

Characteristics and Legal Theory of Consumer Protection in Australia

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I. A Brief History of Consumer Protection Law in Australia

Australian consumer policy history shows the change and subsequent development of legislative thinking about consumer protection. Historical examination demonstrates the process by which Australian law adapted by changing sequentially in line with economic and social development, the global consumer movement, in response to dramatic revolution in the field.

The historical development of consumer protection legislation in Australia began with a focus on simple notions of equity, with less emphasis on the negative impact on the economy in the long run.¹ Australia's policies and regulations in the early years of colonialism manifested as rigid interventions by regulations that mainly focused on quality guarantee instead of promoting the freedom of choice of consumers.² When goods were produced in the mid-nineteenth century, the caveat emptor³ principle became popular in Australia, whereby the spirit of letting "buyers beware" was applied, requiring consumers to make a purchasing decision for themselves relying on their own assessment.

The caveat emptor principle, on the one hand, shows that the consumer protection philosophy at this time in Australia was primarily based on consumers being self-aware of risks in commercial transactions. On the other hand, this prudent principle was also a sign that information imbalance began to be recognized in Australian society, inspiring new ideas and policies.⁴ The Australian government, in the late nineteenth and early twentieth centuries, consistently made efforts to improve information asymmetry through regulations such as standardizing measurements and minimal requirements for professions. However, fair market orientation efforts did not manifest as concerns about the party's rights and obligations relating to the consumer contract.⁵

By the end of the nineteenth century, legislation in the field of commerce and trade, including consumer protection, underwent a dramatic change. The breakthrough derived from the influence of the Sale of Goods Acts 1893 in England⁶, which Australia and the other colonies subsequently enacted as law. This development in commercial transactions regulation manifested in the requirement that goods be of a certain quality and that buyers have the right to inspect the receipt of their goods. These regulations demonstrated a shift from directing the seller's conduct to directing the process of the commercial transaction itself.⁷ It can be said that the present consumer protection regime in Australia has achieved a balance between the desire to protect fair trade and rigid intervention in the behavior of the producer. However, at an early stage, state interventions were introduced by industrial and commercial management without the consumer's voice and involvement.

The consumer movement was formally launched in Australia—and worldwide—in the mid-1900s and was marked by the speech of the American President, John F. Kennedy, focused on the four fundamental rights of consumers.⁸ Australia was initially swept up in this movement by first activating women's right to demand the best quality merchandise for household shopping, and then by establishing the Australian Consumer Association. Along with the breadth of the consumer movement, industrial production had dramatically increased the volume of merchandise available, creating new challenges for consumers' choice of goods. In response to these new demands and led by the 1962 U.K. report on the consumer protection, the "Molony

Report," Victoria enacted the Door to Door Sale Act of 1963,⁹ and New South Wales issued the Consumer Protection Act of 1969.¹⁰ At this time, the question was how state intervention should be limited to protect consumers effectively without causing adverse effects on both consumers and the economy.¹¹ Some new regulations responding to this question emerged in the law through the ban on fraudulent advertisements and bidding frauds.¹²

The modern period of consumer protection in Australia, however, emerged in 1974 with the enactment of the Trade Practices Act (TPA), effectively ending caveat emptor in Australia.¹³ In the draft debate, Senator Murphy pointed out that the principle of caveat emptor no longer fit with complex commercial practice.¹⁴ This vigorous declaration inaugurated the government's renewed commitment to the field of consumer protection, expanding state intervention more deeply into commercial activities. Specific manifestations of this development can be seen in regulations that substantively regulate the content of the transaction, not just its form, such as the widespread banning of fraudulent conduct in trade.¹⁵ At the same time, this period saw a significant development in Australia's consumer policy. The idea that the issue of consumer protection is closely linked and adapted to competition policy to create effective competition has been initiated and become a target of the TPA.

From 1974 to the 2000s, amidst continuous economic development, consumption policy pursued social equity and fundamental rights, while legal and economic factors continued to influence consumer policy.¹⁶ The perception of a strong link between consumer protection and competition policy became more deeply embedded. Accordingly, the Australian government recognized that it was prudent to select the subject of regulation and to consider the measures and levels of government interventions in consumer protection. Otherwise, it would be counterproductive and harmful to consumers. It seemed that such careful consideration could be effectively implemented in light of economic analysis studies. The culmination of this view is the Australian government's transfer of responsibility for consumer affairs to the Treasury in 2007.¹⁷ This move, coupled with keeping consumption and competition policy within the Ministry of Finance, manifested the intimate connection between consumer protection and economic policies.

