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The effectiveness of the legal system in protecting the rights of consumers

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The 2001 HSC specimen paper includes an optional focus study on the rights of consumers. One of the questions asks students to “evaluate the effectiveness of the legal system in protecting the rights of consumers”.

The question might be approached in several ways. This paper explores some of those approaches.

What are consumer rights, and how does the legal system protect them?

Rights are the counterparts of obligations. A right in your hands is only meaningful to the extent that it creates an enforceable obligation on someone else to do something. A good example is the “right to silence”. It takes effect as an obligation imposed on the court not to draw adverse inferences from the silence of the accused. Other rights operate in a similar way.

The obligation in each case arises and is enforced through the legal system. The source of the right and the corresponding obligation might be in a contractual agreement, or it might be in a statute; it might arise elsewhere at general law. In each case, the right is enforceable according to its terms through a legal process. The *force* component of the enforcement is ultimately supplied by the police power of the state.

It follows that rights in this legal sense have no coherent existence outside the context of a legal system.

If the question in the specimen paper is approached on this basis, the examination candidate must evaluate the efficiency of the legal system in enforcing the consumer’s legal rights. The question requires the candidate to consider whether:

- consumers are *aware* of their rights and the remedies available to them, or have access to adequate advice about those matters;
- consumers can *access* legal remedies without prohibitive cost;
- remedies can *in practice* be exercised against the recalcitrant supplier.

These are important matters that must be considered in the specimen paper in the course of any answer, but the question probably intends that a broader approach be taken. This can be accomplished if the reference to “rights” in the question is defined to include more than just legal rights; it might be read as a reference to consumers’ *interests*.

What are the interests of consumers?

Consumers have a range of interests that the legal system might recognise and protect. These include an interest in:

1. promoting open and honest dealing by suppliers, so that consumers are able to make fully informed decisions (but too much information can be a bad thing!);
2. eliminating coercion or undue pressure, so that the consumer's will is not overborne when making a decision;
3. being protected from exploitation and various kinds of sharp practices where suppliers take advantage of the weaknesses of consumers, especially consumers who are particularly vulnerable because of language or cultural barriers, age, commercial (un)sophistication, etc;
4. promoting fair dealing and preventing suppliers from exploiting the rules unfairly;
5. protecting the consumer from unsafe, defective or unsuitable goods and services;
6. allocating the risk associated with the supply of unsafe or defective goods or services to those who are best equipped to bear and manage the risk;
7. accessing a wide range of goods and services;
8. raising quality and reducing prices of goods and services;
9. accessing higher quality ancillary services and advice, eg, product advice and after sales service; and
10. simplifying and lowering the cost of the supply process.

Consumers may also have an interest as members of the community in limiting consumerism and questioning the values that are thought to prevail in a consumer society. Other values and interests might also need to be considered, including the effect of consumption on:

- the environment (does more consumption lead to the waste of scarce resources?);
- labour conditions (are the goods being manufactured in a "sweat shop" where workers are being exploited?);
- the national interest (should we prefer Australian-made goods?); and
- our culture (are we in danger of becoming slaves to consumerism?).

Attempts to address or promote this second set of values tend not to come within the realm of consumer law. The first set, however, are directly affected by a range of laws that fall under the broad heading of consumer protection.

The risk to consumers' interests changes as marketing practices change

The marketing process has evolved and become more sophisticated. The most obvious sign of change has been the emergence of the internet which creates new risks for consumers (eg, the risk of buying a product that one has not sighted or tested, and the risk of dealing with someone whom one does not meet and who may not be located within the jurisdiction). But the evolution of marketing has been going on for many years, independently of the development of new modes of distribution like the internet.

Over the last two decades, marketing has become more scientific as businesses have sought an edge over their rivals. Marketing professionals have emerged, aided by the growth in marketing courses at universities. More resources have been devoted to market research so that marketing practices have become more refined, leading to higher sales and lower costs.

In the past, firms tended to produce products and then push them onto consumers. This "produce first - market

later" approach dictated certain kinds of businesses practices. Convincing consumers to buy products that they might not have wanted led to the development of high pressure sales techniques that, in extreme cases, amounted to coercion or harassment. Concerns about these high-pressure "foot in the door" tactics led to a raft of legislative reforms in the 1970s. Good examples of these provisions can be found in ss60 and 65 of the Trade Practices Act 1974. Section 60 prohibits a corporation from using "physical force or undue harassment or coercion" in connection with the supply, or possible supply, of goods or services to a consumer.¹ Section 65 says that a person who receives unsolicited goods is not required to pay for them if he or she asks the corporation to collect the goods.²

These practices are old-fashioned. They are also bad business since it is difficult to sell consumers products they don't want. Many successful businesses have adopted a more sophisticated approach to marketing that helps them to reduce their costs and the risk associated with producing a product that no-one will buy.

