

# insight

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## Consumer policy tools

This paper discusses a number of consumer policy tools that can be used to address consumer policy issues, and identifies some of the considerations that need to be taken into account when choosing the tools to address particular issues.

Many of the tools set out in this paper relate to consumer policy issues identified under an information-based framework. The tools are not peculiar to that framework, although the assumptions inherent in any given framework are likely to favour different combinations of policy tools. In any given case, the range of policy tools will vary according to factors such as: the available regulatory and market institutions; the specific nature of the consumer policy issue; the nature and impact of consumer detriment; and the trade-offs available in the circumstances.

There are a number of ways in which the market can correct informational problems, by responding to the heuristic devices that consumers use when making decisions under uncertainty. This paper considers the barriers to these responses emerging in a competitive market, and the ways in which the government can help the market to overcome those barriers.

In the absence of a viable market-based solution, government may have to consider regulatory interventions. This paper outlines a number of trade-offs that policy-makers need to consider in designing and choosing policy tools. It goes on to discuss a number of regulatory policy tools that can be used to address informational problems in consumer transactions.



## Introduction

The 2004:1 issue of Insight (Literature review on analytical frameworks) discussed different frameworks for considering the premises for regulating consumer transactions and the goals of consumer law. It noted a number of frameworks that advanced various goals, including:

- addressing market failures or creating efficient markets for consumer goods and services;
- advancing normative goals, such as distributive justice or other community-held values; and
- paternalistic protection of the consumer.

The literature review favoured an information-based framework, in which information is the organising concept for a principled approach to consumer policy. Under this framework, consumer policy focuses on the quality and cost of consumer information.

This paper discusses a number of consumer policy tools that can be used to address consumer policy issues, and identifies some of the considerations that need to be taken into account when choosing the tools to address particular issues. For the purposes of this discussion, and in the interests of maintaining consistency, many of the examples in this paper relate to consumer policy issues identified under an information-based framework. The tools are not peculiar to that framework, and could be used under any of the analytical frameworks discussed elsewhere, although the assumptions inherent in any given framework are likely to favour different combinations of policy tools.

This paper does not purport to identify all available policy tools, or all circumstances in which intervention might be considered. In any given case, the range of policy tools will vary according to factors such as: the available regulatory and market institutions; the specific nature of the consumer policy issue; the nature and impact of consumer detriment; and the trade-offs available in the circumstances. The existence and impact of these variables means that the discussion in this paper must necessarily be somewhat abstract, and that extrapolation will be required to fit this discussion to particular consumer policy issues.

There are a number of ways in which the market can correct informational problems, by responding to the heuristic devices that consumers use when making decisions under uncertainty. This paper considers the barriers to these responses emerging in a competitive market, and the ways in which the government can help the market to overcome those barriers.

In the absence of a viable market-based solution, government may have to consider regulatory interventions. This paper outlines a number of trade-offs that policy-makers need to consider in designing and choosing policy tools. It goes on to discuss a number of regulatory policy tools that can be used to address informational problems in consumer transactions.

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### Options for addressing consumer protection problems

This paper does not discuss the issues underlying, or the process of, problem identification. It starts from the assumption that, in any given case, the problem has been properly defined and scoped.<sup>1</sup> Having said that, problem definition and scoping are important for two reasons:

- in the consumer policy context, the nature of the market in question (competitive, imperfectly competitive or non-competitive) may impact on the overall approach. If the market is very imperfectly competitive or non-competitive, consumer problems may really be problems that have to be addressed by competition policy or economic regulation;<sup>2</sup>
- clear and precise policy objectives will help in making a discriminating initial choice of instruments to serve the policy objectives, and in re-evaluating over time how well the chosen instruments are serving those objectives.<sup>3</sup>

Once a problem has been identified, policy-makers need to consider the range of possible interventions for addressing that problem. Identification of a problem does not create a presumption that government should regulate;<sup>4</sup> instead, policy-makers should ask whether a market-based solution will emerge in a reasonably timely and effective form and whether that solution will be optimal.<sup>5</sup>

