

## Part 3: Approaches to unconscionable or highly unfair trading practices

### Issue 1: Approaches to unconscionable or highly unfair trading practices (Professor Stephen Corones, Faculty of law, Queensland University of Technology)<sup>2</sup>

The first issue for analysis is:

- Approaches to unconscionable or highly unfair trading practices:
  - punitive fees included in contracts that exceed the cost base (e.g., regulating contract terms where transparency may not be enough);
  - the effectiveness of controls to limit pyramid schemes; and
  - the scope of unsolicited selling laws overseas and the approach to direct selling.

### 3.1 Legislative approaches to regulating unconscionable or highly unfair trading practices

There are a number of possible legislative approaches to regulate unconscionable or highly unfair trading practices. One approach is to prohibit specific types of conduct, which are defined (rule-based regulation). This approach has the advantage of clarity and certainty, but it also allows for unscrupulous traders to take advantage of consumers by devising trading practices that fall outside the definition of the banned practice. Another approach is to adopt a general prohibition expressed in terms of a standard of behaviour that is prohibited, such as ‘misleading conduct’, ‘unconscionable conduct’, or ‘unfair terms’, sometimes referred to as safety-net regulation.<sup>3</sup> Under this approach it is not necessary to fit the practice within a restrictively defined banned practice.

Some jurisdictions adopt both general and specific approaches. The approach adopted in Australia is to provide for three general protections in the ACL, which are supplemented by more prescriptive protections in relation to specific conduct such as pyramid selling, door-to-door or unsolicited sales, and undue harassment or coercion.

This part of the Comparative Analysis will consider first the policy objects and then the operative provisions of the consumer protection laws in Australia in relation to punitive fees, pyramid schemes and unsolicited selling. It will then consider the policy objects and the operative provisions adopted in the EU, UK, USA, Canada and Singapore in relation to punitive fees, pyramid schemes and unsolicited selling. The final part will identify any significant differences between the approaches adopted by Australia, and the comparator jurisdictions.

<sup>2</sup> I gratefully acknowledge the research assistance provided by Juliet Davis in the preparation of Part 3.

<sup>3</sup> These objects derive from Recommendation 3.1 made by the Productivity Commission in its *Review of Australia’s Consumer Policy Framework*, Final Report (Canberra, 2008), 41-42. See also Jeannie Marie Paterson and Gerard Brody, ‘Safety Net Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models’ (2015) 38 *Journal of Consumer Policy* 331, 332-3.

## 3.2 General protections in Australia

### 3.2.1 Introduction

The *Intergovernmental Agreement for the Australian Consumer Law*, entered into by all the Australian Governments in 2009, adopted in its recitals the objects for the national consumer policy framework that gave rise to the ACL.<sup>4</sup> They indicate what the Governments were seeking to achieve through the new law.

Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law (2009)* provides:

The objective of the new national consumer policy framework is 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.

This overarching object is supported by six operational objects:

- 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 are at the greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.

The policy object actually prescribed for itself by the CCA is set out in s 2 of the Act. It provides:

- the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair-trading and provision for consumer protection.

In Australia, there are three general protections in the ACL and the ASIC Act that regulate unconscionable or highly unfair trading practices:

- misleading conduct
- unconscionable conduct
- unfair terms.

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<sup>4</sup> These objects derive from Recommendation 3.1 made by the Productivity Commission in its *Review of Australia's Consumer Policy Framework*, Final Report (Canberra, 2008), 41-42. See also Jeannie Marie Paterson and Gerard Brody, 'Safety Net Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 38 *Journal of Consumer Policy* 331, 332-3.

### 3.2.2 General protections in Australia — misleading conduct

The first general protection is contained in s 18(1) of the ACL, which provides that:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

This prohibition does not substantively change compared to s 52(1) of the *Trade Practices Act 1974* (Cth) (TPA), and the State and Territory equivalents in their Fair Trading Acts (FTA). The equivalent provision in the ASIC Act is s 12DA, which prohibits misleading or deceptive conduct in relation to financial products and financial services.

In relation to s 52 of the TPA Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* observed:

... the evident purpose and policy underlying Pt V, which includes s 52, recommends a broad construction of its constituent provisions, the legislation being of a remedial character so that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.<sup>5</sup>

Their Honours also observed that s 52 imposes a ‘norm of conduct’,<sup>6</sup> and the role of the courts was to apply it to a wide range of circumstances involving businesses as well as consumers. The policy object of s 52 of the TPA was to operate as a catch-all provision that could apply to objectionable conduct that might otherwise escape liability, on technical grounds, under the more specific provisions of the Act.

In determining whether conduct is misleading or deceptive under s 18 of the ACL, an important consideration will be the nature of the audience at whom it was directed. Early in the history of s 52 of the TPA it was held that conduct will be regarded as misleading or deceptive only if it misled or deceived (or is likely to mislead or deceive) reasonable members of that audience.

In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*, Gibbs CJ stated:

Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion by [sic] regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens, which the section creates, cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests.<sup>7</sup>

These principles were confirmed by the High Court in *Campomar Sociedad Limitada v Nike International Ltd*:

It is in these cases of representations to the public ... that there enter the ‘ordinary’ or ‘reasonable’ members of the class of prospective purchasers. Although a class of consumers may be expected to include a wide range of persons, in isolating the ‘ordinary’ or ‘reasonable’ members of that class, there is an objective attribution of certain characteristics.<sup>8</sup>

<sup>5</sup> *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 503.

<sup>6</sup> *Ibid* 505.

<sup>7</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199. See also *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 371 [22] (French CJ and Kiefel J).

<sup>8</sup> *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, 85 [102] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (citations omitted).

In *Telstra Corp Ltd v Cable & Wireless Optus Ltd*, Goldberg J thought that the '[t]he extremely stupid, and perhaps the gullible may well be excluded from the class'.<sup>9</sup> The class does not include those who fail to take reasonable care of their own interests.<sup>10</sup> Reasonable members of the class would take reasonable steps to look after their own interests.

However, 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 United States *Federal Trade Commission Act* and US law.<sup>11</sup>

There is considerable scope for overlap between the specific protections under the ACL regulating punitive fees, pyramid schemes and unsolicited selling and the general protection for misleading conduct in s 18(1) of the ACL.

### 3.2.3 General protections in Australia — unconscionable conduct

In relation to unconscionable conduct, the policy object is to prevent practices that are unfair, and 'to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage'. The first interpretative principle inserted as part of the 2011 amendments recognises that it was Parliament's intention that the protection provided by s 21 of the ACL is wider than the equitable concept of unconscionable conduct, just how much wider is a matter of considerable debate and uncertainty.<sup>12</sup>

Since 1 January 2012, the following general protections apply in relation to unconscionable conduct:

- ACL, s 20 is a general prohibition of unconscionable conduct within the meaning of the unwritten law (*ASIC Act*, s 12CA)
- the new s 21 unified the old sections 21 and 22 to create a single, general, prohibition of unconscionable conduct in connection with the supply or acquisition of goods or services (or possible supply or acquisition) other than to or from, respectively, a listed public company within the meaning found in the *Income Tax Assessment Act 1997* (statutory unconscionable conduct). It is designed to confer the same level of protection on consumers and businesses, except where the business is conducted through a listed public company.
- the new s 22 sets out a non-exhaustive list of factors that may be taken into account by a court in deciding whether s 21 has been contravened. This list replicates the list of 12 matters that previously applied under the old s 22 to transactions involving business consumers.

9 *Telstra Corp Ltd v Cable & Wireless Optus Ltd* [2001] FCA 1478, [23].

10 See *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [105]; *Cantarella Bros Pty Ltd v Valcorp Fine foods Pty Ltd* (2002) ATPR ¶41-856 (Lindgren J) [35]-[36].

11 See R M Dietrich, 'Federal Trade Commission and Consumer Protection' (1973) 1 *Australian Business Law Review* 204 and G Q Taperell, R B Vermeesch and D J Harland, *Trade Practices and Consumer Protection* (3<sup>rd</sup> ed, Butterworths, 1983) at [1406], 604-5.

12 See the first interpretative principle in ACL, s 21(4)(a).

### 3.2.4 Different interpretations of statutory unconscionable conduct

Section 21(1) of the ACL provides:

A person must not, in trade or commerce, in connection with:

- (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
- (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
- (c) engage in conduct that is, in all the circumstances, unconscionable.

Two lines of authority have developed around the interpretation of s 21 of the ACL. According to the first line of authority, statutory unconscionable conduct is targeted at commercial conduct involving a ‘high level of moral obloquy’, and the moral or normative standard for statutory unconscionable conduct is higher than unfairness.<sup>13</sup> This line of authority is intended to strike a balance between certainty and flexibility, and to ensure that s 21 of the ACL is not allowed to be used by one party to undermine certainty and the sanctity of contract. This judicially imposed requirement of a ‘high level of moral obloquy’ has been applied in other cases of statutory unconscionable conduct.<sup>14</sup>

According to the second line of authority, statutory unconscionable conduct does not necessarily require a ‘high level of moral obloquy’ and the statutory language needs to be given its ‘ordinary and natural interpretation’. In *ACCC v Lux Distributors Pty Ltd*, the Full Federal Court held that conduct is ‘unconscionable’ for the purposes of s 21 of the ACL if it is ‘not done in good conscience’.<sup>15</sup> Statutory unconscionable conduct is an evaluative standard 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*.<sup>16</sup> It is to be applied according to the particular context of the case by asking: what is the current moral or ethical standard in relation to the conduct at issue?

The Full Federal Court in *ACCC v Lux Distributors Pty Ltd* stated:

The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting.<sup>17</sup>

13 *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ).

14 See *CIT Credit Pty Ltd v Keable* [2006] NSWCA 130 (Spigelman CJ, with whom Giles JA and Gzell J agreed); *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759; *Director of Consumer Affairs Victoria v Scully (No. 3)* (2013) 303 ALR 168 (Neave, Osborn and Santamaria JJA); *DPN Solutions Pty Ltd v Tridant Pty Ltd* [2014] VSC 511 (Hargrave J) and *Sgarretta v National Australia Bank Limited* [2014] VSCA 159 (Whelan and Santamaria JJA).

15 See *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41] (Allsop CJ, Jacobson and Gordon JJ). Leave to appeal to the High Court was refused. See [2014] HCASL 55.

16 *Ibid* [23]; see also *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50 [262] (Allsop CJ) in relation to statutory unconscionable conduct in s 12CB of the *ASIC Act*.

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

The two lines of authority as to the requirement of moral obloquy or moral tainting are difficult to reconcile and in the absence of legislative intervention the matter must ultimately be determined by the High Court. The High Court has granted special leave to hear an appeal from the decision of the Full Federal Court in *Paciocco v Australia and New Zealand Banking Group*,<sup>18</sup> and the issue may be resolved in that appeal.

In *Paciocco v Australia and New Zealand Banking Group*, Allsop CJ provided a useful summary of the values and norms recognised by the statute that are relevant in evaluating business behaviour to determine whether it warrants the characterisation of unconscionable:

The working through of what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts, will take its inspiration and formative direction from the nation's legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts. ... It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.<sup>19</sup>

### 3.2.5 General protections in Australia — unfair terms

The third general protection in the ACL and the *ASIC Act* that regulates highly unfair trading practices concerns unfair terms in contracts.

Unfair terms in contracts were previously regulated in Australia by Pt 2B of the *Fair Trading Act 1999* (Vic) which took effect in 2003. Attempts by the Ministerial Council on Consumer Affairs (MCCA) to devise national legislation along the lines of the Victorian model stalled when the Regulatory Impact Statement (RIS) did not meet the required standard providing only anecdotal evidence of detriment from the use of unfair terms.<sup>20</sup>

In 2008 the Productivity Commission (PC) recommended that unfair terms should be regulated by the ACL.<sup>21</sup> The PC acknowledged that the regulation of unfair terms by the unconscionable conduct provisions of the ACL was 'costly, slow and uncertain'.<sup>22</sup> Two principal rationales were advanced by the PC for such a scheme — one ethical and the other economic. The PC was of the view that such a

18 [2015] HCATrans 229.

19 *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50 [296].

20 See Productivity Commission, *Review of Australia's Consumer Policy Framework* (Final Report, 2008 Canberra), vol 2, 149.

21 *Ibid* 168-169, Recommendation 7.1.

22 *Ibid* 154.

scheme could be justified as an extension of ethical principles about fairness in contracts, the aim of the proposed law being to cover terms that appear to be manifestly unfair.<sup>23</sup> The scheme could also be justified on economic grounds, in that markets do not operate efficiently on the basis of sub-optimal risk assessments by consumers.<sup>24</sup>

The PC in its Review of Australia's Consumer Policy Framework expressed the view that the aim of the proposed law regulating unfair terms was only to cover terms that are manifestly unfair.<sup>25</sup> The Productivity Commission was cognisant of the fact that '[w]hatever their immediate benefits, barring unfair contract terms is likely to have some adverse knock-on impacts for consumers through higher prices (or lower quality goods and services),'<sup>26</sup> and that regulatory action should only take place where net benefits are likely.<sup>27</sup>

Section 23 of the ACL provides:

- (1) A term of a consumer contract or small business contract is void if:
  - (a) the term is unfair; and
  - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A consumer contract is a contract for:
  - (a) a supply of goods or services; or
  - (b) a sale or grant of an interest in land;
  - (c) to an individual whose acquisition of the goods, services or interests is wholly or predominantly for personal, domestic or household use or consumption.

Section 23 was extended to small business contracts by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth). The provisions apply to small business contracts entered into or amended or renewed after 12 November 2016. In the case of application to small businesses, one party to the contract must be a business within the definition contained in s 23(4) which provides:

- (4) A contract is a small business contract if:
  - (a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
  - (b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
  - (c) either of the following applies:
    - (i) the upfront price payable under the contract does not exceed \$300,000;
    - (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000.

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23 Ibid 151, 413-414.

24 Ibid 151, 414-423.

25 Ibid 151, 413-414.

26 Ibid 155.

27 Ibid 157.



In 2015, the general protection against unfair terms was extended to small business by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth). The new law received Royal Assent on 12 November 2015 and takes effect 12 months after that date in order to allow businesses time to implement system changes and contract amendments to ensure compliance. The unfair terms prohibitions will only apply to small business contracts entered into or renewed, or terms of existing contracts that are varied, after 12 November 2016.<sup>28</sup> It will not apply to small business contracts entered into before this date. The object of the extending unfair contract term protections to small businesses is set out in the *Decision Regulation Impact Statement*:

... to promote fairness in contractual dealings with small businesses with regard to standard form contracts. This will reduce small business detriment and have positive impacts on the broader economy by increasing small business certainty and confidence, and providing for a more efficient allocation of risk. Small businesses, in dealing with other businesses through standard form contracts, should have confidence that the contract they are offered is fair and reasonable and that the risks are allocated efficiently.<sup>29</sup>

The test of what is ‘unfair’ is the same for consumers and small businesses. The test falls into four parts. The first part of the test requires the court to consider the term at issue itself.<sup>30</sup> The second part of the test requires the court to consider contextual matters surrounding the formation of the contract containing the term.<sup>31</sup> The third part of the test requires the court to consider whether the term was transparent.<sup>32</sup> The fourth part of the test requires the court to consider the term at issue in the context of the contract as a whole.<sup>33</sup> In determining whether each of the elements of unfairness is satisfied the court may be guided by the indicative ‘grey’ list in s 25 of the ACL.

Section 24(1) of the ACL provides that a term of a consumer contract or small business contract will be ‘unfair’ if:

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In *ACCC v Chrisco Hampers Australia Limited*,<sup>34</sup> (‘Chrisco case’), the Federal Court had to consider whether the HeadStart term inserted by Chrisco Hampers Australia Ltd (‘Chrisco’) into its lay-by contracts with consumers was unfair within the meaning of s 24 of the ACL. The HeadStart term allowed Chrisco to continue to take payments by direct debit from the consumer’s bank account even after the consumer had made full payment for the lay-by order. The term would apply unless the consumer opted out of it. The money withdrawn from the consumer’s bank account would then be used for any future order made by the consumer. If the consumer did not place an order and requested a refund of the money paid, the money would be refunded without interest.

28 CCA s 290A.

29 Consumer Affairs Australia and New Zealand, ‘Decision Regulation Impact Statement, Extending Unfair Contract Term Protections to Small Businesses’ (2015) 11.

30 ACL s 24(1).

31 ACL s 24(2).

32 ACL s 24(2)(a).

33 ACL s 24(2)(b).

34 *ACCC v Chrisco Hampers Australia Limited* [2015] FCA 1204.



Edelman J said:

The legislative concept of ‘unfairness’ in s 24, with elaboration through the three elements of unfairness, might be described as a guided form of open-ended legislation.<sup>35</sup>

Each element of unfairness focuses on the term itself and appears to preclude consideration of any additional matters such as the circumstances surrounding its exercise, or the conduct of the parties during pre-contractual negotiations. While some contract terms may be intrinsically unfair in all circumstances, other terms may only be unfair when they are exercised in an inappropriate way.

While s 24(1) appears to require that the assessment as to whether a particular term is unfair is to be made without consideration of the surrounding circumstances, s 24(2) provides that in determining whether a term of a consumer contract is unfair under s 24(1), a court may take into account ‘such matter that it thinks relevant’. This allows a court to consider the context in which the term was exercised, and may convert a term that is unobjectionable on its face into an unfair term.

### 3.2.6 General protections in Australia — excluded terms

Section 26 of the ACL provides:

- (1) Section 23 does not apply to a term of a consumer contract to the extent, but only to the extent, that the term:
  - (a) defines the main subject matter of the contract; or
  - (b) sets the upfront price payable under the contract; or
  - (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.
- (2) The upfront price payable under a consumer contract is the consideration that:
  - (a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
  - (b) is disclosed at or before the time the contract is entered into;
  - (c) but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

As regards the meaning of the term ‘the main subject matter of the contract’, the Second Explanatory Memorandum states:

The exclusion of terms that define the main subject matter of a consumer contract ensures that a party cannot challenge a term concerning the basis for the existence of the contract.

Where a party has decided to purchase the goods, services, land, financial services or financial products that are the subject of the contract, that party cannot then challenge the fairness of a term relating to the main subject matter of the contract at a later stage, given that the party had a choice of whether or not to make the purchase on the basis of what was offered.

The main subject matter of the contract may include the decision to purchase a particular type of good, service, financial service or financial product, or a particular piece of land. It may also encompass a term that is necessary to give effect to the supply or grant, or without which, the supply or grant could not occur.<sup>36</sup>

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<sup>35</sup> Ibid [40].

<sup>36</sup> Second Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, [5.59]-[5.61].

Section 26(1)(a) implies that a distinction can be drawn between terms that define the main subject matter of the contract and incidental or ancillary terms. If a term relates to the main subject matter it is excluded from consideration under s 23(1) of the ACL. If a term relates to incidental subject matter it may be assessed under s 23(1) of the ACL.

