



**COMPARATIVE REPORT ON CONSUMER
POLICY REGIMES**

Country Reports - Australia,
Canada, Denmark, France,
Germany, Italy, Japan, The
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OCTOBER 2003

URN 03/1919

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Goals/Objectives of Consumer Policy

At the highest level, the goal is to enhance the welfare of Australians through the promotion of competition and fair-trading and the provision of consumer protection. The ACCC has the consumer protection objective of strengthening the position of consumers in their everyday dealings with suppliers, who often have stronger bargaining positions.

Institutions and Resources

Political responsibility for consumer issues is split between the Federal and State governments. At Federal level responsibility for competition and consumer policy now rests with the Treasury. A junior Minister is responsible, the Parliamentary Secretary to the Treasurer (currently Senator Ian Campbell), who reports to the senior Minister, the Treasurer. Consumer affairs appear to have a relatively low profile within Treasury (though the statutory framework is tougher than most regimes and is for the most part not now contentious). Responsibility previously lay with the industry Ministry, and at that time Ministerial agreement was needed for ACCC action. This sometimes led to delays in instituting proceedings.

Australian State and Territory Governments continue to enact and enforce their own consumer legislation. This tends to be modelled on the consumer aspects of the Trade Practices Act, but varies in detail from state to state. At State level the portfolio again often rests with a junior Minister.

Federal competition and consumer law is administered by an independent statutory authority, the **Australian Competition and Consumer Commission (ACCC)**. This was established in 1995 by agreement of the Council of Australian Governments (i.e. of the Federal and various State and Territory Governments). It employs about 500 staff, and had a Federal funding budget of A\$83.4m in FY 2001-2, A\$62.5m in FY 2002-3 and A\$66.6m in FY 2003-4. In addition, fines, authorisation and notification fees amounted to A\$7.2m in FY 2001-2 and A\$7.9m in FY 2002-3. Its responsibilities include utility regulation.

The ACCC is the only agency enforcing competition law. It is accountable to Parliament and to the courts. It is pro-active in its approach to implementation of the legislation, but has no policy function. It has quite a high level of public recognition. Some question its broad role. There has been pressure for a separation of the roles for example the 1997 Wallis Committee recommendations on finance industry regulation, and Bob Baxt, a former Chairman of Trade Practices Commission, has argued that ACCC should not act as both adjudicator and policeman.

Another idea floating in Australia is for firms to have a right to appeal to a nominated ACCC Associate Commissioner who would have particular responsibility for investigating complaints about ACCC conduct or decisions. This would be in addition to existing rights of complaint to the Commonwealth Ombudsman and the Courts. The general question here is accountability. The

ACCC considers that the Commonwealth Ombudsman and the courts provide an effective check on any abuse of power.

The ACCC has jurisdiction (because the Trade Practice Act (TPA) 1974 applies) when complaints concern businesses operating across state borders, and when the breach is by a corporation. Thus the ACCC handles the more significant cases. The ACCC has nine offices; in Canberra, one in each state/territory capital and one regional centre (Townsville). National Office functions are shared between Canberra and Melbourne. The website provides consumers with full contact details.

State consumer policy is administered by state government departments, for example the New South Wales (NSW) Department of Fair Trading, and the Victoria Department of Consumer Affairs. Thus State Ministers directly influence the enforcement of State consumer policy. Most consumer enquiries are handled by State consumer offices, which are located in major towns. NSW for example operates a network of 22 offices, including 5 in Sydney. Advice is commonly sought by telephone and Internet as well as by calling in person.

There are mechanisms for co-ordination of Federal and State policy. A Ministerial Council on Consumer Affairs (MCCA) comprises consumer Ministers from Australian Federal and State and Territory governments as well as the New Zealand government. It meets annually. Supporting MCCA is the Standing Committee of Officials of Consumer Affairs (SCOCA) comprising the CEOs of the various consumer protection agencies. The Commonwealth is represented by both Treasury and the ACCC.

Four advisory committees report to SCOCA:

- Fair Trading Operations Advisory Committee (FTOAC) - deals with enforcement;
- Consumer Products Advisory Committee (CPAC) - product safety officers;
- Trade Measurement Advisory Committee (TMAC); and
- Uniform Consumer Credit Code Management Committee (UCCCMC) - credit officers from consumer agencies.

The MCCA has a rolling list of issues, known as the Strategic National Consumer Affairs Agenda, to focus their efforts.

Advocacy

Education and information provision is a key element in the ACCC enforcement strategy. There is a high flow of publications, and the ACCC aims through publicity to achieve a high level of recognition. The ACCC summarises illustrative past court cases for use in its educative programme and for preparing advice for businesses and consumers. In 2001 the ACCC instituted a Consumer Consultative Committee to facilitate discussions with consumer representatives on consumer issues. The Australian Consumers Association (magazine "Choice", which is similar to "Which?") gives product and business recommendations. The need for consumer input into development of self-regulatory codes is stressed.

Integration of consumer policy with other policies.

Consumer and competition policy are explicitly seen as integral and complementary. The TPA covers both. Anti-competitive conduct reduces choice and increases prices. Fair and ethical competition is good for consumers, giving them price, quality and service benefits. The TPA protects companies that act fairly and competitively. It prevents unfair competition and the deception and misleading of consumers that can undermine consumer confidence.

Government encourages development of industry self-regulation (Codes Of Practice). These mandatory and voluntary standards are seen as light-handed market sensitive ways of securing compliance with TPA. ACCC and State agencies are involved with development and review of operation of industry codes. In theory it should enable them to ensure the codes are effective and fair. In practice they cannot impose terms on an industry, and industry codes tend to have a "lowest common factor" quality.

ACCC staff work in teams responsible for both consumer and competition issues, which helps adoption of competition solutions to consumer problems. It is argued that the lack of any responsibility at State level for competition can result in an over-regulatory approach to consumer issues. ACCC involved in revision of Food Standards Code and related regulations. Also covers food labelling. ACCC is a member of Expert Advisory Committee on enforcement of public health regulations.

Legal Framework

The key Federal legislation protecting consumers is the Trade Practices Act 1974. Prior to this the primary means of protecting consumers was through State legislation. The TPA strengthened and consolidated existing law into one statute and provided a national framework. It is amended and updated from time to time. It covers anti-competitive and unfair market practices, mergers and acquisitions, product safety and product liability. It has covered services since 1980 and education and health since 1995.

A 1978 extension of the TPA made manufacturers directly liable to consumers in respect of "implied warranties", which would not have been possible under common law because there was no contract directly between them. (There is apparently a Canadian precedent for this approach.)

The TPA framework is considered by lawyers to be robust and relatively efficient. The prohibitions are not controversial, and the core provisions such as s52 are more or less sacrosanct. There is no pressure for fundamental change, and policy debate is really about tinkering at the margins. On the other hand enforcement by the ACCC is an issue of concern for Australian industry.

Until recently actions under the Trade Practices Act 1974 had to be instituted with the Federal Court. Some matters involving the consumer protection provisions of the Act, but not those under the unconscionable conduct

provisions, may now be brought before the Federal Magistrates Court. All State and Territory Parliaments have enacted "mirror" legislation (replicating Division 1 of Part V of the TPA - the Unfair Practices provisions) and actions under the respective Fair Trading Acts may be instituted in State and Territory courts.

Key provisions of the TPA

These are bans on misleading or deceptive behaviour, and on unconscionable conduct and harassment. In effect a duty to trade fairly (or not to trade unfairly) is incorporated in the TPA. Section VA deals with product liability and broadly follows the EC directive.

Unconscionable conduct is the exploitation of a weaker party by a stronger party that goes beyond normal commercial dealings. The concept of undue influence has always existed in English and Australian common law.

Unconscionable behaviour implies unfair and unscrupulous behaviour in the circumstances prevailing. The incorporation into the TPA apparently follows the precedent of the American Uniform Commercial Code, which first appeared in US States in 1962.

Section 51 has parts relating to business to consumer (B2C) and business to business (B2B). The B2C ban (s51AA.s51AB) was introduced in 1992. 51AB mentions that the court may have regard to the relative bargaining strength of the parties, the consumer's ability to understand the documentation, whether undue or unfair pressure was applied, whether the conditions imposed went beyond what was needed for the supplier's legitimate interests, and the amount the consumer would have to pay elsewhere for equivalent products or services.

In practice, and the case of B2C, court judgements have so far limited the benefit of the legislation to consumers with some personal vulnerability or disability such that they cannot exercise a worthwhile independent judgement (the 1983 Amadio judgement - Commercial Bank of Australia Limited v Amadio (1983) 151 CLR 447 – although not a case under the TPA). The ACCC and individuals can bring actions for rescinding or amending contracts or compensation

The B2B ban (s51AC) was introduced in 1998, giving SMEs similar protection to consumers, provided the supply of goods or services in question has a value of A\$3m or less. Here the judgement will reflect the nature of the commercial relationship imposed rather than peculiar disadvantage.

