

TRENDS IN INTERNATIONAL CONSUMER PROTECTION POLICY

INTRODUCTION

Today trade liberalisation and rapid developments in technology have meant traditional methods of dealing with consumer protection have been stood on their heads. Existing domestic and international institutional frameworks for consumer protection must be reassessed to ensure that consumer protection agencies are effective in delivering consumer welfare.

The mindset by some, but not all, business interests that somehow the consumer movement is “subversive”, “left-wing”, “anti-business”, and therefore has no useful input into the marketplace, reflects a reactive and not reflective approach to the role of the consumer movement.

Even governments, who are large service providers, have been or are becoming unsupportive of the role of the consumer movement and have even gone as far as in some countries removing support or refusing to recognise the consumer movement as a legitimate “voice” of consumers.

The future of the consumer movement internationally is to work smarter and more cooperatively in the new consumer protection paradigm. This is the global consumer challenge - a radical challenge that calls for radical solutions. It may also mean jettisoning some of the baggage that weighs the movement down or that makes, in appearance or reality, increasingly irrelevant to the changes in the marketplace.

CHANGES IN THE MARKETPLACE

CHANGING REGULATORY APPROACHES

In recent years there has been a decided shift from a rights based/government intervention approach, particularly with the total change of the political, social and economic climate. Some of the practical drawbacks with the rights-based approaches was the lack of access by many to their legal rights because of their lack of “savvy” on how to access the system or just the sheer time and hassle one has to make a case. There was always the issue of an under-resourced individual taking on a well-resourced company. Yet, many in the consumer movement thought the creation of legal rights meant their fulfilment. Far from it. Another drawback was the inadequate resourcing of consumer protection agencies or the lack of political will for strong enforcement.

Today, governments of all persuasions, particularly in the developed countries, have much greater faith in the market’s ability to deliver benefits to consumers. Government policy is aimed at ensuring more competition in markets and government services are rapidly being privatised, corporatised and outsourced. Governments are also retreating from the role of being a service provider.

This increased reliance on market mechanisms by governments has resulted in a greater reluctance, at least in some areas, to introduce detailed statutes and regulation, but instead to rely on market based or market sensitive means of intervention, for example, guidelines, codes of conduct, charters, standards, dispute resolution mechanisms etc, whose focus is

on better market information disclosure and providing consumers with private means of gaining redress.

In this context, governments are also characterising consumer protection intervention as adding an unnecessary compliance/cost burden on business.

While governments are turning to these *market based* means of gaining fair trading outcomes in their own markets, these market mechanisms are also of increasing importance for consumer transactions carried out across national borders where domestic laws are largely irrelevant and private enforcement of legal rights is not a viable option.

THE EMERGENCE OF THE GLOBAL MARKETPLACE

Another major development affecting consumer protection is that the market for consumer goods is rapidly becoming borderless. Already consumers are purchasing easily transported consumer goods in the global market, due to changes in market structures resulting from government action and/or continuous technological changes. New technologies are driving the process of globalisation to a great extent. The key commercial manifestations of these new technologies include:

- On-line commerce - This can encompass various forms of home-shopping, home-banking and home-entertainment accessed through both 'open' and 'closed' on-line computer networks.
The Internet is an 'open' on-line system which does not restrict entry provided that users have the appropriate hardware, software and interconnection facilities. Open on-line systems such as the Internet need to be distinguished from proprietary or 'closed' on-line networks which have a restricted access, the so-called 'intranets'.
- Smart cards - These are cards that use miniature computer chips to store and process information on transactions.
Smart cards have significantly increased functionality when compared to traditional magnetic stripe cards (eg existing credit and EFTPOS cards). They can be loaded with monetary value and can operate in either fully-audited, partially-audited or non-audited systems.
- Other technologies - Increasingly other technologies are also operating across national boundaries to provide entertainment, marketing and client service delivery to retail consumers. The two best examples of this trend are probably call centres and cable television.

In addition to providing some significant opportunities for consumers and businesses alike in terms of price, quality, choice, convenience and service, the emergence of a global electronic marketplace also presents a range of challenges for market participants and regulators. These challenges relate broadly to:

- competition issues - convergence of markets, price fixing, access arrangements;
- consumer protection issues - promise and performance, consumer liability, security, transaction records and audit trails, privacy, identifying reputable traders, pricing, consumer redress and dispute resolution, safety standards, access; and
- enforcement issues - evidentiary issues, jurisdictional issues, choice of law, frauds and scams .

I believe that unless these problems are resolved properly, the degree of consumer protection, and consequently consumer confidence, in using these new forms of electronic commerce, could remain low and retard their growth. Industry, consumers and regulators therefore have a strong incentive to see that these challenges are overcome.

THE SHIFTING PARADIGM FROM CONSUMER RIGHTS TO MUTUAL INTERESTS

A NEW REGULATORY REGIME - SUPPORT FOR MARKET BASED CONSUMER PROTECTION

One of the major challenges flowing from this changing environment is to assess how consumer welfare can be maintained and enhanced. For a start, the amount and type of regulation needs to be influenced by the level of contestability in a market and identified serious market failure problems.

If an informed, contestable market is seen as delivering choice in price and quality then regulatory intervention on behalf of consumers needs to be strategically targeted so that there is little, if any, impact on the competitive process which is delivering such results. Additionally, enforcement of consumer protection laws may only be needed to ensure that market failures which have a serious detriment on consumers are dealt with so as to “draw a line in the sand” to demonstrate to the market when the regulatory authorities will act against what they regard as unacceptable market behaviour.

In fact, any consumer regulation, whatever its form, needs to be:

- capable of producing favourable consumer outcomes, i.e. avoid being used as a guise for protecting consumers when the reality is that the main purpose of the regulation is to isolate some sectional interest from competition;
- focussed so that it addresses market failure in a cost-effective way without unduly impacting on the competitive process, and where it does, to be subject to a public benefit test;
- if anything, be designed to make the market even more competitive by;
 - addressing information and transaction cost problems;
 - ensuring that there are minimal barriers to entry and exit from markets;
 - providing no undue restrictions on market participants or the products they offer; and
 - ensuring markets are open to the widest possible participants.
- as far as possible be self-enforcing and cost-effective. A cost-effective regulatory system requires:
 - a presumption in favour of minimal regulation (mind you, a presumption that can be overridden when a higher level of intervention is justified);
 - an allocation of functions among regulatory bodies which minimises overlaps, duplication and conflicts;
 - an explicit mandate for regulatory bodies to balance efficiency and effectiveness;
 - a clear distinction between the objectives of the regulation and broader social objectives; and
 - the allocation of regulatory costs to those enjoying the benefits.
- any regulatory framework must have the flexibility to cope with changing institutional and product structures without losing its effectiveness; and

- the appropriate regulatory agency should operate independently of sectional interests and with appropriately skilled staff. In addition, a regulatory structure must be accountable to its stakeholders and subject to regulatory reviews of its efficiency and its effectiveness. The leaders of these agencies need intellectual toughness and stamina with a strong commitment to ensure that markets work for the consumer interest and not against it.

