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The Development of Consumerism and the Regulation of Unfair and Restrictive Trade Practices

By Bernard McCabe, Associate Professor, Bond University

Millions of consumer transactions occur every day. Consumers buy goods from supermarkets, department stores, boutiques, restaurants and corner stores. They buy services from doctors, lawyers, plumbers and internet service providers. The law regulating these transactions affects every consumer and business trader.

The law regulating commercial and consumer transactions has two objectives. First, it aims to protect the consumer from exploitation by unscrupulous businesses traders. Consumer protection laws require higher standards of fairness and openness when traders deal with consumers. Restrictive trade practices legislation attacks monopolies and promotes competition. Modern commercial law also provides consumers with more remedies where abuses occur. Secondly, the law aims to make commercial and consumer transactions easier and cheaper for consumers and business traders. By passing laws that streamline transactions, parliaments help to promote the supply of a larger range of goods and services to consumers at lower cost.

The Sale of Goods legislation

An early piece of consumer regulation is the *Sale of Goods Act*, as it is called in most states. The Act regulates when ownership of the goods passes from the seller to the

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buyer. Generally, ownership or property passes when the parties intend it to pass. But the Act also includes default rules that apply, should the parties not make their intentions clear. By providing rules for determining when ownership passes, the Act saves people from the cost and trouble of negotiating about when exactly the buyer becomes the owner.

The Act implies a range of terms into contracts for the sale of goods. In every contract for the sale of goods, the purchaser is assumed to have promised that (1) the goods supplied will be what the purchaser asked for, (2) they will do what the seller said they would do, (3) they will work like they are supposed to do, and (4) where the sale was negotiated with reference to a sample, the bulk of the goods will be the same as the sample. These terms are implied by the Act on the basis that it goes without saying that a seller would make the promises that the Act implies. The Act eliminates the need to talk about what goes without saying. It also provides consumers and other purchasers of goods (including other businesses) with rights, should unfair business practices occur.

Consumer welfare and the Trade Practices Act 1974

During the course of the 20th century, public policy makers became concerned about the imbalance in power between consumers and businesses. In the 1960s, "consumerism" developed, led by the intrepid consumer rights advocate, Ralph Nader, and American reformers such as John Kenneth Galbraith. US President John F Kennedy said in 1962 to the US Congress that marketing was "increasingly impersonal". He said the consumer was increasingly unable to calculate whether goods and services will meet the advertised puffery or "whether the performance of a product will in fact meet his needs". Kennedy's pioneering consumer bill included the consumer's rights to safety against hazardous products, to be informed and not misled, to choose among products and services, to be heard on policy and complaints about products and services, and to seek redress. As manufacturing and consumption became more complex, and the links between manufacturer and consumer more remote, it was difficult for consumers to be aware before completing a purchase. Goods might be packaged and defy inspection. They might be advertised and promoted. They might be made in foreign countries. They might not match their descriptions in catalogues and brochures. They might take days or weeks to work or test (eg, pharmaceutical products), and so on. There grew an imbalance in bargaining positions and knowledge. The law stepped in to rectify this and impose ethical commercial standards.

An increasingly intrusive mass media voiced the public's concerns. Consumer rip-offs became the stuff of current affairs television and newspaper investigations. Concerns about the safety and quality of complex goods like pharmaceuticals brought calls for more extensive protection for consumers. For example there was the Dalkon Shield contraceptive device that made woman ill and Thalidomide, a treatment for morning sickness in pregnant women that caused birth defects, and vehicles prone to explode in minor collisions because of poor design.

The concern over business practices led to the *Trade Practices Act 1974*. The Act contains a range of measures regulating unfair and restrictive business practices. Section 2 of the Act explains that its objective is to, "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

The legislation promotes competition by outlawing restrictive trade practices like price-fixing agreements and the misuse of monopoly power. Contraventions of some restrictive trade practices' provisions attract penalties of up to $10 million.

The consumer protection provisions in the Act promote consumer welfare by creating an obligation to avoid misrepresentations and other misleading or deceptive conduct. *Section 52 of the Trade Practices Act* (which is mirrored by Fair Trading legislation in each state) prohibits corporations, and individuals in some cases, from engaging in conduct in the course of business transactions that is misleading or deceptive or likely to mislead or deceive. Claims alleging breaches of s 52 are now common. Section 52 is one of the most litigated pieces of legislation on the statute books. Any person may seek orders from the court stopping conduct in breach of the section, including aggrieved consumers, competitors, concerned citizens and the regulator, the Australian Competition and Consumer Commission (ACCC). Examples of conduct caught within the reach of the section include:

- businesses trading under well-known names have sued other traders for using a similar name;
- popular public figures have sued traders for using the public figure's name or image, without permission, to promote the sale of goods or services;
- businesses claiming that their goods are "made in Australia" have been sued when the goods were not in fact made here, or were only partly made or assembled in this country;
- businesses that have made false claims in advertisements for goods, services or property.

Where a court finds that a trader has breached s 52, the judge may issue an injunction (an order that the trader cease engaging in illegal conduct), require the payment of damages, or make ancillary orders – the court's power to tear up or re-write contracts, or order that a party provide or pay for

goods or services. The court also has power to order that a trader place advertisements correcting wrong impressions that may have been created in the minds of the public.

The remedies available under the Act are more extensive than the remedies available to other courts. The parliament has said that some breaches of the general law will also amount to breaches of the *Trade Practices Act* so aggrieved persons will have access to the more extensive remedial powers available in the Act. For example, the Act declares that unconscionable conduct within the meaning of the unwritten law of any jurisdiction is a contravention of s 51AA of the Act.

The Act also catches other specific examples of unfair trading practices. These include "pyramid selling" [1] and the use of coercion, harassment and physical force in the sales process. It also makes importers and manufacturers of defective or dangerous goods liable for the damage caused by the goods. The Act also implies terms into contracts for the supply of goods or service to persons qualifying as consumers. The implied terms are similar to those implied by the Sale of Goods legislation in each state, but they cannot be excluded or modified.

Discussion Questions

1. *Have you ever had a consumer complaint against a supplier? How did the supplier respond to your complaint?*
2. *If you have a complaint (eg, the goods you purchased don't work), to whom do you complain?*
3. *Do existing consumer laws "wrap people in cotton wool"? Or do consumers need more protection?*
4. *Do some consumers need more protection than others because of age, language difficulties or levels of sophistication?*

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