The Productivity Commission in its *Review of Australia's Consumer Policy Framework* gave the following reasons for excluding terms setting the upfront price from the unfair terms law:

The argument for exclusion rests on the fact that prices are clearly visible to consumers and, unlike many other terms, cannot legitimately be seen as surprises veiled by a complex contract. Unless there are major barriers to effective competition, consumers can elect to avoid contracts with unfair prices. And where there are such barriers, competition policy is the more appropriate vehicle for achieving efficient prices rather than the discretionary use of unfair contracts law to impose de facto price controls.<sup>37</sup>

As regards the meaning of the term 'the upfront price', the Second Explanatory Memorandum states:

The upfront price payable under a consumer contract is consideration that is:

- provided, or is to be provided, for the supply, sale or grant under the contract; and
- is disclosed at or before the time the contract is entered into, but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.<sup>38</sup>

The exclusion of 'any other consideration that is contingent on the occurrence or non-occurrence of a particular event' from the term 'upfront price' would mean that the following provisions will be subject to scrutiny under the unfair terms provision of the ACL:

- a term providing that additional amounts are payable in the event of default or untimely payment;<sup>39</sup>
- a term providing for early termination fees;<sup>40</sup>
- a term providing for capitalisation of interest;<sup>41</sup> and
- a term providing for a unilateral power to vary the upfront price payable under the contract.<sup>42</sup>

A price escalation clause may be assessed for unfairness. It is included in one of the examples of terms included in the grey list that may be unfair depending on the particular circumstances.<sup>43</sup> Such a clause may be unfair because it allows the price to increase without giving the consumer or small business the right to terminate the contract. Whether it is unfair in the circumstances will depend on the size of the increase. It may be that a small increase is not unfair.

37 Productivity Commission, *Review of Australia's Consumer Policy Framework* (Final Report, 2008 Canberra) vol 2, 161-2.

38 Second Explanatory Memorandum [5.62].

39 *Andrews v Australian and New Zealand Banking Group Ltd* (2011) 288 ALR 611.

40 See ASIC, *Early Termination Fees for Residential Loans: Unconscionable Fees and Unfair Contract Terms*, Regulatory Guide 220 (2010).

41 *PSAL Ltd v Kellas-Sharpe* [2012] QSC 31.

42 Jeannie Marie Paterson, *Unfair Contract Terms in Australia* (Lawbook Co, Sydney, 2012) 47-48 [4.130]-[4.170].

43 ACL s 25(1)(f).

### 3.3 Punitive fees in contracts

#### 3.3.1 Australia

Punitive fees included in contracts that exceed their cost base, are sometimes referred to as ‘exploitative pricing’, ‘monopolistic price setting’ or ‘unethical overcharging’. They may be charged as the upfront price payable for goods or services. They may also be charged as default fees which are contingent on the performance of some act of default on the part of the consumer, or termination fees, in which case they do not form part of the upfront price. Under the *CCA* there are no specific prohibitions against punitive fees, although the *Competition and Consumer Amendment (Payment Surcharges) Act 2015*, establishes a legislative and regulatory framework to ban surcharges imposed in respect of particular payment methods that exceed the cost of acceptance for those payment methods.

The inclusion of punitive fees in contracts may be associated with other misleading conduct, or unconscionable conduct. There are also specific provisions that prohibit false or misleading representations in relation to the supply of goods or services.

#### 3.3.2 Application of statutory unconscionable conduct to punitive fees

In deciding whether the inclusion of punitive fees in contracts constitutes statutory unconscionable conduct the courts have taken into account the size of the disparity between the level of fees and the costs that would be sustained by the fee events. In *PSAL Limited v Kellas-Sharpe*,<sup>44</sup> Applegarth J was required to decide whether the capitalisation of interest over an 18-month period on a short-term loan of 2-months contravened s 12CC of the *ASIC Act* and s 51AC of the *TPA*. It was argued by the defendants that the provisions of the contract went beyond what was reasonably necessary to protect PSAL’s legitimate interests, because PSAL had been provided with substantial security for the loan.

Applegarth J was not persuaded that the 7.5% standard rate that applied when the loan went into default was an exorbitant rate, having regard to PSAL’s potential loss on a defaulting loan. An interest rate of 7.5% was consistent with commercial rates at the time and was not shown to be unreasonable considering the costs and losses that result from default.<sup>45</sup> However, the election by the lender to capitalise the interest on a monthly basis was unconscionable. Applegarth J stated:

I do not find that the rate of interest of 7.5 per cent per month was unconscionable for the original term of the loan, and it would not have been unjust for that higher or default rate to be charged for a period of a few months during which time the borrowers were given a reasonable opportunity to refinance. However, continuing to charge that rate of interest, capitalised monthly, for the long period during which interest was charged at the default rate was unconscionable in circumstances in which costs associated with the default were added to the loan balance and attracted interest at that rate. By mid-2010 the loan had ceased to be a short term loan and the capitalisation of interest at such a high rate imperilled any prospect that the borrowers had of being able to pay out the loan balance. To continue to capitalise interest at such a rate for a period of months and years is irreconcilable with what is right and reasonable.<sup>46</sup>

44 *PSAL Limited v Kellas-Sharpe* [2012] QSC 31.

45 *Ibid* [103].

46 *Ibid* [115].

However, in *Paciocco v Australia and New Zealand Banking Group*,<sup>47</sup> Allsop CJ stated that the fact that a fee is extravagant or exorbitant relative to the cost of the fee event:

... does not necessarily lead to a conclusion of statutory unconscionability ... Their characterisation as the product of unconscionable conduct would depend upon the broader considerations of the statute. The question might be seen to be whether ... the conduct was the imposition of an oppressive burden on a weaker party by the unconscientious use of power by a stronger party.<sup>48</sup>

The Full Federal Court confirmed the decision of the primary judge, Gordon J, that ANZ's late payment fees were not unconscionable within the meaning of s 12CB of the *ASIC Act*. The Court would not intervene solely on the basis that ANZ's late payment fees were said to be too high unless there were other indicators that demonstrated '... the imposition of an oppressive burden on a weaker party by the unconscientious use of power by a stronger party'.<sup>49</sup> There was evidence that other banks charged similar fees to the ANZ bank. Equivalent financial services were available from other financial institutions (banks and non-banks).<sup>50</sup> ANZ's customers had a choice and could move to other financial institutions if they thought ANZ's fees were too high. ANZ's fees could not be seen as 'a form of predation on the weak or poor'.<sup>51</sup>

In Australia, a fee that is extravagant or exorbitant does not breach the statutory unconscionable conduct provisions s 21 of the ACL or s 12 CB of the *ASIC Act* by that fact alone. There must be additional evidence of other conduct such as: 'predation on the weak or the poor'; 'real vulnerability requiring protection'; financial or personal compulsion or pressure'; or 'secrecy, trickery or dishonesty'.<sup>52</sup>

### 3.3.3 Application of unfair terms to punitive fees in contracts

Section 26 of the ACL excludes from consideration as an unfair term, a term that sets the upfront price payable under the contract. Section 25(1)(c) includes in the indicative grey list of terms that may be unfair 'a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract'.

According to Paterson:

Default fees are contingent on an act of the consumer (default) and, accordingly... would not be included in the category of exempted terms that set the upfront price and would therefore be subject to review for unfairness under the [ACL].<sup>53</sup>

Similarly, termination fees which impose a fee if the contract is terminated early do not set the upfront price and would also be subject to review for unfairness under the ACL.<sup>54</sup>

47 *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50.

48 *Ibid* [341].

49 *Ibid* [342].

50 *Ibid* [343].

51 *Ibid* [345].

52 *Ibid* [347].

53 Jeannie Marie Paterson, *Unfair Contract Terms in Australia* (Lawbook Co, Thomson Reuters, Sydney, 2012) 47 [4.130].

54 *Ibid* 48 [4.160].

### 3.3.4 Competition and Consumer Amendment (Payment Surcharges) Act 2015

On 22 February 2016, Parliament passed the Competition and Consumer Amendment (Payment Surcharges) Bill 2015, and upon receiving royal assent will establish a legislative and regulatory framework to ban surcharges imposed in respect of particular payment methods that exceed the cost of acceptance for those payment methods. It is stated in the Explanatory Memorandum accompanying the Bill that:

The amendments contained in this Bill will enhance transparency for consumers and improve price signals on payment method costs, helping consumers to understand the costs of competing payment methods and encouraging the use of the most efficient pricing methods.<sup>55</sup>

The Act inserts a new Pt IVC into the *Competition and Consumer Act 2010* (Cth). It does not form part of the ACL.

Section 55 of the Act states that the object of the new Pt IVC is:

- ... to ensure that payment surcharges:
  - (a) are not excessive; and
  - (b) reflect the cost of using the payment methods for which they are charged.

A 'payment surcharge' is defined broadly in s 55A to mean:

- (a) an amount charged, in addition to the price of goods or services, for processing payment for the goods or services; or
- (b) an amount (however described) charged for using one payment method rather than another.

Section 55B(1) provides that:

A corporation must not, in trade or commerce, charge a payment surcharge that is excessive.

Whether a charge is excessive will be determined by reference to a standard to be published by the Reserve Bank of Australia or the regulations. Section 55B(2) provides that a payment surcharge is 'excessive' if:

- (a) the surcharge is for a kind payment covered by:
  - (i) a Reserve Bank standard; or
  - (ii) regulations made for the purposes of this subparagraph; and
- (a) the amount of the surcharge exceeds the permitted surcharge referred to in the Reserve Bank standard or the regulations.

The relevant payments covered are likely to be payments made by the MasterCard, VISA, and American Express Card Scheme systems, and designated debit card systems such as EFTPOS.

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55 Explanatory Memorandum, Competition and Consumer Amendment (Payment Surcharges) Bill 2015 [1.9].

Section 55G provides that if the ACCC has reasonable grounds to believe that a person has contravened s 55B, it may issue an infringement notice. The penalty will be \$108,000 (600 penalty units) for a listed corporation, or \$10,800 (60 penalty units) for a body corporate other than a listed corporation, or \$2,160 (12 penalty units) for a person not being a body corporate. If the merchant fails to pay the penalty the ACCC is likely to bring proceedings for the imposition of a penalty under s 76 of the CCA. Civil remedies, such as damages and injunctions, will also be available for a contravention of s 55B(1).

### 3.3.5 European Union

#### 3.3.5.1 Introduction

The consumer policy framework in the European Union with regard to the inclusion of punitive fees in contracts is to provide for a general protection and a number of industry-specific protections. The inclusion of punitive fees in contracts is governed by the Unfair Commercial Practices Directive (UCPD), adopted by the European Parliament and the Council of the European Union in 2005, and, more specifically, by the Unfair Terms in Consumer Contracts Directive (UTCCD), adopted in 1993.

The UTCCD is protective legislation, which seeks to safeguard consumers against abuses of power by traders or suppliers, notably with regard to ‘one-sided standard contracts and the unfair exclusion of essential rights in contracts’.<sup>56</sup> The drafters considered that the adoption of uniform legislation regarding unfair terms in consumer contracts would provide ‘more effective’ consumer protection and facilitate the creation of the internal European market.<sup>57</sup>

The central aim of the UCPD is to promote the proper function of the internal market and to provide a ‘high level of consumer protection’ against the economic harm caused by unfair commercial practices.<sup>58</sup> Marked differences in the laws of the Member States regarding unfair commercial practices was seen as causing uncertainty regarding cross border activities, increasing business costs and undermining confidence in the internal market.<sup>59</sup> The UCPD was intended to provide harmonised rules, which, amongst other things, established a general prohibition on unfair commercial practices affecting consumers and for the first time at Community level, regulate aggressive commercial practices.<sup>60</sup>

Financial services fall within the scope of the UCPD. Prior to the adoption of the UCPD, the Commission Staff Working Paper on Retail Financial Services of 22 September 2009 detailed a number of problematic practices taking place in the financial sector, including non-transparent bank fees and insufficient pre-contractual information.<sup>61</sup> Such anti-consumer actions/omissions were intended to be dealt with by the UCPD under the provisions prohibiting misleading commercial practices.<sup>62</sup>

The implementation choices made by Member States regarding the Directives are largely dependent on whether laws regulating unfair commercial practices already existed in the Member States. With regard to the UCPD for instance, some Member States adopted new national laws which transposed the UCPD practically verbatim (UK, Portugal, Romania, Hungary, Cyprus, Poland, Slovenia, Slovakia,

56 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L 95/30 recitals.

57 Ibid.

58 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 1.

59 Ibid art recitals 2-4.

60 Ibid art recital 11.

61 Commission Staff Working Document, Guidance on the Implementation/Application of *Directive 2005/29/EC* on Unfair Commercial Practices, 11.

62 Ibid.

Estonia, Ireland, Luxembourg, Latvia, Lithuania and Greece) whilst others incorporated it into existing legislation: consumer codes (France, Italy, Bulgaria, Czech Republic, Malta), civil codes (the Netherlands), acts against unfair competition (Germany, Austria, Denmark, Spain) or specific existing laws (Belgium, Finland and Sweden).<sup>63</sup>

### 3.3.6 General protection — punitive fees

The Unfair Commercial Practices Directive (UCPD) regulates punitive fees under its ‘unfair commercial practice’ doctrine. ‘Unfair commercial practices’ between businesses and consumers are prohibited under the UCPD.<sup>64</sup>

The UCPD is limited to business-to-consumer (B2C) transactions. Business-to-business transactions (B2B) have been excluded from the Directive. Recital 6 of the Directive states that the UCPD does not cover unfair commercial practices which harm only competitor’s economic interests or transactions between traders.

The test for determining whether a practice constitutes an ‘unfair commercial practice’ under art 5 of the UCPD is multi-layered. Article 5(2) provides that a commercial practice will be unfair if:

- it is contrary to the requirements of professional diligence,
- and
- it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.<sup>65</sup>

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’. According to Abbamonte:

The concept of professional diligence is broader than subjective good faith since it encompasses not only honesty but also competence on the part of the trader. For example, the behaviour of an honest but incompetent antique dealer who sells fakes, believing them to be originals, would not be in conformity with the requirements of professional diligence ... Professionals are expected to comply with good standards of conduct and approved practices. It is a measure of diligence above that of an ordinary person or non-specialist.<sup>66</sup>

The phrase ‘to materially distort the economic behaviour of consumers’ is defined in Article 2(e) to mean: ‘using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to make a transactional decision that he would not have taken otherwise’. This requirement tests whether the practice is likely to cause market failure by distorting consumer preference or freedom of choice.<sup>67</sup>

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63 First Report on the Application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (‘Unfair Commercial Practices Directive’) para 2.2.

64 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5 (1).

65 Ibid art 5(2).

66 G Abbamonte, ‘The Unfair Commercial Practices Directive and its General Prohibition’ in *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart, Oxford, 2007) Ch 2, 22.

67 Ibid 23.



Where an identifiable group of consumers is especially vulnerable to a commercial practice due to their age, credulity, or infirmity, in a way, which was reasonably foreseeable to a trader, an assessment of the fairness/unfairness of the commercial practice will be taken from the perspective of an average member of that group.<sup>68</sup>

The second test of unfairness, found in art 5(4), states that a commercial practice will be unfair if found to be:

(a) misleading as set out in Articles 6 and 7,

or

(b) aggressive as set out in Articles 8 and 9.<sup>69</sup>

The provisions on misleading or aggressive practices make no reference to the concept of professional diligence because misleading consumers or being aggressive towards them is considered to be contrary to professional diligence. The test of professional diligence only has to be satisfied under the general prohibition.

The first limb of the second test, misleading commercial practices, is most relevant with respect to punitive fees. Article 6(1) of the UCPD relevantly considers a commercial practice to be misleading if it contains false information, or deceives/is likely to deceive the average consumer, regarding certain elements, which causes/likely causes the consumer to make a transactional decision that they would not otherwise make.<sup>70</sup> Deception can still be found to occur even where the information provided is factually correct, including in respect of the product or service's overall presentation.<sup>71</sup> A misleading commercial practice may be found in situations where deceptive information is given concerning the following elements for example: the product's nature or existence,<sup>72</sup> the main characteristics of the product including its benefits and risks,<sup>73</sup> and the product's price or method of price calculation.<sup>74</sup> It is also misleading under the Directive to omit 'material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise'.<sup>75</sup> Examples of such material information include: the main features of the product<sup>76</sup> and the price of the product inclusive of taxes or the means of price calculation.<sup>77</sup> A misleading omission will also occur where a trader hides material information or provides it in an unintelligible, unclear, untimely or ambiguous manner.<sup>78</sup>

Article 5(5) puts forward a third means by which a commercial practice may be found to be unfair: a 'blacklist', found in Annex I, of commercial practices which are to be considered unfair in all circumstances. This list is to be applied by all Member States without modification.<sup>79</sup> There are no specific practices contained in Annex I that pertain to the inclusion of punitive fees in contracts.

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68 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5(3).

69 Ibid art 5(4).

70 Ibid art 6.

71 Ibid.

72 Ibid art 6(1)(a).

73 Ibid art 6(1)(b).

74 Ibid art 6(1)(d).

75 Ibid art 7(1).

76 Ibid art 7(4)(a).

77 Ibid art 7(4)(c).

78 Ibid art 7(2).

79 Ibid art 5(5).

However, unlike Australia’s misleading conduct provision in s 18 of the ACL (and s 52 of the TPA) remedies are only available in relation to business-to-consumer (B2C) transactions, not business-to-business transactions (B2B).

Member States have some limited flexibility in the choice of means by which they enforce the provisions of the UCPD, provided that those means are ‘adequate and effective’ in combating unfair commercial practices. However, it is prescribed that one of these means must include legislation under which persons or organisations, regarded under the Member State’s national law as having a ‘legitimate interest in combating unfair commercial practice, including competitors’, may take legal action and/or bring the matter before a competent administrative authority to either initiate legal action or decide complaints.<sup>80</sup>

### 3.3.7 Specific protection — punitive fees

The Unfair Terms in Consumer Contracts Directive (UTCCD) provides specific direction on how Member States should define and counteract unfair terms in consumer contracts. The Directive puts forward both general and specific tests to determine whether a contractual term is unfair.

Article 3 provides that a term that has not been negotiated individually will be determined to be unfair ‘if contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment to the consumer’.<sup>81</sup>

Article 3(3) further provides a ‘grey list’, found in the Annex to the Directive, which contains ‘an indicative and non-exhaustive list of the terms which may be regarded as unfair’.<sup>82</sup> Regarding the inclusion of punitive fees in contracts, the ‘grey list’ relevantly contains contractual terms, which have the object or effect of ‘requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation’.<sup>83</sup>

Article 4 states that a contractual term’s unfairness is to be assessed by ‘taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent’.<sup>84</sup> Terms relating to the definition of the contract’s main subject matter, or the actual price of the goods and services, are not subject to assessment on unfairness grounds provided that they are in plain and intelligible language.<sup>85</sup>

The Directive obliges Member States to prescribe in their national law that unfair terms used in a consumer contract by a supplier or seller will not be binding on the consumer.<sup>86</sup> Additionally, Member States will put in ‘adequate and effective’ measures to prevent the ongoing use of unfair terms in consumer contracts.<sup>87</sup> Such measures must include legal provisions that allow a person or organisation with a legitimate interest in consumer protection, to seek a decision before a court or competent authority as to whether a standard contractual term is fair.<sup>88</sup>

80 Ibid art 11.

81 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L 95/30 art 3.

82 Ibid art 3(3).

83 Ibid 1(e).

84 Ibid art 4(1).

85 Ibid art 4(2).

86 Ibid art 6.

87 Ibid art 7.

88 Ibid art 7(2).

## 3.4 United Kingdom

### 3.4.1 Introduction

The consumer policy framework in the United Kingdom with regard to the inclusion of punitive fees in contracts is to provide for a general protection and specific protections. The inclusion of punitive fees in contracts is governed by the *Consumer Protection from Unfair Trading Regulations 2008* ('CPR') and, more specifically, by the *Consumer Rights Act 2015* and the *Consumer Rights (Payment Surcharges) Regulations 2012*.

The Unfair Commercial Practices Directive of the European Parliament and Council (UCPD) was enacted as a law of the United Kingdom, by the Consumer Protection from Unfair Trading Regulations 2008 (CPR). The CPR came into force in 2008.<sup>89</sup> The central aim of the UCPD is to promote the proper function of the internal market and to provide a 'high level of consumer protection' against the economic harm caused by unfair commercial practices.<sup>90</sup> The UK government declared its support for the UCPD on the basis that the Directive would improve consumer protection and foster cross-border trade. In particular, the legislature referred to research conducted by the Office of Fair Trading in 2001 which indicated that consumer detriment caused by defective goods, poor information and inadequate redress, constituted over £8 billion a year, and that low-income consumers suffered disproportionate welfare loss as a result of unfair consumer practices.

