CONSUMER LEGISLATION IN SOCIO-ECONOMIC PERSPECTIVE: OBSERVATIONS FROM THE ENACTMENTS OF ONE STATE

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One of the more disappointing features of the current interest in consumer legislation is the narrow way in which the various Acts involved are frequently considered. More particularly, studies and accounts of legislation of this kind are too often restricted to what the relevant Acts expressly concern. So they commonly deal with the aims of the statutory provisions within the context of the express terms of the Acts in question, with the success or failure of these Acts in achieving those aims, and if the study has a legal orientation, with the precise meaning of the words and individual sections employed in the legislation. But little else. Studies of consumer legislation, however, can clearly involve much more than this. In particular, given that legislation of this kind necessarily involves not just consumers, and not even just consumers and traders, but a dynamic socio-economic system in which both consumers and traders play active parts, any even moderately thorough study of consumer legislation must be concerned with the effects of the constituent statutory provisions on the general socio-economic system operating within the jurisdiction in question.

The objection to the prevalent narrow approach to consumer legislation is not however confined to the fact that it does not go far enough; it also includes the fact that such an approach tends to give a misleading impression of the function of consumer legislation and as a consequence obscures the full relationship between the various statutory provisions involved. Thus, under the narrow approach Acts or parts of Acts dealing with particular consumer problems are commonly treated as more or less discrete entities which may relate to other Acts or provisions by such obvious nexus as subject-matter or means of enforcement but which otherwise have little in common with each other apart from the fact that they all form part of a collection of statutes which have to do with consumers. It is not surprising, then, that resultant accounts of the consumer legislation of particular juris-

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dictions often consist in essence simply of detailed catalogues of all the relevant Acts.[1] Similarly in respect of studies of the general consumer law of particular jurisdictions. These also often consist basically of catalogues, in this case of relevant statutes and case law assembled together under various subject-headings pertaining to consumer problems, consumer interests, or areas of consumer activity.[2]

Much important and useful information on consumers and the law has been, and can still be, obtained from studies of the kind just referred to. That fact is not called into question. The point to be made here, however, is that even more useful information can be gained from studies which go further by having as their focus the effect of consumer law on the general socio-economic system in which it must operate. From this functional point of view the various pieces of consumer legislation form a more coherent whole than is apparent under the narrow approach; in particular, the constituent provisions are seen to form a single set of devices which are designed to improve the position of consumers by affecting the operation of a given socio-economic system. In this paper we shall briefly examine some recent State consumer legislation from a socio-economic point of view in order to indicate the significance and value of studies of this kind, and also some of the problems which they disclose. Because we wish primarily to foster an approach rather than provide an exhaustive study we shall confine ourselves to the legislation of our own State, Western Australia, though as consumer legislation in Australia is reasonably uniform our observations will have general application to most other State and Territorial jurisdictions. We shall also restrict ourselves primarily to legislation since 1971, when consumerism may fairly be said to have come into its own in Western Australia.

Western Australian Consumer Legislation and Economic Theory

Prior to 1971 the Western Australian Parliament had over the years passed approximately fifteen Acts of particular benefit to consumers. The impression is gained, however, that they had rarely been passed with the same sense of concern for consumer welfare that has been evident in Parliament in more recent years. Occasionally they had even been introduced more as a result of pressure from self-interested

1 See, e.g., the account of Australian consumer legislation in K. C. T. Sutton, *The Law of Sale of Goods in Australia and New Zealand* 433-455 (2nd ed. 1974).

2 See, e.g., the U.K. work, Gordon Borrie and Aubrey L. Diamond, *The Consumer, Society and the Law* (3rd ed. 1973).

businesses and industries than by any strong consumer demand; the original Trade Descriptions and False Advertisements Act of 1936 is a good example in point.[3] In the early 1970s, however, the situation changed, as it had already done elsewhere in Australia. In 1971 Parliament passed the important Consumer Protection (now Affairs) Act which established a Bureau and a Council to protect and promote consumer interests. Since then—and clearly as much due to the activities of those two bodies as to increased public interest in consumer affairs—consumers legislation has been a regular feature of the legislative programmes of successive governments. For example, in 1973 Parliament passed the Unsolicited Goods and Services Act, the Pyramid Sales Schemes Act, and the Motor Vehicle Dealers Act. In 1974 it passed the Small Claims Tribunals Act, and in the following year it passed amendments to four of these new Acts to take into account experience gained since the respective principal Acts had come into effect. Amendments were also made during this period to earlier pieces of consumer legislation.

The economic system that all these Acts are intended to affect is, of course, nominally one of free enterprise. A system of this kind is based on the two-fold principle that the preferences of individuals should count and that traders should be free to enter and withdraw from markets in response to consumer demand. From the point of view of pure economic theory the ideal market within a free enterprise system for both consumers and producers is one where there is perfect competition; that is, where the goods and services available are homogeneous and traded at a single price, where there is perfect knowledge of the price of such commodities on the part of both buyers and sellers, and where there is such a large number of buyers and sellers that no individual buyer or seller is able to influence the prevailing price by his own action. Under such conditions market forces within a free enterprise system ensure both that industries produce the goods and services that the community as a whole most wishes to consume and that these goods and services (a) meet the minimum standards that the community at large is prepared to accept, (b) are produced in the most efficient manner possible given the existing state of technology, and (c) are available within those technological limits at the lowest possible price.[4]

[3] See the statement by the Minister for Employment when opening the Second Reading Debate of the original Bill; 97 L.A. Deb (W.A.), p. 422 (8 September, 1936).

