

A REGULATOR'S REFLECTIONS ON FUTURE FRAMEWORKS

Graeme Samuel, Chairman ACCC

Graeme Samuel:

Thanks George and thanks for the mercifully brief introduction. Well I guess this year 2007; one of the key challenges for business, consumers and government will be to examine the Australian consumer policy framework to ensure it meets the needs of a modern economy. Our system of consumer protection is built on that 3 pronged approach that George just outlined; of strong law, vigorous enforcement and educated consumers. The PC review provides a timely opportunity to reflect on the current framework to examine how it operates in today's economic environment and to identify what, if any improvement, should be introduced. Our system is made up of a whole, of a wide range of legislative, co-regulatory and self-regulatory mechanisms designed to address consumer issues, it relies on a range of enforcement mechanisms including national, state and territory enforcement bodies, ombudsmen schemes and the courts for enforcement of laws. It also relies on educating consumers to participate in competitive processes to obtain the products they want at a price they wish to pay, to make complaints to traders and enforcement bodies when transactions go wrong and to take our own private actions when it's appropriate to do so.

One of the most important corner stones of our consumer protection regime is the Trade Practices Act. Its broad scope, flexibility and adaptability has served Australia well over the last 3 decades and it continues to be a highly effective foundation for protecting the rights of Australian's in many areas. But much has changed since 1974 and issues such as online fraud) have emerged that did not even exist when the legislation was originally drafted. For our legislation to remain relevant to a new century it's necessary to put it under the microscope and consider how it can be enhanced or modified where necessary.

Today I'd like to focus my comments on the Trade Practices Act; it's effectiveness in the past and challenges facing it in the future. I'd also like to provide some thoughts on where the ACCC believes there may be scope for improvement.

Well how market has changed since 1974? Considerable changes have occurred in the Australian market place since the introduction of the Act in 1974. As a result of a number of factors including technological change, deregulation and competition reform and decreasing barriers to international trade, consumers are faced with a broader range of products and services from a greater variety of sources. Competition reforms and deregulation have presented consumers with choices in energy, telecommunications and other areas where previously the only choice was a government owned monopoly or-in the case of compulsory superannuation. The products simply didn't exist. Not only do consumers have more choice between products but due to the rapid growth and new technologies they are also presented with far more complex products such as computers, broadband internet services and other electronic goods. Not only are the products themselves complex but the pricing structures for such products are often highly sophisticated. The development of E-commerce and online trading has also opened up opportunities for consumers to obtain goods and services from businesses from around the globe. Within this environment, healthy competition would generally enhance consumer welfare providing the price/quality of products and services the consumer want and innovation. Nevertheless as choices

and competition increases, consumers face the challenge of how to exercise choice wisely. Consumers must compare increasingly sophisticated products and services often in new technology areas where it's difficult for them to judge the quality of what they're buying. Trading by the Internet has introduced not only a new range of traders, products and prices but also the challenge of dealing with traders in the online environment, in particular how to deal with online traders when things go wrong. Consumers have access to a greater volume of information than ever before in making their purchases due to the ability to use the internet to search for information and prices but also have to manage the volume of information they are receiving in order to utilize it and choose wisely. Also as consumers are exposed to more choices they're potentially exposed to more unscrupulous traders for example the plethora of scams disseminated by the internet or email, nevertheless while there is a tendency to consider these as new issues, in fact there are some striking similarities between the issues faced by consumers today and the issues faced in 1974 when the Trade Practices Act was introduced.

It was introduced following growing concerns about the impact on consumers of changes in manufacturing and production rising after WWII, as one commentator has written 'coupled with the technological revolution that the war had inspired, a new range and variety of products rapidly emerged into the consumer marketplace, many of these were far more complex in engineering and design than their precursors and because of mass production techniques, far more accessible to a broad spectrum of the community. The rapid expansion of commercial radio with its enticing advertisements and the advent of television provided a further impetus to consumer's rapid advance, to compliment this new inversion in consumer market came new methods of finessing products'.

While I guess new technology is more sophisticated products, geographic separation between traders and consumers, it sounds remarkably similar to the market changes being identified today. My point is, not that we can be complacent about our consumer policy framework because nothing has changed, while the fundamental issues of concern for consumers in the market place may not have changed, what has changed and will continue to change over time is the magnitude and intensity of the issues faced by consumers.

