

SOME REFLECTIONS ON CONSUMER PROTECTION AND THE LAW REFORM PROCESS*

A J DUGGAN**

INTRODUCTION

The past twenty years have seen a proliferation of statutory developments in the area of consumer protection. Early legislation, at the state level, included door-to-door sales laws, along with statutes establishing consumer protection agencies and, in some states, consolidating and revising existing laws governing misleading advertising and merchandise marking. A major development occurred in 1974 when the Commonwealth entered the field with the enactment of the *Trade Practices Act*. Part V of the *Trade Practices Act* incorporates provisions governing misleading conduct, product safety and mandatory implied terms in consumer transactions. These provisions have been added to, following statutory amendments, on a number of occasions. The most important innovations have been the inclusion in 1977 of provisions governing manufacturers' liability, and the enactment in 1986 of a provision dealing with unconscionable conduct.

In the period 1985–1990, most of the states moved to adopt *Fair Trading Acts*, which mirrored the consumer protection provisions of the *Trade Practices Act* with a view to filling the gaps in its coverage that resulted from constitutional limitations on the Commonwealth's legislative powers. Other important developments at the state level in the period under consideration have included the enactment of consumer (small) claims tribunals legislation, the upgrading of product safety laws, and the enactment of legislation governing industries such as car sales, house building and travel. Comprehensive consumer credit legislation was enacted in South Australia in 1972, and in the other states (except Tasmania) on a more or less uniform basis between 1984 and 1987. Manufacturers' liability legislation was enacted in South Australia in 1974 and in the Australian Capital Territory in 1975–1977. In 1980, New South Wales enacted the *Contracts Review Act*, dealing with unjust contracts, and this legislation was subsequently used as the basis for the unconscionable provisions of the 'uniform' *Credit Acts*.

The purpose of this paper is not to look at any of these measures in detail.

* This article is an updated version of a paper presented at the 27th Australian Legal Convention in Adelaide in September 1991.

I have benefited enormously in writing the paper from participating in a series of seminars, entitled *The Limits of Freedom of Contract*, conducted by Professor Michael Trebilcock at the University of Melbourne in May 1990. Professor Trebilcock, who is Director of the Law and Economics Programme in the University of Toronto Law Faculty, was a guest of the Melbourne Law School during May and June of 1990.

I am grateful to Professor Trebilcock and also Mr Peter Carroll, Dr Sam Ricketson, Dr Philip Williams and Professor Harold Luntz for their comments on an earlier draft.

** Henry Bournes Higgins Professor of Law, Monash University.

Rather, it is to examine the broader picture and, in particular, to: (1) ascertain the values that underlie this extraordinary burst of legislative activity; (2) critically analyse the way in which objectives have been identified and pursued; and (3) assess the legislative processes, with particular reference to the issue of uniform laws.

It will be argued that, whatever might be the merits of particular initiatives looked at in isolation, the broader picture is marred by a failure to be sufficiently explicit about values, to focus sharply enough on objectives, and to give to uniformity the priority it deserves. In these respects, it is time to take stock before making more new laws or revising old ones.

THE VALUES

INTRODUCTION

Despite the proliferation of statutory initiatives, there is no clearly articulated philosophy of consumer protection. Proponents of intervention commonly speak of the need to eliminate unsafe products from the market, to provide consumers with more information so that they can choose effectively between competing goods or services and to ensure the fairness of fine print clauses in standard form contracts.¹

However, these kinds of sentiment, though unquestionable laudable, explain very little. They ignore the costs of intervening, and for this reason offer no insights into when intervention might or might not be appropriate. Safety (for example) is not an absolute concept. If it were, the wheel would presumably be banned.² The same is true of information, because the provision and absorption of information is not costless, and also of fair contracts (assuming it to be generally understood what is meant by fairness in the first place). Once it is recognised that concepts such as these are relative, the inadequacy of the suggestion that consumer protection is about safety, information or fairness becomes evident. It is inadequate because it takes no account of the questions: (1) how much safety, information or fairness do we want?; (2) (correspondingly) how much (and of what) are we prepared to give up to achieve the desired level?; and (3) is legislation the best way of bringing the change about? These hard questions are sometimes avoided altogether, perhaps through oversight, or perhaps deliberately, because to ask them is considered to be brutish. Nevertheless, failure to ask them is a recipe for inappropriate policy responses, leading to perverse outcomes and social waste.

Given the insufficiency of the notion that consumer protection is concerned with the pursuit of safety, information, fair contracts and the like (at

¹ See, eg J Ziegel, 'The Future of Canadian Consumerism' (1973) 51 *Canadian Bar Review* 191, endorsing President Kennedy's Consumers' Bill of Rights Message of 1962. See also A J Duggan and L W Darvall (eds), *Consumer Protection Law and Theory* (Law Book Company, Sydney 1980), Preface (*nostra culpa*).

² Commonwealth of Australia, *Industry Commission Report on Product Liability* (Report No 4, 1990), 9 (hereinafter to as '*Industry Commission Report*').

all costs), a deeper explanation must be sought. In what circumstances, and to what ends, might the regulation of market activity be justified in the name of consumer protection? Is there a unifying theme to link such apparently disparate measures as product liability rules and truth in lending requirements in credit transactions? The answer is that nearly all consumer protection measures are attributable to one or more of three sets of values. These are: (1) welfare considerations; (2) equity considerations; and (3) an eclectic mix of concerns often grouped together under the pejorative heading, 'paternalism'.

WELFARE CONSIDERATIONS

Consumer preferences lie at the heart of welfare considerations. The normative prescription welfare considerations entail is that people should get what they want. An individual's wants are subjective in the sense that he or she is presumed to know better than anyone else what they are. This is not to say that individuals make infallible choices, or even that they are necessarily very smart. The assumption is, simply, that they are less likely to make mistakes about what they want than is a third party, such as the state. Individuals' wants are subjective in the further sense that they are to be taken as given; it is not legitimate for one person to question the validity of another person's preferences. The only externally valid indication of a preference is the preference-holder's willingness to pay (in the sense of giving something else up) in order to have it fulfilled. Correspondingly, the strength of a preference is measured by how much the preference-holder is willing to pay (give up). From a libertarian perspective, a measure that subverts preferences is *prima facie* bad because it represents an unjustified intrusion on individual freedom. From an economic perspective, such a measure is *prima facie* bad because it threatens a misallocation of resources.

For these reasons, welfare considerations favour minimalist intervention. However, this is not to say that they leave no room for consumer protection initiatives. The welfare case for consumer protection runs in large measure as follows.³ The satisfaction of preferences depends on freedom of choice, and this in turn depends on the availability of information. In an unregulated environment, consumers have various sources of information open to them, including: self-help (inspection of a product before purchasing, and learning from previous purchasing mistakes); third parties (friends, travel agents, lawyers, brokers, retailers, consumer associations, and so on); and sellers and manufacturers (through advertising, product packaging, labelling, and the like).⁴ However, there will be situations where none of these sources of infor-

³ In the United States, Federal Trade Commission officials have been prominent in developing the welfare case for consumer protection. See, eg R Reich, 'Toward a New Consumer Protection' (1979) 128 *University of Pennsylvania Law Review* 1 and Beales, Craswell and Salop, 'The Efficient Regulation of Consumer Information' (1981) 24 *Journal of Law and Economics* 491.

⁴ This last category may include other firms which, under certain conditions, will have an incentive to expose shortcomings in a competitor's product, or false claims made by a competitor. This might occur in the market (eg by resort to comparative advertising) or

mation assist. For example: consumers are vulnerable at the hands of fly-by-night operators who have no investment in goodwill; some latent product defects may not manifest themselves until years after purchase;⁵ in some cases, there may be risks that are more or less common for all products of a class, so that the incentive is lacking for any one firm voluntarily to disclose them.

These are all examples of breakdowns on the supply side of the market for information. Breakdowns may also occur on the demand side. For example, some consumers (whether because of inertia, ignorance or otherwise) may fail to search for information that is readily available, while others may search but have trouble assimilating the results. Under some conditions, these shortcomings may not matter. In particular, the demand generated by informed consumers at the margin may be sufficient to influence market outcomes to the benefit of consumers across the board. In other words, non-searchers may get a free ride on the activity of searchers.⁶ However, this may not happen where the supplier is in a position to discriminate between searchers and non-searchers by offering a better deal to the former than to the latter.⁷

Another example is where consumers underestimate the value of information about a particular product characteristic, so that firms lack the incentive to supply it. This notion has a tautological air about it, but the end result is clear enough, that is to say, less than optimal amounts of information being available in respect of the product characteristic in question. Under these conditions, consumers may rely excessively on price differences as a basis for choice. This can lead to perverse outcomes. For example, where the hidden product characteristic in question is related to its quality, consumers shopping on the basis of price alone are likely to opt for the cheaper, lower quality alternative. If this happens systematically, the lower quality product may eventually drive out the higher quality (high priced) alternative.⁸

in court (eg by means of an action for passing off or unfair competition, or for breach of s 52 of the *Trade Practices Act 1974* (Cth)).

⁵ Thalidomide and asbestos-related products are cases in point. In some cases consumers may never discover the truth (eg that motor vehicle repairs recommended by a repairer were unnecessary, or that the curative properties claimed for an over-the-counter drug were illusory).

⁶ This consideration is commonly raised as part of the response to attacks made on standard form contracts. See, eg M Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 *University of Toronto Law Journal* 359.

⁷ Eg sellers of second-hand cars, consumer credit and certain kinds of insurance (especially consumer credit insurance) may enjoy this advantage. The possibility is graphically illustrated, in relation to the second-hand car dealer, by John Steinbeck's unforgettable depiction of the used car yard in *The Grapes of Wrath*. See generally, A Schwarz and L Wilde, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) 127 *University of Pennsylvania Law Review* 630.

⁸ Akerlof, 'The Market for "Lemons": Qualitative Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488. The 'lemons' problem may lie behind a range of consumer protection initiatives, including laws governing unsafe and defective products, occupational licensing and certification schemes, and regulation of standard form contracts by unconscionability legislation and other means.

These considerations suggest that consumer protection measures which are designed to compensate for information deficiencies in the market may be welfare-enhancing. This will be true where the cost of the intervention in question is less than the benefit, namely increased consumer satisfaction (consumers getting more of what they want). The cost-benefit imperative also requires that if there is a choice between regulatory measures all yielding the same level of benefits, the choice should be exercised in favour of the least costly alternative. The least costly alternative is likely to be the one that is the most tightly geared to the specific problem being addressed, because then the risk of creating distortions or unwanted side-effects will be minimised. Two implications flow from this. The first is that disclosure requirements are in general to be preferred to more stringent forms of legislation, such as composition or design standards for products, or occupational licensing requirements for service providers,⁹ and that bans should be adopted only as a matter of last resort.¹⁰ The second implication is that, preferably, regulations should be targeted at specific products or industries. However, the need for certainty and simplicity in the law may be a countervailing factor, making regulation that is general in scope the preferred alternative. This may explain why, for example, there is a general prohibition on misleading advertising, rather than rules that are specifically directed to the kinds of problem area identified above, and why product liability rules apply across the board, rather than being restricted to cases where consumers are particularly likely to be at risk for the reasons outlined above.

