

Part 4: Approaches to regulation of e-commerce and peer to peer transactions

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The second issue for analysis is how consumer laws have responded to the challenges of **e-commerce and peer-to-peer transactions**.

4.1 Introduction — regulatory approaches to e-commerce

Transactions that take place over the Internet and through application-based platforms raise a number of consumer issues that do not arise in face-to-face transactions. The expanding digital economy has many benefits for consumers such as increased choice and improved customer service as well as expanded opportunities for small business. The absence of a physical business and face to face transaction alters the nature of the business to consumer interaction and creates opportunities for new unfair practices to emerge. Despite the changed business model most jurisdictions have continued to use existing general and specific consumer protection mechanisms supplemented by codes and guidelines to provide consumer protection and redress for online commercial activities.

This report compares the current and proposed regulatory approaches to consumer protection in Australia, United Kingdom, United States, Canada and Singapore for online transactions and emerging consumer issues in the sharing economy.

The report focuses on the specific consumer issues identified by regulators and commentators, which are within the ambit of the Australian Consumer Law:

1. Product quality

The ability of a consumer to verify the quality or description of the products or services purchased is a common problem in all forms of online transaction. Generally existing legal frameworks impose warranties or guarantees of acceptable quality and fitness for purpose which are applicable to products purchased online, but there are two emerging issues. First the online or digital products may not fall easily within traditional concepts of 'goods and services' resulting in uncertainty in the application of these standards. Secondly, consumers in online transactions are more reliant on information about the product and may have regard to customer reviews, comparison website, product ratings and review tools. The increase in these types of information websites raises the probability of inaccurate and unreliable data or information. Thirdly, jurisdictional differences allow suppliers to avoid warranties or guarantees by exclusion clauses or electing to be bound by laws of low regulatory jurisdictions.

2. Misleading information and practices

Misleading practices can occur in any type of transaction whether face to face or online. Greater reliance upon information provided by suppliers on their website and information provides via other comparison website, consumer reviews and social media increase the probability of

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inaccurate information and other misleading or unfair practices developing. Particular practices emerging as common problems in an online environment are:

- Misleading pricing practices (drip pricing and surge pricing),
- Fake online reviews or comparisons;
- Consumer Fraud (eg. fake listings);

3. Sharing economy

The rapid growth of the sharing economy⁴²⁹ through peer to peer platforms⁴³⁰, such as Uber and Airbnb, presents different challenges for the existing regulatory model. In addition to the issues of product quality and misleading practices, questions about the application and suitability of existing business to consumer (B2C) regulatory frameworks arise. The report considers the following issues:

- Should regulation treat all suppliers of goods or services, whether a large corporation or an inexperienced individual, in the same way? Does the variation in the market between sharing of assets by individuals via peer to peer platforms and business to business transactions⁴³¹ mean there is too much complexity for a one size fits all regulatory model?
- Should the regulatory model include some protection for consumers transacting with other consumers? Minimum standard or quality or minimum information disclosure requirements?
- What is the role of the platform provider in the transaction? Should the platform provider bear responsibility for the conduct of suppliers using the platform?

Online transactions also create problems for dispute resolution between consumers across jurisdictions. This aspect is considered in Parts 5 and 6 of the report.

4.2 Product quality in e-commerce

4.2.1 Issues

Consumers in online transactions generally do not have an opportunity to inspect goods and need to rely upon the description of the item available on the website. Evidence also suggests that consumers place significant reliance upon the supplier's online reputation, customer reviews, independent comparison websites and rating tools.⁴³² A buyer will rarely have the means to verify that the description on the website is accurate or that the customer reviews are a true reflection of the seller's business or the product.⁴³³

Consumer complaints about fitness for purpose or acceptable quality and correspondence with description are not unique to online transactions. As a consequence the majority of the reviewed jurisdictions have continued to rely upon the application of existing general protections (misleading

429 Sharing economy has been defined as 'online platforms that help people share access to assets, resources, time and skills. (Debbie Woskrow, *Unlocking the Sharing Economy: An Independent Review*, (available at...))

430 Peer to peer platforms are examined at [29.2].

431 Some examples are BrandGathering (online platform that connects businesses to undertake joint marketing and branding activities helping to save money) and Nimber (sharing of logistics).