### Market-based solutions

Within a competitive market, the market can itself correct informational problems by responding to the heuristic (determining) devices used by consumers when making decisions under uncertainty—for instance:

- price as a signal of quality: at a certain price, consumers expect to find a certain quality, which allows them to make trade-offs.<sup>6</sup> For instance, consumers may avoid low-priced brands on the supposition that they are of inferior quality, or favour such brands on the basis that they do not require or want the additional quality that comes with additional price;
- branding: one of the most important heuristic devices used by consumers is the assumption that past behaviour is an indicator of future performance.<sup>7</sup> Branding is a means of harnessing that assumption to increase market share;

<sup>1</sup> For a discussion of problem definition, see: OECD, Recommendation of the Council of the OECD on *Improving the Quality of Government Regulation* (1995) OCDE/GD(95)95, at 14. Available online: <http://www.OECD.org/EN/document/0,,EN-document-2-nodirectorate-no-6-30839-2,00.html>

<sup>2</sup> Hadfield, G., Howse, R., Trebilcock, M., "Information-Based Principles for Rethinking Consumer Protection Policy" *Journal of Consumer Policy* 21: 131-169, 1998, at 152.

<sup>3</sup> Trebilcock, M., "Rethinking consumer protection policy", paper delivered to the *Consumer Law Conference*, Auckland 2001, at 15.

<sup>4</sup> This assumption forms the basis of the OECD *Recommendation on Improving the Quality of Government Regulation* (supra at note 1). It is also an underlying principle of the information-based framework (Hadfield et al, supra at note 2, at 155). Note that this assumption also forms part of the government's current approach to regulation. See, for instance, Ministry of Economic Development, *The Code of Good Regulatory Practice* (1997). Available online: <http://www.med.govt.nz/bustl/compliance/regprac.html>

<sup>5</sup> *Supra* at note 2, at 155.

<sup>6</sup> Office of Fair Trading, *Consumer Detriment under Conditions of Imperfect Information Research Paper* 11, 1997, at 1998.

<sup>7</sup> *Supra* at note 2, at 160.

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- warranties: although generally unenforceable,<sup>8</sup> promises of quality from manufacturers may serve to structure an effective reputation mechanism to enable consumers to identify high quality manufacturers.<sup>9</sup> If manufacturers offer a warranty as a signal of good quality but the product is in fact poor quality, consumers would turn away as their beliefs were updated through word of mouth;<sup>10</sup>
- experts and third parties: independent parties can provide credible information to consumers, which can help them to make discriminating decisions (for example, consumer magazines providing product reports and comparisons). However, information is a public good, and free-riding by consumers can result in an under-provision of information.<sup>11</sup> In addition, this information may be biased in favour of particular consumers, such as the more affluent;<sup>12</sup>
- experience ratings: these ratings convey important information at low cost, and respond to the assumption that past behaviour is an indicator of future performance. For example, information such as the number of times a professional or business has been the subject of complaint or investigation;<sup>13</sup>
- department store chains acting as screening agents for consumers;<sup>14</sup> This reinforces the consumer's assumption that products on the market are generally safe. Depending on the branding of the department store, it can also give consumers an indicator of quality;
- voluntary standards and certification: standards are documented agreements containing technical specifications or other precise criteria to be used consistently as rules, guidelines or definitions of characteristics so as to ensure that materials, products, processes and services are fit for their purpose.<sup>15</sup> Standards are typically either: performance (output) standards that require certain conditions to be met at the point of supply but do not specify how those conditions are to be met; or specification (input) standards that compel (or prohibit) the use of specific production methods or materials.<sup>16</sup> Consumers can use indicators of compliance with a standard as an indicator of safety or quality, as appropriate; and

<sup>8</sup> Quality claims by manufacturers may not be contractually enforceable unless it can be shown that the manufacturer intended to assume contractual liability. Non-contractual claims may give rise to tort liability if untrue, but the remedies are limited to compensation for harm to person or property (consumers could not, for instance, sue for the difference between the thing as promised and the thing as is). *Supra* at note 2, at 165, n 18. Warranties may lead to liability under the Fair Trading Act 1986 if false or misleading. Civil remedies under that Act include refunds (s 43(2)(c)) and payment of the amount of loss or damage (s 43(2)(d)).

