australian consumer law review

Australian Consumer Law Review

Issues Paper

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Message from the Chair

On behalf of Consumer Affairs Australia and New Zealand, I am pleased to present this Issues Paper on the Australian Consumer Law Review.

This review is the first since the Australian Consumer Law commenced on 1 January 2011. Introducing the Australian Consumer Law was a historic and far-reaching national reform that created a national consumer policy framework with a uniform federal, state and territory consumer protection law that is jointly enforced by national, state and territory regulators.

With five years having passed since the Australian Consumer Law came into effect, now is the time to review whether the law is operating as intended, how effectively the law is being administered and whether the framework is sufficiently flexible to respond to new and emerging issues in the marketplace. These are important questions that will help us identify what has worked well and what could be improved.

The views of stakeholders are crucial to this review and the Issues Paper is a key mechanism for seeking feedback. I encourage you to consider and respond to any or all of the issues raised in the paper and to engage with the broader review process that will take place throughout 2016.

Stakeholder views will help inform the drafting of the review's interim report that will be released in the second half of 2016, with the final report to be provided to the Legislative and Governance Forum on Consumer Affairs by March 2017.

I look forward to your contribution to the Australian Consumer Law Review as we seek to provide a national consumer policy framework that delivers the best outcomes for Australian consumers and businesses.

Garry Clements
Chair, Consumer Affairs Australia and New Zealand

Introduction

About this review

Five years after introducing a generic national consumer law, the federal, state and territory governments are seeking the views of the Australian community on how the Australian Consumer Law is operating in practice.

Your feedback on this Issues Paper will be a key component of the review. This is an opportunity for all stakeholders, including consumers, businesses, advocacy groups and lawyers, to provide views on how the national consumer policy framework is operating and what could be improved.

The Australian Consumer Law

The Australian Consumer Law (ACL) commenced on 1 January 2011. It is a single generic consumer protection law that applies across Australia. This is the first review since the law was implemented.

The ACL is jointly administered and enforced by federal, state and territory consumer law regulators, and is being reviewed by officials from these regulators through Consumer Affairs Australia and New Zealand (CAANZ).

The review process

We will use feedback on this Issues Paper in preparing an interim report. We will also use the outcomes of the second Australian Consumer Survey for consumers and businesses and a study of consumer policy frameworks in other countries to help develop the report.

We will release the interim report in the second half of 2016 and seek more public feedback on the issues and options. We will then prepare a final report to Consumer Affairs Ministers, by March 2017, which will contain findings and options to improve the efficiency and effectiveness of the ACL.[1]

Making a submission

We are seeking the views of as many stakeholders as possible, in sufficient detail to inform the review.

Some of you will have specific issues you would like to raise while others may have views or perspectives that span a broader set of issues. We have provided questions to stimulate discussion (with a consolidated list of questions at the **Appendix**). We have also provided a range of issues you may like to consider in your submission.

However, neither the questions nor matters raised in this Issues Paper are intended to be exhaustive. If you think there are other opportunities to improve the ACL, or its enforcement, please detail these in your response.

The closing date for submissions is Friday, 27 May 2016.

1 The report will be presented to the Legislative and Governance Forum on Consumer Affairs, commonly referred to as the Consumer Affairs Forum (CAF). CAF comprises all Commonwealth, state, territory and New Zealand Ministers responsible for fair trading and consumer protection.

You may lodge your submission electronically or by post, however, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

Electronic lodgement is to be made via the 'Australian Consumer Law Review — Have Your Say' page on the Australian Consumer Law website: www.consumerlaw.gov.au.

Confidential submissions

Unless you indicate that you would like all or part of your submission to remain confidential, all information (including name and address details) contained in submissions will be published on the Australian Consumer Law website.

Confidential submissions should be clearly marked as confidential — automatic confidentiality statements in emails are not sufficient to make your submission confidential. If you would like part of your submission to remain confidential, you should provide this information clearly marked as such in a separate submission.

Guide to the Issues Paper

The Issues Paper is structured to allow you to focus on aspects relevant to you — you need not read the entire document.

Chapter	Topic	In this chapter we are seeking your views on:
1	Consumer policy in Australia	Whether the objectives of the national consumer policy framework remain relevant
2	The legal framework	Whether the language and structure of the ACL is easy to understand and navigate The effectiveness of the ACL's existing rights and protections (such as consumer guarantees, product safety) Whether new rights and protections should be introduced
3	Administration and enforcement	The activities of ACL regulators The adequacy of the remedy and offence provisions Scope for taking private action Access to remedies International reach of the ACL
4	Emerging consumer policy issues	Selling away from business premises (such as 'pop-up' stores, telemarketing and door-to-door sales) Online shopping Emerging business models (for example, the 'sharing' economy) Empowering consumers through access to consumer data and disclosure requirements

ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
AS/NZS	Australian Standard/New Zealand Standard
CAANZ	Consumer Affairs Australia and New Zealand
CAF	Legislative and Governance Forum on Consumer Affairs
COAG	Council of Australian Governments
Cth	Commonwealth
ISO	International Organisation for Standardization
NT	Northern Territory
NSW	New South Wales
SA	South Australia
TPA	*Trade Practices Act 1974*
UK	United Kingdom
Vic	Victoria
WA	Western Australia

1 CONSUMER POLICY IN AUSTRALIA

1.1 Why we have consumer policy

Consumers benefit when they can confidently participate in markets where businesses trade fairly. Confident consumers stimulate effective competition, which in turn leads to better services, more choice and lower prices.

Consumers are confident when they feel empowered. This includes having confidence that markets are safe and fair, having access to information to make informed purchasing decisions and knowing they have adequate rights, protections and access to remedies in situations where they suffer harm from unfair trading practices or unsafe or defective goods and services. This lowers the barriers and costs for consumers, in both time and resources, in deciding if goods and services will meet their needs, promoting economic efficiency.

Since 1 January 2011, Australia has sought to empower and protect consumers through the ACL[2] and similar consumer protections in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) administered and enforced by regulators at the federal, state and territory levels. This comprises our 'national consumer policy framework' and is the subject of this review.

Australia's national consumer policy framework operates within an ever-changing market landscape that is shaped by factors such as:

- rapid technological change
- trade liberalisation
- changing consumer preferences.

To be effective in this environment, the consumer policy framework must appropriately balance addressing consumer harm in a meaningful way, while not imposing unnecessary compliance burdens on business or stifling effective competition and market innovation.

While this review focuses on the national consumer policy framework, it is not the only mechanism for advancing consumer wellbeing. As the Productivity Commission noted in its 2008 *Review of Australia's Consumer Policy Framework*:

> … almost all economic policies —macro and microeconomic— are ultimately aimed at improving consumer wellbeing. Thus, while not explicitly protecting or empowering consumers, sound macroeconomic policies and widespread competition and trade reforms have delivered large gains to them over the last few decades by containing inflation, improving resource allocation and increasing productivity and economic growth.[3]

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2 The ACL is Schedule 2 of the *Competition and Consumer Act 2010* (Cth). Each state and territory has enacted legislation to apply the ACL as a local law through the: *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Australian Consumer Law (Tasmania) Act 2010*; *Australian Consumer Law and Fair Trading Act 2012* (Vic); and *Fair Trading Act 2010* (WA).

3 *Review of Australia's Consumer Policy Framework,* Productivity Commission Inquiry Report No.45, 30 April 2008, Vol 2, page 3.

1.2 Introducing the Australian Consumer Law

Before 1 January 2011, Australia's consumer policy framework comprised a range of Commonwealth, state and territory laws, including the previous *Trade Practices Act 1974* (Cth) (TPA) and the ASIC Act.

In its 2008 report on ways to improve Australia's consumer policy framework, the Productivity Commission found that while the framework had considerable strengths, aspects of the framework needed an overhaul.[4] It noted:

- the divided responsibility between the federal and state and territory governments led to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making
- gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers.

Following this review, on 2 October 2008, the Council of Australian Governments (COAG) agreed to a new, national consumer policy framework. On 2 July 2009, COAG signed the *Intergovernmental Agreement for the Australian Consumer Law* (the Intergovernmental Agreement) that provided for:

- the Australian Consumer Law
- a national product safety regulatory and enforcement regime
- improved enforcement, cooperation and information sharing arrangements between federal, state and territory agencies.[5]

To assess whether the new national consumer policy framework is working effectively, the Intergovernmental Agreement requires its terms and operation, as well as the enforcement and administration arrangements of the ACL, to be reviewed within seven years of the ACL's commencement.[6]

Additionally, the national consumer policy framework has facilitated regular communication and cooperation between regulators in the areas of policy and research, education and information, and compliance and dispute resolution. These arrangements have given rise to an unprecedented level of coordination between consumer regulators, as highlighted in the annual ACL progress reports.[7]

1.3 Australia's consumer policy framework objectives

Questions

1. Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?
2. Are there any overseas consumer policy frameworks that provide a useful guide?
3. Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?

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4 Ibid, Vol 1, p2.

5 *Intergovernmental Agreement for the Australian Consumer Law* (2 July 2009), paragraph E, www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf .

6 Ibid, clauses 23 and 51.

7 These are available at: www.consumerlaw.gov.au/the-australian-consumer-law/implementation-2/.

Overarching objective

Australia's national consumer policy framework has an overarching objective that emphasises confident consumers, effective competition and fair trading:

> **To improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.**[8]

Operational objectives

To achieve this objective, the Intergovernmental Agreement identified six operational objectives:

- to ensure that consumers are sufficiently well informed to benefit from, and stimulate effective competition
- to ensure that goods and services are safe and fit for the purposes for which they were sold
- to prevent practices that are unfair
- to meet the needs of those consumers who are most vulnerable, or at greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred
- to promote proportionate, risk-based enforcement.[9]

Furthermore, the Regulation Impact Statement that accompanied the ACL stated that:

> National consistency in consumer laws provides a strong argument for a national approach as consumers and businesses would only need to be familiar with a single, national law. It would empower Australian consumers and businesses to participate in national markets with greater confidence, and result in compliance cost savings for businesses as they would only be required to comply with a single national law, instead of multiple regulatory regimes. Consumers would also benefit from access to consistent remedies and legal certainty, regardless of where they reside in Australia.[10]

A key purpose of this review is to assess the extent to which these objectives have been achieved, and if they remain relevant for today and into the future. In assessing whether the objectives have been met the review will consider whether risks of consumer and business detriment are addressed at an appropriate level of regulatory burden.

8 *Intergovernmental Agreement for the Australian Consumer Law* (2 July 2009), paragraph C, www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.

9 Ibid, paragraph D.

10 Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, Explanatory Memorandum, page 462.

2 Australian Consumer Law — the legal framework

Terms of reference

The ACL Review will assess the effectiveness of the provisions of the ACL, whether these are operating as intended, and address the risk of consumer and business detriment at an appropriate level of regulatory burden.

The ACL commenced on 1 January 2011, providing a single generic consumer protection law operating as a law of the Commonwealth and of each state and territory. It replaced 17 existing Commonwealth, state and territory laws, including the previous TPA, and combined features of earlier laws with a number of new provisions, most notably:

- a system of consumer protections and remedies in relation to defective goods and services (the 'consumer guarantees')
- unfair contract terms protections
- a harmonised national product safety and enforcement system, replacing a previous patchwork of product safety standards and laws
- national laws covering a number of sales practices
- national rules for lay-by agreements
- enforcement powers including penalties for regulators to use.

A number of ACL provisions are reflected in the ASIC Act as they apply to financial services.[11]

Since being introduced, the ACL has been changed to:

- extend the unfair contract terms protections to small business contracts
- amend the unconscionable conduct provisions to include a list of interpretative principles and unify the consumer and business-related provisions
- allow regulators to make regulations exempting a class of representations from the component pricing requirement, if certain conditions were satisfied.[12]

11 See Part 2 of the ASIC Act.

12 For example, café and restaurant menu surcharges on specific days.

2.1 Structure and clarity of the Australian Consumer Law

Questions

Structure and clarity of the ACL (2.1.1)

Meaning of ‘consumer’ (2.1.2)

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?
5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?
6. Are there overseas consumer protection laws that provide a useful model?
7. Is the ACL’s treatment of ‘consumer’ appropriate? Is $40,000 still an appropriate threshold for consumer purchases?

2.1.1 Structure and clarity of the Australian Consumer Law

Structure of the ACL

For the ACL to empower and support consumers, the law should be easily accessible so consumers can inform themselves about their rights and protections. Ideally, it should be structured in a way that is coherent and easy to navigate, and its language should be clear and simple. It should also be supported by readily-understood guidance and educational material published by regulators.

Current ACL structure	
Chapter 1	Outlines how the ACL applies, provides a set of definitions and explanations about consumer law concepts, including the definition of a ‘consumer’
Chapter 2	Provides a range of ‘general’ (or foundational) protections that create and promote standards of conduct in trade or commerce across all industries, including prohibitions against: • misleading or deceptive conduct • unconscionable conduct • the use of unfair contract terms in standard form contracts for consumers, and soon also for small businesses

Current ACL structure	
Chapter 3	Complements the protections in Chapter 2 by providing consumers with protections against specific unfair practices, such as: • making false or misleading representations • providing unsolicited supplies • multiple pricing Sets out rights in relation to purchasing goods or services (including consumer guarantees and provisions on unsolicited consumer agreements) Sets out product safety provisions
Chapter 4	Outlines the offences that apply to breaches of the Chapter 3 provisions
Chapter 5	Outlines the enforcement powers, penalties and remedies that are available under the ACL
Regulations	Regulations made under the ACL are set out in Parts 6 and 7 of the *Competition and Consumer Regulations 2010*. These give practical effect to implementing certain ACL provisions, for example, they: • provide that certain agreements are not unsolicited consumer agreements • set out requirements for warranties against defects

Clarity of the ACL

The ACL regulates business-to-consumer and business-to-businesses transactions in a number of ways. Using pricing as an example, a consumer misled about prices is not only protected under a broad principle or prohibition against misleading or deceptive conduct, but also, for example, under:

- a specific prohibition against false or misleading representations, which covers representations in relation to price
- provisions regulating the display of multiple prices, and prices that are a component of the total price.

Foundational principles, such as the prohibition against misleading or deceptive conduct, set out standards of behaviour and can help consumers understand their rights across a broad range of situations. These principles can:

- allow for innovation in business compliance
- provide flexibility to deal with new and emerging issues
- help avoid situations where businesses comply with the letter of the law, but not its spirit (a practice sometimes referred to as 'creative compliance').

In practice, however, consumers and businesses often require a certain degree of certainty, clarity and transparency in their transactions, particularly where there are complex issues of interpretation. Ideally, laws that deal with everyday situations and are intended to be relied on by the general public, as many consumer laws are, should be simple and clear.

Clarity in the law can be sought in a variety of ways. The law's underlying principle needs to be clearly articulated and, where appropriate, supported by more detailed rules, whether in the law itself (on the basis that relevant provisions are not spread across legislative instruments) or in regulations or other instruments (which can be more easily updated than legislation).

Rules that embody the principles can range from 'bright line' rules or tests (for example, a theoretical rule that a consumer has a 10-day cooling off period in all circumstances), to more detailed or complex rules (with specified definitions, restrictions, exceptions and so on).