In circumstances where there is little or no contestability in the market (eg in a natural monopoly situation such as a utility) there may be greater justification for intervention to ensure that consumer welfare is maintained because consumers are not driving the market.

Contestability in a marketplace can be affected by a number of matters, including:

- the structure of the market itself;
- the amount of information about all aspects of the product (e.g. price, quality, service) available to consumers in the market;
- regulation, which has either the intended or unintended effect of making it difficult for consumers to move from one trader to another;
- matters such as switching costs, ease of entry into the market, and transaction costs for consumers in any particular market; and
- a “club” or cartel type mentality within the industry which acts as a brake for product and service innovation.
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In short, the amount and type of regulation should be depend on a “contestability spectrum” where at one end there is a highly contested market where regulation should be only introduced with great circumspection and at the other end there is little or no contestability where some form of regulation may be more readily justified.

Many governments are now turning to more flexible and market sensitive means of regulation to deal with consumer issues/ market failure. One of the problems with government legislation is that it is often seen as being not flexible enough to meet rapidly changing market situations. Even with “black letter” laws there is a trend nowadays for governments to draft performance based laws as opposed to detailed prescriptive laws so as to not unduly stifle innovation and to better accommodate changes in the market. This approach and more market sensitive, flexible means of regulating the markets include guidelines, charters, standards and codes are being used increasingly by governments to regulate the market.

INDUSTRY BASED CONSUMER PROTECTION STRATEGIES

“Self-Regulation” and Codes of Conduct

The term “self-regulation” has to be viewed with great circumspection. It is very subjective, meaning all things to all people including, for some, the facade and not the reality of addressing consumer concerns.

As governments have been moving away from prescriptive “black letter” law to regulate markets, they have increasingly turned to codes of conduct as one of a number of means of regulating the market, particularly on an industry-specific basis. Codes of conduct are being used by a number of industries as a means of self-regulation or co-regulation with government. By identifying industry members that are bound by appropriate industry standards, codes represent a public statement of the industry’s responsiveness to consumer needs and concerns.

Some of the advantages that codes of conduct offer over government regulation include:

- Developed voluntarily on the initiative of an industry, they can provide a flexible, cost effective approach to problem areas. Market failure problems can be addressed on an industry-wide basis, and so enhance the competitive process. Also, by addressing recurring or structural problems, codes can establish a form of industry quality control. They offer the flexibility and sensitivity to market circumstance necessary for product innovation, diversification and development.
- They can address industry specific problems and practices and consumer needs and can respond more readily to the dynamics of the market place.
- Members of an industry can feel some ownership over the regulation of that industry.
- Codes developed by industry in consultation with consumer affairs agencies and consumer/user groups can set agreed quality standards of work which can serve as a bench mark in settling disputes between industry members and consumers. They can provide public access to quick and informal complaints handling and redress mechanisms.
- They can provide a positive guide for ethical traders on agreed best practice benchmarks - going further than outlining minimum legal behaviour. They provide a sector of an industry wishing to gain a competitive advantage with the means to contend that it meets higher standards of fair trading than others in the industry (e.g. the use of "quality trader" logos which can give consumers, particularly those buying through the Internet, some degree of confidence).
- Adherence to a code of conduct written as a condition of a contract allows for a private right or action for remedies when there is a breach of the code.

There is currently a debate about the effectiveness of codes of conduct in gaining enduring fair trading/ consumer protection outcomes. The UK Office of Fair Trading (OFT) has recently produced a paper in which it eschewed its previous policy of "all the way with self-regulation". Instead they are opting for a standards-based approach.

I have also observed that in the United States also there is widespread scepticism of the value of codes. There are codes, and there are codes, and I believe that it is very much a "horses-for-courses" approach. It may well be that for many years there have been cogent grounds to be sceptical, but perhaps the codes that have been experienced simply have not been up to world's best practice.

It is our experience in Australia that black letter enforcement no longer works by itself. Instead, there is a role for both codes of conduct and standards in gaining fair trading outcomes, with the latter underwriting the former.

As I will outline in this paper, in Australia we have not opted for the "list of vague/ motherhood statements of good intent" type codes, but a co-regulatory approach, which has to meet a number of essential criteria. These criteria include:

- Addressing consumer concerns
To be effective in addressing consumer concerns a code needs to have rules which address common complaints and concerns about industry practices and which set performance standards for participants. Such rules should address specific stated problems and not be written as broad general principles. The code should set out in its objectives clearly stated reasons why the code was established and what intended outcomes it sets out to achieve.

- Consultation

If codes of conduct/self-regulation are going to be accepted by governments and the public at large, then credibility with these stakeholders is absolutely vital, because only with such credibility will there be public acceptance of the code or an industry-based scheme and commitment to it by the appropriate regulators. To have any credibility at all there needs to be consultation with the appropriate consumer/ community/ user groups and appropriate regulatory/ government agencies. It goes without saying that the industry members themselves need to be consulted.

Sometimes the use of a reference committee can be a cost effective way of having all relevant interests come together and debate and agree on appropriate standards.

Typically consultative devices include user/consumer/community:

- consultation in the drafting of the code;
- involvement in the code administration and review; and
- involvement in complaints handling where appropriate.

- Code administration

Unless there is some body responsible for ensuring the implementation and the ongoing administration of the scheme then its success in delivering fair trading outcomes is severely limited. A code administration body needs to be established and its existence and operations written into the code document itself so that it becomes part of the overall code. Typically the responsibilities of administration bodies will include:

- monitoring and reporting on compliance;
- obtaining from members adequate finance for administering the code and preparing budgets and financial reports;
- ensuring publicity for the code;
- making provision for employee awareness of the code;
- imposing agreed sanctions on members for breaches of the code;
- conducting periodic reviews of the effectiveness of the code and its procedures and recommending amendments if necessary; and
- preparing annual and other reports on the operation of the code.