Whilst legislators recognised that these problematic commercial practices were already the subject of existing UK legislation, it was considered that the principles-based approach and broad scope of the UCPD would improve enforcers' ability to act effectively.<sup>91</sup> The CPR transposed the provisions of the UCPD into UK law almost verbatim. In order to avoid duplication and simplify the UK's consumer protection legislative framework, 23 consumer protection laws were either partially or wholly repealed by the CPR.<sup>92</sup>

The *Consumer Rights Act* ('CRA') was enacted in 2015 for the purpose of protecting the rights and interests of consumers and enforcing the regulation of traders.<sup>93</sup> In doing so, the legislature sought to resolve the overly complex nature of consumer law in the UK, which had developed in a piecemeal manner by way of court decisions, UK legislation and EU directives. By consolidating UK consumer legislation, drafters sought to: clarify the law by removing inconsistencies and discrepancies and using more plain English, improve awareness of the rights, obligations and remedies of consumers and traders, enhance flexibility and assist business growth.<sup>94</sup> Amongst others, the CRA implements, or replaces earlier UK legislation which implemented, the *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*.<sup>95</sup>

89 The Office of Fair Trading, *Guidance on the UK Regulations (May 2008) Implementing the Unfair Commercial Practices Directive*, 2008, 8.

90 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 1.

91 Explanatory Memorandum, *Consumer Protection from Unfair Trading Regulations 2008*, para 7.3.

92 The Office of Fair Trading, *Guidance on the UK Regulations (May 2008) Implementing the Unfair Commercial Practices Directive*, 2008, 8.

93 *Consumer Rights Act 2015* (UK) c 15, introduction.

94 Explanatory Memorandum, *Consumer Rights Act 2015* (UK) c 15, para 15.

95 *Ibid* para 9, 29.

### 3.4.2 General protection — punitive fees

The CPR regulates the inclusion of punitive fees in contracts under the prohibition of ‘unfair commercial practice’.<sup>96</sup> The test for determining whether a practice constitutes an ‘unfair commercial practice’ pursuant to regulation 3 is multi-layered. The first general test for unfair commercial practice states that a commercial practice will be determined to be unfair if it:

- contravenes the requirements of professional diligence; and
- materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.<sup>97</sup>

Where an identifiable group of consumers is especially vulnerable to a commercial practice due to their age, credulity, or infirmity, in a way which was reasonably foreseeable to a trader, and where the practice is likely to materially distort the economic behaviour of only that group, reference to ‘the average consumer’ is to be taken to refer to the average member of that group.<sup>98</sup>

The second test of unfairness, also found in r 3, states that a commercial practice will be unfair if found to be:

- a misleading action under r 5;
- a misleading omission under r 6; or
- aggressive under r 7.<sup>99</sup>

The prohibition of misleading actions and omissions is of particular relevance with respect to the inclusion of punitive fees in contracts. Regulation 5(1) of the CPR relevantly considers a commercial practice to be misleading if it contains false information, or deceives/is likely to deceive the average consumer, regarding certain matters, which causes/likely causes the consumer to make a transactional decision that they would not otherwise make.<sup>100</sup> Deception can still be found to occur even where the information provided is factually correct, including in respect of the product or service’s overall presentation.<sup>101</sup> A misleading commercial practice may be found in situations where deceptive information is given concerning certain matters including: the product’s nature or existence,<sup>102</sup> the main characteristics of the product including its benefits and risks<sup>103</sup> and the product’s price or method of price calculation.<sup>104</sup>

It is also misleading under the CPR to omit ‘material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.’<sup>105</sup> Examples of such material information include: the main features of the product<sup>106</sup> and the price of the product inclusive of taxes or the means of price calculation.<sup>107</sup> A misleading omission

96 Consumer Protection from Unfair Trading Regulations 2008 (UK) no 1277, r 3.

97 Ibid.

98 Ibid r 2(5).

99 Ibid r 7.

100 Ibid r 5.

101 Ibid 5(2)(a).

102 Ibid r 5(4)(a).

103 Ibid r 5(4)(b).

104 Ibid r 5(4)(g).

105 Ibid r 6.

106 Ibid r 6(4)(a).

107 Ibid r 6(4)(d).

will also occur where a trader hides material information or provides it in an unintelligible, unclear, untimely or ambiguous manner.<sup>108</sup>

Regulation 3(4)(d) puts forward a third means by which a commercial practice may be found to be unfair: a 'blacklist', found in Schedule I, of specific commercial practices which are to be considered unfair in all circumstances. There are no specific 'blacklisted' practices contained in Schedule I that pertain to the inclusion of punitive fees in contracts.

A trader is guilty of an offence if they engage in an unfair commercial practice as determined by the CPR.<sup>109</sup> Upon being found guilty of engaging in an unfair commercial practice, a trader is liable, on summary conviction, to be fined, and on indictment, to be fined and/or imprisoned for a maximum of two years.<sup>110</sup>

In 2014, the CPR were amended to include a consumer right to civil redress, in circumstances where, amongst other things:

- (a) the consumer entered into a contract with the trader for the supply or sale of a product; and
- (b) the trader engaged in misleading action under r 5 or is aggressive under r 7.<sup>111</sup>

This consumer right to civil redress includes the right to:

1. unwind a consumer contract if the consumer communicates to the trader that they reject the product within 90 days of the contract being signed, or the goods being delivered amongst other things, whichever is the later. At the time of rejection, the product must not be fully consumed.<sup>112</sup>
2. receive a percentage discount on a consumer contract if the contract has not been rejected and there are still payments owing on the contract, where the percentage reduction is determined by having regard to the seriousness of the prohibited practice;<sup>113</sup>
3. receive damages if the consumer has incurred financial loss, or suffered distress, alarm or physical discomfort or inconvenience, that they would not have incurred or suffered if the relevant prohibited practice had not occurred.<sup>114</sup>

### 3.4.3 Specific protection — punitive fees

The *Consumer Rights Act 2015* ('CRA') provides consumers with statutory protection against unfair terms. Section 62 provides that an unfair term is not binding on a consumer.<sup>115</sup> A term will be determined to be unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'.<sup>116</sup> Section 62 further states that a contractual term's unfairness is to be assessed by taking into account the contract's subject matter, the other terms of the contract and all of the existing circumstances at the time.<sup>117</sup> Terms relating to the definition of the contract's main subject matter, or the actual price of the goods and services, are not subject to assessment on unfairness

108 Ibid r 6(1).

109 Ibid rr 8-12.

110 Ibid r 13.

111 Ibid rr 27A & 27B.

112 Ibid r 27E.

113 Ibid r 27I.

114 Ibid r 27J.

115 *Consumer Rights Act 2015* (UK) c 15, s 62(1).

116 Ibid s 62(4).

117 Ibid s 62(5).

grounds provided that they are in plain and intelligible language.<sup>118</sup> This exception does not however apply to the ‘grey list’ terms contained in Part 1 of Schedule 2.<sup>119</sup>

Section 63 provides for a ‘grey list’, found in Part 1 of Schedule 2 of the *CRA*, which contains ‘an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair’.<sup>120</sup> Regarding the inclusion of punitive fees in contracts, the ‘grey list’ relevantly contains ‘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’.<sup>121</sup>

The *Consumer Rights (Payment Surcharges) Regulations 2012* came into force on 6 April 2013 implementing article 19 of the EU *Directive on Consumer Rights*.<sup>122</sup> The Payment Surcharges Regulation makes it an offence for a trader to charge consumers any payment or fees that exceed the cost borne by the trader for the use of that good or service.<sup>123</sup> While the language in regulation 4 is drafted quite broadly, the explanatory notes to this regulation indicate that its main focus is on surcharges relating to particular payment methods rather than surcharges generally. Surcharges in breach of the regulation are unenforceable.<sup>124</sup>

## 3.5 United States

### 3.5.1 Introduction

The consumer policy framework in the United States with regard to the inclusion of punitive fees in contracts to 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’. As banks, savings and loan institutions, and Federal credit unions are exempted under the *FTC Act*, other specific federal acts, such as the *Truth in Lending Act*, the *Truth in Savings Act*, and Title 15 of the US Code, regulate the financial industry with respect to the inclusion of punitive fees in contracts. In addition, certain industries, such as civil aviation, are subject to specific codes, which refer to punitive fees.

The *FTC Act*<sup>125</sup> was enacted in 1914 to end the deceptive, unfair, and anticompetitive behaviours of monopolistic corporations.<sup>126</sup> The *Truth in Lending Act*, implemented by *Regulation Z*, is intended to protect consumers from unfair and inaccurate credit card and credit billing practices and to enable consumers to make informed decisions with respect to loan products.<sup>127</sup> The *Truth in Savings Act*, implemented by *Regulation DD*, requires depository institutions to make uniform disclosures regarding their products to allow consumers to make informed decisions.<sup>128</sup> US Code provisions

118 Ibid s 64.

119 Ibid s 64(6).

120 Ibid s 63(1).

121 Ibid c 15, sch 2, pt 1, para 6.

122 Council Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64, art 19.

123 Consumer Rights (Payment Surcharges) Regulations 2012, regulation 4.

124 Ibid regulation 10.

125 15 USC § 45.

126 Gina Stevens, ‘The Federal Trade Commission’s Regulation of Data Security under Its Unfair or Deceptive Acts or Practices (UDAP) Authority’ (Research Paper, Congressional Research Services, United States Congress, 2014) 1.

127 Office of the Comptroller of the Currency, ‘Truth in Lending’ [www.occ.treas.gov/topics/consumer-protection/truth-in-lending/index-truth-in-lending.html](http://www.occ.treas.gov/topics/consumer-protection/truth-in-lending/index-truth-in-lending.html).

128 Federal Reserve, ‘Truth in Savings’ [www.federalreserve.gov/boarddocs/caletters/2007/0707/07-07\\_attachment.pdf](http://www.federalreserve.gov/boarddocs/caletters/2007/0707/07-07_attachment.pdf).

s 1639b and 1639c, in Title 15, aim to ensure that consumers are offered residential mortgages that are comprehensive and not deceptive, unfair or abusive, thus enhancing economic stabilisation.<sup>129</sup>

### 3.5.2 General protection — punitive fees

The FTC Act relevantly declares unlawful ‘unfair or deceptive acts or practices in or affecting commerce’ and empowers the Federal Trade Commission (FTC) to prevent persons from using such acts or practices.<sup>130</sup> Depending on the circumstances, the imposition of punitive fees may be regarded as deceptive or unfair for the purposes of the FTC Act.

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.<sup>131</sup>

Under the first limb of this test, the FTC must consider whether the act or practice was ‘likely to mislead’ the consumer. This element can be met where a company is found to have undertaken a deceptive act or practice; actual consumer harm does not have to take place. The second limb requires the FTC to consider the act or practice from a reasonable consumer’s perspective. In considering the ‘reasonableness’ of the ordinary consumer’s reaction, the FTC will consider, amongst other things, the clarity of the representation, whether qualifying information is conspicuous, the importance of any omitted information (and whether such information is available elsewhere), and the familiarity of the public with the product or service. If a particular consumer group is targeted, such as the elderly or children, the FTC will take the perspective ‘of an ordinary, reasonable member of that group’. Thirdly, the FTC must determine whether the deceptive representation, omission, or practice was ‘material’. The FTC considers a misrepresentation or practice to be ‘material’ if it is ‘one, which is likely to affect a consumer’s choice of or conduct regarding a product’.<sup>132</sup>

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).<sup>133</sup>

An act or practice will be considered by the Commission 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.

The first limb, the likelihood of substantial injury, is also the most important. This factor will usually be satisfied by a finding that financial harm was suffered by the consumer; it may also be sufficient to show that a large number of consumers each suffered a small amount of harm. The second limb of the unfairness test expresses the Commission’s understanding that the provision or omission of

129 15 USC § 1639b(1)&(2).

130 15 USC § 45(1)&(2).

131 Federal Trade Commission, ‘FTC Policy Statement on Deception’ (14 October 1983) [www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception](http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception).

132 *Ibid.*

133 *FTC v Wyndham Worldwide Corp et al*, No 14-3514 (3rd Cir August 24, 2015) (Opinion).



product information involves balancing the costs and benefits to sellers and consumers. Thirdly, the unfairness test requires that the injury could not have been avoided by consumers acting reasonably. The Commission considers the market to be self-correcting and believes that consumers can generally be relied upon to make their own decisions effectively without regulatory assistance.<sup>134</sup> The Commission will however intervene when ‘certain types of sales techniques ... prevent consumers from effectively making their own decisions’.<sup>135</sup>

The Commission enforces its consumer protection authority by way of both administrative and judicial processes<sup>136</sup> and is allowed to seek a number of equitable remedies including restitution or redress for consumers, injunctive relief, and a freezing of assets.

### 3.5.3 Financial regulation

The rules pertaining to penalty rates in the financial services industry appear to be largely regulated with respect to specific financial instruments. With regards to residential mortgage loans, the Consumer Financial Protection Bureau has authority to prohibit or regulate terms, practices or acts that the Bureau considers deceptive, unfair or predatory.<sup>137</sup> Disclosure requirements are employed, including that the term ‘finance charge’ must be disclosed more clearly and conspicuously than other terms or data provided as part of the transaction.<sup>138</sup> Additionally, a residential mortgage loan generally must not contain terms requiring the payment of a pre-payment penalty when a consumer pays all or part of the principal after the consummation of the loan.<sup>139</sup> Where such a term is allowed for certain residential mortgage loan products, a creditor must not offer a product with pre-payment penalty terms without also offering the consumer a product which does not contain such a terms.<sup>140</sup>

The *Truth in Lending Act*, which is implemented by *Regulation Z*, provides that the dollar amount of a penalty fee imposed on credit card holders in respect of a violation must represent ‘a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation’.<sup>141</sup> Accordingly, a card issuer must not impose a penalty fee when there is no dollar amount loss connected to the violation, such as account inactivity or the closure of an account.<sup>142</sup> An issuer is also required to obtain the express consent of the consumer before the issuer can impose an overdraft fee for allowing an extension of credit, which exceeds the consumer’s credit limit.<sup>143</sup>

Similarly, the *Truth in Savings Act*, which is implemented by *Regulation DD*, imposes a number of disclosure requirements concerning the imposition of fees, including that fees must be disclosed in periodic disclosure statements<sup>144</sup> and that overdraft services require additional disclosure regarding fees.<sup>145</sup>

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134 Federal Trade Commission, ‘FTC Policy Statement on Unfairness’ (17 December 1980) [www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness](http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness).

135 Ibid.

136 Federal Trade Commission ‘A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority’ (*revised*, July 2008) <<https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>>.

137 15 USC § 1639b(e)(1).

138 15 USC 1632(a)

139 15 US Code § 1639c(c)(1).

140 15 US Code § 1639c(c)(4).

141 12 CFR Part 1026 (Regulation Z) § 1026.52(b)(1)(i).

142 12 CFR Part 1026 (Regulation Z) § 1026.52(b)(2)(i).

143 12 CFR Part 1026 (Regulation Z) §1026.56.

144 12 CFR Part 230 (Regulation DD) § 230.6.

145 12 CFR Part 230 (Regulation DD) § 230.11.

### 3.5.4 Industry Specific Regulation

The *Federal Aviation Administration (FAA) Regulations* provides that it is an unfair and deceptive practice within the meaning of 49 US Code 41712 for an air carrier, foreign air carrier or ticket agent to fail to disclose fees for ‘optional services’ and baggage fees.<sup>146</sup> Provision 49 CFR 41712, which deals with aviation programs, states that the Secretary of Transportation will order an air carrier, foreign air carrier or ticket agent to stop a practice or method that it considers to an unfair or deceptive practice.<sup>147</sup> A breach of 49 CFR 41712 may give rise to a civil penalty with a maximum fine of \$25,000.<sup>148</sup>

## 3.6 Canada

### 3.6.1 Introduction

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.

The *Bank Act*, enacted in 1991, is intended to provide a legislative framework which allows banks to compete productively and remain resilient in a dynamic marketplace, whilst taking into account the interests and rights of consumers of banking services and providing clear and comprehensive national standards, thus contributing to the strength of the national economy.<sup>149</sup> The *Cost of Borrowing (Banks) Regulations* were enacted pursuant to the Bank Act in 2001. The *Canada Transportation Act*, enacted in 1996, deals with unfair or unreasonable fees and penalties with respect to air transportation as part of its regulation of the transportation industry.

### 3.6.2 Banking Industry

The *Bank Act* puts forward a number of disclosure requirements with respect to borrowing. A bank must not make a loan to a natural person unless the cost of borrowing, which has been calculated pursuant to the Act, is disclosed to the borrower in a written disclosure statement.<sup>150</sup> Additionally, a bank must disclose to the borrower whether they have a right to pre-pay the loan before its maturity date and whether, in the event that the borrower exercises this right, they will be subject to a pre-payment penalty, and how this penalty is to be calculated.<sup>151</sup> The bank must also disclose to the borrower the existence of any charges or penalties for a failure to pay, or late payment of, the loan.<sup>152</sup> Where a bank issues a credit card to a natural person, it must disclose, amongst other things, the costs of borrowing and the applicability of any charges or penalties arising from late payment or a failure to pay.<sup>153</sup> Similar disclosures apply to lines of credit.<sup>154</sup>

The *Cost of Borrowing (Banks) Regulations* expressly exclude overdraft charges and prepayment penalty charges from the cost of borrowing for a loan.<sup>155</sup> A bank, which issues a fixed interest loan for a fixed amount, a line of credit, or a credit card, must provide the borrower with a disclosure

146 14 CFR 399.85.

147 49 USC § 41712.

148 49 USC § 46301.

149 *Bank Act* RSC 1991, c 46, preamble.

150 *Ibid* s 450; *Cost of Borrowing (Banks) Regulations* SOR/2001-101, r 6(1).

151 *Bank Act* RSC 1991, c 46, s 452(1)(a).

152 *Ibid* s 452(1)(b).

153 *Ibid* s 452(2).

154 *Ibid* s 452 (3).

155 *Cost of Borrowing (Banks) Regulations*, SOR/2001-101, r 5(2)(a)&(d)

statement that includes information on the nature and amount of any non-interest charge.<sup>156</sup> Regulation 17 provides that a borrower who prepays the outstanding balance of a fixed credit agreement will not be subject to a pre-payment charge and is entitled to a refund or credit with respect to the proportional amount of non-interest charges paid by the borrower.<sup>157</sup> If a borrower fails to make a payment when due or does not comply with another obligation in the credit agreement, the bank may impose, in addition to interest, charges for the sole purpose of recovering costs reasonably incurred in retaining legal services in an effort to collect the debt, realizing on a security interest or processing a dishonoured cheque.<sup>158</sup>

The *Canada Transportation Act* provides that a carrier must display its tariffs, including the terms and conditions of carriage, at its business offices and online sales sites.<sup>159</sup> Any fare, charge or term, which has not been properly displayed, cannot be applied by the carrier.<sup>160</sup> If on complaint in writing by any person, the Canadian Transportation Agency finds that a carrier has applied unreasonable or unduly discriminatory terms or conditions of carriage, the Agency may disallow or suspend those terms or conditions and replace them with other terms and conditions.<sup>161</sup>

### 3.7 Singapore

Section 6 of the *Consumer Protection (Fair Trading) Act* originally enacted in 2003, provides that a consumer who has entered a consumer transaction involving an unfair practice may commence an action in a court of competent jurisdiction against the supplier. The *Consumer Protection (Fair Trading) Act* takes a multi-layered approach to determining whether an act or omission constitutes an unfair action.