From 1974 to 2010, consumer protection in Australia was regulated at the Commonwealth level through the TPA, the Australian Securities and Investments Commission Act 2001 (Cth),¹⁸ and 17 different laws in states and territories.¹⁹ The difference between the Commonwealth and state laws in consumer protection became increasingly apparent when new regulations were updated in major states. The differences are not only in regard to implied conditions and warranties, industry-specific regulation, and product standards, but consist of different approaches to law enforcement and policy development.²⁰ By contrast, markets have grown in size, some of which have erased consumer frontiers through increasingly interstate and international transactions which challenge national consumer policy.²¹ This is one of the main reasons why the demand for a generic national consumer law emerged and became a specific task in Australia in 2006.

From 2007 to 2010, Australia enacted updates to the national legal framework for consumer protection. On October

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2, 2008, a new law at the Commonwealth level was enacted, and a state-wide consensus on consumer protection enforcement regulations was reached.²² In June 2009, the TPA was renamed the Competition and Consumer Act 2010 (CCA)²³ to reflect a more comprehensive policy of promoting both competition and consumer protection.²⁴ After a rigorous lawmaking process in July 2009, the Council of Australian Governments signed an Intergovernmental Agreement to draft the Australia Consumer Law (ACL)²⁵ based on the TPA, accompanied with some amendments, including two tranches. The first part passed as the Trade Practices Amendment (Australian Consumer Law) Act (No 1) in March 2010, containing provisions regulating unfair contracts, the Australian Competition and Consumer Commission's (ACCC) new and powerful role of enforcement, and new civil pecuniary penalties for contraventions of certain consumer protection provisions.²⁶ The second tranche of the ACL reforms, including the introduction of the ACL, was introduced in the Trade Practices Amendment Bill (No 2) 2010.²⁷

Schedule 2 of the CCA set out the ACL as a generic consumer law applied across Australia and took effect on January 1, 2011. The ACL concerns consumer transactions for all goods and services throughout Australia, excluding financial services regulated by the Australian Securities and Investment Commission Act 2001, the Corporations Act 2001, the National Consumer Protection Act 2009, and the National Credit Act.²⁸

II. Characteristics and Legal Theory of Consumer Protection

Analysis of the history and characteristics of consumer policy applied in Australia could provide a basis for understanding the causes and significance of existing consumer protection laws in the country. Likewise, the revolution of consumer policy in Australia may foreshadow the process Vietnam will have to undergo to reform consumer protection legislation. The continued development of the commodity market along with growing awareness of fair trade and consumer rights have made Australia's legal doctrines of consumer protection reach their most advanced states. Australia's consumer protection philosophy has gone through periods of change and is influenced by economic development, the consumer movement, and the contributions of global psychological and social studies. As one of the developed, leading countries in competition and consumer protection legislation, the evolution of Australia's consumer policy has largely reflected the global development in the field.

It is appropriate to explore consumer protection policy in Australia in the context of the endless debate between paternalistic legal intervention and the prior guarantee of individual liberty.²⁹ "Caveat emptor" is likely a crude form of self-determination and self-protection in trade, which has existed in Australia for a long time. Although it is not considered as a means of government intervention, it exists in the common law. However, the development of commodity economics and new insights into policy thinking have prompted the Australian government to adopt a policy of active intervention in consumer protection to optimize the effectiveness of market activities, rather than let the market adjust itself to its inherent defects.

Like other developed countries, Australia has consistently followed both soft paternalism (paternalistic "nudges") and hard paternalism (paternalistic "pushes") in the market with careful consideration of the benefits and harms of each intervention.³⁰



Chris Field provided explanations for paternalism while maintaining a free market and choice for consumers that showed the consistency in competition and consumer protection policy in Australia.³¹ This is quite understandable since the Australian government does not follow the model of a deregulated state but has come to prefer regulation with reasonable interference in the economy, competition, and consumer protection.³² Kate Tokeley argues that Australia has developed stronger paternalistic interventions in the ACL by the regulations that prohibit unfair contract terms and produce interest rates caps on credit for small amounts of money.³³ Meanwhile, the U.S. allows consumers to protect their interests in light of liberalism.³⁴ It is necessary to look back at the history of consumer policy development in Australia to understand the Commonwealth's current consumer protection philosophy.