In some cases, detail in the form of rules may provide consumers and businesses a greater level of certainty, clarity and transparency in those transactions. The ability to enforce the law effectively is also important — in some cases it may be easier to prove a breach of a process or a rule, rather than a principle, particularly a principle that is not well expressed. However, while rules may target known issues at the time of legislating, they may not be appropriate in new or emerging situations and end up creating complexity and uncertainty, and not allow for the law to adapt as circumstances change.

Additionally, regulators can issue guidance for businesses and consumers, which can range from general information about the law, to enforcement policies and regulatory guides on specific issues. These may explain, for example:

- how and when regulators will act
- how regulators interpret the law
- relevant principles underlying their approach
- practical guidance on compliance.

While guidance material can be updated without amending legislation, it does not have legal force and is not a substitute for the law.

In practice, these approaches often work in combination and supplement one another.

Issues

Issues about the ACL's structure and overall clarity for consumers and businesses are raised throughout this Issues Paper and include:

- whether the structure of the ACL is easy to navigate, and the expression of the law clear, so that businesses and consumers can locate their rights and obligations with a reasonable degree of comfort and certainty and understand the relationships between them. This includes:
  - whether the different purposes and roles of the provisions are clear, and appropriately complement one another
  - whether the distinctions between general and specific protections warrant the availability of different remedies and penalties [see Box 12]
  - whether civil and criminal consequences for particular conduct are readily identifiable [see section 3.2.1]

- whether the ACL's underlying principles, and the rules that are relevant to those principles, are clearly articulated, including:
  - whether certain principles may require more clarity, such as whether the consumer guarantee that goods are of 'acceptable quality' is adequately understood by consumers and businesses [see section 2.3.3]
  - the extent to which issues around clarity can be dealt with through legislative and non-legislative interventions to support access to remedies [see section 3.3].

2.1.2 The meaning of 'consumer'

The person protected under the ACL varies depending on the particular provision in question. For example, for the purposes of consumer guarantees and the unsolicited consumer agreements provisions, the person protected is a **'consumer'** who has acquired particular goods or services that are 'ordinarily acquired for personal, domestic or household use or consumption', or where the amount paid 'did not exceed $40,000'.[13] The $40,000 threshold was introduced in 1986 and has not changed since that time.

This definition of 'consumer' is based, in part, on a type of behaviour, rather than defining an entity in itself, meaning that businesses receive consumer protections in some circumstances. The addition of a monetary threshold means that businesses have certain rights if the transaction falls within the monetary threshold. The ACL therefore extends its protections to a broad range of purchasers in the marketplace. In practice, many small and medium-sized businesses, as well as consumers, use and rely on protections in the ACL.

While a number of provisions apply to a 'consumer',[14] some ACL provisions apply to a different class of persons or things, typically where broader protections in the marketplace are needed. For example, all 'persons' for unconscionable conduct, 'consumer contracts' for unfair contract terms, and 'consumer goods' for product safety. As a consequence, there is no single, overarching definition of 'consumer' that applies to the entire ACL.

Issues

Issues that have been raised about the definition of 'consumer' include:

- whether the $40,000 threshold remains appropriate and relevant in today's market
- whether it should cover situations where a consumer, including a business, provides their information to a business (such as a comparator website), rather than 'acquires' a good or service, noting that information about consumers has growing commercial value
- whether the ACL should apply to charities and not-for-profit organisations.

13 See section 3(1) of the ACL.

14 For example, see consumer guarantees and unsolicited consumer agreements (Part 3-2).

Box 1: Definition of 'consumer' in the United Kingdom (UK)

The UK Parliament recently amended its definition of 'consumer', which is now defined broadly as an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.[15]

The UK definition is based on a 'natural person' so cannot include companies or small businesses. The definition is couched in negative terms and where a trader claims that a person was *not* acting for those purposes the trader must prove it. Also, by including individuals who enter into contracts for a mixture of business and personal reasons it is wider than existing definitions in UK and European Union law.

2.2 General protections of the Australian Consumer Law

Questions

Misleading or deceptive conduct (2.2.1)

Unconscionable conduct (2.2.2)

Unfair contract terms (2.2.3)

8. Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

9. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed?

2.2.1 Prohibiting conduct that misleads consumers (Part 2-1)

The ACL prohibits a person, in trade or commerce, from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive. It is a foundational consumer protection with a similar provision in the ASIC Act in relation to financial services.

It is a likely breach of the ACL if a businesses' conduct creates a misleading overall impression among the audience about, for example, the price, value or quality of consumer goods or services.

The prohibition against **misleading or deceptive conduct** is intended to create an obligation or norm of behaviour to not mislead or deceive others. This prevents unfair trading practices and enhances consumer wellbeing and consumers' confident participation in markets, as they can be reasonably certain they are not being misled. The prohibition is also consistent with the general principles of honesty and truthfulness, as reflected in the common law recognised by courts (such as the tort of deceit).

15 See section 2(3) of the *Consumer Rights Act 2015* (UK).

The prohibition applies to any individual or business providing or acquiring a good or service, covering both business-to-consumer and business-to-business transactions. It does not matter whether the conduct was intended to mislead or deceive, only that it had the effect of doing so.[16] 'Misleading or deceptive' is not defined in the ACL, but is taken to have its ordinary meaning.

A finding of misleading or deceptive conduct can result in a remedy being applied, but does not give rise to a criminal sanction or civil penalty against the person in breach.[17]

Issues

Issues raised about the prohibition against misleading or deceptive conduct include:

- whether it is appropriate to maintain the current approach to silences or omissions, where it is not misleading unless there is a 'reasonable expectation' that a consumer would be informed of the omitted fact
- whether it should be extended to prohibit specific forms of 'unfair' commercial practice [see section 2.4.1]
- whether it should attract the same financial penalties and criminal sanctions that apply to the making of false or misleading representations[18] [see Box 12, and also section 2.3.1].

2.2.2 Prohibiting unconscionable business conduct (Part 2-2)

The ACL prohibits a person, in trade or commerce, from engaging in **unconscionable conduct**.[19] A similar prohibition is found in the ASIC Act in relation to financial services.[20]

The unconscionable conduct provisions seek to prevent trading practices that are unfair. They apply to the conduct of any individual or business engaging in trade or commerce, except where the person affected by the conduct is a publicly listed company.

'Unconscionable conduct' is not defined in the ACL and its application has significantly evolved from its origins in the principles of equity as recognised by the courts, and which protected those who were at a 'special disadvantage'. The 1990s saw a number of changes, notably, the introduction of legislative protections in the previous TPA against unconscionable conduct, within the meaning of unwritten law, and later, the extension of those protections to business dealings.[21]

When the ACL was introduced, its provisions on unconscionable conduct extended the range of remedies available and the list of factors that the court could consider. The ACL also explicitly states that the legislative protection is not limited by the 'unwritten law' and can apply to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour.[22]

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16 'Conduct' includes actions and statements such as advertisements, promotions, quotations and statements.
17 Chapter 5 sets out the available remedies which include undertakings, substantiation notices, public warning notices, injunctions, damages, compensatory orders, redress for non-parties and non-punitive orders.
18 A penalty of up to $1.1 million for a corporation or $220,000 for individuals.
19 See section 21 of the ACL.
20 See Part 2, Division 2, Subdivision C of the ASIC Act.
21 See sections 51AA, 51AB and 51AC of the TPA, now sections 20 and 21 of the ACL.
22 See section 21(4) of the ACL.

While these legislative interventions extended the scope of the prohibition, there were debates for many years about whether the interpretation of 'unconscionable conduct' nevertheless requires a very high standard of moral culpability. The recent decision in the *Lux* case has led to greater clarity on this point [see case study 1].[23]

Where a breach of the unconscionable conduct provisions is found, the courts may order a range of penalties and remedies under the ACL, and other common law remedies.

Recently, the Competition Policy Review examined the protections small businesses have under the ACL's unconscionable conduct provisions. In its March 2015 report, the review panel believed that the provisions are working as intended to meet their policy goals. Nevertheless, the panel's view was that the law should undergo active and ongoing review and, if deficiencies become evident, these should be remedied.

Issues

Issues that have been raised about the prohibition against unconscionable conduct include:

- whether the provisions should provide guidance to the courts to facilitate a more consistent interpretation of 'unconscionable', for example, providing further clarity regarding the 'norms of society'
- whether it should be extended to protect all businesses, including publicly listed companies[24]
- whether it should be extended to prohibit specific forms of unfair commercial practice [see section 2.4.1].

Case study 1: Unconscionable conduct — Lux Distributors Pty Ltd

The ACCC alleged that between 2009 and 2011, Lux Distributors Pty Ltd (Lux) engaged in unconscionable conduct in selling vacuum cleaners to elderly consumers. Specifically, Lux sales representatives had called upon five elderly women in their homes under the premise of a free vacuum cleaner maintenance check, and then subjected the women to unfair and pressuring sales tactics to induce them to purchase a vacuum cleaner of up to $2,280.

In August 2013, the Full Federal Court declared that Lux had engaged in unconscionable conduct in relation to the sale of vacuum cleaners to three of the elderly consumers in their homes. Its decision rested on a number of findings, including that, in order for conduct to be unconscionable, it must be against conscience by 'reference to the norms of society'.

In this context, 'honest and fair' dealings were required by those norms. The relevant social norms were evidenced by the various consumer protection measures which exist 'in furtherance of fairness and the elimination of aspects of vulnerability' with which Lux had failed to comply.

This decision helped clarify the operation of the unconscionable conduct provisions, with the courts now more likely to consider social norms and questions of fairness and honesty rather than moral judgement when determining whether there has been a breach.

23 *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

24 Publicly listed companies are currently not protected on the basis they have the ability to protect their own interests, including the capacity to seek redress under the ACL (note that large companies are protected where they are privately held).

2.2.3 Protecting consumers from unfair contract terms (Part 2-3)

The ACL includes protections against **unfair contract terms** in standard form consumer contracts. These are contracts that are often prepared by businesses and presented to customers on a 'take it or leave it' basis.

Standard form contracts can promote the smooth functioning of the economy by avoiding the costs (both in time and resources) associated with negotiating contracts on an individual basis, particularly for low-value transactions repeated with a large number of parties.

For various reasons, parties being offered standard form contracts tend not to review the terms and conditions closely, and may not understand the meaning of particular terms, particularly as standard form contracts tend to be long and, being generic in nature, cover an array of matters. Parties offered such contracts may not often have the power, time or capacity to read through the contract and negotiate terms, even though many concepts in contract law depend on parties being able to negotiate with equal bargaining power, look after their own interests, and understand the consequences of their actions.

The ACL provides protections to consumers for such contracts, by enabling a court to declare an unfair term void and for the contract to continue to operate if it can do so without the unfair term. A similar protection is found in the ASIC Act in relation to financial products and services.[25]

From November 2016, these protections will be extended to small business contracts of less than $300,000, or $1 million for contracts longer than a year.[26]

Although standard form contracts might contain a term that could ordinarily be considered unfair, under the ACL, a term is 'unfair' only if it:

- causes a significant imbalance in the parties' rights and obligations under the contract
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term
- if relied on, would cause detriment to the consumer.

While the legislation provides examples of terms that might be considered 'unfair', it does not prohibit particular terms. A court will consider, on a case-by-case-basis, if a term is unfair in the circumstances ('on the facts'). The protections also allow for a review of individual provisions only, rather than a review of whether the overall contract, as a whole, is unfair because of length, complexity, and any ancillary terms (which supplement the terms of the main contract).

Issues

Issues that have been raised about the unfair contract term provisions include:

- whether the current approach to determining if a term is 'unfair' and if a contract is a 'standard form contract' is sufficiently clear
- whether the protections should extend not only to particular unfair terms but to a contract that is unfair as a whole

25 See Part 2, Division 2, Subdivision BA of the ASIC Act.

26 Note that the Australian Government has committed to reviewing the small business protections two years following implementation, once sufficient time has passed to assess their effectiveness.

- whether standard form contracts covered by the *Insurance Contracts Act 1984* (Cth) should be subject to similar protections against unfair contract terms as apply under the ACL and ASIC Act [see Box 2]
- whether regulators should have the power to seek monetary penalties against businesses in breach of the unfair contract terms provisions, in addition to having the unfair terms declared void
- whether regulators should be able to take an action (such as a representative action) against systemic unfair contract terms
- whether there are issues with contracts in general that the ACL should address, for example, through improving contractual transparency and clarity
- whether there are issues specific to standard form contracts for the use of digital products, for which consumers' rights may be relatively untested [see Box 4]
- whether insurance contracts regulated under the Insurance Contracts Act should be treated in the same way as other standard form contracts [see Box 2].

Case study 2: Unfair contract terms — Chrisco lay-by agreements

In November 2015, in proceedings brought by the ACCC, the Federal Court found that Chrisco Hampers Australia Ltd (Chrisco) breached the ACL in its sale of hampers to consumers by lay-by agreement.

The Court found that Chrisco included an unfair contract term in its 2014 lay-by agreements relating to its 'HeadStart Plan', which allowed Chrisco to continue to take payments by direct debit after the consumer had fully paid for their lay-by order. Consumers were required to 'opt out' to avoid having further payments automatically deducted by Chrisco after their lay-by had been paid for.

The Court made a declaration that the term was unfair because it:

- caused a significant imbalance in the rights and obligations between Chrisco and its customers, in a context in which the term was not presented clearly and in sufficiently plain language
- was not reasonably necessary in order to protect the interests of Chrisco
- would cause financial detriment to consumers if it were relied upon by Chrisco.

Box 2: Unfair contract terms and insurance contracts

The *Insurance Contracts Act 1984* (Cth) does not include protections against unfair contract terms but imposes other requirements, such as the duty of utmost good faith.

The Act also excludes any Commonwealth, state or territory laws regarding contractual 'unfairness' from applying to contracts of insurance regulated under that Act, such as the unfair contract terms provisions in the ACL and ASIC Act.

2.3 The Australian Consumer Law's specific protections

Questions

False or misleading representations (2.3.1)

Other unfair practices (unsolicited supplies, pyramid schemes, pricing, referral selling, and harassment and coercion) (2.3.2)

Consumer guarantees (including 'lemon' laws) (2.3.3, 2.3.4)

Unsolicited selling agreements (2.3.5)

Other consumer rights (lay-by agreements, proof of transaction, itemised bill, and warranty against defects) (2.3.6)

Product safety (2.3.7)

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?
11. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?
12. Does the ACL need a 'lemon' laws provision and, if so, what should it cover?
13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?
14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be more effective, and how? Should protocols or other arrangements be established between ACL and specialist regulators?

2.3.1 Protecting consumers from being misled about goods and services (Part 3-1, Division 1)

The ACL prohibits a person, in trade or commerce, from making **false or misleading representations** about the supply or possible supply of goods or services. The types of prohibited representations are listed in the ACL, and include, among others, false or misleading representations about the quality, standard, style, or price of goods and services, as well as any sponsorship or approval.[27] The ASIC Act has a similar prohibition in relation to financial services.[28]

The prohibition against false or misleading representations applies to both business-to-consumer and business-to-business conduct. It seeks to prevent specific trading practices that are unfair and ensure consumers are sufficiently well-informed to benefit from and stimulate effective competition.