- Transparency

Industry based code schemes aimed at delivering fair trading outcomes need to contain appropriate consumer/user representation on the administration committee, and where appropriate, in complaints handling. In some instances, representation by the appropriate regulatory authority on the code administration body can serve as a means of the regulatory body putting forward a public interest view. Such representation provides transparency to the scheme by providing a “public window” on its operations which ensures that the industry group will be acting in the broader public interest.

- Coverage

The effectiveness of any code will only be as good as the amount of coverage the code has of the relevant industry for which it is aimed. Where codes are being used as an alternative to government legislation some form of mandating legislation may be required to ensure industry wide coverage where this can not be achieved by voluntary means.

- Complaints handling

The code should include provisions to allow for complaints to be lodged and then to be handled by signatories. Performance criteria for effective complaints handling should form part of the self-regulatory scheme. Standards Australia has developed a benchmark type standard for effective complaints handling (AS4269).

- In house compliance

The code's administration body needs to ensure that each participant has some form of in house compliance system to ensure compliance with the code. It can also assist compliance at this level with advice and training. In Australia, code compliance manuals are being developed for code schemes. These manuals are based on the recently released standard on compliance programs (AS3806).

- Sanctions for non-compliance

Commercially significant sanctions will be necessary to achieve credibility with, and thus compliance by participants and also engender consumer confidence in the code/ self-regulatory scheme.

- Independent review of complaints handling decisions

The code should also provide for a review mechanism where a member of the public or an industry member is dissatisfied with the outcome or the way the complaint was dealt with or the sanctions imposed at first instance.

- Consumer awareness

Unless consumers are aware of the code and its contents the code will be ineffective in achieving its fair trading aims. The code provisions themselves should incorporate mechanisms designed to ensure that consumers and other relevant groups are made aware of the terms of the code and its complaints handling provisions.

As codes give consumers some measure of assurance that a trader strives to operate by established standards of conduct, there could be benefit in publishing a list of traders that have adopted a consumer code/charter are deemed to abide by it.

- Industry awareness

In many cases a code fails to operate effectively, not because its principles and procedures are inadequate, but because employees or industry members are either unaware of the code or fail to follow it in day to day dealings. A provision in the code requiring employees and agents to be instructed in its principles and procedures is therefore essential. This is a task which needs to be overseen by the code administration body.

- Data collection

Data collection is important, not only from a reporting point of view, but as a valuable source of market information about the origins and causes of complaints, and therefore to enable identification of systemic and recurring problems which need addressing by industry members.

- Monitoring

Regular monitoring of codes for compliance is essential, not only to ensure the desired outcomes, but to ensure that ethical members complying with the code are not disadvantaged.

- Accountability

Annual reports on the operation of the code should be produced by the code administration committee, allowing for periodic assessment of the scheme's effectiveness.

- Review

A code should provide for regular reviews to ensure that the standards incorporated are meeting current community expectations and that the code is working effectively.

- Competitive implications

Codes should avoid being written in such a way that they have a negative impact on competition. Where it is considered necessary for the success of the operation of the

code to include anti-competitive provisions, there needs to be a transparent public benefit justification process.

- Performance Indicators

Performance indicators should be developed and implemented as a means of measuring the effectiveness of the code's operation. Examples include:

- a high level of awareness of the code amongst participants and consumers;
- easy accessibility of the code to consumers;
- decreased level of complaints received on issues the code is designed to address;
- otherwise meeting the stated objectives of the code;
- high visibility and easy accessibility of complaints handling mechanisms, including quick response times; and
- effective in-house code compliance mechanisms are in place by participants.

Since the release of its report on Self Regulation in 1988, the Commission has set down and further developed these essential elements. The ACCC has produced a number of guides to the development, implementation and essential criteria for fair trading codes of conduct, which also discuss the practical aspects of setting up and administering codes. Recently, the Commonwealth, State and Territory consumer affairs agencies, through the Ministerial Council of Consumer Affairs (MCCA), released a similar guide to codes of conduct.

It is my hope that these essential criteria for codes can also be prescribed at the international level, for governments to use as a recipe for developing successful codes of conduct. I think there is a role for the OECD and ultimately ISO in the development of this international statement of codes criteria, which can bring benefits to countries around the world that many OECD countries take for granted.

An additional feature of many codes in Australia is that the Australian Competition and Consumer Commission underwrites these codes by not only being involved in their development, but also backing them up with strong enforcement action against those who choose not to participate in the code scheme. In short, there is no regulatory void.

A few case studies will demonstrate what I mean. A few years ago, the ACCC was receiving a number of complaints from an academic biologist complaining that advertising of prescription drugs to doctors by pharmaceutical companies was misleading. The Commission undertook a review of the code of conduct being used by the Australian Pharmaceutical Manufacturers' Association (APMA) and recommended a number of changes to the way it operated. The APMA adopted the Commission's recommendations. The main features of this code are:

- Complaints are considered by a independent sub-committee, which is chaired by a lawyer with trade practices experience, and which includes representatives of the Consumers' Health Forum, the primary health regulator (the Therapeutic Goods Administration), and nominees of relevant professionals associations.
- Sanctions are imposed for breaches and can include:
 - cessation or withdrawal of promotion;
 - corrective letter;
 - corrective advertising;
 - financial penalties (up to A\$20,000);
 - suspension of APMA membership; and/or

- expulsion of member company.

At one stage, well-known pharmaceutical company indicated that it would not comply with a sub-committee ruling under the code. The Commission sent it a letter indicating that if it did not abide by the self-regulatory scheme, then we would take appropriate action under the Trade Practices Act. The company decided very promptly that it would abide by the code ruling.

Another successful example of an Australian code is in the fruit juice industry. The Commission for some time was having problems with the adulteration and dilution of fruit juices, particularly orange juices. The industry developed a code of conduct whereby it undertakes random independent testing and has a complaints committee with outside representation which applies warnings and sanctions. There have been a couple of instances where parties found to be in breach of the code have indicated their unwillingness to abide by the industry's complaints committee. The Commission has moved swiftly in those instances to extract enforceable undertakings from these offenders of their compliance in the future.

