THE ADEQUACY OF AUSTRALIAN CONSUMER PROTECTION LEGISLATION—OBSERVATIONS AND PROPOSALS FROM ECONOMIC THEORY

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From a survey of the statute books Australian consumers have been treated well by both State and Federal Governments, particularly over the past decade. For example, statutory consumer protection agencies now exist in all States and mainland Territories, and most (if not by now all) jurisdictions have small claims courts or tribunals. All States have legislated to regulate door-to-door sales, false trade descriptions and mock auctions, and legislation to control pyramid selling, used car dealers and inertia selling is to be found in the majority of jurisdictions. These lists could easily be extended.[1] In Western Australia, to take just one example, there are no less than twenty principal Acts which clearly relate to consumer protection, commencing with the Sale of Goods Act of 1895 and ending to date with the Small Claims Tribunal Act of 1974. In the federal sphere the Trade Practices Act 1974 is particularly noteworthy in its evident recognition and protection of consumer interests.

The number of provisions on the statute books and the variety of matters regulated by enactments are clearly not, however, satisfactory criteria upon which to assess the general protection afforded to consumers through legislation; the only adequate criterion must be the extent to which legislation effectively places consumers in the most favourable position possible within the socio-economic system that exists within any society. The social considerations in this respect involve fundamental ethical questions which we do not wish to explore on this occasion.[2] Instead we wish to present here an account of the main economic principles upon which we would base any assessment of the protection afforded to consumers by Australian legislation and then go

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1 For a survey of State consumer protection legislation to February 1974, see K. C. T. Sutton, *The Law of Sale of Goods in Australia and New Zealand*, 2nd ed. (1974) 433-55. For subsequent developments see, e.g., the annual *Reports* of the Chairman of the Consumer Council of Western Australia; these reports survey recent enactments from all Australian jurisdictions.

2 For an introduction to the basic social considerations relevant to consumer protection, see M. J. Trebilcock, 'Consumer Protection in the Affluent Society', (1970) 16 *McGill L.J.* 263, esp. at 263-76.

on to outline a general, and for the most part theoretical, framework indicating the kind of legislation and economic policy which we believe would most efficiently and most effectively protect consumer interests within free enterprise markets in Australia today.

We were originally led to consider the whole subject of the value, and particularly the economic value, of current consumer legislation because we were—and remain—concerned about two matters relating to this topic. The first is the practical effect of the common lay impression that consumers are well protected by legislation which patently and directly has regard to them, and in particular which increases their rights and liberties *vis-à-vis* those of business and industries. We are particularly concerned that such an impression may lead legislators to enact legislation primarily of just that kind and that they may do so without giving adequate consideration either to the root causes of particular consumer problems or to the possible social and economic consequences of their enactments.

The second matter of concern is the pragmatic approach which Australian legislatures have generally taken to consumer problems. To date legislatures have tended to pass consumer protection legislation only as and when particular problems have arisen. The result has been that each State and Territory now has a collection of discrete Acts, or Acts containing discrete provisions, which deal with particular consumer problems but which do not form anything like a coherent or comprehensive corpus of consumer protection legislation. We suspect, indeed, that the following of this general pragmatic approach has had a self-perpetuating effect in that it has militated against the formulation by Governments of any clear socio-economic policy upon which to base consumer legislation—apart, that is, from the very loose policy that consumers deserve protection in their relations with the business community. One exception to this pragmatic approach, of course, was that taken by the Commonwealth Parliament in the enactment of the Trade Practices Act 1974; this Act does attempt to co-ordinate, on the basis of a declared economic and social policy, trade practices and the competing interests of business, consumers and society as a whole.[3]

CONSUMER PROTECTION LEGISLATION AND ECONOMIC THEORY

If Australia had neither more nor less than a free enterprise economic

[3] On the rationale behind this Act and the general scheme which it involves, see 89 *H. of R. Deb.* 225-34 (Mr. K. Enderby, Min. Manufacturing Industry; 16 July 1974); see also G. Q. Taperell, R. B. Vermeesch and D. J. Harland, *Trade Practices and Consumer Protection* (1974), passim.