<sup>9</sup> *Supra* at note 2, at 142-143.

<sup>10</sup> *Supra* at note 6, at 119.

<sup>11</sup> See generally Hadfield *et al*, *supra* at note 2, at 144; Office of Fair Trading, *supra* at note 6, at 121; Trebilcock, *supra* at note 3, at 8.

<sup>12</sup> Twigg-Flesner, C., Weatherill, S., Willett, C., "Law, Information and Product Quality" *Journal of Consumer Policy* 25: 291-297, 2002, at 292.

<sup>13</sup> *Supra* at note 2, at 157.

<sup>14</sup> *Supra* at note 3, at 8.

<sup>15</sup> International Organization for Standardization, definition available online: <http://www.iso.ch/iso/en/aboutiso/introduction/index.html>. See also the definitions of 'standard' and 'specification', Standards Act 1988, s 2.

<sup>16</sup> Ogus, A., *Regulatory Institutions and Structures*, Working Paper 4 (2001) Centre on Regulation and Competition, University of Manchester, at 6.

- industry self-regulation: this gives traders a structured way of assuring consumers of quality of service. Self-regulation may itself use devices such as experience rating, branding or standards as the mechanisms to provide assurances to consumers.

There are a number of situations where a market-based solution is unlikely to emerge in a competitive market, for instance:<sup>17</sup>

- repeat transactions are rare and consequently the performance incentives created by the possibility of repeat business from satisfied customers are blunted;
- entry and exit costs in the industry are low, leading to the possibility of a large number of fly-by-night operators with few sunk costs and only modest investments in reputational capital;
- many sellers or producers are extra-jurisdictional, making redress through private law more difficult for consumers;
- sellers characteristically have few assets against which a judgement may be enforced;
- the costs to consumers of a 'bad' transaction are delayed or potentially catastrophic, making post-failure relief an inadequate or unsatisfactory solution; and
- the small size of a typical transaction creates a significant disincentive to seeking post-failure relief through the courts.

Where a market-based solution is unlikely to emerge of its own accord, the government may use a variety of levers to facilitate the development of a solution. The government can use its influence, resources and expertise to overcome collective action problems—and resource and knowledge barriers—to market-based solutions. The government can also use the prospect of regulation to prompt the development of a market-based solution.

Depending on the nature of the problem, market-based solutions may be focused on inputs (for example, regulating behaviour of market players) or outputs (for example, regulating the products and/or services provided by the market).

### Regulatory options

If a market-based solution is unlikely to emerge, even with assistance from government, policy makers need to consider whether regulation is necessary. According to the OECD Regulatory Checklist:

Government intervention should be based on clear evidence that a problem exists and that government action is justified, given the values at stake and current government policies; the likely benefits and costs of action (based not on perfect government, but on a realistic assessment of government effectiveness); and alternative mechanisms for addressing the problem.<sup>18</sup>

<sup>17</sup> *Supra* at note 2, at 155-156.

<sup>18</sup> *Supra* at note 1, at 14.

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Even where a significant market failure has been identified, the government should act only where it is feasible and cost-effective to do so.

In considering an intervention, policy-makers may have to balance the merits of alternative interventions. It is unlikely in most cases that any one intervention will be completely effective, so the merits of two or more may need to be compared and trade-offs made. These may include the trade-offs between:

- cost and effectiveness: one tool may fully achieve a given policy objective, but at very high public and private costs. Another may achieve the policy objective only partly, but at much lower costs;<sup>19</sup>
- reducing information costs effectively and maximising consumer choice: policy tools that generate information that is costly or difficult for consumers to interpret or access may be counterproductive. Cruder tools that restrict consumer choice (such as bans of hazardous products) may be more successful in lowering information costs;<sup>20</sup>
- restricting competition and trade, and lowering information costs: because competitive markets are likely to solve many information-related consumer problems on their own, consumer policy tools that have an anti-competitive or trade-restricting effect may be counter-productive;<sup>21</sup>
- being less competitively restrictive and having higher monitoring or enforcement costs: less competitively restrictive tools can result in more significant costs to establish compliance. For instance, it is generally less costly to verify that a product contains a particular design or device than to determine whether widely varying products meet a given standard of safety performance;<sup>22</sup>
- enforcement by a government agency and civil liability: under a liability regime (for example, tort and contract), responsibility for enforcement rests with the individual consumer who is best informed at least cost about the occurrence of a 'bad deal' (that is, the consumer has not made the deal he or she intended or expected). However, these information cost savings come at the expense of a failure to share the costs of enforcement amongst all consumers who might benefit from such in respect of a particular transaction or class of transaction. This approach is also likely to result in under-enforcement — consumer protection laws that give a private right of action to harmed consumers are notoriously under-used.<sup>23</sup>

What follows is a non-exhaustive list of different types of policy tools that may be harnessed to address information-based consumer protection problems.

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<sup>19</sup> *Supra* at note 3, at 16.

<sup>20</sup> *Supra* at note 2, at 159.

<sup>21</sup> For instance, licensing directly restricts the number of competitors in the marketplace. Product safety instruments that specify specific inputs rather than requiring products to meet specified safety objectives may exclude competing products from the market, even if they are safe. Requiring certification by a particular body may be competition-restricting if the certification process has subjective or covert protectionist dimensions. *Supra* at note 2, at 160-161.

<sup>22</sup> *Supra* at note 2, at 161.

<sup>23</sup> *Ibid.*

## Policy tools to address information-based consumer protection problems

### Prohibitions and bans

At first glance, product bans appear to restrict consumer choice. However, if a product or service poses a risk to consumer safety or well-being, then the most effective means of addressing the problem may simply be to ban the product. This is especially so where the risk is unlikely to be mitigated through the provision of consumer information (for example, because that information is high cost, difficult to obtain or understand, or undervalued by consumers through differing perceptions of risk). It may be much more costly to have to obtain specific up-to-date information to avoid purchasing a hazardous product than to simply arrive at the counter to find it is unavailable.<sup>24</sup> Although a product ban is a fairly crude tool that restricts consumer choice, it may be more successful in lowering information costs than other tools.

Regulation can also prohibit certain conduct, such as the prohibitions on misleading or deceptive conduct and unfair practices found in the Fair Trading Act 1986. These prohibitions seek to align consumer expectations and trader conduct, thereby modifying consumers' pre-transaction information costs. Coupled with enforcement and redress mechanisms, such prohibitions also give post-failure relief.

### Labelling and warnings

Other consumer policy tools try to reduce information costs without restricting consumer choice to the same degree as prohibitions and bans. Warnings retain consumer choice, but do not result in the information cost problems associated with more sophisticated disclosure devices. For instance, prominent labelling of a substance as a poison is a low-cost way of providing important information to consumers. Consumers can then choose to: seek a substitute; investigate the details of the risk; or make the purchase and use it with care, based on the precautions most reasonable people take with 'poisons'.<sup>25</sup>

Another way of providing information to consumers is through mandatory labelling or requirements to provide certain information with a transaction.<sup>26</sup> Labelling can be a simple way of conveying important information. However, the goal needs to be clear, otherwise consumers may receive information that does not help to align their expectations with the likely outcome of the transaction.<sup>27</sup>

### Mandatory use of information intermediaries

Another policy tool is the mandatory use of information intermediaries (for example, pharmacy- or prescription-only medication). This can be particularly effective for reducing information costs where the product has severe risks for certain sub-groups and the intermediary knows both the risks and whether they are

<sup>24</sup> *Supra* at note 2, at 158.

<sup>25</sup> *Ibid.*, at 159.

<sup>26</sup> See, for instance, consumer information standards made under the Fair Trading Act 1986.