These examples indicate that by and large, in certain circumstances industry can be left alone to regulate behaviour, but it is important that the appropriate regulator is both seen to be and actually underwriting compliance with the codes through necessary enforcement action.

A final example of codes of conduct that I would like to bring to your attention is the co-regulatory scheme developed in Australia for the telecommunications industry. Since the deregulation of the industry in July 1997, new telecommunications legislation has been in place to encourage new and old industry participants to develop codes of conduct to achieve and maintain good consumer protection standards.

Provisions in the Telecommunications Act encourage industry sectors to develop codes of conduct for specific areas of concern, including customer information, selling practices, billing and privacy issues that are not content-related. These codes can then be registered with the Australian Communications Authority (ACA). If an industry participant refuses to comply with a code, the ACA can direct compliance under penalty of breach of the Act. The ACA also has the power to direct an industry sector to develop a code, and if unsatisfied, can impose its own industry standards.

I regard the Australian telecommunications codes regime, which incorporates all of the essential criteria listed in this paper, to be state-of-the-art co-regulation. In fact, the Australian Competition and Consumer Commission is keen to adopt this type of coregulatory scheme itself in order to set consumer protection standards for content related telecommunications services, such as Internet commerce.

Consumer Charters

While codes have been used as an instrument for gaining fair trading outcomes at the industry, corporation and professional level, consumer charters are seen as a means of gaining consumer responsive outcomes from the public sector or privatised utilities which are in a monopoly situation.

A service charter is a simple and short plain-language document which sets out the quality of service standards customers can expect to receive from that body. Service charters also

outline any avenues for taking up complaints, means of commenting on the charter, and the way the charter is kept up to date.

Some of the reasons put forward for charter development include:

- the changing nature of the public service, e.g. corporatisation where direct political control and administrative review mechanisms are either diluted or no longer exist;
- the fact that consumers have nowhere else to turn to in the case of poor service;
- the focus by governments on ensuring that service delivery in the public sector reflects the standards being used in the private sector;
- as a mechanism to be more consumer responsive;
- as a means of having quality standards from a user's viewpoint;
- as a means of creating a service culture within a government agency;
- as a vehicle for formalising regular consultation with outside constituencies;
- as a compliance mechanism for fair trading; and
- providing community service/safety net obligations.

The move for citizen charters started in the United Kingdom in the early 90s, but they are becoming increasingly popular in other countries. In Australia, the Commonwealth government and some state and local governments are implementing charters. Again the ACCC has identified certain essential elements of charters if they are to be effective in the market place. These include:

- **Standards**

A set of well defined, measurable and achievable performance benchmarks aimed at best practices and service delivery.

- **Visibility**

Service standards and penalties for non-compliance and other information about service, including how and where to complain, are at all times highly visible to, and easily accessed by, agency users.

- **Changing the organisational culture**

Commitment from the top and an implementation strategy aimed at changing corporate culture and ensuring that practices are changed to deliver agreed service outcomes.

- **Employee involvement**

Views of employees sought as to the service standards, their achievability, and what practices need to be changed to meet service outcomes. Without employee acceptance, charters are less likely to be effective because these are the people who ultimately deliver the service. Appropriate training undertaken to ensure that staff are aware of standards and how these can be achieved.

- **User consultation**

Users of the service identified and their input sought as to their service requirements. Such consultation to be done systematically, regularly, and publicly.

- **Information**

Consumers of the services to have access to readily available, easily understood, and easily accessible, information to know what standard of services they are entitled to expect, how and where to complain, and where to receive more detailed information about the product or service.

- **Reporting**

Standards are publicised and a public reporting procedure on whether standards are met.

- Complaints handling/information distribution
Adoption and implementation of standards on complaints handling (e.g. in the Australia, the Standard on Complaints Handling AS4269-1995.)
- Redress
Where standards are not met customers are entitled to pre-determined compensation and, where appropriate, further compensation.
- Monitoring
Regular monitoring undertaken by the agency to ensure that standards are being met.
- Review
Periodic reviews of service standards implementation undertaken by an independent body to ensure that the standards are being met and are still relevant and up-to-date.
- Implementation
A consumer affairs unit within the agency with responsibility for negotiating service standards and ongoing liaison with stakeholders and implementing monitoring programs.

Industry Based Complaints Handling Schemes

Besides the move towards companies setting up their own complaints handling systems, it is also being seen as essential in some industries that consumers have additional access to an external complaints handling body, should their efforts to have the company resolve their problem fail.

In addition to the development of the Australian Standard for handling complaints at the enterprise level, a government/ industry/ consumer working party has developed benchmarks for industry-based dispute resolution schemes as a means of giving consumers an avenue of appeal when they fail to have their complaint remedied by a company.

Since 1990, various dispute resolution schemes have been set up by industry seeking to provide a cost-free, effective and relatively quick means of resolving complaints about the products or services provided by an industry. Customer dispute schemes of this type play a vital role as an alternative to expensive legal action for both consumers and industry.

Dispute resolution schemes have been developed in the:

- life and general insurance industries;
- banking industry; and
- telecommunications industry.

The emergence of customer disputes schemes is also due in part to increasing recognition of the value of effective industry self-regulation. Such schemes enable industry to ascertain the problems faced by their customers and take steps to rectify them, negating the need for government intervention.

In Australia, benchmarks and their underlying principles have been developed for external complaints handling bodies. These include:

- Accessibility
The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

- Independence

The decision-making process and administration of the scheme are independent from scheme members.

- Fairness

The scheme produces decisions which are fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

- Accountability

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

- Efficiency

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

- Effectiveness

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

INTERNALISING CONSUMER PROTECTION

Customer service and internal consumer affairs practices at the company level are increasingly becoming important cutting edge indicators of competition in a market and the sign of a competitive company. Poor internalisation of consumer protection by players in any given industry sector can be an indication of less than genuine market rivalry, as are higher prices and poor quality products.

With markets becoming increasingly more competitive, we are witnessing a convergence between the interests of business and the interests of consumers. Companies are increasingly looking at matters which are of concern to consumer affairs agencies for ideas to gain a competitive edge over their rivals in the marketplace. Smart companies have been or are turning to consumer activists for advice. Many companies are now internalising consumer protection through:

- the establishment of corporate consumer affairs departments;
- the use of corporate charters/codes;
- implementing complaints handling systems; and
- adopting in-house compliance systems.