432 Issues with the reliability of online reviews and recommendations is examined at [27] of this report.

433 There is growing evidence that customers reviews are often fake and that customers are reluctant to leave negative reviews. See Aisha Gani 'Amazon sues 1,000 'fake reviewers'', *The Guardian* (online), 18 October 2015 www.theguardian.com/technology/2015/oct/18/amazon-sues-1000-fake-reviewers and Benjamin G Edelman and Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?* (1 October 2015) Ben Edelman 22 www.benedelman.org/publications/efficiencies-and-shortcuts-2015-11-24.pdf.

or unfair practices) or specific protections (consumer warranties or guarantees). Most of the jurisdictions recognise the benefits of maintaining the same regulatory framework for consumer transactions online or face to face although regulators acknowledge differences in the opportunity for consumers to inspect goods and verify description and quality. While there are parallels between online sales of goods and services and the traditional face to face model, the different nature of digital products and the changing business models within the digital and sharing economies raise a number of emerging issues for regulators:

- (1) Online or digital products may not fall easily within traditional concepts of 'goods' or 'services' resulting in uncertainty about the application of consumer guarantees. This can arise in a number of situations:
 - i. Some common products, such as refrigerators now may also include the acquisition of software connecting the fridge to the internet. Is this a purchase of goods or services or both?
 - ii. Case law has struggled with the legal characterisation of digital content supplied through a download from the internet. The definition of 'goods' in the ACL includes computer software, which means that software provided by way of a disc or a download is included as 'goods'. Despite this there is a potential lack of clarity about the nature of data, such as music, information or advice, downloaded via the internet, which does not include software. If this type of information does not fall within the definition of goods guarantees of acceptable quality will not apply.
 - iii. Transactions occurring via peer to peer platforms⁴³⁴ need careful consideration. The nature of the supply may vary depending upon whether a person is supplying a product (such as selling their car on Gumtree); selling by 'auction' on a shared marketplace or 'sharing' their car via ride sharing platform or a car sharing platform. What guarantees of quality is the consumer entitled to expect?

The only jurisdiction to enact specific legislation to regulate product quality for digital content is the United Kingdom.

- (2) Consumers are often dealing with suppliers who are unknown to the consumer: Should online suppliers be required to provide additional or more detailed information to consumers about their products, the contract terms or their business?
- (3) Increased reliance is placed by consumers on the description of products on supplier websites, consumer reviews, 'independent' comparison websites, and other online tools raising the need to consider if laws regulating misleading conduct and other unfair practices are sufficiently broad and adaptable so as to apply to new online selling and advertising practices.⁴³⁵ Increased provision of professional advice through cognitive digital platforms also raises issues about how to regulate the quality of the advice and the underlying algorithms.⁴³⁶
- (4) The increasing global operation of many online businesses and platforms raises jurisdictional issues for enforcement. Businesses operating in low regulatory jurisdictions, but supplying goods or services within high regulatory jurisdictions will attempt to exclude the operation of warranties or guarantees by choosing the law of another country as the applicable law. Jurisdictions have attempted to counter this behaviour by prohibiting contracting out, broadening extra territorial application of laws and ensuring harmonisation of laws at least nationally and in some cases within regions.

434 The issue of consumer-to-consumer transactions and peer-to-peer platforms is examined at [29] Peer to Peer Transactions and the Sharing Economy.

435 False or fake reviews and endorsements are considered separately at [27].

436 ASIC has recently released a consultation paper proposing a new regulatory guide for providing digital financial product advice to retain clients. As the cognitive ability of computing improves the provision of a range of different types of professional advice through cognitive digital platforms will increase.

The various approaches of Australia, United Kingdom, United States (at a Federal level), Canada (at a Federal level) and Singapore to product quality in e-commerce are explained and compared. The review focuses on:

- (1) the guarantees or warranties of acceptable quality applicable in each jurisdiction for ‘goods’ and ‘services’ purchased online and whether these apply to the different transactions conducted online and digital content;
- (2) whether additional information disclosure requirements have been implemented for online transactions; and
- (3) the application of unfair conduct or misleading conduct provisions to transactions conducted online between parties in different jurisdictions.

