

Part 2: Executive summary

2.1 Approaches to unconscionable or highly unfair trading practices

2.1.1 General and specific protections

The comparative review reveals high levels of convergence between the consumer policy frameworks of Australia and the jurisdictions chosen for comparison. Most jurisdictions adopt a combination of general and specific protections in relation to unconscionable and highly unfair trading practices.

Table 1: Comparison of general protections

General protections		Australia	UK	US	Canada	Singapore
Unfair commercial practice		No	Yes	Yes	Yes	Yes
	Business to consumer	No	Yes	Yes		Yes
	Business to business	No	No	Yes		No
Misleading conduct		Yes [4.2]	Yes	Yes – deceptive commercial practices	Yes – reviewable conduct	Yes
	Business to consumer	Yes	Yes	Yes	Yes	Yes
	Business to business	Yes	No	No	No	No
Unconscionable conduct		Yes [4.3]	Unfair commercial practice	Yes, unfair commercial practices	Yes, in some provinces	Yes, unfair practice
	Business to consumer	Yes	Yes	Yes	Yes	Yes
	Business to business	Yes	No	No	No	No
Unfair terms						
	Business to consumer	Yes [4.5]	Yes	Yes	Yes	Yes, harsh, oppressive or excessively one-sided terms
	Business to business	Yes – small business only	No	No	No	No

Table 2: Comparison of Specific Highly Unfair Trading Conduct

Specific highly unfair trading conduct	Australia	UK	US	Canada	Singapore
Punitive fees in contracts					
General protection	Yes, misleading conduct or unconscionable conduct [5.1]	Yes, unfair commercial practice, misleading commercial practice [5.3]	Yes, unfair or deceptive practice [5.4]	Yes, at province and territory level [5.5]	Yes [5.6]
Specific protection	Yes [5.1.3]	Yes [5.3.3]	Yes, financial services and aviation sectors [5.4.3]	Federal laws regulate banking and aviation sectors [5.5.2]	No
Pyramid selling					
General protection	Yes, misleading conduct or unconscionable conduct [6.1]	Yes, unfair commercial practice, misleading or aggressive commercial practice [6.3]	Yes, unfair or deceptive practice [6.4]	Yes [6.5]	Yes [6.6]
Specific protection	Yes, s 44, ACL [6.6.1]	Yes, Blacklist [6.3.3]	Federal and State industry specific protection	Yes [6.5.2]	Yes [6.6.2]
Door-to-door selling					
General protection	Yes, misleading conduct or unconscionable conduct [7.1]	Yes [7.3.2]	Yes [7.4.2]	Yes	Yes [7.6.2]
Specific protection	Yes [7.1.3]	Yes [7.3.3]	Yes [7.4.3]	Yes [7.5.2]	Yes [7.6.3]

2.2 Misleading conduct

While s 18 of the ACL (and s 52 of the *TPA*) have been used to promote the interests of consumers by improving the conduct of businesses in relation to their advertising, selling practices and promotional activities generally, and by prohibiting them from engaging in sharp practices when dealing with individual consumers, their greatest use has been in connection with disputes of a commercial nature between competitors who are not consumers. In this regard s 52 the *TPA* was influenced by s 5 of the *Federal Trade Commission Act* (FTC Act), and US law.

There is considerable scope for overlap between the general protection for misleading or deceptive conduct in s 18 of the ACL and s 5 of the *FTC Act*, which prohibits ‘unfair or deceptive acts or practices in or affecting commerce’. According to the three-limb test set out in the FTC’s 1983 Policy Statement on Deception, an act or practice is deceptive if it involves:

1. ‘a representation, omission, or practice that is likely to mislead the consumer’;
2. ‘a consumer acting reasonably under the circumstances’; and
3. the representation, omission, or practice is material to the consumer’s choice of or conduct regarding a product or services.

The second limb requires the FTC to consider the act or practice from a reasonable consumer’s perspective.

In the EU, the second test of unfairness found in art. 5(4)(a) of the Unfair Commercial Practices Directive (UCPD) states that a commercial practice will be unfair if found to be misleading as set out in Articles 6 and 7. The ‘average consumer’ test in Art 6(1) of the UCPD has much in common with the ‘ordinary or reasonable consumer’ test adopted in Australia in relation to s 18 of the ACL. However, unlike Australia’s misleading conduct provisions remedies under the UCPD are only available in relation to business-to-consumer (B2C) transactions, not business-to-business transactions (B2B).