Consumer affairs departments

At a corporate level, consideration of consumer issues can be carried out by in-house consumer affairs departments, whose job it would be to promote customer satisfaction by:

- representing a consumer perspective in management discussions;
- being responsible for “listening” to customers (through toll free numbers, using complaints/information requests data as a form of quality control);
- establishing dialogue with user/ consumer/community groups;
- maintaining liaison with regulators as to what they see are market problems;
- looking for emerging consumer problems either overseas or domestically;

- ensuring that documentation is user friendly and that demand for such information is met;
- being responsible for training staff to make the internal culture more consumer responsive;
- ensuring that customers have easy access to information and that complaints are dealt with effectively; and
- monitoring technological innovations to ensure that any consumer problems are addressed.

Corporate charters

Another recent development in Australia is a good example of this movement by companies toward internalising consumer protection. A general insurer, AAMI, has recently produced a customer charter which sets out some clearly defined rights for its customers.

The AAMI charter includes:

- a guarantee for all authorised repairs for the life of the consumer's car;
- the use of genuine parts in the repair of the car;
- the right of access to a decision maker;
- provision of documentation in plain language;
- the right to inspect personal data to ensure information is correct;
- the use of the company's complaints handling system;
- provision of a \$25 penalty if any of the charter promises are not met; and
- an annual independent audit (by KPMG) of compliance with the charter.

In launching the charter, the Chairman of ACCC (Professor Allan Fels) said:

'For a start, I believe that the charter contains "state of the art" consumer responsive mechanisms, including:

- a commitment to provide clear information about the company's products not only through its printed promotional material, but also through accessible telephone and email lines;
- service standards that are clearly defined and measurable;
- redress if standards are not met;
- a visible, accessible and responsive complaints handling mechanism;
- an ongoing consultative process with consumers and other interested parties about the standards; and
- a unique rigorous public accountability mechanism by means of an independent audit each year regarding compliance with the charter.'

The Chairman also commented that one of the features of the AAMI charter was that in a seamless way it had combined compliance with fair trading laws, state of the art quality customer service features and a competitive tool in the marketplace.

Corporate complaints handling systems

A further development where there has been a convergence of interests has been the use of internal complaints handling systems.

A recent study on complaints handling in Australia, the *American Express-SOCAP Study on Consumer Complaint Handling*, found that:

- more consumers indicated that they would not deal with the same company/organisation again in industries which were highly competitive or where choices were greatest if they had a complaint;
- on average, 95% of customers with no “problem experience” will remain loyal;
- 83% of customers with a problem who receive more than they asked for /expected will deal with the same company again;
- 89% of customers with a problem and who are not satisfied with the way their complaint was handled, will not deal with the same company again;
- on average a dissatisfied complainant tells nine people while a satisfied complainant tells half as many.

This study, undertaken by TARP, came to a similar conclusion as an earlier American Express study.

This begs the question as to how one should go about setting in place an effective corporate complaints handling system. The Australian Standard on Complaints Handling (AS4269), which was launched at about the same time as the survey results, sets down some agreed benchmarks for corporate complaints handling. The essential elements of the Australian Standard are:

- **Commitment**

There should be a commitment to efficient and fair resolution of complaints by people in the organisation at all levels, including the chief executive or ruling body. This is shown by an organisational culture which acknowledges consumers’ rights to complain and which actively solicits feedback from consumers. The policy on complaints handling should be in writing.

- **Fairness**

A complaints handling process should recognise the need to be fair to both the complainant and the organisation or person against whom the complaint is made.

- **Resources**

There should be adequate resources for complaints handling with sufficient levels of delegated authority.

- **Visibility**

A complaints handling process should be well publicised to consumers and staff, and shall include information to consumers about the right to complain.

- **Access**

A complaints handling process should be accessible to all and ensure that information is readily available on the details of making and resolving complaints. The complaints handling process and supporting information should be easy to understand and use, and be in plain language.

- **Responsiveness**

Complaints should be dealt with quickly and the complainants should be treated courteously.

- **Charges**

Complaints handling should be at no charge to the complainant, subject to statutory requirements.

- **Remedies**

A complaints handling body should have the capacity to determine and implement remedies, including the provision of refunds.

- Data Collection

There should be appropriate systematic recording of complaints and their outcomes.

- Systemic and Recurring Problems

Complaints should be classified and analysed for the identification and rectification of systemic and recurring problems.

- Accountability

There should be appropriate reporting on the operation of the complaints handling process against documented performance indicators.

- Reviews

A rapidly changing market environment necessitates ongoing evaluation of the complaints body's role and activities. Therefore, the complaints handling process should be reviewed regularly to ensure that it continues to efficiently deliver effective outcomes.

Corporate compliance systems

Another important means of internalising consumer protection has been through the establishment of internal/company based compliance systems. Many companies are realising that having a well thought-out and operative system for compliance with consumer protection/fair trading laws, can also, if properly designed, give them a competitive advantage. The AAMI consumer charter discussed above is a case in point.

The ACCC itself has been assisting industry with self-regulatory initiatives aimed at gaining effective consumer outcomes at the enterprise level in the area of compliance. The Commission is putting more resources into gaining across-the-board compliance by Australian companies with the *Trade Practices Act* through such non-litigious means as:

- production and promotion of its compliance manual "*Best and Fairest*";
- activity of the Commission's Compliance Education Unit;
- guidelines targeted for industry;
- promoting non-litigious compliance mechanisms such as codes of conduct, alternative dispute resolution, charters, and complaints handling systems;
- being involved in the establishment of the Association of Compliance Professionals of Australia; and
- approaching Standards Australia to draft a Standard on Compliance Programs.

Standards Australia has recently released an Australian Standard on Compliance Programs (AS3806).

The Standard proposes requirements and recommendations for the development, implementation and maintenance of a compliance system that can assist an organisation in its compliance with laws and regulations.

It is intended that the implementation of such a system would enable an organisation to identify and remedy any deficiencies in its compliance with legal requirements, and may also be more widely applied to codes of practice and other organisational standards.