It's critically important for the consumer policy framework that enforcement of the Act is efficient and effective. Just as today's commercial environment challenges consumers to choose wisely, the ACCC faces similar challenges to choose wisely in developing its approach to promoting compliance of the Act. We seek to ensure compliance to the Act through a range of strategies including court actions, administrative settlements, education and liaison programs, the media and by working with business on specific programs to bring about a change in conduct. However it is important to note the responsibility for the enforcement of the Trade Practices Act does not lie solely with the ACCC. An individual may also bring private action or participate in a class action in relation to breaches of the fair trading provisions of the Act. Enforcement action for breaches of implied conditions and warranties can only be taken by private parties.

There exists in some circles a perception that the ACCC has two core roles; looking after the welfare of consumers and addressing competition issues in the economy, I suggest to you that dealing with competition issues such as shutting down cartels is looking after the welfare of consumers. The reality is that everything happening in our competitive markets eventually filters down to customers and influences them directly. Every Australian is in some way a consumer. Take cartels as an example. Where businesses agree to keep prices at a certain level be it through

bid rigging or price fixing, it's their customers, the consumers, who end up paying more for the products on sale than if there had been genuine competition in that market. It may be directly through the price they pay for the products at the shop front or indirectly through artificially inflated prices paid by business customers. Ultimately these additional costs all find their way back to the pocket of the consumer. Likewise opposing mergers the risk of substantially lessening competition in the market has a direct impact on the public. Competition is what drives businesses to keep prices as low as possible. Just because consumers don't realise that they're being ripped off by a cartel or that the good prices they're paying at the local store as a result of strong competition doesn't mean they're not receiving a benefit. To see the link more clearly imagine the impact on consumers if businesses didn't need to compete with each other for customers and were allowed to agree on what price they thought would be appropriate to charge. As such competition issues are essential to protecting the economic welfare of consumers and can not be seen as a somehow, unrelated or separate function. It's true to say that the compliance priorities of the ACCC haven't changed significantly in several years. However in the modern economy just as consumers are facing the challenge of exercising choice wisely in the market place, the ACCC faces the equal challenge of exercising its powers wisely to ensure vigorous enforcement of the Act. In particular to promote compliance in a modern economy, the commission believes it's critical that the regulator:

- be well informed of the latest trends in market developments and consumer issues
- have the ability to manage its resources to allow to respond quickly to emerging issues
- ensure that it is using the most effective mix of litigation, enforceable undertakings, administrative settlements, persuasion and education that will lead to compliance with the law in a growing number of areas.

In recent years we've focused on developing sophisticated procedures to enhance our capacity to apply our compliance priorities wisely. One of the key changes has been the implementation of the a sophisticated matters management system that enables senior management within our organisation to perform a continuous stock take of existing investigation and cases to ensure that investigations are progressing in a timely manner and that the overall mix of matters is meeting the organisations aim to maximize compliance of the Act, particularly this is the case in the areas which give rise to significant consumer detriment.

Another change has been the continuous work done over the past few years to develop our liaison network. Liaison initiatives are targeted at consumers and business organisations, other domestic regulators particular those with similar roles to the ACCC such as State and Territory Fair Trading Offices and the Australian Securities and Investment Commission and then of course international bodies. Liaison is critical to the ACCC's compliance role in a number of ways. First it provides a conduit for business and consumer groups to highlight to the Commission issues of concern to the community. This may occur through specific referrals of matters to the ACCC or provide a more general alert regarding an emerging issue. Strong liaison channels with other domestic and international regulators also provide intelligence on emerging issues and how to deal with them. Thirdly liaison work provides the Commission with an opportunity to educate consumers and businesses about their rights and obligations under the Act. Finally it provides us with ongoing feedback on whether we're meeting the expectations of the community.

The Commission also recognizes that the traditional method of identifying arising issues such as through complaints doesn't always provide an accurate picture of what the enforcement agencies

should be doing. While complaint data is an important tool for identifying compliance issues, it makes up only part of the picture. We recognize that to base our priorities solely on a large number of complaints in relation to a particular issue may not achieve the desired result. Complaints data is notoriously influenced by the issue of the day including media exposure of our own activities. Many other important issues may be missed by focusing solely on the complaints and the complaint data.