Section 4 of the Act states that it is an unfair practice for a supplier of goods and services, in relation to a consumer transaction:

- (a) to do or say anything, or to omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;
- (b) to make a false claim;
- (c) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer:
  - (i) is not in a position to protect his own interests; or
  - (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction ...

Section 5(3)(a) states that when determining whether a person has engaged in an unfair practice, the reasonableness of their actions in the circumstances is to be considered. An unfair practice may consist of a single act or omission and can occur at any time during, before or after a consumer transaction.<sup>162</sup> A person will be deemed to be responsible for the act or omission of an employee or agent if the act or omission occurred in the employee's course of employment or the scope of the agent's actual or apparent authority.<sup>163</sup>

156 Ibid rr 8(1), 10(1), 11(1).

157 Ibid r 17.

158 Ibid r 18.

159 *Canada Transportation Act* RSC 1996, c 10, s 67(1).

160 Ibid s 67(3).

161 Ibid s 67.2(1).

162 *Consumer Protection (Fair Trading) Act* (Singapore, cap 52A, 2009 rev ed) s 5(1) and (2).

163 Ibid s 5(3)(b).

Additionally, section 4(d) puts forward a black list of activities that, without limiting the generality of paragraphs 4(a),(b) and (c), constitute an unfair practice. This ‘black list’ is situated in the Second Schedule of the Act. A relevant ‘blacklisted’ act is ‘Taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable’ contained in s 11 of the Second Schedule.

This appears to be broad enough to catch the inclusion of punitive fees in contracts.

## 3.8 Pyramid selling

### 3.8.1 Australia

In Australia, the marketing of pyramid selling schemes may be caught by the general protections for misleading conduct<sup>164</sup> and/ or unconscionable conduct.<sup>165</sup> There are also specific provisions that prohibit false or misleading representations in relation to the supply of goods or services.<sup>166</sup> The principal specific provision prohibiting pyramid selling schemes is contained in s 44 of the ACL.

Pyramid selling is a form of a multi-level marketing scheme, which is similar to referral selling in that they both hold out the prospect of future benefits in order to induce a person to participate in the scheme. In *Australian Communications Network Pty Ltd v ACCC* the Full Court held:

The real vice inherent in pyramid selling schemes appears to be that the rewards held out are substantially for recruiting others, who in turn get their rewards substantially for recruiting still more members, and so on. If there is no underlying genuine economic activity the scheme must ultimately collapse and many people will have been induced to pay money for nothing. We see the purpose of the legislation as directed at proscribing schemes where the real or substantial rewards held out are to be derived substantially from the recruitment of new participants, as distinct from rewards for genuine sales of goods or services.<sup>167</sup>

### 3.8.2 Specific protection — pyramid selling

Section 44 of the ACL provides:

- (1) A person must not participate in a pyramid scheme.
- (2) A person must not induce, or attempt to induce, another person to participate in a pyramid scheme.
- (3) To participate in a pyramid scheme is:
  - (a) to establish or promote the scheme (whether alone or together with another person); or
  - (b) to take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or who otherwise takes part in the scheme).

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164 ACL s 18.

165 ACL s 21.

166 ACL s 29(1).

167 *Australian Communications Network Pty Ltd v ACCC* (2005) 146 FCR 413, 426 [46].

Section 44(1) and (2) are based on s 65AAC(1) and (2) of the respectively. They separately prohibit participating in a pyramid scheme, and inducing or attempting to induce another person to participate in a pyramid scheme. The jurisprudence surrounding the concepts in ss 65AAC, 65AAD and 65AAE of the *TPA* is also relevant to ss 44, 45 and 46 of the ACL.<sup>168</sup>

### 3.8.3 Meaning of ‘pyramid scheme’

Section 45 of the ACL defines a pyramid scheme:

- (1) A pyramid scheme is a scheme with both of the following characteristics:
- (a) to take part in the scheme, some or all new participants must provide, to another participant or participants in the scheme, either of the following (a participation payment):
    - (i) a financial or non-financial benefit to, or for the benefit of, the other participant or participants;
    - (ii) a financial or non-financial benefit partly to, or for the benefit of, the other participant or participants and partly to, or for the benefit of, other persons;
  - (a) the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled, in relation to the introduction to the scheme of further new participants, to be provided with either of the following (a recruitment payment):
    - (i) a financial or non-financial benefit to, or for the benefit of, new participants;
    - (ii) a financial or non-financial benefit partly to, or for the benefit of, new participants and partly to, or for the benefit of, other persons.

Section 45 is based on s 65AAD of the *TPA*. The word ‘scheme’ is not defined in the ACL. In *ACCC v Wordplay Services Pty Ltd*,<sup>169</sup> Finn J in relation to s 66AAD of the *TPA* applied the meaning given to the word by Mason J in *Australian Softwood Forests Pty Ltd v Attorney General (NSW); Ex rel Corporate Affairs Commission*,<sup>170</sup> namely ‘some programme, or plan of action’. In *ACCC v Jutsen (No 3)*, Nicholas J referred to the Macquarie Dictionary definition of the word ‘scheme’ which is ‘a plan or design to be followed’.<sup>171</sup> His Honour was satisfied that TVI Express System was a ‘scheme’ because it required prospective members to pay a membership fee to other participants in the scheme if they were to take part in it. It contains three elements: a participation payment; a recruitment payment; and a requirement of inducement. Section 45(1)(a) provides that participants make a payment (participation payment); and s 45(1)(b) provides that the participation payment is entirely or substantially induced by the prospect held out to new participants that they will be entitled to a payment (recruitment payment) ‘in relation to’ the introduction to the scheme of further new participants.

168 Second Explanatory Memorandum, [6.333]. See *ACCC v Jutsen (No 3)* (2011) 206 FCR 264 (Nicholas J); *ACCC v Wordplay Services Pty Ltd* (2004) 210 ALR 562 (Finn J); upheld on appeal, *Wordplay Services Pty Ltd v ACCC* (2005) 143 FCR 345 (Ryan and Kiefel JJ (with whom Tamberlin J agreed)); *Australian Communications Network Pty Ltd v ACCC* (2005) 146 FCR 413 (Heerey, Merkel and Sipsis JJ).

169 *ACCC v Wordplay Services Pty Ltd* (2004) 210 ALR 562.

170 *Australian Softwood Forests Pty Ltd v Attorney General (NSW); Ex rel Corporate Affairs Commission* (1981) 148 CLR 121, 129.

171 *ACCC v Jutsen (No 3)* (2011) 206 FCR 264, [102].

In *ACCC v Lyonesse Pty Limited*,<sup>172</sup> the ACCC brought proceedings against Lyonesse in respect of alleged breaches of s 44 of the ACL. Lyonesse operated a website which offered consumers a range of different shopping opportunities and discounts in relation to goods and services purchased from Loyalty Merchants by becoming Members or Premium Members of the scheme. Loyalty Merchants were retailers and service providers which had agreed with Lyonesse to promote their products on its website and to provide discounts to Members. The ACCC alleged that the only way a consumer could become a Member or Premium Member was by making a down-payment, which it characterised as a ‘participation payment’ to join a pyramid scheme.

Flick J found that even if there was a ‘participation payment’ that fell within s 45(1)(a), any ‘recruitment payment’ was not a payment in relation to the introduction to the scheme of further new participants as required by s 45(1)(b):

On the facts of the present case, the mere introduction of a new Member did not result in the existing Member receiving any benefit. Any entitlement to receive a benefit was occasioned — not by the introduction of the new Member — but from the pursuit of shopping activity by that new (Direct) Member or Members and the shopping activities of (Indirect) Members who, in turn, may have been introduced by such new Members.<sup>173</sup>

Flick J concluded that the ACCC failed to discharge its onus of making good the allegation that a person could become a Member in Australia only by making a Down Payment’:

Although many people did in fact become Members in that manner, no conclusion can safely be drawn that making a ‘Down Payment’ was the ‘only’ way in which a person could become a Member in Australia prior to April 2012. It is not to the point, with respect, for the Commission to contend that there was no evidence ‘the other way’.<sup>174</sup>

### 3.8.4 Meaning of ‘entirely or substantially’

The words ‘entirely or substantially’ have been held to mean ‘the predominant inducement’. In *ACCC v Wordplay Services Pty Ltd*, Finn J considered the word ‘substantially’ in relation to s 66AAD of the TPA and said that it must be considered in its context and is coloured by the proximity of the word ‘entirely’. His Honour stated:

The use of the composite formula in s 65AAD recognises that there may be a number of inducements to make a participation payment, and if such be the case, their relative significance must be considered. A participation payment could, for example, be induced substantially by the s 65AAD ‘prospect’ held out while another and lesser inducement was the use or enjoyment of the goods or services being provided. Where multiple prospects are held out, if a particular prospect is to be characterised as the substantial inducement, it must be the predominant inducement ...<sup>175</sup>

### 3.8.5 Meaning of ‘in relation to’

A critical element of the definition of a pyramid selling scheme in s 45, is the scope of the words ‘in relation to’ in s 45(1)(b) of the ACL and the precise nature of the link between the participation payment and the recruitment payment. It is not sufficient that there is an indirect link between the two payments; there must be a material connection between the two payments in the sense that the inducement for making the participation payment must be the prospect of consideration or

172 *ACCC v Lyonesse Pty Limited* [2015] FCA 1129.

173 *Ibid* [156].

174 *Ibid* [130].

175 *ACCC v Wordplay Services Pty Ltd* (2004) 210 ALR 562, [110].

reward for the introduction of further new participants. In *Australian Communications Network Pty Ltd v ACCC*,<sup>176</sup> the ACCC instituted proceedings against Australian Communications Network Pty Ltd (ACN) alleging that ACN participated in a pyramid selling scheme. ACN provided retail telecommunications services and adopted a multi-level marketing structure. It resold Telstra and Optus fixed and mobile phone services through networks of independent representatives (IRs). An IR paid \$499 to ACN to join the scheme (a 'participation payment'), which was used by ACN to cover marketing expenses. An IR ACN provided four different forms of remuneration for IRs:

- (1) personal commissions on the revenue received by ACN from telecommunications customers introduced by an IR;
  - (2) bonus promotional payments for signing up a minimum number of customers;
  - (3) customer acquisition bonuses (CABs) for assisting 'downstream IRs' to introduce new customers; and
  - (4) residual override commissions on revenue received by ACN from customers introduced by 'downstream IRs'.
- (5) Independent representatives (IRs) could create 'organisations' by sponsoring new IRs referred to as 'downstream IRs'.

The trial judge, Selway J, held that the bonus promotional payments and residual override commissions were 'recruitment payments' as they were bonuses received as a consequence of introducing new IRs. In allowing the appeal the Full Court held:

In the present case, there is not present the requisite relationship between the payments in question (CABs and residual override commissions) and the introduction of further new IRs. The receipt of any payments by IRs is dependent on the activities of IRs themselves, and/or of the IRs downstream of them signing up customers for ACN and those customers acquiring ACN's telephone services. If an IR does no more than recruit other IRs there is no entitlement to any payment. The quantum of remuneration essentially turns on the volume of customers' business with ACN regardless of whether those customers have been signed up by an IR or a downstream IR.<sup>177</sup>

Leave to appeal to the High Court of Australia was refused on 2 June 2006.<sup>178</sup>

In deciding whether participation payments were induced by a prospect of recruitment payments being made 'in relation to' the introduction to the scheme of further new participants for purposes of s 45(1)(b), it is necessary to consider s 46. Section 46 provides:

To decide, for the purpose of this Schedule, whether a scheme that involves the marketing of goods or services (or both) is a pyramid scheme, a court must have regard to the following matters in working out whether participation payments under the scheme are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments:

- whether the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied with under the scheme (as assessed, if appropriate, by reference to the price of comparable goods or services available elsewhere);

<sup>176</sup> *Australian Communications Network Pty Ltd v ACCC* (2005) 146 FCR 413 (Heerey, Merkel and Sipsis JJ).

<sup>177</sup> *Australian Communications Network Pty Ltd v ACCC* (2005) 146 FCR 413, 426 [48].

<sup>178</sup> *ACCC v Australian Communications Network Pty Ltd* [2006] HCA Trans 265.



- the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods or services by comparison with the emphasis given to their entitlement to recruitment payments.

Subsection (1) does not limit the matters to which the court may have regard in working out whether participation payments are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments.

Section 46(1)(a) focuses on the *participation payments*. In applying s 46(1)(a) it will be necessary to determine first the value of the goods or services that participants are entitled to under the scheme, and then whether the participation payments bore a ‘reasonable relationship’ to the value of the goods or services. In *ACCC v Jutsen (No 3)* those who wished to participate in the scheme were required to pay an up-front membership fee of \$330. A person who paid the fee received a ‘travel certificate’ and the opportunity to receive commission payments for recruiting new members. Nicholas J found that the travel certificates were of little or no value since the scheme was ‘... operated in a way that makes it extremely difficult, if not impossible, for people to redeem their travel certificate for the purpose of taking such a holiday’.<sup>179</sup>

## 3.9 European Union

### 3.9.1 Introduction

Establishing, operating or promoting a ‘pyramid promotional scheme’ is specifically prohibited by the Unfair Commercial Practices Directive (UCPD), adopted by the European Parliament and the Council of the European Union in 2005.

The central aim of the UCPD is to promote the proper function of the internal market and to provide a ‘high level of consumer protection’ against the economic harm caused by unfair commercial practices.<sup>180</sup> Marked differences in the laws of the Member States regarding unfair commercial practices were seen as causing uncertainty regarding cross border activities, increasing business costs and undermining confidence in the internal market.<sup>181</sup> The UCPD was intended to provide harmonised rules, which, amongst other things, established a general prohibition on unfair commercial practices affecting consumers, and for the first time at Community level, regulated aggressive commercial practices.<sup>182</sup>

The implementation choices made by Member States regarding the Directives are largely dependent on whether laws regulating unfair commercial practices already existed in the Member States. With regard to the UCPD for instance, some Member States adopted new national laws which transposed the UCPD practically verbatim (UK, Portugal, Romania, Hungary, Cyprus, Poland, Slovenia, Slovakia, Estonia, Ireland, Luxembourg, Latvia, Lithuania and Greece) whilst others incorporated it into existing legislation: consumer codes (France, Italy, Bulgaria, Czech Republic, Malta), civil codes (the Netherlands), acts against unfair competition (Germany, Austria, Denmark, Spain) or specific existing laws (Belgium, Finland and Sweden).<sup>183</sup>

<sup>179</sup> *ACCC v Jutsen (No 3)* (2011) 206 FCR 264, [114].

<sup>180</sup> Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 1.

<sup>181</sup> *Ibid* art recitals 2-4.

<sup>182</sup> *Ibid* art recital 11.

<sup>183</sup> First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (‘Unfair Commercial Practices Directive’), para 2.2.

### 3.9.2 General protection — pyramid selling

The Unfair Commercial Practices Directive regulates pyramid schemes under its ‘unfair commercial practice’ doctrine. ‘Unfair commercial practices’ are prohibited under the UCPD.<sup>184</sup> The test for determining whether a practice constitutes an ‘unfair commercial practice’ under art 5 of the UCPD is multi-layered. The first general test for unfair commercial practice states that a commercial practice will be determined to be unfair if:

- it is contrary to the requirements of professional diligence,
- and
- it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.<sup>185</sup>

Where an identifiable group of consumers is especially vulnerable to a commercial practice due to their age, credulity, or infirmity, in a way which was reasonably foreseeable to a trader, an assessment of the fairness/unfairness of the commercial practice will be taken from the perspective of an average member of that group.<sup>186</sup>

The second test of unfairness, also found in art. 5, states that a commercial practice will be unfair if found to be:

- misleading as set out in Articles 6 and 7,
- or
- aggressive as set out in Articles 8 and 9.<sup>187</sup>

Whilst this test does not specifically target pyramid selling schemes, certain scheme practices may fall within the test. Article 6(1) of the UCPD relevantly considers a commercial practice to be misleading if it contains false information, or deceives/is likely to deceive the average consumer, regarding certain elements, which causes/likely causes the consumer to make a transactional decision that they would not otherwise make.<sup>188</sup> These relevant elements include: the product’s nature or existence,<sup>189</sup> the nature of the sales process and the commercial practices motives,<sup>190</sup> and the product’s price or method of price calculation.<sup>191</sup> Certain omissions are also held to be misleading.<sup>192</sup>

Article 8, which concerns aggressive commercial practices, states that a commercial practice will be deemed to be aggressive if, on the facts and taking account all of the surrounding circumstances, harassment, undue influence or coercion, including the use of physical force, is used which significantly impairs, or is likely to significantly impair, the average consumer’s freedom of conduct or choice regarding the product, thereby causing them, or being likely to cause them to make a

184 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5 (1).

185 Ibid art 5(2).

186 Ibid art 5(3).

187 Ibid art 5(4).

188 Ibid art 6.

189 Ibid art 6(1)(a).

190 Ibid art 6(1)(c).

191 Ibid art 6(1)(d).

192 Ibid art 7.

transaction decision that they would otherwise not have made.<sup>193</sup> In determining whether a commercial practice employs harassment, coercion or undue influence, certain elements may be taken into account, including the location, timing, nature or persistence of the commercial practice and whether the trader knowingly exploits a ‘specific misfortune’ or a circumstance that is so grave as to impair the judgement of the consumer in order to influence their decision regarding the product.<sup>194</sup>

### 3.9.3 Specific protection — pyramid selling

Article 5(5) puts forward a third means by which a commercial practice may be found to be unfair: a ‘blacklist’, found in Annex I, of commercial practices which are to be considered unfair in all circumstances. This list is to be applied by all Member States without modification.<sup>195</sup> Relevantly, the UCPD blacklists 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’.<sup>196</sup>

Member states have some limited flexibility in the choice of means by which they enforce the provisions of the UCPD, provided that those means are ‘adequate and effective’ in combating unfair commercial practices. However, it is prescribed that one of these means must include legislation under which persons or organisations, regarded under the Member State’s national law as having a ‘legitimate interest in combating unfair commercial practice, including competitors’ may take legal action and/or bring the matter before a competent administrative authority to either initiate legal action or decide on complaints.<sup>197</sup>

## 3.10 United Kingdom

### 3.10.1 Introduction

The Consumer Protection from Unfair Trading Regulations 2008 (CPR), which introduced the Unfair Commercial Practices Directive of the European Parliament and Council (UCPD) into the law of the United Kingdom, came into force in 2008.<sup>198</sup> The central aim of the UCPD is to promote the proper function of the internal market and to provide a ‘high level of consumer protection’ against the economic harm caused by unfair commercial practices.<sup>199</sup> The UK government declared its support for the UCPD on the basis that the Directive would improve consumer protection and foster cross-border trade. In particular, the legislature referred to research conducted by the Office of Fair Trading in 2001 which indicated that consumer detriment caused by defective goods, poor information and inadequate redress, constituted over £8 billion a year, and that low-income consumers suffered disproportionate welfare losses as a result of unfair consumer practices.

Whilst legislators recognised that these problematic commercial practices were already the subject of existing UK legislation, it was considered that the principles-based approach and broad scope of

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193 Ibid art 8.

194 Ibid arts 9(a)&(c).

195 Ibid art 5(5).

196 Ibid annex I, pt 14.

197 Ibid art 11.

198 The Office of Fair Trading, Guidance on the UK Regulations (May 2008) Implementing the Unfair Commercial Practices Directive, 2008, 8.

