

# CONSUMERS, CONSUMER ORGANIZATIONS AND ENFORCEMENT AGENCIES: A THREE-PRONGED APPROACH TO CONSUMER PROTECTION

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***Abstract** In recent decades considerable progress has been made in the definition and extension of rights to empower consumers and protect them from economic and physical harm. However, despite progress in developing legal frameworks, consumers continue to face barriers to effectively seek redress. This paper examines the incentives that consumers have to complain and commence legal actions and the scope for co-operative approaches to minimize consumer harm.*

## I. INTRODUCTION

The field of consumer law has been marked by its considerable progress in defining and specifying consumer rights and protections in the last forty years. However, although significant consideration has been given to how best to design legal frameworks, less consideration has been given to the incentives and capacity of consumers to enforce consumer rights. As a consequence, despite significant reform in consumer protection laws, outcomes for consumers in some markets have been less than anticipated.

The first step in achieving effective consumer protection is a legal framework that provides consumer rights and mechanisms for enforcement and

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protection of these rights by consumers or regulators. In the absence of clear legal rights and a well-defined regulatory framework, consumers have little or no substantive mechanisms for legal recourse. Similar sentiments apply with respect to complaint processes, though the formality and costliness of these processes tend to be lesser than those associated with traditional legal processes.

However, rights are not enough. The theoretical prospect of recourse is insufficient in and of itself if individuals lack the incentive to use the rights available to them or face resource constraints. Resources and incentives are important to the operation of the legal system. Although at times the application of economic concepts to the law has been fraught, in part due to strong normative biases,<sup>1</sup> there is much that economics can contribute to the development of sound enforcement practices.<sup>2</sup>

An application of basic economic concepts provides considerable insight into the behaviour of consumers. There are limitations of a pure rights-based approach to understanding consumer protection. The importance of resource constraints as a field of future research constraints cannot be understated; however, it is not the intent of this paper to address the implications of different levels of resourcing for consumers.

This paper will instead focus on the universal, though not uniform problem of incentives and will not examine issues of resourcing. This is a reflection of two factors. The first is a desire to avoid the devolution of this article into the muddy trenches of distributional politics, and the second is its indirect relevance to issue of incentives.

## II. THE RESPONSIBILITY FOR ENFORCING RIGHTS VARIES

The responsibility to enforce consumer protection laws varies considerably by jurisdiction. Some systems provide little or no role for consumers in the enforcement of their rights and others leaving enforcement to the private

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<sup>1</sup> The field of law & economics has been characterized by strong normative positions which have historically undermined many of its contributions. For a discussion of the normative creep see Richard A. Posner, "Economic Approach to Law" (1974) 53 *Texas Law Review* 757, 768; Michael J. Trebilcock, "The Prospects of 'Law and Economics': A Canadian Perspective" (1983) 33 *Journal of Legal Education* 288, 289; Anthony Ogus, "What Legal Scholars Can Learn from Law and Economics" (2004) 79 *Chicago-Kent Law Review* 383.

<sup>2</sup> Posner (n 1) p.769, argues that there is much that the application of positive economic techniques can teach us.

citizen.<sup>3</sup> Although different systems have varying strengths and weaknesses associated with the specification of legal rights, consideration of the practical ability of consumers to effectively exercise their rights is rare.

The following analysis relates to the incentives of individual consumers to complain or initiate legal proceedings. Accordingly, the analysis is directly applicable to those jurisdictions that provide for individual consumer rights via statute or via existing case law. Although not the focus of this article, there is scope for similar analyses of the conditions under which regulatory or enforcement agencies may initiate action to address breaches of consumer protection regulations.