Throughout its history, consumer protection policy in Australia has gone through three levels of development. The first consumer protection policy in Australia that manifested as a hard intervention with gradual progressive development of the object of regulation existed from the early years of colonialism to the late nineteenth century. At this time, the Australian government pursued rigorous interventions through strict regulations on quantity, price and quality of goods, and set criteria and professional standards for some important occupations.³⁵ At the beginning of this period, regulations were limited to the behavior and characteristics of the producer.³⁶ The way of interference then became more comprehensive by regulating the trading activities itself through consumer contract.³⁷ However, this strict consumer policy, while responding to the requirement of fair trade in the short term, negatively influenced the economy in the long run.³⁸ At the same time, in consideration of the total benefit that consumers receive, excessive state interventions during this period were overall harmful to consumers because they significantly reduced freedom of choice.³⁹

Australia's second level of consumer protection policy derived from global economic development and convincing international research in this field. In the 1970s and 1980s, new paradigms emerged that argued for state intervention in the field of competition and consumer protection. Some prominent economists and legal scholars in Europe put forward numerous critical arguments for paternalism in the field of consumer protection based on the effectiveness criteria of microeconomic theory.

Norbert Reich points out Coase theorem with two objections to this theory to traditional intervention.⁴⁰ The first argument, based on the transaction cost interpretation of consequence, is that resource allocation should not be the work of legal rules when transaction costs do not exist. Thus, the interventionist approach should not proceed because it will be an obstacle preventing the efficient allocation of resources.⁴¹ The second objection to an interventionist or regulatory approach is under the influence of the political theory of the welfare state. Accordingly, the imperialism of state intervention should have less of an impact on some autonomous social areas including consumer choice.⁴² The argument may not have strongly affected Australia since the Australian government does not adhere to a “rugged individualism,” disfavoring a consumer policy in which consumers fully manage themselves to maximize their own benefits.⁴³ Meanwhile, the first argument regarding economic factors affected policymakers in Australia and contributed to guiding new policy trends in this area. Also, the increasingly diversified and complex development of the market altered the notion of rights-based intervention and made the principle of caveat emptor in common law meaningless.⁴⁴

As a result, Australia has witnessed a shift in consumer protection regime rooted in the demands of practice coupled with new insights and marked by the emergence of the TPA.⁴⁵ The change in focus from consumer “protection” to consumer “affairs” showed the government’s attempt to address the criticism that protection was “anti-business.”⁴⁶ By placing consumers in a position of resistance to the market and regulating consumer relations under a rights-based government intervention, the Australian government has adopted a philosophy of mutual benefit protection through market-based intervention.⁴⁷

Efforts to protect consumers during this period were emphasized in light of economic theories in the context of the market operation, in which the apparent interaction between consumer law and broad market regulation were significantly considered.⁴⁸ This stage showed that the consumer policy of Australia at that time was set in a global perspective, linking the effects of economic policy, competition, and the recognition of market failures.

Two specific theories of market-based consumer protection influenced the consumer policy of developed countries, including Australia, in this period: information failure and the economics of information. In 1970, Akerlof’s lemon doctrine highlighted asymmetric information between consumers and sellers, as well as market information deficiencies.⁴⁹ This was the time when a well-informed consumer image was an aim of consumer protection in developed countries, including Australia. Information failure highlighted during this period was one of the justifications for the government’s first level intervention policy on welfare grounds.⁵⁰ The rules pertaining to information obligations in the TPA was strict because the information disclosed must be accurate. Otherwise, the person responsible for providing the information will be held liable even if they have no subjective intention to deceive.⁵¹ Also, the development of the economics of information in the 1970s led governments to seek a balance of information gains with the cost of obtaining information.⁵² A government considers the transaction cost in choosing the most beneficial consumer protection policy. When assessing this attribute of the TPA in 1976, the Swanson Commission addressed the need to weigh the effectiveness of consumer protection in the offset between the benefits afforded to