system with perfectly competitive markets for each type of commodity—markets, that is, where there is perfect knowledge of the price of commodities on the part of both buyers and sellers, where the goods and services available are homogeneous and traded at a single price, and where there is so large a number of buyers and sellers that no individual buyer or seller is able to influence the prevailing market price by his own action—then all other things being equal there would be no need for consumer protection legislation. Market forces in such a situation would ensure that industries produce the goods and services which the community as a whole most wishes to consume and, moreover, that these goods and services (a) meet the minimum standards that the community at large is prepared to accept, (b) are produced in the most efficient manner possible given the existing state of technology, and (c) are available within those technological limits at the lowest possible price.[4]

However, not only does Australia not have a pure, free enterprise economic system, let alone one with perfectly competitive markets, but it is clear that even if it did some consumer legislation would be necessary for social as opposed to purely economic reasons. For example, a free enterprise system with perfect competition caters primarily for short-term preferences, and for the preferences of the majority of consumers in any market. Legislation would therefore be needed to protect the long-term needs of consumers, and to balance the competing demands of minorities with those of the majority, other than on an economic basis. A free enterprise system, moreover, is geared to satisfying the market requirements of those who can afford to consume. Social policy considerations might accordingly demand that there be legislative intervention either to increase the income of some minority groups or to interfere with the market processes in such a way as to bring these groups into the market.

Legislation might again be deemed necessary to hinder or even prevent the satisfaction of consumer demands for potentially dangerous goods and services; tobacco, drugs, and pornography are obvious examples here though others would include such things as very fast cars, fireworks and alcohol. The economic theory in question also presumes more or less equally matched buyers and sellers and more or less perfect goods and services of any particular kind. It does not cater for the effects of particularly persuasive, let alone overbearing or dishonest, salesmen or sales advertising, or for the acts of impressionable or feeble-minded purchasers. Nor does the theory deal adequately with the question of who should first bear any loss resulting from faulty goods or ser-

[4] For a detailed exposition of the economic principles outlined here, see T. Scitovsky, *Welfare and Competition*, rev. ed. (1971), esp. Chs. 2, 8, 20-21.

vices when there is more than one possibility.[5] Rules of law would certainly be necessary to deal with these matters.

The economic system operating within Australia today is still largely one of free enterprise though goods and services are only rarely traded in anything even approaching perfectly competitive markets. This is not necessarily a bad thing; perfect competition, for example, is incompatible with the existence of economies of large-scale production as such economies can be obtained only if few sellers exist within a market.[6] However, notwithstanding such benefits as do accrue to consumers from the present economic system, the current situation is clearly far from satisfactory. The presence of monopolies, oligopolies and dominant firms, and the fact of product differentiation in many markets, enables individual sellers to manipulate both prices and the quality of their merchandise in their own self-interest. If one adds to this the fact that consumers are often ignorant for quite personal as well as practical reasons not only of the prices at which goods are traded within msny markets but also—especially as the result of product differentiation—of the full nature and quality of these goods, it is evident that consumers at large are at a quite clear disadvantage *vis-à-vis* the business sector of society.

Given this situation, the problem then arises as to the best way to improve the position of consumers within free enterprise markets. And here economic theory provides the basic answer; as the theoretical outline at the beginning of this section suggests, all other things being equal the most effective and most efficient way to improve the position of consumers within a free enterprise market is to promote competition.[7] Competition is a purifying agent; it provides an impersonal force (an 'invisible hand' as Adam Smith put it) which purges markets of inefficient businesses and with them undesirable business practices of the kind already indicated.[8] It follows from this that if Governments wish to put consumers in the best position possible within a free enterprise market

[5] For a discussion of this matter in the context of the common law rules on privity of contract, see J. A. Jolowicz, 'The Protection of the Consumer and Purchaser of Goods under English Law' (1969) 32, *M.L.R.* 1.

[6] Perfect competition requires the existence of a large number of businesses in any market; each business enterprise is thus relatively small and this inhibits the development and application of sophisticated production techniques. Large-scale production, on the other hand, is conducive to the development and use of such techniques with resultant lower unit costs of production; see generally P. A. Samuelson, K. Hancock [R. Wallace, *Economics*, 2nd. Aust. ed. (1975), ch. 24.

[7] I.e. *price* competition, where businesses compete for the consumers' dollar by price cuts rather than by resorting to such devices as persuasive (as opposed to informative) advertising and the distribution of free gifts, all of which tend to raise the price of commodities to consumers.