A false or misleading representation can be a verbal or written statement (including advertising), or implied from the person's words or conduct. It includes representations or offers such as:

- gifts and prizes

27 See section 29 of the ACL for the specific types of prohibited representations.

28 See Part 2, Division 2, Subdivision D of the ASIC Act.

- bait advertising (where a good or service is offered for sale at low prices to attract consumers, but where they are not available in reasonable quantities and for a reasonable period at that price)
- wrongly accepting payment.

A breach of the provision can result in a financial penalty of up to $1.1 million for a company and $220,000 for an individual.[29] The courts may also order injunctions restraining companies or individuals from making similar future representations [see case study 3], and compensation for affected customers [see case study 4].

One issue that has arisen is whether the penalties should be the same as those that apply for misleading or deceptive conduct [see Box 12].

Case study 3: False or misleading representations — Coles freshly baked bread

In April 2015, the Federal Court ordered Coles Supermarkets Australia Pty Ltd (Coles) to pay penalties of $2.5 million for making false or misleading representations, and engaging in misleading conduct in relation to the promotion of its par-baked bread products.

In proceedings brought by the ACCC, the Court found the products were promoted as 'Baked Today, Sold Today' and in some cases 'Freshly Baked In-Store' when they were in fact partially baked and frozen offsite by a supplier, transported and 'finished' at in-store bakeries within Coles supermarkets.

In 2014, the Court declared that by using the phrase 'Baked Today, Sold Today', Coles represented to customers that certain bread products were entirely baked on the day on which they were offered for sale, when this was not the case, in contravention of the ACL.

The Court also declared that by using the phrases 'Freshly Baked In-Store', 'Freshly Baked' and 'Baked Fresh', Coles had represented that certain bread products were baked from fresh dough, entirely baked on the day on which they were offered for sale and had been entirely baked in the Coles in-store bakery, when this was not the case and in contravention of the ACL.

In addition to the financial penalty, Coles was ordered to:

- not, for a three-year period, make any representation on packaging, signage, website or other promotional material that bread products were entirely baked on the day of sale or were baked from fresh dough when this was not the case
- place a corrective notice on its website and in its in-store bakeries.

29 See section 224 of the ACL for a full list of financial penalties.

Case study 4: False or misleading representations — Rent-to-buy scheme promoters

In 2013, Consumer Protection Western Australia (WA) began Supreme Court proceedings against two rent-to-buy scheme promoters. It was alleged the promoters were carrying on business as real estate agents without the required licence and that, in promoting their scheme, they breached the ACL by misrepresenting:

- the nature of the services they offer
- the nature of their interests in the properties advertised
- the need for buyers to ultimately obtain finance
- the price of advertised properties.

Consumer Protection WA successfully obtained interim injunctions against the promoters requiring greater disclosure of the true nature of the scheme. For example, the promoters were required to publish a prominent notice on their website clarifying the nature of their business and clearly outlining the purchasing and rental arrangements for the properties being advertised. The Supreme Court subsequently ordered the promoters to pay $70,000 compensation to the affected consumers.

2.3.2 Protecting consumers from unfair practices (Part 3-1, Divisions 2 to 5)

The ACL and ASIC Act also include protections against a range of other unfair practices:[30]

- **Unsolicited supplies of goods or services** — includes prohibitions against sending out credit or debit cards that have not been requested or are not due for replacement, and against asserting a right to payment for unsolicited goods or services [see Box 3].
- **Pyramid schemes** — prohibiting participation (or persuading others to participate) in schemes that primarily make money by recruiting people, rather than by selling actual goods or services. These schemes reward those at the 'top' of the recruiting pyramid, at the expense of the vast majority of people who are later recruited[31].
- **Pricing** — providing consumers with transparent and clear displays for goods and services, including a prohibition against selling goods at more than the lowest displayed price (where multiple prices are shown).
- **Referral selling** — prohibiting schemes where a business persuades consumers to buy a good or service by promising benefits for consumers who help generate sales to other consumers.
- **Harassment and coercion** — prohibiting the use of physical force, undue harassment, or coercion related to the supply of, and payment for, goods or services.

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30 See Division 2, Part 2, Subdivision D of the ASIC Act.

31 The ACL provides guidance for distinguishing between unlawful pyramid schemes and legitimate multi-level marketing schemes.

Box 3: Prohibition against unsolicited debit and credit cards

In 1975, the unsolicited distribution of debit and credit cards was prohibited in response to large scale mail-outs of credit cards. At the time, there were concerns about:

- fraudulent transactions where unsolicited credit cards fall into the wrong hands
- breaches of consumers' privacy
- the potential for increased consumer debt.

However, as noted by the 2015 Financial System Inquiry, more recent developments in technology, regulation and consumer expectations have raised questions about whether the prohibition is necessary today. For example:

- consumers are now much more familiar with credit and debit cards
- additional rules have been created that address some of the previous concerns (such as national credit legislation, 'know your client' requirements and the ePayments Code)
- there have been significant innovations in the types of payments products available.

2.3.3 Giving consumers rights where a product is not of acceptable quality (Part 3-2, Division 1)

When consumers buy goods or services that break too easily, do not work, or do not perform as generally expected, the ACL provides consumers with rights, known as **consumer guarantees**.

Consumer guarantees include, among others, that goods will be of acceptable quality, fit for any specified (particular) purpose, and match the description, sample or demonstration model.

'Acceptable quality' means that goods:

- are safe, durable, and free from defects
- are acceptable in appearance and finish
- do everything they are commonly used for.

For services, consumer guarantees require they be provided with due care and skill, fit for a particular purpose, and provided within a reasonable time.

Consumer guarantees apply regardless of whether the supplier has acted unfairly or fraudulently, or whether there are contractual terms that are inconsistent with these rights.

Where a good or service does not meet a consumer guarantee, the remedies that are available, and who chooses the remedy, depends on whether the failure is 'major' or not. For example, if there is a major problem with a good, such that a consumer would not have bought it had they known about the problem, the consumer can choose between:

- a refund
- replacement
- compensation for the fall in value caused by the problem (while keeping the good).

Otherwise, if the problem is not major, the supplier is entitled to choose the remedy, which may, in the case of a good, be a replacement, repair, or refund.

Consumers can claim a remedy directly from the supplier or manufacturer, and if the issue cannot be resolved, can pursue the matter through a court or tribunal.

Whether there is a breach of the consumer guarantees is determined by the nature of the goods, its price and the information provided by the supplier. This provides for flexibility in responding to an issue and recognises, for example, that not all goods can reasonably be expected to last the same amount of time.

Consumer guarantees were introduced to recognise that, in many cases, consumers do not have the supplier's level of knowledge or experience about the quality of the goods and services they buy. They enable consumers to buy goods and services without spending significant time and resources in finding out whether they will be of acceptable quality, helping consumers confidently participate in markets, and promoting economic efficiency.

The ASIC Act's consumer protections differ from the ACL in that it provides an implied warranty that services will be provided with due care and skill.[32] This is a promise that is presumed to form part of every contract.

Issues

The contextual nature of the consumer guarantees has raised issues about the clarity and certainty of the provisions for both consumers and businesses, including whether there is a need for greater clarity around:

- what constitutes a 'major' failure to comply with the consumer guarantees
- concepts such as 'acceptable quality' and 'reasonable' durability
- the length of time a good should be expected to last
- when the cost of returning goods is 'significant', and, therefore, to be paid by the supplier.[33]

More general issues about how the consumer guarantees provisions apply include:

- whether the consumer guarantees should be extended to goods and services currently excluded, including:
  - financial services (addressed in the ASIC Act)
  - goods and services bought at auction
  - services provided by qualified architects and engineers who are excluded from the consumer guarantee relating to fitness for a particular purpose
- whether unsafe products should be deemed to have a 'major' defect
- the costs and benefits of requiring businesses to provide consumers with written notification of their rights, and what form this notification should take[34]

32 See Part 2, Division 2, Subdivision E of the ASIC Act.

33 Currently, consumers are responsible for returning goods that fail to comply with a consumer guarantee unless the cost of doing so is 'significant' due to the size, weight or difficulty of removal. In this instance, the business must organise and pay for the return or exchange.

- where a good is damaged or lost in transit to the consumer, uncertainty about how the consumer guarantees may apply to the supply of that transport service
- whether the remedies are appropriate, or should be tailored, for digital content (such as music and app downloads), noting that:
  - there may be characteristics of certain digital and non-tangible content that may challenge the distinction between a good and a service, or make it difficult to classify as either
  - the different remedies for goods or services may not necessarily be tailored to the characteristics of digital content. For example, once downloaded, the digital content may be difficult to 'return' in exchange for a refund or replacement [see Boxes 4 and 17]
- whether there are barriers stopping consumers enforcing their rights in a timely and cost-effective way [see section 3.3 on access to remedies]
- whether regulators should have broader powers to take representative actions on behalf of consumers
- whether businesses are adequately informed about consumer guarantees, and understand how this relates to their own store policies [see case study 6]
- the effectiveness of the indemnification provisions, which require the manufacturer to compensate suppliers for costs associated with defects that are the manufacturer's fault. This promotes the resolution of consumer issues by suppliers (who are usually more accessible to consumers than manufacturers) while placing liability on the party most at fault.[35]

There are also a range of issues with **extended warranties** offered by suppliers or retailers of goods and services, which claim to offer rights that are above and beyond, or more certain than, the consumer guarantees. These issues include:

- if, at the point of sale, consumers are being adequately informed of their existing consumer guarantee rights, so that consumers can assess the value of additional warranty products
- if extended warranties should be subject to a cooling-off period (as applies in New Zealand, for example).

Case study 5: Consumer redress for faulty motor vehicles — Chrysler

The ACCC investigated Fiat Chrysler Australia (Chrysler) following a number of customer complaints about motor vehicle faults and how their complaints were handled by Chrysler and its dealers, including delays in sourcing spare parts. Chrysler acknowledged these concerns and, in September 2015, undertook to:

- establish a consumer redress program
- review its handling of previous complaints
- implement a compliance program, including a complaint handling system.

In complying with consumer guarantees, the ACCC's Chairman stated that '... all car manufacturers and suppliers, including dealers, need to think beyond the initial sale and invest in their aftersales care'.

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34 See section 102 of the ACL, and regulation 90(1) of the *Competition and Consumer Regulations 2010*.

35 See section 274 of the ACL.

Case study 6: Representations about consumer guarantee rights — Apple

The ACCC investigated Apple Pty Limited (Apple) following concerns that a number of false or misleading representations had been made about consumer guarantee rights, including that Apple was not required to provide a refund, replacement or repair in circumstances where these remedies were required. The ACCC was concerned that Apple was applying its own warranties and refund policies effectively to the exclusion of the consumer guarantees.

Apple has since acknowledged these concerns and worked with the ACCC to resolve them. It committed to a number of compliance measures, including:

- continuing to offer a consumer redress program
- continuing to implement a program to improve compliance with the ACL
- continuing to monitor and review its compliance with the ACL
- maintaining a website aimed at providing information and clarifying the differences between the coverage provided by the ACL, and Apple's voluntary limited manufacturer's warranty
- continuing to make available in its retail stores in Australia copies of the ACCC's 'Repair, Replace, Refund' brochure
- providing equivalent remedies to those available under the ACL's consumer guarantee provisions to consumers who return an Apple product within 24 months of purchase.

Box 4: Digital products — consumer guarantees and unfair contract terms protections

Consumers are buying more digital goods and services, and hybrid digital/physical products. Examples include cloud computing (email, social media, online file storage), and devices sold with a subscription to a service from the device manufacturer (such as Apple) or a telecommunications provider. In other cases, traditional models involving the sale of a physical item have been replaced with a digital version which is not legally equivalent. For example, an e-book may not include rights enabling it to be sold or gifted to another.

Consumers' ongoing use and enjoyment of digital products raises different issues. Consumers may have to pay an ongoing fee to continue to use and enjoy the product they have 'purchased' and may also rely on a service provider continuing to provide them access to those products. For example, it may only be possible to continue enjoying a movie purchased online if the relevant cloud-based server where it is stored remains accessible.

Consumers are also relying more heavily on email, social media and storage services provided online and based overseas. While difficult to measure in monetary terms, the value of a person's photos, videos, emails or other material stored online may be immense. Some services (which may be funded by an advertising model) are notionally 'free' for the consumer, and the consumer's rights to continued access (or at least adequate notice of any plans to discontinue such a service to allow data to be transferred to another service provider) are untested.

This suggests it is timely to consider what rights and responsibilities consumers should have for digital goods and services, including whether the current consumer guarantees and unfair contract terms regimes are adequate, or sufficiently tailored to digital content.

2.3.4 ‘Lemon’ laws — where a good will not function despite repeated repairs

Several recent reviews have considered whether a **‘lemon’ laws** provision is warranted, either specifically for motor vehicles or more generally [see Box 5].

There are a number of definitions of a ‘lemon’ [see case study 6]. A 2009 report by the Commonwealth Consumer Affairs Advisory Council defined a ‘lemon’ as a product that ‘simply will not function as intended, for reasons that are beyond the expertise of a reasonable repairer to remedy’.[36]

Currently, under the consumer guarantees provisions, consumers have rights of redress when purchasing new and used motor vehicles. Where there is a ‘major’ failure to comply with the consumer guarantees the consumer can choose a refund or replacement, or ask for compensation if the vehicle falls in value. Where it is not a major failure and can be remedied, the supplier can choose between providing a repair, replacement or refund.

Issues

Various issues have been raised around the possible challenges in applying consumer guarantees to motor vehicles. While not unique to motor vehicles, there may be particular issues in establishing:

- whether the failure to comply with the guarantee is a ‘major’ failure, and what is a reasonable timeframe for repair
- whether a failure is ‘major’ if it involves multiple non-major failures, multiple repair attempts, or where the cost of being without the vehicle is significant
- whether the supplier or the manufacturer is responsible for remedying the failure based on the advice provided by the supplier and/or manufacturer.

A ‘lemon’ law for motor vehicles could impose requirements for remedies and responsibilities over and above the general remedies for other goods. It could also clarify the responsibilities and obligations of suppliers and manufacturers about how to remedy faulty or defective vehicles.

An alternative approach was noted in the Queensland Parliament’s Legal Affairs and Community Safety Committee inquiry report, where manufacturers could establish an independent industry-based dispute resolution process. This could include funding an independent assessor, expert panel and arbitrator who could order the manufacturer to repair the vehicle, buy back the vehicle and/or reimburse or compensate the consumer.

Box 5: Recent reviews into ‘lemon’ laws in Australia

A 2015 inquiry by the Queensland Parliament’s Legal Affairs and Community Safety Committee (the Committee) found insufficient evidence to conclude that ‘lemon’ motor vehicles are a prevalent issue, however, for consumers who purchased what they consider a ‘lemon’, it is an issue of great significance, with significant health and financial costs.

The Committee also found there were issues with the ability of the ACL and other state-based legislation to assist consumers who had purchased ‘lemons’, including:

- a lack of clarity in the ACL as to what constitutes a ‘lemon’

36 Commonwealth Consumer Affairs Advisory Council, *Consumer rights: Reforming statutory implied conditions and warranties Final Report*, October 2009, www.ccaac.gov.au/files/2012/10/ConsumerRights_FinalReport.pdf, page 92.