consumers and the damage caused by higher prices and limited consumer choice, freedom, or innovation.⁵³ Consistent with such a view, the interplay between competition and consumer protection that affects the effective allocation of resources has become a priority for policy considerations in Australia. The government began to hesitate in designing directly rigid legislative provisions of which the costs of enforcement were lower than its benefits. Alternatively, the Australian government applied a range of market interventions and helped consumers protect their interests with guidelines, codes of conduct, rules, standards, and dispute resolution mechanisms, as well as information disclosure requirements.⁵⁴ The objective of equity and consumer welfare remained, but it was focused on a more comprehensive landscape where a well-developed market aims for the welfare of society. These desires are obvious in the TPA’s stated objective of promoting effective competition and fair trade, combining the protection of consumer’s interests to enhance the welfare society. The Australian Securities and Investments Commission also stated its objective is “to promote the confident and informed participation of investors and consumers in the financial system.”⁵⁵ The ultimate goal of the Australian National Competitiveness Policy demonstrated that restructuring the economy by promoting competition and improving the efficiency of the market increases consumer welfare.⁵⁶

The third level, the current consumer protection framework in Australia, the ACL, was formed from insights gained in recent decades.⁵⁷ More than three decades after the promulgation of the TPA, behavioral economics emerged as a theory that

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combines the study of economics with psychological theory and significantly influenced consumer policy in developed countries.⁵⁸ Behavioral economics theory provides supplementary justification for state-based interventions due to its discovery that the consumer usually owes misconception to not being rational as recognized by conventional understanding.⁵⁹ This explains the choice of substantive intervention, rather than interfering with previous procedural factors, manifested by the regulation of unfair contract terms in the ACL.⁶⁰ Behavioral economics

has also put forward a number of new issues that require careful consideration by governments such as regulating for self-control and choice overload.⁶¹

Also, the emergence of new insights into a quite contradictory concept, the “empowered consumer,” made a change in defining the image of well-informed consumers to a “confident consumer.” This concept derived from the New Labor Party’s reconsideration and determination of new policy in the Third Way project, which culminated in the 2007 white paper “Modern Market, Confident Consumer.”⁶² This project has identified a change in the target from promoting competition among U.K. industries to improving social justice.⁶³ The Third Way project also asserts that social wellbeing must be built on trust, whereby consumers are empowered to become knowledgeable, self-confident, assertive, and self-reliant.⁶⁴ It is obvious that the vibrant development of theories and economic and social objectives has increasingly required governments to update their consumer protection policy. A modern policy of consumer protection should integrate achievements in the newest policy research and global trends. It should be a policy that restricts information failure to protect consumers’ interests by promoting effective competition

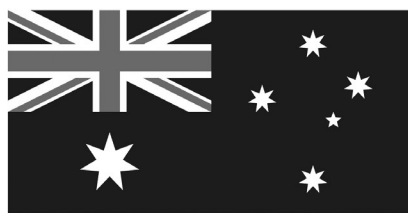
as well as empowers consumers while retaining the balance between economic growth and social welfare.

In response to the development of the market and consumer policy overseas, the Australian Government adopted a new policy in the last decades of the TPA's lifespan, the so-called "post-interventionist" approach.⁶⁵ The post-interventionist approach is a flexible consumer policy focused on consumer protection in relation to competition, political and sociological issues. Such a consumer protection framework would prove to be effective as it belongs to, and is largely a representation of, a philosophy of consumer protection incorporating a complex matrix of economic, sociological and political issues.⁶⁶ In such a position, consumer protection tends to take the form of strong state intervention but still guarantees adequate attribution to enhance consumer confidence in the market.