2.3 Unfair/unconscionable conduct

The UCPD takes a three-tiered approach which consists of a first tier general prohibition of unfair commercial practices, second tier prohibitions against misleading and aggressive practices, and a third tier blacklist of specific practices that are prohibited in all circumstances.

A significant difference between Australia and the EU/ UK position is that Australia does not have a first tier general prohibition of unfair commercial practices similar to art 5(2) of the UCPD, or a third tier black list of specific practices that are prohibited in all circumstances. It has been argued that the standard of ‘unfairness’ in the UCPD is lower than the standard of statutory unconscionable conduct, and that the adoption of the UCPD general prohibition of unfair commercial practices in Australia would increase the overall level of consumer protection.

The standard of ‘unfair conduct’, rather than ‘unconscionable conduct’, is also adopted in s 5(1) of the *Federal Trade Commission Act* in the United States. The test for ‘unfairness’ under the *FTC Act* was first expressed in the 1980 Policy Statement on Unfairness and later codified into the *FTC Act* in 1994 as 15 U.S.C. § 45(n).

An act or practice will be considered by the FTC to be unfair if:

1. it causes or is likely to cause substantial injury to consumers;
2. that is not outweighed by countervailing benefits to consumers or to competition; and
3. that cannot be reasonably avoided by consumers.

2.4 Role of codes of conduct in unfair/unconscionable conduct

In the EU the first tier test of unfairness in Art 5(2) of the UCPD requires that the practice must be contrary to the requirements of professional diligence. Article 2(h) defines professional diligence as ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity’.

In some EU Member States codes of conduct are used to set standards of good business behaviour in a particular sector. Well-established codes of conduct could reflect good business practice and be used to identify the requirements of professional diligence in concrete cases.

In Australia, assessing whether conduct meets the standard of statutory unconscionable conduct in s 21 of the ACL, is an evaluative task to be understood by taking into account the values and norms that Parliament considered relevant when it identified the non-exhaustive list of factors in s 22 of the ACL, and s 12CC of the ASIC Act. One of the factors listed in s 22(1)(g) and (2)(g) of the ACL that a court may have regard to is the requirements of any applicable industry code. In this regard the EU concept on an ‘unfair commercial practice’ and statutory unconscionable conduct under s 21 of the ACL are similar.

2.5 Unfair terms and the requirement of good faith

The definition of an unfair term in the *Consumer Rights Act 2015* United Kingdom has an additional requirement that the term must be ‘contrary to the requirement of good faith’ which is not present in the definition of an unfair term in s 24 of the ACL. Despite the absence of the requirement of good faith in the Australian definition of unfair term Australia’s general protection appears to overlap its UK equivalent. The UTCCD requirement of good faith requires ‘an overall evaluation of the different interests involved’. The unfair terms regime in the ACL already imposes such a requirement. In applying the test of unfairness s 24(2)(b) of the ACL requires the court to consider the term in the context of the contract as a whole.

2.6 Inclusion of punitive fees in contracts

The EU and UK adopt a grey list includes ‘a term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation’.

The Australian grey list of unfair terms includes ‘a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract’.

Both Australia and the UK exclude terms relating to the main subject matter and setting the upfront price of goods or services, but this would not extend to cover default fees or termination fees.

The consumer policy framework in the United States with regard to the inclusion of punitive fees in contracts provide for a general protection and a number of industry-specific protections. General protection is provided by the *Federal Trade Commission Act* (FTC Act), which prohibits ‘unfair or deceptive acts or practices in or affecting commerce’.

In Canada, the regulation of punitive fees in contracts by way of general consumer legislation appears to occur at the province and territory-level. As such, federal laws, which deal with punitive fees in contracts, tend to focus on specific industries, such as the banking and aviation sectors.

2.7 Pyramid schemes

In the EU, the UCPD blacklist includes the establishment, operation or promotion of a ‘pyramid promotional scheme’ which is defined as a scheme ‘where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products’. In the UK, the CPR blacklist includes the establishment, operation or promotion of a pyramid scheme ‘where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products’.