[8] See T. Scitovsky, supra n. 4, esp. chs 2, 20-21.

they should promote competition; more particularly, they should promote the most favourable conditions under which competition thrives unless there are special reasons to the contrary. The goal in this respect, however, is not perfect competition, which is in truth unattainable especially within a modern industrial society, but 'workable', or 'effective', competition. This has been technically defined as:[9]

> a situation in which there is sufficient market rivalry to compel firms to produce with internal efficiency, to price in accordance with costs, to meet the consumers' demand for variety, and to strive for product and process improvement. Thus a workably competitive industry has two characteristics: first, the industry is reasonably efficient and progressive and, second, the efficiency and progressiveness has been achieved through impersonal market pressures.

Put in another way, workable, or effective, competition is that which allows the community to reap the benefits of the lower unit costs which are associated with large scale production whilst at the same time achieving a market situation similar to that which in principle attends a competitive industry.

To promote effective competition Governments may have to regulate industrial structure and the conduct of businesses within industries in order to elicit a satisfactory standard of industrial performance.[10] It may thus be necessary, for example, to break up monopolies, to facilitate the entry of new businesses into industries, to demand full public disclosure of information concerning goods and services, to require truth and honesty in selling, and to set minimum standards in respect of both the process of selling and the quality of the goods and services sold. Moreover, it may be necessary to attend more specifically to the needs of consumers—which within a free enterprise system are primarily for remedies and information—by facilitating the investigation and settling of consumer complaints, and by securing the collection, analysis and publication of information on the goods and services that are available. It may also be considered desirable to establish a public 'watchdog' agency to monitor general industrial performance, or more particularly the position of consumers within markets, and to provide information and advice to Governments on these matters.

It must be stressed, however, that the basic aim of consumer legisla-

9 M. Brunt, 'Legislation in Search of an Objective', in J. P. Nieuwenhuysen (ed.), *Australian Trade Practices: Readings* (1970) at 238.

10 For an account of the relationship between industrial structure, business conduct, and industrial performance, see R. Caves, *American Industry: Structure, Conduct, Performance* (1964).

tion for free enterprise markets should be to promote the most favourable conditions for effective competition; only through such competition are consumers effectively and efficiently placed in the best possible position within markets of this kind. It is accordingly on the basis of the extent to which any enactment creates such conditions that we would assess its value as consumer protection legislation in respect of free enterprise markets. We would naturally allow for exceptions to this rule for clearly social considerations must be allowed to defeat purely economic considerations in the last resort. To give just one example, a Government is clearly justified in requiring children's clothing to be flame-resistant even though this may reduce the number of firms, and thus the degree of competitiveness, in the market owing to the increased costs involved. Nonetheless, as a basic principle our economic criterion is sound.

The potential dangers attaching to consumer legislation within a free enterprise system should now be evident: if such legislation should hinder competition, then consumers will be *pro tanto* disadvantaged. So, for example, given the obvious necessity for successful competition by businesses if they are to survive within competitive markets, if legislation should hinder competition in one way then businesses will seek other ways to circumvent the legislative obstacles. This may lead to even worse market situations than those attacked by the legislation in question. Or again, the result of consumer protection legislation may be increased costs which must be borne either directly or indirectly by consumers or the public in general.

The authors of one article concerning the counter-productive effects of consumer protection legislation have succinctly put this whole matter as follows:[11]

> The major reason why effective consumer protection laws may be counter-productive from a consumer welfare viewpoint is that they frequently take a static, all-other-things-equal approach to regulating a dynamic economic system. It is often assumed that business firms either will not be adversely affected by the law or that they will simply absorb whatever cost increases or revenue reductions are generated by complying with the law without changing their market behaviour.

11 O. C. Walker, Jr., R. F. Sauter and N. M. Ford, 'The Potential Secondary Effects of Consumer Legislation: A Conceptual Framework', (1974) 8 *J. Consumer Affairs* 144, at p. 145. For a discussion of an actual case in point, see Sam Peltzman, 'An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments', (1973) 81 *J. Pol. Economy* 1049, with a comment and reply at (1975) 83 *J. Pol. Economy* 655, 663. See also Sam Peltzman, 'The effects of Automobile Safety Regulation' (1975) 83, *J. Pol. Economy* 677.

> The economic system is dynamic, however, and business firms adapt their behaviour to changes in their environment. Firms may react to new legislation by adjusting their policies and practices in ways not foreseen nor desired by the authors and supporters of such legislation. These reactions, the secondary effects of the law, may lead to a reduction in consumer welfare instead of the anticipated improvement.

