Why aren't CONSUMER PROTECTION LAWS used?

John Goldring

The law may be flouted if it isn't enforced.

The title of this article suggests that consumer protection laws are not used. This is an assumption, but it is based on some observations. First, when the Australian Law Reform Commission looked at product liability laws a few years ago – but more than 12 years after the introduction of the *Trade Practices Act* 1974 (Cth), Pt V, Div 2A – Commission staff were able to discover one reported case in which those provisions were considered. Second, there have been fewer than 20 reported decisions involving the *Contracts Review Act* 1980 (NSW). A survey of consumers conducted for the Trade Practices Commission some years ago showed a remarkable lack of litigation on consumer problems.[1]

If the laws are not used, that may be one measure of their inadequacy. But, in principle, what the UK Consumers' Council said almost a quarter of a century ago still applies:

> In sum, much of the law that consumers need is there. And the field of potential consumer claims is substantial – although undoubtedly many retailers and manufacturers deal fairly and even generously with consumer complaints, regardless of any legal obligation, we know of some firms from whom, because of either policy or inefficiency, it is very difficult to get redress.[2]

Legal remedies are the last resort. There are significant common law and statutory remedies.[3] However, the law also provides standards of behaviour, and it does seem that people do try to comply with those standards, unless competitive pressures force them to cut corners. Since 1970, in Australia, the range of consumers' legal rights has expanded, especially with the introduction of the *Trade Practices Act* 1974 (Cth) Parts IVA, V and VA, the *Contracts Review Act* 1980 (NSW), and the 'uniform' credit and fair trading legislation. Some of this has had quite a profound impact on business conduct, uniformly, I suggest, in ways that benefit consumers both individually and as a class.

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Are consumer protection laws effective?

Laws need not be litigated to be effective. Indeed, the most effective laws will not need to be litigated. The real test of effectiveness of the laws is not how they affect the bulk of law-abiding citizens and corporations, but rather how they affect those marginal firms which are driven to the edge by the competitive forces of the market. Adam Smith's ideal market consisted of players who adopted a common code of ethical behaviour. Real markets consist of people desperate to make money, whose behaviour is only modified if the costs outweigh the potential benefits. The laws must ensure that all players in the market conform to accepted standards of behaviour without the need for civil or criminal litigation. If they do, the laws are effective. While people may internalise norms of behaviour, at the margins of the market the power of the State must be called in to ensure that all behave properly. If the State has the power, which is given by rules of law, but this power is not exercised, then the legal rules are ineffective.

To the extent that we still have abuse of the rules, the markets are failing, and state power is required. Where there is blatant flouting of the rules, the law is ineffective and it is important to find out why. The recent Homefund scandal, the litigation concerning IUDs and silicon breast implants, and a number of cases involving highly respected banks and financial institutions demonstrate this. We still have enough consumer dissatisfaction and suffering to suggest that the rules either do not prevent abuse of economic power, or that those rules are not being enforced.

No single reason will explain why the consumer protection laws have not eliminated abuse of consumers. However, a number of factors do deserve further consideration.

Ignorance by the profession

It is hard to believe that in the 1990s some lawyers are ignorant of the existence of bodies of statute like the *Trade Practices Act* 1974 (Cth), Part V, yet this is true. To some extent, the outmoded nature of legal education in some of the older law schools, which concentrated almost exclusively on case law in subjects such as torts and contracts, can bear the responsibility for this, but even the most conservative Australian contracts courses and textbooks now include references to the *Trade Practices Act* 1974 (Cth) and the *Contracts Review Act* 1980 (NSW), and most lawyers are at least aware of the *Trade Practices Act* 1974, s.52. However, at law school, students tend to socialise themselves, and the prevailing ethos in all schools is that students concentrate on commercial law subjects, which they see as the most prestigious. Section 52 is seen as a commercial provision, not a consumer remedy.

Consumer protection law is not seen as well remunerated because it is not well funded, but consumer protection laws affect many transactions. Most lawyers' work is advice, and every individual who receives advice is a consumer. If lawyers are not fully aware of the range of consumer rights and remedies, they will not be able to advise either consumers or suppliers adequately. They seem unwilling to learn about consumer protection laws either at law school or in continuing legal education – courses in consumer protection are not the most popular. Lawyers thought – and still largely think – that consumer law is not important.