[4] For a more detailed account of the economic principles outlined here, see Tibor Scitovsky, *Welfare and Competition* esp. chs. 2, 8, 20-21 (rev. ed. 1971).

Perfect competition is, however, a purely theoretical construct which cannot be achieved in practice. This is not necessarily a bad thing for there are certain important disadvantages which would attach to any market with such competition. For example, prices there would not necessarily be the lowest possible as perfect competition is incompatiable with the existence of economies of large-scale production. Scale economies can be gained only if few sellers exist within markets; perfect competition, however, requires the existence of a large number of firms in any market with the result that each business enterprise is relatively small, and this inhibits the development and application of those sophisticated production techniques which are conductive to lower costs of production.[5] Economists have accordingly constructed as the ideal market for a free enterprise system in the real world one where there is "effective", or "workable", competition. Competition of this kind involves a market situation which is similar to that which in principle attends a competitive industry but which nonetheless allows the community to reap the benefits of the lower costs which are associated with large-scale production.[6]

The principal point to follow from the economic theory which has just been referred to is that, all other things being equal, the more effective the competition within any free enterprise market the better the position of consumers within it.[7] Competition acts as a purifying agent within a free enterprise market; it provides an impersonal force which purges such markets of inefficient businesses and with them all forms of anti-consumer practices, particularly the manipulation of the price and quality of goods for the sole benefit of the businesses involved.[8] Accordingly, all other things being equal, the best consumer legislation is that which creates the most favourable conditions under which effective competition can thrive. Such legislation may, for example, break up monopolies or facilitate the establishment of new businesses in order to increase the number of firms within a particular market. Or it may require the disclosure of information concerning

5 See generally Paul A. Samuelson, Keith Hancock & Robert Wallace, *Economics* ch. 24 (2nd Aust. ed. 1975).

6 For a definition of effective competition in economic terms, see M. Brunt, "Legislation in Search of an Objective". in J. P. Nieuwenhuysen (ed.), *Australian Trade Practices: Readings* at p. 238 (1970).

7 We should emphasise that by "competition" we mean *price* competition, where businesses compete for the consumers' dollar by price cuts rather than by resorting to such devices as persuasive (as opposed to informative) advertising and the distribution of "free" gifts, all of which tend to raise the price of commodities to consumers.

8 See Tibor Scitovsky, supra note 4,, esp. chs. 2, 20-21.

the goods and services traded so that consumers can compare commodities adequately; or again it may set down minimum standards in respect of either the process of selling or the goods and services sold in order to prevent misrepresentation or deception by sellers.

The important qualification in respect of what has just been said, however, is that all things are equal. It may in fact be considered preferable in particular circumstances to forego the promotion of competition within a market for over-riding non-economic reasons, particularly relating to social welfare. So, for example, it may be considered better to impose particularly high standards in respect of potentially dangerous goods even though this may reduce the number of firms and consequently the degree of competitiveness in the market owing to the increased costs involved. And it may at times even be thought best to close particular markets down on account of the harm that would result from their operation.

In the light of these general observations three basic questions can now be isolated as those around which any thorough study of consumer legislation within a free enterprise economic system must resolve. These are: first, does the legislation in question affect the very existence of a free enterprise system by promoting or hindering the satisfaction of consumer demand by entrepreneurs? Second, does the legislation create or destroy the conditions under which effective competition operates within free enterprise markets? And third, on the basis that any legislation which either hinders the satisfaction of consumer demand by entrepreneurs or fetters effective competition is *prima facie* undesirable within a free enterprise system, is any legislation with this effect justified on the basis of over-riding non-economic considerations?

A Socio-Economic Examination of Western Australian Consumer Legislation

Of the several noteworthy features of Western Australia's consumer legislation of the 1970s one of the more salient is the extent to which the constituent Acts can be seen as creating conditions for effective competition. These conditions appear to arise in three principle ways: negatively, though provisions which require sellers to refrain from certain activities; positively, through those which require sellers either to observe particular standards of conduct or to provide information to consumers; and remedially, by the establishment of institutions to assist consumers improve their position within the present economic and legal systems.

Negative devices are a particular feature of three Acts, all of which were passed in 1973. The first is the Trade Descriptions and False Advertisements Act Amendment Act; this makes misleading, as well as the previously proscribed false, advertising an offence and it also prohibits misleading sales promotion and passing-off (s. 9). The second is the Unsolicited Goods and Services Act which curbs inertia selling and pseudo-invoicing by making it an offence to demand payment for the unsolicited goods and services involved. And the third is the Motor Vehicle Dealers Act which *inter alia* prohibits both prescribed "undesirable practices" and the use of certain false and misleading information in connection with the sale of motor vehicles (ss. 41, 45). The first and obvious aim of these various provisions is, of course, to ensure that consumers are not misled or tricked into paying for commodities which are of a kind or quality they do not want. The point to be brought out here, however, is that such practices are not just anti-social—they also hinder competition by denying competitors the opportunity to sell to consumers the particular goods and services that they do want. Moreover, these practices can even bring a whole industry into disrepute and thus inhibit consumer demand for the products involved, as occurred in Western Australia, for example, with the used-car trade, eventually requiring the enactment of the Motor Vehicle Dealers Act of 1973. By curbing practices of the kind in question legislation benefits not just social welfare but competition and thus consumer welfare also.