EQUITY CONSIDERATIONS

Welfare considerations take the prevailing distribution as given. They have nothing to say about whether it might be good or bad. The concern is with the satisfaction of consumer wants. Wants are signalled by willingness to pay, and no distinction is drawn between this and ability to pay. A redistribution of wealth might result in a different allocation of resources, but welfare considerations provide no basis for preferring one allocation over the other. Both may be optimal.¹¹

Equity considerations focus not on the acquisition of wealth, but on sharing. The goal is a fair distribution. The reference to fairness implies a theory about prior entitlements that is lacking from welfare considerations. In truth,

⁹ For this reason, economists generally prefer certification schemes to licensing. Under a certification scheme, only practitioners who meet the statutory criteria can hold themselves out as being certified, but an uncertified practitioner is not prohibited from carrying on business: see, eg M Friedman, *Capitalism and Freedom* (Chicago, University of Chicago Press, 1962), Chapter 9.

¹⁰ For example, in relation to products that lack redeeming social benefits so that no fully informed consumer would buy them.

¹¹ In the Paretian sense, ie that no-one can be made better off without someone else being made worse off.

Rights theorists, in particular, are critical of the economic approach to law for the reasons touched on in the text. See, eg R Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978).

though, there is no universally accepted notion of fairness. Opinions differ, and sometimes conflict, as to how much equality is a good thing.¹²

Various theories of justice have emerged based on equity considerations. Of these, three warrant special mention in the context of consumer protection, namely: (1) commutative justice; (2) loss-shifting; and (3) distributive justice.

Commutative Justice

Commutative justice is concerned with preserving each citizen's share of the prevailing distribution. It is complementary to the notion of distributive justice, which is concerned with how society's wealth is divided among its citizens in the first place.¹³ The underlying notion is that any redistribution of wealth that is desired in the name of distributive justice should be carried out systematically in accordance with prevailing community perceptions of what is fair. Redistribution should not be allowed to occur *ad hoc* as a result of interactions between parties. In other words, no one should be allowed to gain at another's expense. Where such interactions occur, commutative justice demands that the parties be restored to their original positions. This idea, or a variant of it, is the basis of the modern concept of unjust enrichment. It is also reflected in tort law which, as a general rule, provides for the award of damages that will put the plaintiff in the same position as if the wrong had not occurred. In the context of consumer protection, statutory product liability rules which require a manufacturer to compensate a consumer for loss caused by product defects appear at least in part to be motivated by commutative justice considerations. Similarly, the concept of commutative justice is evident in the equitable doctrine of penalties, the concern of which is to ensure that one contracting party does not gain a windfall from the other party's breach. Statutory versions of this doctrine, in legislation such as the *Hire-Purchase Acts* and the *Credit Acts* appear, in part at least, to be directed to the same end.¹⁴

Gordley has argued that commutative justice considerations can be applied to the contracting process to derive a principle of equality of exchange.¹⁵ An unequal exchange offends against the notion of commutative justice because it necessarily results in one party gaining at the other's expense. According to Gordley, an exchange is unequal if the contract price deviates substantially from the market price,¹⁶ and in those circumstances the contract should be set aside. Elements of this idea were discernible in the re-opening provisions of the old money-lending laws, which allowed a loan contract to be varied or set

¹² At one end of the scale is the notion of complete equality, while close to the other end is Rawls' theory of justice, which is based on a blending of welfare and equity considerations: *A Theory of Justice* (Oxford, OUP, 1972).

¹³ The distinction derives from Aristotle's *Nicomachean Ethics*, Book V, Chapters 3 and 4. For a discussion of the Aristotelian concept of justice in a consumer-related context, see J Gordley, 'Equality in Exchange' (1981) 69 *California Law Review*, 1587.

¹⁴ See, eg *Hire-Purchase Act 1959* (Vic), s 15 and *Credit Act 1984* (Vic), s 109.

¹⁵ Gordley, *op cit*.

¹⁶ Or an approximation thereof, in situations where the market price is not ascertainable independently of the transaction itself (as in the case of a house purchase).

aside on the ground that the interest rate was excessive, even if it appeared to have been freely agreed to by the borrower. Corresponding provisions are now to be found in the *Credit Acts*.¹⁷

Implicitly, commutative justice is to be achieved through reliance on the rule of law, while the primary instruments of distributive justice are the taxation and welfare systems. However, this division of functions has not gone unchallenged, and some argue that it may be appropriate to use the rule of law in the pursuit of distributive justice. These arguments are canvassed further below.

Loss-shifting¹⁸

Legal rules governing the payment of compensation have the effect of shifting the burden of loss from the victim of a legal wrong. This loss-shifting effect is often also the purpose underlying compensation measures. For example, in the context of product liability rules, it is commonly said that the manufacturer, not the consumer, should bear the cost of product-related accidents because the manufacturer is better placed than the consumer to absorb it. More particularly, the manufacturer is assumed to be better able than the consumer to insure against the risk of accident,¹⁹ so that by imposing liability on the manufacturer, the law facilitates the spreading of the loss across a substantial segment of the community. The underlying intuition is that the aggregate adverse effects of a shared loss are likely to be less than those felt by an individual when the loss is allowed to lie where it falls. Where insurance is not available to the firm, or is available but at too high a cost, an alternative is to raise prices, and, if this is done, the loss will be spread among all purchasers of the product. If the firm is constrained in its ability to raise prices, for example, by competition or statutory controls, it may end up having to bear

¹⁷ See A J Duggan, S W Begg and E V Lanyon, *Regulated Credit: The Credit and Security Aspects* (Sydney, Law Book Co, 1989) para 10.3.4.

See also *Trade Practices Act* 1974 (Cth), s 52A, which prohibits unconscionable conduct by a corporation in relation to a consumer. Section 52A(2) directs the court, in determining whether conduct is unconscionable, to have regard, among other things, to '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'.

¹⁸ Loss-shifting is treated here as an equity consideration. This involves assuming that the loss has already occurred. In other words, an *ex post* analysis is adopted. The alternative would be to proceed from an *ex ante* perspective, so that the focus is on risk, rather than loss. Risk-spreading is commonly treated as a welfare consideration, on the assumption that a person who is risk averse will be willing to pay for transfer of the risk to some other person (ie, to insure). Whether the issue is treated as one of loss-shifting (compensation) or risk-spreading (insurance) is, at least in the present context, a formal consideration. Nothing substantial turns on the point. In particular, however the characterization is made, the kinds of trade-off that are explored in Part (3), below, will continue to occur.

¹⁹ In theory, the consumer could take out first-party accident insurance, covering all accident risks however arising. Whether this is a less effective method of risk spreading than product liability insurance taken out by the manufacturer is an empirical question. Observation suggests that first-party accident insurance is rarely sought by consumers and is difficult to obtain. Why this might be so is beyond the scope of the present enquiry.

the loss itself. Such a prospect is commonly greeted with equanimity, on the basis that the firm, being presumptively wealthier than the consumer, can better afford the loss. This is the so-called 'deep-pocket' principle.²⁰

Loss-shifting considerations also underlie the linked credit provider provisions in the *Credit Acts*.²¹ These provisions apply in the case where a consumer purchases goods or services from a dealer, and arranges finance through the dealer with a third-party credit provider. Among other things, the provisions allow the consumer to sue the credit provider, if the dealer becomes insolvent, for damages arising from the dealer's misrepresentation or breach of the contract of sale. The provisions are limited to the case where there is an ongoing arrangement between the credit provider and the dealer with respect to the provision of credit. They derive from a recommendation of the Molomy Committee, which was cast explicitly in equity terms. It was said to be fair that, in the case of the dealer's insolvency, the loss should be borne by the credit provider, because it was likely to be better able than the consumer to sustain it.²²

There are three objections commonly taken to the use of civil liability rules for loss-shifting purposes. The first is that while the theory of loss-shifting suggests a reason why, say, the victim of a product-related accident ought to be compensated, it does not explain why the compensation should be paid by the manufacturer. On the contrary, the theory appears to suggest that if there is some third party who can spread the loss more effectively, or absorb it better, then it is that person, not the manufacturer, who should be made liable. From this perspective, a no-fault accident compensation scheme might be preferable to product liability rules. Correspondingly, some sort of statutory insolvency fund for dealers might be preferable to the linked credit provider provisions.²³

A second criticism that is commonly made of the loss-shifting rationale for liability rules is that compensation administered through the court system is

²⁰ For a compendious account of the development of these ideas, see Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14 *Journal of Legal Studies* 461.

²¹ Eg *Credit Act* 1984 (Vic), Part II. See also *Consumer Transactions Act* 1972-1983 (S.A.), Part II and *Trade Practices Act* 1974 (Cth), s 73.

²² Committee of the Law Council of Australia, *Report of the Attorney General for the State of Victoria on Fair Consumer Credit Laws* (1971) paras 5.1.1-5.4.5 (hereinafter referred to as the 'Molomy Committee Report').

For a critique of the loss-shifting (risk-spreading) rationale for linked credit provider provisions, see M Trebilcock, 'The Role of Insurance Considerations in the Choice of Efficient Civil Liability Rules' (1988) 4 *Journal of Law, Economics and Organization* 243, 255-7.

A stronger case for the measure can be made on welfare (loss prevention) grounds: imposing liability on the credit provider confronts it with the incentive to run solvency checks on dealers before establishing links with them, and from time to time during the currency of the arrangement (see A J Duggan, *Regulated Credit: The Sale Aspect* (Sydney Law Book Co, 1986), paras 14.4.1-14.4.8).

²³ For examples of this kind of measure, see *Motor Car Traders Act* 1986 (Vic) Part V; and *House Contracts Guarantee Act* 1987 (Vic). See also *Travel Agents Act* 1986 (Vic), s 46.

These initiatives in fact overlap to some extent with the linked credit provider provisions.

very expensive. Consequently, some deserving claimants may be deterred from proceeding, while others may have their damages entitlement substantially reduced by legal fees and court costs. For this reason too, from a loss-shifting perspective, some sort of social insurance or welfare scheme might be preferable.

The third criticism is that liability rules may be regressive. For example, where a manufacturer takes out product liability insurance, the premium is likely to be built into the price of the product. The price increase will normally be uniform across the board, so that the poor pay the same as the wealthy when the product is purchased. Nevertheless, the returns to the wealthy consumer are higher because loss of future earnings forms a substantial part of compensation payments. Once again, from a loss-shifting perspective, some form of social insurance scheme, funded through the taxation system, might be a better alternative.²⁴

The explanation usually given for preferring liability rules is that there are other values at stake, apart from loss-shifting, which also need to be taken into account. For example, in the case of product liability rules, there might also be a concern to ensure that manufacturers are confronted with the correct incentive to take cost-justified precautions against accidents. This is a welfare consideration.²⁵ There might also be considerations of commutative justice at work. However, where there are mixed objectives, it becomes necessary to ask whether they are compatible. It is conceivable, perhaps likely that the simultaneous pursuit of competing objectives will result in sub-optimal outcomes on both (or all) fronts.²⁶ This possibility is explored further below in the context of recent unsuccessful Australian attempts at product liability law reform.

