

OPINION

A letter to Faye Lo Po

Faye Lo Po has just been appointed Minister for Consumer Affairs in the New South Wales ALP Government following the 25 March election. I thought I would write her a letter.

Dear Minister

It is time for consumer affairs to be at the forefront of action to enhance competition within Australia. Competition works better when unequal parties get some help. You can use the courts to achieve a large measure of equality for some of the most disadvantaged groups within our society.

No doubt you have now been briefed by your Department's all male, mostly lawyers, senior executive service about issues facing the Department. As an old hand from the NSW bureaucracy you will be able to work out how to get your Department to go where you want it to go rather than the reverse, and it surely is time for a new direction.

Developing the law

As you know the *Fair Trading Act 1987* (NSW) mirrors the *Trade Practices Act 1974* (Cth) but if you look at the use of that latter Act, the courts have developed their doctrines for s.52 in an environment far removed from its consumer protection origins. The overwhelming body of cases, under s.52 especially, have been business to business private litigation. The level of prosecutions has fallen off over the years as the Trade Practices Commission changes the focus of its activities.

You should direct your Department to follow a strict policy of proceeding in the Supreme Court on all its major investigations rather than through the Local Courts. In this way you will be able to build a body of law directly related to consumer protection.

Currently your Department has about four or so matters in the Supreme Court, one involving a retirement village, two concerning sales of advertising to small businesses and one involving product safety. Each case involves important issues of law but they have not come about as a result of a specific plan of action to identify areas of law to test. Rather they have resulted from the efforts of individual officers. The time has come to have a plan rather

than perpetuate management by caprice.

Intervention in court cases

The Department, and you as Minister, have the power to intervene in court matters under various statutes, e.g. *Contracts Review Act 1980*, *Credit (Administration) Act 1984* and *Fair Trading Act 1987* where someone else has already commenced action. You also have the power to approve legal aid and it seems a combination of these two powers is a significant way of taking initiatives on behalf of a large number of consumers. If you want a list of ideas let me know.

Ask for a report on the implications of the High Court decision in the matter of *Carnie v Esanda* (unreported, 23 February 1995) in relation to representative actions involving the *Credit Act 1984*. You might also ask why the Department did not join in the action, which was pursued by the Consumer Credit Legal Service (CCLS). Perhaps your Department could pick up the CCLS's legal bill, after all it was doing the Department's work for it.

Quality of departmental investigations

Once you decide to turn around the investigative and litigation thrust of the Department you will need to make sure your investigators are up to the job.

Ask the Department to let you know what Hunt J of the NSW Supreme Court said in his decision of 9 February 1995 in the matters of *Holloway v Gilport Pty Ltd* and *Holloway v Zygald*. The matter involves a prosecution and the interim decision dealt with evidentiary issues including the manner of conducting interviews with traders suspected of breaching the *Fair Trading Act*. While at the time of writing the court had not given its final judgment, Hunt J noted the following about the Department's practices:

Certainly the Department's procedures can (and should) be criticised strongly for not requiring that a copy of such record of interview must be provided to anyone so interviewed. It does not even now have such a procedure and that situation must be changed.

Now since this decision the Department has moved to change procedures,

although why it took comments from a judge to achieve this is a mystery. It has, for example, purchased one new tape recorder for its investigators (giving it a total of two) and ordered all interviews to be taped. It has also required 'Action Plans' to be prepared for all investigations.

You might care to ask for a detailed plan setting out in full the coherent, comprehensive procedural and staff development steps the Department is to take to deal with Hunt J's comments.

Aboriginal consumers

Your predecessor issued a report titled 'Grin and Bear It' in December 1994 dealing with the experiences as consumers of NSW's Aboriginal population. It came to a number of conclusions but one of these was that only 2-3% of Aboriginals had an awareness of Consumer Affairs or its function.

In the Department's Annual Reports for 1992-93 and 1993-94, reference was made to the methods used to reach Aboriginals with the implication that despite the revealed marketplace abuses educational resource material was all that was really needed.