<sup>27</sup> Note that labelling can serve more than one purpose, which can shift over time. For instance, country of origin labelling for clothing and footwear is mandatory under the Fair Trading Act 1986. Its original purpose was protectionist—to encourage consumers to 'buy New Zealand-made'. Over time, this purpose has shifted, and it can now be seen as addressing consumer information problems: consumers can use country of origin labelling as an indicator of quality and to express through their purchasing ethical views about labour and environmental standards used in the production of goods.

likely to affect a particular consumer. This tool also sends a signal to the consumer that there may be value in searching out more precise information and not relying on general expectations of safety.<sup>28</sup>

### Regulation of terms

Where information barriers are significant and unlikely to be overcome by complex disclosure arrangements, a potentially effective mechanism may be to regulate terms in consumer contracts. Regulation of terms can improve the match between consumers' perceptions and sellers' obligations, for instance:

- imposing a guarantee as to title enables consumers to obtain clear title in circumstances where it may be difficult for them to establish whether the vendor has clear title or whether there are securities over the property in question;<sup>29</sup>
- consumers are likely to assume that spare parts are reasonably available and that they can take the goods to a repair facility. Imposing a guarantee as to the reasonable availability of spare parts and facilities for repair reduces the need for consumers to search out that information before deciding to buy a particular product.

Imposing guarantees of quality can reduce information costs, particularly with purchasing 'experience goods' (where the attributes can only be determined with use, such as a car) or 'credence goods' (where the attributes may not be discovered or, if they are, only some significant time after use, such as asbestos insulation).<sup>30</sup> In this way, regulation of terms can help consumers to transact with a greater degree of confidence.

### Occupational regulation

Occupational regulation may serve a number of goals, including consumer policy goals.<sup>31</sup> In the past, such regulation has often served to protect professions or industries from competition. More recently, occupational regulation has been seen as an effective tool to provide consumer protection, and it can have a significant impact on the cost of information. If a consumer seeks services or products from a member of a regulated profession, the cost of information is reduced because assumptions can be made as to the competence and performance of that member.

However, if occupational regulation is not based on relevant quality control standards, it will not reduce information costs. Instead, it may increase the gap between expectations and reality by giving the impression that the occupational regulation indicates an actual level of safety or competence.<sup>32</sup>

<sup>28</sup> *Supra* at note 2, at 159.

<sup>29</sup> See, for instance, Personal Property Securities Act 1999, Part 5. Section 5 of the Consumer Guarantees Act 1993 gives a right to damages if clear title is not provided.

<sup>30</sup> *Supra* at note 2, at 165 n 17.

<sup>31</sup> See generally Ministry of Economic Development, Policy framework for occupational regulation: a guide for government agencies involved in regulating occupations (1999). Available online: [http://www.med.govt.nz/buslt/bus\\_pol/policyframework/index.html](http://www.med.govt.nz/buslt/bus_pol/policyframework/index.html)

<sup>32</sup> *Supra* at note 2, at 159.

## Standards

Standards are documented agreements containing technical specifications or other precise criteria to be used consistently as rules, guidelines or definitions of characteristics so as to ensure that materials, products, processes and services are fit for their purpose.<sup>33</sup> Consumers can use indicators of compliance with a standard as an indicator of safety or quality, as appropriate.

Incorporating standards into regulation can result in better coverage and wider adoption of standards, because compliance becomes compulsory and is not limited to those businesses that choose to adopt voluntary standards. Coverage may be a particularly important issue in some consumer markets, for example self regulatory approaches to weights and measures may result in incomplete coverage, which could cause confusion in relation to a wide variety of consumer goods.

Non-compliance with standards may be subject to some form of sanction or redress due to their incorporation into regulation.

## Sanctions and redress mechanisms

Where there is a consumer interest that should be protected by law, policy-makers need to consider whether that interest should be protected through public enforcement and sanctions or through private claims and redress.