The authors subsequently present the following formula as a theoretical means of determining the ultimate impact of consumer protection legislation on social welfare:

> '[The] final impact [of consumer protection legislation] is equal to the total benefits to consumers (e.g. more and better consumer information, higher product quality, easier redress of grievances, etc.) minus any increases in costs or reductions in value to the consumer that result from either the implementation of the law or businesses' reactions to it (e.g. increased taxes, increased prices, reduced quality, reduced service, etc.)'.[12]

They then go to conclude that if the total value of the benefits outweighs the total costs, then the law will have a positive effect upon consumer welfare; if not, then its ultimate effect will be negative. This formula has, of course, no scientific use as it necessarily involves the quantification of values; further, it is silent on the matter of the incidence of the costs *vis-à-vis* those of the benefits (e.g., some consumers may bear the costs wholly whilst others bear all the benefits). Nonetheless, the general point is well made.

Two important conclusions follow from the economic principles that have so far been presented. The first is that legislation can clearly protect or otherwise benefit consumers even though it does not expressly or directly have to do with them. The expression 'consumer protection legislation' might thus fairly—indeed, properly—be regarded as comprehending all legislation which promotes competition to the ultimate benefit of consumers. It would accordingly include anti-monopoly legislation like that contained in Part IV of the Trade Practices Act 1974 and all Acts which otherwise regulate industrial structure to make businesses more efficient and more competitive.

The second conclusion is a corollary of the first; it is that not all legislation which purports to protect or benefit consumers necessarily does so. Legislators may, for example, unwittingly deal only with the symptoms of consumer problems rather than with their root causes; they may thus fail to remedy these problems either adequately or at all, and they may, indeed, even make the lot of consumers worse. For example, the

[12] At 150.

prohibition of price discrimination—*prima facie* a pro-consumer ban—will almost invariably result in prices being fixed at the rates charged to the hitherto unfavoured customers—i.e. at the *higher* level—if the businesses concerned to not compete in price but fix their regular prices above competitive levels:[13] price discrimination in such a situation is simply a symptom and not the root cause of the disadvantageous position of the unfavoured customers. This example is particularly relevant to the situation in Australia as price fixing above competitive levels is associated with highly concentrated industries and as one authority has put it: 'Since Australian industry is highly concentrated, the net effect of preventing price discrimination is more likely to be uniformly high prices than uniformly low ones.'[14] Legislators may of course also fail to remedy and even worsen the position of consumers by enacting legislation without taking into account the full economic and social consequences of their legislation. This latter problem has already been referred to.

For legislators and others concerned with consumer protection legislation the main lesson to be learned here is that in the preparation of consumer legislation good-will and the best intentions are not enough. To interfere with the economic system is to court danger unless what is planned is adequately designed to meet and contend with the socio-economic conditions involved. Of particular interest in this respect is the study by D. Cayne and M. J. Trebilcock on why within large urban communities the poor still tend to pay more than other sectors of society for their goods despite the various consumer-oriented laws which have been enacted to alleviate their position.[15] They show that almost all of the ways commonly adopted for ameliorating the position of low- income consumers (restricting, for example, interest rates in consumer credit transactions, creditors' remedies, selling methods) have in fact had the effect either of imposing additional costs or constraints upon merchants and businesses—thus causing them to respond with increases in prices, with reductions in quality, or by withdrawing from the market—or, even worse, of forcing the market underground. The central contention which emerges from their analysis is that 'consumer protection rules should, in the absence of . . . compelling social reasons . . . be limited to remedying the imbalance in bargaining power which fre-

[13] For a consideration of this matter in the context of the *Trade Practices Act* 1974, see S. Breyer, 'Five Questions About Australian Anti-Trust Law' (1977) 51, *A.L.J.* 28 at 36-39.

[14] S. Breyer, supra n. 13 at 37.

[15] 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23, *U. Toronto L.J.* 396.

quently characterizes consumer transactions';[16] in other words, to promoting the conditions for effective competition as we ourselves have advocated as being the best means of benefiting consumers at large in free enterprise markets.