The promotion of competition by positive means during the 1970s has involved two principal objects. The first is to ensure that particular vendors adhere to certain reasonable standards of conduct in their dealings with customers. This can in fact be seen as complementing the general aim of the legislative prohibitions which have just been mentioned as the Parliamentary debates make it clear that the object of these provisions is as much to ensure that the vendors involved do not deliberately take advantage of consumers as it to see that they do not fall below certain standards through lack of knowledge or experience. The most interesting Act here is the Motor Vehicle Dealers Act 1973-76 which attempts to uphold reasonable standards on the part of car traders. This it does not just by setting down express requirements concerning conduct but also by ensuring that so far as possible the personnel involved are of a reasonable quality. This latter object is the concern of Part II of the Act which imposes a duty on all motor vehicle dealers, car yard managers, and car salesmen to hold an appropriate licence issued by the Motor Vehicle Dealers Licensing Board.

To obtain one of these licences an applicant must meet the statutory requirements, which in general terms state that he must be of good character and repute and understand fully the duties and obligations involved under the Act. These licences are revocable on such grounds as failure to carry out the statutory duties or upon conviction for fraud or dishonesty in connection with car trading.

The 1973 and 1975 Door to Door (Sales) Act Amendment Acts, on the other hand, follow the more usual approach of simply setting out certain minimum standards of conduct expected of, here door-to-door, salesmen. The 1973 Act first of all introduces the notion of "permitted hours" for door-to-door sales and then prohibits unsolicited calls by any salesman outside these hours and makes any credit purchase agreement entered into outside these hours unenforceable (ss. 9, 4). The 1975 Act requires in addition that door-to-door salesmen show identification cards to those on whom they call and leave a card with any customer with whom they conclude a credit purchase agreement (s. 11); this card must have on it the name and address both of the salesman himself and of any principal involved.

This last feature crosses over directly to the second positive object of recent legislation, namely, the provision of information to consumers. The importance of this particular object cannot be overestimated. Knowledge by consumers of the full nature, quality and price of the commodites sold in any market is a necessary condition for effective competition. Without it consumers cannot compare goods and prices and consequently cannot make a rational assessment of the economic value and over-all worth of the commodities in question. Economic theory indicates, indeed, that requiring the provision of information of this kind is one of the most effective and most efficient ways in which legislation can promote the welfare of consumers in free enterprise markets.[9] However, in order to take full advantage of their formal socio-economic position within any market consumers will in practice need to have more information that just this. They will also need to be informed of their legal rights as consumers in order to be in a position to exercise and demand them to the full, and they will also need to be aware of the means by which these rights can be

9 Much useful information on the importance and on practical aspects of this matter has been provided by Michael Trebilcock; see, e.g. M. J. Trebilcock, "Consumer Protection in the Affluent Society", (1970) 16 *McGill L.J.* 263, esp. at pp. 276 ff.; David Cayne and M. J. Trebilcock, "Market Considerations in the Formulation of Consumer Protection Policy", (1973) 23 *U. Toronto L.J.* 396, esp. at 405-407, 423-426.

protected and enforced in order to take action against those who might infringe them.

Legislation has required traders to give Western Australian consumers information on facts relating to particular goods since at least 1936 when the Trade Descriptions and False Advertisements Act was enacted,[10] and door-to-door salesmen have been required to give customers information on certain of their legal rights since 1964 following the enactment of the Door to Door (Sales) Act.[11] And as has already been seen, the 1975 Amendment to the latter Act now requires further useful information to be given to customers by door-to-door salesmen. The main Act of the 1970s concerning the provision of information, however, is the Motor Vehicle Dealers Act 1973-76. This requires the display of certain facts and encourages the display of still further information in respect of second-hand vehicles offered for sale by dealers. S. 33 is the prescriptive section: it stipulates that second-hand car dealers must attach a notice to each of their cars setting out certain information such as the dealer's name and business address, the cash price of the vehicle, the year of manufacture if this is known, the licence-plate number, and "such other particulars as are prescribed". S. 35 then encourages dealers to indicate in the prescribed form the known defects of the car together with the estimated cost of rectifying them, the incentive to provide this additional information being the provision that any defects publicised in this way are thereby excluded from the statutory warranty on second-hand cars that dealers are required by s. 34 to give to most purchasers.

The Motor Vehicle Dealers Act is altogether an interesting Act because it is the only Act of recent years to be concerned with improving the whole operation of a particular industry. Prior to the enactment of the principal Act there had been widespread discontent concerning the used-car trade in Western Australia. In particular there had been frequent complaints made concerning both the use of deceptive sales methods and the sale of unroadworthy and dangerous

10 The original s. 5 required that scheduled goods (clothing, bedding, blankets, flannel, flour, furniture, motor bodies, and rugs) have indicated on them the full name and address of the manufacturer and a trade description containing prescribed details. The substance of this section remains though the relevant goods are now those prescribed and special provisions have subsequently been added in respect of textile products (see the new ss. 4A-4E).

