of the Wellbeing Framework. Often, these impacts imply trade-offs. While much government regulation will impact directly or indirectly on consumers, 'consumer policy' consists primarily of the suite of government policies that deal with the purchase and use of consumer goods and services. At the Commonwealth level these are largely regulated through the consumer protection provisions of the *Trade Practices Act 1974* and the mirror provisions of the *Australian Securities and Investments Commission Act 2001* (in respect of financial services). In addition, sector-specific consumer regulation and government information/education campaigns also exist.

The first element of Treasury's Wellbeing Framework, which invites the policy maker to consider the level of opportunity and freedom that people enjoy, is central to good consumer policy. From July 2007 to June 2008, Australian households spent \$591.9 billion on consumer goods (excluding dwellings)⁵³, and they funded this, in

⁵³ Australian Bureau of Statistics (2008), Series ID A2304081W – Households Final Consumption Expenditure, 5206.0 – Australian National Accounts: National Income, Expenditure and Product.

part, with \$83 billion in consumer borrowing.⁵⁴ Household consumption currently represents 57.7 per cent of annual GDP. As such, policies directed at facilitating consumer interactions are significant for most people, both in terms of their ability to consume material goods and services, but also in terms of empowering individuals to make choices.

Consumer policies have an indirect, but important, impact on the second element of the Wellbeing Framework: the level of consumption possibilities. The market is most effective at providing the consumption possibilities demanded by consumers when consumers are confident in engaging in markets, businesses have clear signals about consumer preferences and consumers understand the range of offerings in the market. Effective consumer policy can improve the functioning of competition by promoting transparent transactions and deterring illegitimate operators from the market. Many of the consumer protection provisions of the TPA (and equivalent state and territory legislation) are concerned with mitigating the potential for traders to distort and then take advantage of consumers' expectations about the price, quality and availability of goods and services on offer.

Consumer policies also have an indirect influence on the third element of the Wellbeing Framework: the distribution of consumption possibilities. Certain groups in society face special disadvantages as consumers due to social, economic and other factors. The nature and extent of that disadvantage will determine whether it is best addressed through consumer policies or through non-market social policies. For example, the Ministerial Council on Consumer Affairs endorsed the introduction of a National Indigenous Consumer Strategy (www.nics.org.au) in 2005, with a view to improving Indigenous Australian consumers' knowledge of their rights and obligations and reducing detriment experienced by vulnerable or disadvantaged Indigenous consumers.

Consumer policy has a more obvious link with the fourth and fifth elements of the Wellbeing Framework. In relation to the level and incidence of risk, for centuries the rule of *caveat emptor* assigned all risk associated with a transaction to the consumer alone. This rule relies on the understanding that consumers are discerning and can ascertain the quality of goods and services. But over time this principle has worked against consumer interests, particularly with the widespread use of pre-packaging. Governments recognised that in addition to equipping consumers with more information, one of the most effective means of rectifying this information asymmetry was by placing the cost of product failure onto the producers whenever they are in the best position to identify and rectify product deficiencies. Division 2, Part V of the TPA

⁵⁴ Australian Bureau of Statistics (2008), Series ID A2413439V – Personal Finance Commitments, 5671.0 – Lending Finance, Australia.

implies into all consumer contracts certain non-excludable conditions and warranties (including that goods are fit for purpose and consumers can enjoy quiet possession). Most of these implied conditions and warranties cannot be removed by sellers even if consumers have provided consent.

Finally, the Wellbeing Framework places an emphasis on policy making taking into account the level of complexity confronting Australians. When markets change rapidly (for example, through new technology or changes in preferences), there may be incentives for traders to exacerbate the complexity associated with those markets. There are two broad ways governments can address complexity: by reducing complexity (through regulation directed at the way businesses deal with consumers); and by helping people to better deal with complexity (through dispute resolution arrangements and educational initiatives). In addition, the non-government sector is able to provide intermediary services to assist consumers to deal with complexity. Financial services and consumer credit are particularly complex areas for many consumers. In response, Australian Securities and Investments Commission's Understanding Money website (formerly managed by the Financial Literacy Foundation) is an educational tool designed to assist consumers in understanding basic and moderately complex financial issues, such as investing and superannuation.

All five elements of the Wellbeing Framework shed light on consumer policy issues, and the framework as a whole provides a firm basis for developing good consumer policy.

A demand side harnessed, but champing at the bit

From its beginnings, Australian consumer policy has addressed fundamentally economic problems and provided economic solutions to them, even if they were not clearly recognised as such at the time. The challenge of consumer law has always been to harness the demand side of markets, in order to drive those markets to efficient outcomes that will benefit consumers. But since the demand side is given much rein, it heads constantly in new directions, engaging with new markets and encountering new snares. In order to ensure consumer wellbeing, effective consumer policy requires an analytical framework which considers the economic implications of any policy on the choices available to consumers, and on the risks to which they are exposed. It is also necessary, for truly effective policy development, to recognise the importance of non-economic perspectives. For these reasons, Treasury uses the Wellbeing Framework as the foundation of its policy development. It allows for active and responsive policy on consumer issues, within a context that ensures consumer policy will continue to form an important element of Australia's national economic policy.

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