Distributive Justice

Loss-shifting relates to the spreading of losses. Distributive justice refers to the spreading of income and assets, that is to say, the shifting of wealth from the rich to the poor in the furtherance of some concept of equality. The traditional mechanisms for redistributing wealth are the taxation and welfare systems. However, it is occasionally argued that this is also a proper function of the rule of law. For example, Caplovitz in his famous book, *The Poor Pay More*, suggested the use of interest rate ceilings and restrictions on credit providers' remedies as a means of shifting income from credit providers to low-income consumers in the United States urban ghettos.²⁷

²⁴ Cf A Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472, 498-510.

¹⁵ In the case of the linked credit provider provisions, imposing liability on the credit provider may induce the credit provider from time to time to run checks on the dealer's financial situation. This may be an efficient outcome if it is cheaper for the credit provider to run such checks than it is for the consumer: Duggan, *op cit* para 14.4.6.

²⁶ M Trebilcock, 'The Social Insurance — Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis' (1987) 24 *San Diego Law Review* 929.

²⁷ See also, Kronman, *loc cit*. Kronman argues that the rule of law may sometimes be a superior mechanism to taxation as a means of distributing income. Cf W Lucy 'Contract

Parts of the uniform *Credit Acts* appear to have been influenced by distributive justice considerations. For example, the Acts provide that if a credit provider fails to comply with the statutory requirements governing the form and content of credit contracts, the debtor is not liable to pay the credit charge.²⁸ This rule applies even where the credit provider's breach is a technical one, and the debtor has suffered no loss. It is true that the credit provider may apply to the Tribunal for full or partial reinstatement of the credit charge.²⁹ However, the Tribunals have been reluctant to order full reinstatement, even in the case of technical errors. To this extent, debtors receive a windfall. There are interest rate ceilings in force in Victoria (though not elsewhere),³⁰ and these appear to have been motivated, partly at least, by distributive justice considerations. Some of the Tribunal decisions under the provisions of the *Credit Acts* governing unjust contracts appear to be influenced by considerations of distributive justice. Restrictions imposed by the Acts on creditors' remedies might be similarly explained.³¹

This kind of statutory intervention can lead to perverse outcomes.³² For example, rate ceilings may result in some high risk borrowers being unable to obtain credit and in small loans being less readily obtainable. In either case, it is the low income consumer who is most likely to be disadvantaged by being deprived of what might be an important source of funds. This result is difficult to justify if the purpose of intervening in the first place was the relief of poverty.³³ Excessive restrictions on creditors' remedies, civil penalties for technical breaches and an over-eagerness to reopen contracts on the grounds of perceived injustice are likely to result in an increase in rates of credit charge. The rate increase may be discriminatory, in which case credit will become more expensive for those debtors who are, for example, most likely to default, or to attract the sympathy of the Tribunals in a reopening application pursuant to the provisions governing unjust contracts. Again, this can hardly be the right outcome where the object of the exercise was to ease the burdens of poverty. Alternatively, the rate increase may be across the board, in which case some consumers will end up subsidising others. This may be a congenial outcome from a distributive perspective, but it is impossible to be sure without knowing who will end up bearing the burden and what its effect on them might be.

as a Mechanism of Distributive Justice' (1989) 9 *Oxford Journal of Legal Studies* 132 and Richardson, 'Contract Law and Distributive Justice Revisited' (1990) 10 *Legal Studies* 258, 265-70.

²⁸ See, eg *Credit Act* 1984 (Vic), s 42.

²⁹ *Credit Act* 1984 (Vic) s 85.

³⁰ *Credit Act* (Vic), ss 150A and 150B.

³¹ Eg the prohibition on repossession without the Tribunal's consent, in a case where three quarters or more of the amount financed has been repaid. *Credit Act* 1984 (Vic) s 110.

³² See D Cayne and M Trebilcock, 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 *University of Toronto Law Journal* 396, where Caplovitz's prescriptions for poverty relief are criticized on this ground.

³³ The purpose may have been something else, eg, forcing the poor out of the credit market into the social welfare system (see below, p 263).

PATERNALISM³⁴

Paternalism is a pejorative term sometimes applied to measures which interfere with freedom of choice. Such measures are perceived as running counter to the notion that people themselves know best what is in their own interests. Paternalism is not always disapproved of, even by those who favour free choice. For example, it is generally conceded that restrictions are necessary on the freedom of children, and the mentally ill, to enter into contracts. These restrictions are explicitly based on the assumption that such people are not capable of determining their own preferences, and that they cannot look after themselves. Such concessions raise the possibility that there might be other cases that warrant paternalistic intervention, and the question then becomes one of where to draw the line.

There are different shades of paternalism. The reason for intervention might be to counteract perceived deficiencies in: (1) the way a choice was exercised in favour of a particular preference; (2) the way the preference itself was formed; or (3) the outcome of the choice. The first kind of intervention usually has to do with information problems. Information failure may be a justification for intervention on welfare grounds. However, the perception of what amounts to an information failure warranting intervention is inclined to be a narrow one, more broadly based intervention being labelled paternalistic. For example, it is often suggested that consumers have difficulty evaluating low-probability outcomes. The tendency may be either to over-estimate the risk or to under-estimate it. An example of the first kind of error is the reaction a doctor may encounter when explaining to a patient the risks associated with an elective surgical procedure or the use of a particular drug. An example of the second kind of error is the failure of smokers to react to mounting evidence concerning the health hazards of smoking. The prevalence of the second kind of error may help to explain the imposition of restrictions on the advertising of cigarettes in addition to the requirement for mandatory health warnings on cigarette packets. Similarly, a perceived consumer tendency to under-estimate the risks associated with certain kinds of product may explain why bans are considered to be necessary, and mandatory disclosure of the risk insufficient.

The second kind of intervention is based on the following considerations. Welfare theory has been criticised for taking preferences as given (just as it takes the prevailing distribution as given). If preferences were different, there might be a fresh allocation of resources, but welfare considerations have nothing to

³⁴ There is a growing body of legal literature exploring the justifications for paternalism. See, in particular: M Kelman, 'Choice and Utility' [1979] *Wisconsin Law Review* 769; Sunstein, 'Naked Preferences and the Constitution' (1984) 84 *Columbia Law Review* 1689; Sunstein, 'Legal Interference with Private Preferences' (1986) 53 *University of Chicago Law Review* 1129; Sunstein, 'Disrupting Voluntary Transactions' in J Chapman and R Pennock (eds) *Markets and Justice: Nomos XXXI* (New York, NYU Press, 1989), 299; A Kronman, 'Paternalism and the Law of Contracts' (1983) *Yale Law Journal* 763; D Kennedy, 'Distributive and Paternalism Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland Law Review* 563; R West, 'Taking Preferences Seriously' (1990) 64 *Tulane Law Review* 659.

say about which is the more desirable state, nor do they recognise any role for law in the shaping of preferences. This is because preferences are taken to be subjective, so that there is no basis for enquiring into whether they were validly formed or not, and no way of distinguishing qualitatively between one set of preferences and another. This may not be universally true. Some preferences may be shaped by: social conditioning (for example, sex and race discrimination); habit (for example, smoking); or lack of available opportunities (for example, the restrictions on voting rights that preceded the introduction of universal suffrage). Some laws appear to have been enacted at least partly with a view to countering perceived deficiencies such as these in the process of preference formation. Anti-discrimination legislation is an example. So are mandatory seat belt laws. Examples in the consumer protection context include the various facets of the government campaign against smoking, and mandatory interest rate disclosure in credit contracts, in so far as the objective is to induce consumers to take account of comparative credit costs in their purchasing decisions when they had previously demonstrated little inclination to do so.³⁵ Legislation imposing mandatory legibility and comprehensibility requirements in respect of standard form contractual documents is a further case in point.³⁶

The third kind of intervention might be described as 'true' paternalism. It is based on substantive judgments about the validity of particular preferences. Choices are prohibited because the outcome is considered not to be in the individual's best interest. People are assumed not to be able to look after themselves. Examples of this kind of measure include: minimum deposit requirements in hire-purchase legislation;³⁷ interest rate ceilings in relation to credit contracts, to the extent that the objective is not to redistribute income but, rather, to deprive certain debtors of access to credit facilities;³⁸ restrictions imposed by credit legislation on the taking of certain kinds of security;³⁹ and unconscionability legislation, to the extent that it allows a contract to be reopened because the court perceives the outcome to be unjust (substantive unconscionability).⁴⁰

A well recognised feature of legislation that is enacted with a view to overriding preferences is that parties are likely to react by looking for ways around the prohibition. For example, the minimum deposit requirements in the hire-purchase laws were widely evaded by the device of loading both the hirer's trade-in and the cash price of the goods to be acquired by an amount which enabled the stated trade-in value to equal the statutorily required minimum

³⁵ See further p 266, below.

³⁶ Eg *Credit Act* 1984 (Vic), ss 151-4.

³⁷ These are still in force in the hire-purchase legislation of Tasmania and the Northern Territory.

³⁸ See, p 261 above.

³⁹ Eg assignment of wages, salary or superannuation benefits; blanket securities; and assignment of interests under a will *Credit Act* 1984 (Vic), ss 98, 119 and 150, respectively.)

⁴⁰ See further, p 273, below.

deposit.⁴¹ It is not easy to compel people by legislation to act in a way that is contrary to where they perceive their own interests to lie.⁴²

CONCLUSION

Consumer protection presently suffers from the lack of a robust theory that explains the need for intervention. Consequently, consumer protection initiatives are often criticised for being ad hoc in character, or ill-considered.⁴³ In the United States, there have been moves to meet this kind of criticism by developing a welfare-based case for intervention, and Federal Trade Commission officials have been prominently involved in this exercise.⁴⁴ However, there are other values that are clearly reflected in current consumer protection laws, including equity and paternalist considerations, and a robust theory of consumer protection must take account of them. Such a theory must also point to the circumstances when appeal to these other values might be appropriate. In this connection, a number of points can be made:

- (1) welfare considerations sit uneasily with the concept of commutative justice, because the preoccupation of the former is with the transacting process (free choice), whereas the concern of the latter is with outcomes (wealth preservation). However, the two sets of considerations may be reconcilable at least in cases that involve egregious inequality because then inferences might be drawn about the quality of the consumer's assent from the one-sidedness of the outcome;⁴⁵
- (2) reliance on rules of law for shifting losses or redistributing income is rarely likely to be appropriate because such measures involve hidden welfare trade-offs, and also because (assuming that the trade-offs, if revealed, were acceptable) there are cheaper, more reliable methods that can be used;
- (3) true paternalism and welfare considerations are incompatible, in the sense that they derive from competing premises. Accordingly, if the prevailing view is that consumers by and large are capable of making their own choices, the rein given to true paternalism should be a very tight one. Current consumer protection laws are affected by ambivalence on this score;⁴⁶

⁴¹ See *Molomby Committee Report*, para 4.1.3.

⁴² Or as the Molomby Committee put it, '[e]xperience has shown that no person is keener to find a way around the prohibition than the person who was prohibited in his own interest from entering into a transaction' (*ibid*).