11 Door-to-door salesmen must give persons entering into a credit purchase agreement with them a written statement in the prescribed form which informs customers of their right to rescind the contracts; agreements entered into in breach of this requirement are unenforceable (s. 3).

vehicles, especially to unsuspecting buyers.[12] It is interesting to note, though, that the advocates of reform included not just consumers and their representatives but also the car trade itself; as the Minister for Consumer Protection explained during the Second Reading Debate on the original Bill, the car trade was "particularly concerned at its own image and the bad reflections which the actions of a minority of unethical dealers and their agents were having upon reputable and well established firms in the trade".[13] The resulting Act, as has been seen, now requires that all motor vehicle dealers, yard managers and salesmen be licenced, it stipulates that certain facts be given to prospective purchasers of used cars and it encourages the disclosure of information concerning any defects in second-hand vehicles. Other provisions prohibit tampering with used cars in order to enhance their value (s. 45), prevent the waiver of any of the new statutory rights by customers without the consent of the Commissioner for Consumer Protection (s. 48), and establish special procedures before the Commissioner for Consumer Protection for the resolution of disputes between purchasers and dealers arising under the Act (s. 36).[14]

A further noteworthy feature of this particular Act is the fact that the motor vehicle trade was not just an advocate of the new legislation but was also involved in its planning. This was revealed by the Minister for Consumer Affairs during the Second Reading Debate on the original Bill.[15] Some commentators may interpret this fact as indicating an untoward attitude by the Government in favour of traders, contrary to the best interests of consumers, or at least as evidence that the motor trade was improperly influential in respect of the new Act. There is, however, a less sinister interpretation. As the economic theory outlined at the beginning of this article points out, in a free enterprise market the position of consumers improves as competition improves. But more than this: as competition improves,

12 See 201 L.A. Deb. (W.A.) p. 4920 (13 November, 1973) (Second Reading Debate on the Motor Vehicle Dealers Bill, 1973), referring especially to the first annual *Report of the Chairman of the Consumer Affairs Council* (W.A.) (1972-73), pp. 15-16.

13 Op. cit. p. 4921.

14 Western Australia's motor vehicle legislation is based on experience gained from legislation in other States. For a descriptive account of this legislation up to 1974, see K. C. T. Sutton, supra note 1, at 448-450, 455. See also in this connection the influential *Report on the Law Relating to Consumer Credit and Moneylending* by the University of Adelaide Law School (1969), ch. 13 ("Used Car Transactions"), and more generally M. J. Trebilcock, "Protecting Consumers against Purchases of Defective Merchandise: Is What is Good for General Motors Good for America?" (1971) 4 *Adelaide L. Rev.* 12.

15 201 L.A. Deb. (W.A.), p. 4921 (13 November, 1973).

so too does the position of all efficient businesses in the market. The result is that efficient businesses and consumers have a mutual interest in each others welfare, and this welfare is dependent on the realisation of effective competition. Any legislation which promotes competition, whether primarily aimed at benefiting efficient businesses or consumers, will accordingly benefit both parties. It appears from a reading of *Hansard* that the Government of the day (interestingly a Labor Government) recognized this fact and also that it appreciated that traders are often the best source of information on the factors which hinder competition in their industry. Opposition to the involvement of traders in the planning of consumer welfare legislation is of course understandable given the natural propensity of businesses to act purely in their own self-interest. Nonetheless, the promotion of consumer welfare is compatible with the promotion of business welfare—indeed, in strict economic theory the two are interdependent—provided the businesses involved are efficient. And business efficiency, as has been seen, is promoted by competition. One of the more unfortunate features of some current proposals for the improvement of consumer welfare is that they appear to ignore the crucial importance of competition in free enterprise markets and consequently assume that joint promotion of both consumer welfare and business welfare is an impossibility.

Although the Motor Vehicle Dealers Act is the only Western Australian Act of recent years to be concerned with improving the operation of a specific industry, it is not the only Act which has been designed to affect a particular industry. There is also the Pyramid Sales Schemes Act 1973-75 which has as its object the suppression of an industry—that of buying and selling positions, or "franchises", within pyramid sales schemes. The important feature of this Act for present purposes is the fact that it prohibits the satisfaction of any consumer demand that may exist for positions within schemes of the pyramid sales type. It will of course be argued in support of such legislation: first, that the only people who in practice ever profit from such schemes are the main promoters (the principal "traders"); second, that the people who then join these schemes (the "consumers") are very often of low intelligence or are particularly gullible; third, that the great majority of these people will not make any money out of such an operation on account of the inherent as well as the typical defects in any such scheme; and fourth, that most pyramid sales schemes are promoted by means of misrepresentation and even

fraud.[16] Nonetheless, the two points to be emphasized here are first, that there has obviously been a demand for participation in such schemes, otherwise there would be no need for legislation to curb it, and second, that in suppressing these schemes the Government has acted against one of the basic principles of a free enterprise system, namely that consumer demand should be satisfied by any available entrepreneurs.