In all jurisdictions there is a degree of uncertainty in applying the test and distinguishing between a legitimate multilevel marketing scheme and an illegal pyramid scheme.

2.8 Unsolicited selling and cooling off periods

Most jurisdictions adopt a combination of general and specific protections in relation to unsolicited selling all provide for a ‘cooling off’ period in which the consumer can withdraw from a contract entered into away from the seller’s permanent business location, including a consumer’s home, which varies between three and 14 days in length.

2.9 Approaches to regulation of e-commerce and peer-to-peer transactions

2.9.1 Summary

Common regulatory approaches to consumer protection issues in e-commerce have been adopted in the reviewed jurisdictions in relation to product quality, misleading pricing practices, fake reviews and fraud. While regulators acknowledge the different challenges presented by online transactions the common approach is to modify existing regulatory frameworks rather than adopting a different model for e-commerce. The most significant differences in approach appear in the combined regulations of the UK and EU which specifically regulate consumer issues for digital content, information asymmetry in online transactions and false online reviews.

The main differences in approach are summarised below.

2.9.2 Product quality

The ability of a consumer to verify the quality or description of the products or services purchased is a common problem in all forms of online transaction. Most jurisdictions continue to use existing legal frameworks to impose warranties or guarantees of acceptable quality in the context of online transactions. Only the UK has specifically addressed quality for digital content other than computer software. No jurisdiction has reviewed the desirability of excluding sales by auction from guarantees of quality where consumers purchase goods via online auctions. Only those jurisdictions with distance selling regimes (United Kingdom (EU) and Canada) have imposed additional information disclosure requirements on businesses selling online.

Product quality	Australia [10.2]	UK [10.3]	US [10.4]	Canada [10.5]	Singapore [10.6]
Statutory Guarantee of quality for goods	Yes — acceptable quality	No	No	No	Yes — merchantable quality
Implied warranty of quality		Yes — satisfactory quality	Yes — merchantable quality#	Yes- merchantable quality if sale by description#	Yes — merchantable quality
Goods includes computer software (Disc or USB)	Yes — expressly included	Yes on basis of case law	Yes — on basis of case law	Maybe — case law unclear	Maybe — no case law
Goods includes computer software (download)	Yes	No	No	No	No
Digital content (other than software)	No	Yes	No	No	No
Sale by auction excluded	Yes	No — unless second hand and physical inspection	No	No	Yes
Limited to 'consumers' as defined	Yes	Yes	No	No	Statutory guarantee — Yes Implied term — No
No contracting out	Yes	Yes	No — but test of reasonableness applies	Yes — warranty implied by statute	Yes — statutory guarantee only
Expressly overrides choice of law clause	Yes	Yes	No	No	No
Supply by a trader/merchant only	Yes — trade or commerce	Yes — trader conducting a business	Yes — in business of selling goods*	Yes — deals in goods of that description	Yes — in the course of business
Misleading conduct — misrepresentations and omission	Yes	Yes — unfair commercial conduct	Yes — unfair or deceptive commercial practices	Yes — reviewable conduct	Yes

State/provincial Sale of Goods legislation

*Note — warranty of fitness for purpose applies to all sales.

2.10 Unfair pricing

There is a high level of similarity in the regulatory policies and approaches to drip pricing and surge pricing. Most jurisdictions, including Australia continue to apply general protections for unfair, deceptive or misleading practices to drip pricing or surge pricing in e-commerce. However, the ACL general protections are potentially narrower than the prohibitions on ‘unfair commercial practices’ in the United Kingdom and United States. No jurisdiction has enacted specific provisions dealing with drip pricing but in Singapore surge pricing by taxis using online booking services is regulated.