⁴³ See, eg Parish, 'Consumer Protection and the Ideology of Consumer Protectionists' in A J Duggan and L W Darvall (eds), *Consumer Protection Law and Theory* (Sydney, Law Book Co 1980), 229; Sieper, *Consumer Protection — Boon or Bane?* (Sydney, CIS 1978); P Swan, *The Pure Food Laws and Regulations: Burdensome Laws in Search of Meaningful Objectives?* (Sydney, CIS, 1987), Chapter 3.

⁴⁴ *Supra* fn 3.

⁴⁵ See, eg S Rea, 'Efficiency Implications of Penalty and Liquidated Damages' (1984) 13 *Journal of Legal Studies* 147.

On the other hand, inferential reasoning of this kind is itself a slippery slope: see further, p 275, below.

⁴⁶ Eg the *Credit Acts* reflect welfare considerations in the truth in lending provisions, but other provisions exhibit a strong paternalistic flavour (see, pp 263, above).

- (4) recent studies of the influences which shape the formation of preferences suggest a range of considerations, normally included under the rubric of paternalism, that might be appealed to by way of justifying a broader agenda for consumer protection than traditional welfare considerations would allow; and
- (5) the problem with paternalism is that once that the case for it is admitted in a particular instance, there is no logical stopping place. The compelling, the persuasive and the plausible case for intervention are merely points along a continuum and there is no principled basis for discriminating between them. On the other hand, if there is insufficient discrimination, collective solutions will become the norm, and the market-based economy will collapse. Then consumer protection will be irrelevant.

The challenge is to strike the right balance.

THE OBJECTIVES

INTRODUCTION

Failure to address the broad theoretical concerns identified above may result in confusion over more immediate objectives, and in the choice of inappropriate policy instruments. This point is demonstrated by the following three case studies, each of which focuses on a major law reform initiative of recent times.

INTEREST RATE DISCLOSURE

Mandatory interest rate disclosure in relation to consumer credit transactions is aimed at providing consumers with comparative credit cost information as an aid to credit purchasing decisions. The measure was first adopted in the United States *Truth in Lending Act*, in 1968,⁴⁷ and this lead has since been followed in many other countries, including Australia.

It needs to be asked why the measure was considered necessary given that, if consumers really wanted interest rate information, it would be in the interest of credit providers to supply it.⁴⁸ One explanation is that, before the legislature intervened, there was no standardised method for calculating rates.⁴⁹ In these circumstances, any measure a particular firm might adopt would be susceptible to challenge, especially by competitors, on the ground that it was

⁴⁷ *Consumer Credit Protection Act* 15 USC 1968.

⁴⁸ Cayne and Trebilcock, op cit 426.

⁴⁹ There were two main variables: (1) the items to be included in the amount of the credit charge that is used as the basis for calculating the rate (in particular, is the credit charge meant to reflect the cost of the transaction to the borrower, or the return to the lender?); see Duggan, Begg and Lanyon, op cit para 3.2.4); and (2) the method of distributing the credit charge over the debtor's repayment schedule, for the purpose of determining how much of the principal remains outstanding from time to time (ibid paras 3.2.14-3.2.18).

false or misleading. The obvious way of avoiding this risk was not to make the disclosure.⁵⁰ This explanation suggests a supply-side failure in the market for information. A second possible explanation runs as follows. Before the legislature intervened, consumers were insensitive to interest rates, so that credit providers had no incentive to supply the information. However, the reason why consumers were insensitive to rates was that they had not previously had the opportunity of shopping for credit on this basis, and had adapted their preferences for credit cost information accordingly. This suggests a possible demand-side failure in the market for information.⁵¹

If the first explanation is the real reason why mandatory rate disclosure was introduced, then the measure is clearly grounded in welfare considerations. The objective is to facilitate consumer choice, so that preferences are satisfied. If the second explanation is the correct one, then the measure can be regarded as welfare-based in that it is meant to facilitate consumer choice in the market for credit, but also paternalistic, in that it seeks to alter consumers' preferences in the market for information.

There are two ways in which information about interest rates might assist consumers. The first is as a guide to locating the best credit deal. This assumes that consumers, if given the opportunity, will shop actively among competing credit alternatives. It is consistent with the idea of intervention being based on a supply-side failure in the market for information. The second is as a warning to avoid a particularly bad deal. This assumes that consumers will remain partially insensitive to rates, even after mandatory disclosure laws are introduced, but that the disclosure laws will at least heighten consumers' awareness of rates prevailing in the market at large. Any charge out of the ordinary would then stand out. This warning function is consistent with the idea of intervention being based on a demand-side failure in the market for information.⁵²

It is not clear which of these alternative scenarios the legislature had in mind when the *Credit Act* was passed. The Act was based on the reports of two committees, the Rogerson Committee and the Molomy Committee, and the

⁵⁰ Beales, Craswell and Salop, *op cit* 523.

⁵¹ The magnitude of the problem, on either explanation, ought not to be overstated. There is overseas evidence that, even in the absence of legislation, consumers are at least sensitive to the relative cost of credit from different categories of credit provider (banks, finance companies, retailers, and so on), and would use this information as a surrogate for interest rates when shopping for credit: see the studies referred in A J Duggan, 'Consumer Credit Rate Disclosure in the United Kingdom and Australia: A Functional and Comparative Appraisal' (1986) 35 *International and Comparative Law Quarterly* 87. This suggests that consumer credit markets may function quite well even in the absence of rate information, with strong competition occurring *between* classes of credit-granting institutions (see Committee of Inquiry into the Australian Financial System, *Final Report* (1982), Chapter 32), though not necessarily *within* classes (see United Kingdom, *Report of the Committee on Consumer Credit Cmnd 4596* (1971), para 3.3.3 ('Crowther Committee Report')).

The second explanation may in any event be open to question in the light of the empirical evidence: see further p 268 below.

⁵² A J Duggan, 'Consumer Credit Rate Disclosure in the United Kingdom and Australia: A Functional and Comparative Appraisal' (1986) 35 *International and Comparative Law Quarterly* 87.

recommendations of these two bodies with respect to rate disclosure embraced both possibilities.⁵³ In the case of a loan contract, the Act requires disclosure of the annual percentage rate in the contract document itself, a copy of which must be given to the debtor before signing.⁵⁴ The use of the contract document as the primary vehicle for disclosure is inconsistent with any notion of consumers using the information for the purpose of shopping around. Contractual disclosure comes too late for that purpose, because by the time the contract is prepared, the consumer's mind is already all but made up.⁵⁵ Accordingly, if the legislation was enacted with this objective in mind, it cannot possibly hope to succeed. On the other hand, use of the contract document as the vehicle for disclosure may not be inappropriate for the more limited warning function. It is quite conceivable that if a contract document discloses a very high rate figure, the consumer will react by refusing to sign. To this extent, at least, there is a prospect of success for the statutory disclosure measures.

The Standing Committee of Consumer Affairs Ministers (SCOCAM) is currently working on a major overhaul of the *Credit Acts*. The exercise has been under way since 1987.⁵⁶ One of the primary areas of contention is the truth in lending requirements. SCOCAM has been persuaded that any new legislation should require the disclosure of an effective annual percentage rate.⁵⁷ The current legislation requires disclosure of a nominal rate.⁵⁸ The effective rate is a more accurate measure of comparative credit costs than the corresponding nominal rate, but the calculations necessary to yield the effective rate are more complex. The risk of error for credit providers is accordingly higher. One of the main complaints about the present legislation concerns its excessive technicality, and it hardly seems a sensible response to propose new legislation that is even more complex.

In any event, the effective rate proposal is misconceived. It clearly implies a

⁵³ Committee of the Adelaide Law School, *Report to the Standing Committee of State and Commonwealth Attorneys-General on the Law Relating to Consumer Credit and Money-Lending* (1969), 26–30 (hereinafter referred to as 'Rogerson Committee Report'); *Molomby Committee Report*, Chapter 4.5.

⁵⁴ *Eg Credit Act 1984* (Vic), ss 32, 36.

⁵⁵ J Landers and R Rohner, 'A Functional Analysis of Truth in Lending' (1979) 26 *University of California, Los Angeles Law Review* 711; Duggan 'Consumer Credit Rate Disclosure in the United Kingdom and Australia: A Functional and Comparative Appraisal' (1986) 35 *International and Comparative Law Quarterly* 87, 89–90.

⁵⁶ In December 1991, SCOCAM released a draft Credit Bill for public comment. This was the seventh in a series. The earlier efforts were not made public. The Bill has been trenchantly criticised (see, eg, (1991) 27 *Australian Law News* 26), but at the time of writing the indications were that it might yet become law.

⁵⁷ SCOCAM Draft Credit Bill 1991, cl 12 and Schedule 1.

⁵⁸ The functional difference between the two alternatives is that an effective rate is calculated to take account of the frequency with which credit charges become payable, whereas a nominal rate is not. The effective rate is a more accurate measure of comparative credit costs. This is because, the higher the frequency of repayments, the worse off the debtor will be, and, correspondingly, the better off the credit provider. For example, from the debtor's point of view, 1% per month is a less favourable rate than 6% per half year, because in the former case the credit charge must be paid earlier. The nominal annual rate in each case is 12%, but the effective rates, namely 12.68% and 12.36%, respectively, highlight the difference: Duggan, Begg and Lanyon, *op cit* para 3.2.13.

commitment to the first of the functions of rate disclosure outlined above (the facilitation of comparison shopping), as well as a belief that the reason why intervention is necessary has to do with a supply-side failure in the market for information. These propositions have never been expressly articulated, at least in public. They fly in the face of mounting empirical evidence from the United States and elsewhere that disclosure laws do not markedly alter credit purchasing patterns, but at best serve to heighten consumer awareness of prevailing rates.⁵⁹ These studies suggest that the most disclosure laws can hope to achieve is the warning function. The degree of accuracy that effective rates entail is not necessary for the warning function. For this, an approximation is sufficient. Furthermore, it is apparently still intended to use the contract document as the main vehicle for disclosure.⁶⁰ However, as has already been pointed out, disclosure in the contract document comes too late for comparative shopping purposes. The best that contractual disclosure will achieve is the warning function, and effective rate disclosure is pointless in these circumstances.⁶¹

The issue of what rate to require for disclosure purposes is an important one because incorrect calculation by the credit provider of the annual percentage rate will result in a contravention of the disclosure requirements. The penalty for this is loss of credit charges, and if the error is common to all the credit provider's contracts, the amount at stake may run into millions of dollars. The more complicated the calculations required for disclosure purposes, the greater the risk of error by credit providers, and the higher the cost of precautions against error. Accordingly, the imposition of requirements that are difficult to comply with should be avoided unless there are clear social gains.

PRODUCT LIABILITY

Manufacturers' liability for product defects is currently governed by Division 2A of Part V of the *Trade Practices Act* 1974 (Cth), along with corresponding statutory initiatives in some states,⁶² and a combination of contract and tort law. Under the *Trade Practices Act*, a manufacturer is made strictly liable to consumers for loss caused by product defects. Liability does not extend to

⁵⁹ Some of these studies are discussed in A Duggan, 'Consumer Credit Rate Disclosure in the United Kingdom and Australia: A Functional and Comparative Appraisal' (1986) 35 *International and Comparative Law Quarterly* 87.