Relevant factors include relative bargaining strength, whether conditions imposed were not reasonably necessary, whether the small business could understand the documentation, whether undue influence or unfair tactics were used, whether similar conduct was used in relation to other customers, and whether the supplier unreasonably failed to disclose to the business customer the possible consequences.

The Minister gave a direction to the ACCC to initiate proceedings under s51AC for the specific purpose of establishing legal precedent on matters of specific relevance to small businesses, and to give precedence to initiating such proceedings. Actions for damages can be brought under s51AC. S51AD

requires corporations not to contravene applicable industry codes. A breach of a voluntary code may be taken into account by the court when assessing a case. The court can impose injunctions, damages, and variation or cancellation of a contract.

Section 52 requires businesses not to engage in conduct likely to mislead or deceive. This is the most widely used and considered to be the most effective consumer protection provision. It does not adopt common law language of, for example, liability, but establishes a norm of conduct.

It does not matter whether the conduct did mislead or whether there was an intention to mislead. What matters is whether the conduct was likely to mislead. Conduct is misleading if it is likely to mislead its target audience. It need not be a continuing course of conduct. It can include silence where that may mislead (N.B. this conclusion is not possible under common law). Intent, knowledge, recklessness and carelessness may be relevant. The judgement attempts to be objective and is not qualified by reference to common law principles. S52 can be applied to private contracts. It can be applied to services, unlike the UK Trade Descriptions Act (which drives aggrieved parties to resort to the ASA Code, and a direction to desist, and no possibility of damages).

Only civil action is possible under s52, avoiding the problem of having to demonstrate intent. The civil finding is also based on the balance of probability rather than the tougher criminal test of beyond reasonable doubt. Penalties have recently been toughened, and are up to A\$220,000 for individuals and A\$1.1m for companies for breaches of consumer protection provisions. The ACCC or any person can seek a restraining injunction, and any person can seek damages for suffering or loss arising from the conduct (and it can be easier to demonstrate misleading conduct than common law negligence). The ACCC can also apply for a corrective advertising order. While s52 is broad it is not considered uncertain: court decisions have established the parameters of the prohibition. The ACCC does not have anything like the OFT's "stop now" powers.

Section 53 makes it illegal for a business to falsely represent or describe goods or services. Advertising cases may be caught in this way as well as under s52. This is important in B2B cases.

Conditions and warranties

TPA Part V, Division 2 provides consumers with protection when they buy goods and services. It implies various conditions and warranties into the transaction whether this is a sale, lease, or hire purchase of goods or services. The beneficiary can be a consumer or a business acquiring goods or services of a type normally for household use, or any other type so long as the cost is less than A\$40,000, provide the goods were not acquired solely for resale or for alteration or repair work.

The TPA provides statutory conditions that goods must be supplied to the consumer with clear title (or with any restrictions on ownership fully and clearly

explained) - s69, merchantable quality - s66(2), 71(1), fitness for purpose - s71(2), and for supply by sample or description - ss70, 72.

The conditions apply to all consumers when they buy goods or services from sellers, manufacturers or importers. If goods are not of merchantable quality, not fit for purpose, or do not match the sample or description given by the seller, consumers are entitled to rescind the contract and obtain a refund. Services must be supplied with due care and skill and with materials that are fit for purpose. Manufacturers and importers must stand by their warranties or guarantees.

When rescinding a contract the consumer must either write to the seller giving details, or return the goods with full details of the problem, within a reasonable time in all the circumstances. Once the contract is rescinded the seller is obliged to give a refund. Sellers may offer to replace or repair the goods but the consumer is entitled to insist on a refund. If the supplier refuses they are liable to a penalty.

The ACCC cannot bring an action for breach of any statutory conditions or warranties. A consumer can bring an action for damages in any competent court or tribunal, and can claim damages. Ultimately what is reasonable will depend on the court's assessment. Refund proceedings must be commenced within 3 years of the date on which the consumer ought reasonably to have become aware of the problem, but in any event within 10 years of the date of sale.

In July 2001 Part VC was introduced to the TPA. It provides for criminal actions to be taken for breaches of a wide range of unfair practices and breaches of product safety provisions. It includes false or misleading representations (s53 not s52), false or misleading conduct in relation to land, bait advertising, harassment or coercion, pyramid selling, unsolicited debit and credit cards, demanding payment for unsolicited goods, breach of product safety and information standards, and failure to comply with product recall orders.

Court remedies for offences under Part VC can include injunctions to stop, compensation, corrective advertising orders, community service, probation orders, and fines. Fines can be imposed on both businesses and individuals; breach of TPA consumer protection provisions can lead to fines up to \$1.1m for companies and \$220,000 for individuals.

Industry Codes of Practice

The Federal and State governments have actively encouraged industry to self-regulate by developing effective voluntary B2C and B2B Codes of Practice with Alternative Dispute Resolution Schemes incorporated in these respective Codes. The arguments are that it promotes best practice, enables regulation to be tailored to the specific circumstances of the industry, provides low compliance costs and a quick low cost dispute resolution procedure is good for business. Membership of a voluntary scheme may give trading advantages, through the consumer confidence engendered by membership but also provides access to efficient and cost effective Alternative Dispute Resolution Schemes.

The Trade Practices Act 1974 ("TPA") allows for Codes of Conduct to be prescribed. The TPA empowers the Minister to prescribe a Code, which makes compliance mandatory. A breach of a prescribed Code is unlawful and can be enforced through the courts. The Minister may pursue this route in response to complaints from members of the industry, consumers or reports from government authorities. However the Minister will only consider initiating a proposal for prescription of a code of conduct if:

- the code would remedy an identified market failure or promote a social policy objective; and
- the code would be the most effective means for remedying that market failure or promoting that policy objective; and
- the benefits of the code to the community as a whole would outweigh any costs; and
- there are significant and irremediable deficiencies in any existing self-regulatory regime-for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems; and
- a systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes; and
- a range of self regulatory options and 'light handed' quasi-regulatory options has been examined and demonstrated to be ineffective.

A mandatory prescribed Code under the TPA is administered by the Australian Competition & Consumer Commission.

Licensing

Licensing of trades has a long tradition in Australia: the ferries between Sydney and Parramatta were licensed as early as 1803 "to oblige them to be more circumspect in their conduct towards passengers." Proprietors had to enter a bond of £50 and two securities of £25 each for due performance of the regulations, a considerable sum in those days.

The States continue to regulate problematic sectors by licensing and/or specific legislation. Victoria licences 160 occupations (but not home builders), and has recently adopted a systematic approach to regulation and licensing, based on the principles in the last but one paragraph. Licensing is seen as a step beyond co-regulation, and more intrusive and potentially costly. Victoria State policy is now to apply licensing only where there is a probability of serious loss to the public, or to public health or safety, if any lesser regulatory mechanism was to be applied.

Victoria is also committed to ensuring retesting of licensees where competence is a criterion, and also to adopting the Californian principle that regulatory bodies and tribunals should have only a minority of members from the occupation concerned, and that the majority should be members of the public, and that their decisions should be made public, to help ensure that the body is not operated in the shorter term interests of the occupational group (the Estate Agents Tribunals were mentioned as examples).

NSW has a similar broad approach. In their view, deregulation of sectors such as home building, second hand car dealing, auctioneering, credit provision, travel agents, and second-hand dealing, either would give rise to serious problems as a

result of asymmetry of information, or would carry a risk of significantly more criminal activity, for example with second-hand dealing in stolen goods. Licensing enables the State government to screen out undesirable people and to withdraw licences from those that behave illegally. NSW plans to spend about A\$14.5m on work connected with the licensing and registration in FY 2002-3. The cost of licensing, industry tribunals and enforcement is met in part by annual licence fees. Victoria raised A\$4.3m in 2001-2 in this way.

An academic lawyer's criticism of the approach is that it is too easy a response to a problem, and that the imposition of licensing is not sufficiently related to the risk inherent in the market. There is therefore a tendency to over-prescription. The more systematic Victorian approach to deciding on the degree of regulation appropriate in a particular case should in theory address this point.

In addition, and against the background of limited success with sector Codes of Practice, some States have begun to introduce sector specific legislation. For example NSW passed The Home Building Legislation Amendment Act in 2001, and the Home Building Amendment (Insurance) Act in 2002.