Unfair pricing	Australia [11.2]	UK [11.3]	US [11.4]	Canada [11.5]	Singapore [11.6]
Drip pricing					
Express prohibition	No	No	No	No	
Misleading conduct	Yes	Yes	Yes — unfair or deceptive commercial practices	Yes — reviewable conduct	Yes
Unfair commercial practice	No	Yes — if materially distorts consumer behaviour	Yes — if consumers are misled	Yes	Yes — if consumers misled
Mandatory information disclosure of price components at time of contract		Yes	No	Yes — provincial level	
Pricing guidelines		Yes —	Yes — Dot.com	Yes- Contract Template	Yes — advertising guidelines
Surge pricing					
Express prohibition	No	No	No	No	Yes — taxi services only
Misleading conduct	Yes — if misleading conduct re price surge	Yes — if	Yes — unfair or deceptive commercial practices	Yes — reviewable conduct	Yes — if consumers misled
Unfair Commercial practice		Yes — if materially distorts consumer behaviour	Yes — if consumers are misled	Yes — if consumers misled	Yes — unfair practices (misleading conduct)

2.11 Fake reviews

Australian regulatory approach to fake or false review is comparable with other jurisdictions. Consumers appear to obtain the most effective protection and support in the case of online reviews from a regulatory approach that consists of general protections, specific protections for misleading testimonials, broad enforcement powers, guidelines and consumer education. These elements are present in the Australian approach. The only one which may warrant further inquiry is whether liability or responsibility should be attributed to platform providers in peer to peer transactions.

Online reviews	Australia [12.2]	UK [12.3]	US [12.4]	Canada [12.5]	Singapore [12.6]
Misleading conduct	Yes — specific provision for misleading testimonials	Yes	Yes — unfair or deceptive commercial practices	Yes— reviewable conduct— specific prohibition of misleading testimonials	Yes
Unfair commercial practice	No	Yes — specific prohibition of particular online review conduct	Yes — if consumers are misled	Yes	Yes — if consumers misled
Guidelines for online reviews	Yes	Yes	Yes	Advertising Standards Code	Advertising Standards Code

2.12 Fraud

Australian regulatory approach to fake or false review is comparable with other jurisdictions. The Federal Trade Commission, UK regulator and Canadian regulator have focussed attention on international consumer protection issues arising from the use of the Internet and various platforms contained on it. This is the same approach Australia has adopted having recognised the increasing importance of such inter-agency cooperation to achieve positive outcomes in this area.¹ This approach should be fostered and improved to ensure consumer fraud is enforced not only domestically, but also at an international level.

¹ Australian Competition and Consumer Commission, Submission No 46 to House of Representatives Standing Committee on Communications, *Inquiry into cyber crime*, July 2009, 2.

Fraud	Australia [13.2]	UK [13.3]	US [13.4]	Canada [13.5]	Singapore [13.6]
Misleading or deceptive conduct	Yes	Yes	Yes — unfair or deceptive commercial practices	Yes	Yes
Unfair commercial practice	No	Yes — specific prohibition of fake websites, aggressive behaviour and shill bidding	Yes	Yes — misleading and deceptive practices — eg. fake websites	Yes — if consumers misled
Regulator provides consumer education	Yes	Yes	Yes	Yes	Yes
Sharing of information between regulators	Yes	Yes	Yes	Yes	

2.13 Peer-to-peer transactions

The rapid growth of the sharing economy through peer to peer platforms presents different challenges for existing regulatory models. Regulators in most jurisdictions are yet to adopt clear policies in relation to the sharing economy and have generally resorted to existing consumer protection provisions when problems arise. Jurisdictions have to date focussed on other consumer issues in the context of peer to peer platforms relating to licensing regimes, consumer safety, privacy and insurance. Particular emerging issues include whether platform operators should bear responsibility for the conduct of users, extension of consumer warranties to consumer to consumer transaction and the adaptability of existing regulatory approach to future disruptive technology

2.14 Institutional structures relating to the administration and enforcement of consumer laws

2.14.1 Summary and key observations

- i) This Part compares international institutional structures for the administration and enforcement of consumer laws in five jurisdictions: Canada, the United States, New Zealand, Singapore and the United Kingdom.
- ii) The key institutions responsible for administering and enforcing consumer laws are identified and their mandates and operating methodologies are described. Some of the reviewed countries have state or regional agencies or actors. These are described as 'other actors', and include sectoral regulators and non-profit consumer groups.
- iii) Any significant changes to the law or administration in a jurisdiction over the last five years are described, along with the relevant government's rationale for change.