⁶⁰ SCOCAM Draft Credit Bill 1991, cl 12. Disclosure of the effective rate will probably also be required in some circumstances in credit advertising (ibid cl 9). However, the disclosure will be by reference to examples, so that the disclosed rate is unlikely to bear a close correlation with the rate applicable to a particular contract. It will only be an approximation. If the disclosed rate is only an approximation, then it might as well be a nominal rate as an effective one.

⁶¹ The push for effective rates is also inconsistent with the apparent desire to permit more flexible pricing policies by credit providers than the present law allows. For example, any new legislation is likely to permit variable rates in loan contracts (SCOCAM Draft Credit Bill 1991, cl 12). The possibility of a rate variation affects the reliability of the figure originally disclosed as a measure of comparative credit costs.

⁶² *Manufacturers' Warranty Act* 1974 (SA); *Law Reform (Manufacturers' Warranties) Ordinance* 1977 (ACT).

third parties such as bystanders or non-owners who happen to be using the goods. The basic scheme is to make manufacturers liable to consumers on the same footing that the immediate supplier is liable. Accordingly, a manufacturer may be required to pay damages if, for example, the product is not of merchantable quality or fit for its purpose, or if it does not correspond with a description that has been applied to it. Where the legislation does not apply, the plaintiff will be restricted to a cause of action at common law, for breach of contract if privity can be established, but otherwise in tort for negligence.

In a joint report, the Australian Law Reform Commission and the Victorian Law Reform Commission concluded that the present law is unsatisfactory, predominantly because it requires proof of fault on the part of the manufacturer (that is to say, proof, where the statute applies, that the goods were defective, and in tort, that the manufacturer was guilty of negligence), and this means that too many consumers end up going uncompensated for product-related injuries.⁶³ The Commissions proposed a new statutory regime to replace the existing laws. In outline, the proposal was as follows: (1) manufacturers would be liable for injuries caused by the way goods acted, regardless of fault on the manufacturer's part in either of the senses outlined above; (2) liability would extend beyond the purchaser of the product to anybody who had been injured by it; (3) there would be a range of defences, including a state of the art defence, a defence based on voluntary assumption of risk by the plaintiff, and a partial defence based on contributory negligence on the part of the plaintiff; and (4) a manufacturer would be entitled a claim contributions from other parties in the distribution chain who might be responsible for the way the goods acted (for example, a component manufacturer, or a retailer).

The welfare case for imposing strict liability on manufacturers is based on the assumption that consumers systemically under-estimate the risk of product-related accidents.⁶⁴ Given this, they fail to discount the product price sufficiently, so that more of the product ends up being purchased than would be warranted by its true cost (including the expected accident cost). The imposition of strict liability on manufacturers will cause them to raise their prices, so that the explicit price of the product does include a component for accident costs. The result should be a drop in demand to the optimal level, and a consequent reduction in the number of accidents.⁶⁵

The other way of reducing the number of accidents is by precaution. The imposition of liability on a manufacturer should confront it with the incentive

⁶³ *Product Liability* (ALRC Report No 51 and VLRC Report No 27, 1989) (hereinafter referred to as '*Product Liability Report*').

⁶⁴ This assumption is made in nearly all the law and economics literature relating to product liability. It is, however, an empirical observation, and it has not gone unchallenged. See, eg. Schwartz, 'Proposals for Product Liability Reform: A Theoretical Synthesis' (1988) 97 *Yale Law Journal* 353, 374-84.

⁶⁵ S Shavell, 'Strict Liability Versus Negligence' (1980) 9 *Journal of Legal Studies* 1. Cf Trebilcock, 'The Social Insurance — Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis' op cit 987-8, where the contrary view is put. The argument is that activity levels could be reduced just as readily by internalising the cost of the activity to the consumer, as by internalising it to the manufacturer. There is no *a priori* reason for preferring the latter alternative.

to take steps that will avoid the accident and, consequently, the need for it to pay damages (for example, design improvement, provision of warnings, or the adoption of testing procedures). It will be worthwhile for the manufacturer to take precautions so long as the cost of doing so is less than the reduction achieved in the expected accident cost. In the absence of liability, and still assuming consumers' tendency to under-estimate product risks, these precautions might not be taken, with the consequence that avoidable accidents will continue to occur. The corollary of this notion is that in so far as the precaution could more easily be taken by the plaintiff (for example, careful handling of the product), the manufacturer should not be liable. Otherwise the plaintiff may have an insufficient incentive to take the precaution. It is true that in many cases, investment in goodwill will act as a sufficient inducement for the manufacturer to take care, while concern for personal health and safety will prompt the consumer to be careful. Nevertheless, deterrence considerations do remain significant at the margin.

The loss-shifting case for strict liability is based on the assumption that insurance is more readily available to the manufacturer than it is to the consumer.⁶⁶ Imposition of liability on a manufacturer will induce it to take out insurance, so that if an accident occurs, the loss will be shifted from the victim and spread over a substantial segment of the community.

The Commissions' proposal was explicitly based on this mix of considerations.⁶⁷ Attributes of the scheme that are referable to welfare concerns include the following: (1) the reduction in problems of proof confronting plaintiffs following upon removal of the need to establish that the product was defective, or that the manufacturer was negligent; (2) the extension of non-fault based manufacturer liability to third parties; and (3) the introduction of defences that have no counterpart under the present statutory regime, in particular, the 'contributory negligence' defence. The attribute of the scheme that is most obviously referable to loss-shifting considerations is the substantial broadening it entails of the basis for manufacturers' liability. Under the present law manufacturers are liable if certain conditions are satisfied (including proof of negligence, or that the product was defective). Under the Commissions' proposal they would be liable *unless* certain conditions were satisfied (in particular, that one or other of the defences applied). The preconditions to manufacturers avoiding liability under the Commissions' scheme do not mirror the preconditions to manufacturers' liability under the present law. They are more generous to manufacturers in some respects, and less generous in others.⁶⁸ The Commissions' scheme represents, in effect, a shift

⁶⁶ This is again an empirical observation; see p 258, above.

⁶⁷ *Product Liability Report*, Chapter 2.

⁶⁸ The net effect is problematical, mainly because the scope of the defences proposed by the Commissions is uncertain. For example, the voluntary assumption of risk defence would apply if what the claimant knew about the goods before the loss or damage occurred would have enabled a reasonable person to assess the risk that the goods would act in the way they did. The state of the art defence would be available if the manufacturer 'could not have discovered, using any scientific or other techniques then known, or in any other way, that the goods could act in the way they did'. Under the contributory negligence defence, the court may reduce the amount of compensation payable to the claimant if 'an

from strict liability (and negligence) to a form of qualified absolute liability.

The Commissions sought to promote their proposal by arguing that it achieved the best of both worlds, namely welfare improvement and better loss-shifting.⁶⁹ In doing so, they paid too little regard to the trade-offs that are necessarily involved when competing policy considerations are pursued simultaneously. In particular, while the scheme has welfare-improving attributes (as already mentioned), there are other features of it that would reduce welfare: (1) relaxation of the burden of proof borne by consumers, while making it easier for legitimate claims to be brought, would be likely also to facilitate the bringing of fraudulent claims;⁷⁰ (2) to the extent that prices rise to take account of increased insurance costs, the scheme entails compulsory insurance for consumers, whether they want it or not;⁷¹ (3) consumers not prepared to pay the higher price might opt for less safe alternatives (for example, second-hand goods), with a possible increase in the number of accidents resulting; (4) the greater liability imposed on manufacturers could be expected, to some extent, to discourage innovation;⁷² and (5) the imposition of primary liability on the manufacturer would result in a lessening of the incentives confronting other parties in the distribution chain to take precautions against harm.⁷³ These, and other, welfare-inhibiting features of the scheme

act of the claimant increased the risk that the goods would cause loss or damage. . . to take account of the unreasonableness of the act.'

Expressions such as 'what the claimant knows', 'reasonable person', 'could not have discovered' and, 'unreasonableness of the act' depend on judicial interpretation for their meaning, so that the overall effect of the proposed scheme would be very much subject to the way the courts read the key provisions: see *Industry Commission Report*, Chapter 3. Cf *Product Liability Report*, para 10.25, where it is claimed that the greatest benefit of the proposal is that the criterion of liability is clear. This is said to be in contrast to the present law which relies on expressions such as 'fit for purpose' and 'reasonable conduct', the meaning of which 'can only be indeterminable'.

⁶⁹ See, eg *Product Liability Report* para 10.07:

[a]ccidents are inevitable. Some loss will be caused by products.

That loss may affect Australia and its economy adversely. The adverse effects will be reduced to the extent that

- loss is prevented in ways that do not increase the cost of production of goods beyond the optimal level and
- cost of spreading the risk of loss is reduced.

Both effects are comprehended by the policy objectives identified in chapter 2. The overall effect of the recommended changes will be to reduce both the incidence of loss caused by goods and the cost of recovering compensation — including both the actual cost of compensation and the necessary transaction costs. While either reduction would benefit the economy, *when the two occur together their effects are greatly magnified* (emphasis added).

⁷⁰ The Commissions' proposal included a requirement that the plaintiff give the defendant at least 28 days before the action is commenced, written particulars on oath of the circumstances in which the accident occurred. This requirement might deter some fraudulent claims, but it hardly goes far enough: *Industry Commission Report*, 24.

⁷¹ The Commissions' proposal included a voluntary assumption of risk defence. However, it would only apply in limited circumstances: *ibid* 25–6.

⁷² The Commissions' proposal incorporated a state of the art defence which would go some way towards meeting this difficulty, but the defence only applies in limited circumstances, and it may be difficult to establish: *ibid* 26–7.

⁷³ It is true that the Commissions' proposal provides for contribution by contributors. However, the degree to which a contributor was at fault is not relevant in setting the

were identified by the Industry Commission in its report to the Federal Treasurer on the economic implications of the Law Reform Commissions' proposal.⁷⁴ The Industry Commission could not confidently predict whether, when these offsetting factors were taken into account, the result would be a net gain or a net loss in welfare terms. However, it concluded that, even if there were a gain, it would be too small to warrant the costs involved in making such a radical reform to the law as the Commissions proposed.⁷⁵

Conversely, while the scheme has loss-shifting attributes (as already mentioned), it also has features that would inhibit loss-shifting. The most obvious example is the contributory negligence defence. Under the present law, the rights of a plaintiff in a product liability case are not subject to contributory negligence, except where the cause of action is negligence. Similarly, there is no state of the art defence in the present statutory scheme.⁷⁶ Nor is there any general defence based on voluntary assumption of risk.⁷⁷ The Industry Commission was critical of the Law Reform Commissions' proposed state of the art and voluntary assumption of risk defences on the ground that, in welfare terms, they did not go far enough. From a loss-shifting perspective, they are open to criticism for the opposite reason. These features of the Commission's scheme will, to some extent, make it harder for plaintiffs to recover. While this outcome might be supportable on welfare grounds, it is inconsistent with the loss-shifting objective. In a submission to the Industry Commission, Professor Harold Luntz of the Melbourne University Law School, who is one of this country's foremost proponents of comprehensive (no fault) accident compensation, was trenchantly critical of the Law Reform Commissions' scheme because of the adverse effects he predicted it would have on loss-shifting. Professor Luntz urged the Industry Commission to reject the Law Reform Commissions' proposal and suggested that reform should be limited to amending the *Trade Practices Act* so as to provide for recovery by third

amount of the contribution payable. The basic rule is one of equal contributions by contributors, except where the court considers that this would be unfair. In that case, contribution is to be based on the extent of the contributor's input into the goods. The rules governing contribution can be excluded by agreement between the contributors, but only if the exclusion is fair.

