CONSUMER PROTECTION LEGISLATION AND THE MARKET PLACE

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Numerous statutes[1] and regulations[2] have as their principal or incidental function the protection of the New Zealand consumer.[3] It is proposed in this article to consider the desirability, or otherwise, of such extensive governmental intervention in the market-place and to identify and evaluate the basic objectives of consumer protection legislation.

I GOVERNMENT INTERVENTION OR NOT?

A fundamental question is: Should legislation be enacted for the protection of the consumer or should the market and the common law be preferred over state regulation?

"Laissez-faire" was the rallying cry of philosophers and businessmen in the nineteenth century and both groups were against bureaucratic restrictions on freedom of opinion and enterprise. As Dalton[4] comments

> Belief in laissez-faire was like belief in pre-marital chastity, a conviction about what ought to be, rather than actual knowledge of who actually does what to whom in the real world. The economists supplied the underlying rationale for governmental chastity, for continence in its market interventions and spending.

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1 For example: Sale of Goods Act 1908; Door to Door Sales Act 1967; Consumer Information Act 1969; Hire Purchase Act 1971; Layby Sales Act 1971; Commerce Act 1975; Motor Vehicle Dealers Act 1975; Unsolicited Goods and Services Act 1975; Safety of Children's Nightclothes Act 1977; Credit Contracts Act 1981; Food Act 1981; Medicines Act 1981.

2 For example: Food and Drug Regulations 1973; Dangerous Goods (Labelling) Regulations 1978; Metrication (Retail Trading) Regulations 1978; Plastic Wrapping Regulations 1980.

3 The term "consumer" may be defined widely as referring to any person, natural or legal, to whom goods, services or credit are supplied or sought to be supplied by another in the course of a business carried on by him; however, the context may dictate that a more limited interpretation must be placed on the term, as where the legislature has restricted the ambit of the protective mechanisms of certain statutes to a narrower class of persons it has perceived to be in greatest need of protection or assistance. See, for example: Door to Door Sales Act 1967 s 2(1); Hire Purchase Act 1971 s 12(1)(c) and 22(4); Credit Contracts Act 1981 s 15(1)(d).

4 *Economic Systems and Society* (1974) at 44. See also Keynes, *The End of Laissez-Faire* (1926) at 13-14, where he comments: "The economists were teaching that wealth, commerce and machinery were the children of free competition — that free competition had built Man . . . . The principle of the Survival of the Fittest could be regarded as a vast generalisation of the Ricardian economics. Socialist interferences became, in the light of this grander synthesis, not merely inexpedient, but impious, as calculated to retard the onward movement of the mighty process by which we ourselves had risen like Aphrodite out of the primeval slime of Ocean."

Laissez-faire found its economic expression in free enterprise and the superiority of the market over public regulation or control as an instrument of economic co-ordination. Today the leading advocates of the laissez-faire approach are the Chicago school of economists and their disciples in various other parts of the world. Fundamental to this treatment of the consumer and his position in the economy generally is the assertion that the consumer is sovereign. According to this theory the consumer's role is to guide the economy to the production of goods and services that he wants — the consumer, in short, expresses his wishes by casting "dollar votes".[5] The aggregate of "votes" cast dictate what the economy should produce, how production can be efficiently organised and how the resulting output should be distributed. Viewed in this way the consumer is sovereign because, for example, if consumers are dissatisfied with the quality of a particular commodity they will collectively cease to purchase that commodity. Finding that the commodity is no longer commercially saleable at that price the producer may be forced to improve the product quality, lower the price or abandon production altogether.

Furthermore, competition among businesses is said to minimise the risk of undesirable trade practices. This point may be elaborated upon by reference to advertising. Free market theorists argue that legislative interference to combat the joint problems of misleading and uninformative advertising is unnecessary and potentially harmful. It is argued that where there is a plurality of sellers of goods and services that have unequal attributes, for example, the sellers of superior goods and services will accurately inform consumers, through advertising, of the attributes of their products and will challenge and expose any misleading or inaccurate claims by competitors; that is, competitive forces generate accurate information about goods and services and the seller of the superior product or service has an incentive to fully inform the consumer. Businesses which resort to deception to encourage sales will soon lose patronage to their competitors when disillusioned customers find, or are advised, that the product or service does not measure up to advertised expectations. Consequently such businesses will have to modify their behaviour or run the risk of the ultimate market sanction — liquidation.[6] Proponents of the laissez-faire approach therefore see consumer protection legislation as unnecessary, given consumer sovereignty in the market-place.

However, there are certain debatable assumptions underlying the analysis upon which the edifice of consumer sovereignty is erected. There has to exist a situation of perfect competition which entails, inter alia:

(i) The presence of large numbers of independently acting buyers and sellers operating in the market for any particular product, resource or service.

5 Samuelson, *Economics* (8 ed 1970) at 40.

6 See, for example, Posner, "Strict Liability: A Comment" (1973) 2 The Journal of Legal Studies 205, 211; Samuelson, op cit, chapter 3; Cranston, *Consumers and the Law* (1978) at 20; Cranston, "Creeping Economics" [1977] British Journal of Law and Society 103, 104; Dickey and Ward, "Consumer Legislation in Socio-Economic Perspective: Observations from the Enactments of One State" (1978) 13 UWALR 378, 397.

This emphasises the fact that the essence of competition is the widespread diffusion of economic power among the individual units, that is, the manufacturers, sellers and consumers, which comprise the economy. In particular, where a large number of buyers and sellers are present in a particular market, no one buyer or seller will be able to demand or offer a quantity of the product sufficiently large to noticeably influence the price.[7] For example, if a product becomes unusually scarce the price will rise, and if there is a single producer or a small group of producers acting together, who decide to restrict the supply of a particular product, he or they can raise the price to an artificially high level. The essence of competition is that there are so many sellers that each, because he is contributing an almost negligible fraction of the total supply, has virtually no control over the product price. Similarly, buyers are plentiful and act independently, and thus no single buyer can manipulate the market to his advantage.

(ii) Sellers and buyers must be free to enter or leave particular markets. In particular there must be no significant obstacles preventing new firms from establishing themselves and selling their goods in competitive markets.[8]

(iii) The goods and services available must be homogeneous and traded at a single price. Consequently, competitive firms must be producing a standardized or approximately standardized product so that, given a single price, the consumer is indifferent as to the seller from which he purchases; ie, in a competitive market the products of firms B, C, D, E etc are looked upon by the buyer as perfect substitutes for that of firm A.

(iv) There is perfect knowledge of the price of such commodities and products on the part of buyers and sellers.