- demarcation issues, particularly where a consumer attempts to achieve redress initially with a dealer
- adjudicators lacking technical expertise
- the courts and tribunals lacking investigatory functions
- the financial and emotional cost to consumers of seeking legal redress.

The Committee recommended there be consideration of a national approach to the issue, and for this to be included in the ACL Review. It also recommended incorporating clear and practical definitions and provisions into any nationally consistent laws applicable to new 'lemon' motor vehicles, including:

- mandatory time and repair limits
- clarity as to when a supplier or manufacturer must repair, refund or replace a motor vehicle
- an adequate definition of what constitutes a 'lemon'.

In 2009, before the ACL's introduction, the Commonwealth Consumer Affairs Advisory Council (CCAAC) considered the case for introducing a separate 'lemon' law as part of its review of statutory implied conditions and warranties. It found the case for a separate law had not been made, but suggested Australian governments monitor the effectiveness of consumer guarantees as they apply to motor vehicles. CCAAC recommended that consumers should have access to low-cost dispute resolution mechanisms, and that state and territory governments consider the appointment of specialist adjudicators and assessors to deal with disputes.

In Victoria, Janice Munt MP, with the assistance of Consumer Affairs Victoria, conducted public consultation in 2007-08 into motor vehicle 'lemon' laws. This review was conducted before the introduction of the ACL, and considered a statutory right to obtain a refund or replacement, where a dealer, manufacturer, or importer is unable to repair a vehicle's defects within a reasonable period.

Box 6: 'Lemon' laws in the United States

In the USA, 'lemon' laws generally focus on a breach of a manufacturer's (express) warranty for new vehicles, compelling automobile manufacturers to give purchasers a refund or a replacement vehicle if, after a reasonable number of attempts at repair, an automobile fails to conform to the terms of a warranty. State-based 'lemon' laws apply to new cars which suffer a 'non-conformity', which is defined as a 'defect or condition which substantially impairs the use, value or safety of the vehicle'.

The definition of a 'lemon' or 'non-conformity' differs among states, but is generally based on the number of unsuccessful repairs or days out of service within a specified time period or distance travelled.

For example, New York defines a 'lemon' as four unsuccessful repair attempts of the same problem, or 30 or more calendar days out of service, within the shorter of two years or 18,000 miles. In Ohio, eight minor defects are sufficient.

Under the 'lemon' laws, consumers are generally able to sue for breach of warranty. However, many states require that parties undergo informal dispute resolution before going to court. If the vehicle is found to be a 'lemon', the manufacturer must offer a replacement vehicle or refund the purchase price (usually with a provision for a mileage reduction).

The duty to repair extends beyond the warranty period and in some cases, the costs of legal fees must be met by the manufacturer. The 'lemon' laws provisions do not prevent purchasers from seeking other remedies in relation to the failure, such as compensation.

2.3.5 Providing consumers with rights when a salesperson approaches uninvited (Part 3-2, Division 2)

The ACL provides consumers with specific rights and protections when entering into an agreement to acquire goods or services in situations where the supplier was not invited by the consumer, such as in a door-to-door or telemarketing situation. These rights and protections are not available in other retail contexts and also impose specific obligations on businesses engaged in these sales practices.

The **unsolicited consumer agreements** provisions were introduced to protect consumers in circumstances where they may be subject to additional vulnerability or disadvantage due to the nature of the sales process. For example, the consumer may be subject to aggressive or high-pressure selling techniques, and lack sufficient information to make an informed decision. This is particularly the case when consumers are generally unprepared to transact, such as when they are in the sanctuary of their home [see case study 7 and Box 7].

The provisions only apply to agreements for goods or services that exceed $100 in total, or where the value is unknown at the time the agreement is made.

The ACL requires suppliers to negotiate an agreement within certain calling hours, make certain disclosures about the contract, and provide a 10-day cooling-off period that allows consumers to change their mind and cancel the contract.[37] A breach can result in a financial penalty of up to $50,000 per contravention.

Issues

Issues that have been raised about unsolicited consumer agreements include:

- whether the provisions are flexible enough to deal with emerging business models, including whether it is appropriate to maintain the distinction between 'solicited' and 'unsolicited' sales [see section 4.3].
- whether the provisions should apply to commercial companies collecting donations on behalf of charities (currently, donations to charity where no sales are involved are not unsolicited consumer agreements)
- whether the provisions should also apply to business consumers
- whether the exemption allowing goods up to the value of $500 to be supplied during the cooling-off period is appropriate and, if so:
  - whether it should it be extended to the supply of services during the cooling-off period
  - whether suppliers should be allowed to accept or require payment for goods during the cooling-off period
- whether a consumer should be required to 'opt in', within a certain time and without further contact from a supplier, to confirm their decision to enter into the agreement (rather than 'opt out' under a cooling-off period).

37 During the 'cooling-off' period, a good or service cannot be supplied and the business cannot accept or require payment. The prohibition of supply does not apply to goods up to the value of $500 which allows a consumer to take immediate delivery or to 'test' the good before they pay for it (see regulation 95, *Competition and Consumer Regulations 2010*).

Case study 7: Unlawful door-to-door selling practices — Origin Energy

In March 2015, the Federal Court ordered Origin Energy Electricity Limited (Origin) to pay $2 million in penalties. The Court found Origin had breached the ACL's provisions regarding unsolicited consumer agreements, unconscionable conduct, undue harassment or coercion and making false or misleading representations. Origin's marketing company, SalesForce Australia Pty Ltd (SalesForce), was ordered to pay $325,000 in penalties.

In proceedings brought by the ACCC, the Court found that Origin and SalesForce, through sales representatives acting on their behalf, had called on 10 consumers at their homes in New South Wales, Victoria, Queensland and South Australia to negotiate electricity contracts with Origin. The sales representatives had breached a number of the unsolicited consumer agreement provisions by:

- failing to clearly advise consumers that the purpose of their visit was to seek the consumer's agreement to enter into an electricity contract with Origin
- failing to leave the premises immediately on the request of the consumer, including one instance where the consumer had a 'do not knock' sticker displayed
- calling on consumers outside permitted hours
- failing to inform consumers in writing of their right to end their contract within the cooling-off period.

In addition to the financial penalties, Origin and SalesForce were ordered to jointly publish a corrective newspaper notice, maintain compliance programs and contribute to the ACCC's costs.

Box 7: Report into door-to-door sales practices

A 2012 report prepared for the ACCC found the most common types of door-to-door sales are for:

- energy (electricity and/or gas supply)
- pay TV services
- telecommunications
- media (particularly newspaper subscriptions)
- solar energy (especially solar panels)
- other types of sale (including home appliances, home insulation, security systems, educational software, club memberships, photography and first aid products).

Due to the low set-up costs compared with 'bricks and mortar' sales practices, the report noted that door-to-door sales can be an effective mechanism for new businesses to enter the market.

Mostly, traders reported that door-to-door sales do not generally involve the targeting of specific customers, given the need to call or visit many homes in a given day to generate sales. However, one in five sales agents interviewed for the report described sales practices specifically targeted at elderly, low income, or other vulnerable consumers.

Other issues included the failure to provide consumers with adequate information on their rights, including altering or removing disclosure statements in some way, or exaggerating claims about the good or service.

2.3.6 Other consumer rights in transacting with a supplier (Part 3-2, Divisions 3 and 4)

In addition to consumer guarantees and the unsolicited selling provisions, the ACL provides consumers with a range of other rights when entering into a consumer transaction:

- requiring **lay-by agreements** to be transparent and in writing, and allowing the consumer to cancel the agreement at any time before receiving the goods[38]
- requiring the supplier to provide the consumer with **proof of the transaction** (where the total price is $75 or more) as soon as practicable after supplying goods or services[39]
- allowing a consumer to request an **itemised bill** from the supplier, within 30 days of receiving the service (or an invoice). This must be provided free of charge and within 7 days[40]
- requiring that suppliers or manufacturers who provide a **warranty against defects** for goods or services to do this in writing and in a prescribed form.[41]

2.3.7 Protecting consumers from unsafe products (Part 3-3)

The ACL's **product safety regime** provides a framework for identifying, preventing, stopping supply and removing unsafe, or potentially unsafe, consumer goods and product-related services (collectively referred to in this Issues Paper as 'products').[42] It also includes the right to compensation where the defect causes loss or damage. The product safety regime complements the consumer guarantees provisions about product quality, and represents a key component of Australia's broader product liability laws, including negligence laws.

The product safety regime seeks to reduce individual harm and broader costs to the community caused by unsafe products.[43] Individual harm could include physical and psychological injury, lost income, and costs associated with medical treatment. Community costs are things such as demands on the public health and welfare systems, and impacts on economic productivity.

In effect, the ACL's provisions on product liability, recalls, and false or misleading representations make suppliers responsible for the safety of the products they make, source and supply to consumers. This general protection supports specific protections for particular products as necessary, including:

- **mandatory safety standards** — seek to prevent or reduce the risk of injury by specifying various safety requirements for certain products, such as the way they are made, what they contain, any tests they need to pass, and warnings and instructions to be included. Standards are declared by the federal Minister

38 A 'lay-by agreement' allows a consumer to buy a product and pay for it in multiple instalments before taking it home.

39 Examples of 'proof of transaction' are an invoice, cash register receipt and credit card statement

40 An 'itemised bill' must be clear and legible and may include the number of hours of labour and hourly rate, materials used and how the price was calculated.

41 A 'warranty against defects' is a representation that (conditionally or under specific conditions) the defective good or service will be repaired, replaced, provided again, rectified or refunded.

42 'Products' refers to consumer goods and the services relating to their supply (including installation, maintenance, repair, cleaning, assembly and delivery).

43 See *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, 30 April 2008.

- **temporary and permanent bans** — can be placed on a consumer product where there is a risk it may cause serious injury, illness or death. It is unlawful to supply, manufacture or possess a banned product[44]
- **product recalls** — the product safety framework provides a single national approach to issuing and enforcing recalls of hazardous consumer products, or products that do not comply with a mandatory standard or ban. Recalls remove the product from the market and can be initiated voluntarily by suppliers, or in response to an order by the federal, state or territory Minister
- **safety warning notices** — these notices warn the public that a good or service is under investigation or poses a safety risk, and are published on the Product Safety Australia website[45]
- **mandatory reporting** — the ACL requires suppliers to report certain deaths, serious injuries, or illness associated with consumer products [see case study 9].

Supplying products in breach of a ban or safety standard can result in financial penalty of up to $1.1 million.[46]

The intention of Australia's product safety regime is to:

- deliver appropriate levels of consumer safety
- maximise benefits and choice for consumers
- minimise regulatory burden for suppliers and provide certainty about their obligations
- foster competition in the supply of regulated products
- ensure that regulation is efficient, appropriate and responsive.

Issues

Issues that have been raised about the approach to adopting and managing product safety standards include:

- whether there are ways to improve the processes for adopting Standards Australia's voluntary standards and 'trusted' international standards that already exist in the international market [47] [see Box 8]
- whether there are ways to minimise the delays in updating a safety standard [see case study 8]
- whether there are ways to improve businesses' access to relevant standards

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44 An interim ban can be imposed by the relevant Commonwealth, state or territory minister where they consider the good (or its use) may or will injure someone, or to align with a similar ban. It only applies to the minister's jurisdiction (however an interim ban imposed by the Commonwealth Minister applies throughout Australia) and lasts for 60 days but can be extended for a further 60 days. A permanent ban can only be imposed by the Commonwealth Minister, applies nationally, and can last for up to 10 years. It is normally published with affected suppliers given the opportunity to meet with the ACCC.

45 See www.productsafety.gov.au.

46 See section 224 of the ACL for a full list of financial penalties.

47 'Trusted international standards' are those safety standards that already exist in an international market that can be trusted by the Australian Government and the community. Whether the process or certification is 'trusted' will depend on factors such as the overseas authority's track record in regulating, transparency of the assessment process and how actively the quality of approvals and risk assessment are maintained.

- whether, in appropriate circumstances, limited permits or waivers could be issued to supply products varying from the exact requirements of a safety standard.

More general issues about product safety include:

- whether there should be a prohibition against the supply of unsafe goods (as well as against non-compliance with a safety standard or a ban) [see case study 9]
- the adequacy of interim (120-day) bans and their interaction with permanent bans where they relate to the same product, including whether 120 days for such bans is enough to allow for ongoing solutions to be implemented
- the effectiveness of the current approach to product recalls and remedies
- whether it should be compulsory to rectify product-related services that have resulted in an unsafe consumer good
- whether it is desirable to introduce a register of customer details for major purchases to facilitate later recalls (and using other data sources such as motor registries)
- whether an unsafe product should be deemed to have a 'major' failure, for the purposes of the consumer guarantees provisions [see section 2.3.3].

Box 8: Australia's product safety regime and international standards

To promote transparency, and ensure international standards are suitable in Australia, the ACCC has published criteria for accepting 'trusted' international standards in making a safety or information standard and for imposing bans.[48]

However, to implement a mandatory safety standard in Australia based on a 'trusted' international standard, either:

- Standards Australia must prepare or approve a corresponding Australian Standard, which the federal Minister can declare by reference, or
- the federal Government can make or change regulations to specify, in detail, the proposed requirements in the international standard. This requires the federal Government to undergo the lengthy regulatory process, which can create unnecessary duplication, as well as costs and delays for businesses.

The Australian Government has stated in its *Industry Innovation and Competitiveness Agenda: An Action Plan for a Stronger Australia*, published on 14 October 2014, that:

> … if a system, service or product has been approved under a trusted international standard or risk assessment, then Australian regulators should not impose any additional requirements, unless there is a good and demonstrable reason to do so. This will reduce costs and delays for businesses, increase the supply of products into the Australian market and allow regulatory authorities to focus on higher priorities.

48 See: www.productsafety.gov.au/content/item.phtml?itemId=1014180&nodeId=8c5e403e1c3370083bd125af4e1a6f42&fn=ACCC%20policy%20principle%20%20International%20standards%20for%20the%20safety%20of%20consumer%20products%20-%20criteria%20for%20acceptance.pdf.

Case study 8: Updating Australia's mandatory safety standard for children's toys

The voluntary Australian standard for the safety of children's toys forms the basis of Australia's mandatory safety standard. There are 11 parts to the voluntary standard and all are subject to review and update, with the first part (AS/NZS ISO 8124.1) currently undergoing review with the updated standard to be the fifth version since 2010. The process involves a specialist committee of stakeholders, including industry and safety groups, and all proposed changes are subject to a public consultation process, are rarely controversial and usually strongly supported by stakeholders.

The volume and regularity of changes in the voluntary standard can result in multiple points of difference with the mandatory standard which can create confusion for suppliers regarding which requirements are in force and which compliance tests are appropriate.

An alternative approach is the model set out in the *Therapeutic Goods Act 1989* (Cth), which allows for the underlying referenced standard to automatically update when a change is made to the voluntary standard — 'by applying, adopting or incorporating, with or without modification, any matter contained in an instrument as that instrument is in force from time to time'.[49]

Case study 9: A prohibition against unsafe goods — the EU example

The Australian product safety system relies on specific protections (in the form of prescribed standards) rather than a general protection against unsafe products. In effect, the ACL prohibits non-compliance with a safety standard, but does not prohibit the supply of unsafe goods without a relevant standard, even if serious injury or death results, or there is severe negligence on the supplier's part.