Well how is this reflected in the work that the Commission is doing? Potential breaches of the fair trading provisions of the law are by far the largest category of conduct where the ACCC achieve results through litigation, court enforceable undertakings or administrative (inaudible-mumbling) issues. In the 2005/06 financial year, 87% of total enforcement outcomes related to alleged breaches of part 5, that is the consumer protections provisions of the Act. A high proportion of matters are settled by court enforceable undertakings for a number of reasons. First, litigation may not always be capable of providing the best solution for consumers. In particular because the current legislative framework limits the ability of the commission to obtain orders for consumer redress. For large numbers of consumers, court enforceable undertakings can be used to obtain compensation when it would not be practical to do so through the litigation process. Second court enforceable undertakings provide for a quicker resolution of matters. If too many resources become tied up in expensive and time consuming litigation then the commission will not be in a position to respond quickly and decisively to emerging issues.

We at the ACCC we believe strongly that informed consumers are empowered consumers. Where they're aware of their basic legal right, they're much more able to protect their own interest and are more likely to complain when they believe their rights have been breached. Educating traders is the other side of the coin. It produces inadvertent beaches of consumer protection laws means retailers will be more aware of their obligations to consumers, it also raises awareness of the serious potential consequences that may flow from breaching those laws. On both the customer and trader side, increase awareness is likely to result in greater compliance meaning less unnecessary follow up by regulators and more importantly, greater likelihood for consumer rights being observed. Other benefits may include less unnecessary disruptions for businesses and better results for consumers. Education has become an increasingly important tool in consumer protection since the introduction of the Act in 1974, where it was a relatively minor component of the work of the commission back then. In 2005/06 the Commission issued 315 media release. But it's important to note that it's not just the volume of media releases or publications issued that's important but how education and information tools are being used to combat serious fair trading issues. In developing our educational material we look at a range of factors including:

- who should the material be targeted towards to achieve the best results- consumers or business or both? How should material be presented; booklets, newsletters, media releases, websites?
- when should material be released in order to achieve the best outcome? For example is it better to provide information about refunds and warranties just before the Christmas or mid-year sales so consumers have their statutory rights in mind when shopping, or is it better to launch these materials after the sales at a time when consumers are more likely to be experiencing problems with faulty goods? and finally
- how should material be distributed? We have our ACCC regional offices, businesses, consumer organisations and state and territory offices of Fair Trading just to mention a few.

One particular area where we've focused on educational issues for consumers is in relation to scams. Scams are a high priority for the Commission because they can have a real detriment for consumers and internet and email are making it easier for scammers to contact consumers than ever before. At the same time scams are difficult to litigate, often it's very hard to find the perpetrator and consumers, I regret to say, are often embarrassed to complain. Accordingly much of our work in this area relates to arming consumers with the capacity to recognize and protect themselves from scams.

While I've spoken primarily about the fair trading provisions in the Act and the ACCC role in administering those laws, it's important not to overlook the role of the anti-competitive conduct provisions of the Act in consumer policy framework. Competition and fair trading provisions are both regulatory tools designed to enhance consumer welfare. Competition drives traders to offer consumers a diverse range of products and services at competitive prices. But it is well recognized that competition and consumer welfare can be severely damaged through anti-competitive conduct such as price fixing and merges that result in substantial lessening of competition in the market. Equally, competition doesn't work well to enhance consumer welfare if consumers can not participate effectively in the competitive process. Consumers can not participate effectively when they're subject to false or misleading claims about products or coerced into buying products due to a particular vulnerability. The nature of competition laws as an aspect of consumer policy is illustrated by the fact that many competition matters involve direct consideration of consumer issues. For example the authorization process contained in the Act is a clear example of the flexibility that has allowed it to remain relevant and responsive to evolving situations. The Act provides a process for authorization of potentially anti-competitive conduct where the potential benefits of the conduct outweigh the potential detriments. This concludes consideration of consumer welfare benefits associated with the conduct.