The existence of rights although a necessary condition for ensuring the protection of consumers is not sufficient to ensure that consumers are adequately protected, and it is the extent to which these rights are enforced or respected that determines whether consumers face harm. The effectiveness of legal rights should be determined by reference to the actual effect of legal rules on behaviour and the substantive outcomes that they produce.<sup>4</sup>

### III. INCENTIVES

Taking this test as a barometer, how then do consumers interact with the comprehensive system of consumer rights that have been afforded to them? The answer is in most part *rarely* – when considered against the many opportunities that consumers have to complain or instigate legal proceedings, more often than not they choose not to.

This occurs quite often in jurisdictions with exceptionally well-developed legal frameworks that provide clear legal rights to consumers and avenues for recourse. However, once the law is settled,<sup>5</sup> and rights are adequately specified such that consumers may launch enforcement actions either via established complaint making processes or via legal action there is a tendency for consumers not to engage in litigation.

The issue of incentives is not merely a function of the resources that a consumer may have at their disposal, however even individuals with considerable economic resources fail to complain or commence litigation.

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<sup>3</sup> Michael Faure, Anthony Ogus and Niels Philipsen, “Enforcement Practices for Breaches of Consumer Protection Legislation” (2007) 20 *Loyola Consumer Law Review* 361.

<sup>4</sup> George L. Priest, “Michael Trebilcock and the Past and Future of Law and Economics” (2010) 60 *The University of Toronto Law Journal* 155, 166–167.

<sup>5</sup> Although arguably no law is truly settled and is constantly subject to legal review and reinterpretation.

The question that this immediately raises is *why* consumers interact with the legal system so infrequently – and the answer in the simplest terms is that there is a cost to doing so, one that often exceeds the benefits that might be attained. Because every individual face what economists like to describe as *opportunity cost*, making a complaint or commencing a proceeding means allocating resources whether financial or non-financial (e.g. time) to pursuing redress, an activity which diverts those resources from other potentially more productive or indeed valued activities (e.g. leisure).<sup>6</sup>

As individuals we regularly assess the relative costs and benefits of a particular course of action, and more often than not choose not to complain about minor inconveniences or annoyances. The frustration associated with the early failure of a cheap set of headphones that break earlier than expected, or a disappointing cup of coffee may not be enough to spur an individual into action.<sup>7</sup> However in aggregate the failure to complain or litigate may mean that producers of poorer quality goods and services continue to profit at the expense of consumers and their rivals who may sell better quality though more expensive products.

The existence of opportunity cost is part of the reason that consumers do not access *free* dispute resolution processes which should be better understood as *feeless* dispute resolution processes. The existence of opportunity costs, means that in actuality there can never be a form of dispute resolution that is *free*. The objective of less costly dispute resolution processes (to the extent that these are commensurate with principles of justice and fairness) however remains a desirable one.

#### IV. WHEN MIGHT A CONSUMER COMPLAIN OR COMMENCE LEGAL ACTION?

Assuming that consumers are rational, in that they will try to pick the best option available to them to achieve a desired outcome,<sup>8</sup> and that they will try to attain the highest benefit possible relative to costs,<sup>9</sup> they will reg-

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<sup>6</sup> This is the origin of the economist's phrase "that there is no such thing as a free lunch", as every lunch free or not implies forgoing an alternative lunch.

<sup>7</sup> Although alternative sanction approaches that are lower cost may be used, the work of Ellickson on social norms is interesting in this regard, see Robert C. Ellickson, "Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County" (1985) 38 Stanford Law Review 623.

<sup>8</sup> Richard A. Posner, "Rational Choice, Behavioral Economics, and the Law" (1997) 50 Stanford Law Review 1551.

<sup>9</sup> Vipin P. Veetil, "Conceptions of Rationality in Law and Economics" (2011) 31 European Journal of Law and Economics 199, 222.

ularly choose to neither complain nor commence litigation. Fundamentally this is because the cost to the individual as a private citizen in complaining or litigating often materially outweighs the expected benefits that may be attainable by a consumer in terms of compensation or alternative forms of redress.

However, where the injury or harm caused to the consumer is significant, as is often the case with product safety issues the incentives for consumers to seek redress may be substantial. It is therefore unsurprising that we regularly see cases of this nature in almost all jurisdictions where consumer law provides for redress.