In contrast, the European *General Product Safety Directive 2001/95/EC* requires Member States to have requirements with generic application, ensuring a high level of product safety for consumer products that are not covered by industry-specific legislation. The Directive also complements the provisions of industry-specific rules which do not cover certain matters, such as producers' obligations and the regulators' powers and tasks.

49 See section 63(4)(b) of the *Therapeutic Goods Act 1989* (Cth).

Case study 10: Product safety — Woolworths

On 5 February 2016, the Federal Court ordered Woolworths Limited (Woolworths) to pay a $3 million penalty for breaches of the ACL relating to safety issues with house brand products sold in Woolworths supermarkets, Big W and Masters stores. Woolworths was also ordered to:

- contribute to the ACCC's costs
- publish information about product safety and recalls on its website and smartphone app
- implement an upgraded product safety compliance program.

Part of the penalty ($57,000) was for failing to provide mandatory reports of injuries, the first penalty of this kind in Australia. Woolworths admitted to eight instances where it had failed to report incidents of serious injury or illness caused by the use of consumer goods it had supplied, within the required two days.

The rest of the penalty was for engaging in misleading or deceptive conduct and making false or misleading representations about the safety of five of its house-brand products — a deep fryer, drain cleaner, safety matches, a padded flop chair and a folding stool.

Of particular significance was the fact that Woolworths became aware of serious injuries resulting from defects in these products, but failed to act (by removing the products from sale and recalling them) within a reasonable period of time. These products were subsequently removed from sale and recalled, but not always before the defects resulted in further injuries. Accordingly, the Court found that Woolworths had misled consumers as to the suitability of the products.

In relation to two products, the flop chair and the folding stool, the Court also found that Woolworths had made false or misleading representations about the maximum usable weight for these products.

This judgment confirms that suppliers must take reasonable steps to assess products, and to promptly withdraw and recall them when they identify them as unsafe.

Specialist regulatory regimes

Various issues have been raised about the role of the ACL and ACL regulators for products that fall within **specialist regulatory regimes**.

Governments have established specialist regulatory regimes to provide an effective response to safety issues for specific types of complex products or where safety is paramount (such as electrical safety, motor vehicles, food, therapeutic goods and building products).

Specialist regulators have specific industry experience and expertise, specialist networks and technical skills relevant to the subject matter of their regulatory framework, making them ideally placed to be the initial responder to safety issues for products that fall within their regime.

The ACL's product safety regime is much broader in scope, with ACL regulators responsible for addressing unsafe consumer products in the general marketplace. Additionally, the ACCC administers the Product Safety Recalls Australia website[50] that provides information about all safety recalls undertaken in Australia.

Given the broad scope of the product safety regime, there may be exceptional circumstances where further actions are required from regulators about a particular product, despite earlier action by specialist regulators [see case study 11]. This may create some ongoing uncertainty for consumers and industry as to which regulator has primary responsibility for incidents of non-compliance.

While communication and cooperation between specialist and ACL regulators helps mitigate uncertainty, there is scope to provide greater clarity by establishing specific protocols for handling an unsafe product that is captured by both regimes. Ordinarily, where the product falls within the scope of a specialist regulatory regime, the specialist regulator will be the lead regulator on product safety matters.

To improve communication and cooperation, ACL regulators have recently taken steps to map the various speciality regulatory regimes. This will assist ACL regulators to more quickly and effectively refer future matters to specialist regulators with the relevant experience, networks, and expertise.

The roles of specialist safety regulatory regimes are part of the terms of reference for an independent assessment of the administration and enforcement arrangements underpinning the ACL [see Box 11].

Case study 11: Product safety — recall of Samsung washing machines

NSW Fair Trading is leading a recall, in its capacity as the NSW electrical safety regulator, and working closely with the ACCC to address safety concerns associated with six models of Samsung top loader washing machines that were sold nationally between 2010 and 2013. The affected units have an internal fault where condensation can penetrate an electrical connector causing deterioration which may in turn cause a fire.

Samsung continues to work with regulators on the recall, and in September 2015 issued a media statement clarifying that consumers are entitled to refunds or replacement for recalled washing machines, following reports that some consumers were only offered a repair.

Regulators are advising consumers that where there is a major safety failure in breach of the consumer guarantee of acceptable quality, consumers have a choice of remedy, which is not overtaken by the electrical safety recall.

This is an example of where an electrical safety issue involving specialist regulators also raises broader issues about the interaction of safety recall remedies and consumer guarantees.

50 See www.recalls.gov.au.

2.4 Other issues

Questions

Addressing 'unfair' commercial practices (2.4.1)

Interaction between the ACL and the ASIC Act (2.4.2)

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?
16. Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?
17. Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

2.4.1 Addressing 'unfair' commercial practices

Currently, the ACL does not contain a general prohibition against **unfair commercial practices**. This has raised issues about whether there are aggressive commercial practices or business models resulting in significant risks of consumer harm that are not adequately addressed by the ACL (for example, through the unconscionable conduct, false or misleading representations, or unfair contract terms provisions).

Various issues have been raised about whether certain types of business models are only viable because they take advantage of a consumer's reduced ability to protect their own interests in a transaction. In considering whether 'unfairness' is inherent in these models, it may be helpful to distinguish between the types of behaviour and harm associated with:

- business models that effectively depend on a class of consumers that cannot access, or are not aware of, alternative goods or services to meet their needs, perhaps because alternatives are too costly upfront, or require high literacy skills to access or understand — in this situation, it may be that the class, as a whole, is more vulnerable to consumer harm
- business models that market goods or services to consumers with characteristics that tend to be associated with consumer harm (such as physical or psychological injuries) — however, in this situation, individual consumers may still have choices, and may not necessarily be vulnerable as a class or in all transactions
- business models based on ongoing fees, or fees significantly disproportionate to the cost of providing the good or service — while these models may not necessarily target specific types of consumers, businesses may have little incentive to adequately inform consumers about fee structures, or whether the good or service meets a consumer's needs.

In 2008, the Productivity Commission examined the need for a general prohibition against unfair commercial practices in its *Review of Australia's Consumer Policy Framework*, concluding that:

> … a general provision against unfairness might be more conceptually neat than practically useful. Nevertheless … it would be prudent for Australian policymakers to see how the European model develops, and only to consider the option of pursuing a general unfair practices provision at a later time if warranted by strong evidence in its favour.[51]

Box 9: Prohibiting unfair commercial practices — some overseas examples

The European Union's *Unfair Commercial Practices Directive 2005* provides both a broad and a prescriptive regime for regulating 'unfair' business-to-consumer commercial practices. It provides a general prohibition against unfair commercial practices, prohibitions against misleading and aggressive practices, and lists 31 specific practices that are prohibited in all circumstances.

In the United States, section 5 of the Federal Trade Commission Act prohibits 'unfair or deceptive acts or practices in or affecting commerce'. An act or practice is considered 'unfair' where it:

- causes or is likely to cause substantial injury to consumers
- cannot be reasonably avoided by consumers
- is not outweighed by countervailing benefits to consumers or to competition.

In applying the law, the Federal Trade Commission will also consider if the act or practice violates established public policy, and is unethical or unscrupulous.

2.4.2 Interaction between the ACL and ASIC Act

ASIC took sole responsibility as the national regulator for consumer protection in financial services in 1998 and for credit in 2002.

As recommended by the Financial System Inquiry (the Wallis Committee Report 1997), consumer protection provisions comparable to those in Parts IVA and V of the former TPA were inserted into the ASIC Act and restricted to 'financial services'. The purpose of this was to ensure that the ASIC Act 'replicated' the consumer protection provisions of the TPA.[52]

This arrangement was continued under the *Competition and Consumer Act 2010* (Cth), where financial services and products are explicitly excluded from provisions of the ACL, as applied at the federal level.[53]

In implementing this arrangement, the mechanism used to determine what constitutes a 'financial service' under the ASIC Act is complex and difficulties can arise in determining whether the conduct under investigation falls within the scope of the ACL or the ASIC Act.[54]

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51 *Review of Australia's Consumer Policy Framework,* Productivity Commission Inquiry Report No.45, 30 April 2008, Vol 2 page 141.

52 The sections primarily relied upon by ASIC to enforce its consumer protection responsibilities (including sections 12CA, 12CB, 12CC, 12DA and 12DJ of the ASIC Act) turn on whether the conduct was relevantly connected with 'financial services'.

53 See section 131A of the *Competition and Consumer Act 2010* (Cth). Note that this exclusion does not affect the powers of state and territory regulators with regard to the ACL, as applied at the state and territory levels.

54 For example, see *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164.

3 ADMINISTERING AND ENFORCING THE AUSTRALIAN CONSUMER LAW

Terms of reference

The ACL Review will assess whether the existing institutional, administrative and regulatory structures underpinning the ACL, such as the 'multiple regulator' model and the coordinated enforcement, education, policy, research and advocacy approach of the federal and states and territories, are effective and efficient in supporting a single national consumer policy framework.

3.1 Proportionate, risk-based enforcement

Question

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

The ACL operates under a single law, multiple regulator arrangement (the **'multiple regulator' model**). This means that the ACL is jointly administered and enforced by the ACCC and state and territory consumer affairs agencies, with ASIC administering similar provisions under the ASIC Act relating to financial services [see Box 10].

An independent assessment of the 'multiple regulator' model will be undertaken as part of this review and will identify opportunities to improve the model [see Box 11].

In administering and enforcing the ACL, regulators cooperate to make the best use of resources and maximise public benefit by targeting their activities at priority areas or where there is evidence or likelihood of consumer harm. This helps meet the national consumer policy framework's objective to 'promote **proportionate, risk-based enforcement'**.

Best practice regulation suggests that:

> Sound regulatory administration is risk-based and should generally be proportionate to the risk of non-compliance and regulatory failure. Adopting a risk-based approach can assist a regulator in minimising compliance costs for regulated entities, streamlining interaction between them and regulated entities, and enhancing the benefits derived to the community.[55]

To support proportionate, risk-based enforcement, there needs to be:

- a variety of remedies and offences in the ACL to ensure flexibility and proportionality in enforcement [see sections 3.2.1 and 3.2.2]
- financial penalties that appropriately deter future breaches of the law [see sections 3.2.3 and 3.2.4]

55 *Administering Regulation: Achieving the Right Balance*, Australian National Audit Office, June 2014, page 3.

- a range of non-punitive measures aimed at rectifying the harm caused to consumers [see section 3.2.5]
- opportunities for regulators to tailor their approaches to address local circumstances and to be innovative, while ensuring there is enough consistency to effectively address consumer harm and deter future breaches [see section 3.2.6]
- effective access to remedies for businesses and consumers [see section 3.3]
- appropriate ways for dealing with international business conduct [see section 3.4].

Box 10: The 'multiple regulator' model

In administering the ACL, the national regulator generally focuses on issues with national significant or that result in substantial consumer harm. State and territory regulators typically engage more closely in dispute resolution and enforcement of local issues. Where possible, the regulators should work together to address outstanding issues.

The 'multiple regulator' model provides scope for innovation and diversity in regulatory practices. Rather than having one regulator administer the ACL the same way across the country, it combines the benefits of a coordinated approach with the ability to tailor approaches to local circumstances and to experiment in tackling issues. This allows local innovations to be tested and, if effective, they can be adopted nationally.

For this model to operate effectively, regulators need to communicate, cooperate and coordinate their activities across enforcement, education, and policy and research. Regulators have published an annual progress report, since the introduction of the ACL, on their cooperative activities in these areas at: consumerlaw.gov.au.

ACL regulators

States and territories

ACT Fair Trading — Access Canberra

NSW Fair Trading

NT Consumer Affairs

Queensland Office of Fair Trading

SA Consumer and Business Services

Tasmania Department of Justice — Consumer, Building and Occupational Services

Consumer Affairs Victoria

WA Department of Commerce

National

Australian Competition and Consumer Commission

Australian Securities and Investment Commission (ASIC Act)

Box 11: Independent assessment of the 'multiple regulator' model

The Terms of Reference for the ACL Review require that an independent assessment of the enforcement and administration arrangements of the ACL be undertaken. The assessment will consider:

- the complementary roles played by ACL regulators
- the effectiveness of existing mechanisms in improving the coordination, consistency and collaboration in regulators' approaches
- the roles of specialist safety regulatory regimes and the interaction with ACL regulators
- the implications of changes in resourcing levels and regulator involvement in administering the ACL
- ways to improve the current model to ensure it remains flexible and responsive in addressing new and emerging issues.

The assessment will seek stakeholder feedback and apply a performance evaluation framework consistent with the Memorandum of Understanding agreed by regulators.

Further information about the independent assessment will be available on the ACL website at: consumerlaw.gov.au.

3.2 Effectiveness of remedy and offence provisions

Questions

Distinction between civil and criminal penalties (3.2.1)

Types of ACL penalties and remedies (3.2.2)

Deterrent effect of financial penalties (3.2.3)

Setting and updating maximum financial penalties (3.2.4)

Role of non-punitive orders (3.2.5)

Jurisdictional differences in the enforcement 'toolkit' (3.2.6)

19. Are the remedy and offence provisions effective?
20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches?
21. Is the current method for determining financial penalties appropriate?
22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?
23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?
24. Do you have views on any of the issues raised in section 3.2?

Providing accessible and timely redress to consumer harm is an operational objective of the national consumer policy framework. Accordingly, the ACL's enforcement toolkit must be appropriate and adequate to achieve this objective.

3.2.1 Distinction between civil and criminal penalties

The ACL distinguishes between breaches attracting civil penalties and remedies, and offences subject to criminal penalties.

Civil penalties and remedies are court orders, including financial penalties, imposed where a court has found a person has breached certain provisions of the ACL. Courts apply the 'balance of probabilities' standard of proof to civil matters. Civil penalties are designed to act as a deterrent to businesses breaching the law, remedy the breach and provide compensation to victims.

Civil penalties may deter businesses with an ongoing presence and reputation, however they may not be enough to deter less scrupulous operators.[56]

The ACL also assigns criminal liability for certain breaches,[57] for example, certain false or misleading business practices. Criminal liability usually arises where the breach is considered serious, either because of the damage caused or because the nature of the conduct warrants a criminal sanction. In such instances, certain matters can be referred to a jurisdiction's Director of Public Prosecutions who can take action for a suspected breach of a criminal prohibition.

3.2.2 Types of ACL civil penalties and remedies

A court can impose a range of civil penalties and remedies for a breach of an ACL provision, except for misleading or deceptive conduct [see case study 1).[58] These provide for a graduated series of sanctions and include:

- **financial (pecuniary) penalties**
- **injunctions** — ordering the person or business to stop the conduct breaching the law
- **compensation orders** — provided to those suffering loss or damage as a result of the breaching conduct
- **orders to redress** — provided to non-party consumers regarding the loss or damage they have suffered
- **non-punitive orders** — for example, for the person to establish a compliance or education and training program to mitigate against future breach
- **adverse publicity orders** — requiring the person to publicly disclose certain information regarding their breach
- **disqualification orders** — disqualifying the person from managing corporations for a specified period.

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56 For example, see www.accc.gov.au/media-release/peter-foster-sentenced-for-contempt-of-court.
57 See Chapter 4 of the ACL.
58 See Part 5-2 of the ACL.