Another area commonly considered to fall within the category of competition rather than fair trading laws, that has a direct consumer policy element, is the regulation of telecommunications pursuant of the Act. While this work is rarely reported on outside of the business pages, it has very real and direct benefits for Australian consumers, for example when the Commission declared Australia's copper wire, known as the unconditioned local loop service, competition in the market for broadband services increased and consumers had more choice. Telstra has also removed the limits on its ADSL speed which enhance the quality of service it provided to its own customers but did so by its own admission only in response to the competitive challenge from competitors in the telecommunications market place. A third area is resale price maintenance, which prohibits the supplier from requiring a business customer to sell the suppliers goods at a minimum price specified by the supplier. The ACCC has taken a number of cases in this area recently, that directly impact on the price of goods sold to consumers. Because of the close relationship between competition and fair trading policies and laws, it's important that the primary responsibility for administration of these two aspects of regulating for consumer welfare is carried out by a single agency. There are a number of reasons why various jurisdictions, including the United States, Canada and the United Kingdom, have combined the responsibilities of administering competition and fair trading laws within one entity. First as I've outlined, many aspects of the administration of competition laws involve direct consideration of consumer issues and the agency is better placed in terms of don't understanding of the issues if it's also exposed to fair trading issues on a regular basis.

Second, an understanding of competitive issues can assist informing priorities for the organisation for example an understanding of competition issues informs the importance of combating false environmental claims. Because the truth of such claims are often undetectable to consumers, it's important to take a strong enforcement stance on the issue otherwise traders will have no incentive to respond to market signals to make their products more environmentally friendly. The detriment associated to such claims is not just the detriment to one consumer but of course the community as a whole.

Third from an operational perspective combining the two functions provides a critical mass of resources to respond to issues as they arise and enables resources to be deployed to, resources to the areas where it's most needed at any particular time. I note that David Cousins, the Director of Consumer Affairs Victoria in his Consumer Affairs 2007 lecture on Tuesday night said, and I quote, "*in practice, competition and consumer protection matters are readily distinguished when it comes to enforcement, separating the functions would avoid the perception of the ACCC being biased in favour of consumers in it's competition assessment work.*" Let me read that again "*separating the functions would avoid the perception of the ACCC being biased in favour of consumers in its competition assessment work.*"

If that is the perception, then I have to say the Commission is very proud of it indeed. What's wrong with making consumers our number one priority? The whole point of competition regulation is to deliver efficient and effective markets to protect the interest of all the 20 million Australians, competition and regulation and consumer protection are inextricably linked.

Let me know deal with scope for future improvements. The broad scope and flexibility of the law is one of its key strengths which make it well suited to its task. The institutional framework established by the Act also enables the Commission the flexibility to respond to changing market conditions and issues, it does this through a selection of enforcement matters and its ability to engage in a broad range of activities to promote compliance including liaison, education, information and research. Nevertheless there are a number of potential areas where improvements could be made which the ACCC will outline in it's submission to the productivity commissions review, given that we have limited time available today, I don't propose to address every possible issue, if I mention a few of the areas that are key in our view to the effectiveness of consumer policy in Australia.

The first issue I'd like to mention is the need for introduction of several pecuniary penalties into the Act. Currently, penalties for wrongdoing can only be obtained through criminal proceedings. The ACCC is committed to taking criminal actions where the conduct warrants such a response, private criminal actions are slow and require significant resources not to mention the need to meet a very high standard of proof to achieve a result. The ability to obtain several pecuniary penalties, declarations, injunctive relief and other measures such as corrective advertising within a single action will significantly enhance the ability of the ACCC to obtain effective outcomes and provide a higher degree of deterrence.

The second issue is the need for the ACCC to seek court orders to obtain, sorry to obtain consumer redress for large numbers of consumers. Currently we can only obtain consumer redress in relation to persons who provide written consent. This limits the ability of the ACCC to obtain such redress, due to the administrative difficulties associated with locating relevant consumers prior to taking an action. In cases involving large numbers of consumers over a broad geographic region - exactly the type of case the ACCC is best placed to take, and increasingly

likely to arise as markets become more national and international in character. The difficulty in obtaining written consent from thousands or at times hundreds of thousand consumers is prohibitive. The ACCC can still obtain consumer redress where the trader offers a section 87b undertaking to the ACCC. While this can provide a speedy and flexible result it will not provide a satisfactory outcome in all cases. Accordingly, it would greatly enhance the effectiveness of the Act if the ACCC were given the ability to seek orders for redress for consumers this would increase deterrents for wrongdoing and provide consumers the ability to gain redress particularly in situation where many consumers have, may have lost small amounts.