Under conditions of perfect competition laissez-faire economic theory declares the consumer to be sovereign and rejects any argument for government intervention in the market-place. Given the four assumptions outlined above, market forces are said to ensure that firms produce the goods and services that the community as a whole most wishes to consume, and that these goods and services (a) meet the minimum standards the community at large is prepared to accept; (b) are produced in the most efficient manner possible given the existing state of technology; and (c) are available within those technological limits at the lowest possible price.[9]

However, in practice perfect competition in any market is a rare phenomenon[10] and the assumptions upon which perfect competition is

7 Samuelson, op cit at 61-63; Dickey and Ward, "The Adequacy of Australian Consumer Protection Legislation — Observations and Proposals from Economic Theory" (1979) 14 UWALR 133, 135.

8 Brozen, *The Competitive Economy: Selected Readings* (1975) at 7.

9 See, for example, Lipsey, *An Introduction to Positive Economics* (5 ed 1979) at 243; Brozen, op cit at 64; Samuelson, op cit at 55; Tibor Scitovsky, *Welfare and Competition* (1971) Chs 20-21.

10 Samuelson, op cit at 43 says "in the real world competition is nowhere near 'perfect'."

founded do not reflect the realities of the market-place for most goods and services.

First, it is generally accepted today that imperfect competition is the prevalent form of market organisation, that is, oligopoly, monopolistic competition and pure monopoly.[11]

"Oligopoly" is defined in the Commerce Act 1975 as meaning a situation where the market for goods and services or a large part of such a market is supplied by a small number of firms.[12] A high proportion of manufacturing industries in all Western countries are oligopolistic[13] and New Zealand is no exception. In New Zealand in 1976-77 86 percent of manufacturing industries had a four firm concentration in excess of 40 percent of the market.[14] When a few firms dominate the market their individual market shares will be significantly large so that each firm's actions and policies will have repercussions for other firms.[15] Bain[16] comments that "there is an interdependence of non-dependence of the price and output policies of rivals, and each will determine his price and output in light of the concurrent moves or induced reactions of rival firms". Due to the mutual interdependence peculiar to oligopoly there is considerable incentive for a group of oligopolistic manufacturers or sellers to form some sort of collusive agreement in respect of prices.[17]

"Monopolistic competition" on the other hand describes a situation analogous to that of perfect competition, with the important distinction being that each firm sells a product that is somewhat differentiated from that of its competitors.[18] Although the firms in such an industry are producing the same general type or class of product, the particular product of each firm will have certain distinguishing features which set it off to some extent from those of other firms in the industry. The monopolistically competitive firm can effect modest price increases without losing sales to competitors because buyers recognise some difference between the products of various sellers. Consumers are likely to have definite preferences for the products of specific sellers, and relatively small price increases will not cause buyers to change their brand allegiance and seek out the close substitute products of rival firms in that industry. Entry into a monopolistically competitive industry may be difficult because a new firm must not only incur considerable research and product develop-

11 See text and references below.

12 Commerce Act 1975 s 2(1); Areeda and Turner, *Anti-Trust Law* (1978) Vol II para 404(a), define it simply as a situation "in which a few relatively large sellers account for all or the bulk of the "output". See also Kaysen and Turner, *Anti-Trust Policy* (1959) Chapter II; Brozen, supra n 8 at 215.

13 Lipsey, supra n 9 at 283.

14 *New Zealand Census of Manufacturing* 1976-1977.

15 A characteristic of oligopoly is that usually the firms will be producing virtually standardised or homogeneous goods. Because each firm supplies a large portion of total industry output, actions taken by one firm to improve its share of the market will directly and immediately affect its rivals. For example, if one firm lowers its price it will initially gain sales at the expense of its rivals; the rivals will be forced to retaliate to recover their market shares.

16 *Industrial Organisation* (1968) at 29.

17 Samuelson, supra n 5 at 490; Lipsey, supra n 9 at 284.

18 Samuelson, supra n 5 at 493; Lipsey, supra n 9 at 284.

ment costs to produce a distinguishable product, but in addition considerable advertising outlays may be necessary to inform consumers about the new product and its alleged advantages.[19]

Finally we turn to "monopoly" which represents the most extreme departure from the model of perfect competition. Monopoly exists "whenever an industry is in the hands of a single producer".[20] It follows from this that the monopolist's product is unique in that there are no close substitutes available. From the consumer's point of view he must buy the product from the monopolist or do without. In the model of perfect competition the individual firm exercises no control over product price because it contributes only a negligible proportion of the total supply. However, the pure monopolist exercises considerable control over price and the reason is obvious — the monopolist controls the total quantity supplied and by manipulating supply can cause the product price to change. Like perfect competition, imperfect competition in the guises of oligopoly, monopolistic competition and pure monopoly are only models representing abstractions or approximations of reality; that is, between the extremes of perfect competition and pure monopoly lie an almost unlimited variety of market arrangements.[21] What is revealed, however, is that to the degree that competition declines so will producers and resource suppliers be less subject to the will of consumers. In light of the fact that imperfect competition prevails to a greater or lesser extent in most markets it is a fiction to cling to the concept of consumer sovereignty based upon the abstract model of perfect competition.

Second, the assumption of freedom of entry into markets, being a cornerstone of perfect competition, is manifestly unrealistic in many cases. E. Scott Maynes[22] enumerates some typical barriers to entry as being

> large capital requirements, lack of access to technology, control of raw materials, or government regulation that seeks to conserve the competitors rather than competition.[23]

A further formidable barrier to entry exists where economies of scale are substantial, that is, where reasonably efficient production will be possible only with a small number of producers.[24] Likewise where there are a

19 Keltey, *New Consumerism: Selected Readings* (1973) Ch 10; Tibor Scitovsky, "Ignorance as a source of oligopoly power" [1950] American Economic Review 48.

20 Lipsey, supra n 9 at 261. See Commerce Act 1975 s 2(1).

21 Samuelson, supra n 5 at 43 comments that "All economic life is a blend of competitive and monopoly elements".

22 "Consumer Protection: The Issues" (1979) 2 Journal of Consumer Policy 97, 100.

23 See generally Green and Nader "Economic Regulation vs. Competition: Uncle Sam the Monopoly Man" (1973) 82 Yale Law Journal 871.