Preparation of the Standard was commenced following a request from the ACCC. This followed concerns by the Commission that for some time there has been no universally recognised and agreed Standard on what the hallmarks of an effective compliance system/program are or should be. It was felt that a Standard on compliance

systems/programs could therefore give Australian companies some much needed objective benchmarks on what an effective compliance program should contain.

The purpose of the Standard as set out in the Standard itself is to provide a framework for an effective compliance system, the performance of which can be monitored and assessed. The Standard states that a compliance system is an important element in the corporate governance and due diligence of an organisation, and should:

- a) aim to prevent, and where necessary respond to, breaches of law, regulations, codes or organisational standards occurring in the organisation;
- b) promote a culture of compliance within the organisation; and
- c) assist the organisation in remaining or becoming a good corporate citizen.

Section 2 of the Standard outlines the essential elements of effective compliance and sets these out in the form of structural, operational and maintenance elements of a compliance system.

Section 3 is a “how to” guide on implementing the essential elements set out in Section 2. While it is recognised that a company’s compliance system needs to be customised to meet the company’s unique regulatory requirements, nevertheless, the Standard should serve as an important and vital reference tool for the compliance professional seeking to put in place an effective compliance system.

THE NEW ROLE OF CONSUMER PROTECTION LAWS AND INFRASTRUCTURE

While the trend is for governments to use more market sensitive means, this does not mean that there is a need to do away with the basic consumer protection laws developed since the 1960s. They still serve as an important underpinning or safety net for consumers. Many need further strengthening and tougher enforcement. What is needed to make these more market sensitive means for consumer welfare to work is to have a strong and active consumer protection and competition infrastructure and enforcement so that the risk-takers who choose not to use these more market-sensitive mechanisms will not disadvantage either consumers or the ethical traders who are willing to commit themselves to these approaches.

If, as it is argued, contestable markets produce consumer welfare and need less government intervention, then the obvious *quid pro quo* is that there should be a strong competition enforcement body with adequate penalties and remedies in its armoury and the willingness to use them to ensure that there is a high degree of contestability in the marketplace. This also has to be backed up by government policies which set in place a framework to ensure that market structures are as contestable as possible, rather than picking winners or supporting a particular sectional interest at the expense of consumer welfare.

This use of market sensitive means of regulating the market is even going to be more pertinent where consumers decide to buy goods in the global market, as legal remedies, in many cases, will not be available under domestic laws and other remedies, amongst other reasons will not be realistically available, for cost and accessibility reasons.

If the global market for consumers is to work, then it will need the development of “quality” companies and “quality” industries where consumers can have confidence that the

companies they deal with will deliver value for money goods and remedies if things go wrong. The market sensitive mechanisms discussed in this paper will be the principal means of protecting consumers and giving them the necessary confidence to deal in the global market.

THE ROLE OF GOVERNMENT AGENCIES

Enforcement of consumer protection laws

Traditionally, there is benefit in undertaking enforcement action and maintaining a strict enforcement presence. However, in the new global marketplace, market operators may be situated abroad, which seriously hampers detection, apprehension and enforcement action. If the protection of the welfare of consumers in the new global marketplace is to be enhanced, it is imperative that government enforcement agencies are better able to enforce their consumer protection goals. Joint law enforcement actions can also help to address unfair trading practices more effectively.

That said, consumer protection agencies can also position themselves as champions of ethical traders as much as of consumers, and promote the benefits of fair trading compliance and consumer protection standards for business as much as for consumers.

National consumer protection authorities need to work with each other on scams carried out in the global market to ensure that this market is not a “safe haven” for scam operators. The establishment and operation of the International Market Supervision Network is a positive move in this direction.

International Cooperation

Consumer protection agencies working together doesn't come automatically. It only happens when a common bond is developed through regular personal contact and through discussing common problems and sharing ideas. This in turn comes from having a conscious policy and internal mechanisms to ensure that each consumer affairs agency belongs to and is an active participant in regional and global networks.

Methods of international cooperation between enforcement agencies include:

- sharing enforcement techniques;
- sharing information, possibly by developing memoranda of understanding and establishing global cooperative networks;
- improving mechanisms for international governmental cooperation, by developing mutual assistance treaties and memoranda of understanding; and
- adopting a united approach to the development of consumer protection strategies in understanding issues as they emerge, and in the determination of the type of regulatory structures which will best regulate global market transactions.

Existing regional and global bodies such as the International Marketing Supervision Network (IMSN) and the OECD Committee on Consumer Policy, have been instrumental in developing cooperative and harmonised policies on consumer protection issues and to enforce consumer protection laws. For instance, the ACCC recently coordinated the “International Internet Sweep Day” under the auspices of the IMSN. Other networking bodies could be established to cover areas of interest not currently catered for in the global market. Until now, a list of regional and global consumer networks include:

- Consumers International Government Officials Group;
- International Marketing Supervision Network;

- OECD Committee on Consumer Policy; and
- ad hoc task related actions, eg. International Internet Sweep Day.

November 1997 marked the formation of a brand new network - the International Society of Consumer Affairs Officials (ISCAO). The International Society of Consumer Affairs Officials (ISCAO) was formed at a specially convened meeting of government officials at the Consumers International Congress held in Santiago, Chile. At the meeting, thirty nine government officials registered their interest in the creation of a global network for consumer affairs officials.

ISCAO was formed to encourage strong networking and a cooperative approach to solving consumer problems and a sharing of ideas, so that emerging problems arising out of the creation of borderless markets and technological advances can be dealt with effectively. The aims of the network are to:

- create a global network of consumer affairs officials;
- liaise and establish dialogue with:
 - the OECD Committee on Consumer Policy
 - the International Marketing Supervision Network
 - Consumers International
 - United Nations
 - Society of Consumer Affairs Professionals in Business
 - International Standards bodies such as COPOLCO;
- encourage best practices in consumer policy law and administration;
- encourage agencies to:
 - commit themselves to use of technology for interagency communication
 - research exchange
 - open up training programs for overseas officials;
- encourage the development of global consumer protection policies and practices;
- encourage the development of harmonised consumer protection laws;
- advocate cost effective consumer remedies;
- encourage business to adopt consumer responsive, market sensitive mechanisms for dealing with consumer problems;
- sharing of intellectual developments in consumer protection; and
- provide a monitoring system between consumer agencies.

The Australian Competition and Consumer Commission is providing the interim secretariat for the ISCAO. I am happy to provide interested parties with further information about the Society, and how to obtain a copy of the first ISCAO newsletter.