It is not an object of this paper to argue for the existence of a completely free enterprise economic system in Australia. The point to be made here is simply that given the basic premise that a free enterprise economic system is to operate within Australia for the time being, any legislation which hinders the operation of this system, either by thwarting the satisfaction of demand or by hindering competition, should be fully justified. This matter, though, raises a fundamental question in connection with consumer protection, namely on what extra-economic grounds is interference with the accepted economic system justified in the interests of consumer welfare? M. J. Trebilcock, in an article concerning this particular question, observes that one current—and apparently popular—answer is founded on the principle that consumers should ideally always make *prudent* shopping decisions.[17] For the proponents of this principle, consumer legislation should accordingly promote decisions of just such a kind. However, Trebilcock then points out the difficulties associated with this seemingly plain and commendable proposition. These concern, in short, the identification of the necessary and sufficient conditions for such a decision:[18]

> When can one say that a person through lack of knowledge or discipline has brought goods that he does not *"need"* or *"cannot afford"?* When can one say that the fringe operator has caused a consumer to *"overbuy"* or to *"pay too much"*? The need for action in a particular field can only be established, on this [prudent] approach, when these questions have been answered, and these questions can only be answered after a concept of a *prudent* purchase or a *prudent* shopping decision has been constructed. What is a *prudent* shopping decision? The question has only to be posed for some of the difficulties inherent in it to become apparent.

16 For an account of the problems and practices concerned with pyramid sales schemes, see the first annual *Report of the Chairman of the Consumer Affairs Council* (W.A.) (1972-73), pp. 12-13.

17 "Consumer Protection in the Affluent Society", (1970) 16 *McGill L.J.* 263.

18 Pp. 263-64.

Trebilcock subsequently goes on to examine in some detail the competing arguments for what he sees as the two basic alternatives for maximum consumer protection, namely, "a state-planned 'good life'," where the particular problems just referred to are ultimately dealt with by overseeing state planners, and "a system of protection based on information", where consumers are provided with sufficient facts upon which they can make their own shopping decisions, prudent or otherwise. The latter alone is consistent with a free enterprise economic system.

It is worth emphasising that the provision of information can never ensure that consumers will make prudent decisions; they may, for example, not have the intellectual ability to do so. The provision of information will not even by itself prevent consumers from making harmful decisions. It may thus be considered desirable to control the satisfaction of certain consumer demands substantially on the ground that these can, or will usually, or will often, have harmful or otherwise undesirable effects. A strong argument for curbing pyramid sales schemes may indeed be based on the fact that membership of such schemes is usually harmful to participants given the financial commitments and risks involved and the financial means and natural abilities of those who join them. Another strong argument can be based on the fact that the demand for participation in such schemes exists for the most part only because it is artificially created, usually by misleading and even fraudulent promotion devices. This latter argument, though, raises only further problems concerning the socio-economic welfare of consumers for the fact is that almost all consumer wants are created if only because they are learned.[19]

The Pyramid Sales Schemes Act is interesting for yet another reason. This is the fact that it also forms part of a small body of recent consumer legislation which is primarily designed to control a certain type of selling, namely that promoted at people's homes. Thus this particular Act, besides attacking pyramid schemes, also prohibits "referral selling", that is selling goods to customers at a discount if they then give the vendor the name and address of other potential purchasers (s. 6). This provision was principally aimed at certain door-to-door encyclopaedia sellers who were using the practice of referral selling both as a device to sell their books as well of course as

19 For an introductory study on the extent of the creation of consumer wants in modern society, see John Kenneth Galbraith, *The Affluent Society* (2nd ed. 1969).

a means of gaining information on potential customers.[20] The main terms of the other Acts in question, the Door to Door (Sales) Act and the Unsolicited Goods and Services Act, have already been noted. In short, the former now restricts the operation of door-to-door salemen to certain times of the day, requires that any credit purchase agreements entered into by such salesmen be in the prescribed form and subject to rescission by the purchaser, and also requires that these salesmen present identification cards to potential customers setting out their, and their principal's, name and address. The latter Act prohibits both "inertia selling", which is principally sending unsolicited goods to people and then demanding payment for them, and "pseudo-invoicing", which is inducing subscriptions to directories by the use of order forms which look like invoices.[21]

The provision in the Pyramid Sales Schemes Act and the whole of the Door to Door (Sales) Act have the important common feature that both were designed to improve the conduct of door-to-door salesmen. The problem which led to the enactment of both pieces of legislation involved certain itinerant traders—usually vendors of expensive sets of encyclopaedias—who would call mainly upon families in lower-class suburbs and by means of high-pressure and persuasive sales-talk entice them into buying merchandise which they often did not really want. Goods were thus frequently sold without customers having an adequate opportunity either to think about the prospective purchase or to assess the value and quality of the goods involved. As a result of such practices shop traders were prejudiced because their commodities were not adequately considered as possible alternatives by the purchasers of the hawked merchandise and door-to-door salesmen as a class were prejudiced by virtue of the bad reputation created by the disreputable vendors. By giving purchasers a statutory "cooling-off" period during which they can rescind certain contracts the Door-to-Door (Sales) Act has sought to balance both the interests of shop traders with those of door-to-door vendors, and the interests of consumers with both. Both Acts moreover, have attempted to improve the general reputation of door-to-door salesmen, and consequently perhaps their sales potential, by requiring a reasonable standard of conduct from traders of this kind. It is interesting to note in this connection the express support given to the promotion of at least the Pyramid Sales Schemes Act by the Direct Selling Association,