199 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 1.

the UCPD would improve enforcers' ability to act effectively.<sup>200</sup> The CPR transposed the provisions of the UCPD into UK law almost verbatim. In order to avoid duplication and simplify the UK's consumer protection legislative framework, 23 consumer protection laws were either partially or wholly repealed by the CPR.<sup>201</sup>

### 3.10.2 General protection — pyramid selling

The CPR regulates 'pyramid promotional schemes' under their prohibition of 'unfair commercial practice'.<sup>202</sup> The test for determining whether a practice constitutes an 'unfair commercial practice' under regulation 3 is multi-layered. The first general test for unfair commercial practice states that a commercial practice will be determined to be unfair if it:

- contravenes the requirements of professional diligence; and
- materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.<sup>203</sup>

Where an identifiable group of consumers is especially vulnerable to a commercial practice due to their age, credulity, or infirmity, in a way which was reasonably foreseeable to a trader, and where the practice is likely to materially distort the economic behaviour of only that group, reference to 'the average consumer' is to be taken to refer to the average member of that group.<sup>204</sup>

The second test of unfairness, also found in r 3, states that a commercial practice will be unfair if found to be:

- a misleading action under r 5;
- a misleading omission under r 6; or
- aggressive under r 7.<sup>205</sup>

Whilst this test does not specifically target pyramid promotional schemes, certain scheme practices may fall within the test. Regulation 5(1) of the CPR relevantly considers a commercial practice to be misleading if it contains false information, or deceives/is likely to deceive the average consumer, regarding certain matters, which causes/likely causes the consumer to make a transactional decision that they would not otherwise make.<sup>206</sup> These relevant matters include: the product's nature or existence,<sup>207</sup> the commercial practices motives,<sup>208</sup> the nature of the sales process,<sup>209</sup> and the product's price or method of price calculation.<sup>210</sup>

With regard to aggressive commercial practices, r 7 states that a commercial practice will be deemed to be aggressive if, on the facts and taking account all of the surrounding circumstances, harassment, undue influence or coercion, including the use of physical force, is used which significantly impairs, or is likely to significantly impair, the average consumer's freedom of conduct or choice regarding

200 Explanatory Memorandum, Consumer Protection from Unfair Trading Regulations 2008, para 7.3.

201 The Office of Fair Trading, Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive, 2008, page 8.

202 Consumer Protection from Unfair Trading Regulations 2008 (UK) no 1277, r 3.

203 Ibid r 3.

204 Ibid r 2(5).

205 Ibid r 7.

206 Ibid r 5.

207 Ibid r 5(4)(a).

208 Ibid r 5(4)(d).

209 Ibid r 5(4)(e).

210 Ibid r 5(4)(g).

the product, thereby causing them, or being likely to cause them to make a transaction decision that they would otherwise not have made.<sup>211</sup> In determining whether a commercial practice employs harassment, coercion or undue influence, certain elements may be taken into account, including the location, timing, nature or persistence of the commercial practice and whether the trader knowingly exploits a ‘specific misfortune’ or a circumstance that is so grave as to impair the judgement of the consumer in order to influence their decision regarding the product.<sup>212</sup>

### 3.10.3 Specific protection — pyramid selling

Regulation 3(4)(d) puts forward a third means by which a commercial practice may be found to be unfair: a ‘blacklist’, found in Schedule I, of specific commercial practices which are to be considered unfair in all circumstances. Relevantly, the CPR blacklists 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’.<sup>213</sup>

A trader is guilty of an offence if they engage in an unfair commercial practice as determined by the CPR.<sup>214</sup> Upon being found guilty of engaging in an unfair commercial practice, a trader is liable, on summary conviction, to be fined, and on indictment, to be fined and/or imprisoned for a maximum of two years.<sup>215</sup>

In 2014, the CPR were amended to include a consumer right to civil redress, in circumstances where, amongst other things:

- the consumer entered into a contract with the trader for the supply or sale of a product; and
- the trader engaged in misleading action under r 5 or is aggressive under r 7.<sup>216</sup>

This consumer right to civil redress includes the right to:

- unwind a consumer contract if the consumer communicates to the trader that they reject the product within 90 days of the contract being signed, or the goods being delivered amongst other things, whichever is the later. At the time of rejection, the product must not be fully consumed.<sup>217</sup>
- receive a percentage discount on a consumer contract if the contract has not been rejected and there are still payments owing on the contract, where the percentage reduction is determined by having regard to the seriousness of the prohibited practice;<sup>218</sup>
- receive damages if the consumer has incurred financial loss, or suffered distress, alarm or physical discomfort or inconvenience, that they would not have incurred or suffered if the relevant prohibited practice had not occurred.<sup>219</sup>

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211 Ibid r 7(1).

212 Ibid r 7(2).

213 Ibid schedule 1, para 14.

214 Ibid rr 8-12.

215 Ibid r 13.

216 Ibid rr 27A & 27B.

217 Ibid r 27E.

218 Ibid r 27I.

219 Ibid r 27J.

## 3.11 United States of America

### 3.11.1 Introduction

There is no specific federal legislation, which targets pyramid selling schemes in the United States. Instead, pyramid schemes are prohibited at the federal level under a range of laws which employ differing characterisations of the illegal act. The Federal Trade Commission is authorised to prevent pyramid schemes under the Federal Trade Commission Act's broad prohibition of 'unfair or deceptive acts or practices in or affecting commerce'.<sup>220</sup> This prohibition is fundamentally protective as a pyramid scheme is regarded as a zero sum game wherein '[f]or each person who substantially profits from the scheme, there must be many more losing all, or a portion, of their investment to fund those winnings'.<sup>221</sup>

Another federal agency that pursues pyramid schemes is the Securities and Exchange Commission, which acts against 'financial distribution networks' which sell unregistered 'securities' under the *Securities Act 1933* and the *Securities Exchange Act 1934*.<sup>222</sup> Pyramid schemes may also be prosecuted criminally by the Department of Justice, with the assistance of investigative agencies such as the US Postal Service and the Federal Bureau of Investigation, for mail fraud under 18 U.S.C. § 1341 and money laundering under 18 U.S.C. §§ 2, 1957.<sup>223</sup>

Pyramid schemes are also prohibited under state laws, which may be general or specific in nature. Certain states, such as Georgia, ban pyramid schemes under laws concerning commerce and trade that regulate multi-level marketing.<sup>224</sup> More broadly, Illinois characterises pyramid schemes as criminally deceptive acts aimed against property and California classifies such schemes as 'endless chains' and criminalises them under its laws banning illegal lotteries.<sup>225</sup>

### 3.11.2 General protection — pyramid selling

Given the general and multitudinous nature of federal and state legislation, which deals with pyramid selling schemes, and the key role played by the Federal Trade Commission, regard will only be given to the operation of the FTC Act in this section.

The FTC Act relevantly declares unlawful 'unfair or deceptive acts or practices in or affecting commerce' and empowers the Federal Trade Commission (the Commission) to prevent persons from using such acts or practices.<sup>226</sup> Depending on the circumstances, a pyramid scheme may be regarded as deceptive or unfair for the purposes of the *FTC Act*.

In *Webster v Omnitrition International, Inc.*, the United States Court of Appeals (9<sup>th</sup> Cir) approved the FTC's test for determining whether a multilevel marketing (MLM) business is a pyramid scheme: a pyramid scheme is 'characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users'.<sup>227</sup>

220 Michael D Scott, 'The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone too Far?' (2008) 60(1) *Administrative Law Review* 129.

221 Federal Trade Commission, 'Staff Advisory Opinion- Pyramid Scheme Analysis' (14 January 2004).

222 Debra A Valentine, 'Pyramid Schemes' (Paper presented at the International Monetary Fund's Seminar on Current Legal Issues Affecting Central Banks, 13 May 1998).

223 *Ibid.*

224 *Ibid.*

225 *Ibid.*

226 15 USC §§ 45(1) & (2).

227 *Webster v Omnitrition International, Inc* 79 F 3d 776, 781 (9<sup>th</sup> Cir 1996) (quoting *Koscot*, 86 FTC, 1180).

In *Federal Trade Commission v BurneLounge, Inc*, the United States Court of Appeals (9<sup>th</sup> Cir) applied the two limbs of the FTC's test confirmed the finding of the District Court that BurnLounge was an illegal pyramid scheme. BurnLounge participants joined the scheme by buying packages, which included a BurnPage — a readymade customised web page through which participants sold music and merchandise. Participants earned rewards by recruiting others to join the scheme, i.e., by recruiting new participants to buy packages. In each case, the participants sold something (inventory or packages), but the rewards the participants received in return were largely for recruitment, not for product sales.

The Court held:

We agree with the district court that the FTC provided sufficient evidence to prove that BurnLounge's focus was recruitment and that the rewards it paid, in the form of cash bonuses, were primarily for recruitment rather than for sales of merchandise. Recruiting was built into the compensation structure in that recruiting led to eligibility for cash rewards, and more recruiting led to higher rewards.<sup>228</sup>

BurnLounge argued that the second limb of the *Omnitrition* test required recruitment rewards to be completely unrelated to product sales. The Court rejected this contention:

This test does not require that rewards be *completely* unrelated to product sales, and BurnLounge provides no support for its argument that the test should be interpreted this way.

The Commission enforces its consumer protection authority by way of both administrative and judicial processes<sup>229</sup> and is allowed to seek a number of equitable remedies including restitution or redress for consumers, injunctive relief, and a freezing of assets.<sup>230</sup>

## 3.12 Canada

### 3.12.1 Introduction

Pyramid selling schemes are illegal under both the *Competition Act 1985* and the *Criminal Code 1985*.

The Competition Act aims to encourage and maintain competition in Canada in order to promote economic efficiency and provide consumers with product choices and competitive prices.<sup>231</sup> The prohibition of pyramid selling schemes stems from the recognition that such schemes are inherently unstable and inevitably collapse due to the finite number of potential recruits, causing the majority of participants to lose their investment.<sup>232</sup>

228 *Federal Trade Commission v BurneLounge, Inc* No 12-56197 DC No. 2:07-cv-03654- GW-FMO.

229 Federal Trade Commission 'A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority' (revised, July 2008) [www.ftc.gov/about-ftc/what-we-do/enforcement-authority](http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority).

230 Debra A Valentine, 'Pyramid Schemes' (Paper presented at the International Monetary Fund's Seminar on Current Legal Issues Affecting Central Banks, 13 May 1998).

231 *Competition Act*, RSC 1985, c. C-34, s 1.1.

232 Competition Bureau, Enforcement Guidelines on the Multi-level Marketing Plans and Schemes of Pyramid Selling — Sections 55 and 55.1 of the *Competition Act*, 13.



### 3.12.2 Specific protection — pyramid selling

Section 55.1(2) of the *Competition Act* prohibits a person from establishing, operating, advertising or promoting a scheme of pyramid selling.<sup>233</sup> A ‘scheme of pyramid selling’ is defined in the Act as a ‘multilevel marketing plan’, itself defined in section 55(1), whereby:

- (a) a participant in the plan pays for the right to receive compensation for recruiting other participants into the plan;
- (b) a participant in the plan must purchase a specified amount of a product as a condition for entering into the plan, other than a specified amount of the product bought at cost price for the sole purpose of facilitating sales (e.g. a starter kit);
- (c) a person knowingly ‘inventory loads’, that is supplies a commercially unreasonable amount of the product to a participant in the plan;
- (d) a plan participant who is supplied with the product:
  - (i) is not given a buy-back guarantee which is able to be exercised on reasonable commercial terms or a right to return the product in saleable condition on reasonable commercial terms, or
  - (ii) is not informed of the existence of the guarantee or right.<sup>234</sup>

For the purposes of determining whether a ‘commercially unreasonable’ amount of product has been provided under section 55(2)(c), consideration may be given to matters such as: the product type; the price of the product; the market size; the number of participants and competitors; and the product’s sales history.<sup>235</sup>

A person who establishes, operates, advertises, or promotes a scheme of pyramid selling contrary to section 55.1(2) is guilty of an offence and is liable, on summary conviction, to a maximum fine of \$200,000 and/or imprisonment for a maximum term of 1 year and, on indictment, to a fine fixed at the discretion of the court and/or imprisonment for a maximum term of 5 years.<sup>236</sup>

The Canadian Criminal Code prohibits pyramid selling schemes as part of its regulation of lotteries and games of chance. Section 206(1) of the *Criminal Code* states that a person is guilty of an indictable offence if they conduct, manage or are a party to ‘any scheme contrivance or any operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obliging himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance, or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation’.<sup>237</sup>

This definition aligns with the first limb of section 55.1(2) of the *Competition Act*, which also prohibits schemes where a participant in the plan pays for the right to receive compensation for recruiting other participants into the plan. If found guilty of this offence under the *Criminal Code*, the offender is liable to imprisonment for a maximum term of two years.<sup>238</sup>

<sup>233</sup> *Competition Act*, RSC 1985, c. C-34, s 55.1(2).

<sup>234</sup> *Ibid* s 55.1(1).

<sup>235</sup> Competition Bureau, Enforcement Guidelines on the Multi-level Marketing Plans and Schemes of Pyramid Selling — Sections 55 and 55.1 of the *Competition Act*, 24.

<sup>236</sup> *Competition Act*, RSC 1985, c. C-34, s 55.1(3).

<sup>237</sup> *Criminal Code*, RSC 185, c. C-46, s 206(1)(e).

<sup>238</sup> *Ibid* s 206(1).

## 3.13 Singapore

### 3.13.1 Introduction

The *Multi-level Marketing and Pyramid Selling (Prohibition) Act* was enacted in 1973 in order to outlaw the practice of pyramid selling. The Singaporean legislature concluded that the undesirable features of pyramid selling, including the financial loss and hardship suffered by franchise holders, were sufficiently objectionable to call for a complete ban, rather than regulation, of the practice.<sup>239</sup> It was further considered that the undesirable features of pyramid selling schemes, despite being tainted with possible fraud and dishonesty, did not fall easily within existing criminal and civil laws. As such, it was determined that specific legislation was required to deal with the practice.<sup>240</sup>

The drafters were confronted with the difficult task of clearly distinguishing harmful pyramid schemes from inoffensive multi-level marketing practices. The definition of a pyramid selling scheme or arrangement thus took on a primary importance, as the legislature sought to clearly and effectively pinpoint the objectionable elements of such a scheme or arrangement, without capturing lawful schemes and arrangements within an overly-expansive scope.<sup>241</sup>

Dissatisfaction with the Act's definition prompted its amendment in 2000, on the grounds that the Act's original definition of pyramid selling and multi-level marketing was too narrow.<sup>242</sup> Amendments were made in order to capture all businesses that were multi-level in nature within the Act's prohibitive scope. Section 2 of the Act was amended to include a general definition of pyramid selling and multi-level marketing. This was intended to remove rigidities in the original definition of pyramid selling, such as that a participant in a pyramid scheme must share their commission with another participant.<sup>243</sup>

However, as not all multi-level schemes are offensive, the Minister was given the power to order the exclusion of legitimate multi-level arrangements and schemes from the Act's ambit.<sup>244</sup> In June 2000, concurrent with the Act's amendments, the Minister enacted the *Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order* (Exclusion Order), which excludes a number of specific kinds of multi-level arrangements and schemes from the Act.

### 3.13.2 Specific protection — pyramid selling

Section 2 of the Act gives the amended definition of 'pyramid selling scheme or arrangement' as meaning 'any scheme or arrangement for the distribution or the purported distribution of a commodity whereby:

- (a) a person may in any manner acquire a commodity or a right or a licence to acquire the commodity for sale, lease, licence or other distribution;
- (b) that person receives any benefit, directly or indirectly, as a result of:
  - (i) the recruitment, acquisition, action or performance of one or more additional participants in the scheme or arrangement; or
  - (ii) the sale, lease, licence or other distribution of the commodity by one or more additional participants in the scheme or arrangement; and

<sup>239</sup> Singapore, *Parliamentary Debates*, 28 August 1973 (Hon Sui Sen).

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> Singapore, *Parliamentary Debates*, 9 May 2000 (Lim Swee Say).

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*

<sup>244</sup> *Ibid.*

- (c) any benefit is or may be received by any other person who promotes, or participates in, the scheme or arrangement (other than a person referred to in paragraph (a) or an additional participant referred to in paragraph (b)).’

The definition expressly excludes from the Act’s ambit ‘such schemes or arrangements for the sale, lease, licence or other distribution of a commodity, or any class of such schemes or arrangements’ that are the subject of the Exclusion Order.<sup>245</sup>

The Exclusion Order was issued in 2000 to specifically exclude from the Act’s prohibition of multi-level schemes: financial advisory services, master franchise schemes and insurance companies that met certain conditions.<sup>246</sup> In 2002, this was extended to generally exclude direct selling companies which meet certain criteria. In order to meet the general test in section 2(c) of the Exclusion Order, a direct selling scheme or arrangement must satisfy the following terms and conditions:

1. a person wishing to participate in the scheme or arrangement must not be required to provide any benefit or buy any good to enter other than a sales kit at cost price;
2. any benefit received by a recruiter or participant in the scheme or arrangement must not come from the recruitment of additional scheme participants but rather from the sale, lease, licence or other distribution of a commodity;
3. a promoter of the scheme or arrangement must not make representations regarding the benefits of the scheme apart from those deriving from the sale, lease, license or other distribution of a commodity;
4. the promoter must keep fair and accurate records as to the benefits that have accrued under the scheme or arrangement and must not knowingly make false or misleading representations or omissions, or engage in false or misleading conduct, regarding the commodity or the scheme or arrangement or use fraud, coercion, harassment, or unconscionable or unlawful means in promoting the scheme, arrangement or commodity; and
5. a clearly stated refund or buy back guarantee should exist for every participant on reasonable commercial terms.<sup>247</sup>

It is unlawful for any person to promote or participate in a multi-level marketing or pyramid selling scheme or arrangement, or hold out that they are promoting or participating in such an arrangement.<sup>248</sup> It is also unlawful to register a business, which is designed to promote a multi-level marketing or pyramid selling scheme or arrangement<sup>249</sup> or incorporate or register under the Companies Act any company, which proposes to promote a multi-level marketing or pyramid selling scheme or arrangement<sup>250</sup>. Any person who contravenes these provisions is guilty of an offence and, on conviction, will be liable to a maximum fine of \$200,000 and/or imprisonment for a maximum term of 5 years.<sup>251</sup> Where a company commits an offence under the Act, any individual who at the time of the offence was an officer of the company concerned in the company’s management, or purporting to act in such a capacity, including specifically a director, general manager, manager and secretary, as well as the company, will be deemed guilty of the offence and liable to prosecution and punishment.<sup>252</sup>

245 Multi-Level Marketing and Pyramid Selling (Prohibition) Act (Singapore, cap 190, 2000 rev ed) s 2(2).

246 Ibid rr 2(1)(a)&(b).

247 Ibid r 2(1)(c).

248 Ibid s 3(1).

249 Ibid s 4(1).

250 Ibid s 5(1).

251 Ibid ss 3(2), 4(2), 5(2).

252 Ibid s 6.

Where a person is convicted of the offence of promoting or participating in a multi-level marketing scheme or arrangement or a pyramid selling scheme or arrangement under section 3(3), the court may impose an additional penalty if the person has received an assessable benefit, such as a sum of money, either directly or indirectly, as a result of committing the offence.<sup>253</sup> This penalty, recoverable as a fine, should not exceed the amount, or as the court determines, the value of the benefit received.<sup>254</sup> In determining the penalty to be paid by the person, the court may take into account any benefit that the person may have paid for the right to participate in the scheme or arrangement, as well as any loss they may have occurred as a result of their participation.<sup>255</sup>

## 3.14 Unsolicited selling laws

### 3.14.1 Australia

Under the *CCA*, unsolicited selling may be caught by the general protections for misleading conduct<sup>256</sup> and/ or unconscionable conduct.<sup>257</sup> There are also provisions that prohibit false or misleading representations in relation to the supply of goods or services.<sup>258</sup> However, the principal specific protection against unsolicited selling is contained in Pt 3-2, Div 2 of the *ACL*.