ALTERNATIVE RULE MAKING FORUMS

Previously, international standards have needed the backing of national laws to be effective. However, as national and state legislatures can be ineffective in setting international standards, the global marketplace will require alternative rule making bodies. Accordingly, some international organisations are adopting quasi-regulatory roles by developing standards which may or may not have force of law.

Five venues for international rule making are:

- the United Nations;

- international standards setting organisations;
- regional and other governmental cooperation bodies;
- international industry organisations and peak bodies; and
- international non-governmental organisations.

United Nations

As an organisation of sovereign nations, the United Nations (UN) provides the machinery to help find solutions to disputes or problems on the global stage, and is therefore a key forum for international standards setting.

UN Guidelines on Consumer Protection

Thirteen years ago the United Nations published a universal charter for Consumer Protection. The UN Guidelines on Consumer Protection were adopted by the UN after constant lobbying by Esther Peterson, and have since become the benchmarks upon which many consumer protection laws around the world, especially in third world countries, have been based.

The Guidelines set global norms for governments to protect their citizens as consumers, set some targets for businesses in their dealings with consumers and finally, encouraged consumer groups to take an active role in the consumer protection task.

The objectives of the Guidelines are:

- to assist countries in achieving or maintaining adequate protection for their population as consumers;
- to facilitate production and distribution patterns responsive to the needs and desires of consumers;
- to encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;
- to assist countries in curbing abusive practices by all enterprises at the national and international levels which adversely affect consumers;
- to facilitate the development of independent consumer groups;
- to further international cooperation in the field of consumer protection; and
- to encourage the development of market conditions which provide consumers with greater choice at lower prices.

The Guidelines themselves cover such areas as physical safety, economic interests, standards, distribution facilities, redress and education. The core areas of the UN Guidelines remain entirely relevant to consumer policy and, while they may need revising, there are a number of new areas of consumer policy which need to be considered for future incorporation in the Guidelines.

Although the Guidelines remain very relevant, environmental challenges, the processes of globalisation and the application of structural adjustment programs by developing countries has led to a number of gaps in the Guidelines which need to be filled.

Implementation of the Guidelines varies from country to country and region to region, however, there is strong evidence of their broad acceptance by member governments for the purposes of:

- establishing consumer policies, implementing legislation to protect consumers; or
- as a benchmark against which existing policies are assessed.

A key benefit (recognised at the time the Guidelines were developed) is the development of effective international cooperation for consumer protection between governments, businesses and consumers. In addition, UN agencies themselves have been active in applying the principles of the Guidelines as well as encouraging their implementation in member countries and on a regional basis.

In 1995, the UN Commission on Sustainable Development took on the mandate of extending the Guidelines to pick up the vital area of sustainable development and to examine the extent to which the Guidelines should cover new areas such as global marketing, financial services, the deregulation and privatisation of public utilities and the development of new standards for codes of conduct. Driven by developments in the global marketplace and a recognition that governments are in retreat from detailed marketplace intervention, this process is both challenging and exciting.

The international consumer movement has long recognised the value of using market forces to drive consumer protection, however, the consumer movement remains sceptical that market forces alone can overcome all market deficiencies. Problems of anti-competitive conduct, the uneven and unequal bargaining power of consumers and regional distortions require continued action from governments in the overall mix of consumer protection.

In considering the Guidelines, one has to look at the context of the early 1980's in which they were developed and to understand the extent to which other sources of consumer protection have come into being. New sources include liberalisation of trade regimes, the new multilateral trading system and the implementation of consumer protection measures in regional groupings such as the European Union.

One of the fundamental consumer protection concerns is the safety of goods and services. The Guidelines, while dealing with this issue, need to be updated to take into account much that has happened in the 12 years since their publication. Particularly in the areas of food safety and international cooperation in tracking dangerous goods, there are a number of measures which can be taken to update the guidelines and ensure governments, businesses and consumers around the world have access to the best practice in product safety.

A more controversial yet vital area for the reform of the Guidelines is to recognise the extent to which the governments as providers of goods and services need themselves to be subject to some quality control and supervision. Typically, remedies are very limited when it comes to governments as providers of services and this is a subject requiring attention in the revised Guidelines.

Access to justice, another long standing consumer protection theme is due for more attention, especially the elaboration of new principles that come from alternative dispute resolution systems, informal tribunals, industry based complaints schemes and many of the developments of the late 1980's and 1990's need to be built into the Guidelines.

As noted earlier, a theme in the Guidelines is the need for international cooperation in consumer protection. This is particularly needed in the establishment of modern market based consumer protection laws, enforcement and compliance mechanisms and schemes for market sensitive consumer redress. Large amounts of experience have developed through bodies such as the OECD Consumer Policy Committee, the International Marketing Supervision Network, and the Society for Consumer Affairs Professional in Business. The opportunity to import and describe in contemporary language this new experience in the

Guidelines needs to be taken now. A particular example is the encouragement of corporations to adopt complaints handling systems which, far from being a negative for businesses, can be turned into a strategic management resource wherein new products and services as well as ways of dealing with consumers can enhance consumer welfare and profitability.

For State owned businesses and businesses with a large scale, the implementation of consumer charters in which consumer policies, complaints processes and performance measures are spelled out, can provide an effective way of internalising consumer protection principles. The guidelines could easily establish some benchmarks for charters and for the incorporation of consumer protection.

The historical antipathy between some governments, consumer groups and transnational corporations is on the wane and the revision and extension of the Guidelines provides an excellent opportunity for coming to new accords with the representatives of transnational corporations to find new ways to reduce or eliminate the negative aspects of their conduct while maximising this positive contribution.

Amongst the urgent issues for developed and developing countries alike in making markets work and providing more efficient outcomes for consumers is the elimination of corrupt practices. While this is the subject of work at the OECD, there is scope for new clauses in the Guidelines as well.

Amongst those sectors of the modern economy showing the greatest change over the past decade (and posing some of the greatest problems for consumers) is financial services. Insurance, banking, investments and securities as well as conditions surrounding borrowing and lending of money have all been transformed by new technology and fierce competition by providers. Issues of consumer protection, full disclosure and access to effective remedies are all high on the agenda of just about every consumer policy agency. The revised Guideline provides an excellent venue to document some of the new consumer principles to be adopted.