4.2.2 Australia

Under the *Australian Consumer Law* consumers purchasing online or in face to face transactions are provided with both general and specific protections in relation to the quality of goods and services. General protections are provided for misleading conduct occurring in trade or commerce⁴³⁷ and unconscionable conduct in the supply of goods and services in trade or commerce.⁴³⁸ Specific protection is provided by statutory guarantees applying to goods and services. In 2006 the *Australian Guidelines for Electronic Commerce* were issued with the purpose of enhancing consumer confidence in electronic commerce by providing guidance for business to consumer transactions. The guidelines do not alter the provisions of the *Australian Consumer Law*.

Both the statutory guarantees and general misleading conduct provisions are technology neutral and purport to apply to both face to face and online transactions. There are no specific provisions in the ACL directed to the quality of digital products or services. This section of the report focusses on the operation of the general misleading conduct provisions and the statutory guarantees in the context of online transactions.

4.2.2.1 General protections — misleading conduct

Section 18(1) of the ACL which prohibits a person from engaging in conduct that is misleading or deceptive was outlined previously.⁴³⁹ The section applies to conduct engaged in by persons or corporations in the course of trade or commerce that is apt to lead another person into error.

The main issue arising in an application of the misleading conduct provisions is whether these provisions apply to international sellers located outside of Australia. Many disputes and enforcement actions in relation to online transactions will involve suppliers or customers who are in different states or more commonly, different countries. Many of the enforcement or civil penalty actions by the ACCC involve allegations of misleading conduct by suppliers⁴⁴⁰ or potentially peer to peer platform operators who are domiciled in other countries.

437 *Australian Consumer Law*, s 18 and s 29 (false and misleading representations in relation to goods and services).

438 *Australian Consumer Law*, ss 20-22.

439 See Part 3.

440 See for example *Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653; *ACCC v Valve Corp* [2016] FCA 196.

The ACL as a law of the Commonwealth⁴⁴¹ applies to the conduct of corporations. A corporation according to s 4(1) *Competition and Consumer Act 2010* includes a 'foreign corporation' which is defined by reference to the corporation's power in s 51(xx) of the *Australian Constitution*. Most corporations operating in online markets that are not Australian corporations will fall within this definition.

The second requirement in s 18 ACL is that the corporation must be acting in trade or commerce, which is defined as meaning 'trade or commerce within Australia or between Australia and places outside Australia' (s2 ACL).

Section 5 of the *Competition and Consumer Act 2010* extends the operation of the ACL to 'conduct engaged in' outside Australia by:

- (1) bodies corporate incorporated or carrying on business within Australia; or
- (2) Australian citizens; or
- (3) persons ordinarily resident within Australia.

The effect of these provisions is that a foreign corporation engaging in conduct in Australia or carrying on business in Australia is subject to the misleading conduct provisions of the ACL. Conduct in the form of representations will be characterised as occurring in Australia where the representation occurs in the course of a transaction with an Australian consumer or is directed toward an Australian consumer.⁴⁴² engaged in by a corporation Carry on business usually requires the corporation to carry on activities of a commercial nature with customers within Australia. There is no requirement for the corporation to have a physical presence in Australia.⁴⁴³ The combined effect of these provisions is that a corporation supplying goods or services to a consumer in Australia via an online website will usually be subject to the misleading conduct provisions of the ACL, even if the website is located on a server outside of Australia.

These type of conduct provisions are applicable to misleading claims by suppliers about product quality or assertions by suppliers that guarantees of quality in the ACL do not apply. In the absence of this type of conduct a consumer will only be able to claim a remedy for defective or faulty goods if the statutory guarantees in the ACL apply.

4.2.2.2 Specific protections — statutory guarantees

Under the *Australian Consumer Law*, a consumer of goods is provided with a number of statutory guarantees concerning the title to the goods and the quality of the goods.⁴⁴⁴ The purpose of the guarantees is to provide minimum standards and obligations on the suppliers of goods or services to consumers.⁴⁴⁵ There is a difference between the guarantees applicable to goods and services.

Guarantees for 'goods' are:

- (1) the supplier has the right to dispose of the goods (s 51);
- (2) the supplier has the right to undisturbed possession (s 52);

441 The ACCC as a Commonwealth Regulator. The ACL as a law of different state jurisdictions can be enforced by a State regulator.