20 See 202 L.A. Deb. (W.A.), p. 5346 (22 November, 1973).

21 For an account of State legislation on these matters elsewhere in Australia to 1974, see K. C. T. Sutton, supra note 1, at 444-448, 450-451.

a body representing such well-known direct-selling firms as Avon and Tupperware. In a telegram read out to Parliament by the Minister for Consumer Protection in 1973 that body supported the passage of this Act as it attacked "the evil of the practice of pyramid selling" but "without infringing the established ethical direct sellers operation".[22]

Associated with the apparent economic objects of these two Acts, however, is the more obviously social aim of the legislation, that of protecting consumers from their intellectual and other human shortcomings and in particular from becoming the victims of overbearing, slick or deceptive sales techniques. This latter was, indeed, also the principal object of the Unsolicited Goods and Services Act. Such a combination of both economic and social aims in legislation, however, again raises the general problem of when interference with the operation of the accepted economic system is justified on extra-economic grounds, particularly those pertaining to social welfare. More specifically it raises here the problem of weighing the economic effects of legislation against their social effects in order to determine whether the net result is beneficial or detrimental to consumers and society generally. This in turn raises the further problem of how these various effects are anyway to be identified and valued. Related, and often no less intractable, problems exist in determining simply the net economic result of legislation.[23] Sometimes the solution to problems such as these presents no real difficulty. There would, for example, be little dissent from the proposition that any increase in the price of goods sold by door-to-door salesmen in order to meet the cost of having identification cards, as required under s. 7B of the Door-to-Door (Sales) Act, is outweighed by the benefits to consumers that these cards confer. However, it is not at all easy to decide whether the overall increase in cost to consumers that results from the whole of that Act is outweighed by the total benefit that it produces, *a fortiori* if one cost is a reduction in genuine services provided by door-to-door salesmen, especially to outlying or disadvantaged districts.[24]

22 See 202 L.A. Deb. (W.A.), p. 5652 (29 November, 1973).

23 On the general problem of assessing the effects of consumer legislation, see Orville C. Walker, Jr., Richard F. Sauter and Neil M. Ford, "The Potential Secondary Effects of Consumer Legislation: A Conceptual Framework", (1974) 8 *J. Consumer Affairs* 144.

24 For a consideration of the effects of legislation affecting door-to-door sales on consumers living in poor areas of large urban cities, see David Cayne and M. J. Trebilcock, supra note 9 at 406, 423. For a critical account of the potential effects of W.A.'s Door to Door (Sales) Act see A. J. Wilson, "Consumer Protection at the Front Door", (1976) 12 *U. West. Aust. L. Rev.* 557.

The two outstanding consumer welfare Acts of the 1970s in Western Australia, however, are the Consumer Affairs (formerly Protection) Act 1971-75, which establishes a Consumer Affairs Council and a Bureau of Consumer Affairs, and the Small Claims Tribunals Act 1974-76 which establishes institutions of the kind indicated in the title. The Bureau and the Tribunals in short combine to provide consumers with information and support to enable them to obtain an increase in the benefits to which they are entitled within the present economic system and according to the present law. The Bureau basically provides administrative assistance to individuals concerning their consumer problems and the Tribunals provide a speedy, informal and inexpensive means of officially—and finally—resolving complaints by consumers against traders. The third body, the Consumer Affairs Council, is essentially a "watchdog" agency. Its function is to investigate areas of concern to consumers and report to the Minister for Consumer Affairs on any legislative or administrative action that needs to be taken to promote the interests of consumers (s. 14).

The Bureau of Consumer Affairs has among its several functions the administration of certain consumer statutes in conjunction with the Department of Labour and Industry.[25] Its primary function, however, is to assist consumers overcome practical or personal limitations which prejudice them in their dealings with traders. The Bureau is, for example, empowered to act on behalf of customers; in particular it can investigate their complaints and even institute or defend legal proceedings on their behalf (ss. 17-18). The former power is, indeed, popularly considered to be the most important of the powers and duties of the Bureau. Equally important in many ways, though, are those functions which centre around the provision of information to consumers. For example, the Bureau may answer consumers' questions and provide information to the public at large (s. 17). It should be emphasized, however, that to be of maximum value to consumers these latter functions must be directed to ensuring that consumers have sufficient information to make informed decisions in competitive markets and also sufficient information to deal effectively with those traders who for one reason or another fail to meet their legal or commercial obligations.

25 See the fourth annual *Report of the Chairman of the Consumer Affairs Council* (W.A.) (1975-76) p. 6. The statutes include the Motor Vehicle Dealers Act, the Door to Door (Sales) Act, the Pyramid Sales Schemes Act, the Trade Descriptions and False Advertisements Act, and the Unsolicited Goods and Services Act.