In making this decision, a number of factors need to be taken into account, including:

- the information costs of compliance or enforcement: for example, the choice between performance and specific standards needs to reflect that it may cost less to verify that a product contains a particular design or device than to determine whether products of widely varying design meet a given standard of safety or quality performance;<sup>34</sup>
- whether there is a public goods aspect to the class of dispute in question which requires a public institutional presence.<sup>35</sup> In liability regimes (for example, tort and contract), the consumer is responsible for enforcement and is best informed (at least cost) about the occurrence of a 'bad deal' (that is, the consumer has not made the deal he or she intended or expected). However, as noted previously, this information cost saving involves a failure to share the costs of enforcement amongst all those who might benefit from enforcement and so can result in under-enforcement;
- the positive externalities from the provision of civil justice: providing an avenue for redressing grievances in a socially non-disruptive fashion (that is, 'writs rather than rifles'); providing some measure of consistency and predictability in decision-making by generating and interpreting legal rules which other parties can rely on as precedents in shaping their own conduct; and the incentive or deterrent effect on third parties of requiring one party to pay compensation to another.<sup>36</sup>

<sup>33</sup> *Supra* at note 15.

<sup>34</sup> *Supra* at note 3, at 13.

<sup>35</sup> *Ibid.*, at 19.

<sup>36</sup> *Ibid.*, at 18.

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Where the protected class is large and dispersed, and individual claims are relatively small, consideration needs to be given to economies of scale. In this context, public enforcement may be more efficient than requiring individuals to take claims on an individual basis. Alternatively, class actions could be used to achieve economies of scale in litigation where members of a class have similar claims. This would reduce the costs in individual prosecution of each claim, and enhance access where many of these individual claims might not otherwise have been brought.<sup>37</sup>

In some cases, it might be appropriate to use a combination of public and private enforcement. This would harness the efficiencies noted above, providing a measure of protection to consumers who would be unlikely (or unable) to take action on their own behalf. It would highlight under-enforcement in relation to particular classes of case by public enforcement authorities.<sup>38</sup> It would also harness the incentives that competitive firms have to monitor each other's conduct that would, in turn, result in better outcomes for consumers.<sup>39</sup>

There are other possible redress mechanisms, including:

- facilitating or mandating informal dispute resolution processes within firms, bureaucracies or government agencies. This may be complemented by the provision of internal or industry-wide dispute resolution systems, where consumers with a grievance not resolved within the firm at first instance can seek resolution through an informal, but external, process;<sup>40</sup>
- alternative dispute resolution (ADR), which may be publicly or privately supplied as a complement to the civil justice system. However, consideration needs to be given to whether encouraging parties to rely on ADR may compromise some of the public goods aspects of the civil justice system. In addition, because enforcement (if required) is likely to be through the courts, consideration needs to be given as to what forms of public supervision are required of ADR systems (especially privately-provided systems);<sup>41</sup>
- self-executing remedies such as cooling-off periods imposed on consumer contracts. These can provide an extremely low-cost remedy for consumers who may have been rushed into a decision.<sup>42</sup>

Finally, government can provide, or facilitate the provision of, forms of public legal education, to:

- enable consumers to avoid potential disputes in the first place; and
- educate them on how to take complaints effectively on a self-help basis.<sup>43</sup>

<sup>37</sup> *Ibid.*, at 31.

<sup>38</sup> *Ibid.*, at 22.

<sup>39</sup> For instance, a significant proportion of private actions taken under the Fair Trading Act 1986 are taken by businesses against their competitors. In this way, the market polices compliance with the Act and contributes to the Act's consumer protection objectives.

<sup>40</sup> *Supra* at note 3, at 24.

<sup>41</sup> Options might include ex ante certification of the mechanisms (for example, e.g. required qualifications of personnel, or decision-making processes) or ex post judicial supervision (e.g. for example, rights of appeal or judicial review). *Supra* at note 3, at 19-20.

<sup>42</sup> *Ibid.*, at 25.

<sup>43</sup> *Ibid.*, at 23.