These provide for reform of licensing to allow the Director General to become responsible for disciplinary action, including a power to cancel licences for bankruptcy, and introduces tougher criteria for licence renewal, including that the applicant does not have an unreasonable number of complaints or failure to comply with consumer Tribunal orders, and a requirement to attend approved education courses. The second Act introduces insurance reforms for the home building industry. Similar legislation was passed in 2001 to toughen regulation of second hand motor dealers. NSW also has legislation to deal with pre-paid funerals and fitness centre pre-payment fees.

Enforcement

Most litigation under the TPA is through private actions by business parties, who are following well-trodden ground to ensure compliance with the law. The vast majority of cases are brought under Section 52. Academic lawyers told us that this has had a significant effect on the law of tort and contract, and that it has made common law concerning misrepresentation irrelevant.

Individuals can bring civil but not criminal cases. S80 permits ACCC or any other person to apply for an injunction; this is different to common law which restricts the power to those affected. Grouped proceedings are also possible. However independent action by consumers is not common, because of the costs and risk of award of costs: legal aid for consumers is rare and they generally prefer the route of small claims courts.

The ACCC have discretion as to whether to act on a complaint. They receive about 60,000 complaints a year. Where appropriate complainants are referred to other agencies, including State regulators. About a quarter concern possible breaches of s52 (misleading and deceptive conduct). Next most frequent, but far behind, are complaints about retail warranties and misleading prices. The most problematic sectors are telecoms services, domestic electrical goods retailing and petrol retailing.

The ACCC undertakes about 400 major investigations a year. The ACCC can compel provision of information, require evidence be given on oath, and enter premises to see or copy documents. It is more likely to act in cases that accord with its broad priorities, namely where there is:

- blatant disregard for the law;
- significant public detriment;
- worthwhile deterrent or educative effect;
- significant new market issues; and/or
- significant effect on disadvantaged consumers.

Court action is only taken in the most serious cases. The ACCC accept undertakings enforceable in the court from businesses or persons. The ACCC settles a much larger number of cases in this way. This is efficient but such cases provide no legal precedents.

ACCC court action, while to some extent driven by the nature of cases, also reflects strategic objectives. They tend to take to court cases which are either blatant and serious abuses, or help establish the limits of the application of the law, by setting precedent, or which have "educational" value. Currently the ACCC is bringing an action under s52 in the field of private medical care, and is also looking at private education, both new fields for the application of the TPA. They also try to act quickly in cases where the vulnerable are at risk.

Resources for court cases are limited, though the ACCC receives specific funding from Treasury to finance large court cases. At any one time the ACCC has about 60 court cases in train. One law firm criticised ACCC for bringing insufficient cases to help define the limits of applicability of s51 (unconscionable behaviour), and for spending too much on cases under s52 (misleading and deceptive conduct), which is considered now to be fairly well trodden ground.

However, misleading and deceptive conduct, in particular fine print and deceptive pricing, remains a priority for the ACCC. In this respect the ACCC seems in large part response driven. From a strategic point of view, the ACCC is giving more attention to the conduct of the professions, health issues, and higher education. It is also giving more attention to examining SMEs claims of unconscionable behaviour by larger firms (in line with Ministerial direction).

The ACCC tends to prefer to bring cases under the civil rather than the new criminal provisions of the TPA. The burden of proof is lower and cases are progressed quicker, but fines cannot be imposed in such cases. ACCC can also sue people indirectly involved, for example those aiding, abetting, counselling, procuring or inducing or knowingly concerned in the breach. The ACCC say they pursue individuals involved as vigorously as the business.

Publicity

A key feature of the ACCC approach to enforcement is their use of publicity. This is generally either at the conclusion of a case, or at the point of introduction of a case into court. In the latter case the publicity is a factual statement of information already publicly available about the allegations made by the ACCC that are to be heard in court. The courts have said this is good

practice. Courts have not reduced fines in the face of complaints about pre-court publicity. In the former case (post decision) the ACCC may release a press statement. It may also, as a part of the injunctive relief sought, ask the court to approve a requirement for corrective advertising.

In a landmark case concerning Target, a large retailer, the company was required to issue a corrective television advertisement on the same channel as it previously issued misleading advertisements about price cuts. The wording of the corrective advertisement was unequivocal and required the approval of the ACCC. It more or less said the company were sorry they had misled consumers about the price cuts.

The ACCC say that only about 1% of publicity is about investigations under way; about 10-12% is about cases listed for hearings in court, and the remainder is post-decision publicity. They also said that only a minority of cases in progress were publicly known (on average there were about 250 cases continuing at any one time, of which about 6 on average would be known publicly).

Publicity is considered by the ACCC to be a very effective remedy. But several commercial lawyers and representatives of big business thought that the ACCC was going too far, and the result was trial by media. Publicity before the case is heard is a particular gripe. The ACCC's use of publicity is the most contentious aspect of the TPA at present, and has been recently reviewed by the Dawson Committee, whose report is now with the Treasury Minister.

State level enforcement

State fair trading departments have enforcement powers in relation to their own State legislation. But, like the ACCC, they must be selective in what they pursue and they only intervene in cases on an exceptional basis. Some States, for example Victoria, have legislation that allows them to reverse the burden of proof when dealing with a trader. These "substantiation" powers can be used to oblige a trader to explain what they have done, otherwise the case may go against them. This is particularly useful in dealing with cases of misleading or deceptive conduct, which can be hard to prove if the onus is on the consumer.

Section 155 of the TPA gives the ACCC limited powers to enter premises and inspect and/or copy documents and to require a person to furnish information, provide documents, and/or attend to give evidence under oath or affirmation.

NSW has recently begun passing sector specific legislation (see Legislation section) to enable them to toughen their licensing procedures. Victoria has also overhauled its procedures. Western Australia (WA) has toughened substantially the penalties for operating without a licence.

In principle, where licensing is based on the presumption of competence, a tougher regime offers an attractive route to deal with the problem of poor performers in markets where asymmetry of information means that the market does not work efficiently to drive them out of the market.

Historically, the number of revoked licences has been small compared to the number of licensees. Industry tribunals, often dominated by representatives of the industry, have been reluctant to revoke licences, and it can be difficult to prove the case for such a drastic remedy. Revocation normally occurs because of criminality or insolvency rather than incompetence. But the NSW annual report suggests an increased ability and willingness on the part of the Fair Trading Department to use its enhanced powers to take disciplinary action directly by imposing fines or reprimands or suspending licences. ACT is following a similar policy. It is too early to judge whether the revised approaches will succeed. We heard complaints in both NSW and Victoria about ineffective enforcement (the tacit tolerance of unlicensed operators).

Consumers are encouraged to resolve routine disputes themselves (see "Redress" section). While the State fair trading agencies may mediate to help to settle disputes they emphasize that they cannot compel parties to accept their proposals. In the end the consumer has the option of recourse to the courts.

The State Magistrates and Small Claims Courts and Tribunals are important mechanisms for redress and enforcement by civil action throughout Australia (unlike the UK where it is said they are limited to criminal cases). These courts can consider cases under the Federal TPA consumer protection provisions and under parallel State consumer legislation, though there are limitations on the remedies these courts can impose. The intention is that these courts should provide speedy decisions. The system seems quite effective. The NSW Conciliation or Tribunal system has resolved about 70% of disputes within 35 days of a dispute being lodged with the court. The NSW courts are also willing to be flexible about rules of procedure in small claims courts, in the interests of making the court a more accessible and less intimidating experience for the ordinary citizen who wishes to represent himself.

In Canberra, Magistrates Courts can since 1982 deal with damages claims of up to A\$50,000, and in some States the upper limit is A\$100,000. Building and building maintenance cases are common. The upper limit for damages claims in small claims courts in Canberra is A\$10,000, and in Queensland it is \$7500. Costs are seldom awarded in cases in these courts, which means they are attractive to consumers, who do not run the risk of having costs awarded against them.

It is common practice for magistrates to try to conciliate rather than consider a case in court, on the basis that this saves money for the court system and for the parties. There is a small fee for the service. A high proportion of cases are resolved in this way. It is also possible for parties to agree to disputes being settled by a referee, who can decide on damages up to a level of A\$1,000: failure to abide by a decision would lead to the case escalating into court, and non-compliance may be held against the party concerned.

While decisions of the court are made public, a magistrate argued that consolidating this information to generate databases about builders, plumbers and the like could infringe IT privacy rights. It may be necessary to provide through legislation a public interest reason for permitting such consolidations to protect consumers.

Redress

The TPA confers private rights and imposes private obligations. The consumer has a right to a refund if goods are defective, not fit for purpose, do not match the sample shown to the consumer or are not of merchantable quality. There is often no precise description of these criteria. Case law is important.

Competitors, customers or consumers can sue for damages if they suffer harm as a result of a breach.