442 *ACCC v Valve Corp* [2016] FCA 196, [180].

443 *ACCC v Valve Corp* [2016] FCA 196, [199] — [205].

444 The statutory guarantees apply to goods or services supplied after 1 January 2011.

445 The guarantees are in similar terms to the consumer guarantees in the *New Zealand Consumer Guarantee Act 1993* (NZ).

- (3) the goods are free from undisclosed securities (s 53);
- (4) goods supplied in trade or commerce, other than by way of auction, are of acceptable quality (s 54);
- (5) goods supplied in trade or commerce are fit for a disclosed purpose or any purpose represented by the supplier (s 55);
- (6) goods supplied in trade or commerce by description to a consumer, other than by way of sale by auction, correspond with the description (s 56); and
- (7) goods supplied in trade or commerce, other than by way of sale by auction, by reference to sample or demonstration model correspond to that sample or model (s 57).

Guarantees for 'services' are:

- (1) the services supplied in trade or commerce are rendered with due care and skill (s 60);
- (2) the services are fit for the purpose made known to the supplier at the time of supply (s 61);
- (3) the services will be completed within a reasonable time (s 62).

The statutory guarantees apply regardless of the terms of the contract and cannot, except in some limited cases, be contracted out of.⁴⁴⁶ A failure to comply with the statutory guarantees may allow a consumer to replace goods, repair goods or obtain a refund. Consumer remedies are supplemented by an enforcement power vested in the Australian Competition and Consumer Commission (ACCC) to commence an action against a supplier. Usually this power will be used if there is evidence of systemic failure to honour guarantees. As part of this action the ACCC can seek penalties up to \$1.1 million against bodies corporate and \$220,000 against individuals.

Key issues for application of the statutory guarantee provisions to online transactions are:

- Do statutory guarantees apply to digital products and services?
- Should statutory guarantees apply to the supply of all goods or services provided online, irrespective of the type of transaction or identity of the seller? This issue is considered in detail under Peer to Peer.
- Do statutory guarantees apply to transactions with international sellers? Can sellers opt out of the guarantees under the terms of the contract?

The application of statutory guarantees products and services purchased online; particularly where digital products are supplied depends on a number of threshold issues. First does the particular type of online transaction fall within the threshold requirements and secondly, if the statutory guarantee provisions apply, will the acceptable quality and fitness for purpose provisions be effective in the event of a defect in the product.

4.2.2.3 Application of statutory guarantees in e-commerce

Statutory guarantees in the ACL apply where:

- (1) a person supplies;
- (2) goods or services to a consumer; and
- (3) the supply is in trade or commerce.

⁴⁴⁶ *Australian Consumer Law* ss 64-64A. A supplier is only able to limit liability where the services are not of a kind ordinarily acquired for personal or domestic use.

1. 'Supply'

A person will supply goods to another person where the goods are supplied (including re-supplied) by way of 'sale, exchange, lease, hire or hire-purchase'.⁴⁴⁷ Notably, the definition requires that some consideration be paid in exchange for the goods and, therefore, statutory guarantees will not generally apply to the supply of goods by way of gift.⁴⁴⁸ A supply of services occurs where the services are 'provided, granted or conferred'.

Clearly an online transaction in the following form is a supply:

- sale, lease or hire of traditional goods (books, watches, appliances etc) via an online site;
- a provision of services via an online medium (eg cloud computing services, IT help services, digital professional advice)
- sale of software provided by wave of a disc or USB is a supply of goods, due to the inclusion of computer software in the definition of goods.