Inversely, in those scenarios where the loss that a consumer faces is small, and the costs of seeking redress are high, or indeed merely outweigh the harm, the incentive to pursue redress is weak. A consumer would be irrational to seek compensation in those circumstances where the potential compensation that could be attained is likely to be less than the cost of its pursuit.

Accepting that there is inherently risk in the pursuit of any complaint or legal action, the incentives for consumers pursue redress are even weaker. When the expected benefits are adjusted by the probability of attaining them, and the certainty of facing some costs (in terms of time or direct financial costs) the rational consumer does not seek redress for small sums. The consumer becomes apathetic, though rationally so, and does not take action despite facing loss.

An important point to note here is not to assume that a loss that may be too small to litigate or complain about that it is necessary is of a small order of magnitude. Just because the loss to an individual consumer may be too *small* to spur them into action does not imply that the sum in consideration is in and of itself *small* by any objective viewpoint.

Litigation is costly, and individuals may be reluctant to initiate a legal action with uncertain prospects of success for small sums. Depending upon the opportunity cost faced by an individual in terms of time and financial resources it is conceivable that even relatively large sums – in the order of hundreds of thousands of dollars may be insufficient to spur complaints or litigation.

However, even if the costs are trivial at the level of the individual consumer, they may reflect widespread costs borne across the entire consumer

population.<sup>10</sup> As is the case in cartel behaviour and industry misconduct as outlined in the case study below, small harms can add up to quite substantive sums across consumer populations.

## V. HOW REAL IS THIS PROBLEM?

The problem of rational apathy exists beyond the theoretical models developed by law & economics scholars. It is reflected in empirical consumer research which indicates consumers are unlikely to make complaints where the benefits of doing so are expected to be low. Research undertaken on behalf of consumer organisations, have indicated that in industries such as telecommunications that consumers will seek to escalate complaints to the third-party alternative dispute resolution mechanism in around 3% of cases.<sup>11</sup>

In more targeted research concerning unexpected third-party charges faced by consumers on their mobile phone bill,<sup>12</sup> consumers were asked what their probability was of seeking redress by reference to the amount they had been charged. Unsurprisingly consumers indicated that their willingness to dispute a charge increases as a function of the value of that charge, with less than 36% of consumers very likely to dispute a charge of \$1, increasing to 52% for a \$5 charge, 71% for a \$10 charge and 88% for a \$30 charge.<sup>13</sup> Clearly the expected payoffs of complaining are important to consumers and there is accordingly a need for enforcement agencies and regulators to take this into consideration when determining enforcement priorities.

This outcome is to be expected, when government estimates that Australians value their leisure time at \$31 per hour,<sup>14</sup> and the average time spent in seeking to get a complaint resolved before it goes to external

<sup>10</sup> Anthony Ogus, *Regulation: Legal Form and Economic Theory* (1994) 37–38.

<sup>11</sup> Colmar Brunton, *Can You Hear Me?* (ACCAN 2018) 40 <<http://accan.org.au/our-work/research/1523-can-you-hear-me-ranking-the-customer-service-of-australia-s-phone-and-internet-companies>> accessed 13 June 2019.

<sup>12</sup> Ipsos, *Mobile Third Party Billing* (ACCAN 2017) 58 <[https://accan.org.au/files/Reports/Ipsos%20Report%20-%20ACCAN%20Third%20Party%20Billing\\_FINAL%20060717%20v2.pdf](https://accan.org.au/files/Reports/Ipsos%20Report%20-%20ACCAN%20Third%20Party%20Billing_FINAL%20060717%20v2.pdf)> accessed 6 June 2019. This research had a total sample size of n = 2,018, with variation in sample size according to response.