Complexity of laws

Assuming that lawyers are aware of consumer protection laws, some of them – especially the credit legislation and some provisions of the *Trade Practices Act* 1974 (Cth) dealing with product liability – are unduly complex. This complexity discourages reliance on the sections, because any actions risk being drawn out by relatively wealthy defendants (usually insurers) in argument about the meanings of unclear provisions.

Public enforcement – inadequate resources

A government too committed to cutting the public sector

Legal rights are only as good as the resources available to put them into effect. Traditionally, some consumer protection laws have depended on private enforcement, and some on enforcement by a public agency. In modern times, however, both public and private enforcement have largely depended on funds provided from the public revenue. Since 1975 the rhetoric of all major political parties in Australia and elsewhere has been directed at cutting taxes and government spending, under the influence of (often mistaken) views of economic theorists that private sector economic and managerial activity is invariably more efficient than public sector activity. Cuts in taxes have not always been implemented, but there have been major reductions in more obvious forms of government spending. Governments are happy to enforce criminal laws, but less so to enforce consumer protection laws and occupational health and safety laws, even though the latter are usually far more beneficial overall to the economic and physical health of the community. Consumer protection agencies have been 'downsized' and the resources available for law enforcement by these agencies have been reduced universally, often to the extent that, although enforcement was never great, it has become a mere token. Politicians, wrongly, see more votes in prosecuting victimless crime, prostitution and illegal gaming than in enforcing consumer and occupational health and safety laws.

A rapacious private sector

After the boom years of the 1906s and 1970s, we entered the recession we had to have. A sluggish and protected Australian private sector turned its capital from productive uses to financial speculation, with disastrous results. The productive activities which survived faced vastly increased competition from domestic and international sources. Firms that previously could afford to be charitable and concerned with high levels of product quality and safety were forced to cut corners to survive. Although product quality and safety are worthwhile long-term investments, in the short run, price competition forced suppliers to produce a no-frills product, at times inferior in safety and quality. This is, of course, what consumer protection laws are designed to prevent, so that at a time when there was a greater need for state intervention in the market to protect quality and safety standards, the resources available to consumer protection agencies was reduced.

Private enforcement – inadequate resources

Costs of litigation

Litigation was never cheap, but there were times when ordinary people were prepared to pay to enforce their rights. That is not the case now. Twenty years ago, the Royal Commission into Poverty in Australia found that poor consumers had significant unmet needs for legal services.[4] If anything, the position is now worse than it was then, and the National Legal Aid Advisory Committee saw legal aid in consumer cases as a priority need.[5]

Absence of legal aid

The absence of adequately funded legal aid and advice, whether provided through private lawyers, community or group legal services, or pubic legal aid agencies, is probably the greatest barrier to the effective use of the consumer protection laws by those for whose benefit they were intended. Businesses that receive goods or services of lower quality than they bargained for are able to make a commercial judgment as to whether the costs of litigation are justified by the potential returns and can apply their working funds for that purpose. Individual consumers, unless they are in the top 10% of income earners, generally cannot make decisions of that kind. The most they can expect would be to pay a solicitor to advise and probably write a letter of demand. The risk of losing, and then having to pay, in addition to his or her own costs, the costs of a supplier which almost invariably either has greater capacity and resources for litigation, or is represented by an insurer, deters any litigation.

Legal aid funds are limited. Other areas are seen as having higher priority, and it would be virtually impossible to deny that legal aid cases involving the liberty of individuals charged with offences, or the custody and maintenance of children should have priority over those involving other civil litigation.

What are the alternatives?

More legal aid

More legal aid would probably be nice, but even if it were made available as of right in every case to be brought under the *Fair Trading Act* 1987 (NSW) or the *Trade Practices Act* 1974 (Cth), Parts IVA, V and VA, it would still not be enough to enable all consumers to enforce every right they have under all the consumer protection laws. It would probably enable greater use of the rules, thus creating a much more effective incentive for suppliers to comply with the rules than they have at present. But there still would not be just redress for consumers in every case. However, the total funding of legal aid direct from the revenue is unlikely to increase significantly.

Alternative legal aid funding

The Law Foundation of New South Wales has been conducting experiments with systems of group legal aid, or 'legal aid insurance', and a number of trade unions offer access to similar plans. While these are not the answer and do not provide for the poorest consumers, they may give some help to a fair range of middle-income consumers who might otherwise be unable to enforce their rights.