ACCC maintains an information centre. 65% of complaints relate to consumer protection. NSW Office of Fair trading receives about 25,000 complaints a year. The ACCC and State agencies aim to encourage customers and traders to solve problems themselves without seeking formal enforcement action by the authorities.

They provide consumers and traders with copious advice about the extent of their rights and obligations (in other words, the advice goes beyond a statement of rights, and tries to show their limits, and in so doing strikes a balance between consumer and trader which should allow them to settle disputes more easily). They advise:

- customer and supplier to try to agree a solution. Business is reminded that bad reputations (spread by word of mouth) damage business;
- local consumer protection agencies will want evidence from both sides that they have tried reasonably to solve the problem. In NSW for some sorts of dispute (including home building work above A\$10,000 value) the Consumer, Trader and Tenancy tribunal is required by law to hear a case only if parties have first used the Building Conciliation Service to try to resolve the dispute. It may mediate, bringing in a neutral person;
- industry Codes of Practice help businesses and customers; and
- provide accessible summaries of the key consumer legislation, with the obligations falling on businesses and consumer rights.

Codes of Practice

These were seen in the later 1990s as a promising way of reducing and resolving consumer complaints. Codes for dealing with consumers would be drawn up by members of a trade or sector. Those agreeing to the Code would be expected to follow guidance on resolving disputes. So far all codes have been voluntary except for one, governing franchising, which has statutory force.

Since then, the limitations of Codes of Practice have become more apparent. Voluntary codes tend to be loosely worded and often do not go far enough in terms of consumer protection. There is general agreement that they may help to establish among consumers a reasonable expectation of service, but that it may be difficult to enforce compliance by signatory firms either with the Code or with the decisions of tribunals. We heard that in some cases firms cannot even be compelled to attend tribunals. In court cases the law of contract takes precedence if there is any conflict with the terms in the voluntary code.

The ACCC are also wary of mandatory codes. These can smack of over-regulation and unless tightly drafted they would be difficult to enforce and

would absorb disproportionate regulatory effort. Mandatory codes have their own problems.

Codes can be helpful and tend to be more effective when a high proportion of the sector has agreed to it. They must provide for an effective complaints resolution procedure, with internal industry enforcement mechanisms. The most successful codes are in the telecoms and banking spheres, where an ombudsman has enforcement powers.

Product Safety

The TPA contains general product safety and liability provisions, enabling action against a supplier of unsafe or defective goods. The TPA (s65C and D) permits the Commonwealth Consumer Minister to:

- ban unsafe goods from sale;
- set safety and information standards;
- require suppliers to recall unsafe goods, issue public warnings, repair, replace unsafe goods or make a refund.

For bans and recalls the Minister issues a draft notice. Suppliers have 10 days to seek a meeting with the ACCC (s65J). Then the ACCC advises the Minister on the ban. Dangerous goods can be banned without delay (s65M). Ministers can also issue public warning notices (s65B) and compel product recalls (s65F). Suppliers voluntarily recalling unsafe goods that may cause injury must inform the Consumer Minister in writing (s65R). These are then posted on a website: www.recalls.gov.au.

The TPA enables consumers to seek compensation or damages for personal injury or loss caused by a defective product. The manufacturer of defective goods is primarily liable. Manufacturer includes maker, company claiming to manufacture, seller of own-brand goods made under licence, company promoting goods as manufacturer, importers. Retailers can be deemed to be manufacturers when the manufacturer is unknown to the claimant.

TPA provides for joint and several liability. A claimant may serve written request on any known supplier for information about the manufacturer. If there is no response within 30 days the claimant may act against the supplier as if it were the manufacturer. The customer therefore cannot be given the run-around. The claimant may also claim the full amount of damages from anyone liable. The defendant may join other parties by third party action. This arrangement relieves the claimant of responsibility for identifying who ultimately is responsible. Action may be taken within 3 years of the loss, and within 10 years of the time the product was first made by the manufacturer.

Failure to comply with Mandatory Product safety standards, Product Information Standards or banning orders can lead to fines of up to \$1.1m for businesses, or \$220,000 for individuals. Compliance with mandatory standards is the responsibility of suppliers including manufacturers, importers, distributors, and retailers. Again, consumer cannot be given the run-around.

ACCC is responsible for compliance with product standards and sales bans.

The TPA product recall provisions were said to be similar in scope to the UK Product Safety Directive. The formal powers were intended to be a backstop to a voluntary system (which needs a threat of legal or statutory action to make it effective). The legislation was said to have made a difference to the willingness of companies, for example car companies, to arrange recalls. It was not simply a change of climate towards safety. It was pointed out however, that the EC general duty to supply safe goods went further by making safety a prime requirement for a supplier; it is more than arranging recalls to put right mistakes retrospectively.

Each of the states of Australia has a complimentary legislation on product safety.

Consumer Knowledge

An important feature of the Australian system is that the TPA legislation (and State mirror legislation) is drafted in straightforward and readily understood terms. The ACCC website provides contact details (addresses, telephone, fax and e-mail) for each office, its Director, and telephone numbers for each Commissioner. The ACCC and State consumer offices provide straightforward general guidance for consumers and business. Thus the same sources provide guidance to both sides of the consumer contract.

The ACCC website gives businesses comprehensive information about their rights and obligations under the Trade Practices Act and a range of useful links to other useful government sites. The ACCC and State Fair Trading Office websites provide extensive advice to consumers on their rights. This is given in straightforward terms. They also provide advice on how to make complaints, take cases through the courts and in one case (Queensland) even provide model letters for various situations.

The Treasury Department produced this year "The Australian Consumer handbook", an expanded version of earlier directories of consumer dispute resolution and complaints handling organisations. It is primarily intended to help advisory organisations to help consumers. It also contains advice on best practice for dispute resolution procedures, fact sheets and model letters.

Consumer Confidence

There is very little information available on this subject. The 2001 International Complaints Culture Survey by TMI suggests Australians (and New Zealanders):

- are less likely to complain than consumers in most other developed countries;
- do not believe their companies make it easy to complain;
- do not believe companies welcome complaints (only 11% thought companies saw complaints as a basis for improvement);
- complaints are increasing in number, indicating either more confidence or a rise in customer expectations?;
- increasingly use the internet to complain (fast and 50% expect response the same day).

Impact on Markets

Initial criticism of the far-reaching nature of the TPA (and in particular of s51 and s52, has died down. The courts have taken decisions that have set parameters for application of the prohibitions. An academic lawyer considered the effects of the TPA had been more significant than equivalent USA legislation, because of the effect it had had on B2B actions.

S51 is relatively new and has so far had limited impact (but we were told that s52 was a "sleeper" for about 10 years). Small business argues that provision s51AC, which applies particularly to small business, should protect them from unconscionable behaviour by big suppliers or customers, such as supermarkets. The courts have so far not interpreted s51 in this way. Inequality of bargaining power and knowledge is only one consideration. Interestingly, the strongest opposition to s51 at the Bill stage was from the supermarkets and property sectors. It has turned out that property disputes comprise a large portion of the cases brought under s51 (unconscionable behaviour).

It was also said that the comparative certainty of English common law was a chimera. In practice certainty was less, for example the position on exclusion clauses. The UK Unfair Contract Terms Act was considered to have some similarities with unconscionability. It was expected that the TPA would have a similar effect but so far case law has involved procedural rather than substantive unconscionability. There is some uncertainty over whether enforcement of contractual rights and unilateral variation clauses in contracts can be unconscionable. ACCC has brought test cases to try to clarify the scope of s51.

S52 on the other hand is very influential. Industry accepts the broad framework. It has obliged companies to be much more careful over the drafting of contracts. Any effects on costs and profits are not such as to raise objections from business.

The ACCC believe the TPA has had a very significant impact in raising marketing and advertising standards, and fair treatment of consumers and competitors. Not one note of dissent was heard about these legal prohibitions, which were generally regarded as beneficial for the Australian economy. The broad scope of s52 prevents problems arising that cannot be tackled.

Market Case Studies

1. Second Hand Cars

Separate handling on State websites shows it is a major problem. Most if not all States operate a licensing system. State Fair Trading offices provide consumer and trader guidance. Small claims courts and Tribunals are often used to resolve disputes.

In Victoria, sales are regulated by the Motor Car Traders Act (Victoria) 1986 (amended from time to time). Second hand car traders require a licence, renewed annually, and have done since 1973. Licensees need to show they understand the legislation, are of good character, have the necessary financial

resources and can and will train staff in all the legislative requirements. There is a licence fee to cover costs of administration, enforcement and the tribunal. The major barrier to entry was said not to be the licence fee but the requirement that the prospective dealer demonstrate that he has the finance to open and operate a car dealers yard. Traders have to provide for each car a Notice of Particulars, a Defect Notice, which lists what the trader is not putting right and an estimate of the costs of doing so, and a Road Worthy Certificate. Victoria provides for a 3 day cooling off period, and for 3 months or 5,000km a guarantee for cars that have done less than 160,000km.