<sup>13</sup> *Ibid.*

<sup>14</sup> Australian Government Office of Best Practice Regulation, “Regulatory Burden Measurement Framework” (Canberra 2016) 18.

dispute resolution is 3.4 hours.<sup>15</sup> A consumer would need to be facing considerably more than a loss of \$1 or even \$30 to justify expending \$105.4 of their leisure time in seeking to rectify an unexpected third party charge.

Accordingly, while a useful indication of the existence of the problem, the survey responses received from consumers concerning third-party charging probably overstates their actual likelihood of making a formal complaint. This is also reflected in the survey responses of those consumers who actually faced unexpected charges, and who had not engaged in the complaint process.

Of those consumers who indicated that they had not contacted their service provider over 48% indicated that they had not done so because they believed that the charge was too small to worry about or they didn't have the time to dedicate to it.<sup>16</sup> In economic terms, about half of consumers had determined that the costs of seeking redress were likely to outweigh the benefits of attempting the process.

This result is striking, when considered against the fact that access to the alternative dispute resolution framework is notionally free, with consumers facing no fees for using it. The argument therefore that consumers are sufficiently empowered because they have free access to alternative dispute resolution mechanism may therefore be weak if the true cost of engaging in a dispute is the indirect loss of one's productive or leisure time.

The implications of few consumers seeking to exercise their rights would be less concerning if it were not for the significant amount of harm that can occur at the market and economy level as a result of weak incentives. However, as is the case with cartels, small amounts of distributed harm can have significant market-wide or economy-wide implications.

This problem is also likely to be universal and perhaps even more extreme in those economies where the opportunity cost of an individual's time is particularly high, such as those working for subsistence. However, within and across societies the issue of opportunity cost is endemic, and it is likely that we would see the problem affecting those at either ends of the spectrum of income and wealth.

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<sup>15</sup> Australian Communications and Media Authority, "Reconnecting the Consumer — Estimation of Benefits" (2015) 15.

<sup>16</sup> *Ipsos* (n 12) 55.

The harm to a consumer in individual terms may be relatively small as was identified in the aforementioned study. However, in the aforementioned market for third party charges the harms faced by consumers across the marketplace were in fact significant.

In late 2018 and early 2019 court action by the Australian Competition and Consumer Commission resulted in the two main providers of third-party billing services admitting that the number of impacted customers were likely to number between 100,000 to 340,000.<sup>17</sup> In absolute terms, the estimated losses to consumers in this market had been in excess of \$47 million over a series of years, with consumers facing losses of \$24.24 million from Telstra Australia's largest service provider,<sup>18</sup> and \$23.4 million from Optus the second largest.<sup>19</sup> The aforementioned estimates of consumer loss are likely to be conservative, with third-party billing practices having a considerably broader reach and longer history than that identified in the context of these cases.

## VI. WHY THIS PROBLEM IS IMPORTANT

The problem of weak incentives to complain or litigate is important because it can result in outcomes like the one seen above, where consumers faced significant harm at the aggregate level but at the individual level did not seek recourse. This is problematic for numerous reasons not least of which is that it provides poor incentives for firms and suppliers of goods and services to engage in harmful conduct where the prospect of a consumer seeking redress is low.

Whether a party which has engaged in misconduct faces the prospect of penalties, complaints or potentially a legal suit from a consumer is important to setting the incentives that they face. The risk of sanction whether

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<sup>17</sup> *Australian Competition and Consumer Commission v. Optus Mobile Pty. Ltd.*, 2019 FCA 106, 58, <<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/106.html>>; *Australian Competition and Consumer Commission v. Telstra Corp. Ltd.*, 2018 FCA 571, 73, <<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2018/571.html>>.

<sup>18</sup> *Ipsos* (n 12); *Australian Competition and Consumer Commission v. Telstra Corp. Ltd.*, 2018 FCA 571, at [52]. This figure has been estimated by applying the rate of non-consent to revenue figures using ACCAN survey results (12%), if the limited survey results set out at 37 were accurate the estimated loss would be \$155.4 million. As the sample size was exceptionally limited ACCAN considers that this upper bound figure is likely to be inaccurate but notes that consumer losses may be in excess of the baseline estimate.