According to the Regulatory Impact Statement (RIS) set out in the Second Explanatory Memorandum:

The objective of regulation in this area is to promote the operation of fair and efficient markets by providing appropriate consumer protection in situations where the consumer is subject to an added vulnerability or disadvantage due to the nature of the sales process. This is achieved by giving consumers additional rights and protections that are not available in other retail contexts and providing specific obligations for businesses engaged in these sales practices. This may be warranted where aggressive selling techniques (such as high pressure sales) are employed in a non-retail environment, especially where consumers do not have the option of walking away from the situation, such as in their own home, and may feel threatened to agree to an offer simply to put the situation at an end, or where it is unclear that they are entering into a contract, as can occur over the phone.<sup>259</sup>

The unsolicited sales practices regulations are premised on the view that consumers are more vulnerable when confronted by sales representatives who door-knock households to sell products or services or telephone consumers to sell products or services, and may make purchases that, in a cooler or more rational state, they would not make. Mandating a cooling-off period gives consumers an opportunity for rational re-consideration to overcome the influence of impulsive choice. However, while the *ACL* regulates unsolicited sales and makes provision for the manner in which consumers may be approached, disclosure obligations, and mandating express consumer rights such as cooling-off periods, these provisions do not apply to in-home sales where the consumer invites the sales person into their home.

The evidence of consumer detriment that results from unsolicited selling practices is considered in the RIS.<sup>260</sup> On 17 August 2012 the ACCC released a comprehensive research report into the

<sup>253</sup> *Ibid* s 7.

<sup>254</sup> *Ibid* s 7(1).

<sup>255</sup> *Ibid* s 7(2)

<sup>256</sup> *ACL* s 18.

<sup>257</sup> *Ibid* s 21.

<sup>258</sup> *Ibid* s 29(1).

<sup>259</sup> Second Explanatory Memorandum, *Regulatory Impact Statement*, [23.52].

<sup>260</sup> *Ibid* [23.60]-[23.68].

door-to-door sales industry in Australia, which provides further evidence of significant consumer detriment arising from unsolicited selling practices.<sup>261</sup>

### 3.14.2 General protections — unsolicited selling laws

Unsolicited selling practices are regulated through the operation the general protections for misleading conduct and/ or unconscionable conduct. In *ACCC v Lux Distributors Pty Ltd*,<sup>262</sup> sales representatives of the respondent made door-to-door sales of vacuum cleaners to three elderly women. The respondent required its representatives to contact potential customers by telephone, offering to conduct a ‘free maintenance check’ of their existing vacuum cleaner. This offer was a ruse to gain entry to their home. Once there, having conducted a maintenance check, the representative would persuade them that their existing machine needed to be replaced by a new one, which they would then sell to the occupant. On the three occasions in question the sales representative contravened Commonwealth or State legislation governing ‘direct selling’ (door-to-door selling).

At issue in these proceedings was whether their conduct was also unconscionable under s 51AB of the *TPA* (for two sales occurring in 2010), or the original s 21 of the *ACL* (for a sale occurring in 2011). The application failed at first instance; the ACCC appealed to the Full Court, which held that Lux had contravened the statutory unconscionable conduct provisions. The *ACL* proscribes various unethical business practices including certain door-to-door selling practices; bait advertising, pyramid selling, and asserting a right to payment for unsolicited goods. The prior existence of these laws in relation to door-to-door selling was of considerable assistance to the Full Federal Court in finding that the conduct at issue in *Lux Distributors* was unconscionable.<sup>263</sup>

However, in relation to business-to-business conduct, the normative standard to be applied in cases of statutory unconscionable conduct is contestable. At what point does the application of pressure by a stronger party in a business relationship become the application of illegitimate pressure?

In *ACCC v Australian Power and Gas Company Limited*,<sup>264</sup> the Federal Court imposed a penalty of \$200,000 for a contravention of s 21 of the *ACL* in the context of door-to-door sales conduct that breached the *ACL*, when its sales representatives dealt with a non-English speaking customer. Similarly, in *ACCC v Origin Energy Electricity Limited*,<sup>265</sup> the Federal Court imposed a total penalty of \$600,000 on Origin Energy Electricity Limited (Origin) for a contravention of s 21 of the *ACL* in the context of unlawful door-to-door selling when its sales representatives dealt with a non-English speaking customer.

### 3.14.3 Specific protection — unsolicited selling

The principal specific protection against unsolicited selling in Australia is contained in Pt 3-2, Div 2 of the *ACL*. The term ‘unsolicited consumer agreement’ is defined in s 69(1) of the *ACL*.

Unsolicited consumer agreements may result from:

- door-knocking households to sell products or services, or to ask consumers to switch to a different service provider
- telephoning consumers to sell products or services

261 *Research into the Door-to-Door Sales Industry in Australia*, Report by Frost & Sullivan for the Australian Competition and Consumer Commission (August 2012) [www.accc.gov.au/content/index.phtml/itemId/1070526](http://www.accc.gov.au/content/index.phtml/itemId/1070526).

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

263 *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [23] and [71].

264 *ACCC v Australian Power and Gas Company Limited* [2013] FCA 1358 (Logan J).

265 *ACCC v Origin Energy Electricity Limited* [2015] FCA 278 (Katzmann J).

- approaching consumers in the common area of a shopping mall centre to sell products or services.

The third element requires that the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services.<sup>266</sup> In relation to civil proceedings, s 70 creates a rebuttable presumption that an agreement or proposed agreement is an unsolicited consumer agreement.

Section 74 imposes three duties on a dealer who calls on a person for the purpose of negotiating an unsolicited consumer agreement:

1. to clearly advise the consumer at the outset of an approach that their purpose is to seek the person's agreement to the supply of goods or services;<sup>267</sup>
2. to clearly advise the person that the dealer is obliged to leave the premises immediately on request; and
3. to display or produce identification containing information prescribed by the regulations.<sup>268</sup>

Regulation 82 of the ACL Amendment Regulations requires a dealer to provide their name and address. A dealer may provide a post office box, business or workplace address. If the dealer is not the supplier of the goods or services, the dealer must provide the supplier's name and address (not being a post office box). A supplier is not permitted to use a post office box address, to ensure that a consumer, or a consumer law enforcement agency, is able to readily contact a supplier in the event that a problem arises with goods or services supplied under an unsolicited consumer agreement.

In *ACCC v Neighbourhood Energy Pty Ltd*,<sup>269</sup> Neighbourhood Energy, as a supplier of retail electricity was held liable under s 77 of the for contraventions of s 74(a), (b) and (c) of the by its dealers. Section 75(1) imposes a duty on the dealer to leave a consumer's premises on request.<sup>270</sup> Section 75(2) provides that if such a request is made by the consumer, the consumer must not be contacted for a similar purpose for at least 30 days after the request was made.<sup>271</sup> In *ACCC v AGL Sales Pty Ltd*,<sup>272</sup> the ACCC was successful in its argument that a 'do not knock' sticker can constitute a request to leave the customer's premises under the ACL.

A dealer must not make an unsolicited consumer agreement without first disclosing certain matters.

Section 76(a) imposes a duty on the dealer to inform the consumer prior to making the agreement of their rights to terminate the agreement, and such other matters as are prescribed by the regulations.<sup>273</sup>

Regulation 83 ACL Amendment Regulations provides that a consumer must be provided with information about the 10 day cooling off period prohibition provided for by s 86 of the ACL. Regulation 83 does not prescribe the exact words that must be used, to provide businesses with flexibility about the way in which they comply.

266 ACL s 69(1)(c).

267 *ACCC v Australian Power and Gas Company Limited* [2013] FCA 1358, [9].

268 *ACCC v Origin Energy Electricity Limited* [2015] FCA 278, [23].

269 *ACCC v Neighbourhood Energy Pty Ltd* [2012] FCA 1357 (Marshall J). See also *ACCC v Neighbourhood Energy Pty Ltd* [2012] FCA 1357, [13]; *ACCC v Australian Power and Gas Company Limited* [2013] FCA 1358, [9]; and *ACCC v Origin Energy Electricity Limited* [2015] FCA 278, [23].

270 *ACCC v Australian Power and Gas Company Limited* [2013] FCA 1358, [9].

271 *Ibid.*

272 *ACCC v AGL Sales Pty Ltd* (2013) ATPR 42-449 (Middleton J).

273 *ACCC v Origin Energy Electricity Limited* [2015] FCA 278, [23].

Section 76(d) provides that the form in which, and the way in which, the person is given the information must comply with the regulations.

Regulation 84 ACL Amendment Regulations provides that the information given in writing must be:

1. attached to the agreement or agreement document for the goods or services;
2. transparent, that is, it is expressed in reasonably plain language, legible and presented clearly; and
3. in text that is the most prominent text in the document other than the text setting out the dealer's or supplier's name or logo.

Regulation 84 ACL Amendment Regulations does not prescribe the exact words that must be used to provide businesses with flexibility about the way in which they comply.

Sections 78(1) and (2) impose duties on the dealer to provide the consumer with a copy of the agreement:

- if the agreement was made in person, a copy of the agreement after it has been signed by the consumer; or
- if the agreement was made by telephone, a copy within five business days after the agreement was made.

Sections 79, 80 and 81 set out the formal requirements for a valid agreement arising from a supplier approaching a consumer by telephone or otherwise, including a termination notice (containing prescribed information) and supplier information. A valid agreement will need to comply with clarity requirements and will need to be given to the consumer.

The ACL provides for the following express rights and obligations.

The unsolicited consumer agreement provisions deal with situations in which a consumer may otherwise succumb to unacceptable pressure-selling tactics employed by a supplier. This risk is the greatest when a consumer is approached by a supplier and is not provided with sufficient time (in particular, time spent away from the influence of the seller) to consider whether to purchase the goods or services offered. Section 82(1) of the ACL provides for a 10 day cooling off period during which the consumer may cancel the contract.

### 3.14.4 European Union

#### 3.14.4.1 Introduction

Unsolicited selling in the European Union is governed broadly by the Unfair Commercial Practices Directive (UCPD), adopted by the European Parliament and the Council of the European Union in 2005, and, more specifically, by the Consumer Rights Directive (CRD), adopted in 2011.

#### 3.14.4.2 General protection — unsolicited selling

The UCPD regulates unsolicited selling under its 'unfair commercial practice' doctrine. 'Unfair commercial practices' are prohibited under the UCPD.<sup>274</sup> The test for determining whether a practice constitutes an 'unfair commercial practice' under art 5 of the UCPD is multi-layered. The first general

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274 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5 (1).



test for unfair commercial practice states that a commercial practice will be determined to be unfair if:

- it is contrary to the requirements of professional diligence,  
and
- it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.<sup>275</sup>

Where an identifiable group of consumers is especially vulnerable to a commercial practice due to their age, credulity, or infirmity, in a way, which was reasonably foreseeable to a trader, an assessment of the fairness/unfairness of the commercial practice will be taken from the perspective of an average member of that group.<sup>276</sup>

The second test to determine whether a commercial practice is unfair, also found in art. 5, states that a commercial practice will be unfair if found to be:

- misleading as set out in Articles 6 and 7,  
or
- aggressive as set out in Articles 8 and 9.<sup>277</sup>

The second limb of this test, concerning aggressive commercial practices, is of most relevance when considering unsolicited selling. Article 8 states that a commercial practice will be deemed to be aggressive if, on the facts and taking account all of the surrounding circumstances, harassment, undue influence or coercion, including the use of physical force is used which significantly impairs, or is likely to significantly impair, the average consumer's freedom of conduct or choice regarding the product, thereby causing them, or being likely to cause them to make a transaction decision that they would otherwise not have made.<sup>278</sup> In determining whether a commercial practice employs harassment, coercion or undue influence, certain elements may be taken into account. For the purposes of unsolicited selling, this includes the practice's location, timing, nature and persistence.<sup>279</sup>

Article 5(5) puts forward a third means by which a commercial practice may be found to be unfair: a 'blacklist', found in Annex I, of commercial practices which are to be considered unfair in all circumstances. This list is to be applied by all Member States without modification.<sup>280</sup> Two 'blacklisted' practices relevant to unsolicited selling include: making personal visits to the consumer's home in contravention of the consumer's request to leave or not return<sup>281</sup> and making 'persistent and unwanted solicitations' by email, telephone, fax or other remote means.<sup>282</sup> However, such acts will be exempted from the 'blacklist' in Annex I if they are legally justifiable for the enforcement of a consumer's contractual obligation.<sup>283</sup>

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275 Ibid art 5(2).

276 Ibid art 5(3).

277 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5(4).

278 Ibid art 8.

279 Ibid art 9(a).

280 Ibid art 5(5).

281 Ibid annex I, pt 25.

282 Ibid annex I, pt 26.

283 Ibid annex I, pts 25-26.

Member States have some limited flexibility in the choice of means by which they enforce the provisions of the UCPD, provided that those means are ‘adequate and effective’ in combating unfair commercial practices. However, it is prescribed that one of these means must include legislation under which persons or organisations, regarded under the Member State’s national law as having a ‘legitimate interest in combating unfair commercial practice, including competitors’ may take legal action and/or bring the matter before a competent administrative authority to either initiate legal action or decide on complaints.<sup>284</sup>

#### 3.14.4.3 Specific protection — unsolicited selling

The Consumer Rights Directive (CRD) is concerned with consumer transactions that occur outside of business premises and at a distance. An ‘off-premises contract’ is defined, amongst other things, as any contract between the consumer and the trader which is concluded in a place that is not the trader’s business premises with both the consumer and the trader in physical attendance.<sup>285</sup>

The CRD does not apply to, amongst other things, contracts for financial services<sup>286</sup> the sale of real property,<sup>287</sup> and the rental of residential property.<sup>288</sup> Member States may also choose not to apply the Directive to off-premises contracts with a value of less than EUR 50, or a lesser amount if they wish.<sup>289</sup>

Article 9 of the CRD provides a 14 day ‘cooling off’ period in which the consumer can withdraw from an off-premises contract without providing any reason or incurring any costs beyond certain reasonable costs associated with the return of the goods to the trader.<sup>290</sup> The withdrawal period ends 14 days after the consumer obtains physical possession of the goods for sales contracts, and 14 days after the contract is concluded in the case of service contracts.<sup>291</sup> However, if the trader fails to provide the consumer with information concerning the withdrawal period, as required by articles 6 and 7 of the CRD, the withdrawal period will be extended to 12 months after the end of the initial 14 day withdrawal period.<sup>292</sup>

### 3.14.5 United Kingdom

#### 3.14.5.1 Introduction

Unsolicited selling in the United Kingdom is governed broadly by the *Consumer Protection from Unfair Trading Regulations 2008* and more specifically by the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*.

The *Consumer Protection from Unfair Trading Regulations 2008* (CPR), which introduced the *Unfair Commercial Practices Directive of the European Parliament and Council* (UCPD) into the law of the United Kingdom, came into force in 2008.<sup>293</sup> The central aim of the UCPD is to promote the proper function of the internal market and to provide a ‘high level of consumer protection’ against the

284 Ibid art 11.

285 Directive 2011/83/EU of The European Parliament and of The Council of 25 October 2011 on Consumer Rights [2011] OJ L 304/64, art 8(2).

286 Ibid art 3(3)(d).

287 Ibid art 3(3)(e).

288 Ibid art 3((3)f).

289 Ibid art 3(4).

290 Ibid art 9(1).

291 Ibid art 9(2).

292 Ibid art 10(1).

293 The Office of Fair Trading, *Guidance on the UK Regulations (May 2008) Implementing the Unfair Commercial Practices Directive*, 2008, 8.

economic harm caused by unfair commercial practices.<sup>294</sup> The UK government declared its support for the UCPD on the basis that the Directive would improve consumer protection and foster cross-border trade. In particular, the legislature referred to research conducted by the Office of Fair Trading in 2001 which indicated that consumer detriment caused by defective goods, poor information and inadequate redress, constituted over £8 billion a year, and that low-income consumers suffered disproportionate welfare losses as a result of unfair consumer practices.

Whilst legislators recognised that these problematic commercial practices were already the subject of existing UK legislation, it was considered that the principles-based approach and broad scope of the UCPD would improve enforcers' ability to act effectively.<sup>295</sup> The CPR transposed the provisions of the UCPD into UK law almost verbatim. In order to avoid duplication and simplify the UK's consumer protection legislative framework, 23 consumer protection laws were either partially or wholly repealed by the CPR.<sup>296</sup>

The *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (CCR), which came into force in June 2014, implement most provisions of the EU Consumer Rights Directive, which aims to achieve a 'high level of consumer protection' and facilitate the proper functioning of the European internal market by regulating contracts concluded between traders and consumers.<sup>297</sup> The CCR seek to fundamentally reform UK consumer rights, ensuring that consumers and traders are aware of information requirements, cancellation rights and hidden cost measures. The drafters anticipated that an improved awareness of rights and responsibilities between traders and consumers would contribute to more effective markets and a rise in economic growth.<sup>298</sup>

### 3.14.6 General protection — unsolicited selling

The CPR regulates unsolicited selling under their prohibition of 'unfair commercial practice'.<sup>299</sup> The test for determining whether a practice constitutes an 'unfair commercial practice' under regulation 3 is multi-layered. The first general test for unfair commercial practice states that a commercial practice will be determined to be unfair if it:

- contravenes the requirements of professional diligence; and
- materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.<sup>300</sup>

Where an identifiable group of consumers is especially vulnerable to a commercial practice due to their age, credulity, or infirmity, in a way which was reasonably foreseeable to a trader, and where the practice is likely to materially distort the economic behaviour of only that group, reference to 'the average consumer' is to be taken to refer to the average member of that group.<sup>301</sup>

294 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 1.

295 Explanatory memorandum to the Consumer Protection from Unfair Trading Regulations 2008 (UK) no. 1277, para 7.3.

296 The Office of Fair Trading, *Guidance on the UK Regulations (May 2008) Implementing the Unfair Commercial Practices Directive*, 2008, 8.

297 Directive 2011/83/EU of The European Parliament and of The Council of 25 October 2011 on Consumer Rights [2011] OJ L 304/64, art 1.

298 Explanatory memorandum to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (UK) no. 3134, para 2.1.

299 Consumer Protection from Unfair Trading Regulations 2008 (UK) no. 1277, r 3.

300 *Ibid.*

301 *Ibid* r 2(5).