These firms commence the marketing process by researching the market to identify what it is that consumers actually want. Once the consumers' needs and wants are identified, the firm can produce products that satisfy the consumers. There is less emphasis on high-pressure selling tactics. Misrepresentation is probably a bigger challenge for the legal system as firms offer products which *appear* to meet consumers' needs.

Laws regulating misrepresentation are found in the Trade Practices Act and other legislation (including the Fair Trading statute in each state, and the Australian Securities and Investments Commission Act 1989) and in the general law (eg, the tort of deceit). The most extensively litigated provision is s52 of the Trade Practices Act. Section 52(1) provides:³

"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

The diversity of laws regulating various marketing (mal-)practices suggests that the legal system has coped relatively well with the changes in marketing. Section 52 of the Trade Practices Act plays a particularly important role in this regard: the section is cast in very wide terms and is intended to catch sharp practices that are not targeted by more specific provisions.



Does the legal system assist consumers to make fully-informed decisions?

There is a range of legal rules designed to promote honesty and assist consumers to make informed decisions. The most important of these is s52 of the Trade Practices Act which prohibits a supplier from engaging in conduct that misleads or deceives. In order to comply with its obligations under the section, the supplier is required to avoid misrepresentations. It may also be necessary to disclose matters that the supplier would otherwise keep secret.

Section 52 tests conduct with reference to the audience to which the conduct is directed. If the conduct is directed to an audience comprised of vulnerable or unsophisticated individuals, the supplier will be required to do more than the supplier who deals with a more sophisticated audience. "Doing more" might involve providing extra information, or providing information in a more understandable form.

The courts have wide remedial powers where a contravention of s52 occurs. The court can order that damages be paid to compensate a person who suffers loss as a result of the contravention. The court can also fashion orders under s87 that will do justice in the situation - for example, the court can order that remedial work be done, or replacement goods and services provided.

Contraventions of s52 have civil consequences. You do not commit a criminal offence if you breach s52. But there are more specific prohibitions of false or misleading conduct elsewhere in the Trade Practices Act that do create criminal offences. For example, s53 makes it an offence to make a false or misleading statement about a number of matters, including:⁵

- the price of goods or services;
- the goods or services having endorsement, sponsorship or affiliation they do not have;
- the rights and remedies that a consumer has in relation to the supplier.

Section 53A makes it an offence to make false or misleading statements with respect to land,⁶ and s53B makes it an offence to make a false or misleading statement about terms and conditions and other matters relating to employment.⁷

There are other specific provisions that effect the quality of information provided by suppliers to customers. Section 71(2), for example, implies a term into contracts for the supply of goods which provides that the goods must be fit for their purpose.⁸ The term is designed to hold suppliers accountable for the specialist advice they give to customers about the suitability of their products. The Sale of Goods Act 1923 includes a similar provision.⁹

Part V Div 1A of the Trade Practices Act also provides that suppliers must comply with any product information standards that are in force in relation to particular products. Section 65E empowers the Minister to declare product information and safety standards.¹⁰ Section 65D¹¹ prohibits a corporation from dealing in goods that do not satisfy a relevant product information standard. The information standard may require disclosure of information relating to performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of goods.

The legal system provides a number of measures - most

notably s52 of the Trade Practices Act - that have the effect of promoting more effective disclosure so that consumers are able to make more informed decisions.

Does the legal system protect consumers from exploitation and pressure?

We have already seen that s60 of the Trade Practices Act prohibits coercion and undue harassment. The consumer who has been exploited or treated unfairly has other sources of relief under the Act and elsewhere.

The courts have always had the power at general law to decline to enforce legal rights where it would be outrageous or offend good conscience to do so. The approach of the legal system to unconscionable conduct was demonstrated in *Commercial Bank of Australia Ltd v Amadio*.¹² In that case, a bank had taken security over the home of the parents of one of the bank's customers. The bank knew that the customer had approached his parents for help but had not explained the real risks of giving security to the bank. The bank also knew that the parents were not commercially sophisticated and that they did not have a good grasp of English. The court held the bank was not permitted to enforce its legal rights under the security arrangement because it would offend good conscience to do so. Mason J explained at 461:

"Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest."

A corporation that engages in unconscionable conduct at general law is deemed to contravene s51AA of the Trade Practices Act.¹³ Courts have access to a wider range of remedial powers under the Act than they possess at general law - most obviously the power to make orders under s87 which are fashioned to do justice as between the parties in the circumstances.