'Grin and Bear It' similarly revealed major disadvantages faced by Aboriginals, and the Trade Practices Commission has had no trouble identifying, exposing and remedying significant abuses within the insurance industry involving Aboriginals. Your Department since December has sent one Investigator to Bourke to meet local consumers. Hardly proportional.

It seems clear a major enforcement effort in relation to motor dealer, retail and credit practices should be carried out in the Supreme Court as a means of making a significant impact on the economic well being of this group of the population.

Generally speaking you might ask the Department in relation to other specially targeted groups how it evaluates its impact and how it knows what marketplace problems they face. If after several years of attention to Aboriginals, its own December report reveals so little awareness and so many problems, is it not time to rethink?

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Where Ludlow tries to provide a more critical social history, the limits of space often turn the commentary into sweeping generalisations about social attitudes and motives that occasionally seem to miss the point. While Ludlow recognises that there is a constant problem of 'punishing children for welfare matters', she seems to see this as incidental to the system rather than intrinsic to the ideology of welfare-oriented practice that conflates definitions to see criminality as a manifestation of the neglected child and (almost) all (other) children in need of some kind of welfare intervention.

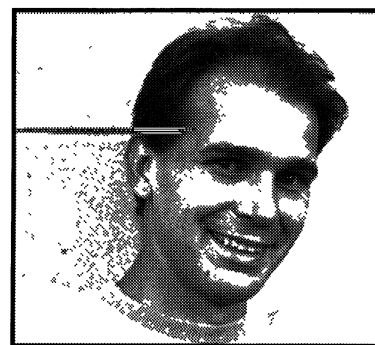
As a teaching text *For Their Own Good* would perhaps be most suited to

high school students and would be useful across disciplines. The language is clear and straightforward and there are some excellent photographs (that are occasionally spoiled by over explanatory-captions), including a terrific one of a determined Rex Jackson wielding an axe and a striking image of a before and after shot of a boy being dressed for 'boarding out': 'Only the child's wary facial expression has not changed'.

*Look out kid
Don't matter what you did
Walk on tip toes . . .
Bob Dylan*

MEHERA SAN ROQUE
Mehera San Roque is in the final semester of her law degree.

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Special projects

You have a Departmental body called the Special Projects Unit which operates almost exclusively to identify issues you might like to pursue. A report was done within the Unit on a review of the furniture industry in October last year and your predecessor was probably meant to be the beneficiary of its findings.

The report is going back and forth within the Department and the latest is that a brochure for consumers will be prepared. Big deal. If there are problems in the industry get them in front of the courts. Anyhow, why not ask what has happened to the report of the review.

At the same time, throw in a couple of questions about a Supreme Court order to repay consumers a total of \$345,104. The order was made on 28 September 1990 in the matter of *Holloway v Witham* (1990) 21 NSWLR 70 but the money has never been paid. What steps have been taken to collect it? A decision on an unrelated matter in this case is awaited from the High Court but should not the Department be pursuing the money.

Killer toys

Please do not fall for the trap of getting media coverage about banning some unsafe toy. Let your bureaucrats get their photos in the paper. There are more important issues in product safety where you can have a major impact.

Late in 1994 the Department did a survey of about 80 traders and detected

more than 100 offences relating to breaches of regulations about unsafe products. Those traders have in recent times been re-inspected with the result there has been a very high re-infringement rate revealed. You can ensure the Department initiates major litigation in the Supreme Court on a mass scale to change market place behaviour. This will be more important than a photo-opportunity with some fluffy toy. Ask for an interim report now.

Some organisation matters

The Office of Real Estate Services and the Registry of Co-operatives have been returned to your administration. Amalgamate all their investigators with the rest of the Department, it will save money and provide the widest possible flexibility in dealing with issues. You might also ask for a cost benefit analysis of the practice of the Real Estate Services Council outsourcing its legal needs to private firms. Perhaps it would be cheaper to use your Department's legal officers. Ask for a report about it.

Finally, consumer problems are not just the difficulties of atomistic individuals requiring a one-off remedy. The market place needs incentives from time to time to operate equitably. Vigorous litigation in the superior courts is one such method.

Yours faithfully

Peter Wilmschurst
Peter Wilmschurst teaches law at Macquarie University.