The second test of unfairness, also found in r 3, states that a commercial practice will be unfair if found to be:

- a misleading action under r 5;
- a misleading omission under r 6; or
- aggressive under r 7.<sup>302</sup>

When considering unsolicited selling, the third limb of this test, concerning aggressive commercial practices, is of most relevance. Regulation 7 states that a commercial practice will be deemed to be aggressive if, on the facts and taking account all of the surrounding circumstances, harassment, undue influence or coercion, including the use of physical force, is used which significantly impairs, or is likely to significantly impair, the average consumer's freedom of conduct or choice regarding the product, thereby causing them, or being likely to cause them to make a transaction decision that they would otherwise not have made.<sup>303</sup> In determining whether a commercial practice employs harassment, coercion or undue influence, certain elements may be taken into account. For the purposes of unsolicited selling, this includes the practice's location, timing, nature and persistence.<sup>304</sup>

Regulation 3(4)(d) puts forward a third means by which a commercial practice may be found to be unfair: a 'blacklist', found in Schedule I, of specific commercial practices which are to be considered unfair in all circumstances. Two 'blacklisted' practices relevant to unsolicited selling include making personal visits to the consumer's home in contravention of the consumer's request to leave or not return<sup>305</sup> and making 'persistent and unwanted solicitations' by email, telephone, fax or other remote means.<sup>306</sup> However, such acts will be exempted from the 'blacklist' in Schedule I if they are legally justifiable for the enforcement of a consumer's contractual obligation.<sup>307</sup>

A trader is guilty of an offence if they engage in an unfair commercial practice as determined by the CPR.<sup>308</sup> Upon being found guilty of engaging in an unfair commercial practice, a trader is liable, on summary conviction, to be fined, and on indictment, to be fined and/or imprisoned for a maximum of two years.<sup>309</sup>

In 2014, the CPR were amended to include a consumer right to civil redress, in circumstances where, amongst other things:

- (a) the consumer entered into a contract with the trader for the supply or sale of a product; and
- (b) the trader engaged in misleading action under r 5 or is aggressive under r 7.<sup>310</sup>

This consumer right to civil redress includes the right to:

- (1) unwind a consumer contract if the consumer communicates to the trader that they reject the product within 90 days of the contract being signed, or the goods being delivered amongst other things, whichever is the later. At the time of rejection, the product must not be fully consumed.<sup>311</sup>

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302 Ibid r 7.

303 Ibid r 7(1).

304 Ibid.

305 Ibid schedule I, para 25.

306 Ibid para 26.

307 Ibid para 25 & 26..

308 Ibid rr 8-12.

309 Ibid r 13.

310 Ibid rr 27A & 27B.

311 Ibid r27E.

- (2) receive a percentage discount on a consumer contract if the contract has not been rejected and there are still payments owing on the contract, where the percentage reduction is determined by having regard to the seriousness of the prohibited practice,<sup>312</sup>
- (3) receive damages if the consumer has incurred financial loss, or suffered distress, alarm or physical discomfort or inconvenience, that they would not have incurred or suffered if the relevant prohibited practice had not occurred.<sup>313</sup>

### 3.14.7 Specific protection — unsolicited selling

The *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (CCR) are concerned with consumer transactions that occur outside of business premises and at a distance. An ‘off-premises contract’ is defined, amongst other things, as any contract between the consumer and the trader which is concluded in a place that is not the trader’s business premises with both the consumer and the trader in physical attendance.<sup>314</sup>

The CCR do not apply to, amongst other things, contracts for financial services<sup>315</sup> the sale of real property,<sup>316</sup> and the rental of residential property.<sup>317</sup>

Regulation 29 of the CCR provides a 14 day ‘cooling off’ period in which the consumer can withdraw from an off-premises contract without providing any reason or incurring any costs beyond certain reasonable costs associated with the return of the goods to the trader.<sup>318</sup> The withdrawal period ends 14 days after the consumer obtains physical possession of the goods for sales contracts, and 14 days after the contract is concluded in the case of service contracts.<sup>319</sup> However, if the trader fails to provide the consumer with information concerning the withdrawal period, as required by regulation 10 and 12 of the CCR, the withdrawal period will be extended to 12 months after the end of the initial 14 day withdrawal period.<sup>320</sup>

It is an offence for a trader to enter into an off-premises contract without providing the consumer with notice of their right to cancel the contract.<sup>321</sup> A person who has been found guilty of this offence is liable to be fined on summary conviction.<sup>322</sup>

### 3.14.8 United States

#### 3.14.8.1 Introduction

Unsolicited selling with respect to ‘door-to-door sales’ is governed in the United States by the Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (Cooling-Off Rule) and the *Federal Trade Commission Act 1914* (FTC Act). The Telemarketing Sales Rule prohibits any seller or telemarketer from engaging in deceptive or abusive telemarketing acts or practices.<sup>323</sup>

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312 Ibid r271.

313 Ibid r271.

314 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (UK) no. 3134, r 5.

315 Ibid r 6(1)(b).

316 Ibid r 6(1)(c).

317 Ibid r 6(1) (d).

318 Ibid r 29.

319 Ibid r 30.

320 Ibid r 31.

321 Ibid r 19(1).

322 Ibid r 19(2).

323 16 CFR §§ 310.3 & 310.4.

### 3.14.8.2 General protection — unsolicited selling

The FTC Act<sup>324</sup> was enacted in 1914 to end the deceptive, unfair, and anticompetitive behaviours of monopolistic corporations.<sup>325</sup> The *FTC Act* relevantly declares unlawful ‘unfair or deceptive acts or practices in or affecting commerce’ and empowers the Federal Trade Commission (the Commission) to prevent persons from using such acts or practices.<sup>326</sup>

### 3.14.8.3 Specific protection — unsolicited selling

The Cooling-Off Rule is a piece of protective consumer legislation which is designed to prevent unfair or deceptive acts or practices in sales that take place away from the seller’s permanent business location, including a consumer’s home.<sup>327</sup> The specific regulation of door-to-door sales stems from a desire to prevent misleading or aggressive sales tactics such as the use of deception to enter a consumer’s home, misrepresentation as to the price, quality or nature of the product, high pressure sales practices, and the nuisance caused to consumers of having a salesperson in their home uninvited.<sup>328</sup> Legislators felt that consumers were potentially more vulnerable to the ‘hard sell’ of door-to-door salespeople due to a misplaced sense of hospitality to their ‘guest’ and the fact that the consumer could not leave the sales location, unlike a permanent business location.<sup>329</sup> As such, the Cooling-Off Rule is intended to provide consumers with confidence that they can change their minds about products that they bought at the front door.<sup>330</sup>

The majority of U.S. states also have separate statutes that regulate door-to-door contracts and provide for customer rescission of such contracts. Whilst the drafters of the Cooling-Off Rule recognised that the operation of many, often inconsistent, laws aimed at protecting consumers in door-to-door sales may impose a significant burden on door-to-door sellers, they considered that joint and coordinated efforts by the Federal Trade Commission and state authorities were required in order to ensure that all consumers had access to a unilateral right to rescind door-to-door sales without penalty.<sup>331</sup> As such, the Federal Cooling-Off Rule does not pre-empt state laws that regulate door-to-door sales, except where such laws are directly inconsistent with the provisions of the Cooling-Off Rule.<sup>332</sup>

The Telemarketing Sales Rule gives effect to the *Telemarketing and Consumer Fraud and Abuse Prevention Act*. Amongst other things, the Rule provides consumers with improved privacy protections and safeguards against unprincipled telemarketers.<sup>333</sup>

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324 15 USC § 45.

325 Gina Stevens, ‘The Federal Trade Commission’s Regulation of Data Security under Its Unfair or Deceptive Acts or Practices (UDAP) Authority’ (Research Paper, Congressional Research Services, United States Congress, 2014) 1.

326 15 USC §§ 45(1) & (2).

327 Julie Brill, ‘Concurring Statement of Commissioner Julie Brill Federal Trade Commission Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (the ‘Cooling-Off Rule’), 6 January 2015. Debra A. Valentine, ‘Pyramid Schemes’ (Paper presented at the International Monetary Funds Seminar on Current Legal Issues Affecting Central Banks, 13 May 1998).

328 Julie Brill, ‘Concurring Statement of Commissioner Julie Brill Federal Trade Commission Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (the ‘Cooling-Off Rule’), 6 January 2015.

329 Jeff Sovern, ‘Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures’ (2014) 75 *Pittsburgh Law Review*, 337-338.

330 Federal Trade Commission, ‘FTC Settlements Protects Door to Door Sales Consumers’ (2 May 2000) [www.ftc.gov/news-events/press-releases/2000/05/ftc-settlement-protects-door-door-sales-consumers](http://www.ftc.gov/news-events/press-releases/2000/05/ftc-settlement-protects-door-door-sales-consumers).

331 16 CFR § 429.2(a).

332 16 CFR § 429.2(b).

333 Federal Trade Commission, ‘Complying with the Telemarketing Sales Rule’ [www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule#introduction](http://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule#introduction).

### 3.14.8.4 Door-to-door sales

The Cooling-Off Rule provides consumers with a general right to rescind a 'door-to-door sale' within three business days of entering into the transaction.<sup>334</sup> A 'door to door' sale is relevantly defined in the Cooling-Off Rule as a sale, rental or lease of consumer goods or services where the seller personally solicits the sale and the buyer's offer or agreement to purchase is made in a location other than the seller's business place, such as the buyer's residence.<sup>335</sup> The purchase price of the sale must be at least \$25 for a sale at the buyer's residence, or at least \$130 for a sale made at another temporary location.<sup>336</sup> The term 'door-to-door sale' specifically does not include, amongst other things, a sale which is entirely conducted and concluded by telephone.<sup>337</sup>

Other transactions which are not subject to the Cooling-Off Rule include the sale of insurance and securities, and the sale or rental of real property.<sup>338</sup> Also exempt from the Cooling-Off Rule are sellers of motor vehicles sold at auction and other temporary places, provided that the seller has a permanent place of business, and sellers of arts and crafts at fairs and similar locations.<sup>339</sup>

The Cooling-Off Rule puts forward a number of acts or practices that, when undertaken by a seller in connection with any door-to-door sale, will constitute an unfair or deceptive practice.<sup>340</sup> Such practices include:

- (a) Failing to provide the consumer with a receipt or sales contract in the same language as the oral sales presentation which, amongst other things, states the consumer's right to cancel the sale at any time within 3 business days of the date of the transaction;<sup>341</sup>
- (b) Failing to provide the consumer, at the time of the sale, with a completed notice of cancellation form which advises the consumer, in the same language as the contract, of their right to cancel the sale, and the manner in which this must be done;<sup>342</sup>
- (c) Failing to verbally inform the consumer, at the time of signing the contract or purchasing the goods or services, about their right to cancel;<sup>343</sup>
- (d) Misrepresenting the consumer's right to cancel;<sup>344</sup>
- (e) Failing or refusing to honour a consumer's valid notice of cancellation.<sup>345</sup>

The FTC Act relevantly declares unlawful 'unfair or deceptive acts or practices in or affecting commerce' and empowers the Federal Trade Commission (the Commission) to prevent persons from using such acts or practices.<sup>346</sup> The Commission enforces its consumer protection authority by way

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334 16 CFR § 429.1.

335 16 CFR § 429.0(a).

336 16 CFR § 429.0(a).

337 16 CFR § 429.0(4).

338 16 CFR § 429.0(6).

339 16 CFR § 429.3.

340 16 CFR § 429.1.

341 16 CFR § 429.1(a).

342 16 CFR § 429.1(b).

343 16 CFR § 429.1(e).

344 16 CFR § 429.1(f).

345 16 CFR § 429.1(g).

346 15 USC § 45(1)&(2).



of both administrative and judicial processes<sup>347</sup> and is allowed to seek a number of equitable remedies including restitution or redress for consumers, injunctive relief, and a freezing of assets.<sup>348</sup>

### 3.14.8.5 Telemarketing sales

The Telemarketing Sales Rule prohibits any seller or telemarketer from engaging in deceptive or abusive telemarketing acts or practices.<sup>349</sup> For the purposes of unsolicited selling, the Telemarketing Sales Rule's prohibition of abusive telemarketing is of most relevance. For example, it is an abusive act or practice for a telemarketer to:

- (a) Telephone a person continuously or repeatedly, with intent to annoy, harass, or abuse any person at the called number;<sup>350</sup>
- (b) Prevent or interfere with a person's right to be placed on a 'do not call register';<sup>351</sup>
- (c) Telephone a person who has previously stated that they do not wish to be telephoned by the seller, or has their number on a 'do not call' register;<sup>352</sup>
- (d) Telephone a person's residence outside of the hours of 8:00am and 9:00pm.<sup>353</sup>

## 3.14.9 Canada

### 3.14.9.1 Introduction

Direct selling is primarily regulated in Canada by province and territory-level legislation. As such, the scope of consumer protection differs between jurisdictions. All such legislation does however contain a uniform ten day cooling off period in respect of direct sale contracts due to the *Direct Sellers Harmonization Agreement* which was formally completed by the Consumer Measures Committee.<sup>354</sup> The Consumer Measures Committee was established under Chapter Eight of the *Agreement on Internal Trade* (AIT) in 1995 to provide a federal-provincial-territorial cooperative framework aimed at improving consumer protection in the marketplace through the harmonisation of laws.<sup>355</sup> The AIT identified direct selling as a key focus of the proposed harmonisation efforts, which were to be completed by July 1, 1996 but were later extended to allow compliance.<sup>356</sup>

Unsolicited telemarketing is dealt with generally under the federal *Telecommunications Act 1993* (the Act) and more specifically under *The Unsolicited Telecommunications Rules*, which were first established by the Canadian Radio-Television and Telecommunications Commission in 2007 as authorised by the Act and subsequently modified.

### 3.14.9.2 Specific protection — unsolicited selling

The *Direct Sellers Harmonization Agreement* provides consumers with an absolute right to cancel a direct sales contract any time within the 10 day period after the consumer receives a copy of the

347 Federal Trade Commission 'A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority' (*revised*, July 2008) [www.ftc.gov/about-ftc/what-we-do/enforcement-authority](http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority).

348 Debra A. Valentine, 'Pyramid Schemes' (Paper presented at the International Monetary Fund's Seminar on Current Legal Issues Affecting Central Banks, 13 May 1998).

349 16 CFR §§ 310.3 & 310.4.

350 16 CFR § 310.4(1)(b)(i).

351 16 CFR § 310.4(1)(b)(ii).

352 16 CFR §310.4(1)(b)(iii).

353 16 CFR §310.4(1)(c).

354 Consumer Measures Committee, 'About the CMC' <[http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h\\_fe00013.html](http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00013.html)>

355 Consumer Measures Committee, 'About the CMC' <[http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h\\_fe00013.html](http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/h_fe00013.html)>

356 Agreement on Internal Trade between Governments of Canada, Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories and the Yukon Territory (entered into force July 1, 1995) <<http://www.ait-aci.ca/agreement-on-internal-trade/>>.

contract or, in the absence of a written contract, the seller provides the consumer with a statement of cancellation rights.<sup>357</sup> The cancellation period may be extended to a year where the seller does not comply with legislative requirements concerning licensing and registration or the seller does not provide a statement of cancellation rights to the consumer.<sup>358</sup> No specific form of cancellation is prescribed; it is sufficient if the consumer's intention to cancel the contract is indicated.<sup>359</sup> In the event of cancellation, the direct seller must refund the consumer all money received under the contract within 15 days of the cancellation.<sup>360</sup> On receipt of the refund, the consumer must return the goods to the seller.<sup>361</sup>

The *Telecommunications Act* provides that the Canadian Radio-Television and Telecommunications Commission may, by order, regulate or prohibit a person's use of a Canadian carrier's telecommunications facilities for unsolicited telecommunications where the Commission deems it necessary to prevent unwarranted inconvenience or nuisance, subject to the considerations of freedom of expression.<sup>362</sup> The Act also creates a legislative framework for a Canada-wide 'do not call' list.<sup>363</sup>

The *Unsolicited Telecommunications Rules* regulate telemarketing in Canada. Relevantly, they require that a telemarketer not telephone a consumer who is on the national 'do not call' list<sup>364</sup> or has previously informed the telemarketer that they do not wish to be contacted.<sup>365</sup> Additionally, the Rules restrict telemarketing telecommunications to the hours between 9:00 am and 9:30 pm on weekdays and 10:00 am and 6:00 pm on weekends.<sup>366</sup>

## 3.14.10 Singapore

### 3.14.10.1 Introduction

The *Consumer Protection (Fair Trading) Act* (Act), enacted in 2003 and amended in 2009, is protective consumer legislation intended to safeguard 'small consumers who lack the expertise and resources to fend for themselves against unfair practices'.<sup>367</sup> The decision to provide consumers with an avenue for civil redress, rather than criminalise unfair practices, was prompted by the legislature's view that the 'more serious offences', such as intimidation and cheating, were already covered in existing legislation, as well as their aversion to 'over-regulat[ing] and add[ing] to business costs'.<sup>368</sup> Instead, the legislation was intended to empower consumers to take action against unscrupulous traders, promoting 'greater consumer responsibility and pro-activity'.<sup>369,370</sup> Legislators also regarded the Act as a means of improving transparency in the Singaporean marketplace, which in turn would 'encourage more bona fide businesses to enter the marketplace' and 'boost confidence among consumer, especially tourists, who come from countries where Fair Trading Act exists [sic] such as the UK, US, Australia or New Zealand'.<sup>371</sup>

357 Consumer Measures Committee, Direct Sellers Harmonization Agreement, 1.

358 Ibid 2(1).

359 Ibid 4.

360 Ibid 5(1).

361 Ibid 5(2).

362 *Telecommunications Act* RSC 1993, c. 38, s 41(1).

363 Ibid c. 38, ss 41.2 to 41.7.

364 The Unsolicited Telecommunication Rules, Part II, r 4.

365 Ibid Part III, r 14.

366 Ibid Part III, r 23.

367 Singapore, *Parliamentary Debates*, 10 November 2003 (Raymond Lim Siang Keat).

368 Ibid.

369 Singapore, *Parliamentary Debates*, 10 November 2003 (Dr Teo Ho Pin (Holland-Bukit Panjang)).

370 Singapore, *Parliamentary Debates*, 10 November 2003 (Raymond Lim Siang Keat).

371 Singapore, *Parliamentary Debates*, 10 November 2003 (Dr Teo Ho Pin (Holland-Bukit Panjang)).

The Singaporean legislature, responding to specific complaints regarding high pressure sale tactics for direct (door-to-door) sales, also anticipated the creation of a ‘cooling off’ period for such consumer transactions by way of regulations made under the Act.<sup>372</sup>

Unsolicited selling is regulated both generally under the ‘unfair practice’ doctrine in the *Consumer Protection (Fair Trading) Act* and specifically with regard to direct sales under the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009*.

### **3.14.10.2 General protection — unsolicited selling**

The *Consumer Protection (Fair Trading) Act* takes a multi-layered approach to determining whether an act or omission constitutes an unfair action.

Section 4 of the Act states that it is an unfair practice for a supplier of goods and services, in relation to a consumer transaction:

- (a) to do or say anything, or to omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;
- (b) to make a false claim;
- (c) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer:
  - (i) is not in a position to protect his own interests; or
  - (ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction ...

Section 5(3)(a) states that when determining whether a person has engaged in an unfair practice, the reasonableness of their actions in the circumstances is to be considered. An unfair practice may consist of a single act or omission and can occur at any time during, before or after a consumer transaction.<sup>373</sup> A person will be deemed to be responsible for the act or omission of an employee or agent if the act or omission occurred in the employee’s course of employment or the scope of the agent’s actual or apparent authority.<sup>374</sup>

Additionally, section 4(d) puts forward a black list of activities that, without limiting the generality of paragraphs 4(a),(b) and (c), constitute an unfair practice. This ‘black list’ is situated in the Second Schedule of the Act. A relevant ‘blacklisted’ act for the purposes of direct sales, ‘[t]aking advantage of a consumer by exerting undue pressure or undue influence on the consumer to enter into a transaction involving goods or services’, is found in section 12 of the Second Schedule.

A consumer ‘who has entered a consumer transaction involving an unfair practice’ has the right to commence a civil action against the supplier.<sup>375</sup> The consumer need only enter into a transaction ‘involving’ an unfair practice. It is unclear whether this requires that the unfair practice was the reason that the consumer entered into the contract. The Act does not provide any criminal sanctions in respect of unfair practices.

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372 Singapore, *Parliamentary Debates*, 10 November 2003 (Raymond Lim Siang Keat).

373 *Consumer Protection (Fair Trading) Act* (Singapore, cap 52A, 2009 rev ed) s 5(1) and (2).

374 *Ibid* s 5(3)(b).

375 *Consumer Protection (Fair Trading) Act* (Singapore, cap 52A, 2009 rev ed) s 6.