Financial services are just one of the new consumer policy agenda challenges. Services generally continue to grow and take a much larger proportion of consumers' disposable income. A further area for incorporation in the revised Guideline is new policy provisions for consumer services.

The UN Consumer Protection Guidelines were developed over a period of ten years. Many early proposals for inclusion in the Guidelines were never incorporated while some matters that were not thought of by the original planners were incorporated.

Undoubtedly, the same process will operate in the current revision. The foregoing suggestions are silent as to the precise form of the new Guidelines should take or the level of detail to be included, but are designed to assist the debate about the need for revision and for the incorporation of direction rather than the form and content.

OECD

The greatest part of the world's population live in developing countries with regulatory regimes which fail to adequately recognise the rights of consumers. The OECD can do its part to address this by being a major force for global consumer welfare.

For instance, the OECD Committee on Consumer Policy offers an excellent opportunity for international cooperation in the development of consumer protection standards for global commerce. Recent initiatives of the Committee include:

- the recent Guidelines for Cryptography Policy;
- work in progress on “Consumer Redress in the Global Marketplace: Chargebacks”;
- OECD Privacy Guidelines (which are now global norms); and
- an “Overview of Codes of Conduct for Distance Selling” and development of standards for distance selling.

The OECD Consumer Policy Committee is currently working on and debating the Guidelines on Consumer Protection in Electronic Commerce, which will provide governments with instructive principles for both applying existing laws and developing new ones, if necessary, as they work to establish consumer protection mechanisms for electronic commerce. This should also help to harmonise approaches to consumer protection in electronic commerce, at the national, regional and global levels.

International Standards Setting Organisations

With the inexorable move towards a single global market with governments moving away from prescriptive consumer protection laws in their deregulatory thrust, the stage for rule making has shifted from the local jurisdiction to the international stage.

Bodies now operate for drafting international, harmonised rules to address consumer concerns.

International standards setting organisations have a long running association with the development of technical and safety standards.

Such standards do not have force of law, but are often adopted by governments or become recognised as international best practice so that companies who want to compete in the relevant marketplace have a great incentive to adopt them.

The development of international standards of best practice by international standards setting organisations could help to harmonise consumer protection standards on a global basis.

The International Organisation for Standardisation, ISO, is an international non-government standards-setting body - a confederation of national standards bodies which produces international standards by mutual agreement.

Promoting national and international standardisation, ISO plays an important role in the development of international voluntary standards.

ISO can play a major role in setting global consumer protection standards. A start would be to develop, and encourage the adoption by businesses operating within the global marketplace of, a complaint handling standard (similar to that developed by Standards Australia) for use within the international community.

ISO Global Market Standards

One of the strategies included in ACCC’s “The Global Enforcement Challenge” Discussion Paper is the development of international standards for the global marketplace, including

complaints handling and compliance standards. Currently a COPOLCO working party is investigating the possibility of ISO doing work on these global market standards. Part of this has been the drafting of a discussion paper to COPOLCO outlining the viability of ISO developing these standards, initially with a standard on complaints handling. The discussion paper was presented to COPOLCO earlier this month. It outlines a number of reasons why ISO is the most appropriate body to develop standards in this area. These include:

- ISO has a proven track record at producing market-based and market-accepted standards, including the 9000 (quality) and 14000 (environmental) series. In particular, the 14020 series of standards covering environmental marketing claims indicates that the ISO has already developed standards setting benchmarks for market behaviour by industry.
- ISO standards are voluntary.
- ISO standards are based on consensus.
- The ISO rule making process is highly transparent.
- ISO is truly international. In comparison, with such bodies as the OECD which have limited membership. Similarly, government to government agreements on standards do not always involve consumers and often are conducted on a limited basis.
- The ISO committee framework allows consumers and users the fully opportunity to participate along with industry participants. It is also a forum where regulatory agencies and policy makers can participate.
- ISO has a high profile and excellent level of credibility in the market and therefore its standards are more readily acceptable by national governments, industry participants and consumer organisations than other forms of standards/benchmarks/rules.
- The ISO offers a cost-effective mechanism for the development of standards, especially where the cost of producing standards by small and/or less developed countries is prohibitive.

International industry organisations/ peak bodies

As global market industries play a significant role in the global marketplace, it is important that international industry associations and peak bodies be actively involved with rule making processes.

Indeed, global business groups are already engaged in private sector harmonisation efforts. For instance, the International Chamber of Commerce (ICC), is working to establish codes for advertising practices, US and European toy manufacturers are working with the US Council of Better Business Bureaus to develop guides for children's advertising, and direct marketing companies also have international self-regulatory programs under way. In this way, it is important that international cooperation be maintained with these industry groups.

International Non-Governmental Organisations

It is important for those involved in looking after consumers' interests is to make sure that they have a clear and adequate "voice" at rule making forums so that their views are put and put strongly.

To the extent that commercial interests support divergent standards as protectionist or trade facilitating measures, consumer organisations can provide an essential countervailing force.

Like their industry counterparts, international consumer groups should be actively involved with rule making processes to ensure adequate standards of consumer protection, and constant international cooperation with these groups should be maintained.

In this way, the UN Guidelines for Consumer Protection need to address the existence and role of consumer representation in global rule making bodies and insert some basic criteria or benchmarks for the operation of such bodies.

Benchmarks could include such things as:

- the right for adequate consumer representation at each forum; and
- procedures of the bodies need to ensure that the consumers' "voice" is heard.

Some means of support is also required for consumer organisations, to prevent the continued imbalance of consumer representation.

Consumers International is an international consumer organisation that has played an integral part in standards setting procedures. In 1995, Consumers International released its Consumer Charter for Global Business, aimed at encouraging ethical behaviour and a consumer-centred approach by large transnational corporations.

More recently, there have been calls for Consumers International to encourage improvements in the process of the Codex Alimentarius.

CONCLUSION

Today it is imperative to recognise and indeed promote both domestic and international competition as a means of gaining consumer welfare. To not do so often means propping up an inefficient sectional industry and professional group at the expense of consumers.

The emerging global marketplace requires a lateral approach to ensure that the enormous potential benefits it has for consumers and businesses alike are not lost. This means not placing all of our expectations in the domestic "rights-based" approach, but looking at encouraging the market to recognise the benefits of employing a fair trading approach to business.