⁷⁴ *Id* Chapter 3.

⁷⁵ In particular, the adjustment costs to industry.

The Industry Commission conceded that welfare considerations indicated a need for reform, but suggested that this could be achieved by relatively minor amendments to the existing law (in particular, extension of manufacturers' strict liability to third parties).

⁷⁶ It is true that under the statute, a consumer will only recover if the product is, for example, not of merchantable quality. However, it has been held in the context of the analogous sale of goods legislation that whether or not goods are merchantable is to be judged in the light of all information available at the time of the trial, including facts that were not known at the date of delivery: *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.

⁷⁷ Though voluntary assumption of risk may be relevant in some circumstances. For example, the obligation relating to merchantable quality does not apply where the consumer examined the goods, as regards defects that the examination ought to have revealed. Similarly, the obligation relating to fitness for purpose does not apply if the consumer is found not to have relied on the manufacturer's skill or judgment.

parties (users and bystanders).⁷⁸ Ironically, this was precisely what the Industry Commission did recommend, though on welfare (not loss-shifting) grounds. In the end, therefore, the Law Reform Commissions, by trying to devise a scheme that would please everybody, ended up by displeasing parties on both sides of the ideological fence. The episode underscores Trebilcock's thesis, namely that 'a single legal instrument seems unlikely to perform simultaneously prospective standard-setting functions and retrospective assignments of liability in an optimal way'.⁷⁹

It is futile to attempt to reform the system with social insurance objectives as the operative criteria. The closer we come to realising these objectives, . . . the further we will have moved from attainment of optimal deterrence objectives . . . There is a necessary *inverse* relationship between the two sets of objectives.⁸⁰

UNCONSCIONABILITY LEGISLATION

The *Contracts Review Act* 1980 (NSW) provides for reopening of a contract if it is found by a court to be unjust.⁸¹ 'Unjust' is defined to include unconscionable, harsh or oppressive. In deciding whether a contract is unjust, the court is directed to have regard to the public interest, as well as to a list of other factors, including: (a) whether or not there was any bargaining inequality between the parties; (b) whether or not the provisions of the contract were the subject of negotiation; (c) whether or not it was reasonably practicable for the party seeking relief to negotiate for alteration or removal of any of the provisions of the contract; (d) whether or not any of the provisions of the contract impose conditions which are unreasonable; (e) whether or not a party to the contract was unable to protect their interests because of age or physical or mental incapacity; (f) the relative economic circumstances, educational background and literacy of the parties; (g) the form and intelligibility of the contract; (h) whether or not independent advice was obtained by the party seeking relief; (i) the extent to which the contract was explained to, and understood by, the party seeking relief; (j) whether there was any undue influence, unfair pressure or unfair tactics exerted on the party seeking relief; (k) the conduct of the parties in relation to similar dealings; and (l) the com-

⁷⁸ Luntz, *Submission to the Industries Assistance Commission (sic.) on Product Liability* (28 November 1989); 11-2. The suggestion was made on the assumption (correct) that the Commission would not be interested in reviving the comprehensive accident compensation proposal.

⁷⁹ 'The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis' op cit 989-90; cf Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Haven Yale University Press, 1970).

⁸⁰ Id 993.

In December 1991, a bill relating to product liability was introduced into the Federal Parliament (*Trade Practices Amendment Bill* (No 2) 1991). The Bill is based, not on the Law Reform Commission's recommendations, but on the 1985 European Economic Community Directive relating to Product Liability. Its introduction represents an implicit rejection of the key aspects of the Law Reform Commission's proposals.

⁸¹ The Act is restricted to consumer dealings, in that relief is not available to corporations or traders (s 6).

mercial setting of the contract.⁸² The reopening provisions in the *Credit Acts* are similar, except that jurisdiction is vested in a tribunal rather than the courts. The reopening power extends to any regulated credit contract that is found by the tribunal to be unjust, and also to any case where the interest rate is excessive. Unconscionability provisions broadly comparable with the *Contracts Review Act* are also to be found in the *Trade Practices Act 1974* (Cth), s 52A and in corresponding State fair trading legislation.

The *Contracts Review Act* derives from recommendations made by the late Professor John Peden in a report submitted to the New South Wales government in 1976.⁸³ Peden's recommendations were, in turn, substantially influenced by Article 2-302 of the United States *Uniform Commercial Code*. Peden stated that the purpose of the new approach to unconscionability was to make the law 'sharp in focus, conceptually sound and explicit in its policy underpinnings', so as to preserve judicial rigour in its application and to avoid 'ad hocery' in decision-making.⁸⁴ This is precisely what the legislation does not achieve.

The legislation is not 'sharp in focus' because it fails to distinguish between procedural unconscionability (where the contract is unjust because of deficiencies in the bargaining process), and substantive unconscionability (where the contract is unjust because the outcome is one-sided or otherwise unfair).⁸⁵ The list of factors to which the court is required to have regard, in determining whether a contract is unjust, is a mish-mash of process-oriented and outcome-oriented considerations. Consequently, it is for the most part⁸⁶ quite unclear whether a court would be entitled to reopen a contract on the ground that it perceived the outcome to be unjust (as where the contract contains terms that the court considers to be unreasonable) even if there is no evidence of procedural unconscionability, or whether some form of procedural injustice must be found so as to facilitate a conclusion that the quality of the complaining party's assent to the outcome was affected. In the leading case to date on the *Contracts Review Act*, *West v AGC (Advances) Ltd*, it was suggested that in an appropriate case a contract might be held to be unjust simply on account of gross disparity between the price of goods and services and their value, even though none of the process-oriented criteria set out in the legislation was met.⁸⁷ However, perhaps not surprisingly, no indication was given of what an appropriate case might be.

The legislation is not 'conceptually sound' because, in so far as it does require proof of procedural unconscionability, it offers no guidance as to how

⁸² Section 9(2).

⁸³ The report subsequently formed the basis of a book: J Peden, *The Law of Unjust Contracts* (Sydney, Butterworths, 1982).

⁸⁴ *Id* 95.

⁸⁵ See A Terry 'Unconscionable Contracts in New South Wales: The *Contracts Review Act 1980*' (1982) 10 *Australian Business Law Review* 311, drawing on criticisms made earlier of UCC, Art.- 2-302 in A Leff, 'Unconscionability and the Code: The Emperor's New Clause' (1967) 115 *University of Pennsylvania Law Review* 485.

⁸⁶ In the case of the *Credit Acts*, it is clear that a contract may be reopened on the ground that the interest rate is excessive, even if the contract was freely entered into: See Dugan, Begg and Lanyon, *op cit* para 10.3.4.

⁸⁷ (1986) 5 NSWLR 610, 621 *per* McHugh JA.

far this proof might legitimately be derived by inference from one-sided outcomes. The more readily such an inference is drawn, the less tenable the distinction between procedural and substantive unconscionability becomes. The issue is particularly important in relation to contracts of guarantee. It is common these days for a credit provider to suggest that an intending guarantor obtain independent advice before contracting.⁸⁸ The question as to whether independent advice was obtained by the complaining party is one of the factors to be taken into account under the statute in determining whether the contract was unjust. However, if a court disapproves of the transaction, or is moved by the plight of the guarantor, the temptation may well be irresistible to conclude, by inference, that the advice given to the guarantor must have been inadequate and that, therefore, the contract is unjust.⁸⁹ This is tantamount to concluding that the contract is unjust on a substantive grounds. In this respect the legislation is indeterminate.

The legislation is not 'explicit in its policy underpinnings'. It is quite unclear whether it is directed primarily (or at all) to welfare considerations, equity considerations or paternalistic concerns. Depending on how it is interpreted, it could be made to relate to any of these goals. For example, if the application of the legislation were restricted to cases where there was evidence of procedural unconscionability (for example, duress or exploitation by the stronger party of a disability in the weaker party) it would clearly be welfare-oriented. On the other hand, if the legislation were interpreted as allowing intervention on the basis of unjust outcomes alone, it could be made to reflect either distributive or paternalistic concerns. In that case, the courts would be free to set their own agenda. For example, the legislation could be used to strike down standard form contracts, for commutative justice reasons, if the court believed that standard form contracts are the product of unequal bargaining power and are routinely used to exploit consumers.⁹⁰ Alternatively, the legislation could be used to set aside contracts such as guarantees, for the reason that the court believed the transaction to be foolhardy and not in the best interests of the guarantor.⁹¹ These kinds of intervention have their costs,⁹² but the courts are not particularly well placed to identify them. Ac-

⁸⁸ In some cases, this procedure is made mandatory by statute; see, eg *Consumer Transactions Act 1972-1983* (SA), s 44; *Hire-Purchase Act 1959* (Vic) s 19.

⁸⁹ See, eg *Beneficial Finance Corporation Ltd v. Adams* (unreported, SCt NSW, 1989, Giles J); affirmed sub nom *Beneficial Finance Corporation Ltd v. Karavas* (1991) 23 NSWLR 256 (CA).

⁹⁰ Cf M Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' op cit.

⁹¹ See, eg *Beneficial Finance Corporation Ltd v. Adams* supra fn 89.

⁹² See above, p 258.

See also the comments of Sir Owen Dixon:

'if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor charts. The courts would come to exercise an unregulated authority over the fate of men and their affairs which leave our system indistinguishable from the systems which we least admire.'

cordingly, they represent the very kind of 'ad hocery' that it was an explicit aim of the legislation to avoid. In this respect, too, the unconscionability legislation is indeterminate, or as Leff put it, 'it is easy to say nothing with words. Even if those words make one feel all warm inside, the result of sedulously preventing thought about them is likely to lead to more trouble than the draftsman's cosy glow is worth'.⁹³ That warning was sounded in 1967, nearly ten years before the Peden Report was written, thirteen years before the *Contracts Review Act* was enacted, and twenty years before the unconscionability provision was inserted in the *Trade Practices Act* 1974 (Cth).