There is a lack of clarity about:

- **Sharing or exchange via a peer to peer platform.** Whether the person is 'supplying' goods or services may depend on the form of the interaction. The view taken by a court may be influenced by whether consideration is paid or operates in a commercial context. For example the sharing of household items⁴⁴⁹ between individuals while resembling a lease or hire arrangement, may not be a supply if not money is paid. In contrast, a person who provides ride sharing services through Uber in exchange for payment will probably be considered by a court as supplying a service. Clarity about whether the transaction is for goods or services is relevant to the applicable guarantees.
- **Online auctions:** It should also be noted that a number of the statutory guarantees (ss 54-59 ACL) do not apply to goods sold by *auction*. *The phrase sale by auction is defined as, 'in relation to the supply of goods by a person, means a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means).'* The rationale for this approach is based upon the ability of a consumer for an auction to evaluate the value of the goods prior to auction. The continued application of this rationale to an online auction should be reconsidered. Whether an online auction, such as those that occur through eBay is actually an auction in accordance with the definition is also unclear.⁴⁵⁰ Unlike a face to face auction, eBay does not actually sell the goods as agent for the seller, but merely provides an online platform for the seller to obtain bids from consumers and facilitates acceptance of a price.⁴⁵¹ On this basis a seller via eBay or similar website may not be engaged in a sale by auction.⁴⁵²

447 Supply is defined in s 2 of the *Australian Consumer Law*.

448 Note s 5 *Australian Consumer Law* which provides a 'donation' of goods or services is not a supply unless for promotional purposes and s 266 of the *Australian Consumer Law* which applies where a consumer who acquires goods gives them to a third party. The third party will be able to enforce the statutory guarantees in relation to those goods as if it were the consumer of the goods.

449 Gumtree, Etsy, The Clothing Exchange, TuShare.

450 For an examination of this issue refer to Kate Tokeley, *Towards a New Regulatory Regime for New Zealand Online Auctions* [2011] *New Zealand Law Review* 91. The exception for auctions was removed from the *New Zealand Consumer Guarantees Act 1993* in 2013.

451 *Smythe v Thomas* [2007] NSWSC 844. Whether particular online auction sites fall within the definition will depend in each case on the role of the auction website in the transactions.

452 *Malam v Graysonline, Rumbles Removals and Storage* [2012] NSWCTTT 197.

2. 'Goods' and 'services'

The characterisation of digital content or products as 'goods' or 'services' is important for determining the standard of quality the product must meet. Goods obtain the benefit of the guarantee of 'acceptable quality' (s 54 ACL). There is no equivalent for services which are instead required to be fit for the implied or express purpose made known by the consumer (s 61 ACL). Acceptable quality is a broader concept and will require the goods to be fit for all purposes for which the goods would ordinarily be used. Goods that are not fit for one of the purposes for which they are normally used, will not be of acceptable quality.⁴⁵³ Appearance and finish, being free from inherent defects, design defects, manufacturing defects or instructional defects and being safe to use are all attributes of acceptable quality.

Goods and services are both defined widely in s 2 of the ACL.

The definition of 'goods' in s 2 ACL includes various goods, chattels, vehicles, minerals and crops as well as 'computer software'. Computer software was added to the definition in 2010 due to uncertainty about whether software fell within the ordinary meaning of 'goods'.⁴⁵⁴

'Services' is also broadly defined in s 2 ACL so that any item not categorised as 'goods' will be services.⁴⁵⁵

It is important to note that a supply of goods cannot also be a supply of services. The two are mutually exclusive and if the product supplied comes within both definitions it will be a supply of goods. It is possible however for one transaction to include separate supplies of goods and services. This approach has been applied by courts in the case of computer software supplied by way of a computer disc or USB.⁴⁵⁶

On the basis of the current definitions computer software provided on a disc or USB or downloaded from the internet will fall within the definition of goods in the ACL. On the other hand digital data that does not contain executable code, such as pictures or music is unlikely to fall within the definition. The issue was recently considered in the decision of *ACCC v Valve Corporation*. Valve Corporation is a computer game developer and supplier which is incorporated, and based, in the State of Washington in the United States. Valve Corporation operates and controls:

- (1) a website located at <http://store.steampowered.com> (the Steampowered Website);
- (2) an online computer game delivery platform called 'Steam' which is an application that a consumer can download from the Steam Website to install on to a computer or electronic device; and
- (3) an online support assistance service known as 'Steam Support' accessible from Steam or the Steampowered Website.

The ACCC alleged misleading conduct on the part of Valve constituted by representations on their website about the applicability of statutory warranties to their products. The ACCC alleges that a 'good' was supplied by Valve Corporation either because software is supplied, or because Valve

453 *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1969] 2 AC 31, 78-79.