A court determines the penalty or remedy after considering the nature and extent of the act or omission, the circumstances in which it occurred, any loss suffered, and whether the person has previously engaged in such conduct. A financial penalty is not to exceed the amount specified in the ACL.[59]

In addition to a court-determined penalty or remedy, ACL regulators can also accept court-enforceable undertakings, which, if breached, would allow the regulator to apply to the court for an order requiring the business to comply. Failure to comply with a court order may lead to fines or imprisonment for contempt of court.

Regulators may also be able to issue infringement notices, notices requiring claims to be substantiated (substantiation notices), and public warning notices. These can be significant steps for businesses seeking to maintain their reputations.

Issues

Issues that have been raised about the nature and range of the ACL's penalties and remedies include:

- whether the same penalties and remedies should be available in relation to both misleading or deceptive conduct, and false or misleading representations [see Box 12]
- the appropriateness of the current civil penalties and remedies in the context of 'phoenix' companies [see Box 13].

Box 12: ACL penalties and remedies for misleading or deceptive conduct

Section 18 of the ACL provides a general prohibition against 'misleading or deceptive conduct' applying to all forms of business conduct across all sectors of the economy. Section 29 also prohibits specific types of false or misleading representations, including that the goods are of a particular standard or quality or come from a particular place of origin. Part 2, Division 2, of the ASIC Act contains similar prohibitions relating to financial services.

While the misleading or deceptive conduct provisions are broad in scope and can include silence or omissions, sections 18 and 29 can overlap in some areas and, in many cases, there is little or no difference between the actual harm caused by a breach. However, the provisions have different purposes and different penalties — the financial penalties in Part 5-2 are available for a breach of false or misleading representations but not for a breach of the prohibition against misleading or deceptive conduct.

Nevertheless, issues have been raised about whether those differences are enough to warrant a different approach to the available penalties and remedies.

Box 13: 'Phoenix' companies

A 'phoenix' company emerges from the collapse of another, with assets shifted from the former company to the new company. The new company conducts the same or similar trading activities as the former, and typically involves the same directors and has a similar name to enable it to resume operations while avoiding the liabilities of the collapsed company.

59 See section 224 of the ACL.

‘Phoenixing’ can have wide-ranging harmful effects, leaving consumers and suppliers out of pocket and with little chance of recovering their losses. It is also difficult for ACL regulators to recover penalties and costs. The practice damages the competitive process, by allowing the phoenix company to get an unfair competitive advantage over other businesses that do not breach the law.

Currently, ‘phoenixing’ is generally addressed under Australian law as a breach of directors’ duties which can result in civil and criminal penalties and disqualification orders under the *Corporations Act 2001* (Cth), and potentially private litigation.

The ACL enables actions to be taken against an individual who has breached the ACL. For example, in certain circumstances a regulator can issue a warning notice in relation to a ‘phoenix’ company about conduct which they reasonably suspect contravenes certain provisions of the ACL. However, consumers have limited ability to obtain redress when the company that breached the ACL may have technically been dissolved. Purview

The remedies available under the ACL do not prevent ‘phoenixing’ or address continuing consumer harm where the individuals of the collapsed entity persist in their conduct. The effectiveness of ACL remedies are also limited by:

- the time required to bring court proceedings
- the new entity having committed no offence
- the tendency for assets to be transferred from the former to the new company — while regulators can seek orders to freeze the transfer of assets, by the time regulators are aware of the conduct it is often too late for such orders to be effective
- procedural and evidentiary issues for regulators in using admissions made, or information provided by, the former company or its representatives.

This raises the issue of whether changes could be made to the ACL to address the impact that ‘phoenixing’ activities can have on the effectiveness of the ACL and the ability for individuals to seek redress.

3.2.3 Deterrent effect of financial penalties

For penalties to effectively deter future breaches of the ACL they must adequately reflect not only the nature and gravity of the breach, but also be sufficient to not be considered ‘an acceptable cost of doing business’. A penalty may be considered insufficient if it is disproportionately low compared to the size of a business, or is only a fraction of the potential advantage a business may gain from the conduct in breach.

The maximum financial penalties currently available under the ACL ($1.1 million for companies and $220,000 for individuals) were set when the law was introduced in January 2011. They apply to breaches of false or misleading representations, unconscionable conduct, pyramid selling and product safety.[60]

60 The equivalent maximum penalties in the ASIC Act are 10,000 penalty units for a body corporate (currently $1.8m) and 2000 penalty units for an individual (currently $360,000) — see section 12GBA of the ASIC Act.

Lesser financial penalties apply to other breaches of the ACL, for example, the maximum penalty for a breach of the multiple pricing provisions is $5,000 for a corporation or $1,000 for a person other than a corporation.[61]

ACL regulators can seek a financial penalty from the courts for most breaches of the ACL. It is for the court to consider the circumstances of the breach, and to determine and impose the penalty amount, up to the maximum allowed under the ACL.

Courts will also consider the deterrent effect of a penalty amount, both to the business or individual found to have contravened the law, and to the broader community [see case study 11]. The court will also consider factors such as:

- the nature and extent of the conduct
- any loss or damage suffered
- the circumstances in which the conduct took place
- the size of the business
- if the business has previously breached the ACL
- any penalty amounts imposed for similar breaches in the past.

Case study 12: ACCC v Coles Supermarkets Australia Pty Ltd

On 22 December 2014, the Federal Court, by consent, made declarations that Coles had contravened section 22 of the ACL (unconscionable conduct) and ordered it to pay financial penalties of $10 million and $1.25 million towards the ACCC's costs.

Coles also entered into court enforceable undertakings with the ACCC to provide redress for over 200 suppliers subject to conduct by Coles that the ACCC considered unconscionable.

In the Federal Court's judgment, Justice Gordon stated that while:

> … it is a matter for the Parliament to review whether the maximum available penalty of $1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of $22 billion acts unconscionably … the current maximum penalties are arguably inadequate for a corporation the size of Coles.[62]

3.2.4 Setting and updating maximum financial penalties

A court can choose the size of the financial penalty up to the maximum amount allowed by the ACL. In deciding the penalty to be imposed, courts consider how the case before it compares to previous cases, and the penalty that is appropriate to achieve deterrence. Accordingly, the 'maximum' penalty is rarely imposed in practice, as it is reserved for the most culpable forms of conduct.

The maximum penalty provides a strict cap on the amount a court can impose and in the ACL is expressed as a dollar value. Changing the cap means changing the law.

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61 See section 224 of the ACL for a full list of financial penalties.

62 *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, at 106.

While a fixed-value cap provides certainty for businesses and the community, the maximum amount risks becoming outdated. To address this issue, the ASIC Act and *Crimes Act 1914* (Cth), for example, apply 'penalty units', with the unit value periodically updated to keep pace with inflation.

A different method for determining the financial penalty for a particular breach is used under the competition provisions of the *Competition and Consumer Act 2010* (Cth). Under this method, the penalty takes into account the size of the company and the benefit of the breach, allowing the court to impose:

- on companies, the greater of:
  - the maximum penalty (of $10,000,000)
  - three times the value of the benefit the company received from the breach, or
  - if the benefit cannot be determined, 10 percent of annual turnover in the preceding 12 months.
- on individuals, $500,000.

These methods seek to give courts greater flexibility in tailoring the financial penalty to the severity of the offence, and ensure that the maximum financial penalty does not erode over time.

3.2.5 Role of non-punitive orders

In addition to financial penalties and compensation orders, a regulator can ask the court to issue a non-punitive order for a breach of the ACL. These orders are designed to not punish a supplier, rather to rectify the harm caused, or prevent further harm. They include:

- **probation or compliance orders** — for example, requiring the business to establish a compliance program to identify and reduce the risk of breaching the law and to create a culture of compliance within the business. This may also include an order that the business conduct an internal review of its operations to understands the factors that led to the contravention
- **corrective advertising orders** — requiring the business to place a specified advertisement, often outlining how the business has breached the ACL, and any other orders made by the court
- **orders to disclose certain information**
- **community service orders** — directing the business to perform a service that relates to the conduct, for the benefit of the whole or a section of the community [see case study 12 and Box 14].

The court will only make a non-punitive order if it is appropriate in the circumstances, and the court is satisfied the required action relates to conduct that breached the ACL. For example, a community service order may require a person who has made false representations to make available a training video that explains the ACL's advertising obligations.[63]

63 See section 246(2)(a).

Case study 13: Community service orders — ACCC v Titan Marketing Pty Ltd

In June 2014, the Federal Court found Titan Marketing had breached several provisions of the ACL in selling first aid kits and water filters by door-to-door sales. This included engaging in unconscionable conduct, making false or misleading representations, breaching the unsolicited consumer agreement provisions and failing to specify a single price for goods.

In addition to financial penalties, the Federal Court ordered Titan Marketing to perform the community service of delivering the remaining first aid kits in its possession to Indigenous Community Health Care Centres in two Indigenous communities particularly affected by the conduct.[64]

Box 14: Non-punitive orders

At the federal level probation orders, which can require a business to establish a compliance or education and training program, are often used as part of a settlement of court proceedings by consent. Community service orders are less common but have been used to benefit communities in appropriate cases.

One issue to consider is whether a business given a community service order, but which is not qualified or trusted to give effect to that order themselves, should be allowed or required to hire a third party to give effect to that order.

Another issue is whether the ACL could be extended to facilitate orders to disperse ill-gotten funds to charities or for other public purposes, noting the 'skimming off' actions used in Germany, for example, to disperse the profits gained from breaches of competition law. Using case study 12 as an example, this may have enabled the court to direct Titan Marketing to pay funds to a community centre so that it could run a series of workshops on consumers' rights under the ACL.

3.2.6 Jurisdictional differences in the enforcement 'toolkit'

The 'multiple regulator' model enables regulators to work together to achieve consistent outcomes in applying the ACL's penalties and remedies. At the same time, the model is designed to allow states and territories to tailor their approach to address local circumstances and to test innovations in their jurisdiction, which may subsequently be adopted more widely.

Regulators, both national and state-based, use processes and administrative rules established within their jurisdiction's broader justice system. This can sometimes result in local variations between:

- the powers of Local or Magistrates courts, and County or District courts, to dispense ACL civil remedies, particularly in relation to nationally operating businesses (sometimes requiring separate action in different states and territories)
- the penalties for breaches of ACL non-monetary orders made by Local or Magistrates courts, and County or District courts, exercising their civil jurisdiction

64 *ACCC v Titan Marketing Pty Ltd* [2014] FCA 913.

- jurisdictional limits of Local or Magistrates courts impacting on ACL civil financial penalties and criminal fines
- infringement notice powers and penalty amounts
- powers of regulators to publicly identify recipients of infringement notices
- availability of different remedies for ACL breaches.

Issues

Issues that have been raised about regulators' enforcement 'toolkit' include whether:

- all ACL regulators should be given powers to issue infringement notices, and address breaches of ACL civil remedy orders
- local courts should be empowered to issue ACL civil remedies separately (and not only as part of other proceedings)
- all state and territory regulators (rather than just some) should have the capacity to bring proceedings in the Federal Court to get orders to restrain the misconduct nationally, and not just in their own jurisdiction
- a shared arrangement is needed to provide redress to affected consumers not named as parties in court proceedings (see Box 15].

Box 15: Managing surplus funds from court-ordered ACL remedies — creating an ACL trust?

Where consumers are affected by conduct in breach of the ACL, but are not named as parties in the court proceedings, an ACL regulator can ask the court to order redress on behalf of those consumers (under section 239). Redress could include refunds, contract variations and non-financial redress such as apologies and corrective advertising.

However, in some cases, not all of the available financial redress is distributed to the eligible non-party consumers. In this situation, issues have been raised about how these surplus funds should be dealt with, including whether the business that breached the ACL should keep them or whether they should be used for some other socially beneficial purpose.

Victoria has established a Consumer Law Fund to hold undistributed funds that can be used for other purposes, such as grants for improving consumer well-being, consumer protection, or fair trading. The Commonwealth and a number of states and territories do not have in place specific arrangements for managing surplus funds.

3.3 Access to remedies and scope for private action

Questions

Effective dispute resolution (3.3.1)

Scope for private action (3.3.2)

Reach of the ACL — international private action and recognition of foreign judgments (3.3.3)

25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?
26. What low-cost actions could consumers and businesses more readily use to enforce their rights?
27. Are there any overseas initiatives that could be adopted in Australia?
28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?
29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

3.3.1 Effective dispute resolution

Access to remedies begins with a consumer's ability to understand their problem, the rights and protections that are available under the law, the actions they can take, and the services available to help them resolve their problem efficiently and effectively.

Resolving disputes early prevents legal problems from occurring and escalating, and ensures the time and cost spent dealing with a problem remains proportionate to the nature and severity of the issue. This enables the formal justice system to focus on resolving more complex and intractable disputes.

Accordingly, it is important that:

- problems are generally prevented or avoided in the first place — for example, by providing education and guides for consumers and businesses [see case study 15]
- where problems do occur, they are resolved in a timely manner, and the parties have access to information to help resolve the problem
- where a problem cannot be resolved directly with the supplier, the parties know about, or are directed to, the relevant dispute resolution services
- the dispute resolution services are accessible to all parties
- the problems escalated to a tribunal (or a court) are problems that were not able to be resolved by other means, or which involve widespread or serious harm requiring legal action from regulators
- at the end of any dispute resolution process the parties have access to appropriate remedies that promote consumer wellbeing and address consumer harm [see section 3.2.6]. This includes harm to businesses where the ACL extends its protections to a broader class of persons.

Currently, regulators provide education and information about the ACL through a variety of channels, including websites, social media, apps, and a series of guides to the law.[65] State and territory consumer law regulators also provide dispute resolution services in certain circumstances. A range of other organisations, including consumer advocates, community legal centres, and industry associations, may also provide information, advice, or advocacy services in relation to the ACL.

Australia has a well-established dispute resolution framework. Industries such as financial services, energy, water and telecommunications have ombudsman schemes to help consumers resolve complaints. In financial services, holders of a Financial Services or Australian Credit licence must be a member of an ASIC approved external dispute resolution scheme to resolve complaints which cannot be resolved directly.

There are currently two financial services ombudsman schemes: the Financial Ombudsman Service and the Credit and Investments Ombudsman Service. Both schemes deal with consumer complaints about financial services or credit issues, including complaints relating to the consumer law provisions in the ASIC Act. The statutory Superannuation Complaints Tribunal deals with disputes in relation to superannuation.

Where court action is appropriate for resolving disputes, ACL regulators can bring representative actions on behalf of consumers who have suffered loss or damage, and can seek compensation on behalf of a class of consumers or businesses who are not parties to the legal proceedings.[66] NSW Fair Trading has also recently trialled a 'super complaint' mechanism, allowing a consumer body to present evidence of systemic issues to the regulator for further research and assessment.[67]

Case study 14: UK Retail Ombudsman and Consumer Ombudsman

In 2015, the UK established a Retail Ombudsman and Consumer Ombudsman to help resolve consumer disputes. These ombudsmen are third party organisations authorised by the UK Government to deliver alternative dispute resolution services, an initiative that implements the European Union Directive on Consumer Alternative Dispute Resolution.