<sup>19</sup> This figure has been estimated by applying the rate of non-consent to revenue figures using ACCAN survey results (12%), against Optus revenues of \$195 million, set out in detail at [57] in *Australian Competition and Consumer Commission v. Optus Mobile Pty. Ltd.*, 2019 FCA 106.

social, administrative or under consumer law is enough to deter many individuals and firms from engaging in misconduct. For those for whom the law alone does not provide sufficient dissuasion from misconduct, the reality of sanctions becomes important.

However, if consumers as the enforcers of their rights lack incentives to make a complaint or litigate, firms engaging in misconduct are able to obtain an economic gain at the consumers expense and face no prospect of sanction. A situation of rational apathy is therefore a recipe for consumer harm, in the absence of enforcement action by government agencies or regulators.

In abstract terms, this problem represents a loss to the economy through the misallocation of scarce resources, but in practical terms it can often mean that consumers, including the most vulnerable in our societies face the appropriation of their income or wealth. Setting aside the economics of the matter, this would represent a step backwards from the objectives eloquently expressed in consumer protection law, namely, to protect consumers and support ethical market transactions.

The second reason that the problem is important is because the first step to resolving any problem is acknowledging its existence. Once identified the problem of weak consumer incentives to initiate a complaint or legal action can help enforcement agencies and regulators to focus part of their enforcement efforts towards low-level but widespread problems. Enforcement agencies already take this approach, in respect to cartel conduct where the harm faced by the individual consumers through increased prices or anti-competitive conduct may be low, but the industry or economy wide harm is material.

The third reason that this problem is important is because it can spark a genuine discussion between enforcement agencies, consumer organizations and industry about whether existing approaches to consumer law are achieving their objectives. There is unlikely to be any one particular approach to promoting better outcomes for consumers, however the following section outlines some options and considerations when examining potential solutions.

## **VII. POSSIBLE SOLUTIONS TO THE PROBLEM**

The problem of weak incentives to engage in complaint processes and litigation has historically been identified as a problem in the law & economics

literature, with some authors proffering potential solutions to the issue. Possible solutions include the bundling of similar interests among affected consumers through class-action processes,<sup>20</sup> the creation of mechanisms for the referral of complaints by consumer organizations or the more classical centralized enforcement model.

The use of class action processes to resolve the problem of weak incentives to pursue complaints or commence litigation, although a sound proposal in that it reduces the costs faced by individual consumers does create other issues. In resolving the issue of incentives of consumers to pursue compensation, new issues are created with respect to the incentives of those acting on behalf of consumers to pursue early settlement. Irrespective of the limitations of the process of creating mechanisms for obtaining compensation for consumers, it is area that merits further research.

The simplest and most immediate solution to the problem is likely to be the adequate resourcing of consumer representation and advocacy bodies funded either via industry levy or via government revenues. Funding consumer organizations to receive, pool and refer complaints onto enforcement agencies is likely to represent a relatively low-cost way for regulators to identify problems like those outlined above. Strong relationship and co-operation between consumer advocates and enforcement agencies have the potential to allow for the rapid identification of pervasive, but low-level harm that is best addressed through centralized enforcement action.

The use of super-complaints mechanisms or more simply a referral mechanism has found support among economists as a potential opportunity to reduce the costs of identifying areas for potential enforcement action. In a recent review to Australia's consumer protection framework, the potential for a well-designed super-complaints or referral mechanisms to be used to identify areas of consumer harm was found to have merit.<sup>21</sup>

The role of consumer organizations is therefore important in a context where enforcement agencies have resource limitations of their own and are not in a position to act wherever a breach of consumer laws occurs. Consumer organizations can pool their significant on-the-ground knowledge

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<sup>20</sup> Hans-Bernd Schaefer, "The Bundling of Similar Interests in Litigation: The Incentives for Class Action and Legal Actions Taken by Associations" (2000) 9 *European Journal of Law and Economics* 183.