- iv) This Part attends to the following topics:
- digital purchasing and digital products, with attention to developments in e-commerce and cross-border cooperation for consumer law enforcement
 - developments in institutional design and focus, together with innovative new programs, particularly those that arise in e-commerce
 - progress of ECC–net, which is a project on best practices for consumer redress, which is being undertaken for the UN Commission on Trade and Development
 - the UK *Consumer Rights Act 2015*
 - the revised UN Guidelines for Consumer Protection and Sustainable Development Goals.

2.15 Jurisdictional comparisons

2.15.1 Comparison of main institutions for consumer protection

In the United States, consumer protection policy places emphasis on enabling consumers to protect their own self-interest. Law enforcement is overwhelming private-party based and relies heavily on the judicial system. The Federal Trade Commission and national and state governments tend to take a non-interventionist approach, although they are active in encouraging businesses to deal fairly with consumers. There is however growing evidence of a more interventionist tendency as a result of the creation of the Bureau of Consumer Financial Protection. It has a substantial budget and a strong enforcement mandate. The Bureau engages in consumer research, education monitoring and enforcement.

Canada, in common with its southern neighbour, employs a regulatory model that places strong emphasis on using the judicial system for enforcing consumer legal rights. Also in common with the US, it places policy emphasis on promoting an environment for well-informed and confident consumers, and seeks to provide consumers with tools for protecting their own interests. The Office of Consumer Affairs provides generous financial support to not-for-profit consumer and voluntary organisations to attain these goals.

Institutional approaches to administration and enforcement of consumer law in New Zealand remained largely unchanged for some time. However, significant reforms that will change the role of government in consumer law enforcement have been implemented in more recent times.

In Singapore, the administration of consumer protection laws involves a high degree of self-regulation, mediation and small claims deliberations, and contracted out enforcement. The Ministry for Trade and Industry has entered into a commercial arrangement with a voluntary consumer group, the Consumers Association of Singapore (CASE), to investigate and mediate complaints on behalf of consumers, including tourists to Singapore.

2.15.2 Legislation and jurisdictional comparisons

The US has implemented laws and regulations dealing with credit card chargeback, class actions and fraud and identity theft. The US also places a strong emphasis on promoting consumer awareness, to enable consumers to protect their own interests.

In Canada, responsibility for consumer protection is divided between federal and provincial governments. Under the *Department of Industry Act*, the Minister of Industry is mandated to promote and protect consumer interests throughout Canada. There are, in addition, extensive Provincial laws and agencies to administer them.

In New Zealand, the *Fair Trading Act* which commenced operation in 2013 sets a new policy and direction. Similarly, new laws and directions are in place in the United Kingdom.

2.15.3 Comparative issues in policy and practice

The US places strong emphasis on promoting consumer awareness, to enable consumers to protect their own interests. There is however growing evidence of a more interventionist tendency as a result of the creation of the Bureau of Consumer Financial Protection. It has a substantial budget and a strong enforcement mandate. The Bureau engages in consumer research, education monitoring and enforcement.

The strategic direction of consumer policy in Canada is similar to other reference countries, with a focus on protecting vulnerable consumers and building confidence in the electronic marketplace. Canada has identified educating and equipping consumers to deal with sustainable consumption as a key strategic goal. In New Zealand, policy now requires government agencies to work with businesses, employees and consumers to assist them participate effectively in the marketplace. The consumer marketplace regulator, the Commerce Commission, focuses its activities on the provision of advice, information and education services. Much of the major law reform that occurred during 2013 harmonises New Zealand law with the Australian Consumer Law.

An interesting feature of consumer policy in Singapore is the extensive promotion of trust marks. The awarding of the 'trustSG' is widely seen as a powerful consumer protection measure and business advancement tool.

The UK has an extensive ADR network and places considerable reliance on these as a means for dispute resolution, rather than upon the traditional judicial system. The Government commissioned a major review of consumer legislation in 2015.

Of particular interest are the newly introduced laws on the supply of services to consumers and the introduction of a range of novel remedies, including the capacity to deem a trader's spoken or written statement a binding contractual term. The updating of the 1977 *Contract Terms Act* is also an issue of considerable interest. The application of consumer law principles to digital content is another noteworthy development.