454 In the case of *State Sale of Goods Acts* software downloaded from the internet to a computer was not a supply of 'goods' under the Act.⁴⁵⁴ In contrast in *Goldiwood Pty Ltd t/as Margaret Franklin & Associates v ADL (Aust) Pty Ltd t/as Adviser Logic* [2014] QCAT 238 web-based software provided for financial planning was held to fall within the definition of 'goods' in s 2 of the ACL, because of the inclusion of 'computer software' in the definition

455 The definition of services does not include financial services which are regulated under the *ASIC Act*.

456 *Toby Constructions Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48; *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481.

Corporation has bundled software and services, and the definition of 'goods' includes computer software. Valve Corporation denies that it supplied 'goods' within the meaning of 'consumer goods' in s 2(1) of the ACL. It says that it supplied 'online access to video games via a subscription service'. It says that this is a 'service' within s 2(1) of the ACL so that the consumer guarantee of acceptable quality in s 54 does not apply.

The Court concluded that the contract between Valve and the consumers was a contract for the supply of goods because the primary supply by Valve to its customers was computer software. This conclusion was reached after a detailed consideration of the nature of the digital product provided by Valve. Even though the predominant supply was computer software it is clear from the judgment that other non-executable data, such as music and pictures will not necessarily fall within the definition.

Assuming the analysis in Valve is adopted more widely by Australian courts there are still a number of uncertainties that may arise:

- (1) If the software downloaded is 'goods' the statutory guarantee of acceptable quality will usually only apply if the software is supplied for consideration in trade and commerce. If the software is given for free to the user there is no consideration and the question is whether this is a 'supply'. Is the situation distinguishable if the subsequent service (ie downloading data using the software) is for a monetary fee? Is it possible to argue the provision of the software together with the data was a 'sale' for consideration?
- (2) Is the 'service' provided by the supplier the right to access the data for the purpose of download or the actual downloaded data? Is the downloaded data actually a different service or should it be characterized as 'goods' to obtain the benefit of the 'acceptable quality guarantee' rather than only attracting the benefit of the guarantee in s 61 ACL of fit for the consumer's implied or express purpose. In *Valve* the structure of the transaction and the close connection between the software and the data resulted in the whole of the transaction being characterised as a supply of goods. If the predominant supply is instead digital data or the supply is a subscription service which does not require software a different conclusion may be reached?
- (3) As technology changes the methods for delivery and access to digital data will change. It is foreseeable that computer software may not need to be provided as part of the supply of the data. For example, a subscription service to stream movies to a computer does not usually include the provision of software to the consumer by the supplier. This will mean the supply is more likely a supply of services to which the guarantee of acceptable quality does not apply.

3. 'Consumer' and 'Trade or Commerce'

The final two threshold requirements are for the supply to be to a consumer in the course of trade or commerce. An examination of these requirements is relevant to whether a supply to a consumer from a person who is not acting in trade or commerce should be entitled to the same guarantee of quality or fitness for purpose. The risk to a consumer is that it will be difficult to distinguish in an online environment between a person acting in trade and commerce and one that is not. In some cases it will be clear, such as buying a used car on Gumtree, but in other cases such as on EBay it is not necessarily obvious whether the sale is with a trader or an individual merely selling household items.

This issue is particularly relevant in peer to peer transactions.

4. Extraterritorial operation

The application of the statutory guarantees may be impacted by rules governing choice of law clauses in contracts. The purpose of s 67 of the ACL is to limit the circumstances in which statutory guarantees can be displaced by a choice of law clause in a contract choosing another jurisdiction as the appropriate law. Section 67 provides:

If:

- (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
- (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:
 - (i) the provisions of the law of a country other than Australia;
 - (ii) the provisions of the law of a State or a Territory;

the provisions of this Division apply in relation to the supply under the contract despite that term.

In *ACCC v Valve Corporation* the court held that the effect of s 67 was to ensure that the statutory guarantees in the ACL apply to a contract where there is a supply of goods or services to an Australian consumer or by an Australian company. Section 67 will be effective to override any provision of the contract to the contrary and any substitution of a law of another country as the law of the contract.