24 The American automobile industry provides a good illustration. General Motors, Ford and Chrysler controlled over 90 percent of the automobile market in the United States in the early 1970s. They faced very little competition from new entrants because in order to achieve the low unit costs essential to survival, any new entrants would necessarily have had to start out as large producers — this would have required enormous capital investment. See Lipsey, supra n 9 at 222; Brozen, supra n 8 at 264; Samuelson, supra n 5 at 462.

limited number of producers producing a homogeneous product in an industry confronted with inelastic demand,[25] there is a powerful incentive towards collusion and merger. No newcomer can obtain a market share except at the expense of competitors who may collectively retaliate if the price is cut. In addition, rivalry from small, relatively unknown producers sometimes fails to have any significant effect on price, quality, or selling conditions of the established firms — in fact, new firms are often unable to get a foothold because of their inability to overcome the goodwill advantage of the established enterprises. Advertising may amount to a substantial barrier to entry and thus promote market power in the hands of a few, as, in the absence of adequate knowledge about competing goods, consumers are likely to rely upon heavily advertised goods and to trade with sellers with an established name. Superficially this may seem to be a legitimate reward for a seller who expends funds on advertising and provides consumers with information about the merits of his particular goods. However, often a product, no matter how meritorious, cannot reach the consumer unless the producer can afford a huge advertising outlay necessary to create a market share. Advertising may therefore act as a barrier to entry insulating sellers already in the market from competition. Product differentiation and the corollary of brand loyalty create a substantial goodwill advantage for established sellers and in spite of the fact that substantial profits might prevail in a particular market, new producers may not be able to overcome the barriers. A new entrant seeking to penetrate such a market must initiate a price war in an endeavour to undercut established sellers (with potentially disastrous consequences), or embark upon a major advertising campaign to dislodge or disturb existing brand loyalties. This latter course may be financially prohibitive, but even if it is not, it is fraught with difficulties in that it is easier to induce repeat purchases than to occasion a switch in brands, and consequentially a new entrant's campaign must be even more intensive than that of the established sellers.[26]

Third, goods and services available in any particular market are not necessarily homogeneous and traded at a single price.[27] The very essence

25 Where price changes result in only modest changes in amount purchased, demand is said to be inelastic.

26 See, generally: Comandor and Wilson, *Advertising and Market Power* (1974) 46; Hirsch, *Law and Economics* (1979) 253; Simon, *Issues in the Economics of Advertising* (1970) 220; Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (1956). Note that in rebuttal of the argument outlined above, advocates of unrestricted advertising argue that substantial advertising is required to achieve economies of scale and that once achieved substantial benefits accrue to the consumer which outweigh the disadvantages enumerated. While it must be conceded that some concentration is necessary if economies of scale and distribution are to be achieved and that advertising in promoting sales facilities concentration, it is by no means clear that present levels of concentration reflect a commitment to lower unit costs, as opposed to the avoidance of price and quality competition. See Comandor and Wilson, op cit at 217-234; Bernacchi, "Advertising and its Discretionary Control by the FTC: A Need for Empirically Based Criteria" (1974) 52 Journal of Urban Law 223, 239.

27 Keltey, supra n 19 at 120; Eugene R. Beem in his chapter 9, of this text entitled "The Plight of the Consumer", comments that "in addition to a baffling assortment of goods from which to choose, consumers are confronted with a myriad of competing qualities for most every product which they wish to buy".

of the monopolistically competitive firm is based upon the notion of product differentiation.[28] Because products are differentiated, competition in such industries is characterised by competition in areas other than price; in particular, emphasis is placed on product quality advertising and conditions of sale. Advertising proclaims, and if possible, magnifies, real differences in product quality. Similarly, in oligopolistic markets, advertising plays an important role in the masquerade of product differentiation. Emphasis on price terms in oligopolistic situations often is avoided out of a desire to avoid price "wars" and price cutting, and most oligopolists prefer to allocate their marketing budgets to persuade consumers that their products are different to those of competitors. As Duggan[29] explains,

> By suggesting the existence of "illusory" distinctions between competing brands, [advertising] can create a spurious heterogeneity . . . . In short, effective product differentiation stimulated by advertising can fragment a market and so facilitate the charging of higher than competitive prices.

Free market theorists assert that a consumer's choice between competing brands of the same product will be determined by price and quality differences between the respective brands. However, advertising in promoting the cause of brand differentiation may create significant brand loyalties, justifying substantially higher prices for a particular brand which is not appreciably different from that of its competitors. In place of price and quality competition may be substituted competition in advertising.[30]

Finally, the assumption of perfect knowledge on the part of consumers is perhaps the least realistic, as a consumer's knowledge may be imperfect for a number of reasons. While it is undoubtedly true that information about most goods and services is available as a result of sellers responding to market incentives, the nature and quality of the information generated is variable in the extreme; that is, ranging from supermarket advertising of prices and special buys to the "ours-is-the-best" exhortation at the other end of the spectrum. For example, much advertising conveys little factual information about goods or services capable of objective assessment. As Jordan and Rubin[31] assert:

> Much advertising is patently uninformative; rational consumers should not care what sort of breakfast cereal is eaten by famous baseball players, nor should they expect any relationship between the cleanliness of their clothes and the catchiness of the tune used to advertise a wash powder.

Arguments that competitive forces generate accurate and detailed information about goods and services flounder still further when one considers the primary role of advertising, for example. The function of

28 See the discussion of monopolistic competition, supra.
29 "The Great Soap Opera" (1978) 11 MULR 467, 473.
30 See Nader and Cowan, "Claims Without Substance" in Nader (ed), *The Consumer and Corporate Accountability* (1973) at 97.
31 "An Economic Analysis of the Law of False Advertising" (1979) 8 The Journal of Legal Studies 527, 528-529.

advertising from the point of view of the seller is to promote the sales of goods and services, and it is obvious that sellers seldom will be satisfied with the mere recitation of objective facts about a product or service, and informational content of advertisements usually will be subordinated to the function of influencing and persuading a purchase of the product or service. For obvious reasons advertising will present the advantages of a particular product, and not the disadvantages, and there is a marked reluctance on the part of sellers to publicise the disadvantages associated with the products of competitors through fear of retaliation.[32] Therefore, the consumer does not receive adequate information about goods and services to be in a "state of perfect knowledge" and the technical complexity and multiplicity of goods makes perfect knowledge an unrealistic expectation for even the most educated consumer.[33] Consequently it may be asserted that the assumptions underlying the model of perfect competition and its corollary of consumer sovereignty are unrealistic in the extreme.

However, the next question which arises is: To what extent does the common law protect the consumer and counter market imperfections? It could be argued that the consumer has adequate recourse to remedies at common law which makes legislative intervention unnecessary — but it is suggested that severe reservations may be advanced to such a proposition. As Cranston[34] comments,

> A general feature of common law is that consumers must take the initiative to enforce their legal rights. The assumption is that consumers know their rights and are sufficiently motivated to press them. If they are harmed because a business infringes their rights, economic self interest will impel them to take action, including court action if a settlement cannot be achieved.