Section 51AB of the Act includes an independent source of relief for consumers complaining of unconscionable conduct. Section 51AB(2) sets out the factors that the court will take into account when it characterises the conduct of the supplier. Section 51AB provides:

- (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the "consumer"), the Court may have regard to:
 - (a) the relative strengths of the bargaining positions of the corporation and the consumer;
 - (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.
- (3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.
- (4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:
- (a) the Court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

In New South Wales, the Contracts Review Act 1980 provides the consumer with relief from harsh or unfair contracts. Section 7 of that Act permits the court to intervene and make a range of orders where the contract was made in circumstances that make it unjust.¹⁴

These provisions establish a minimum requirement of fair dealing in relations between suppliers and their customers.

Does the legal system protect the consumer from defective, unsafe or unsuitable goods and services?

The legal system provides a range of remedies to the consumer complaining that goods or services are defective or unsuitable.

The terms implied by Part V Div 2 of the Trade Practices Act and the Sale of Goods Act require that goods be fit for the purpose for which they are sold, and that they be of merchantable quality. Goods will not be of merchantable quality within the meaning of the Trade Practices Act if they are not fit for all of the purposes for which goods of that kind would ordinarily be used having regard to the price, description and other circumstances.

Section 74 of the Trade Practices Act implies a term into

contracts for the supply of services that the services will be rendered with due care and skill. There is also an implied term that the services will be suitable for the purpose for which they are supplied.¹⁵

The implied terms are incorporated into the contract between supplier and consumer. But the legal system recognises that a claim against the retailer is not always the most effective remedy for the consumer. As a result, Part V Div 2A of the Trade Practices Act also creates rights of recovery for defective goods which may be exercised directly against the manufacturer or importer of goods.

Part VA of the Act creates a product liability regime that recognises a consumer's right to claim against the manufacturer or importer of defective goods that are unsafe. Manufacturers and importers can be held responsible for loss or damage caused by defective goods.

The product liability regime in Part VA supplements the general law. The courts recognised that a consumer could sue the manufacturer of negligently manufactured goods in *Donoghue v Stevenson*.¹⁶ In that case, a person purchased a bottle of drink from a retailer which had been manufactured by someone else. The drink contained an impurity – a snail that had somehow made its way into the bottle during the course of the manufacturing process. The ultimate consumer of the drink became ill after drinking the contents of the bottle.

Prior to the decision in *Donoghue*, a consumer who was injured by negligently manufactured products could only sue the person with whom he or she had a contract – such as the retailer. *Donoghue* permitted actions to be brought against the manufacturer.

Does the legal system promote more efficient production and distribution of services - helping to lower the cost to the consumer?

The legal system's allocation of risk away from the consumer is not simply an exercise in identifying the defendant with the deepest pockets. The decision in *Donoghue* and the product liability regime recognise implicitly that the consumer and the retailer are not necessarily in a good position to assess and manage the risk associated with defective goods. The customer in *Donoghue* had no way of guarding against the risk of impurities in the drink; the retailer who acquired the drink in a sealed package from the manufacturer was in a similar position. Only the manufacturer was able to eliminate the danger of contamination. Manufacturers can take steps to manage their manufacturing process in such a way that foreign bodies do not make their way into products. Manufacturers are also in the best position to identify design faults and other defects in the product.

In a perfect world, the parties to a consumer transaction would recognise this reality and insist on allocating the risk to the retailer or manufacturer at the time of contract. But bargaining over these rules in advance is costly. Consumers do not have the time, resources or expertise to negotiate over every eventuality; nor, for that matter, do the suppliers.

The costs associated with negotiating the bargain are known as transaction costs. The legal system helps to reduce transaction costs, which simplifies and reduces the real cost of supply to the consumer. If the law is able to anticipate what the parties would have agreed was an appropriate rule to apply in a particular event without putting the parties to

the expense of actually negotiating, the parties are able to stream-line their relationship. As a result, a consumer does not need to negotiate with a supplier over whether the goods he or she has purchased are in fact the ones he or she asked for: s70 of the Trade Practices Act implies a term into contracts for the supply of goods that provides that the goods will conform to their contractual description. Similarly, the customer does not have to bargain with the supplier over what will happen if the goods do not work: s71 of the Act implies rules providing that the goods will work as promised.

In this way, the legal system relieves the parties of the obligation (and expense!) of discussing things that should go without saying.

Does the legal system help the consumer to access a wider range of goods and services? Does it help consumers to access lower prices and higher quality?

In addition to the rules designed to promote fair trading, the legal system also promotes competition. The Trade Practices Act includes a range of provisions in Part IV that target anti-competitive business practices.