The third issue I'd like to raise today is the need to reduce the level of inconsistency between State, Territory and Commonwealth Fair Trading laws. Since the introduction of the current form of State and Territory Fair Trading Laws during the 1980's, the benefits of uniformity have been well recognized by all parties concerned. In June 1983 agreement was reached in a meeting of commonwealth and state consumer affairs Ministers that there should be uniformed fair trading throughout Australia. However in practice, uniformity has been difficult to achieve. Some areas of inconsistency include:

- unfair contract terms legislation in Victoria;
- different standards for what constitutes harassment or coercion;
- different requirements in relation to the conduct of door to door and telemarketing activities
- different definitions of pyramid selling schemes, and
- different jurisdictions have different enforcement powers for example some have the power to issue public warning statements, issue infringement notices in certain circumstances and issuing notices requiring a trader to substantiate public claims or representations.

At the same time as the level of diversions between laws appears to be increasing the need for uniformity is becoming more urgent. The cost of increasing lack of uniformity is significant. For business there are costs associated with meeting different requirements in different jurisdictions, while business may be able to minimize this cost by complying with the jurisdiction with the highest level of protection, there may be considerable hidden costs associated with this because business has taken on the burden of meeting a standard that perhaps the majority of Australian jurisdictions do not even believe to be necessary. The current system also imposes an increased burden on consumers to be aware of the different standards that may exist between jurisdictions and can raise false expectations that protections may exist in their home jurisdictions when dealing with traders in other jurisdictions.

There's also a cost for government and regulators in developing laws separately rather than pooling resources. As markets become more national and global in nature the cost for business and consumers in particular are increasing. Australia's not the only jurisdiction to recognize this. For example in the European Union it's been identified that a significant proportion of EU retailers surveyed think harmonization of consumer protection laws within the EU should have a positive effect on their cross boarder sales and the consumers are less competent about making purchases from businesses located abroad from their home state. For these reasons the EU has developed a strategy to develop a uniform approach across the Union. There are of course benefits associated with a Federal system for Fair Trading laws including the advantages of sharing government and regulators ideas and experiences to develop appropriate laws and the advantages of entrusting the administration of laws to regulators operating at different levels. The

issue will be to craft a model for uniformity that retains these key benefits of the federal approach. It may well be argued that a non-uniformed legislative approach has the benefit of allowing a particular law to be test driven in one jurisdiction. However there's some drawbacks with that approach particularly in today's market environment. Because many businesses now operate on a national scale, there's no such thing as a small experiment in one state or territory. If a law is introduced in one area, business is generally bound to apply the requirements of that law to avoid the burden of dealing with the diverse regulatory requirements in various jurisdictions. Developing a uniform legislative approach does not necessarily mean that the good ideas that a particular jurisdiction may have will not be heard. Rather, the model for developing uniformity should continue to draw on ideas and experiences from each jurisdiction to deliver the best national uniform legislation for Australia. Within a uniform legislative framework there's still a fundamental role for national or state and territory regulators. As I've discussed earlier, the primary role of the ACCC is to promote compliance by taking up systemic issues of national significance that are causing widespread detriment to consumers. Though many consumer issues arise on an individual or local basis, whether the issue is one of breach of the law or resolvable misunderstandings between consumers and traders. In aggregate these issues are no less important to the overall well being of consumers. Accordingly within a uniform legislative framework there's still an important role for State and Territory Fair Trading Agencies, particularly in dealing with local issues and assisting consumers to obtain fast, effective justice in individual cases.

Now as I've outlined there's an increasing emphasis placed on the role of information and education in... ..cannot always protect themselves against traders who deliberately provide misinformation. However, as products become more complex and unfamiliar, new products and services introduced more rapidly, it is important that the consumers are in a position to take their own precautions to the extent that it is possible to do so. Information and education are fundamental tools that empower consumers.

Some of the ways that they can assist consumers, include:

- to identify the type of information that they should find out about product and services before purchasing;
- assisting them to make complaints, assisting them comparing the products and services on objective grounds; and
- identifying issues to be wary of in relation to certain products and services.