With respect to the particular problems faced by the poor in the market-place these writers conclude that 'few solutions, limited or otherwise, can be found to the consumer problems of the poor by ad hoc restrictions on the flow of market forces.'[17]

> '[I]t is the condition of poverty and the attributes of the poor which underlie the prejudice which the low-income buyer suffers in the market place. Paying more is frequently a necessary incidence of proverty and has not been demonstrated to result from weakness in the market itself. Hence policy makers, in the light of existing evidence, are unlikely to be able significantly to improve the plight of the poor consumer by attempting to restructure the low-income market".[18]

This relates directly back to the necessity of distinguishing between the symptoms and the root causes of consumer problems and the obvious need of attending to the latter if the position of consumers is to be substantially improved.

A FRAMEWORK FOR CONSUMER LEGISLATION

At the beginning of this article we drew attention to the pragmatic approach that Australian legislatures have generally taken to consumer problems and we put forward our suspicion that this approach has had a self-perpetuating effect by militating against the formulation by Governments of any clear socio-economic policy upon which to base consumer legislation generally. We did, however, note the new and more comprehensive approach adopted by Commonwealth Parliament in the enactment of the *Trade practices Act* of 1974. The pragmatic approach, however, may be deemed by State governments to be the best approach to be adopted for the time being, especially given the difficulties involved in devising and co-ordinating a more satisfactory common policy within our present federal system. The root of the problem here is of course that both State and Commonwealth Parliaments have wide powers to legislate in respect of consumers and industries but that any Commonwealth legislation overrides that of a State in the case of a con-

16 Id. at 426-27.

17 Id. at 430.

18 Id. at 407. We presume that in the last sentence quoted the writers are in no way discouraging such improvements to the market structure as may benefit low-income consumers (see text to n. 16).

flict.[19] The difficulties involved in such a situation are naturally only increased by any political or ideological differences between the Governments involved.

Nonetheless, if our economy is to include basically free enterprise markets (where preferences of consumers determine the goods and services traded),[20] and if both State and Commonwealth Governments wish to place consumers in the best possible position *vis-à-vis* traders in any such market, then it is clearly desirable that these Governments adopt a positive and co-ordinated policy of promoting effective competition. To repeat the operative economic principles which have already been referred to, all other things being equal workable competition most efficiently and most effectively ensures that consumers within a free enterprise market are provided with the goods and services that they most prefer at the minimum standards that they are prepared to accept and at the lowest possible price. Consumer policy and market policy in sum are quite interdependent in a free enterprise system for the economic position of consumers in such a system improves only as (price) competition between traders improves and it deteriorates as competition declines.

Given, then, the adoption in principle of a basic policy to promote effective competition, the problem immediately arises as to the best form of organisation for the various controls that may be necessary to put this policy into effect. More specifically this problem concerns the allied questions of who should be responsible for regulating such matters as industrial structure, business practices and commercial standards, and how should the regulations involved be enforced.

This organisational problem, however, involves other, more basic problems, at least two of which are definitional. Competition, as has been seen, involves the trading of (more or less) homogeneous products within single markets and any attempt to foster competition must obviously involve the application of this axiom. What, though, constitutes a 'product' and what constitutes a 'market'? Under what conditions, for example, should one treat the whole of Australia, each State, and a simple geographic locality as constituting a single market for any product? And in respect of the second term, under what conditions should one treat physically similar objects (e.g. tailor-made and ready-made

19 On the question of existing conflicts in this respect, see H. H. Mason and P. A. Butler, 'The Trade Practices Act 1974, and the Possible Inconsistency Therewith of Certain State Laws Dealing with Consumer Protection' (1975) 49, *A.L.J.* 539. Note, however, the effect of the more recent case Re Credit Tribunal: Ex parte General Motors Acceptance Corporation (1977), 14 *A.L.R.* 257 (High Ct.).

20 On whether the preferences of consumers *should* determine the goods and services traded in modern society, and if so to what extent, see M. J. Trebilcock, supra n. 2.

suits), and objects which have the same end or use (e.g. cars and motorbikes) as single 'products', each with its own market? These two problems are in fact usually interconnected in economics through the use of the concept of a 'product market' in contradistinction to the less economically useful concept of a 'geographic market'. These and other definitional problems of basic economic importance currently loom large in the context of the Trade Practices Act 1974[21] and must frequently arise in legislation which is designed to promote competition by regulating industrial structure and market forces. One of the benefits of our proposed framework for consumer legislation is that it will to a large extent enable legislators, who for the most part are not economists or traders and who are thus not the best people to grapple with these problems, satisfactorily to avoid them.