### Government regulation versus market-based solutions

Government regulation and market-based solutions are not necessarily mutually exclusive. There are many variations of co-regulation that may be considered relating to respective responsibility for rule-making and/or enforcement adjudication. For example, a private association may be involved at the legislation stage by developing a code of practice, while leaving enforcement to the government, or the government may establish regulations but delegate enforcement to the private sector. Sometimes government will mandate that a private association adopt and enforce a code of self-regulation. Often, a private association will engage in self-regulation in an attempt to stave off government regulation. Alternatively, self-regulation may be undertaken to implement or supplement legislation.<sup>44</sup>

Self-regulation will generally be favoured where:

- private parties have a significant comparative advantage in information, either due to specialist technical knowledge or greater capacity to assess the relative costs and benefits of different rules;
- flexibility is important: if there is a need to take into account exemptions and exceptions or provide for frequent changes of rules over time;
- the industry is a cohesive group and is easy to demarcate;
- there is a high level of consensus within an industry on the need to improve standards and the standards it wants to promote;
- the problems can be fixed within the industry: the industry is not dependent on outside players to assist with the solution;
- participation is important to achieve compliance.

Government regulation will generally be favoured where:

- there is a misalignment between private and public goals, which may mean private parties do not have incentives to act consistently with public goals;
- the public sector will have a comparative advantage in enforcement through making rules mandatory and having powers of compulsion;
- there may be concerns of anti-competitive conduct through rule-making by private parties.

### Publicity

Although not necessarily properly characterised as a regulatory intervention, government agencies can and do use publicity to achieve consumer policy goals. This can take a variety of forms, ranging from general consumer information and education, and information on specific issues, through to 'naming and shaming' particular traders or sectors. 'Naming and shaming' serves as a disincentive to poor conduct, and also as a useful consumer warning.

Publicity may also be used in conjunction with regulatory interventions such as product recalls or bans, or to protect consumer safety. In this context, public statements may be made pursuant to a statutory provision for privileged statements.

<sup>44</sup> *Supra* at note 24.

This mechanism facilitates the use of publicity in appropriate circumstances by reducing the fear of civil proceedings (such as defamation) being launched as a result.<sup>45</sup>

### Consumer representation

Consumer representation is the appointment of appropriate people to represent the consumer perspective and consumer interests on statutory boards, advisory bodies, departmental working parties and committees (where the consumer perspective is appropriate or required). This tool does not seek to specify particular policy outcomes for consumers, but instead seeks to improve decision-making processes by bringing decision-makers into contact with a wider range of perspectives. It is assumed that this will result in more robust and longer lasting decisions, and in policies that can be better implemented.

Consumer representation does this by bringing an informed consumer perspective into the decision-making process, and by facilitating access to consumer expertise and opinions.<sup>46</sup>

### Summary

In summary, there is a broad range of consumer policy tools available to policy-makers for addressing problems of consumer protection.

Problem definition and scoping is an essential first step when addressing consumer issues, because it will help to characterise whether the appropriate intervention is through consumer policy, competition policy or economic regulation. It can also help in making a discriminating initial choice of policy tool.

Identification of a consumer issue does not create a presumption that the government should regulate. Instead, policy-makers should ask whether a market-based solution will emerge in a reasonably timely and effective form and whether that solution will be optimal.

There are a number of ways in which the market can correct informational problems, by responding to the heuristic devices that consumers use when making decisions under uncertainty. There are a variety of barriers to these responses emerging in a competitive market, and there are a number of ways in which government can help the market to overcome those barriers.

In the absence of a viable market-based solution, government may have to consider regulatory interventions to address informational problems in consumer transactions. When designing and choosing policy tools, policy-makers need to be aware of trade-offs between different options.

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<sup>45</sup> See, for instance, section 37 of the Food Act 1981, s 37, which empowers the Director-General to publish statements relating to food or appliances for the purpose of protecting the public. Statements under s 37 that section are protected by qualified privilege.

<sup>46</sup> Note that the Ministry of Consumer Affairs has developed guidelines for consumer representation, which are available on its website: <http://www.consumeraffairs.govt.nz/aboutus/consumer-rep-report/guidelines/index.html>. The guidelines are to be distributed to all Ministers, who are invited to draw them to the attention of their Chief Executives. [CAB Min (02) 32/3B refers].

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