I would like to leave you with the following observations. First while market places are changing, the issues for consumers are in fact similar to types of issues that raised concerns when the Trade Practices Act was first introduced in 1974. The Act is as relevant to those issues today as it was in 1974, and continues to do a good job of protecting consumers. While the issues appear to amount to the same, which shouldn't discount the importance of the fact that they are growing in magnitude. While our system is essentially sound, there is scope for some significant change. For our laws to remain relevant they need to address concerns, including assuring consistency across jurisdictions, apply the appropriate level of penalties to allow for a swift response to arising problems, and to be able to respond effectively on behalf of a large group of consumers, that may be affected by particular conduct.

The flexibility of the Act provides to the ACCC in how it undertakes its role, has allowed it to remain a success tool in protecting the welfare of consumers. With the appropriate changes it will continue to be an effective safety net to consumers and allow consumer protection agencies, like the ACCC, the ability to deal with issues quickly and decisively.

The Productivity Commission's review promises to deliver a better system than the one we currently enjoy, allowing regulators and other consumer protection bodies to work effectively. Armed with the right tools, the ACCC will be able to continue responding to new challenges. In a number of ways. In particular by refining its approach to compliance, to ensure that it is exercising its compliance role wisely. What is on offer is an improved, better coordinated and stronger protection regime. At the centre of the changes the winners will of course be all Australian consumers, as they should be.

Thank you very much.

George Negus:

I was wondering as you were speaking, what you were going to say about the suitability of the Act, given that it is 32 years old. And you seem to be saying at the conclusion of your remarks that you think it is probably okay. But would from the consumer's points of view and the general public perception of what the ACCC does and what Trade Practices are all about, and what Fair Dealing's all about – a name change be helpful? Do you think that people really know, if there was lawyers, or consumer advocates what trade practices are? I am thinking of something really ridiculously simple like, Free and Fair Trade Act or something like that. Do you think it is obvious enough to the public, what the Trade Practices Act is all about?

Graeme Samuel:

Well I will give you two responses to that George. If you were to try and summarize the Act in two lines, two sentences, I think it would be this?

Business – thou shalt not behave anti-competitively and Business – thou shalt not behave dishonestly. And if you look at the fundamental principles of part 4, the Competition Provisions and part 5, the Consumer Protection Provisions, as they are described - the Fair Trading Provisions. That is the essence of what they are about. In essence those laws haven't changed, or certainly the ones about behaving dishonestly haven't changed since the days of Moses. And the laws relating to anti-competitive activity, I guess so now well enshrined both in our law, but also within our (indistinct), as I think Robert Fitzgerald will attest, having worked with me closely on the National Competition Council for many years. Governments around this country, on a bi-partisan basis, recognize the benefits of competition with some very, very few exceptions. I will leave those aside for policy issues. So that would be the first thing I would say.

The second thing I think that is worth commenting on is this, that the work of the ACCC is probably better known than almost any regulator in this country. It is well publicised, some would suggest too well publicised, but that is our view. We think it should be well publicised. If anything, the only problem that occurs is sometimes that there is an expectation that we can deal with matters that frankly we can't deal with under the law, and I am often not sure that we ought to be dealing with them. Often there is an expectation that for example, we should be out there regulating petrol prices, I don't want any questions on petrol prices please. That we should be

regulating petrol prices, and that we can control the way that petrol moves during the week. That is an expectation that is there, that the ACCC can actually fix all these things. Let me just give you an example George, during the last financial year, we had 75,000 calls and enquiries and complaints lodged with our info centre – 75,000. Now of those a vast number are actually not issues for the ACCC, they are then very carefully referred by info centre personnel to appropriate agencies, or indeed issues can be resolved very quickly over the phone. But it perhaps a sign that 75,000 enquiries came into us, with an expectation... well the ACCC can actually deal with these issues.

George Negus:

Would an education campaign... I mean even though you are dead right, I mean the ACCC is one of our better known institutions, no doubt about that. We're still lagging on the education where the general public is concerned, 75,000 sounds like a lot, but 20 odd million people it isn't?

Graeme Samuel:

I think, yes there will be a number of reasons why matters may not even be the subject, although 75,000 enquiries. I might say that is almost a 50% increase over the past two or three years, over what we have traditionally had, so I think if profile is anything and if knowledge of what we are doing is anything, perhaps that is just one statistic, although it can be flawed.