Queensland has a mandatory Code of Practice for motor traders. The Code is prescribed conduct for licensed traders, by regulation of the State government. It requires dealers to act honestly and fairly and not to act fraudulently or mislead, engage in high-pressure tactics, harassment or unconscionable conduct. If the ordinary industry dispute resolution system does not work the claimant has the option of dispute resolution through the Department of Justice, the small claims tribunal, or contacting the Office of Fair Trading for statutory action.

The Victoria system, which is administered by the Justice Department, has been criticised for not keeping up with the times, and for insufficient enforcement. The legislation is out of date in that it does not deal with Internet sales. Licensed dealers want stronger enforcement against unlicensed illegal dealers. There are said to be about 2,000 licensed and about 1,000 unlicensed dealers in Victoria. The Victoria government say more policing would mean higher licence fees. The WA government has recently (2002) increased the fine for operating without a licence from A\$3,000 to A\$50,000 to try to deal with the problem of unlicensed operators.

The Victoria dealers' licence fee of A\$1,000 includes a contribution to the Motor Car Traders Fund float. If a complaint proceeds to the tribunal and it finds against a trader, the consumer is paid from the fund; the trader is then required to recompense the fund. If the trader refuses to pay then his licence is automatically suspended. Similarly the NSW Motor Vehicle Tribunal (an example of industry self-regulation) can remove licences. The consumer has the option instead of taking a case the local magistrates court.

The car retail industry claims licensing and self-regulation have been successful in lowering the incidence of complaints. Cars were apparently top of the list but have now fallen to seventh or eighth. The number of sustained complaints has also fallen significantly. It was said that when Victoria deregulated and allowed cars to be converted to natural gas by unlicensed operators, there was an upsurge of problems.

2. Travel agents, Holidays and Flights

This is a highly regulated sector with a history of consumer problems. New legislation was introduced in the 1980s following the collapse of a number of travel agencies and significant consumer losses. In WA a Certificate is required to trade as a travel agent, and must be displayed in the premises. All letters, cheques, and similar business cards must include the name of the licensee even

if the business is entitled to carry on under another name. All partners must be shown.

Licensing allows the screening and exclusion of people not regarded as fit and proper persons. Acting as a travel agent without a proper licence can lead to a maximum fine of \$50,000 and/or 12 months in prison. Similar provisions apply in most States.

An applicant for a licence would need to show qualifications and experience (usually of several years selling international tickets and holidays). The Commissioner for Consumer Affairs has a duty to enquire into applications to establish that applicants are fit and proper persons, conduct character checks and ensure they are properly registered under the Business Names Act. New applications are published in the paper, in line with the requirements of the Act. Anyone can raise an objection to be investigated. A travel agent must also lodge an annual statement with the consumer protection agency, otherwise the licence is cancelled. Similarly if the agent withdraws from the Travel Compensation Fund the licence is cancelled.

The Western Australia Department of Consumer and Employment Protection www.docep.wa.gov.au provides advice to consumers on choosing holidays and a handbook of advice to travel agents, prepared with the Australian Federation of Travel Agents. This includes a guide to the principle requirements of the Travel Agents Act and related regulations. The aim is to help travel agents understand their rights and obligations. The WA system has a great deal of transparency

If the travel agent repeatedly engages in "unjust conduct" the WA Commissioner for Consumer Affairs can require an enforceable undertaking (breach of which carries a penalty up to \$10,000) or object to the licence with the Commercial Tribunal. The Tribunal can withdraw the licence. Its decision can be appealed to the District Court.

The licence requires membership of the Travel Compensation Fund, established in 1986 by Ministers in NSW, Victoria, South Australian and WA. (Note: Queensland and Tasmania are not party.) The Fund is administered by officials from the member states, and persons who have a knowledge of the travel industry and (separately) of travel consumers.

The Travel Compensation Fund is however still regarded as inadequate. The recent Ansett collapse resulted in a large claim on the fund, and consumers were not adequately covered. The government had to bail the industry out, and consumers received 60c in the A\$. A leading industry figure believes consumers will have to take out cover themselves to insure against loss.

He also believes the Australian Federation of Travel Agents should have a more prominent role as an industry (self-regulatory) watchdog. It is critical of the lack of enforcement by State authorities, and points to the number of unlicensed traders (a similar criticism to that made by licensed car dealers). It also says the consumer is insufficiently aware of the requirement for travel agents to have a

licence to trade, and that the State government should be more active in raising awareness of the law.

3. Clothing

Not addressed in the interview programme

4. Hotels

There is no special legislation for regulating the hotel sector in either NSW or Victoria.

5. Home Building

Complaints about home building work are high in all parts of Australia. Consumers have little appreciation of the building process and pitfalls and there is no general system to help the consumer identify better builders. Building standards and regulations are silent on non-structural or health aspects, and thus provide no objective basis for dispute resolution about work in other areas, or its quality.

In most parts of Australia builders require a licence; decisions are based on technical skills and personal criteria, for example good character, and on possession of a certificate of eligibility for insurance obtained from an insurer. Insurance has to cover materials and workmanship and job completion. Only in Queensland do builders have to pass a viability test.

Many small builders are undercapitalised. As a result the risks of insolvency are significant. Unfinished work is a frequent problem and cause of insurance claims. Builders may have trouble in securing Home Builders Warranty Insurance. For their part insurers are raising premiums or withdrawing from insuring against certain risks given the rising levels of incomplete or faulty building work. A major home building insurer collapsed in 2001.

Withdrawal of licences, though within the power of the State governments, is rare. It seems to arise mainly as a result of insolvency or criminal acts rather than persistent poor quality work. It may be that it is difficult to demonstrate in court that the performance is the builder's fault rather than for example bad luck or misunderstandings with customers.

NSW Department of Fair Trading published, for the first time in October 2002, a list of 13 discredited builders. Publication of such lists is permitted under new State government legislation in respect of builders deregistered or suspended since the legislation was introduced. It is said that hundreds of builders were serving suspensions imposed before the end of 2001. One had been the subject of 30 complaints since 1989, and has been banned for life. None of the State's Master Builders Association has been suspended in the last 12 months. However the number of builders in NSW runs into many thousands.

A report for the Australian government in 2002 (National Review of Home Builders' Warranty Insurance and Consumer Protection prepared for the Ministerial Council on Consumer Affairs by Professor Percy Allen) concluded the regulatory process does not provide sufficient protection for consumers or honest builders and insurers. Allen believed a free-market option would not be

acceptable to most Australians, who would expect Government protection from the worst excesses of a free market system. He recommended that the government put less emphasis on insurance (though maintaining the home builders' warranty insurance scheme) and give more attention to strengthening the regulatory framework.

It considered a large number of possible solutions and concluded that the key actions needed were to:

- adopt realistic insurance requirements; this included excluding risks that were not fathomable and therefore not insurable. Other risks might have to be covered by a builders' fidelity fund;
- eject cowboy builders from the industry; the report proposed developing a rating system for home-builders based on previous building achievements, business history, financial soundness, disputes record and clients' feedback. A weaker alternative would be to adopt a "Builders Choice" award (by the major insurer) as exists in Alberta, to help consumers identify low risk builders. The aim would be to make it easier for consumers to identify good builders. In the absence of any guide, consumers often decide on price, and are not aware of the quality implications of their choice;
- set clear building standards and enforce them; proposals included a single standard contract and set of specifications for all work above a certain threshold value, and require on-site inspections at each critical stage, and to audit the performance of private and local certifiers. Inspectors would need to be independent, and have their work audited. In the past there have been problems over builders bribing inspectors;
- intervene and resolve disputes early; this included setting timelines for each stage of dispute resolution (mutual negotiation, arbitration, litigation, and insurance claims). The point here is that disputes become harder to resolve if not tackled quickly. Mediators would also need to have the technical skills of a surveyor, and be able to make binding decisions. Sanctions against builders not complying would include qualifying or suspending their licence. This would be a cheaper alternative to resort to the courts, though both builders and consumers would retain their rights to appeal to a civil court or building disputes tribunal. Building disputes account for a significant share of cases coming before small claims and tribunals.

6. Plumbers

Plumbers in Victoria need to be licensed or registered by the Plumbing Industry Commission www.pic.vic.gov.au (PO Box 360, Caulfield East, Victoria 3145). Operating outside this framework is illegal. For jobs costing more than \$5,000 the plumber should issue a Certificate of Compliance, guaranteeing the workmanship for six years.