2.16 The revised United Nations guidelines for consumer protection

In November 2015 the UN General Assembly adopted a revised version of the UN Guidelines for Consumer Protection. The Guidelines, which will be accompanied by extensive implementation manual, is the first major revision in 30 years and addresses new forms of consumer detriment, and provides guidelines for strengthening international cooperation and the growth of cross-border and digital commerce. The new Guidelines provide guidance on the regulation of financial services and public utilities, and on good business practices and international cooperation.

2.17 United Nations sustainable development goals

Following the successful conclusion of the negotiations on the post 2015 development agenda, the UN General Assembly agreed to a plan of action to attain global sustainable development by 2030. Much of the document is directed at poverty alleviation and appropriate measures for developing countries. Of future relevance is the national, regional and global mechanisms for follow-up and review, which are embodied in the document.

2.18 Digital purchasing and digital products

The significant growth in consumer online purchasing of goods and services is presenting new enforcement and administration challenges. The enforcement of consumer rights for cross-border purchases is particularly challenging. In September 2015, the European Commission published the results of extensive consumer surveys that questioned consumer participants about the barriers they believed they faced when purchasing online. Data protection and payment security were key concerns, while worries about the difficulties in replacing or repairing a faulty product also rated as a significant barrier. As expected, concerns about cross-border e-commerce are primarily linked to delivery issues, including shipping costs and long lead times in product delivery. The difficulty of obtaining redress was also seen as a problem. A third of the shoppers surveyed stated they have experienced problems with cross-border online shopping.

2.19 Other interesting developments

This section contains a number of recent consumer protection innovations and proposals. The developments include:

- chargeback and the limitations of this remedy if a trader refuses to provide a refund where it is warranted
- a Pan-European Trust Mark
- the first 10 years of operation of EEC-Net
- the review of Best Practices of Consumer Redress undertaken by Dr Ying Yu from the University of Oxford for UNCTAD
- the European Union Online Disputes Resolution platform
- the European e-Justice Portal
- the Consumer Conditions Scoreboard, which tracks the situation and behaviour of consumers across the EU. The tool enables policymakers to identify the need and plan for interventions if necessary, or discontinue interventions if they are no longer necessary.

The EU commissions from time to time impact studies to better understand the progress and achievements of consumer and market integration policies. This Part outlines the results of a study commissioned by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO), which was undertaken by Civic Consulting between July and September 2014. The study reviews achievements in promoting the European single market and consumer protection.

2.20 Measures to facilitate access to justice

2.20.1 Summary

Access to justice is integral to the success of any statutory regime in providing fair and effective consumer protection. However no one measure can ensure that consumers are able to enforce their legal rights as provided under this legislation. What is required is a combination of strategies. These strategies must be assessed from the perspectives of both traders and consumers.

A vertically tiered system of measures to facilitate access to justice is necessary to respond to the different levels of trader wrongdoing that may be implicated in consumer disputes.

Consumer-trader disputes may arise because of trader ignorance of their obligations under the law. These disputes may be easily resolved through negotiation. At the other end of the spectrum rogue traders may have set out systematically to exploit consumers. Such traders may stubbornly refuse to negotiate with consumers who attempt to assert their legal rights. In these types of cases access to justice may only be secured by the intervention of regulators.

Access to justice measures must be designed in response to the diverse needs of consumers and in particular the needs of the most vulnerable and disadvantaged consumers. These are the consumers who may be least able to access information about and then take measures to enforce their rights under the ACL. Off the shelf support, information and advice services may simply fail to address the needs of those consumers who, for reasons such as age, geographical location, language barriers or disability, may be particularly vulnerable in consumer transactions.

What follows is a summary of the measures commonly taken to promote access to justice in the consumer protection context, focusing on measures covering:

- The form and content of legislation
- Information and education
- Assistance and advice
- Alternative dispute resolution
- Regulatory oversight and enforcement.

This part also identifies considerations that should guide strategies to facilitate access to justice and innovative new measures from other jurisdictions that may be worthy of further consideration in the Australian context.