Many suggested plans for the regulation of free-market institutions and mechanisms in the interest of consumers are directed towards central planning, this being, in theory at least, more conducive to administrative efficiency and less susceptible to bias against consumers than most alternative schemes. Michael J. Trebilcock, for example, in a recently published study of the position of consumers under regulatory systems affecting businesses and industries, concludes as follows:

> It is submitted that the general form of the antidote [to anti-consumer business practices] to be urged by consumerism . . . is this: *As a first priority,* we should preserve or re-activate vigorously competitive markets wherever possible and not succumb to producer pleas to substitute accommodating regulatory regimes (original italics).[22]

With this, of course, we wholeheartedly agree. However, he then goes on:

> *As a second best solution,* in the event of demonistrated and significant market failure, or in the event of undesirable social outputs from admittedly competitive markets, we should invoke central planning instruments such as competition, tariff and tax policies or legislated direct subsidies, through a more publicly accountable central political process. . . . *Only as a third best solution,* where delegation of regulatory authority is unavoidable, should delegated regulatory agencies be utilised, provided, however, that they are

20 On whether the preferences of consumers *should* determine the goods and services traded in modern society, and if so to what extent, see M. J. Trebilcock, supra n. 2.

21 See G. Q. Taperell, R. B. Vermeesch, and D. J. Harland, supra n. 3, secs 253-80; S. Bryer, supra n. 13 at 32-36.

22 'Winners and Losers in the modern Regulatory System: Must the Consumer Always Lose?' (1975) 13, *Osgoode Hall L.J.* 619 at 646.

much more publicly accissible and politically accountable than at present (original italics).[23]

We are not convinced that in the event of significant market failure Governments should consider promoting consumer interests—even through the encouragement of competition—principally by central planning or even regulation by a series of independent or public bodies. We believe that Governments should foster consumer interests in such circumstances primarily by encouraging industries themselves to engage in vigorous competition. Our proposal, in short, centres on the promotion of effective self-regulation by those industries which *prima facie* have the numbers to be competitive in any market. There are, of course, clear dangers in self-regulation by industries. For example, there is an obvious tendency for self-regulatory bodies to promote their own interests at the expense of consumers and in particular to protect themselves from the 'purifying' effect of competition by such devices as price-fixing and placing restrictions on the entry of new businesses into the market. But the same is in fact true of *public* regulatory bodies. The conclusion that 'legislative and regulatory decision-making processes are, *in the nature of things,* skewed to reflect a pro-producer, anti-consumer bias' (original italics)[24] is unassailable in the context of present-day experience. The only way to remedy this situation is to ensure that any regulatory body is itself regulated in such a way as to minimise the effects of these tendencies.

If these tendencies can be corrected, tendencies, let it be emphasised, which pertain to *all* regulatory processes—in other words if one can be reasonably certain that the regulatory bodies involved will act to foster effective competition within a free-enterprise market (to the advantage not only of consumers but of all efficient firms within the market, though not of the inefficient ones)—then the reasons for self-regulation by industry rather than by any public authority would appear to us to be both overwhelming and convincing. The main argument in favour is the fact that generally speaking it is industry itself that has the most intimate knowledge of the market in which it functions and thus of the problems that it faces and the means by which to solve them. Industrial bodies are consequently in the best position to take not just the most appropriate action to correct any defects in the state of the market but also the quickest action and even preventative action in appropriate circumstances. Moreover, industrial bodies are in the best position to ensure that such action would minimise and even avoid any disadvantageous secondary effects of the kind referred to in the previous section

[23] Id. at pp. 646-47.

[24] See M. J. Trebilcock, supra n. 22, at 622; and see generally 620-22, 627-28, 644-45.

of this article. One of the particular problems with regulation of industries from the outside is that any clash between the wishes of industry and the requirements of the regulatory body involved is likely to result in obstructive opposition by the former together with vigorous attempts to circumvent any imposed obstacles, to the ultimate detriment of consumers.

Associated with the notion of regulation is that of enforcement, and it is already apparent that self-regulation by industry avoids many of the problems of enforcement that tend to result from regulation by external agencies. The reason for this improved situation is two-fold. First, there is commonly pressure from among the members themselves for conformity with their own regulations. One reason for this is the fact that members generally wish to ensure adherence to their own rules in order to uphold the reputation of their industry, a reputation from which each benefits or suffers according to its kind. Second, those who offend against regulations of the kind in question lay themselves open to judgment and sanctions not by some relatively impersonal public authority but by their peers or a body representative of them. Offenders thus lose face and reputation within their industry besides possibly suffering some other, more positive penalty. This aspect of self-regulation tends to be disparaged. However, experience from at least professional bodies such as Law Societies suggests that this is a not insubstantial reason for adherence to the rules of self-regulating bodies.