The National Plumbing Regulators Forum, a national advisory body, issued a draft Plumbing Code of Australia in 2002. This is aimed at providing a national standard for technical work. Code is consistent with the Building Code of Australia. It does not include any complaints mechanisms or system for policing rogue plumbers. Withdrawal of licence is probably the sanction available to State consumer bodies to deal with rogues.

Canada

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Canada

Goals/Objectives of consumer policy

Consumer policy at the central Government level (Industry Canada) is aimed at providing “a fair and efficient marketplace that supports and advances the interests of Canadians as consumers and protects consumer interests in the event of market failure”.

In its business plan, the Office of Consumer Affairs (federal) sets out five strategic goals which it is working to:

- assist consumers in obtaining information on how to protect their interests in the marketplace;
- influence the formulation of government policies to reflect consumer interests;
- promote cooperation in the development of consumer policies across Canada;
- assist consumer organisations to represent consumer interests effectively to government and the private sector; and
- work with the consumer movement and the private sector to develop new approaches to consumer protection.

Institutions

Federal-Provincial Division of Responsibility

The Constitution Act does not specifically assign consumer affairs to federal or provincial jurisdiction. The federal government is responsible for the broad rules of the marketplace relating to peace, order and good government, **trade and commerce, criminal law, currency, banking and weights and measures**. In practice the federal government is responsible for national standards relating to **food safety, transport safety, product safety (except electrical), labelling, legal metrology, banking and interest rates, competition policy**. Federal legislation relating to misleading advertising and unfair practices is seen as competition not consumer policy, part of ensuring a level playing field for traders.

Provincial governments, under their power to regulate property and civil rights, regulate individual transactions, contracts and sales of goods and services, and most industry specific issues. They are responsible for sale of goods and services, guarantees, licensing of traders, electrical safety, credit unions and structural safety. Ontario, with the largest population, tends to set the standards which other provinces will follow, for example in the area of electrical safety. There also exist areas which require cooperation between the two levels of government as both have some degree of responsibility (for example, misleading advertising, company registration, financial institutions). Mechanisms for harmonisation in these areas include the Agreement on Internal Trade, the Uniform Law Conference and legislated codes (for example, electrical code, building code).

The **Consumer Measures Committee (CMC)** was created under Chapter Eight of the Agreement on Internal Trade. The Consumer Measures Committee has a representative from the federal government as well as every province and territory. The CMC provides a federal-provincial-territorial forum for national

cooperation to improve the marketplace for Canadian consumers, through harmonization of laws, regulations and practices and through actions to raise public awareness. The CMC is presently co-chaired by the Director General of the Office of Consumer Affairs, Industry Canada and the Director of Consumer Affairs, New Brunswick Department of Justice. The CMC also provides support and develops policy proposals for Federal-Provincial-Territorial Ministers of Consumer Affairs, who meet approximately every two years to take joint actions in consumer issues.

Federal, provisional and territorial ministers are focusing on cooperation in the following key areas: the development of consumer protection measures in electronic commerce, including legislative harmonisation, consumer education and improved cooperative enforcement.

Consumer Affairs in the Federal Government

Within the federal government, several departments and agencies have regulatory or policy roles relating to specific aspects of consumer affairs, focussed on their departmental regulatory duties. Industry Canada is responsible for legal metrology, non-food product labelling, marketing practices and telecommunications. The Minister of Health, through Health Canada, is responsible for the safety of non-electrical consumer products, medical devices and pharmaceuticals, safety of tobacco products and radiation safety. The Minister of Agriculture and Agri-Food protects consumer interests in the area of food safety, food labelling and pesticides through the Canadian Food Inspection Agency. The Agency reports directly to the Minister. By integrating the consumer protection function into a number of sectoral departments and agencies, responsibility and accountability has been placed on the departments and ministers with the greatest capacity to ensure that consumer issues are addressed as part of their specific mandates.

Industry Canada Role

The system relies on the Minister of Industry to bring a broader consumer perspective to the Cabinet table. Under *The Department of Industry Act* (1995, c.1), Section 5 (Objectives):

"The Minister shall exercise the powers and perform the duties assigned by subsection 4 (1) in a manner that will... promote the interests and protection of Canadian consumers."

The Minister has policy and consultation instruments for consumer issues generally. The **Office of Consumer Affairs (OCA)** works to: give consumers tools they can use to make informed decisions by creating award-winning innovative information products, expand practical consumer protections in the marketplace by encouraging the development of voluntary codes and standards, build the capacity of consumer organizations so that they can contribute more meaningfully to public policy development, and to develop a co-operative agenda with the provinces and territories by facilitating harmonisation of consumer protection legislation and regulations. The Minister co-chairs the Federal-Provincial-Territorial Committee of Ministers Responsible for Consumer Affairs.

Resources. The Office of Consumer Affairs has 25 staff. Focus is on policy analysis. Annual funding is C\$ 1.3m (C\$ 850,000 operating budget, C\$

450,000 – Gateway). OCA is responsible for the Contributions Program for Non-Profit Consumer and Voluntary Organisations. Current budget C\$1.75m. This supports a range of project proposals including research. About 11 organisations receive funding each year. Measure impact through Consumer Trends report – due at end of year.

Competition Bureau

The Competition Bureau of Industry Canada is the administrative and law enforcement body charged with the preservation of a competitive marketplace in Canada. The head of the Bureau is the Commissioner of Competition, appointed under the Competition Act. In addition to the Competition Act, the Commissioner is responsible for the administration and enforcement of the Consumer Packaging and Labelling Act, the Textile Labelling Act, and the Precious Metals Marking Act (the “standards-based acts”). The purpose of the legislation is to maintain and encourage competition in Canada in order to promote the efficiency of the economy; to expand opportunities for Canadian enterprises in world markets; to ensure that small and medium-sized businesses have equal opportunities; and to provide consumers with competitive prices, competitive product choices and accurate product information.

The Competition Bureau, Fair Business Practices Branch, is responsible for enforcing the Competition Act, the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act. The Competition Act has a broad reach. By updating the guidelines it can generally be applied to new practices, for example misleading advertising on the internet.

The Competition Bureau's approach to the administration and enforcement of the Acts is based on five principles: confidentiality, fairness, predictability, timeliness, and transparency. The Competition Bureau seeks to secure compliance with the law through educating business, promoting understanding of the law, seeking undertakings and through litigation as necessary. It will give advisory opinions to companies on request (for a fee). In cases where the Competition Bureau believes someone is engaged in anti-competitive practices in respect of merger or other civil reviewable matters, it can institute formal proceedings before the Competition Tribunal. Civil sanctions comprise one or more of cessation/stop order, corrective order, and administrative monetary penalty capped at C\$100,000.

Criminal prosecutions are the responsibility of the Attorney General of Canada and the Bureau may refer evidence of an offence to the Attorney General who will consider bringing the matter before the courts. Current big issues in this area concern telemarketing and unsolicited mail. Misleading advertising is a criminal offence when it is knowingly reckless. FBP Branch has 155 employees, including enforcement officers, lawyers and economists, 45 – 50 in HQ, 30 in Toronto, 20 in Montreal. The Competition Bureau supports self-regulation and codes. It encourages law enforcement partnerships, for example with police, Fair Trade Commission, “Toronto Partnership”. There was crossover with Measurement Canada on labelling issues. Sharing intelligence was an issue because of confidentiality – more generally, Bureau will not name traders unless they have been named in a court action.

Measurement Canada (MC)

Measurement Canada ensures that goods and services traded on the basis of measure are inspected to ensure they are measured accurately. MC is responsible for policymaking and analysis, legislation and enforcement of the *Weights and Measures Act* and the *Electricity and Gas Inspection Act*. It is responsible for legal metrology – its functions in this respect are equivalent to the National Weights and Measures Laboratory. MC is a national agency divided into 5 regions and 25 districts. Approximately 350 people work in this area, 200 of these are inspectors and enforcement officers. MC is Government funded and any income is returned to the Government. Inspection is contracted out to public and private bodies. Enforcement is done at district level. District officers deal with complaints. The President of Measurement Canada reports to the Industry Canada minister through the deputy minister. There is no formal provincial government involvement although MC can devolve some issues to provincial government, for example taxis.

MC is currently undertaking a Trade Sector review of 39 industries and will make recommendations incorporating stakeholder views. The review was preceded by a number of research /focus groups into consumer views which were funded by OCA. Emerging findings are that MC adds little value to industry-to-industry transactions where there would be scope for more self-regulation.

Weights and measures is a low priority for legislation. Regulations can generally be modified within an 18 month timeframe. New standards in relation to electricity and gas can be signed off by the President. Current trend is to move away from inspection and set rules for the marketplace. Sanctions are weak. Maximum fine is C\$ 5000 – no change for three years. MC provides information through publications and its website, and at trade shows. Impact – Measurement Canada's view was that enforcement was better 20 years ago but that the new targeted approach to sectors would improve things over the next 5 –6 years.