However, in practice there are a number of factors impeding access to the courts. The most obvious obstacle confronting a consumer is the cost of litigation. Notwithstanding the general rule that "costs follow the event", where the amount involved is small the risk of losing is a formidable deterrent. In addition to the direct expenses of litigation must be added opportunity costs, that is, indirect costs incurred through time spent in court, consulting lawyers, travelling to and from court, and the progressive erosion of the claim by inflation.[35] Even where direct expenses are low, due to legal aid or where the claim is pursued before a small claims tribunal, for example, the indirect costs associated with any litigation remain. Furthermore, many consumer disputes will involve an adversary who is no stranger to the legal system — for example, a finance company, insurance company or retailer. For the consumer on the other hand, contact with the legal system will be a unique experience, and

32 See, for example: Green and Moore, "Winter's Discontent: Market Failure and Consumer Welfare" (1973) 82 Yale Law Journal 903, 907.

33 See Trebilcock, "Consumer Protection in the Affluent Society" (1970) 16 McGill Law Journal 263, 276.

34 *Consumers and the Law* (1978) at 23.

35 Phillips and Hawkins, "Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims" (1976) 39 MLR 497.

Galanter[36] advances the theory that discrepancies in the relative positions of the parties enable the stronger of the two to exploit the passivity of the legal system. Repeated access by the institutional party facilitates the mass-processing of disputes and may result in the achievement of economies of scale. Obviously the institutional party will have financial resources far in excess of most individual consumer litigants and the relative poverty of the individual means that he or she will rarely be in a position to resist an offer of settlement. Consumer ignorance highlights yet another deficiency of the common law in protecting consumers. Consumers are often ignorant of their legal rights and remedies by which their grievances may be redressed. For example, a consumer's statutory right to cancel a door-to-door sales agreement will be of no use to him unless he is aware of its existence. It is also said to be a feature of certain consumer offences that they are complex, diffused over time and unpublicised.[37] For example, the adverse effects of some food additives and drugs do not manifest themselves until they have been used over a period of time, and where large numbers of the public are only affected to a small degree the likelihood of them aggregating to collectively complain is very small. In respect of products that are potentially dangerous to the consumer some pre-market filter mechanism is essential, but the common law looks to the cure in the form of damages rather than prevention. For these reasons, and for others that will become apparent below, the consumer cannot rely exclusively on the common law for his or her protection.

Given that market arrangements usually reflect imperfect competition to a greater or lesser extent, and given the limitations of the common law, it is obvious that some level of governmental intervention in the market-place is necessary. However, a significant point that emerges from the discussion of economic theory above is that, generally speaking, the more effective the competition within any nominally free enterprise market the better the position of consumers within it. Competition within an economy based upon free enterprise performs the vital function of ensuring that prices reflect the levels of supply and demand, that producers are efficient and profits reasonable, and that innovation, technological improvement and cost reduction are vigorously pursued.[38] Dickey and Ward[39] state that,

> Competition acts as a purifying agent within a free enterprise market; it provides an impersonal force which purges such markets of inefficient business and with them all forms of anti-consumer practices, particularly the manipulation of the price and

36 "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 95.

37 Cranston, "Creeping Economism: Some Thoughts on Law and Economics" (1977) 4 British Journal of Law and Society 103, 109.

38 See generally, Tibor Scitovsky, *Welfare and Competition* (1971) esp. Chapters 20-21; Lipsey, supra n 9 Chapter 5.

39 "Consumer Legislation in Socio-Economic Perspective: Observations from the Enactments of One State" (1978) 13 UWALR 378, 381. See also Dickey and Ward, "The Adequacy of Australian Consumer Protection Legislation — Observations and Proposals from Economic Theory" (1979) 14 UWALR 133.

> quality of goods for the sole benefit of the businesses involved. Accordingly, all other things being equal, the best consumer legislation is that which creates the most favourable conditions under which effective competition can thrive.

Consequently, while only a few industries' market structures approximate to the model of perfect competition, the purely competitive market model provides a norm against which less competitive markets may be evaluated[40] and a goal to which market regulations and control might appropriately be directed.

The real problem facing any legislature then is to strike a balance between consumer protection and market intervention on the one hand and market freedom on the other. At the outset the decision of whether or not to intervene is complicated by the difficulty in ascertaining the real level of competition in many markets and in determining to what extent any distortions may be cured by legislative intervention.[41] Free market economists are critical of much of the legislation passed on behalf of the consumer and decry regulation. For example, Clair Wilcox[42] argues,

> Regulation cannot set prices below an industry's costs however excessive they may be. Competition does so, and the high cost company is compelled to discover means whereby its costs can be reduced. Regulation does not enlarge consumption by setting prices at the lowest level consistent with a fair return. Competition has this effect. Regulation fails to encourage performance in the public interest by offering rewards and penalties. Competition offers both.

Thus regulation in the eyes of free market economists is a pallid substitute for competition. Briefly, the arguments that may be ranged against government regulation are as follows:

(i) Market failure doesn't automatically call for government intervention. Winter[43] argues that markets fail in varying degrees and government intervention cannot be justified unless the benefits exceed the costs. For example, it is suggested that drug regulation severely impedes the rate of introduction of new drugs and thus prevents beneficial as well as harmful drugs from entering the market. The danger of a thalidomide being marketed must be weighed against the danger of a penicillin being suppressed.[44] Furthermore, as the Molony Committee point out,[45]

> The consumer is the taxpayer, and we see small merit in creating an elaborate new system to assist him in one capacity, when he would have to pay for it in the other. In so far as any increased cost fell on industry, recoupment from the consumer would be no less inevitable.

40 As Posner, *Economic Analysis of Law* (2 ed 1977) at 13 stresses: ". . . lack of realism, far from invalidating the theory, is the essential pre-condition of theory."
41 Cayne and Trebilcock, "Market Considerations in the Formulation of Consumer Protection Policy" (1973) 23 University of Toronto Law Journal 396.
42 *Public Policies Toward Business* (1966) at 476-477.
43 "Economic Regulation vs. Capitalism: Ralph Nader and Creeping Capitalism" (1973) 82 Yale Law Journal 890, 894.
44 Turner, *The Chemical Feast* (1970) 225; Winter, *The Consumer Advocate Versus The Consumer* (1972) at 5.
45 *Final Report of the Committee on Consumer Protection* Cmnd 1781, 1962, para 16.
46 Reported in Goldring and Maher, *Consumer Protection Law in Australia* (1979) at 232.