4.2.3 United Kingdom

The UK engaged in a review of their consumer protection legislation in 2011 with the aim of creating a simple and modern framework for the UK. The review included a range of issues, but relevant to this Report purports to set out a consistent framework for consumer rights in relation to goods, services and digital content. Application of consumer protection laws to digital content was an important aspect of the review due to the uncertainty raised in case law about application of the Sale of Goods Act to digital products.⁴⁵⁷

4.2.3.1 General Protections — unfair commercial practices

The *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277 ('CPR') consolidates consumer protection legislation in the UK and implements the EU *Unfair Commercial Practices Directive* (2005/29/EC). They apply to unfair commercial behaviour that occurs before, during and after a contract is made.⁴⁵⁸ The CPRs are principle-based legislation cast in broad terms. The overall objective of enacting the CPRs was to improve consumer redress for unfair commercial practices and to harmonise the UK laws with the EU to improve consistency of consumer protection. The CPR adopted verbatim the EU *Unfair Commercial Practices Directive*. The general operation of these provisions was considered at [7.1] in relation to punitive fees.

The provisions may apply to unfair practices including the giving of false information or insufficient information about a product similar to the operation of the misleading conduct provisions of the Australian Consumer Law examined at [25.2.1].

457 *Southwark LBC v IBM* [2011] EWHC 549 cf *St Albans City and District Council v International Computers Ltd* [1997] FSR 251 where the sale of software fell within the scope of the *Sale of Goods Act* because it was provided on disc.

458 Explanatory Memorandum, *The Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008*, 16.

4.2.3.2 Specific protections — Consumer Rights Act 2015

The *Consumer Rights Act 2015* consolidates and brings consistency to consumer protection legislation that was previously spread across a range of UK Acts and Regulations.[1] The *CRA* also gives effect to the remaining provisions of the Consumer Rights Directive (2011/83/EU) not previously enacted in *Consumer Rights (Payment Surcharges) Regulations 2012* and *the Enterprise Act 2002 (Part 8 EU Infringements) Order 2013*; *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* and introduces new rules, particularly in relation to digital content and consumer remedies.

The *CRA* retains protections for ‘goods’ purchased whether face to face or over the internet the implied terms of satisfactory quality (s 5), fitness for a particular purpose (s 10) and as described (s 11) apply. These implied terms are also applicable to the purchase of digital content. Consumer remedies for goods and digital content are also harmonized, except that there is no right to reject digital content, but rather the remedies include the right to repair or replacement, the right to a price reduction and the right to a refund. The implied terms and remedies provided by the Act cannot be contracted out of by the trader (s 31).

Key aspects of the *Consumer Rights Act 2015* in relation to product quality for good or services acquired via the internet:

Common legal framework for ‘goods’ and ‘digital content’

Consumer warranties apply to goods, services and digital content. A new definition of ‘digital content’ which is governed by a separate part of the Act is included (‘data produced and supplied in digital form’) to ensure transactions for wholly electronic products are protected. The decision to expand the *CRA* to include digital content was borne largely from recommendations made by government-funded investigations into the area identifying that existing rights in relation to digital content were unclear.⁴⁵⁹ The definition of ‘goods’ as moveable property is retained on the basis this applies to computer software supplied on a disc or other physical device. Instead of including digital content in the definition of ‘goods’, the UK parliament elected to include a new Chapter in the *CRA* dealing specifically with digital content. As a result certain rights that apply to the sale of tangible goods (refer to the definition of ‘goods’ in section 2(8) of the *CRA*) do not apply to digital content including the guarantee that goods will correspond with a sample (s13 of the *CRA*).⁴⁶⁰

The effect of the *CRA* is that consumer warranties related to satisfactory quality clearly apply to both goods and digital content, irrespective of the medium of purchase. Similarly warranties as to fitness for the purpose, satisfactory quality, to be as described and guarantees of title (or in the case of digital content the ‘right’ to sell) also apply to both. Similar to the supply of goods the provisions apply only to the supply of digital content where the consumer pays for the content. Although the implied terms are the same, the relevant criteria related to satisfactory quality are altered to accommodate the different nature of digital content. For example, ‘appearance and finish’ are relevant to satisfactory quality of goods (s 9(3)(b) but not relevant to digital content (s 34).

