

Chapter 2
Just Who is the Consumer?
Policy Rationales and a Proposal for Change

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I The Setting

Who comes within the ambit of consumer protection? While it is trite to say that we are all consumers, what this chapter reveals is that remarkably, in some instances, transactions and the people who participate in them are considered unworthy of protection. The basis of this is not irrefutable logic or common sense, but merely an arbitrary application of how a particular judge will rule on the meaning of words. Such an approach must stop.

All jurisdictions grapple with the concept of the person deserving of protection in the name of consumer law and policy, yet none has taken what we see as the obvious step. This would be to treat all transactions as consumer orientated to begin with, but allow well-resourced parties (such as large firms) to contract out of the protective regime should they wish. In effect, allow these parties to bargain away their imposed protection when it meets their ends. In other words, we would start from a premise of protection to all, and only allow a contracting out to those entities of a particular size or turnover, or those which have the financial and legal capacity to bargain away their protections in return for business arrangements unavailable to the household consumer. For example, the supplier to a large retailer may have a shared revenue model whereby sales profits from the retailer to consumers are split. The supplier and retailer may also have contractual agreements concerning the return of goods or they may have negotiated a pricing structure built around the economies of scale that can be achieved with multiple supplies of a particular good. In these scenarios, it may well be appropriate that the transaction not invoke the protections of consumer guarantees. However, outside these limited circumstances, we argue that all transactions should be considered as consumer-orientated.

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