A particular advantage of fostering self-regulation by industry would be that such fundamental problems as determining what constitutes a 'product' and a 'market' would very often be solved by industry itself. Thus, if the Government were to encourage the formation of self-regulatory bodies within industries generally, then those businesses which regard themselves as competing with each other would come together, as they have already done in many cases,[25] to form their own regulatory bodies. In this way regulatory organisations would emerge by a process which could almost be described as 'natural selection'. In this way, too, some businesses might regard themselves as in fact belonging to two or even several industries and accordingly join more than one regulatory body.

The arguments in favour of self-regulation by industries are not, however, of a practical nature only. There is also the important argument of principle that 'the most democratic process of government is that in which decision-making and administrative functions are devolved to the lowest level of government possible, consistent with a certain agreed-

[25] In Western Australia, for example, 249 trade associations had registered under the (now moribund) Trade Associations Registration Act 1959, as to 30 June, 1976.

upon level of efficiency'.[26] If industries are to be regulated, and if industries can regulate themselves both effectively and efficiently, then simply on the basis of the reason just presented we believe that industries should be given every encouragement and opportunity to be governed by their own regulatory bodies. It may be objected here that in order to put this principle into effect consumers should play a part in the regulatory process. This, however, overlooks the fact that the principal function of the regulatory bodies in question is to promote competition between the firms which constitute a particular industry (to the ultimate benefit of consumers), and not to foster competition between businesses and consumers. Within the framework which we envisage the particular interests of consumers would be looked after elsewhere.

Our proposed scheme does not, of course, exclude any direct regulation of industries and markets by Government or public agencies; the recommendation here is simply for the maximum self-regulation by those industries which *prima facie* have the numbers to be competitive and which have the ability and willingness to regulate their operations in order to promote genuine competition. The fact that so many self-regulatory bodies have already been set up within industries is, we believe, indicative of the genuine interest that industry as a whole has in the existence of such organisations. It is true, as we have already pointed out that such bodies do tend to act in their own self-interest, in particular by operating as price-fixing agencies and by restricting the entry of newcomers. It is nonetheless equally true that such bodies have acted to the benefit of consumers by promoting healthy competition, especially by laying down minimum standards to be observed by their members, by guaranteeing to consumers the enforcement of those standards, and by taking action against those businesses which fail to act accordingly. These bodies do not, of course, engage in such beneficial practices out of a sense of altruism; they do so principally out of pure self-interest in order to promote sales and thus their own personal welfare. The object of our proposed framework is to exploit this fact and by so doing improve the position of consumers in what is the most effective and efficient way possible.[27]

[26] Second annual *Report of the Chairman of the Consumer Affairs Council* (W.A.) (1973-74) at 14. This quotation is in fact taken from a consideration of the allied question of the organisation of consumer affairs bodies.

[27] It is interesting to note in connection with our central proposal that in the United Kingdom s.124(3) of the Fair Trading Act 1973 expressly imposes a duty on the Director General of Fair Trading 'to encourage relevant [trade and business] associations to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers in the United Kingdom'. On the subsequent developments in this matter, see S. E. March, 'Voluntary Codes in Practice' (1977) 127, *New L.J.* 419.

Direct or indirect Government regulation of industries and markets will nonetheless always be necessary for certain purposes. Thus, the implementation of our main proposal depends on the existence of a sufficient number of businesses within an industry to enable competition to operate effectively. Where monopolies or oligopolies exist within an industry it would still be for Governments to break these up if they wish to secure effective competition.[28] Governments would also have to secure any other conditions that are necessary for effective competition within a given market but which cannot, or cannot adequately, be secured by the industry involved—variations in tariffs, for example, or the provision of subsidies to assist particular industries or businesses. Governments, moreover, would still have to intervene to impose standards on the business community as a whole, for example to prohibit false or misleading advertising generally, or to forbid certain widespread practices like door-to-door, inertia, or pyramid selling which do not necessarily pertain to any particular industry. And they would also have to regulate a market process directly when they consider it best for social reasons to impose standards which may be higher than those secured by effective competition; examples here would be cautiously high safety standards or increased public information on particular matters.[29]