If traders fail to meet their legal obligations to consumers there then, of course, arises a particular need for appropriate machinery by which the related rights can be enforced. As M. J. Trebilcock has put it: "Whether rights possessed by a consumer are bargained for or conferred by statute, they will be of no practical value to him unless he has the ability to litigate them".[26] (*Mutatis mutandis* non-legal consumer rights, for example those conferred by industrial codes). The Small Claims Tribunals now complement the Courts system in Western Australia by providing an official means of settling consumer complaints in respect of sums of up to $1,000. As has already been indicated, these Tribunals operate expeditiously and with a minimum of formality; for example, they do not have to follow the normal rules of evidence (s. 33(3)), parties may not normally be legally represented (s. 32), proceedings are in private (s. 33(1)), and there is no right of appeal (s. 18). Proceedings before these Tribunals are also cheap: the only official fee involved is $2 to file a complaint, and costs cannot be awarded against a party. There is still a common impression in Western Australia that these Tribunals are a form of "poor man's court". This, however, is misleading. These Tribunals certainly provide the poor with a cheap means of seeking redress for small claims, but they are also a convenient forum for those who are certainly not poor. The truth is that even the rich normally cannot afford on a purely economic cost-benefit basis to litigate small claims through the main Courts system, and thus they too benefit from these new institutions.[27]

Conclusion

The consideration of consumer statutes has so far taken the provisions involved mainly at their face value. In particular no attempt has been made to see whether the Acts do in fact operate as their promoters had intended or whether they have the economic and social effects which have been referred to. This is an omission of necessity for there is presently minimal information of significance on the socio-economic effects of these Western Australian statutes. This situation is particularly unfortunate as reports from other countries, especially from the United States and Canada, indicate that similar consumer legislation has often not had the effects that had originally been

26 Supra note 9 at 294.

27 On this matter see M. J. Trebilcock, supra note 14 at 16, 41. On the need for small claims tribunals (or courts), see the Consumer Council (U.K.) study, *Justice out of Reach: A Case for Small Claims Courts* (1970). For a short account of small claims tribunals in Australia and New Zealand see E. P. Ellinger, "Small Claims Tribunals", (1977) 5 *Aust. Bus. L. Rev.* 121.

expected or intended.[28] To mention just two instances pertaining to institutions akin to Western Australia's Bureau of Consumer Affairs and Consumer Affairs Council. In Canada a survey of over seventeen thousand consumers who had written letters of camplaint to both government and private consumer service agencies in 1972 indicated that "the average consumer complainer is a middle aged, well educated, affluent, managerial-professional man or woman".[29] The survey also found that 49% of complaint letters were written by only 24% of the complainants. The authors of the resulting study rightly commented that "these consumers may not be those whose needs are greatest or who receive unequal or unjust treatment in the marketplace";[30] they thus probably do not represent the sector of society which those who established these consumer bodies most wished to help. The authors of this study also added the important warning that "the magnitude of over-representation of [certain] groups suggests the existence of a core of professional complainers whose chronic letter writing substantially biases the representativeness of consumer complaint data".[31]

The second instance concerns the findings of several reports on bodies similar to the Consumer Affairs Council. These raise serious doubts concerning the ability of such institutions to promote the interests of consumers satisfactorily.[32] The root of the problem is two-fold. The first is that the interests of individual consumers are varied and diffused whereas the interests of individual industries are concentrated and well-defined. It is thus difficult to ascertain what the main interests of the former are, whilst there is little problem in respect of the latter. The second is that industries have substantial resources that they can call upon in the way of both finance and expertise to promote their own special interests whereas the same is rarely true of consumers or even the better endowed consumer organizations. If one adds to this the fact

28 Of special interest here is the study by David Cayne and M. J. Trebilcock on the effect of consumer legislation on markets operating within poor districts of large urban cities; see supra note 9.

29 J. P. Liefield, F. H. C. Edgecombe and Linda Wolf, "Demographic Characteristics of Canadian Consumer Complainers" (1975) 9 *J. Consumer Affairs* 73.

30 Op. cit. p. 79.

31 Op. cit. p. 80.

32 See the survey and observations by Michael J. Trebilcock in "Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?" (1975) 13 *Osgoode Hall L.J.* 619. See also Mary Gardiner Jones "Planning the Federal Trade Commission's Consumer Protection Activities" (1974) 8 *J. Consumer Affairs* 8.

that many public consumer bodies (including W.A.'s Consumer Affairs Council) are required to include industrial representatives, who may not have the best interests of consumers at heart,[33] the general position of consumer groups *qua* effective consumer welfare organizations is seen to be weak compared with business and industrial organizations. A consensus of informed opinion would, indeed, add yet a further difficulty facing consumer organizations; this is the apparent fact that legislative decision-making processes upon which consumer welfare measures often depend, are, *"in the nature of things,* skewed to reflect a pro-producer, anti-consumer bias" (original italics).[34] The problem of devising a satisfactory institution to oversee and promote consumer interests is one which seems not to have been adequately resolved despite good intentions on the part of governments and legislatures.

Good intentions, though, are never sufficient to produce satisfactory consumer welfare legislation for whatever purpose. This point would seem trite were it not for the prevalence of a popular attitude to the effect that consumers are well served by any legislation which patently has to do with them provided it increases their rights in respect of sellers and industries. Not only is this wrong, but it is also potentially harmful. This attitude can lead consumer representatives to advocate, and legislators even to enact, just such legislation without their giving adequate consideration either to the root cases of particular consumer problems or to the socio-economic consequences of such enactments. The crucial point is that consumer legislation must work within a dynamic economic system. It is thus only in the context of such a system as it in fact operates within a particular jurisdiction that such legislation can adequately be considered. This was our original point and it holds good whether the purpose of any study concerns the value of existing legislation or proposals for legislative change. The fact that the expertise of lawyers is different from that of other social scientists, and especially economists, is not sufficient reason for their considering consumer legislation from any narrower point of view if they wish to deal with this subject as thoroughly as possible. Members of each social science will naturally be concerned with different topics and will ask distinctive questions. Nonetheless, only if they are all

33 Of the twelve members of W.A.'s Consumer Affairs Council, one must represent primary producers, three must be experienced in manufacture, distribution, advertising or other aspects of trade or commerce, and one must be a member of a society of employers; only four members are expressly required to represent the interests of consumers (s. 6 (2)).