This argument may be further illustrated by reference to the advertising industry. Advertisers argue that advertising promotes full employment by inducing high levels of consumer spending. This is said to be particularly crucial in a wealthy society where much production takes the form of luxury or semi-luxury goods. One does not need to advertise to sell food to a hungry person, but advertising and sales promotion are essential in persuading consumers that they need a colour television, a stereo system or an automatic dishwasher. Thus it is argued that stability in an opulent society calls for extensive want-creating activities — in particular, advertising — or high levels of production and employment will not be sustainable. It is argued that government regulation and intrusion into the market-place by regulating advertising may have a detrimental effect on production and employment. For example, Bernard Holt, Federal Director of the Association of Advertising Agencies, remarked that,[46]

> It would not be too unkind to suggest that [the critics] in venting their spleen against advertising, they are really, whether they know it or not, striking out against the free enterprise system . . . . Quite obviously this [advertising] expenditure serves our society through wages and prices — wages, in that mass produced products and readily available services have to be sold to the consumer for the economy to work at all. To be sold they have to be wanted. This is advertising's role — to make them wanted. The more goods and services are sold the more people are employed.

However, the consensus of opinion among economists is that advertising affects the composition, more than it does the volume of spending, and there is a general reluctance to concede a close correlation between the volume of advertising and levels of output and employment.[47] It is not this writer's intention to become embroiled in this debate, for even conceding such a close correlation, it does not follow that misleading or deceptive advertising should escape regulation and modification. Nevertheless, the point that does emerge is that careful assessment of the costs and benefits must be made before any regulation is introduced.[48]

(ii) Regulation often diminishes competition and promotes monopoly power. For example, a feature of many regulatory schemes is that control is exercised on the entry of new competitors into the regulated industry. While such entry restrictions are often essential in the public interest,[49] some regulation amounts to the tyranny of the status quo.[50] In

47 See, for example: Telser, "Advertising and Competition" [1964] Journal of Political Economy 537; McConnell, *Economics* (4 ed 1969) at 518; Cannon, *Advertising: The Economic Implications* (1974) at 39-62.

48 As Layton and Holmes, "Consumerism: A Passing Malaise or a Continuing Expression of Social Concern", comment in 46 Australian Quarterly 6 at 23-24: "It would seem that in assessing any programme of consumer protection, we must . . . seek to establish that particular balance between exploitation and over protection that yields the minimum social cost to the community."

49 Occupational licensing of medical practitioners and legal practitioners, for example.

50 See, for example: *The Pharmaceutical Society of Great Britain* v *Dickson* [1970] AC 403 (new pharmacies to be situated on physically distinct premises); *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 (only accredited advertising agents entitled to receive commission).

addition, set prices for particular goods and services to ensure a predetermined rate of return for all firms in a regulated industry is seen as an unwelcome restraint on pure competition. Furthermore, Green and Nader[51] argue that this leads to "technological lethargy"; that is, a firm with a fixed rate of return and protected from outside competition due to entry restrictions has no incentive to be innovative.

(iii) Another major criticism of regulation relates to the "processes of regulation".[52] Delay, inflexibility and inadequate information for accurate decision-making are all charges levelled at government regulatory bodies. Furthermore, it is argued that "government by its very nature reacts to political pressure, rather than impartial standards".[53]

(iv) Statutory intervention is said to be unnecessary in light of the self-enforcement and regulatory procedures that already exist in the commercial community. Business self-regulation is said to enjoy a number of advantages over legislative control in that it is cheap, flexible and more effective.[54] Furthermore, it is argued that businesses who introduce self-regulatory codes are more likely to comply with the spirit as well as the letter of the code, than be resistant, as they would be to statutory regulation. Standards established in a self-regulatory system can be applied in a commonsense practical way and not in the legalistic technical way of legislative controls. For these reasons the free market advocates view market intervention by the government with a well developed scepticism.

However, the arguments for regulation are no less cogent and the following matters deserve mention:

(i) Regulation when employed appropriately may correct various distortions in the economy and encourage competition.[55] Take advertising, for example. While accurate and informative advertising undoubtedly stimulates product improvement and facilitates price and quality comparisons, misleading and deceptive advertising may result in a misallocation of resources through expenditures on inferior goods or, as instanced above, by diverting trade to higher priced goods that differ from cheaper substitutes only in terms of the quality and quantity of advertising expended in their promotion. If producers spend more and more money on inflated and misleading advertising campaigns rather than concentrating on product improvement or price competition to expand their market share, the result is both the exploitation of the consumer and the undermining of serious meaningful competition. Pitofsky[56] contends further that,

> (d)eceptive advertising if not controlled can eventually undermine the whole competitive system by reducing the extent to which consumers will rely on product claims and descriptions.

51 Supra n 23 at 881.
52 Winter, supra n 43 at 894; Green and Nader, supra n 23 at 875.
53 Winter, supra n 43 at 893.
54 See Cranston, supra n 34 at 61.
55 For example, anti-monopoly legislation; see the Commerce Act 1975.
56 "Beyond Nader: Consumer Protection and the Regulation of Advertising" (1977) 90 Harvard Law Review 661, 671.

Viewed in this perspective, false or deceptive advertisers are in effect "free riders" profiting from the reputation of advertisers who are accurate and truthful. As the consumer cannot determine truth from falsity from the face of an advertisement, the existence of some false or misleading advertising casts a cloud over all advertising and weakens consumer confidence.

(ii) Social welfare considerations may dictate regulation regardless of economic factors. Promotion of competition may be a secondary goal; e.g. when the safety of consumers is at stake it may be preferable to impose exceptionally high standards in respect of potentially dangerous goods even though this might reduce the number of firms and consequently the degree of competitiveness in the market due to the increased costs.[57]

(iii) The market system often fails to register all the costs associated with the production of certain goods and services. These costs are not taken into account by the producer because they are not internal to the firm. Illustrations of such costs are the smoke, smog and pollution which have characterised the production of certain products. These costs which economists call "externalities"[58] are necessarily controlled by regulation. For example, firms may be forced by regulation to adopt alternative but more costly techniques of production that cause less pollution.[59] Arguments about the social costs of advertising also abound. Critics point to the environmental pollution of unsightly bill boards and posters, claim that the independence of the media is threatened, assert that advertising is an unacceptable form of psychological conditioning[60] and that much advertising offends one's common sense and tries the patience of society. Furthermore, Galbraith[61] asserts that,

> It will surely be agreed that whatever the effects of advertising its ultimate effect is an extremely powerful and sustained propaganda on the importance of goods. No similar case is made on behalf of artistic, educational and other humane achievement.