CONCLUSION

The consumer protection agenda in Australia has been substantially shaped by lawyers. The *Credit Acts* are based on recommendations made by committees composed entirely of lawyers, the SCOCAM Working Party on Credit Law Reform comprises mainly lawyers, the plethora of recently enacted unconscionability statutes is based on a report prepared by a lawyer, and membership of law reform commissions around the country is confined mainly (in some cases, exclusively) to lawyers. It has been said (by lawyers) that 'lawyers seem to have an almost boundless faith in the efficacy of rules. If a problem exists, pass a law telling it to go away. If it does not (as is likely), pass another law articulating the injunction more emphatically'.⁹⁴ The same concern is reflected in the question posed rhetorically some years ago by a frustrated economist, namely, 'is law reform too important to be left to the lawyers?'⁹⁵

The above case studies suggest that a more substantial input may be required into the policy-making part of the law reform process from disciplines other than law. It is true that in the case of truth in lending, there has been some input from mathematicians, but this went to the nature of the disclosure. The question of how the disclosure should be made appears to have been left to the lawyers, with insufficient account being taken of behavioural considerations. Economists were involved in the Law Reform Commissions' reference on product liability,⁹⁶ but their influence (though evident in the references made to economic concepts in the Commissions' report) appears to have been too little, and come too late.⁹⁷ As a result, the enquiry ended up

('Concerning Judicial Method' (1955) 29 *Australian Law Journal* 468, 476, quoted in R Meagher, W Gummow and J Lehane *Equity Doctrines and Remedies* (2nd ed, Butterworths Sydney, 1984), para 1722.

⁹³ op cit 559.

⁹⁴ Trebilcock, Prichard and Waverman, 'The Consumer Interest and the Regulatory Process' in Duggan and Darvall (eds) op cit 256, 260.

⁹⁵ P Swan, 'Is Law Reform too Important to be Left to the Lawyers: A Critique of Two Law Reform Commission Reports, *Human Tissue Transplants* and *Insurance Agents and Brokers*' in R Cranston and A Schick (eds), *Law and Economics* (Canberra, ANU, 1982), 10.

⁹⁶ Dr Richard Braddock (Macquarie University) and Dr Philip Williams (University of Melbourne).

⁹⁷ Braddock was engaged as a consultant, so that his function was largely a reactive one (see Braddock, *Product Liability; Economic Impacts* (ALRC Product Liability Research

being conducted twice: first, by the Law Reform Commissions (mostly lawyers) and secondly, by the Industry Commission (mostly economists). Bifurcation of legal and economic analyses should be avoided in the law reform process. It involves substantial duplication of effort and is time-consuming and wasteful.

THE PROCESSES

INTRODUCTION

The case for uniform laws to govern national markets appears to be widely accepted in Australia. For example, Swan has identified the costs of non-uniformity in relation to food laws as follows: (1) the cost of designing and producing special labels that may differ for each state; (2) the cost of shortening or interrupting production runs due to special compositional and packaging requirements; (3) the cost of discovering and complying with numerous different and changing laws; (4) the cost of reduced competition arising from artificial barriers to trade between the states, with higher prices to consumers as the likely consequence; and (5) the cost of making, modifying and enforcing separate sets of laws.⁹⁸ Basically the same considerations apply in relation to other industries.⁹⁹

Nevertheless, the states have by and large been desultory in the pursuit of uniform laws. There have been some partial successes, for example, in the areas of fair trading, food and hire-purchase. However, in none of these cases has the resulting legislation been completely uniform, and in some cases (hire-

Paper No 2, January 1989); and *Economic Impact of Revised Proposals* (ALRC Product Liability Research Paper No 2A, June 1989)). Williams, a part-time member of the VLRC, became actively involved in the reference relatively late in the day.

⁹⁸ Swan, *The Pure Food Laws and Regulations: Burdensome Laws in Search of Meaningful Objectives?* op cit 29.

The issue is perhaps not quite so clear-cut as Swan suggests. The adoption of uniform laws entails trade-offs. These include reduced opportunities for policy innovation and experimentation at the State level, and a lessened capacity to satisfy the diverse needs and preferences of citizens in different locations. Any move away from State autonomy means sacrificing at least some of the advantages of federalism. The benefits of federalism need to be weighed against the kinds of costs identified by Swan. In Australia, a higher value appears to be attached to uniformity than in some other federal systems (for example, in the US, incorporation laws are a State responsibility, and the diversity of the legislation is widely regarded as beneficial; in Canada, consumer credit legislation is a provincial responsibility, but in contrast to Australia, the commitment to uniformity in this area has not been strong). One reason perhaps has to do with the small size of the overall population, which is seen as making the development of national markets in a wide range of industries important if businesses are to remain viable. In other words, uniformity may be necessary as a means of achieving economies of scale. Another reason may be the difficulty of achieving constitutional change in Australia. The distinction between matters on which national regulation is desirable, and matters of local significance suitable for State laws should be reflected in the Commonwealth Constitution. However, if the constitution becomes outdated and is difficult to change, measures such as uniform State laws may need to be considered as a substitute for national legislation.

⁹⁹ See D Bailey, 'Far Too Much Law for our Own Good' (1990) 25 *Australian Law News* 34.

purchase, for example) the problems of maintaining uniformity have proved to be insurmountable.

A notable failure has been in the area of implied conditions and warranties in consumer transactions. Reporting in 1976, the Swanson Committee made the following observations:

[t]he Committee considers that uncertainty and confusion arises when different laws, each with its own constitutional limitations, attempt to deal with the same matter, even if in a slightly different manner only . . .

. . . Because of constitutional limitations of both the Commonwealth and the States, and because each jurisdiction has approached the substantive law in its own way (including, importantly, the definition of a "consumer"), questions whether conditions or warranties are now implied by law into contracts and, if so, which contracts, are determined by a number of distinctions of a technical nature which are largely irrelevant to both commercial behaviour and the interests of consumers.

The Committee believes that it is essential, both in the interests of commercial certainty and effective consumer protection, that the laws on conditions and warranties to be implied into consumer transactions be uniform throughout Australia. The present position is extremely unsatisfactory to all those affected by the law.¹⁰⁰

These recommendations have been taken up only by Western Australia and, recently, the Northern Territory.¹⁰¹ Elsewhere they appear to have been ignored. In Victoria, the sale of goods legislation was amended in 1981 by the addition of provisions purportedly based on Division 2 of Part V of the *Trade Practices Act 1974 (Cth)*.¹⁰² However, there are so many differences of wording and substance between the Commonwealth provisions and their Victorian counterparts that in no sense could they be described as uniform.¹⁰³

Perhaps the most notorious attempt of recent times to achieve uniform laws has been in the area of consumer credit. Victoria, New South Wales, Queensland, Western Australia and the Australian Capital Territory have all enacted legislation which is in substantial respects uniform. However, it is only substantially so. There are numerous points of difference. For example, in Queensland, the legislation is expressed to apply to a credit contract if the amount financed is \$40,000 or less, whereas elsewhere the cut-off figure is \$20,000. Again, in Queensland, variable interest rates are permissible in loan contracts, subject to certain restrictions, whereas elsewhere they are prohibited. In Western Australia, the legislation extends to credit unions, but elsewhere it does not. Many more examples could be cited. Some of the differences are subtle, and not easy to spot. The result is to create a trap for credit providers. In this respect, uniform legislation which is not really uniform can

¹⁰⁰ Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976), paras 9.8-9.23.

¹⁰¹ *Fair Trading Act 1987 (WA)*, Part III; *Consumer Affairs and Fair Trading Act 1990 (NT)*, Part V, Div 2.

¹⁰² *Goods (Sales and Leases) Act 1981*.

¹⁰³ Duggan, *Regulated Credit: The Sale Aspect* para 14.3.1.

be quite misleading. The legislation is not really uniform in the further sense that it has not been adopted in South Australia which has enacted its own set of laws,¹⁰⁴ or in Tasmania and the Northern Territory both of which have persevered to date with the hire-purchase and money lending laws.

At the time of writing, SCOCAM was working on a new draft *Credit Act* for adoption by all the states on a truly uniform basis. A bill was released for public comment in December 1991, but it is badly flawed.¹⁰⁵

THE HOLY GRAIL

What makes uniformity such an elusive goal? The *Credit Act* experience, supplemented by reference to what has happened in other areas, such as companies and securities and defamation law reform, suggests some answers. The reason has to do with the conflicting preoccupations of the key players in the law reform process: (1) the politicians; (2) the bureaucrats; (3) the drafters; (4) the industry; and (5) the public.

POLITICIANS

There are various reasons why politicians might be lukewarm about uniformity. First, a commitment to uniformity necessarily entails some sacrifice of power. No single state politician or government has complete control over the shape of the legislation, and the freedom to make amendments in the future may also be restricted. It goes against the grain for a politician to give up power.¹⁰⁶ Secondly state politicians may see uniformity as the first step towards Commonwealth takeover of the area in question.¹⁰⁷ Experience in the area of companies and securities law reform indicates that this fear is not groundless. Thirdly, and consequent upon the foregoing, uniformity may be opposed on states' rights grounds, that is to say, as representing a threat to the federal system.¹⁰⁸ Fourthly, parochialism and political rivalries may inhibit

¹⁰⁴ *Consumer Credit Act 1972–1983* and *Consumer Transactions Act 1972–1983*.

¹⁰⁵ *Supra* fn 56.

¹⁰⁶ Swan, *The Pure Food Laws and Regulations: Burdensome Laws in Search of Meaningful Objectives?* 31.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Supra* fn 98.

In this connection, the following extracts from correspondence between a Melbourne firm of solicitors and the then Queensland Attorney-General in relation to the *Credit Act 1987* (Qld) are reproduced without comment:

(i) Solicitors: 'We are very concerned about the lack of consistency between the Queensland forms and the forms currently in use in the other Credit Act States. Changing expressions like "get a copy of this Offer" to "obtain a copy of this Offer" and "you can take out insurance through any company you choose" to "you can take out insurance with any company of your choice" and "keep to all the terms and conditions" to "observe all the terms and conditions" is of trivial benefit to consumers, and of major importance to persons carrying on business in more than one State. Perpetuating differences in supposedly uniform legislation of this kind so that credit providers must continue to use different procedures and different documents in each State only undermines support for the legislation and strengthens calls for Federal legislation covering the field. So far as Credit Providers are concerned, they want to be able to use forms that are identical in each State. . .'

(ii) Attorney-General: 'So far as possible Queensland has attempted to adopt a uniform

cooperation between the parties. For example: political differences between the New South Wales (Conservative) Government and the Victorian (Labor) Government appear for a considerable period significantly to have impeded progress in the area of consumer credit law reform; Queenslanders tend to view with suspicion anything that emanates from the 'southern states', while South Australians and Western Australians are sensitive about being rail-roaded by the eastern states. Fifthly, there may be policy differences between the states, either real or manufactured out of the other sources of conflict already referred to. For example, in the area of defamation law reform, a substantial impediment to the achievement of uniformity has been disagreement about whether truth alone should be a sufficient defence, or whether public benefit should be required as well.¹⁰⁹ The main policy tensions in consumer credit law reform are discussed below.