I think that when you talk about an education campaign, we need to recognize that amongst those 20 million Australians, issues are often resolved very well through negotiation – they are done privately, they are done deliberatively with traders and the like over the counter. I can tell you a few I have resolved myself without identifying who I was by just getting a big angry with the trader and standing up. The important thing is that the consumer needs to know their rights. They need to know when not to accept what is put to them by a trader who is trying to put something that may save the trader the difficulty or the problem either exchanging goods or taking back faulty goods or compensating, and consumers need to know their rights. Now we along with the Offices of Fair Trading throughout Australia do a large amount in trying to educate consumers as to what their rights are. We are constantly writing articles in the daily media to explain what their rights are, particularly around the time of the sales, Valentines Day, talking about some of the internet dating scams. So we try and do as much of that as possible. But I think it is fair to say, it is never time to say enough.

George Negus:

So the ACCC is a relationship counsellor as well, as everything else?

Unknown Male:

I have noted that the UK has had the Unfair Contracts Act for some years. Victoria followed suit. Would you find as a competition and consumer protection regulator, find that a useful bit of legislation in the Trade Practices Act?

Graeme Samuel:

Look we will be providing a discussion on Contracts Legislation in our submission to the Productivity Commission. And it might be easier if you have a look at the considered position we put there. I think it is fair to say this, that we have a threshold that is already contained in part in the existing legislation in 51ab and 51ac relating to unconscionable conduct. And as one or more of my colleagues have recently described that that relates to contract arrangements or conduct that is grossly unfair, harsh and oppressive. Now how much further below the level of gross unfairness or harsh and oppressive conduct in terms of dealings between business and consumers you lower the bar to deal with what is otherwise described as unfair contract terms, I think is the subject of some quite extensive discussion that we are putting in our submission for PC.

John Wood:

John Wood. I guess in this context for 10 years, I was head of the Consumer Policy Advisory body to the Federal Government, the then Federal Bureau of Consumer Affairs. I just want to pick up George's lead here, about uniformity. The first discussion on uniformity of food regulation took place in 1864, raised by Sir Henry Parkes and was finalised in uniformity in 1990. (laughter) The first discussion about uniform credits started in 1956 and was finally kind of resolved in... well not resolved still I guess you could say, but in 1992 there was agreement. The first discussion of post sales consumer protection uniformity started in 1989 and still not being completed. So I guess my question to you Graeme is... like how are we going on uniformity? (laughter)

Graeme Samuel:

Well that is a rhetorical question I would suspect. Look, let's not be too pessimistic about this, because and I go back to the experience that Rob Fitzgerald and I had about the National Competition Council and Competition Policy Reform. That was an extraordinary unprecedented agreement, reached between nine Australian Governments, to bring about substantial reform of the competition law and police in this country. It was bought about over a period of I guess ten years following the Hilmer Report. And it is not beyond the realms of possibility that we can see repeats of that occurring. It requires goodwill; it requires a recognition of the costs of lack of uniformity and I don't think there would be anyone in this room, that would disagree with the principles that you are averting to and I have actually tried to outline in the comments here - that uniformity is very important; it not only saves costs for business which they reflects itself in price to consumers, but more importantly it assists in consumers in only having to understand one law that is distinct from nine laws, so that they might be dealing with in this country.

Jan Whittaker:

Jan Whittaker, Australian Privacy Foundation. I am impressed by this discussion about uniformity, because anything that can make life simple for those, I think pretty much a good thing, from both sides of the aisle. But the question I have relates to the trends that have been going on in terms of de-regulation, self-regulation, co-regulation or whatever view you want to take. It has been away from legislating requirements and towards the industries making their own rules how they ought to behave. And what I have seen is that many times, is that you get multiple codes operating, you never know who is being under the code and it makes the

consumer side of interpretation worse than even if you have the multi-jurisdictions that we have in legislation. So that is the Commission's perspective on codes.