To this extent advertising is said to create an imbalance between the demand for private and public goods. On the other hand proponents of advertising see it as supporting national communications, "enriching mass culture",[62] increasing enjoyment of life by increasing people's wants and considerably enlivening the market-place.

(iv) Regulation may ensure that adequate information reaches the consumer about goods and services so as to facilitate rational choice.[63] For example, labelling as to identity, quality, quantity, composition, safety

57 Green and Nader, supra n 23 at 885; Winter, supra n 43 at 895; Dickey and Ward, supra n 6 at 382.
58 Lipsey, supra n 9 at 436; Samuelson, supra n 5 at 453.
59 Idem.
60 Trebilcock, supra n 33 at 261.
61 "Economics as a system of belief" in Wheelwright and Stilwell (eds), *Readings in Political Economy* Vol. 2 (1976) at 37.
62 Collinge, *Law of Marketing in Australia and New Zealand* (1971) at 208.
63 Green and Moore, supra n 32 at 906.

and use, code dating, and disclosure of true lending rate provisions all may improve the consumer's position.[64] Given the enormous expenditure on advertising each year,[65] and recognising that ultimately these costs are borne by the consumer,[66] the consumer is entitled to scrupulously accurate, fair and informative advertising and disclosure generally.

(v) Business self-regulation is structured on a voluntary basis and often such voluntary codes of conduct flounder as there are no means to enforce them. A voluntary code of practice is only applicable "to members of the association promoting the code, who choose to accept the standards, and to remain members".[67] It is unlikely that a voluntary code of practice will attract universal allegiance throughout an industry, trade or profession. For example, the Committee of Advertising Practice has promulgated a code of practice that has had a significant impact on some of the advertising excesses that prevailed in New Zealand.[68] Unfortunately, however, the Committee has no control over direct mail solicitation or other distribution of brochures or circulars, nor are certain important journals represented on this Committee and bound by the Code. Consequently the utility and efficacy of a voluntary code will be restricted through membership of the association promulgating it. Moreover, as one writer[69] suggests, ". . . rogue operators are much less likely to join trade associations than honest and experienced traders".

Compounding the problem of non-membership is the fact that associations of businessmen may be reluctant to take action against one of their fellows and are unlikely to allocate adequate resources to enforce codes.[70] Even if a self-regulatory body decides to take action against one of the subscribers to their code, often that body will not have legal powers and it will be difficult to enforce the sanction. It is this problem that led the Securities Commission[71] to conclude that "(T)he main point arising from our study of self regulation . . . is that it requires reinforcement by legal rules". Of course, if an Association is sufficiently

64 See, for example: Weights and Measures Act 1925 ss 5-6; Wool Labelling Act 1949 s 3; Merchandise Marks Act 1954 s 3; Pesticides Act 1979 s 38; Credit Contracts Act 1981 ss 15-19; Clothing Marking Order 1957; Meat Regulations 1969 reg. 174; Food and Drug Regulations 1973 regs. 5, 6, 86, 239; Metrication (Retail Trading) Regulations 1978; Poultry Board Regulations 1980 regs. 22-24.

65 Advertising revenue for newspapers and periodicals in New Zealand during the 1978-79 financial year was $101 million, while radio and television advertising revenues during the period 1980-81 was $94 million. Source: *New Zealand Official Yearbook 1982* at 229-231.

66 Chamberlain, *The Theory of Monopolistic Competition* (1931) 123 states that: "In the last analysis, these costs borne by the consumer must be counted as selling costs — costs of altering his demands, rather than as production costs — costs of satisfying them"; see also Baran and Sweezy, "The Absorption of Surplus: The Sales Effort" in Wheelwright and Stilwell (eds), *Readings in Political Economy* Vol. 2 (1976) at 44; Trebilcock, op cit at 278 remarks that: "The consumer pays dearly for the benefit, if any, that he derives from being told what he wants."

67 Marsh, "Voluntary Codes of Practice" (1977) 127 NLJ 419.

68 See the Report of the Working Party reviewing certain Consumer and Commercial Legislation, *Proposals for a Selling Practices Act* (1980) at 20.

69 Harvey, *The Law of Consumer Protection and Fair Trading* (1978) at 207.

70 Cranston, supra n 34 at 63.

71 *Proposed Recommendations for Securities Regulations* (1980) 12.4.4.

well known and respected by consumers the sanction of expulsion from the Association might amount to a sufficient incentive to abide by that Association's code of conduct or practice. However, since earliest times[72] the principle that no man should be judge in his own cause has been recognised and yet herein lies the very "stuff" of self-regulation and its potential failure in terms of consumer protection. As long as the industry sits in its own courtroom, conducts its own prosecution and defence, observes in the jury box and ruminates on the Bench, the risk of vested interests dictating outcomes must remain.

It is submitted that the above arguments in favour of legislative control convincingly demonstrate the need for some government intervention in the market-place although the negative characteristics of regulation that were stressed earlier must always be borne in mind in assessing the desirability of intervention.

II The Basic Objectives

The second fundamental question is: what should be the basic objectives of consumer protection legislation? An adequate answer to this question presupposes an identification of the problems facing the consumer in modern society. Briefly, the following may be stressed:

(i) Modern business demonstrates a capacity to sustain an almost unceasing flow of mass-produced new goods due to advanced technology coupled with efficient research and management. However, this very success, while producing the reward of high living standards, has made the task of accurate and wise selection exceedingly difficult even for sophisticated consumers. Compounding the problems of multiplicity and variety of goods is the complexity of many of them. As one writer[73] observes:

> How does an average consumer know how much unhealthy radiation is being emitted from a microwave oven or from his dentist's x-ray machine? Should we assume a car buyer can know whether his purchase's motor mounts will fail, or when; or whether tasteless and odourless carbon monoxide is seeping into the passenger compartment from the exhaust system; or whether the drug he purchases is effective or toxic?

As mentioned above, advertising is frequently unhelpful as a source of information to guide the consumer to a rational choice. While advertising does provide the consumer with a great deal of information about goods and services, the quality of the information provided is often seriously deficient and even misleading and false. Market incentives do not lead to the disclosure of certain types of information, in any event, as in the interests of survival certain types of information will be avoided deliberately. For example, it would be mutually disadvantageous for rival cigarette producers to stress low tar and nicotine content arguments and hence unduly emphasise the health problem.

72 See, for example: *Dr Bonham's* case (1610) 8 Co Rep 107; 77 ER 638.

73 Green, "Appropriateness and Responsiveness: Can the Government Protect the Consumer?" (1974) 8 Journal of Economic Issues 309, 310; cited in Cranston, *Consumers and the Law* (1978) at 2.