There are, however, three matters with which Commonwealth or State Governments would be particularly concerned within our proposed framework. The first is that of ensuring the effective and efficient operation of the self-regulating bodies set up by industries; this matter has already been referred to. The second is providing direct assistance to consumers with their problems. The third is keeping a general watch on the position of consumers within the various markets and of ensuring that reports are made to legislators, industries or the public at large on

28 Three points are worth mentioning here. First, it may often be the case in Australia that markets are so small as not to warrant the break up of monopolies and oligopolies as the advantages of lower costs resulting from large-scale production may outweigh the advantages attached to effective competition. Second, by 'breaking up' monopolies and oligopolies we mean breaking up effective control as well as formal ownership; this is an important point especially in the light of U. S. experience. Third, it should be observed that the mere presence of a number of quite independent businesses in an industry will not necessarily result in price competition; besides the possibility of restrictive practice agreements there is also the problem of 'interdependence' whereby businesses in a highly concentrated industry engage in anti-competitive conduct independently of each other. On the problem of interdependent conduct in the context of the Trade Practices Act 1974, see S. Breyer, supra n. 13, at 65-69, and generally J. E. Hibdon, *Price and Welfare Theory* (1969) 285-290.

29 For other accounts of ways in which Governments might intervene in market operations to promote either competition generally or the interests of consumers in particular, see D. Cayne and M. J. Trebilcock, supra n. 15, at 426-27; M. J. Trebilcock, supra n. 22, at 646-47.

particular problems that arise and on such other matters as deserve attention—in short, providing 'an ongoing feedback loop of information' as economists will put it. What kind of organisations or agencies should be established to execute these functions and who should be involved in them are not matters that can adequately be considered here. We would, though, emphasise that in establishing and running such bodies good-will and the best of intentions on the part of Governments and constituent members are not enough. In Australia, where organisations like consumer affairs bureaux and small claims tribunals are quite new, commentators on these institutions are presently going through a eulogistic stage, focusing attention primarily on the benefits that these bodies have produced and expressing praise and admiration accordingly: however, the findings from more exhaustive studies of similar institutions abroad may lead us to revise our assessment of these bodies and to reconsider the kinds of organisations and methods that are most suitable for protecting the general interests of consumers at large.[30]

A further matter that may simply be noted and not considered at length here is that of the division of particular areas of micro-economic control between State and Commonwealth Governments. It is interesting to observe in this respect that something like a general line of demarcation has already evolved. Broadly speaking, the Commonwealth Government concerns itself primarily with regulating industrial structure whilst State Governments control just business conduct and standards. There is, however, no firm, let alone formal, separation of powers in this respect. The Commonwealth, for example, was recently very active in regulating the latter matters in Part V of the Trade Practices Act 1974 ('Consumer Protection'), though it is interesting to note that rarely has a State ever concerned itself with industrial structure. Experience will show where these respective controls best lie. On a related matter, careful attention would also have to be given in the implementation of the proposed framework to the division between the Commonwealth, the States, and even local governments, of those consumer protection functions that are to be carried out independently of the self-regulatory bodies of industry. Indeed, this general question has already been stated in a *Report* by one Consumer Affairs Council to be of current importance in Australia.[31]

30 See, e.g. J. P. Liefeid, F. H. C. Edgecombe and L. Wolfe, 'Demographic Characteristics of Canadian Consumer Complaints' (1975) 9, *J. Consumer Affairs* 73; M. J. Trebilcock, supra n. 22. See also M. Gardiner Jones, 'Planning the Federal Trade Commission's Consumer Protection Activities' (1974) 8, *J. Consumer Affairs* 8.

31 See 'The Location of Responsibility for Consumer Affairs', in the second annual *Report of the Chairman of the Consumer Affairs Council* (W.A.) (1973-74), 13.

Our proposed framework, which was devised primarily to benefit consumers notwithstanding its emphasis on businesses and competition, is just one that is possible within an economic system such as that which exists in Australia today. Some economists will disagree with our suggestion and put forward an alternative plan.[32] Whatever is proposed, however, it must be remembered that any such plan must work within a given socio-economic system. Any proposals for interference with the operation of market forces, whether primarily to assist consumers, traders, or even society as a whole, must accordingly be geared to this system as it actually operates if the plan is to be fully considered and satisfactorily implemented.

[32] See, e.g., M. J. Trebilcock, supra n. 22 at 646-47.