Health Canada – Consumer Product Safety Bureau

The Consumer Product Safety Bureau is situated in the Healthy Environments and Consumer Safety Branch (HECS) in Health Canada. It moved to HECS in the 1990s from what was the consumer protection side so as to give product safety a better focus. The Consumer Product Safety Bureau is responsible for improving and maintaining the quality of life through reduction and prevention of injuries, adverse reactions, illnesses and death associated with the use of consumer products, cosmetics and personal use products. It is also responsible for providing safety information to Canadians who use hazardous materials in the workplace to avoid injury, illness and premature death. The Bureau is responsible for enforcing two pieces of legislation covering product safety issues, the Hazardous Products Act (HPA) and the Food and Drugs Act. At the centre there is a team of 35 – 40 people developing and coordinating policy, legislation, information and education programmes. The Bureau aims to secure stable funding (after a period of decline) to enhance education and to boost its compliance and enforcement capacity. The Bureau has a Product Safety Laboratory (30 – 40 people) and six regional offices employing 60 staff.

The Bureau would like to modernise the legislation. The HPA takes a product specific approach; would prefer to move towards a general safety requirement. There is no mandatory recall at federal level; they rely on provinces to work with industry to recall products.

Department of Finance, Canada

The Finance Department (Consumer issues section) is responsible for development of policy and legislation to protect consumers of federally regulated financial institutions. Federal government has exclusive authority over banks including consumer protection. Consumer protection measures for other financial institutions (for example insurance companies) are mainly dealt with at provincial level.

The Department aims to promote competition and ensure consumers are educated. They aim not to be interventionist. Consumer measures in FI statutes focus on: disclosure regulations, rate of interest/how calculated, service charges, complaint handling provisions, coercive tied selling, branch closure provisions, public accountability statements. The Department preferred voluntary initiatives. Banks had proposed MOUs to avoid being regulated – MOUs on low cost accounts signed with the 8 largest banks; Debit Card code of conduct was revised in 2002; liability on consumer to prove when bank card stolen, consumer must prove not negligent.

A new agency, the Financial Consumer Agency, had been set up to enforce the regulations. To some extent the role of the FCA is still being worked out. FCA would track complaints for systematic breaches and monitor compliance, but would not follow up individual complaints. It will rule on systematic breaches and issue directional notices to banks. Its decisions are subject to challenge in the courts. Also has a consumer education role and monitors the effect of codes, but cannot impose sanctions for breach of codes. Individual complaints go to institutional ombudsman, national ombudsman or courts. A number of consumer groups advocated in this sector. But funding of consumer groups is an issue, with some funding from Industry Canada. Harmonisation of provincial laws is a key issue facing the Department. For example they are working to extend the law on the cost of borrowing beyond federally regulated FIs across the board.

Role of Provincial Government

Ontario (population 12 million). The role of the Ministry of Consumer and Business Services (MCBS) is to ensure fairness and safety in Ontario's overall marketplace. The ministry administers 64 statutes, amending an average 65 regulations each year. The core businesses of the ministry are Consumer Protection and Public Safety, Integrated Service Delivery, Registration and Alcohol and Gaming Management. Consumer protection falls to the Policy and Consumer Protection Services Division (PCPSD). PCPSD develops the strategic policy framework and creates and administers legal framework for consumers and businesses in Ontario. It establishes standards in marketplace, technical / public safety standards, regulation of alcohol and gaming. Statutes prescribe key provisions such as scope of law, mandatory licensing/registration requirements (for example cars and travel agents), and key civil remedies.

Regulations then set out specific requirements for example to adapt to changing marketplace or technology (such as disclosure rules for consumer contracts, technical requirements for public safety). PCPSD monitors, inspects, investigates, enforces. There is sector specific regulation governing cemeteries, collection agencies, condominiums, franchises, bailiffs, consumer reporting agencies, paperback and periodical distributors, theatres and professional boxing.

Delegated administrative authorities have been set up since 1997 to carry out the day-to-day functions of core business areas, while the ministry retains overall control of policy development and the legislation. The authorities operate on a cost recovery non-profit making basis. The administrative authorities are:

- Technical Standards & Safety Authority;
- Real Estate Council of Ontario;
- Ontario Motor Vehicle Industry Council;
- Travel Industry Council of Ontario;
- Electrical Safety Authority;
- Vintners Quality Alliance Ontario.

In 2001 an independent evaluation concluded that the delegated administrative authority models had been a success, leading to more focused attention on consumer and industry needs; new programmes to improve public safety and consumer protection; and enhanced service.

Recent legislation

PCPSD has modernised, harmonised and consolidated six consumer statutes into a new Consumer Protection Act, significantly expanding consumer protection including provisions to foster electronic commerce. Within PCPSD, the Marketplace Standards and Services Branch directly administers 20 statutes. It has four key functions which break down as follows:

- **Consumer Services Bureau:** Call centre, 12 staff. Deals with 45,000 consumer complaints and enquiries per year. Provides advice, mediation and consumer education.
- **Registration and Licensing**
- **Inspections:** 1650 inspections in 01 / 02.
- **Investigations and Enforcement:** 171 investigations, 533 charges. C\$537k in consumer restitution and fines

Quebec (population 7 – 8 million; Montreal 4m). Office of Consumer Affairs. The Office of Consumer Affairs became an independent agency around 1980. It reports to a Board of Directors (nine in total), appointed by the minister. Current President is Maurice Boisvert. It has social and economic goals: to promote consumer rights and ensure a balance between consumer and business interests. It has an advocacy role, to ensure consumer voice is represented among organisations whose actions/responsibilities affect consumers. There are eleven regional offices dealing with consumer complaints, making information available to consumers, enforcing the law and carrying out inspections.

Resources. 115 people work for the agency, 30 in Montreal. There are 7 inspector/enforcement officers. The Agency spends C\$500k on funding

consumer groups, with an additional \$C 80,000 for projects (for example on compliance issues).

Consumer Complaints. The regional offices will provide information to consumers with problems. If the consumer wants to file a formal complaint, he/she can complete the documentation and send it to the office. The office will try to resolve the problem with the trader. If the complaint cannot be resolved, the agency will advise the consumer how to make a complaint to the court. The small claims court will deal with cases involving amounts up to C\$7000. Surveys carried out show that the agency is well known in Quebec. The agency seeks to raise its profile through daily media stories, aimed at warning consumers about scams. Communication department is responsible for educating consumers and provides business guidance.

Enforcement follows a risk management approach. Big issues currently are advance payment for funeral arrangements and motor vehicles. Motor vehicle related complaints represent 21% of all complaints. Resources tend to be used to target specific issues. For example, collection agencies were targeted for a week. The motor industry is similarly targeted. Consumers are given help with contracts, for example leasing. Complaint levels are monitored, if they creep up again the sector can be retargeted.

The Agency has adopted a naming and shaming policy based on the complaints it receives. Following investigation, where the agency is satisfied that a complaint is justified (following careful verification), it is published as part of the trader profile. Trader profiles are available on-line. Business is very nervous about this policy and it has raised privacy issues. Complaints about merchants doing business under their own name are not published.

Self-regulation: A general problem with self-regulation is lack of monitoring and enforcement. The Agency is thinking about legislation which would allow Government to enforce codes of practice. A voluntary code on price accuracy had been agreed and adopted by industry. This was reasonably successful. The voluntary Code on Debit cards had been largely ignored by the industry and was not well known by consumers, so the Agency was thinking about legislation.

E-commerce: The Agency does not receive many complaints about on-line shopping. Quebec appears to be doing relatively little business on-line. They are working hard with provinces and federal government to develop a template to implement the new code of practice.

Non-governmental organisations: Consumer Representation

Overview

Canada seemed to lack strong consumer representation on a national scale. There was better representation of consumers in Quebec where we learnt of two networks of consumer groups. There was little in the way of federal Government funding being put into supporting groups – C\$1.7m (£700k per year). Quebec had a tradition of funding consumer groups, originating from trade union support in the past.

The Consumers' Association of Canada (CAC) was founded in 1947 and is an independent, not-for-profit, volunteer-based, charitable organization. Its mandate is to inform and educate consumers on marketplace issues, to advocate for consumers with government and industry, and work with government and industry to solve marketplace problems. CAC focuses its work in the areas of food, health, trade, standards, financial services, communications industries and other marketplace issues as they emerge. The organisation was not strong as it had been in the 1950s. Its magazine had gone bankrupt and it no longer received federal funding.