(ii) Many goods and services that are marketed are sub-standard, dangerous or worthless. A perusal of any *Consumer*[74] magazine serves to confirm this allegation.

(iii) Inequality in bargaining power is a further serious problem. The concept of freedom of contract, with its roots in the social, economic and political philosophies of the sixteenth and seventeenth centuries,[75] is based upon the premise that both parties to a contract are bargaining from a position of equal strength, and that each is free to accept or reject any terms that the other might wish to impose in the contract. This fails to take into account the fact that true equality rarely exists and the fact that many contracts are the result of necessity. As Jacobsen[76] describes the position of the consumer:

> . . . he can either accept the contract as it is without any changes, or refuse to become a party thereto. In fact very often, or almost always, the supplier is the only one, or one of few, who is in a position to supply the required services or the necessary goods — and the suggested option of the consumer is merely theoretical for in fact it does not exist.

This inequality is also apparent when the consumer seeks redress. Although this writer is in agreement with Cranston[77] when he comments that "(m)any businesses adopt a positive attitude to consumer grievances" the consumer is in a weak bargaining position due to the disparity in knowledge and resources between the parties.[78] Ignorance of legal rights, inadequate funds and delays in court processes all deter consumers from litigation.

(iv) As stressed above, the concept of absolute consumer sovereignty rests upon the ideal of perfect competition and, generally speaking, as competition declines so will the consumer's strength in the market-place diminish. Where "workable competition"[79] does not exist in a particular industry consumers may be exploited in any or all of the following ways: (1) restriction of output; (2) exorbitant prices; (3) delay in, or prevention of, quality improvements; (4) quality deterioration or induced

74 Published by the Consumer Council of New Zealand constituted under the Consumer Council Act 1966.

75 See, for example: Grotius, *Inleidinge,* 3.1.10; John Locke, *The Second Treatise of Government* Ch. II.

76 "The Standard Contracts Law of Israel" (1968) 12 Journal of Business Law 325; see also Ziegel, "The Future of Canadian Consumerism" (1973) 51 Canadian Bar Review 191.

77 Supra n 73 at 2.

78 See Caplowitz, *The Poor Pay More* (1967) Chapter 12; Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law and Society Review 95.

79 'Workable competition' has been defined as "a situation in which there is a sufficient market rivalry to compel firms to produce with internal efficiency, to price in accordance with costs, to meet the consumers' demand for variety, and to strive for product and process improvement. Thus a workably competitive industry has two characteristics: first, the industry is reasonably efficient and progressive and, second, the efficiency and progressiveness has been achieved through impersonal market forces." Brunt, "Legislation in Search of an Objective" in Nieuwenhuysen (ed) *Australian Trade Practices:* Readings (1970) at 238. See also, Collinge, supra n 62 at 10.

obsolescence in order to speed up replacement sales; (5) less option to consumers as to conditions of sale.

In the light of these major problems facing the consumer it is suggested that the following objectives should be pursued:

(a) Promotion of competition. Due to the recognised benefits of competitive pressures the consumer generally will be best served by legislation that seeks to ensure that workable competition obtains in the market-place — the word "workable" is used advisedly in that "perfect" competition in the vast majority of markets is unobtainable, and the object of legislation in promoting competition must be tempered by the realities of the market-place. Competition may be bolstered not only by controlling monopolies, mergers and takeovers, but also by the control and regulation of unfair and unscrupulous trade practices which are contrary to the consumer interest. Control of unfair trade practices not only directly protects consumers from unscrupulous firms, but is beneficial to reputable and honest firms in that they are not forced to match these practices in order to retain their market share.[80] Where advertising is anti-competitive, to the extent that it functions as a surrogate for price competition and to the extent that it constitutes a formidable barrier to entry, there is a clear need for control. Of course, the objective of fostering workable competition is not always appropriate. The consumer interest may dictate safety or health regulations that directly inhibits competition and economists will be quick to point out that economies of large scale production[81] may only be obtainable if a few firms operate in a particular market; that is, industrial concentration may be better for consumers in that the application of sophisticated production techniques are conducive to lower costs of production and, consequently, lower prices to the consumer.

(b) The quantity and quality of information that the consumer receives must be improved. The United States Special Committee on Retail Instalment Sales, Consumer Credit, Small Loans and Usury said:[82]

> It is fair to ask precisely what it is that the consumer is to be protected from. Must he be protected from his own lack of knowledge or discipline which leads him to take advantage of easy credit to buy things he does not need or cannot afford? Is he to be protected from the "fringe" operator who may take advantage of the ignorance and gullibility of the consumer to cause him to overbuy or pay too much?

Trebilcock[83] says that it is implicit from this statement that the promotion of "prudent shopping decisions" is a fundamental objective of consumer protection legislation. Before a prudent shopping decision *can* be made the consumer must be in possession of adequate information

80 For example, purchasing decisions based upon misleading advertising claims lead to serious misallocations of resources in that trade is diverted away from honest traders and away from the "better" product.

81 See McConnell, supra n 47 at 523-524; Samuelson, supra n 5 at 25, 34 and 462.

82 This quotation from the US Special Committee Report, at 9, appears in M. J. Trebilcock's article, "Consumer Protection in the Affluent Society" (1970) 16 McGill Law Journal 263.

83 Ibid at 264.

about the true cost if credit is available.[84] The provision of adequate information can never ensure that consumers *will* make a rational choice,[85] but nevertheless the absence of such information deprives the consumer of even the possibility of reaching a reasoned decision.

In order to facilitate the attainment of this objective, disclosure legislation and sanctioning of deceptions in packaging, labelling, advertising and selling are necessary. Furthermore, the establishment of consumer agencies which provide information on a comparative basis to subscribers is a vital supplement to state disclosure requirements.[86]

(c) The goods and services available in the market-place must be of reasonable quality having regard to such criteria as their price and any description applied to them.[87] Furthermore, in the interests of health and safety certain categories of goods and services must meet minimum quality standards.[88] For example, occupational licensing must ensure that a minimum standard of competence prevails in a given profession, such as dentistry, and drug regulation must prevent the distribution of inadequately tested and potentially dangerous medicines and drugs.

(d) Redress of certain imbalances in bargaining power. Jacobsen argues that:[89]

> . . . it is among the duties of the legislator in the modern world to protect people even against their own folly, not to permit exploitation, and to remove any manifest unfairness. The protection of consumers is gradually becoming a recognised feature in modern law and it inevitably involves limitations upon the doctrine of freedom of contract.