The post-intervention policy has been further developed as Australia entered the new consumer protection era with the introduction of the ACL. In that legislation, the Australian government clearly identified the objective of its consumer protection policy. This final target, along with the way it will be performed, has shown that Australian lawmakers mapped out their policy frameworks by applying diverse approaches of consumer protection theories. These approaches include reviewing specific TPA and *Trading Act 1999* provisions related to consumer wellbeing with considerable application of behavioral economics, especially for vulnerable and disadvantaged consumers. Also, the government has focused on the interaction and linkages between consumer and competition policy and placed consumer protection policy in relation to other sectors of the economy.⁶⁷ The comprehensive review has resulted in the specific objective of Australia's consumer protection policy: "[T]o improve consumer well-being by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith."⁶⁸

From the above statement, it is possible to see the two most clearly expressed ideas of the objective of Australia's consumer protection policy, including the promotion of effective competition and the activation of confident consumer participation. The ultimate goal is to maximize consumer wellbeing by maintaining effective competition that is "created by empowered consumers and responsive suppliers that trade fairly."⁶⁹ It can be seen that the goal of consumer protection in Australia has been raised to a new level, not only to protect consumers' interests but to improve their active participation in the market, enhancing the wellbeing of each consumer. The empowerment element to create consumer confidence alongside the task of consumer protection is also manifested as a way to attain the ultimate goal.⁷⁰

Australia's consumer protection philosophy demonstrates the combination of both efficiency and equilibrium. Such a comprehensive policy is likely the result of the application of the basic principles of policymaking called the "Wellbeing of the Treasury," of which the first principle is the guarantee of "the opportunity and freedom that allows individuals to lead lives of real value to them."⁷¹



Australian policymakers argue that competition policy alone is insufficient "to improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets".⁷² It is asserted in rationales for consumer protection that competition policy alone cannot guarantee a well-functioning market or reduce the potential disadvantages for consumers. An Australian consumer protection policy must ensure fair trade and achieve harmonization, balancing the interests of the supply and the demand side. It is striking that in the set of goals listed in the review report, the second objective is to promote effective competition, which is likely the result of this balance.

Moreover, the consideration of effective practices to attain the goal has been driven by two main approaches. The first is the economics of law, in which the cost of interventions must be taken into account for efficiency, and the second is the application of behavioral science to consumers.⁷³

The application of new doctrines in consumer protection policy has led to the tendency of Australian policymakers to choose the post-interventionist approach.

However, the Australian government insists that it has not opted for a pure paternalism, but a co-regulatory approach that must meet some essential criteria.⁷⁴ Allan Asher lists some essential measures such as addressing consumer concerns, consultation with consumer and community agencies, developing a code of conduct in important industries and conducting periodic assessments of the effectiveness of the code.⁷⁵ Also, self-regulation as a form of expression of liberalism in consumer protection is an option considered by the Australian government. However, this method has been deemed limited, only effective in certain small markets. Thus, self-regulation at the federal level is seen as a priority intervention in the consumer market, but other interventions are also used to attain their policy objectives.⁷⁶

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1 Stephen Hally-Burton, Siddharth Shirodkar & Simon Winckler, *Harnessing the Demand Side: Australian Consumer Policy*, 4 ECON. ROUNDUP 91, 93 (2008).

2 *Id.* at 94.

3 See Alan M. Weinberger, *Let the Buyer Be Well Informed: Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 388 N.5 (1996), FOR A DISCUSSION OF THE LATIN PHRASE IN ITS ENTIRETY: *CAVEAT EMPTOR, QUI IGNORARE NON DEBIT QUODJUS ALIENUM EMIT* ("LET A PURCHASER, WHO OUGHT NOT BE IGNORANT OF THE AMOUNT AND NATURE OF THE INTEREST WHICH HE IS ABOUT TO BUY, EXERCISE PROPER CAUTION").

4 Hally-Burton, Shirodkar & Winckler, *supra* note 1, at 96.

5 *Id.* at 96.

6 The British Sale of Goods Act 1893 (56 & 57 Vict. c. 71).

7 *Id.* at 96.