<sup>21</sup> Productivity Commission, *Consumer Law Enforcement and Administration* (2017) 224.

to assist regulators and enforcement agencies to refine their efforts to address those areas where the greatest harm is being faced by consumers.

An effective and responsive enforcement environment, with active enforcement agencies and regulators will provide strong incentives for firms to comply with consumer protection regimes. A key part of this is deterring misconduct through individual, collective and state action to demonstrate to those considering engaging in misconduct that the rewards of doing so are likely to be fleeting, followed by sanctions and erode their reputation and profitability.<sup>22</sup>

### **VIII. REDRESS AFTER ENFORCEMENT ACTION CAN STILL BE COSTLY TO OBTAIN**

Following a successful claim for compensation or enforcement action by a regulator, consumers can still face material costs in obtaining redress. In addition to the costs associated with making a complaint or initiating a legal claim, once an outcome is arrived at in favour of a consumer getting access to redress is not a costless activity. In 2017 and 2018 the Australian Competition and Consumer Commission obtained enforceable undertakings from an array of internet service providers that they would provide compensation to consumers that had been misled about potential speed that could be provided.<sup>23</sup>

More recent reports indicate that on the issue of third-party charges that less than 26% had taken up offers of compensation from Telstra.<sup>24</sup> A positive view of the failure of consumers to take up offers of compensation is that they had not faced material harm as a consequence of the

<sup>22</sup> Gary Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy*.

<sup>23</sup> Australian Competition and Consumer Commission, *Telstra Offers to Compensate 42,000 Customers for Slow NBN Speeds* (2017); Australian Competition and Consumer Commission, *Dodo, iPrimus and Commander to Compensate over 5000 Customers* (2018). <<https://www.accc.gov.au/media-release/dodo-iprimus-and-commander-to-compensate-over-5000-customers>>, accessed 24 September 2018.

Australian Competition and Consumer Commission, *Measuring Broadband Australia: Initial Findings Report*, March 2018 (2018); Australian Competition and Consumer Commission, *Measuring Broadband Australia, Report 2*, July 2018 (2018);

Australian Competition and Consumer Commission, *S. 87-B Undertakings Register* <<https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register>> accessed 24 September 2018.

<sup>24</sup> Ry Crozier, "Telstra Offered 272,397 Refunds for Premium Content Charges", *itNews* (Sydney, 3 June 2019) <[https://www.itnews.com.au/news/telstra-offered-272397-refunds-for-premium-content-charges-526065?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=itnews\\_autopost](https://www.itnews.com.au/news/telstra-offered-272397-refunds-for-premium-content-charges-526065?utm_source=twitter&utm_medium=social&utm_campaign=itnews_autopost)> accessed 8 June 2018.

aforementioned conduct and therefore were not interested in the compensation on offer. The more likely explanation is the same as that outlined above – where compensation is not available automatically and a process is entailed – a consumer may find the opportunity cost of spending their time on obtaining compensation exceeds the sum on offer.

The underlying economics and logic of this problem is fundamentally the same as above, if it costs a consumer 2 hours to attain compensation of \$50, and the value of that time to the consumer is \$62, then it would be illogical to expect that they would seek redress. The dimensions of this problem are important in considering the mechanisms on offer for consumers to seek compensation, but also importantly when designing how compensation is to be paid.

Regulators, lawyers and enforcement agencies should be cognizant of this problem and seek to devise compensation mechanisms that involve automatic payment of eligible consumers or that minimize the opportunity costs of obtaining compensation to the minimum amount required. As part of developing any compensation process the evidentiary requirements associated with assessing eligibility are of course important.

In designing compensation arrangements consideration should be given to the incentives faced by consumers and the sum in question. Processes should be proportionate to the sum in question. Accordingly, in circumstances where the compensation to be paid is relatively small a process that is simplified may be preferable to a more costly or complex process, which may be appropriate in matters concerning large sums.