BUREAUCRATS

Ministerial advisers and departmental officials tend to be subject to the same kinds of influence as their political superiors, but there are other factors at work as well. First, it is a function of advisers and officials to develop policy. It is likely to prove more rewarding to develop one's own policy than it is to develop a policy cooperatively (in which case the credit must be shared) or to go along with a policy developed by someone else (in which case there may be no credit at all). Secondly, the upper levels of the bureaucracy tend to experience high staff turnover, as more talented officers are poached by private enterprise. This has been a continuing problem in the area of consumer credit law reform. Replacements are often appointed who are not versed in the complexities of the law reform initiative, so that valuable time is lost in the (sometimes uncertain) pursuit of expertise. Thirdly, bureaucrats tend to be jealous of their policy-making function, or insecure about it (perhaps for the reasons given above), and are often reluctant to consult outsiders during the policy formulation stage. This can result in avoidable mistakes being made, and in controversy when the end product is finally released for public scrutiny.

approach to this legislative exercise, but when it has been considered necessary changes to the uniform model have been made. Australia is a Federation. Each State has a elected Government (sic) which is answerable to the people and makes decisions in accordance with those matters which it considers proper. . . I think your firm and others have to take a very realistic view of the matter and realise that it is incumbent on each Government to enact legislation in the interests of its citizens and institutions. . . [T]he first matter of concern to me as Attorney-General and the Government, is enacting into law statutes which will advance the rights and interests of Queenslanders'.

¹⁰⁹ There are other points on which the States have been slow to reach agreement, including: (1) remedies (retraction orders in lieu of damages); (2) forum-shopping; (3) the rights of public figures under defamation law; (4) the limitation period; and (5) the role of juries: see 'Current Topics' (1990) 64 *Australian Law Journal* 683. The differences appear finally to have been settled, at least as between the eastern States: uniform defamation legislation was introduced into the Parliaments of Victoria, New South Wales and Queensland on 14 November 1991.

DRAFTERS

Parliamentary counsel are likely to be subject to at least some of the influences that are common to politicians and bureaucrats. In addition, drafters (in common with most writers) tend to believe their way with words to be superior to others'. This means that when a drafter is confronted with a model statute, there will be a temptation to tinker with the wording which in some cases may prove irresistible: a more felicitously chosen adverb here, a more dexterously placed comma there.¹¹⁰ Changes made for aesthetic reasons are no doubt often assumed to be inconsequential, but they can ruin a uniform scheme.¹¹¹

INDUSTRY

In some areas (such as the food laws), segments of the regulated industry have a vested interest in non-uniform state laws. Non-uniform laws set up barriers to entry by interstate firms and are sometimes a form of protectionism.¹¹² In the case of consumer credit, the problem is not that the industry is opposed to uniformity (on the contrary), but rather that there are different views as to the form regulation should take. Some segments of the industry appear to favour a prescriptive approach, that is to say, an approach which leaves as little as possible to the discretion of either the contracting parties or the courts and tribunals. Others appear to favour a broad principle approach, that is to say, legislation which lays down basic requirements, but which does not purport to describe in detail the means of compliance. The attraction of the prescriptive approach is that it promotes certainty, while the attraction of the broad principle approach is that it promotes flexibility. The main concern of those who favour certainty is that it should be possible for a credit provider to determine in advance of transacting what precisely it must do to comply with the law. Subject to this, the actual substance of the legislation tends to be a secondary consideration. By contrast, the main concern of those who favour flexibility is that the legislation should not impede innovation, and this necessarily means avoiding statutory requirements that are too rigid. The difficulty the industry has experienced in choosing between the competing virtues of certainty and flexibility has been translated into the political arena, in the course of the lobbying process. Thus, New South Wales and the Commonwealth, for example, have from time to time tended to favour the broad principle approach, while Victoria (for example) has favoured the prescriptive approach.

¹¹⁰ Eg compare *Trade Practices Act 1974* (Cth), s 4B and *Goods Act 1958* (Vic), s 85(1) and *Credit Act* (Vic), s 4(1) (definition of 'credit'): Duggan, Begg and Lanyon, op cit para 2.1.4.

¹¹¹ Supra fn 108.

¹¹² Swan, *The Pure Food Laws and Regulations: Burdensome Laws in Search of Meaningful Objectives?* op cit Chapter 5.

THE PUBLIC

It has become common in areas like consumer credit law reform to release draft legislation for public comment before it is enacted. This is supposedly the payoff for the secrecy adverted to earlier which surrounds the policy formulation and drafting processes. The public consultation process probably does not much assist the drive for uniformity. Submissions are most likely to be received from interest groups (including consumer organisations and industry associations) and lawyers. No doubt some submissions would give high priority to the need for uniform laws, but in most cases it is likely that the main concern would be to press the case for substantive changes to the draft: more stringent protection for consumers, or fewer restrictions on free enterprise, as the case may be. Uniformity is a less immediate concern, and perhaps not so much worth taking the trouble over in a letter to Government. Besides, suggestions for substantive improvements are more likely to strike a responsive chord because there are votes to be won in catering to consumer interests or business concerns (as the case may be), and there are no votes in uniformity.

CONCLUSION

The saga of consumer credit law reform in Australia highlights what appears to be an institutional bias against the achievement of uniform legislation, even in areas where the benefits of uniformity can be demonstrated. A partial solution may lie with increased Commonwealth intervention, but the possibilities in this regard are limited by the scope of the Commonwealth's legislative powers, as recent experience in the companies and securities field amply shows.¹¹³ Besides, resort to Commonwealth legislation whenever uniformity is thought to be desirable could be seen as posing a threat to the continued viability of the federal system.

An alternative solution, pending wholesale constitutional reform, would be for the establishment of a body along the lines of the National Conference of Commissioners on Uniform State Laws in the United States.¹¹⁴ The Conference is a perpetual body promoting uniformity of law by voluntary state action. It comprises at least three commissioners appointed by each State Governor. Commissioners are drawn from among leading legal practitioners, judges and law teachers, and serve usually for a three year term on an honorary basis.¹¹⁵ The Conference is funded by contributions from the states, the American Bar Association and the State Bar Association.

¹¹³ *NSW v The Commonwealth; South Australia v The Commonwealth; Western Australia v The Commonwealth* (1990) 169 CLR 482.

¹¹⁴ See, eg A Dunham, 'A History of the National Conference of Commissioners on Uniform State Laws' (1965) 30 *Law and Contemporary Problems* 233; Hay and Rotunda, *The U.S. Federal System: Legal Integration in the American Experience* (Milan, Oceania Publications, 1982), 310-324.

¹¹⁵ The full Conference meets annually to consider proposals for draft uniform laws, and to review drafts currently in progress. Each draft law is prepared by a special committee of commissioners appointed by the Conference, and must be considered by the full Conference, section by section, at no fewer than two annual meetings before being voted on.

There is a similar body in Canada, known as the Uniform Law Conference of Canada.¹¹⁶ However, in contrast to its United States counterpart, the Conference in Canada makes no attempt to secure enactment by the provinces of its Uniform Acts. This is generally regarded by commentators as being a serious weakness. Another weakness is that in Canada, the conference is composed almost exclusively of government officials. As such, it does little, if anything to counteract the institutional biases against uniform laws adverted to earlier. Again, the commentators are agreed that the composition of the Conference should be altered so that it draws on all segments of the legal community.¹¹⁷ A collateral advantage of such a change is that it would increase the pool of expertise available to be tapped in the different areas under review.

Notwithstanding their acknowledged limitations, these appear to be promising initiatives for Australia to consider. A permanent organisation devoted to the pursuit of uniformity and drawing on the fully supply of expertise across the country could play an important role, not only in bringing state laws together in areas where it matters to do so, but also in achieving harmony between state and Commonwealth laws,¹¹⁸ and between Australian laws and the laws of other countries, such as New Zealand in furtherance of the Closer Economic Relations agreement.

The procedures of the United States Conference are cumbersome, and have been criticised for being too time-consuming.¹¹⁹ Careful attention would need to be given to this issue in the development of an equivalent Australian body. Additionally, the composition of the body would need to be carefully determined. For example, in view of observations made earlier, there may be a case for involving experts from fields other than law, such as economics, business management and the behavioural sciences. However, these are matters of detail which it is beyond the scope of this paper to resolve. The first concern is to secure support in principle for the proposal.¹²⁰

Each State is entitled to one vote, and a draft requires the approval of a majority of the States represented at an annual meeting and at least twenty jurisdictions, before it can be promulgated as a Uniform Act.

¹¹⁶ See, eg J Ziegel, 'The Future of Commercial Law in Canada' (1986) 20 *University of British Columbia Law Review* 1; J Ziegel, 'Uniformity of Legislation in Canada: The Conditional Sales Experience' (1961) 39 *Canadian Bar Review* 165; E Palmer, 'Federalism and Uniformity of Laws: The Canadian Experience' (1965) 30 *Law and Contemporary Problems* 250.

¹¹⁷ See, especially, Ziegel, 'The Future of Commercial Law in Canada' op cit 28.

¹¹⁸ One of the by-products of intensive legislative activity in fields such as consumer law is the increased prospect of constitutional inconsistency as Commonwealth and State laws interact. See, eg: *Credit Act* 1984 (Vic), Part VII and *Insurance Contracts Act* 1984 (Cth) (insurance) (Duggan, Begg and Lanyon, op cit Chapter 9); *Credit Act* 1984 (Vic), Part II and *Trade Practices Act* 1974 (Cth) s 73 (linked credit providers) (Duggan, *Regulated Credit: The Sale Aspect* (Law Book Company, Sydney 1986), para 11.2.14); and *Hire-Purchase Act* 1959 (Vic), s 5 and *Trade Practices Act* 1974 (Cth), s 68 (mandatory implied terms) (ibid para 7.11.3).

¹¹⁹ See, eg Dunham, op cit 245.

¹²⁰ There is already some support for the idea; see, eg Bailey, op cit.

CONCLUSION

This paper has sought to identify three areas of weakness in current approaches to consumer protection. The first has to do with values. It is the failure to develop a coherent philosophy, and is the reason for the charges of ad hocery that are from time to time levelled against consumerism. The solution lies in a careful reassessment of priorities, with particular reference to the key underlying issues of welfare, equity and paternalism. Choices need to be made about which of these sets of values is to be given primacy, with a view to establishing a principled basis for rationalising old laws and shaping new ones.

The second area of weakness has to do with objectives, and is a product of the first. It is the common failure to be explicit about what a particular measure is intended to achieve, manifested sometimes in an inappropriate choice of policy instrument, and sometimes in blindness to the side effects of intervention. A possible solution would be to give disciplines other than law a more meaningful involvement in the formulation of consumer protection policy before legislation is drafted.

The third area of weakness is in the legislative process. It is the low priority that is given to the achievement of uniform laws. The reasons are institutional, so that an institutional response is called for. The suggested solution is the establishment of a new national body charged with the promotion of uniform laws for national markets.

The first of these imperatives is the critical one. It involves being clear about the basic premises of intervention. If the starting point is a belief that consumers, by and large, are capable of making their own choices, then legislative intervention will take a quite different shape from legislation which derives from the opposing view. In the one case, the function of intervening is primarily to help consumers choose for themselves, while in the other case it is to make consumers' choices for them. Both viewpoints are reflected in the current body of consumer legislation, occasionally even in the same statute. This may indicate a considered response to different kinds of market failure, or it may spring from a belief that consumers are capable of making up their own minds about some things but not others. Often, however, it is merely ambivalence. At the risk of sounding tautological, it is time we made up our (collective) mind about whether we are capable of making up our (individual) minds.