Consumers seeking to use an ombudsman must firstly attempt to resolve the dispute with the trader who, while not compelled to use the body, must advise their customers of an appropriate body should the dispute not be resolved.

An ombudsman's decision is reached 'in accordance with what is fair and reasonable in all the circumstances having regard to principles of law, good practice, equitable conduct and good administration'.[68] While not legally binding, in most cases it is expected that traders will voluntarily agree to be bound by the decision and in some cases their membership of a particular scheme or professional association will require this.

If the Ombudsman cannot resolve the dispute, or if the consumer is unhappy with the Ombudsman's decision, the consumer may take the complaint to the relevant regulator or a court.

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65 These are available from the Australian Consumer Law website: www.consumerlaw.gov.au.

66 Sections 237 and 238 of the ACL provide for representative and class actions by an ACL regulator to seek compensation on behalf of persons who have suffered loss or damage.

67 For example, see super complaints project between NSW Fair Trading and CHOICE: www.fairtrading.nsw.gov.au/ftw/About_us/Our_compliance_role/Our_compliance_priorities/Super_complaints.page.

68 See www.ombudsman-services.org/downloads/Consumer%20Ombudsman%20-%20Terms%20of%20Reference.pdf.

3.3.2 Scope for private action

Where a consumer or a business takes a private action in a tribunal or a court, the onus is on them to prove a breach of the ACL on the balance of probabilities. However, where a regulator has established a breach of the ACL in contested proceedings, the findings of fact (or determinations about the factual scenario made by the court) can be used as prima facie evidence of that fact in a 'follow-on' proceeding.[69] This may help affected parties seek compensation by not requiring them to re-establish the same facts.

Recently, the Competition Policy Review recommended extending an equivalent 'follow-on' provision in the *Competition and Consumer Act 2010* (Cth) to apply to admissions of fact made by the person against whom proceedings are brought, as well as findings of fact made by the court.

Issue

An issue that has been raised about private actions is whether the 'follow-on' provisions in the ACL can be further strengthened or extended to help reduce some of the costs and complexities of private actions by consumers or businesses.

Box 16: Productivity Commission inquiry into Australia's Access to Justice Arrangements

The Productivity Commission's 2014 inquiry into *Access to Justice Arrangements* noted that a well-functioning civil justice system serves not only private interests, with profound impacts on a person's wellbeing and quality of life. Such a system also generates broader social and economic benefits through promoting social order, communicating and reinforcing civic values and norms, and giving people the confidence to enter into contracts and business relationships.[70]

The inquiry identified a range of access to justice problems common across Australia's civil justice system. For example:

- many people lack an understanding of their rights, and find it difficult to identify the legal dimension of their problem
- many people do not know where to go for assistance and, where a legal professional is needed, find it challenging to select a legal representative
- some people are deterred from pursuing action fearing it will be too slow and costly
- tribunals are seen as overly formal bodies that are no longer a low-cost alternative to the courts. Court processes still have many delays and costs
- the adversarial nature of the formal system provides little incentive to cooperate, hindering dispute resolution.

69 A 'follow-on' proceeding arises from the same fact scenario as a previously decided legal proceeding. A follow-on proceeding is usually brought by a third party connected with the earlier proceeding (for example, a consumer affected by a breach of the ACL), who is seeking a different legal resolution (for example, compensation for loss or damage).

70 *Access to Justice Arrangements,* Productivity Commission Inquiry Report No.72, 5 September 2014, page 6.

Case study 15: Providing vulnerable consumers with information about the ACL

In 2013-14, ACL regulators with support from the National Indigenous Consumer Strategy Reference Group, jointly developed *Be Smart — Buy Smart*, a simple guide to help protect Indigenous consumers against unfair trading practices.

The guide provides helpful information about consumers' shopping rights and responsibilities under the ACL and lets consumers know how to contact ACL regulators across Australia for advice. It includes information about shopping rights, credit, refunds, consumer guarantees and warranties, lay-by, contracts and scams, as well as how to resolve issues and make a complaint. The guide was distributed to Indigenous consumers, including communities in regional and remote areas, and is published on ACL regulator websites.

3.3.3 Reach of the ACL — international private action and recognition of foreign judgments

Many Australian consumers purchase goods and services from overseas traders, benefiting from lower prices and greater choice. Global competition creates an incentive for Australian traders to lower their prices, offer better service, and introduce new and innovative products to meet consumer's needs.

Consumers are more likely to confidently participate in overseas markets if they are able to assert their ACL rights when dealing with overseas traders. However, consumers may face a number of practical difficulties when attempting to enforce their rights under the ACL against overseas traders. These difficulties may be exacerbated where:

- the ACL technically applies to the transaction but the trader does not have a physical presence in Australia and refuses to recognise the ACL's application
- the consumer has taken successful private action under the ACL in an Australian court but has difficulties enforcing that judgment in the traders overseas jurisdiction.

Currently, the Competition and Consumer Act extends the ACL as a law of the Commonwealth to conduct occurring outside of Australia provided the conduct is engaged in by:

- a business incorporated or carrying on a business within Australia (including selling into Australia where the trader does not have a physical presence in Australia)
- an Australian citizen, or
- a person ordinarily resident within Australia.

For private action to be taken in these circumstances, the consent of the federal Minister is required.[71]

There are several avenues for Australian judgments regarding a breach of the ACL to be recognised by overseas jurisdictions. Australia has reciprocal agreements with approximately 20 countries to recognise and enforce foreign civil and commercial judgments.[72] Where formal arrangements are not

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71 See section 5 of the Competition and Consumer Act.

72 These agreements underpin the *Foreign Judgments Act 1991* (Cth) and the *Trans-Tasman Proceedings Act 2010* (Cth).

in place, Australian judgments may still be recognised and enforced by countries that have other rules for recognising and enforcing foreign judgments. However, these rules vary between different countries and can be complex to navigate.

Currently, there is an international project to develop a global judgments Convention. If successful, this project would expand the list of countries in which Australian judgments could be recognised and enforced. The key objective of the Convention is to create a uniform and streamlined system for recognising and enforcing foreign judgments, and limit the possible grounds for refusing such recognition and enforcement.[73]

73 Draft text for the Convention has been put forward as a starting point for negotiation by governments — see https://assets.hcch.net/upload/wop/gap2016pd07a_en.pdf.

4 Emerging consumer policy issues

Terms of reference

The ACL Review will assess the flexibility of the ACL to respond to new and emerging issues to ensure that it remains relevant into the future as the overarching consumer policy framework in Australia.

Consumer markets are always evolving, as are consumers themselves. As the Organization for Economic Co-operation and Development noted in 2010:

> … the markets for (and the marketing of) goods and services have undergone profound transformations in recent decades, driven by regulatory reform, more open global markets, new technologies and a growth in services. While these changes have provided consumers with significant benefits through the expansion of available goods and services, they also pose challenges for consumers and have changed the nature of issues that consumer regulators need to address.[74]

In this context, and as technology, business models and consumer preferences continue to evolve, the ACL will need the capacity to respond to new and emerging issues in the marketplace if it is to meet the objective of improving consumer wellbeing both now and into the future.

4.1 Selling away from business premises

Questions

30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?
31. Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving 'pressure selling'?
32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?
33. How could these issues be addressed?

Australia's retail landscape has seen strong growth in online sales, and in new temporary stores selling from locations away from their traditional business premises to be closer to consumers. Supported by advances in mobile point-of-sale systems, this growth has been driven by a desire to provide consumers with faster, more convenient and innovative retail experiences. While these developments benefit consumers, they also raise the issue of whether the ACL is operating effectively in this environment.

74 'The Changing Consumer and Market Landscape', *Consumer Policy Toolkit,* OECD, 2010, p16.

As noted in section 2.3.5, the **unsolicited consumer agreements** provisions provide specific rights and protections in circumstances where a seller approaches a consumer outside of their place of business uninvited. They recognise that the consumer may be subject to additional vulnerability or disadvantage where the uninvited presence of a salesperson creates significant psychological barriers to refusing offers or seeking further information. For this reason, the ACL provides a 10-day cooling off period to allow consumers to reconsider their purchase, without the pressure of a salesperson.

These provisions were designed primarily to address unsolicited offers to supply goods and services outside of a traditional retail context.[75] An 'unsolicited consumer agreement' is defined broadly to cover evolving sales methods, and complements specific protections on door-to-door and telephone sales (such as the limitation on calling hours).

In keeping with the broad nature of the unsolicited consumer agreements provisions the term 'business or trade premises' is not defined. This may create some uncertainty for non-traditional businesses, such as 'pop-up' stores, as to whether the provisions apply. However, this may not be an issue in practice because consumers typically approach a 'pop-up' store, kiosk or vendor van, voluntarily (so that an unsolicited consumer agreement would not be created). However, the unsolicited consumer agreement provisions may be triggered where, for example, the seller leaves their stall or kiosk in a shopping centre to approach a consumer.

A number of emerging sales practices appear to blur the distinction between 'solicited' and 'unsolicited' agreements. For example, a third party (such as a comparator website, or a company contracted by a seller) may seek consumers' contact details and consent to be contacted by the seller. Consumers may then be contacted or visited by the seller and could be exposed to similar kinds of highly emotive or 'pressure selling' techniques that have traditionally been associated with door-to-door and telephone sales.

Recently introduced regulations in the UK avoid this issue by not distinguishing between 'solicited' and 'unsolicited' sales. Under these regulations, consistent consumer rights and trader obligations apply to any form of selling made away from the trader's business premises [see Box 17].

Box 17: UK provides 'cooling-off' rights for any purchase made at a place other than the business premises of the trader

In June 2014, the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* came into effect in the UK. These regulations apply to all purchases, including those made at a distance or face-to-face off-premises (online, over the phone, door-to-door), including contracts for the supply of digital content, and does not distinguish between 'solicited' and 'unsolicited' sales.

The regulations require sellers to provide certain information for sales made at a distance or face-to-face off-premises over and above what is required for a sale made from a trader's business premises. Failure to provide this information can see the cancellation period being extended for up to one year.

It also provides the right to cancellation, for any reason, within 14 days from entering into a service contract or when the goods are received. Consumers can waive the right to cancel if seeking to download digital content immediately. The regulations also cover auctions (although there are no cancellation rights in relation to public auctions).

75 The Explanatory Memorandum for the ACL indicates the unsolicited consumer agreement provisions were intended to regulate unsolicited offers to supply goods and services in a non-retail context.

The trader can accept payment within the cancellation period but must provide a refund if the consumer decides to cancel the contract. The consumer's right to cancellation is additional to their right to return a good if it is faulty, does not do what it is supposed to, or does not match the description given.

4.2 Online shopping

Questions

Price transparency (4.2.1)

Transparent safety information for products sold online (4.2.2)

Comparator (comparison shopping) websites (4.2.3)

Online reviews and testimonials (4.2.4)

34. Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?
35. Are there any changes that could be made to the ACL to improve pricing transparency?
36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?
37. Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

4.2.1 Price transparency

With the increasing popularity of online shopping, **'price transparency'** has become an important consumer issue. Transparent prices allow consumers to identify upfront the full price of a good or service. This has a range of benefits for consumers, including:

- helping them more readily compare prices with other goods or services
- avoiding being misled into buying a product that does not best meet their needs
- avoiding paying more than they would have otherwise.

Examples of opaque pricing practices include:

- **'drip' pricing** — where a 'headline' price is advertised at the beginning of an online purchasing process and additional fees and charges (which may be unavoidable or applied in most transactions) are then incrementally disclosed (or 'dripped'). This can result in consumers paying a higher price than the advertised price and spending more than they realise, and it makes it difficult to compare offers [see case study 16][76]
- **'component' pricing** — where the prominently advertised price is only part of the total price.

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76 Drip pricing conduct has recently been an area of focus for the ACCC. It was an identified priority area in the ACCC's 2014 *Compliance and Enforcement Policy* and remains a focus as part of its current priority area of 'systemic consumer issues in the online marketplace'.

The ACL seeks to improve price transparency through its component pricing provisions, which require sellers to advertise the minimum quantifiable price for which a consumer can purchase the good or service. This includes fees and charges that are compulsory but not those that are optional, such as extra fees for a particular payment method.

In practice, this can allow for an infrequently used or obscure payment option (such as a boutique credit card) to be used in the advertised single price, rather than the price reflecting a commonly used payment method that attracts a higher fee. As a result, the advertised single price may not represent the minimum total price paid by the majority of consumers.

The ACL also requires that when a component of the total price is displayed, the minimum total price must also be displayed as a single figure in a 'prominent' way, and 'at least as prominently' as any component price.[77]

However, it may not always be clear to a seller (or the consumer), what is meant by, and required for, 'prominence', as this may depend on factors such as:

- the advertising medium
- the size, placement, font and background of the advertised price.

It may also be unclear if the single price must be 'equally prominent' or displayed in the 'most prominent' manner.

The recent Financial System Inquiry considered some broader issues about the transparency and level of fees for credit card surcharges. In response to that inquiry, the federal Parliament passed legislation on 22 February 2016 to ban sellers from imposing credit card surcharges exceeding the cost of accepting those payment methods. Whereas the ACL ensures that any applicable fees are adequately disclosed, this ban will address the actual amount of the card fees that merchants are able to charge.

Case study 16: ACCC takes action on drip pricing

In 2014, the ACCC took Jetstar and Virgin to court alleging that each airline failed to adequately disclose that a Booking and Service Fee applied to a substantial proportion of bookings, with consumers only becoming aware of the fee after moving through a number of stages on each airline's booking process.

In November 2015, the Federal Court held Jetstar and Virgin contravened the ACL by engaging in misleading or deceptive conduct and making false or misleading representations about the price of particular advertised airfares. The court considered Jetstar and Virgin failed to adequately disclose their respective Booking and Service Fee on:

- Jetstar's website in 2013 and mobile site in 2014
- Virgin's mobile site in 2014.

The Court held that the ACCC had not established that similar misleading representations were made by Jetstar on its website in 2014, by Virgin on its website in 2014, or by either Jetstar or Virgin in their promotional emails in 2014.

77 See section 48 of the ACL.

These cases demonstrate that determining whether drip pricing is problematic under the ACL depends on the particular circumstances of each case and the sufficiency of the disclosure of the additional fees or charges in question.

4.2.2 Transparent safety information for products sold online

Point-of-sale information is critical to the safety of many consumer products that are increasingly sold online. Mandatory safety standards can require information to be provided on the packaging of certain products so consumers can choose a safe product, for example, the information standard for cosmetics ingredients labelling.

However, online sellers may not always provide this information prominently on their website, or provide it, for example, on one part of the website but not another. This creates the risk of consumer harm where a consumer purchases and uses the product unaware of the relevant safety information.

An issue that has been raised in this context is whether, and what, steps that could be undertaken to ensure this information is displayed prominently.

4.2.3 Comparator (comparison shopping) websites

Comparator websites are playing an increasingly important role in online markets through the information they provide consumers.[78] They have the potential to facilitate greater competition, choice, convenience and quality, and save consumers time and costs when comparing goods and services. However, these benefits may be undermined if comparator website providers fail to act appropriately.