In the USA, most 'consumer' litigation has been funded by the system of contingent fees, coupled with the absence of a general 'costs follow the event' rule.[6] There is much current discussion of the introduction of different versions of the scheme in Australia. Although I was originally resolutely opposed to any system which would remunerate lawyers on any other basis than a fee for service, on the grounds that this is the only sound basis of ensuring that quality professional services will be provided to all clients on the same basis, I have been converted to the need for some version of contingency fees, because I think this is the only way that significant sections of the community will have any access to their legal rights at all. Denial of legal rights is a greater danger than perhaps encouraging the development of inferior quality legal services or the encouragement of a speculative and unprofessional attitude among some lawyers. Those matters can, to some extent, be controlled by the courts, legal services ombudsmen, and legal professional bodies, if they are prepared to be more rigorous and public-spirited than they have been in the past in stamping out poor quality legal services. Recently the Trade Practices Commission, in its Draft Report on the Legal Profession recommended that clients be permitted to agree that a solicitor could act on the basis that no fee would be payable if the action were not successful, but if it were, the fee would be the solicitor's normal fee plus 25% (Chapter 11). The *Legal Profession Bill* now before the New South Wales Parliament would allow this arrangement.

Greater knowledge of class action procedure

The introduction of representative procedures in the Federal Court,[7] and some State Supreme Courts means that where a number of consumers are similarly and adversely affected by goods or services that do not, or whose delivery does not, meet the standards required by law, they may join in a representative action which may lead to significant savings in costs. Lawyers need to be aware of these provisions and to be prepared to co-operate with other lawyers in order to ensure that clients have access to remedies in appropriate cases. The Federal Court has jurisdiction over most actions brought under the *Trade Practices Act* 1974 (Cth), Part V, so this procedure may well be the most appropriate means of enforcing some claims arising out of false or misleading conduct that may contravene, for example, ss.52 or 53.

More judicious use of provisions like Trade Practices Act 1974 (Cth), ss. 87, 170.

Under the *Trade Practices Act* 1974 (Cth), s.87, the Commission may take action on behalf of groups of people who may be similarly affected by contraventions of that Act. Few actions have actually eventuated, but actions have been commenced under corresponding sections of the *Fair Trading Act* 1987 (NSW) (for example, *Holt v Biroka Pty Ltd* (1988) ASC 55-674).

More importantly, s.170 allows the Minister to grant legal assistance in cases which raise important issues of principle. This provision is administered by the Federal Bureau of Consumer Affairs, which reports that it receives few applications – possibly because practitioners are not aware of its existence.

The danger: inaccessible legal rights

There are significant legal rights which should protect consumers. They also should provide standards to guide businesses in their operations, secure in the knowledge that if their competitors do not comply with the standards, they face legal sanctions. The laws will only be effective if there are adequate machinery and resources for their enforcement. The machinery is probably there, but the resources, including both money and information, are not.

The danger is that those who should comply with the laws will point to them and say 'The laws are in place; all is well'. If that happens, people are entitled to ask what function the law performs. If it can be flouted because those who contravene the rules cannot be called to account in court, then the laws themselves fall into disrepute, with disastrous consequences for our society, as laws are a vital part of the social fabric.

References

1. Winton, L. and West, L., *Survey of Consumer Opinion in Australia*, Canberra, Trade Practices Commission, 1987.
2. Consumers' Council, *Justice out of Reach*, London, 1970, p.6.
3. See Goldring, J., Maher, L.W. and McKeough, J., *Consumer Protection Law*, 4th edn, Butterworths, Sydney 1993. Since the first edition of this book was published in 1979, the volume of statute law has increased; it has become (with the notable exception of the credit legislation) more effective, and the courts have increased the rights of consumers and goods and services.
4. Cass, M., and Sackville, R., *Legal Needs of the Poor*, Canberra, 1975, pp.36 and 38.
5. NLAAC, *Legal Aid for the Australian Community*, AGPS, Canberra, 1990, p.270.
6. See, for example, Fleming, J.G., *The American Tort Process*, Oxford, 1989. For a specific example see, Goldring, J., 'Rock Hudson's Lover, Defective Goods and Abandoned Principles – Tort Liability in America' (1990) 6 *Australian Bar Review* 103-116.
7. *Federal Court of Australia Act* 1976 (Cth), Part IVA.