Graeme Samuel:

Yes, let me give you my own perspective and I think it is reflected also in the Commission. When I first joined the Commission, I was, I have to say, somewhat enthusiastic about the prospects of self-regulation. I have to say, I have become a lot more sanguine about that, and sceptical about it as time has progressed. That is not to suggest that we need extensive more regulation, but it is to suggest that I think that self-regulation works most where community expectations are set at such a level, they are one realistic and two have been so widely publicised - the subject of so much comment, that this is oddly recognised that they had better toe the line, as a matter of good commonsense, otherwise it will find itself the subject of regulation. But I would have to say to you, that self regulation while it has worked in some cases, it works particularly where it suits the business groups, or the business organisations concerned, far more than necessarily it reflects the needs of consumers.

Now having said all that, do we need more regulation or more legislation? Well, if you have got some fundamental laws that say, "That business shall not be anti-competitive and business shall not be dishonest", you have got some very wide all embracing laws before you start, so therefore we need to be careful, that we don't set in place regulatory codes to cover every intricate situation, which can themselves become inflexible - not inflexible in terms of the way the business deals with them, but actually inflexible in adapting to the changes that are swamping us and moving through the society and economy at the present time. So I have a concern... look we talk about change, and I think the question was asked before about the time taken to bring about uniformity, but all of us, both at regulator level, consumer level and I would guess at parliamentary level, would express their own private and in this case public frustration at the pace at which change in terms of the introduction of relevant regulation or changes to legislation takes place to meet changing needs and changing requirements in the economy and the society. And when you put in place prescriptive codes, recognise one - it will take awhile to get it there, but two - it will take an awful long time to change it to meet the changing needs of society, and therefore we have to try and strike a balance.

But yes, I will say upfront, I am somewhat more sanguine about ability of business to regulate itself to deal with community expectations. I often say when talking to business around board tables and the like, that there are three C's involved with compliance of the Trade Practices Act.

One is compliance culture, starting at the top running all the way through. Two is communication - that is communicating with your customers, communicating with your suppliers, and community with the regulator where a problem has arisen. The third one though, is the one that raises the most eyebrows and I call it commonsense. Commonsense is just simply reacting to community expectations and adjusting your business behaviour in a way that meets community expectations, without necessarily sacrificing the ultimate objective of the business, which is to earn a return on its investment.

George Negus:

I think self regulation quite often Graeme... you mentioned the word sanguine, you have to be sanguine about it. It seems like a nice idea at the time, almost. In my profession I sat on the

authority or the Commission's Inquiry into violence on television after the Hoddle Street Massacre, which spawned this inquiry. At the end of 12 hard months, we came up with a set of self regulatory... a proforma for self regulation. If you ask anybody in the Australian media where these self regulatory guidelines are with things like grief intrusion and violence on television concerns, they wouldn't know where to find it. It would be in the very bottom drawer.

Graeme Samuel:

It is a bit like our use of undertakings. Undertakings are very effective when you have got the threat of litigation. It is one of the reasons why we would like to see civil penalties introduced in the litigation process. The ability to obtain consumer redress through enforceable undertakings... the only threat, the only leverage you have got is the fact that you may put the business to the ignominy and the expense of litigation, unless they provide some form of consumer redress through the process of court enforceable undertakings.

And so in the context of, shall we say self regulation generally will arise as a response to the potential threat of regulatory codes, of enforced regulation and that is not a very helpful way of business to be operating.

George Negus:

Could go on, but what I thought of finishing on Graeme – your signposts of the future were worth referring to again, and ask you, how do you go about making those things actually occur? The civil pecuniary penalties into the Act, the Court Orders to obtain Consumer redress, the reduction of inconsistency between Federal, State and Territory bodies - these seem to be your three main points and how the hell can we go from where we are to having those three things enshrined?

Graeme Samuel:

Well the third one is easy because I doubt there is any disagreement around the whole of the Commonwealth, probably amongst 20 million Australians, about consistency and uniformity, so that is the easiest one to state - perhaps the most difficult one to achieve. The other two are policy issues for government. They are matters that governments are aware of is the ACCC's view and it is for governments to actually deal with those. They are issues that we will be putting into our Productivity Commission Review. How do we achieve those? Well they are one... they are but three of a number of issues that we will be putting into the PC Review. The best thing you could do is actually flood Rob Fitzgerald and his team with a whole series of submissions that argues for exactly that. They may actually turn around and say, "Well if everyone says something, it is a good idea, we ought to recommend it".