In particular, consumers may be misled where there is a lack of transparency in both the material on the operators' website, or if the website's behind-the-scenes operations influence the advice provided to consumers. This lack of transparency limits a consumer's ability to make an informed decision and can erode trust in the integrity of the tool. In particular, consumers may, for example, be unaware of such practices as:

- inducements
- preferential treatment
- the operation of algorithms
- sales quotas
- the commercial relationships between a comparator website operator and service providers.

In August 2015, the ACCC issued a guide for comparator website operators and suppliers, following a 2014 review of the industry. The review found that poor conduct by some industry participants may undermine the important benefits comparator websites can provide to both consumers and businesses.

78 A comparator website is an online search engine that enables consumers to filter and compare products based on price, features and other criteria.

The ACCC guide outlines three key principles which comparator website operators should comply with, to avoid conduct likely to mislead or deceive:

- facilitate honest, like-for-like comparisons
- be transparent about commercial relationships
- clearly disclose who and what is being compared.

4.2.4 Online reviews and testimonials

Online reviews are another form of consumer information that is playing an increasingly important role in online markets and in consumer markets more generally, helping shape consumers' product knowledge and purchasing decisions.[79] In this regard, consumers expect reviews to be independent and genuine to help inform their decisions.

Given their ability to influence consumer choice, online reviews have gained increasing commercial value for businesses seeking to attract customers and gain market share. This creates an incentive to create and disseminate fake reviews, undermining consumer trust and confidence in online reviews [see case study 17]. There can also be commercial relationships between review platforms and businesses that may influence the overall rating of a business on their website.

Businesses and review platforms that do not remove reviews they know to be fake, or selectively edit reviews (such as removing negative reviews) risk breaching the ACL's prohibitions against misleading or deceptive conduct, and false or misleading representations. Regulators also seek to better inform consumers by providing tips on how to identify fake reviews and by encouraging websites to disclose of any commercial relationships between businesses and review platforms.

Case study 17: National project to address online testimonials

During 2013, NSW Fair Trading led a national project to identify traders using fake online reviews and testimonials as a promotional tool. Regulators wanted to learn more about the way traders use fake testimonials, which are significantly underreported given the difficulty consumers have in determining the veracity of testimonials.

Regulators reviewed 290 traders in 20 market sectors and issued substantiation notices to 38 businesses. The use of substantiation notices put the focus on self-compliance by traders. Several traders then agreed to remove unsubstantiated testimonials from their websites. Regulators continue to monitor testimonials as part of their other investigations.

79 Online reviews are postings about an experience with a particular business, good or service, and often include a rating. They can be made on the business' website, in social media or provided through an online platform that specialises in reviewing goods or services (such as TripAdvisor, Product Review, and Zomato).

4.3 Emerging business models and the Australian Consumer Law

Questions

38. Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?
39. Does the ACL provide adequate clarity and certainty for consumers when engaging in the 'sharing' economy? What areas need to be addressed, and what types of personal transactions should be excluded?

Recent technological developments, such as widespread access to broadband internet and smartphones, have enabled new business models that were not possible only a few years ago. Rapid growth in online shopping has seen an increase in goods and services purchased from overseas suppliers and marketing approaches tailored to individual consumers, as well as an expanding 'sharing' economy.

The Competition Policy Review recognised the impact of technological innovation on markets and its implications for consumer safety in its March 2015 report:

> Technological innovation is lowering barriers to entry across a range of markets. Innovative, competitive new entrants in a market can lower prices to consumers and widen their choice of providers. However, they can also raise concerns about consumer safety. The community will expect new entrants to challenge existing providers by offering new and better products, while still adhering to expected safeguards against doubtful or dangerous market practices. New entrants should not be exempt from the need to operate in a safe and reliable way, consistent with community expectations.[80]

4.3.1 The 'sharing' economy

Arguably, the most significant market development in recent years has been the rapid expansion of the 'sharing' (or 'collaborative') economy. Using business models that previously were not economically viable, the 'sharing' economy now applies to a wide range of goods and services, for example:

- auction sites for new and second-hand goods (such as Gumtree, and eBay)
- accommodation sharing (StayZ, Airbnb)
- errands and odd jobs (TaskRabbit, Airtasker)
- ride sharing (Uber, Lyft)
- lending and venture financing (SocietyOne, DirectMoney, RateSetter).

With the emergence of third parties that own, host, enable and facilitate the service (generally as a for-profit venture, charging one or both parties a fee or commission) the 'sharing economy' enables buyers and sellers to find each other more easily than ever before. This allows complete strangers to trade at a distance with relatively low transaction costs, promoting economic efficiency.

80 *Competition Policy Review Final Report*, Australian Government, March 2015, page 22.

As businesses seek to cater to consumers' interests and preferences in innovative ways, the 'sharing' economy also offers benefits such as greater consumer choice, and an emphasis on user-friendliness and accessibility.

The March 2015 report of the Competition Policy Review stated:

> Any regulation of such services should be consumer-focused, flexible enough to accommodate technical solutions to the problem being regulated and not inhibit innovation or protect existing business models.

The 'sharing' economy has also developed its own set of tools to inform consumers, and promote the quality and safety of goods and services on offer. These can include consumer review mechanisms, insurance coverage for sellers, participant screening, and minimum standards for sellers.

Sellers and the ACL

The 'sharing' economy is subject to the ACL, which applies generically across all industries in Australia, but usually only where the supply occurs 'in trade or commerce'. For example, the misleading or deceptive conduct provisions do not cover the private sale of a principal place of residence.

Whether a particular supply is 'in trade or commerce' depends on factors such as the regularity or frequency of transactions and whether the peer-to-peer transactions are a main source of income. The definition of 'business' in the ACL also includes a 'business not carried on for profit', and the definition of 'in trade or commerce' includes 'any business or professional activity (whether or not carried on for profit)'.[81]

While a traditional 'garage sale' is unlikely to be covered, the situation may be less clear where a 'sharing' platform makes peer-to-peer selling easier and a seller increases the volume and frequency of their transactions. These sellers may not be aware of their responsibilities under the ACL, nor consider themselves as engaging 'in trade or commerce'.

Issues around clarity may also occur in the context of online auctions. The consumer guarantees in the ACL do not apply to auctions, whether online or in person, but confusion may arise where the same seller uses an online auction platform to offer an item that is available both by winning a bidding process, or by an immediate purchase option (such as eBay's 'Buy it now' option). If the item is bought by the former process the consumer guarantees are excluded, but if bought immediately the consumer guarantees apply.

'Sharing' platform operators and the ACL

Certain provisions in the ACL, including the prohibition against misleading or deceptive conduct, do not apply to a business that merely publishes information provided by a third-party.

However, the 'sharing' economy both drives, and responds to, consumer demands for greater innovation, service and convenience. It is not uncommon for 'sharing' platform operators to actively facilitate transactions by taking steps to promote buyers' trust, and to set standards for the quality of sellers' goods and services.

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81 See section 2 of the ACL.

Where a platform operator engages in these activities they are likely to be subject to the ACL, including the prohibition against misleading or deceptive conduct [see case study 18]. However, issues can arise where operators and consumers are unsure about whether the ACL applies to their transaction, or are not familiar with their rights and responsibilities in this context.

Case study 18: Online pricing practices — Airbnb and eDreams give undertakings to the ACCC

On 13 October 2015, the ACCC accepted court enforceable undertakings from Airbnb Ireland (Airbnb) and Vacaciones eDreams, SL (eDreams) following concerns that the companies made online price representations to consumers in Australia that were in breach of the ACL.

The ACCC considered that Airbnb, since November 2012, and eDreams, from January to December 2014, engaged in misleading or deceptive conduct and made misleading representations by failing to adequately disclose to consumers in Australia particular mandatory fees on key pages of one or more of their online booking platforms.

Airbnb and eDreams each acknowledged the ACCC's concerns and cooperated with the ACCC during its investigation. Both companies have separately undertaken to improve their pricing practices such that mandatory fees will be incorporated into prices displayed, or otherwise disclosed, on key pages during the booking flow to ensure consumers are given accurate price information 'up front'.

Airbnb also undertook to establish and maintain a consumer law compliance program within the company, and eDreams has undertaken to train staff in compliance, focusing on key aspects of the ACL.

4.4 Promoting competition through empowering consumers

Questions

Consumer access to data (4.4.1)

Disclosure requirements (4.4.2)

40. Do consumers want greater access to their consumption and transactional data held by businesses?
41. What is the role of the ACL and the regulators in supporting consumers' access to data? Is there anything in the ACL that would constrain efforts to facilitate access?
42. Does the provision of data, or the emergence of an 'infomediary' market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?
43. Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?

4.4.1 Consumer access to data

Information about customers' **purchasing and consumption behaviour**, such as how often and when they use a product or service, and how or when they pay for it, is an increasingly valuable commercial asset used by businesses to better target products and services to consumers.

Where consumers are able to access consumption and transaction data held by businesses, they may be better placed to make informed choices and reward suppliers who best meet their needs. This is particularly the case for complex products and services, such as communications, financial products and utilities. This has a vital role in driving effective competition.

Access to data was recently considered by two federal Government reviews. Both the Competition Policy Review and Financial System Inquiry made recommendations to consider increasing consumers' access to, and improving the use of, their data. This includes:

- working with consumer groups, industry, and privacy experts, in providing consumers with greater access to their information in readable forms
- requiring government agencies to enhance the presentation of information in their possession, noting that consumers already have certain rights to request access to their 'personal information' held by government agencies, under privacy and freedom of information legislation.

In response, the federal Government has tasked the Productivity Commission to investigate ways to improve the availability and use of public and private sector data. This includes identifying ways consumers can use and benefit from access to data, particularly data about themselves, and considering how to preserve individual privacy and control over data use. This 12-month public inquiry will report by March 2017.[82]

Case study 19: UK's midata initiative

The UK Government's midata initiative is a voluntary project in partnership with regulators, businesses, consumer and privacy groups, and computer application developers.

The UK Government has sought to address accessibility issues by seeking voluntary compliance from businesses for consumers to be able to access their information in an electronic, portable and secure format. Working groups examined interoperability, privacy, security and legal issues towards the development of data protection principles, guidelines, and voluntary accessibility standards.

Midata initially focused on three key sectors: banking and financial services (current accounts and credit cards), energy companies and mobile phone companies. These sectors were chosen because the businesses have a long-standing relationship with the consumer, involve complex purchases, and are often difficult to compare different products and services when deciding whether to switch suppliers.

Currently in the UK, consumers can share their data with some computer application ('app') developers, with the government developing prototype apps on energy support for vulnerable people, personal finance management, healthcare and assistance for moving home.

82 The inquiry's Terms of Reference is available at: www.pc.gov.au/inquiries/current/data-access/terms-of-reference.

4.4.2 Disclosure requirements

The ACL establishes a number of **disclosure requirements**, including in relation to information standards,[83] unsolicited consumer agreements, price displays and consumer warranties. By helping consumers to make informed choices, disclosure requirements support consumers' confident participation in markets and, in turn, promote competition.

To provide an effective source of information such disclosure needs to be readily accessible to consumers. The existing general protections in the ACL against unconscionable conduct, and misleading or deceptive conduct, provide some 'principles-based' guidance on how information can, and should, be conveyed to consumers. In this context, issues have been raised about whether further specific rules are required, such as a prescribed minimum font size for contracts, advertisements, and other consumer documents, or other requirements for readability and accessibility.

In its 2008 *Review of Australia's Consumer Policy Framework*, the Productivity Commission highlighted the role of well-informed consumers in promoting competition by signalling their preferences to suppliers. While there is a role for governments to support consumers to make informed choices, the additional costs of any intervention should be carefully considered. Additionally, any enhanced disclosure needs to be consumer-tested to ensure that it actually informs consumer choice.

83 Information standards (Part 3-4 of the ACL) regulate the type and amount of information provided about a particular good or service — by requiring particular information to be provided (or not) and in a specified form and manner. Current information standards include: care labelling for clothing products, and ingredient labelling of cosmetics and toiletries.

Appendix: Consolidated list of questions

Consumer policy in Australia

Australia's consumer policy framework objectives (1.3)

1. Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?
2. Are there any overseas consumer policy frameworks that provide a useful guide?
3. Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?

Australian Consumer Law — the legal framework

Structure and clarity of the Australian Consumer Law (2.1)

Structure and clarity of the ACL (2.1.1)

Meaning of 'consumer' (2.1.2)

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?
5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?
6. Are there overseas consumer protection laws that provide a useful model?
7. Is the ACL's treatment of 'consumer' appropriate? Is $40,000 still an appropriate threshold for consumer purchases?

General protections of the Australian Consumer Law (2.2)

Misleading or deceptive conduct (2.2.1)

Unconscionable conduct (2.2.2)

Unfair contract terms (2.2.3)

8. Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?
9. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed?

The Australian Consumer Law's specific protections (2.3)

False or misleading representations (2.3.1)

Other unfair practices (unsolicited supplies, pyramid schemes, pricing, referral selling, and harassment and coercion) (2.3.2)

Consumer guarantees (including 'lemon' laws) (2.3.3, 2.3.4)

Unsolicited selling agreements (2.3.5)

Other consumer rights (lay-by agreements, proof of transaction, itemised bill, and warranty against defects) (2.3.6)

Product safety (2.3.7)

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?
11. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?
12. Does the ACL need a 'lemon' laws provision and, if so, what should it cover?
13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?
14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be made more effective, and how? Should protocols or other arrangements be established between ACL and specialist regulators?

Other issues (2.4)

Addressing 'unfair' commercial practices (2.4.1)

Interaction between the ACL and ASIC Act (2.4.2)

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?
16. Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?
17. Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

Administering and enforcing the Australian Consumer Law

Proportionate, risk-based enforcement (3.1)

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

Effectiveness of remedy and offence provisions (3.2)

Distinction between civil and criminal penalties (3.2.1)

Types of ACL penalties and remedies (3.2.2)

Deterrent effect of financial penalties (3.2.3)

Setting and updating maximum financial penalties (3.2.4)

Role of non-punitive orders (3.2.5)

Jurisdictional differences in the enforcement 'toolkit' (3.2.6)

19. Are the remedy and offence provisions effective?
20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches?
21. Is the current method for determining financial penalties appropriate?
22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?
23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?
24. Do you have views on any of the issues raised in section 3.2?

Access to remedies and scope for private action (3.3)

Effective dispute resolution (3.3.1)

Scope for private action (3.3.2)

Reach of the ACL — international private action and recognition of foreign judgments (3.3.3)

25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?
26. What low-cost actions could consumers and businesses more readily use to enforce their rights?
27. Are there any overseas initiatives that could be adopted in Australia?
28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?
29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

Emerging consumer policy issues

Selling away from business premises (4.1)

30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?

31. Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving 'pressure selling'?

32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?

33. How could these issues be addressed?

Online shopping (4.2)

Price transparency (4.2.1)

Transparent safety information for products sold online (4.2.2)

Comparator (comparison shopping) website (4.2.3)

Online reviews and testimonials (4.2.4)

34. Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?

35. Are there any changes that could be made to the ACL to improve pricing transparency?

36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

37. Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

Emerging business models and the Australian Consumer Law (4.3)

38. Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?

39. Does the ACL provide adequate clarity and certainty for consumers when engaging in the 'sharing' economy? What areas need to be addressed, and what types of personal transactions should be excluded?

Promoting competition through empowering consumers (4.4)

Consumer access to data (4.4.1)

Disclosure requirements (4.4.2)

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