Although a definitive conclusion cannot be arrived at either way in respect to the compensation on offer under the terms of the undertaking described above, the cost of obtaining redress in terms of opportunity cost is an area for further research.

## **IX. THE ONE-LEGGED STOOL APPROACH TO CONSUMER PROTECTION**

It is improbable that any approach to consumer protection that relies on a sole agent as the enforcer of rights will be effective. All parties whether they be consumers, consumer organizations or enforcement agencies face constraints and reliance on any one of these three groups to be the sole enforcer of consumer protection laws is akin to attempting to construct a one-legged stool – it is bound to fail in one way or another.

Relying on consumers who face weak incentives to complain and litigate in many instances is a recipe for under-enforcement of consumer protection laws. Similarly, although consumers and consumer advocates can be fierce, effectively contribute significantly to strong outcomes in individual cases or industries; the resourcing of consumer organizations is usually insufficient to ensure consumers are adequately protected.

In other contexts, however, consumers have been left to their own devices with the expectation that they are best placed to enforce their rights. Setting aside the practical barriers that consumers face in terms of exercising their rights, including structural gaps in knowledge and resource limitations, opportunity cost, weak incentives and rational apathy are problems that are unlikely to be resolved without genuine action by consumer organizations, consumer rights lawyers and enforcement agencies.

An alternative and more constructive approach to enforcement would entail a tripartite approach to consumer law, with consumers, consumer organizations and enforcement agencies work co-operatively and independently of one another to protect the interests of consumers. In the aforementioned case study this is what occurred, with consumers coming to the peak consumer group for communications the Australian Communications Consumer Action Network who then gathered evidence and notified the Australian Competition and Consumer Commission who undertook a full investigation and commenced enforcement proceedings.

The problem of rational apathy is not one that can be resolved through the action of any one entity, whether this be consumer organizations or enforcement agencies, but rather requires a co-operative and collaborative effort by all parties to address the problem. Consumer organizations can contribute much, through their grass-roots engagement with consumers and can inform enforcement agencies and regulators about whether the law is operating effectively in practice, whether there are new problems emerging or the need for enforcement activity.

## **X. THE NEED FOR RESEARCH CONTINUES**

This article outlined some of the contributions of law & economic scholars to the theory of litigation and enforcement incentives for individuals. However, little empirical or primary research has been undertaken on these issues and the understanding of how incentives influence consumer behaviour in complaining or litigating remains limited. The mechanics of

compensation mechanisms and how best to design these mechanisms in light of the costs that they entail for consumers who have faced harm is another area that deserves further empirical research.

As a branch of research, the role of incentives in the decision's consumers make about complaining or litigating is one with significant opportunities for future research. Although in the abstract consumers may face weak incentives to complain or commence litigation, how consumers assess the opportunity cost of doing so is an important component in any real-world analysis of the problem. There are however sufficient theoretical and evidentiary grounds on the basis of the case study outlined above to conclude that there is a *prima facie* case for further investigation and research on this issue.

How the issue of incentives interplays with real world constraints faced by consumers in terms of the resources that they have available to them, has not been considered in this article. However, resources do play a significant role in the opportunity costs that consumers face. What role they play is unclear and highly contextual and consequently have been excluded from this analysis.

For example, although it may be simple to assume that consumers who are living on a subsistence wage may have weak incentives to complain about a breach of their rights, a *small* loss, in the totality of their income may represent a sufficiently large loss for them to seek redress. Alternatively, the costs associated with taking time off work may be significant and as a result the loss of work may outweigh the loss they face as a consumer.

In light of the practical limitations associated with assessing the impact of resourcing in an abstract setting, the issue of resources has been set aside. As an avenue of research however the role of resources in the incentives that consumers have in complaining, engaging in litigation and seeking compensation remains an interesting and important one.