- 8 <https://hoofnagle.berkeley.edu/2015/05/07/president-kennedy-consumer-bill-of-rights-march-15-1962/>
- 9 Victoria Door to Door (Sales) Act 1963 (No. 7091).
- 10 New South Wales Consumer Protection Act 1969.
- 11 Bruce Smith & Graeme Wiffen, *Consumer Protection Does Anyone Know What It is?* 9 LEGAL SERVICE BULL. 263, 264 (1984).
- 12 *Id.* at 265.
- 13 The Commonwealth Trade Practices Act 1974 (Cth).
- 14 Commonwealth, Parliamentary Debate, Senate 30 July 1974, 540-541 (Lione Murphy, Leader of the Government in the Senate).
- 15 Hally-Burton, Shirodkar & Winckler, *supra* note 1, at 97.
- 16 *Id.* at 110.
- 17 *Id.* at 108.
- 18 Australian Securities and Investments Commission Act 2001 No. 51 (Cth).
- 19 <https://squareup.com/au/en/townsquare/australian-consumer-law>
- 20 Standing Committee of Officials of Consumer Affairs, *An Australian Consumer Law. Fair Markets: Confident Consumers'* (Treasury, 2009) 8.
- 21 Nicola Howell, *Searching for a National Consumer Policy Reform Program?* (2005) 12 Competition & Consumer Law Journal/(2005) 294, 295.
- 22 The Standing Committee of Officials of Consumer Affairs, *The Australian Consumer Law - Consultation on draft Regulation Impact Statements*, (27 November 2009) <http://archive.treasury.gov.au/documents/1665/PDF/Consultation_ACL_RIS.pdf>
- 23 Australia Competition and Consumer Law Act 2010 (Cth).
- 24 Editorial, *How well is Australia's consumer law fairing five years on?* (2016) CCLJ No 3/Editorial Competition & Consumer Law Journal 197.
- 25 Competition and Consumer Law Act 2010 (Cth) sch 2 (Australian Consumer Law).
- 26 Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010.
- 27 *Id.* at 197.
- 28 The Law Handbook, *Australian Consumer Law* (30 June 2017) <http://www.lawhandbook.org.au/2018_07_02_01_australian_consumer_law>
- 29 Kate Tokeley, *Consumer Law and Paternalism: A Framework for Policy Decision-Making in Susy Frankel and Deborah Ryder (eds), Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, 2013) 265.
- 30 *Id.*
- 31 Chris Field, *Having One's Cake And Eating It Too – An Analysis Of Behavioural Economics From A Consumer Policy Perspective* (Paper presented at the Roundtable on Behavioural Economics and Public Policy 9 August 2007) 4–6.
- 32 John Goldring, *Consumer Protection, Globalization and Democracy* (1998) 6 Cardozo J. Int'l & Comp. L. 1, 22.
- 33 Tokeley, *supra* note 25, at 73.
- 34 *Id.*
- 35 Hally-Burton, Shirodkar & Winckler, *supra* note 1, at 97.
- 36 *Id.*
- 37 *Id.*
- 38 *Id.* at 96.
- 39 *Id.*
- 40 Norbert Reich, *Diverse Approaches to Consumer Protection Philosophy* (1992) 14(3) Journal of Consumer Policy 257, 262.
- 41 *Id.*
- 42 *Id.* at 263.
- 43 Goldring, *supra* note 28, at 21. Goldring states that the UK and much of Europe are not convinced by “rugged individualism” and implies that these states accept the slight inconvenience of a legitimate state with social welfare system rather than follow the vague advantages of individualism that are promoted in some countries like the US.
- 44 Allan Asher, *Going Global: A New Paradigm for Consumer Protection* (1998) 32(2) Journal of Consumer Affairs, 183, 184. See also Hally-Burton, Shirodkar and Winckler, *supra* note 1, at 56, where the authors refer to Senator Murphy, during the debate of the Trade Practices Bill in Parliament, declaring the caveat emptor principle to be dead.
- 45 David Harland, *The Liability to Consumers of Manufacturers of Defective Goods—An Australian Perspective* (1981) 5(3) Zeitschrift für Verbraucherpolitik 212, 212.
- 46 Amanda McLeod, *Legislating in the Consumer Interest: The Victorian Consumers Protection Council 1964 – 1970* in Robert Crawford, Judith Smart and Kim Humphery (eds), *Consumer Australia: Historical Perspective* (Cambridge Scholar Publishing, 2010) 115.
- 47 Asher, *supra* note 39, at 183.
- 48 Hally-Burton, Shirodkar and Winckler, *supra* note 1, at 107.
- 49 George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, The Quarterly Journal of Economics, Vol. 84, No. 3. (Aug., 1970), 488-500.
- 50 AJ Duggan, *Some Reflections on Consumer Protection and the Law Reform Process* (1991) 17 Monash UL Rev. 252, 262.
- 51 Stephen G Corones and Sharon Christensen, *Comparison of Generic Consumer Protection Legislation* (Queensland University of Technology, Faculty of Law, 2007) 5.
- 52 Joseph P. Mulholland, *Behavioral Economics and the Federal Trade Commission* (12 December 2007) <<https://ssrn.com/abstract=1091745>>
- 53 Trade Practices Act Review Committee, *Report to The Minister for Business and Consumer Affairs* (1976). 7–9.
- 54 Asher, *supra* note 39, at 184.
- 55 Corones and Christensen, *supra* note 45, at 25.
- 56 Hally-Burton, Shirodkar and Winckler, *supra* note 1, at 107.
- 57 Brendan Sweeney, *Direct Marketing Code of Practice: An Important Cog in the New Consumer Protection regime* (2000) 28(1) Australian Business Law Review 35. Regulation of commercial activities to protect consumers is moving from a rights-based model to a market-driven model.
- 58 Lucia A. Reisch, *Behavioural Economics, Consumer Behaviour and Consumer Policy: State of the Art*, Behavioural Public Policy (2017), 1: 2, 190–206, 201.
- 59 See Christine Jolls, Cass R Sunstein and Richard Thaler, *A Behavioral Approach to Law and Economics* (1998) Stanford Law Review 1471.; Hanneke A Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Intersentia, 2010) 164, 49.
- 60 Jeannie Marie Paterson, *The Australian Unfair Contract Terms Law: the Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts* (2009) 33(3) Melbourne University Law Review 934, 936.
- 61 Steven Kennedy and Australian Treasury, *The Future of Consumer Policy: Should We Regulate to Protect Homo Economicus?* (Report, Australian Treasury) 1213.
- 62 Modern Markets: Confident Consumers - The Government's Consumer White Paper (Command Paper) by Great Britain: Dept. of Trade & Industry.
- 63 Ajit Nayak and Antony Beckett, *Infantilized Adults or Confident Consumers? Enterprise Discourse in the UK Retail Banking Industry* (2008) 15(3) Organization 407, 460.
- 64 *Id.* at 460. See also Office of Fair Trading, *Unfair Contract Terms Guidance - Guidance for the Unfair Terms in Consumer Contracts Regulations 1999*, (2008) 6.