Serious consideration must be accorded to proposals advocating that suppliers of goods and services may not contract out of certain quality standards and other normal incidents of consumer transactions unless in all the circumstances it is reasonable to do so.[90] Particular powers to re-

84 The Contracts and Commercial Law Reform Committee in their *Report on Credit Contracts* (1977) para. 8.08, identify as their cardinal principle regarding disclosure the need to provide "information in a form enabling the public to 'shop for credit'."

85 Cayne and Trebilcock, "Market Considerations and Consumer Protection Policy" (1973) 23 University of Toronto Law Journal 396, 406 comment that ". . . inability to utilise information will always subvert a disclosure requirement. The educational inadequacies associated with poverty are relevant in this context."

86 The Consumers' Institute performs a vital function in this regard. Through *Consumer* magazine consumers are provided with objective information in a readily understandable form and, consequently, are placed in a better position to distinguish between competing brands of substantially similar products or competing services.

87 See, for example: Sale of Goods Act 1908 ss 15-16; Hire Purchase Act 1971 ss 12-13; Motor Vehicle Dealers Act 1975 ss 92-93; *Young and Marten Ltd* v *McManus Childs Ltd* [1969] 1 AC 454.

88 See, for example: Safety of Children's Nightclothes Act 1977 s 5; Plastic Wrapping Regulations 1979 reg. 2; Food Act 1981 s 42(1); Medicines Act 1981 ss 35-42.

89 Supra n 76 at 326.

90 It is submitted that the approach adopted in the Hire Purchase Act 1971 s 51 represents the ideal compromise; that is, no contracting out except in the limited circumstances endorsed in the Act itself. The outmoded attitude reflected in the Sale of Goods Act 1908 s 56 belongs to the time when the dominant concern was with notions of freedom and sanctity of contract.

open extortionate bargains and a general doctrine of unconscionability will further counteract inequalities in bargaining power.[91]

(e) Facilitate consumer redress. Given the undeniable dependence of substantive rights on procedural rights, a vast body of substantive rights will not assist the consumer if his avenues of redress are inadequate. Some of the obstacles impeding access by consumers to the ordinary courts may be alleviated by the provision of legal aid[92] or by allowing class actions or substituted actions.[93] Alternatively, impediments associated with the ordinary courts may be by-passed by the creation of special courts for the resolution of consumer grievances; e.g. small claims tribunals and market courts.[94] It is essential that the consumer have ready and relatively inexpensive access to the courts and tribunals to obtain redress for legitimate complaints in relation to relatively minor matters.

The law in pursuit of these objectives obviously must maintain a fine balance. Notwithstanding distortions in the market, caution should be exercised lest the cost of the cure exceed the benefit proposed. As Atiyah[95] comments, "Social questions cannot always be reduced to mercenary financial considerations" but "it is absurd to think that it is rational — even in matters of social policy — to buy something without paying attention to the price". Consumer legislation is not enacted in a vacuum, but in a dynamic economic system, and it may be patently wrong to assume that merely because legislation has increased consumer rights vis-a-vis firms in the market-place that it necessarily follows that they will be better off in the long term.[96] Furthermore, while the

91 See, for example: Credit Contracts Act 1981 ss 9-14; *Archer* v *Cutler* [1980] 1 NZLR 386; Angelo and Ellinger, "Unconscionable Contracts — A Comparative Study" (1979) 4 Otago Law Review 300.

92 Short of a massive increase in the qualification limits for civil legal aid, at enormous expense to the taxpayer, legal aid will be confined to a relatively small percentage of the community. See Legal Aid Act 1969 ss 17, 19; Legal Aid Regulations 1970 reg. 10. Furthermore, a recent legal aid survey of Department of Justice files showed that 93.5 percent of all applications arise from domestic proceedings in the District Court, the predominant use of the scheme being to enforce maintenance obligations of welfare beneficiaries. See *The Press,* 24 September 1981.

93 The representative action, provided for in the Code of Civil Procedure, rule 79, is the weak and impoverished relative of the class action which has developed in the United States and other jurisdictions. See, for example: Miller, "Of Frankenstein Monsters and Shining Knights; Myth, Reality and the Class Action Problem" (1979) 29 Harvard Law Review 664; Duggan, "Consumer Redress and the Legal System" 1979 AULSA Conference Paper 1, 11.

94 Recognition of this has led to the establishment of the small claims tribunal infrastructure in New Zealand and the steadily increasing number of claims and expansion in the number and location of tribunals testify to the popularity and necessity for such forums. See Small Claims Tribunals Act 1976; Frame, "Small Claims Tribunals" [1982] NZLJ 250.

95 "Consumer Protection — Time to Take Stock" (1979) 1 Liverpool Law Review 20, 39-40.

96 For example; the enactment of legislation subjecting exemption clauses to the test of reasonableness may encourage firms habitually employing such clauses to raise their prices to cover the cost of additional insurance (see Atiyah, ibid at 39-44); to insist on the suppression of advocacy in advertising in the name of objective recitation of facts might well succeed only in frustrating the whole object of the exercise by discouraging sellers and producers from advertising at all (see Winter, *The Consumer Advocate Versus the Consumer* (1972) at 10).

existence of problems and distortions in the market dictate regulation, this does not lead one to the irresistible and inevitable conclusion that there should be *government* regulation. Industry or business self-regulation may overcome many of the problems outlined more cheaply than governmental intervention and it is theoretically possible for the consumer's interests to be protected by resort to the courts, either by the consumers themselves, or by those sellers with superior products who see their market shares declining in the face of inroads based on inaccurate and/or deceptive marketing practices. Therefore a balancing process must be undertaken; the costs and benefits of any market intervention must be weighed in the balance and there must be a careful evaluation of the various modes of redressing the problem. For those who regard consumer protection as being no more than a "bandaid on the malignancy of capitalism",[97] or for those who see this body of law as an unwelcome departure from the laissez-faire approach and the underlying philosophy of individualism,[98] such a balance is not possible. Like Cranston,[99] this writer believes that "social engineering" within the present private enterprise system is worthwhile and necessary. It is clear that the law should not be so favourable to the consumer that it encourages evasion or dereliction of the consumer's responsibility to protect himself, nor should the law ignore the necessity to protect the consumer against abuses which, for practical purposes, are outside his or her control. In conclusion, it is suggested that the following observation by Atiyah should be borne in mind:[1]

> ". . . it is not necessarily the best policy to frame our consumer protection laws on the basis of the maxim, *lex procurator fatuorum est* —the law is the protector of the stupid."

97 Goldring, "Consumer Protection and the Trade Practices Act" (1974-75) 6 Federal Law Review 288.
98 Friedman, *Capitalism and Freedom* (1962) at 5.
99 Supra n 73 at 9.
1 Supra n 95 at 44.