Public Interest Advocacy Centre (based in Ottawa)

The Public Interest Advocacy Centre (PIAC) seeks to advance the interests of individuals and groups who are generally un-represented or under-represented in issues of major public concern. It champions those issues that involve the delivery of important public and utility services, primarily concerning telecommunications, energy, privacy, the information highway, electronic commerce, financial services, broadcasting, and competition law. The Centre undertakes solid legal and research services on behalf of consumers. Engages in advocacy on issues associated with fairness, financial consumer protection, and access to banking services

The Public Interest Advocacy Centre is a non-profit federally incorporated organisation. Founded in Ottawa in 1976, PIAC has been especially vigilant in compelling government and private corporations to administer programs or to conduct business in accordance with fairness and due process. PIAC has won many victories on this basis in the courts and tribunals and provides a strong consumer-based voice in the regulation of important public services and utilities. PIAC's main concerns were deregulation and competition. Consumers were overloaded with choice, not enough price transparency. In its view, the Government hid behind competition as guaranteeing sufficient consumer protection. Regulatory bodies had become weaker and consumers suffered from, for example, the permissibility of arbitration-only clauses in standard contracts.

PIAC thought that business was generally against consumer legislation. Self-regulation could be helpful, but code schemes only covered those who wanted to participate (likely to be the better firms) and adherence was variable. Examples of self-regulatory schemes mentioned were those of the Toronto DMA (Direct Marketing Association) and the Canadian Association of Internet Service Providers. There was an Electronic Funds Transfer Code.

Consumers' knowledge of their rights was low in PIAC's opinion. Access to advice was difficult and generally there were difficulties in obtaining redress (although some sectors such as telecoms had special dispute resolution schemes). There were small claims courts (though the \$50 filing fee remained a barrier), and class actions were available in half of the provinces and territories. PIAC viewed the quality of public law enforcement as poor - the authorities concentrated on larger cases. Some common consumer problems included fraud, banking and cell phones (moves to longer contracts, unfair penalties for early cancellation), timeshare and estimates for services like house repairs.

Option Consommateurs (Quebec)

Option Consommateur is a small consumer organisation which gives practical advice to consumers and takes action in the courts on behalf of groups of consumers. It receives funding from Centraid, a charitable organisation which receives contributions from employees and which funds some 250 organisations. Option also receives funding from federal government (for research) and from the provincial government. Further revenue is raised from providing good consumer stories to the media. Option is part of a loose network of about 40 consumer groups in Quebec. It has between 800 and 1000 individual subscribers.

The key issues which caused complaints were financial services especially insurance, sales of goods (warranties), hidden defects, and the used car market including repairs. Food retailing was also mentioned. An article in the Quebec civil code allows the group to take class action. There is a fund for class actions provided by the provincial government. Option has begun about 20 class actions in the year, with 8 of them now settled.

Union des Consommateurs (Quebec)

Union des Consommateurs grew out of the Quebec branch of the old Consumers Association of Canada. It is a federation which represents local consumer groups (not including Option which is part of a different network). Union works on national issues mainly relating to food, energy, telecoms, e-commerce, social and fiscal policy, credit debt and bankruptcy. Union's priorities are set out annually in an action plan which is made up from community plans. Union is supported by a regional group structure.

Union des Consommateurs – views on consumer protection in Canada:

- federal /provincial split is a problem - at provincial level there is insufficient competence to act. For example, Quebec was forced to shut down a regulatory body because it was found unconstitutional. Provincial government fails to act, for example won't challenge unfair contract terms, because of tension with federal level enforcement;
- provincial level enforcement was not adequate- prosecutions had dropped dramatically. Federal level enforcement was even less effective, very formal, bureaucratic and difficult – there was no compensation for consumers, so no incentive for consumers to complain at that level;
- consumer organisations needed to be empowered to take cases. As with Option, Union was empowered to bring class actions – a powerful tool. There had been a successful action against misleading advertising by car manufacturers.

Money counselling is a big issue for consumer groups. 40,000 consumers use counselling agencies across Canada – there will be research into this group to measure impact of debt/lifestyle policies.

E-Commerce: The Director of Union had co-chaired the committee to develop the Code. Union is monitoring compliance with the new e-commerce code.

Canadian Council of Better Business Bureaux

The Canadian Council of Better Business bureaux is part of the Better Business Bureau network which started in the United States - there are 14 bureaux in Canada, with 25,000 members (representing 8-9% market penetration). BBBs are non-profit organisations supported by business. The Canadian Council of Better Business Bureaus (CCBBB), established in June of 1966, is the coordinating and licensing body of the Better Business Bureau (BBB) system in Canada. The BBB system is a public service agency financed by the private business sector with the local Bureaus across Canada serving as the action arm of the BBB system.

BBB system aims to promote high ethical standards of business practice, serving as a vehicle through which the business community manifests its concern for sound consumer relationships and provides a platform for national and local business on matters of business-consumer policy. BBBs offer a variety of consumer services. They provide consumer education materials, answer consumer questions, provide information about a company and complaints about it (where known by BBB), help resolve buyer / seller complaints against a company, including some mediation and arbitration services and provide information about charities. BBBs do not judge or rate individual products or brands, handle complaints concerning the price of goods and services, handle employer / employee wage disputes or give legal advice. Aims to protect business as well as consumers. Sends out scam alerts quickly. Supports self-regulation, fends off legislation.

Top 10 Inquiries & Complaints December 2002

Inquiries	Complaints
1. Work-at-Home	1. Auto Dealers New/Old
2. Auto Dealers New/Old	2. Computer Sales and Service
3. Moving & Storage	3. Moving & Storage
4. Auto Repairs & Service	4. Contractor – Home Remodelling/Renovations
5. Computer – Sales & Service	5. Floor Covering
6. Charities	6. Contractor – Heating & AC
7. Travel Agencies	7. Telephone/Cell Phones Co
8. Sweepstakes/Lotteries	8. Windows/Doors Installation
9. Multi-Level Selling	9. Internet Services
10. Contractor – Roofing & Guttering	10. Collection Agencies

Consumer knowledge

Canadian Consumer Information Gateway (CCIG)

The Canadian Consumer Information Gateway (<http://consumerinformation.ca/>) is a Government Online initiative that includes over 35 federal government departments and agencies, as well as over 250 provincial and territorial partners. These organizations have come together in a unique partnership to promote Canadian consumer interests and awareness. Over the coming months, selected Non Governmental Organizations (NGOs) will join this cooperative initiative, further enhancing its value to Canadian consumers. This site gives

consumers the tools they need to make informed decisions, safe and healthy product choices, alerts them to recalls and scams and provides them with the contacts to seek redress.

The OCA's website, (<http://www.consumerconnection.ic.gc.ca/>) **Consumer Connection**, provides interactive information tools designed to enable consumers to obtain the information they need to protect their interests as quickly and efficiently as possible. New products include: *Fraud Files*, a mini quiz to help assess consumer's vulnerability to fraud; *Annual Financial Service Charges Report* and *Privacy Town* which is a guide to privacy protection in the Canadian marketplace. Consumer education is not included in the school curriculum. A key source of consumer information is "Protegez-Vous" a high quality magazine which provides consumer reports (similar in style to Which? in the UK).

The Canadian Consumer Handbook

The Canadian Consumer Handbook, available on CD-ROM and the Internet (<http://www.consumerinformation.ca>), offers information and advice to help consumers learn about consumer rights, make informed decisions and protect against unscrupulous merchants. Included in the handbook are points to consider, questions to ask and steps to take when making purchases or signing contracts or, for consumer affairs professionals, when helping consumers with these things. There are tips on how to complain effectively (including a sample complaint letter), things to consider before and after buying a product or service, how to deal with a collection agency, consumer privacy, contracts (for dating services, health clubs, timeshares, etc.), door-to-door sales and electronic commerce. Also included are tips on how to deal with fraud, funerals, home renovations, landlord and tenant problems, mail order, major purchases (houses, cars), misleading advertising, multilevel marketing and pyramid selling schemes, product safety, rent-to-own, telemarketing and travel. Finally, for the most common types of consumer problems, the handbook includes corporate, consumer, government and non-government contacts.

CBC, the main national television network offers consumer advice, tips and news on their website and two consumer programs, "Marketplace" (aimed at younger audience) and "Street Cents". CBC's French network provides "La Factice" (The Bill).

"Straight goods" (www.straightgoods.com) is an online independent source of news and tips relating to consumer affairs.

Consumer confidence

Industry Canada saw the lack of "informed, assertive consumers" as the principal policy problem. One of their goals is to assist consumers in obtaining information to protect their interests in the marketplace. Many consumers do not have sufficient numeracy and literacy skills to evaluate the information they are given. More articulate consumers do not have time to digest the information in the marketplace to make informed decisions.