65 Reich, *supra* note 35, at 267, 271.

66 Louise Sylvan, *Activating Competition: The Consumer-Competition Interface* (2004) 12(2) *Competition and Consumer Law Journal* 191; L D Griggs, *Intervention or Empowerment - Choosing the Consumer Law Weapon!* (2007) 15(1) *Competition & Consumer Law Journal: A Journal of Trade Practices Law* 111, 117.

67 Productivity Commission, *Review of Australia's Consumer Policy Framework*, (Inquiry Report, 2008) 6–7.

68 *Id.* at 4.

69 *Id.*

70 The Standing Committee of Officials of Consumer Affairs, *An Australian Consumer Law Fair Markets: Confident consumers*, (17 February 2009) <http://archive.treasury.gov.au/documents/1484/PDF/An_Australian_Consumer_Law.pdf> 11.

71 Hally-Burton, Shirodkar and Winckler, *supra* note 1, at 12.

72 LD Griggs, *Intervention or Empowerment-Choosing the Consumer Law Weapon!* (2007) 15(1) *Competition & Consumer Law Journal: A Journal of Trade Practices Law* 111, 7, 112.

73 Sylvan, *supra* note 58, at 10.

74 Chris Field, *Consumer Dealings - Reviewing Australian Consumer Protection* (2007) 35(1) *Australian Business Law Review* 46, 46.

75 Asher, *supra* note 44, at 184.

76 Howell, *supra* note 18, at 4. Howell refers to Productivity Commission, 'Taskforce on Industry Self-Regulation, Industry Self-Regulation in Consumer Markets' (2000) <<http://www.consumersonline.gov.au/content/SelfRegulation/finalreport/taskforce/default.asp>>, and Department of Industry Science and Tourism, 'Codes of Conduct Policy Framework' (1999) 3 <<http://www.consumersonline.gov.au/content/SelfRegulation/codes.asp>> to explain the role of self-regulation and co-regulatory approaches in achieving outcomes for consumers as stated in the Productivity Commission's discussion draft.