34 Michael J. Trebilcock, supra note 32 at 622.

dealing in one way or another with the full range of fundamental issues will each be attempting to make the most significant contribution possible to consumer inquiries.

BOOK REVIEW

GOVERNMENT BY JUDICIARY—THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT. By R. Berger. Harvard University Press, 1977. Pp. x, 483. Recommended retail price $15 (U.S.).

> Whoever hath an absolute authority
> to interpret any written or spoken
> laws, it is he who is truly the
> Law-giver to all intents and purposes,
> and not the person who first wrote
> or spoke them.*
>
> A word is not a crystal, transparent
> and unchanged, it is the skin of a
> living thought and may vary greatly
> in color and content according to
> the circumstances and the time in
> which it is used.**

Oliver Wendell Holmes[1] has reminded us that "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics."[2] Doubtlessly many who have watched

* Benjamin Hoadly, Bishop of Bangor, Sermon preached before the King, 31 March, 1717, quoted in J. C. Gray, *The Nature and Sources of Law* 102, 125, 172 (2 ed., 1921 rep. 1972).

** Towne v Eisner, (1918) 245 U.S. 418, 425 (Holmes, J.).

1 1882-1899 a Justice of the Supreme Judicial Court of Massachusetts, 1899-1902 Chief Justice of that Court, 1902-1932 a Justice of the Supreme Court of the United States. See generally, "Symposium—Mr. Justice Holmes: The Man and His Legacy," (1976) 28 *U. Florida L. Rev.* 365.

2 O. W. Holmes, Jr., *The Common Law* 5 (M. DeWolfe Howe ed. 1963). This book, published in 1881, was a revision of a series of lectures given by Holmes

constitutional developments[3] within the Australian polity would agree. Others hold a differing viewpoint. But this merely serves to illustrate the public's growing awareness of the Commonwealth Constitution Act and its ramifications.[4]

What better time can there then be to turn our attention to the experience under the comparable[5] constitution of the United States of America—not only to find answers but more importantly to discover alternative methods, approaches and solutions to the increasingly complex range of questions within Australian constitutional law.[6] Valuable information can be gleaned from over four hundred volumes of United States Supreme Court reports, treatises,[7] and law reviews.[8] To this list can now be added four books by Raoul Berger.[9]

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in November and December of 1880 at Lowell Institute in Boston. This famous aphorism, had been used in a somewhat different form by Holmes in March, 1880 in an unsigned Book Review of *A Selection of Cases on the Law of Contracts, With a Summary of the Topics Covered by the Cases* by C. C. Langdell (1879) in (1880) 14 *Am. L. Rev.* 233, 234. See generally, Note, "Holmes, Pierce and Legal Pragmatism," (1975) 84 *Yale L. J.* 1123.

3 For example, *Labor and the Constitution* 1972-1975 (G. Evans ed. 1977); *Commentaries on the Australian Constitution* (L. Zines ed., 1977); G. Sawer, *Federation Under Strain: Australia 1972-1975* (1977); Sawer, "Seventy Five Years of Australian Federalism," (1977) 36 *Aust. J. Pub. Admin.* 1.

4 A bibliography concerning the events in October-November 1975 is in *Constitutional Seminar* 64-68 (1977); *Australian Constitutional Convention—The Senate and Supply—Special Report of Standing Committee D to Executive Committee* 149-150 (23 June, 1977).

5 "Indeed it may be said that, roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions" Dixon, "Two Constitutions Compared," (1942) *A.B.A.J.* 733, 734; See also, Cowen, "A Comparison of the Constitutions of Australia and the United States," (1954) 4 *Buffalo L. Rev.* 155. A comparative table of the provisions of both constitutions is in P. H. Lane, *The Australian Federal System with United States Analogues* 1005-1007 (1972). See, however, Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd., (1920) 28 CLR 129, 146-148.

6 Supra notes 3 and 4.

7 J. Story, *Commentaries on the Constitution of the United States* (2 vols. 5th ed., 1905); W. W. Willoughby, *The Constitutional Law of the United States* (3 vols. 2d ed., 1929); L. H. Tribe, *American Constitutional Law* (1978).

8 For example concerning judicial solicitude for state interests see, Note, "Municipal Bankruptcy, The Tenth Amendment and the New Federalism," (1976) 89 *Harv. L. Rev.* 1871; Tribe, "Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services," (1977) 90 *Harv. L. Rev.* 1065; Michelman, "States' Rights and States' Roles: Permutations of 'Sovereignty' in National League of Cities v Usery," (1977) 86 *Yale L. J.* 1165.

9 Formerly Charles Warren, Senior Fellow in American Legal History, Harvard University.