Measures to facilitate access to justice: new initiatives

	Australia [38.1]	Canada	Singapore	South Africa [38.2]	UK [38.3]	US
General Consumer Ombudsman	No	No	No	Yes	Yes	No
General Consumer Online Dispute Resolution	No	British Columbia [39.1]	No	No	Yes (through the EU) [39.2]	No

2.21 The form and content of legislation

Consumer protection clearly promotes consumer access to justice by providing consumers with substantive legal right. The very form in which legislation is expressed may also have a role in promoting access to justice. When dealing with consumer protection, simple, clear legislation can have significant advantages in promoting access to justice over more complicated or ambitious schemes. Clear legislation is more likely to be used by consumers in themselves asserting their rights than legislation that requires the expertise of a lawyer to interpret and apply. Legislation may also contribute to access to justice by publicly affirming the value of consumer rights.

2.22 Information and education

Information and education initiatives can assist consumers in making better purchasing decisions and in understanding their rights and obligations under the ACL. Thus, information and education strategies can promote access to justice by preventing disputes from arising in the first place and empowering consumers themselves to resolve any disputes that do arise.

To be effective in promoting access to justice, information and education initiatives need to be properly targeted to reach a wide range of community groups not merely urban, online and middle class consumers. Proactive education strategies and use of a variety of different forms of media are likely to be important in ensuring that all consumers have the opportunity to benefit from these kinds of strategies.

Some level of coordination between information and education providers would be useful to consumers, particularly in reducing the difficulties associated with information overload. For example, in the Canadian context, a Consumer Handbook collates consumer resources available to consumers in one source.

It must also be recognised that the inherent limitations on the ability of all individuals to use information in informing their decision making mean that information and education initiatives must be complemented by other strategies in order genuinely to promote access to justice.

2.23 Assistance and advice

In the event that a dispute between a trader and its consumers cannot be resolved by private negotiation in the light of the ACL, legal assistance and advice is an important means of ensuring consumers are able to access justice and vindicate their legal rights. Once again advice services need to be carefully tailored to ensure that they cater for vulnerable, disadvantaged and otherwise marginalised consumers.

In most jurisdictions legal aid will not be available for assisting consumers to pursue claims in court. This reality underlines the importance of relatively inexpensive and informal forums for dispute resolution and of active and engaged regulators.

2.24 Alternative dispute resolution

Informal and inexpensive opportunities for dispute resolution outside of courts, such as mediation, tribunals and ombudsman services, are important mechanisms for promoting access to justice. The challenge is to ensure that these forums remain responsive to the needs of consumers while still providing fair and consistent decisions that accord with the law enacted for the benefit of consumers in the ACL.

Ombudsman services are widely used in Australia in particular industries, such as banking, insurance, telecommunications and energy. Generally, ombudsman services are an independent body funded by the relevant industry, which is required by legislation to provide ADR to its customers. The attractions of these services are that they provide low cost, non-legalistic and proactive dispute resolution that can reach a wide range of consumer groups. Australia might accordingly consider the introduction of a general Consumer Ombudsman, as recently initiated in the United Kingdom and in South Africa.

One area where Australia lags behind some other countries in facilitating access to justice is in online dispute resolution. Online dispute resolution offers the opportunity for cost effective, consistent and

yet individualised resolution of consumer disputes. Australian regulators should monitor developments overseas with these types of initiatives, in particular the Online Civil Resolution Tribunal being trialed in British Columbia and the Online Dispute Resolution platform being introduced in the United Kingdom. The risk to be guarded against in these types of initiatives is perpetuating a digital divide between the consumers who have and do not have easy access to technology and the Internet.

2.25 Regulatory oversight and enforcement

Regulatory enforcement action promotes access to justice by pursuing cases that may not be justified or affordable from the perspective of individual consumers yet have a widespread impact on consumers. Enforcement action by regulators sends a clear message about the risks of non-compliance to the business sector and allows uncertain or controversial aspects of the law to be considered and developed by courts. Australian regulators have shown a relatively coordinated and vigilant approach to enforcement and the national regulator, the Australian Competition and Consumer Commission has set out a compelling and responsive set of enforcement priorities. The importance of regulatory oversight should not be overlooked in considering other, lower cost, methods of dispute resolution and access to justice measures.

Any strategy that genuinely seeks to extend and protect access to justice to all consumer groups will require careful and coordinated planning by all stakeholders. A rigorous program of research and review is also important in ensuring that access to justice initiatives are both efficient and effective in achieving their objectives.