The legal system's pursuit of competition is based on the assumption that competition promotes the welfare of consumers. The rivalry between firms leads to lower prices and better quality goods and services as traders attempt to get an edge over their competitors. Competition law is designed to prevent firms from curtailing their rivalry and seeking a comfortable coexistence at the expense of consumers. Even government-owned trading enterprises are subject to competition laws.

The provisions in Part IV catch a range of anti-competitive practices, including:

- misuse of market power;¹⁸
- anti-competitive agreements, including agreements to fix prices and share markets;¹⁹
- certain kinds of exclusive dealing, including requirements that a customer or supplier acquire goods or services from a third party;²⁰
- acquisitions and takeovers that might substantially lessen competition.²¹

Part IV also includes a range of measures designed to combat boycott activity, especially boycotts arising out of certain kinds of industrial action.

A corporation that contravenes a provision of Part IV is liable in most cases to a pecuniary penalty (as opposed to a fine) of up to \$10 million.²²

Are the rights recognised by the legal system practically enforceable?

While the legal system creates a battery of measures that are designed to protect consumers, there can be no meaningful protection unless those rights are readily accessible. Can consumers actually take advantage of the measures which are available?

One obstacle to consumer action is ignorance and misinformation. If consumers are unaware of their rights, or if suppliers are able to mislead consumers about the remedies available to them, consumers will not be able to obtain relief against misconduct.

The law treats misrepresentations about consumers' rights very seriously. For example, a corporation that misinforms a consumer about their rights to return goods or obtain a refund contravenes ss52 and 53(g) of the Trade Practices Act. Contravention of s53 is a criminal offence. (Remember that consumers have a statutory right to rescind a contract for the sale of goods under s75A²³ if there has been a breach of one of the terms implied under the Act, such as the implied condition that the goods will be fit for their purpose or of merchantable quality.)

The law also prevents suppliers from attempting to exclude terms implied under Part V Div 2 of the Trade Practices Act from consumer contracts. The prohibition on "contracting out" is found in s68.²⁴ Other provisions, such as ss52 and 53, may not be excluded. The legal system prevents unscrupulous suppliers from using the fine print of a contract to strip a consumer of his or her rights.

While the law entrenches consumer rights, the consumer may still experience some difficulty in accessing a remedy. Difficulties include:

- the cost of commencing proceedings in a court or tribunal. Legal action of any kind is expensive and time-consuming. It is particularly difficult to justify where the amounts involved are relatively small. Even specialist consumer tribunals may not adequately address the cost problem;
- regulators who might take up a matter on the consumer's behalf have limited resources;
- there is sometimes confusion as to who is the appropriate regulator in a particular case. Does one deal with the state Department of Fair Trading, or the Australian Competition and Consumer Commission (ACCC)? Apart from the confusion caused by the federal-state division, there may be confusion caused by the distribution of administrative responsibilities within a government department. For example, the ACCC and the Australian Securities and Investments Commission (ASIC) both administer laws regulating misleading or deceptive conduct and unconscionability. Both fall under the jurisdiction of the federal treasurer. But ASIC has responsibility for dealing with conduct in relation to financial services, while the ACCC deals with other conduct.

Even so, the threat of action by a regulator with the accompanying bad publicity can be an effective deterrent to many types of misconduct. Consumers are also assisted by the fact that some of the rules that are designed for their protection may be enforced by third parties who are unaffected by the conduct. Ordinarily, a court will not entertain legal proceedings that are brought by someone who has no interest in the matter. But under the Trade Practices Act, strangers – including competitors of the offender and public interest advocacy groups – can bring actions for misleading or deceptive conduct. Consumers end up being protected when the rivalry between firms spills over into the court room.

¹www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s60.html. For an interesting illustration of the application of 260, see *ACC, v MCaskey* www.austlii.edu.au/au/cases/cth/federal_ct/2000/1037.html

²www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s65.html

³www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s52.html

⁴www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s87.html

⁵www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s53.html

⁶www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s53a.html

⁷www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s53b.html

⁸www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s71.html

⁹www.austlii.edu.au/au/legis/cth/consol_act/soga1923128/s19.html

¹⁰www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s65e.html

¹¹www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s65.html

¹²(1983) 151 CLR 447.

See at www.austlii.edu.au/au/cases/cth/high_ct/151clr447.html

¹³www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s51aa.html

¹⁴www.austlii.edu.au/au/legis/nsw/consol_act/cra1980201/s7.html

¹⁵www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s74.html

¹⁶[1932] AC 562

¹⁷www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s70.html

¹⁸www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s46.html

¹⁹www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s45.html

²⁰www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s47.html

²¹www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s50.html

²²www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s76.html

²³www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s75a.html

²⁴www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/s68.html