### 3.14.10.3 Specific protection — unsolicited selling

In 2009, the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations* (Regulations) were made under the Act to regulate direct sales contracts.<sup>376</sup> A 'direct sale contract' is relevantly defined in the Regulations as a 'consumer transaction, which is entered into during an unsolicited visit by a supplier to the place of residence of the consumer; the place of residence of another person; or the place of business of the consumer'.<sup>377</sup>

The Regulations expressly do not apply to, amongst other things, any lease of residential property,<sup>378</sup> contracts for the supply of goods and services for business use,<sup>379</sup> consumer contracts that do not exceed \$50,<sup>380</sup> and any contract for the supply of financial services or financial products which are subject to a statutory cancellation period as administered by the Monetary Authority of Singapore<sup>381</sup>.

The Regulations provide that a direct sale contract may not be enforced against a consumer prior to the elapse of five business days from the date that the contract was entered into, or the date that the consumer information notice was brought to the consumer's attention if this was done after the date of the contract.<sup>382</sup> A consumer has the right to cancel the direct sales contract at any time during the five day 'cooling off period'<sup>383</sup> and the contract will cease to be enforceable upon cancellation.<sup>384</sup> The consumer information notice, amongst other things, must advise the consumer of their right to cancel the contract within the 'cooling off period'.<sup>385</sup>

## 3.15 Comparing and contrasting

### 3.15.1 Introduction

This Part of the Report will compare and contrast the general and specific protections in relation to punitive fees in contracts, pyramid selling and unsolicited sales in the jurisdictions chosen for comparison. It will identify the similarities and differences between them. There is a high level of convergence between the consumer policy frameworks of Australia and those jurisdictions. Most jurisdictions adopt a combination of general and specific protections in relation to unconscionable and highly unfair trading practices.

### 3.15.2 General protections

The Australian consumer policy framework has most in common with the EU, the UK and the US consumer policy frameworks. The *Unfair Commercial Practices Directive of the European Parliament and Council* (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. The first tier general prohibition defines the conditions for determining whether a commercial practice is unfair. Article 5(2) provides that a commercial practice will be unfair if:

376 Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009 (Singapore) r 1.

377 Ibid r 2 [see r 2 for full definition of direct sales contract].

378 Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009 (Singapore), r 3(b).

379 Ibid r 3(c).

380 Ibid r 3(d).

381 Ibid r 3 (h).

382 Ibid r 4(1).

383 Ibid 4(2).

384 Ibid r 5(1)(a).

385 Ibid Schedule 1.

- (it is contrary to the requirements of professional diligence,  
and
- it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.<sup>386</sup>

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’.

According to Abbamonte,

The general prohibition has an autonomous regulatory function in the sense that a practice which is neither misleading nor aggressive can still be captured by the general prohibition if it meets its criteria.<sup>387</sup>

The UCPD was enacted as a law of the United Kingdom, by the *Consumer Protection from Unfair Trading Regulations 2008* (CPR). The UK regulator enforces the CPR by relying on the second tier prohibitions of aggressive and misleading practices rather than the first tier general prohibition of unfair commercial practices.<sup>388</sup>

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, which some have suggested would be a useful addition to the ACL regime,<sup>389</sup> or a third tier black list of specific practices that are prohibited in all circumstances.

Since most unfair commercial practices are either misleading or aggressive, there is considerable overlap between the level of consumer protection in Australia, the EU and the UK. There may, however, be some unfair commercial practices that are neither misleading nor aggressive that will be prohibited in the EU and the UK if they meet the general criteria of the first tier general prohibition in art 5(2) of the UCPD.

### 3.15.3 Misleading conduct: reasonable consumer v average consumer

There is considerable scope for overlap between the general protection for misleading or deceptive conduct in s 18 of the ACL and the second tier test of unfairness in the EU Unfair Commercial Practices Directive. The second test of unfairness found in art. 5(4)(a) of the UCPD states that a commercial practice will be unfair if found to be misleading as set out in Articles 6 and 7.<sup>390</sup>

Article 6 specifies the misleading *actions* that will be unfair. Article 7 specifies the misleading *omissions* that will be unfair. The courts are required to apply an objective test, namely, whether the commercial practice is likely to mislead the ‘average consumer’, and whether the average consumer

386 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5(2).

387 G Abbamonte, ‘The Unfair Commercial Practices Directive and its General Prohibition’ in Weatherill and Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart, Oxford, 2007), Ch 2, 20.

388 Paterson and Brody, above n1, 347.

389 Consumer Action Law Centre, ‘Discussion Paper: Unfair Trading and Australia’s Consumer Protection Laws’ (July, 2015), 17-23.

390 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5(4).

is likely to be harmed by it. Where an identifiable group of consumers is especially vulnerable to a commercial practice due to their age, credulity, or infirmity, in a way, which was reasonably foreseeable to a trader, an assessment of the fairness/unfairness of the commercial practice will be taken from the perspective of an average member of that group.<sup>391</sup>

The ‘average consumer’ test has much in common with the ‘ordinary or reasonable consumer’ test adopted in Australia in relation to s 18 of the ACL. However, the ‘ordinary or reasonable consumer’ test does not protect the ‘[t]he extremely stupid, and perhaps the gullible may well be excluded from the class’.<sup>392</sup> The class does not include those who fail to take reasonable care of their own interests.<sup>393</sup> Reasonable members of the class would take reasonable steps to look after their own interests.

The UCPD was enacted as a law of the United Kingdom, by the *Consumer Protection from Unfair Trading Regulations 2008* (CPR). The second test of unfairness, found in r 3, states that a commercial practice will be unfair if found to be:

- (a) a misleading action under r 5; or
- (b) a misleading omission under r 6.<sup>394</sup>

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.<sup>395</sup>

Under the first limb of this test, the FTC must consider whether the act or practice was ‘likely to mislead’ the consumer. This element can be met where a company is found to have undertaken a deceptive act or practice; actual consumer harm does not have to take place. The second limb requires the FTC to consider the act or practice from a reasonable consumer’s perspective. In considering the ‘reasonableness’ of the ordinary consumer’s reaction, the FTC will consider, amongst other things, the clarity of the representation, whether qualifying information is conspicuous, the importance of any omitted information (and whether such information is available elsewhere), and the familiarity of the public with the product or service. If a particular consumer group is targeted,

391 Ibid art 5(3).

392 *Telstra Corp Ltd v Cable & Wireless Optus Ltd* [2001] FCA 1478, [23].

393 See *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, 85 [105]; *Cantarella Bros Pty Ltd v Valcorp Fine foods Pty Ltd* (2002) ATPR ¶41-856 (Lindgren J) [35]-[36].

394 Consumer Protection from Unfair Trading Regulations 2008 (UK) no 1277, r 7.

395 Federal Trade Commission, ‘FTC Policy Statement on Deception’ (14 October 1983) [www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception](http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception).



such as the elderly or children, the FTC will take the perspective ‘of an ordinary, reasonable member of that group’. Thirdly, the FTC must determine whether the deceptive representation, omission, or practice was ‘material’. The FTC considers a misrepresentation or practice to be ‘material’ if it is ‘one, which is likely to affect a consumer’s choice of or conduct regarding a product’.<sup>396</sup>

### 3.15.4 Statutory unconscionable conduct v unfair commercial practice

The scope of the protection afforded by the prohibition of statutory unconscionable conduct in s 21 of the ACL is unclear. According to one line of judicial authority that has developed around the interpretation of s 21 of the ACL, and equivalent provisions in other statutes, statutory unconscionable conduct involves a ‘high level of moral obloquy’ and is not to be equated with unfairness. According to another line of judicial authority there is no such requirement. In *Paciocco v Australia and New Zealand Banking Group*, Allsop CJ stated that in applying s 12CB of the *ASIC Act* what is required is:

... an evaluation of business behaviour (conduct in trade or commerce) as to whether it warrants the characterisation of unconscionable, in the light of the values and norms recognised by the statute. The task is not limited to finding ‘moral obloquy’; such may only divert the normative inquiry from that required by the statute, to another, not tied to the words of the statute.<sup>397</sup>

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.<sup>398</sup>

In Australia, the general protection provided by statutory unconscionable conduct may be harder to satisfy than the first tier general protection for unfair commercial practice although the approach to be adopted in relation to each has much in common. In *Paciocco v Australia and New Zealand Banking Group*, Allsop CJ observed:

Although it can be accepted that unjustness and unfairness are of a lower moral or ethical standard than unconscionability ... The characterisation of unjustness or unfairness is, of course, evaluative and a task to be carried out with a close attendance to the statutory provisions.<sup>399</sup>

According to Paterson and Brody,

... the general prohibition on unfair commercial practices appears capable of catching the (mis) selling of unsuitable consumer credit insurance to inexperienced and low-income consumers ... The sale of products that are patently unsuitable for those who are purchasing them might well be considered inconsistent with the level of ‘skill and care’ that a business may reasonably be expected to exercise towards consumers and certainly distorts the ‘economic behaviour’ of the target group. These concepts might even extend to sanction the conduct of payday lenders who extend credit to consumers already in debt and highly unlikely to be able to repay the loan without financial hardship.<sup>400</sup>

396 Federal Trade Commission, ‘FTC Policy Statement on Deception’ (14 October 1983) [www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception](http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception).

397 *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50, [304]-[305].

398 See Paterson and Brody, above n1, 351.

399 *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50, [363]-[364].

400 Paterson and Brody, above n1, 349.



### 3.15.5 Role for codes of conduct

According to the OECD *Consumer Policy Toolkit*, '[c]odes of conduct ... are tools that can be used by governments and/or industry to help establish and consolidate good business practices'.<sup>401</sup>

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. According to Abbamonte,

... well established codes of conduct could reflect good business practice and be used to identify the requirements of professional diligence in concrete cases.<sup>402</sup>

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*.<sup>403</sup> 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. Mandatory and voluntary industry codes of conduct are regulated by Pt IVB of the *CCA*, and do not form part of the ACL. They are generally concerned with protecting small business owners rather than consumers. In *ACCC v South East Melbourne Cleaning Pty Ltd (in liq)*<sup>404</sup> Murphy J observed that the Franchising Code provides a normative standard of conscience for the purposes of assessing whether conduct is unconscionable.

In this regard the EU concept on an 'unfair commercial practice' and statutory unconscionable conduct under s 21 of the ACL are similar.

### 3.15.6 Aggressive commercial practices

The second tier test of unfairness in art 5(4)(b), of the UCPD states that a commercial practice will be unfair if found to be: aggressive as set out in Articles 8 and 9.<sup>405</sup> Article 8 of the UCPD states that a commercial practice will be deemed to be aggressive if, on the facts and taking account all of the surrounding circumstances, harassment, undue influence or coercion, including the use of physical force, is used which significantly impairs, or is likely to significantly impair, the average consumer's freedom of conduct or choice regarding the product, thereby causing them, or being likely to cause them to make a transaction decision that they would otherwise not have made.<sup>406</sup>

Article 9 provides that in determining whether a commercial practice employs harassment, coercion or undue influence, certain elements may be taken into account, including the location, timing, nature or persistence of the commercial practice and whether the trader knowingly exploits a

401 OECD, *Consumer Policy Toolkit* ((OECD, Paris, 2010), 90.

402 G Abbamonte, 'The Unfair Commercial Practices Directive and its General Prohibition' in Weatherill and Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart, Oxford, 2007), Ch 2, 29.

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

404 *ACCC v South East Melbourne Cleaning Pty Ltd (in liq)* [2015] FCA 25, [128].

405 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 art 5(4).

406 *Ibid* art 8.

‘specific misfortune’ or a circumstance that is so grave as to impair the judgement of the consumer in order to influence their decision regarding the product.<sup>407</sup>

In the United Kingdom, the *Consumer Protection from Unfair Trading Regulations 2008* (CPR), the second test of unfairness, found in r 3, states that a commercial practice will be unfair if found to be aggressive under r 7.<sup>408</sup> With regard to aggressive commercial practices, r 7 states that a commercial practice will be deemed to be aggressive if, on the facts and taking account all of the surrounding circumstances, harassment, undue influence or coercion, including the use of physical force, is used which significantly impairs, or is likely to significantly impair, the average consumer’s freedom of conduct or choice regarding the product, thereby causing them, or being likely to cause them to make a transaction decision that they would otherwise not have made.<sup>409</sup> In determining whether a commercial practice employs harassment, coercion or undue influence, certain elements may be taken into account, including the location, timing, nature or persistence of the commercial practice and whether the trader knowingly exploits a ‘specific misfortune’ or a circumstance that is so grave as to impair the judgement of the consumer in order to influence their decision regarding the product.<sup>410</sup>

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:

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

### 3.15.7 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. Does the absence of the requirement of good faith in the Australian definition of unfair term make Australia’s general protection narrower or broader than its UK equivalent?

One of the purposes of the *Consumer Rights Act 2015* was to give effect in the UK to the Unfair Terms in Consumer Contracts Directive (UTCCD). The preamble to the UTCCD states that the purpose of the requirement that the term must be ‘contrary to the requirement of good faith’ is to ensure that the fairness assessment includes:

... an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals

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407 Ibid art 9(a)&(c).

408 Consumer Protection from Unfair Trading Regulations 2008 (UK) no 1277, r 7.

409 Ibid r 7(1).

410 Ibid r 7(2).

fairly and equitably with the other party whose legitimate interests he has to take into account.<sup>411</sup>

One difficulty with adopting a similar requirement in Australia is that:

... it has been overtly recognised for centuries across many different legal contexts, and across both the civil law and common law, it is a principle that can mean different things in different contexts.<sup>412</sup>

In *Mineralogy v Sino Iron Pty Ltd (No 6)* Edelman J observed:

In the context of a contractual clause which empowers one party to act to the detriment of another, the content of the norm of good faith has often been described as requiring ‘reasonableness’ in the exercise of the power, or, in more detail, ‘to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained’: *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50 [288] (Allsop CJ citing *Renard Constructions, Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91, *Burger King Corporation v Hungry Jack’s Pty Ltd* [2001] NSWCA 187; (2001) 69 NSWLR 558, and *Alcatel Australia Ltd v Scarcella* [1998] NSWSC 483; (1998)44 NSWLR 349.<sup>413</sup>

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. Some contractual terms that appear to be unfair when viewed in isolation, might be considered to be fair in the context of the agreement as a whole: a harsh term may be necessary to ensure that the consumer obtains the goods or services at a lower price. The lower price is the trade-off for the harsh term.

### 3.15.8 Inclusion of punitive fees in contracts

The EU and UK include a grey list include ‘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’ which is included in the UK grey list.<sup>414</sup>

The Australian grey list 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’.<sup>415</sup>

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 to 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’.

411 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L 95/30 recital 16.

412 *Mineralogy v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, [1003] (Edelman J).

413 *Ibid* [1010].

414 *Consumer Rights Act 2015* (UK) c 15, schedule 2, part 1, para 6.

415 ACL s 25(1)(c).

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.

### 3.15.9 Pyramid Schemes: promoting retail sales over recruitment

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’.<sup>416</sup>

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’.<sup>417</sup>

In both Australia and the US, there is a degree of uncertainty about how to distinguish between a legitimate multilevel marketing scheme and an illegal pyramid scheme.

In Australia, s 46(1)(b) of the ACL focuses on the *recruitment payments* and whether the emphasis in the promotion of the scheme was given to the entitlement to receive recruitment payments as opposed to earning money through the volume of business transacted in terms of selling goods or services. In some cases this may be relatively clear cut. In *ACCC v Jutsen (No 3)* Nicholas J found that the respondents placed ‘great emphasis’ in the promotion of the scheme on the ability of a member to earn income from the recruitment of new members, rather than on earning income from the sale of goods or services.<sup>418</sup>

In the United States, the *Omnitrition* test of an illegal pyramid scheme requires two limbs to be satisfied: (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users.

The Court of Appeals (9<sup>th</sup> Cir) in *Federal Trade Commission v BurneLounge, Inc*, stated that in order to fall within the *Omnitrition* test of an illegal pyramid scheme it is not necessary that the recruitment rewards be *completely* unrelated to product sales. However, the Court did not decide the degree to which recruitment rewards would need to be unrelated to product sales.

In Canada, income from an illegal pyramid scheme is derived primarily from recruitment payments and not from the retail sale of products.

At one end of the spectrum, if rewards are earned simply from product sales it will be characterised as a legitimate multilevel marketing scheme. At the other end of the spectrum if rewards are earned from recruiting others to join the scheme it will be characterised as an illegal pyramid scheme. If rewards earned from recruiting new participants to buy products for retail sales it may be an illegal pyramid scheme depending on the focus or emphasis of the scheme. To avoid a finding of an illegal scheme, the scheme must have rules promoting retail sales over recruitment.

416 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 annex I, pt 14.

417 Consumer Protection from Unfair Trading Regulations 2008 (UK) no. 1277, schedule 1 para 14.

418 *ACCC v Jutsen (No 3)* (2011) 206 FCR 264, [116].

### 3.15.10 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. All jurisdictions recognise that consumers are more vulnerable to aggressive sales tactics when confronted at their own home, since they cannot leave the sales location, unlike a permanent business location.

In the EU, the blacklist includes two practices relevant to unsolicited selling include: making personal visits to the consumer’s home in contravention of the consumer’s request to leave or not return<sup>419</sup> and making ‘persistent and unwanted solicitations’ by email, telephone, fax or other remote means.<sup>420</sup> However, such acts will be exempted from the ‘blacklist’ in Annex I if they are legally justifiable for the enforcement of a consumer’s contractual obligation.<sup>421</sup>

In the UK, the blacklist includes two practices relevant to unsolicited selling include making personal visits to the consumer’s home in contravention of the consumer’s request to leave or not return<sup>422</sup> and making ‘persistent and unwanted solicitations’ by email, telephone, fax or other remote means.<sup>423</sup> However, such acts will be exempted from the ‘blacklist’ in Schedule I if they are legally justifiable for the enforcement of a consumer’s contractual obligation.<sup>424</sup>

All jurisdictions provide for provide for a ‘cooling off’ period in which the consumer can withdraw from a contract. In the US the Cooling-Off Rule provides consumers with a general right to rescind a ‘door-to-door sale’ within three business days of entering into the transaction.<sup>425</sup>

In Australia, s 82(1) of the ACL provides for a 10 day cooling off period during which the consumer may cancel the contract.

In Canada, the *Direct Sellers Harmonization Agreement* provides consumers with an absolute right to cancel a direct sales contract any time within the 10 day period after the consumer receives a copy of the contract or, in the absence of a written contract, the seller provides the consumer with a statement of cancellation rights.<sup>426</sup>

In the EU, Article 9 of the CRD provides a 14 day ‘cooling off’ period in which the consumer can withdraw from an off-premises contract without providing any reason or incurring any costs beyond certain reasonable costs associated with the return of the goods to the trader.<sup>427</sup>

In the UK, Regulation 29 of the CCR provides a 14 day ‘cooling off’ period in which the consumer can withdraw from an off-premises contract without providing any reason or incurring any costs beyond certain reasonable costs associated with the return of the goods to the trader.<sup>428</sup>

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419 Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 annex I, pt 25.

420 Ibid annex I, pt 26.

421 Ibid annex I, pts 25-26.

422 Consumer Protection from Unfair Trading Regulations 2008 (UK) no 1277, schedule I, para 25.

423 Ibid schedule I, para 26.

424 Ibid para 25 & 26.

425 16 CFR § 429.1.

426 Consumer Measures Committee, *Direct Sellers Harmonization Agreement*, 1.

427 Directive 2011/83/EU of The European Parliament and of The Council of 25 October 2011 on Consumer Rights [2011] OJ L 304/64, art 9(1).

428 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (UK) no 3134, r 29.