459 See, for example, Robert Bradgate, ‘Consumer Rights In Digital Products: A Research Report Prepared For The UK Department for Business, Innovation and Skills’ (Research Report, Institute for Commercial Law Studies, Sheffield and 2010) www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products.

460 See Althaf Marsoof, ‘Digital Content And The Definition Dilemma Under The Sale Of Goods Act 1979: Will The Consumer Rights Bill 2013 Remedy The Malady?’ (2014) 9(4) *Journal of International Commercial Law and Technology* 285, 289 for a useful discussion of this issue.

Remedies available to consumers are also consistent except that a consumer is not entitled to reject digital content, but can insist on repair or replacement, the right to a price reduction and the right to a refund. An additional remedy is provided to a consumer where digital content damages a device or other digital content belonging to a consumer (s 46). A consumer is entitled to request the trader repair the damage or compensate the consumer for the damage. Importantly s 46 applies even if the consumer has not paid for the digital content.

Approach to extra territorial operation

The *CRA* applies to all contracts for the supply of goods or digital content to a UK consumer. No contracting out provisions are included in s 31 and s 47. This means that consumer agreements subject to UK law cannot avoid the operation of the provisions. European Regulation EC 593/2008 (Rome I Regulation) sets out the rules as to which country's law (within the EU) applies to consumer contracts. Traders are able to choose the law of the contract but where the trader pursues or directs its activities to a UK resident, the provisions of the *Consumer Rights Act 2015* cannot be contracted out of by the trader.

UK regulators have similar powers to Australia. Enforcement action can be taken against any trader who supplies goods or services to a UK resident in the course of their business. There is no requirement for the supplier to carry on a physical business in the UK.

Harmonisation with EU laws also assists in ensuring the welfare of UK consumers. One of the clear policy aims of the UK government is to ensure a consistent approach with other EU member states. The *CRA* takes into account the definitions and measures contained within the *Consumer Rights Directive* (2011/83/EU) and, as far as appropriate, has made the Act consistent with the Directive, with the intention of achieving overall a simple, coherent framework of consumer legislation.⁴⁶¹ The *CRA* applies across England, Wales, Ireland and Scotland and because of consistency with EU Directives largely contributes to a harmonized EU position. The harmonisation of laws by the UK government with the EU minimized the differences in contractual terms and the likelihood of a supplier attempting to contract out of statutory requirements.

Additional information disclosure requirements

The *CRA* incorporates the information required to be given by a trader under the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* as a term of a contract to which the *CRA* applies. The 2013 Regulations ensure that consumers and traders are clear about the bargain they are making in three main areas: information which traders should provide to consumers; cancellation rights and responsibilities; and measures to prevent hidden costs.

The *Consumer Rights Act 2015* maintains the application of implied warranties to transactions between traders and consumers (who are individuals). This fails to take into account that many transactions are undertaken between consumers (particularly in peer to peer transactions) or between traders and small business. The *CRA* has been criticized as not adopting a broader application as allowed by the EU Directive.

4.2.3.3 Information Disclosure Internet Contracts

Specific provision is made in the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* for certain information to be provided to consumers purchasing goods or service over the internet. The Regulations ensure consumers are provided with clear information

461 Other EU Directives were also incorporated (*Directive 99/44/EC* on certain aspects of consumer goods and associated guarantees).

about the main characteristics of the goods or digital content, the total price, delivery charges, total cost of a service or subscription over the period of the agreement and the total period of the contract. The trader must ensure that consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. If the order is placed over the internet any button activating the order must be clearly labelled. A failure to comply with these requirements will allow the consumer to terminate the contract. Together with the *Electronic Commerce (EU Directive) Regulations 2002*⁴⁶² the Regulations establish legal rules that online retailers and service providers must comply with when dealing with consumers in the 27 member countries of the European Union (EU). The directive dictates the information that consumers must be provided with in online transactions. If a retailer/service provider fails to provide information required by the directive, its contract with the consumer may be invalid and it may be in breach of member state retail law.

The information to be disclosed includes a detailed description of the product as well as information about pricing, shipping and contact details. These provisions are examined further at below in relation to unfair pricing practices.

4.2.4 United States

The regulatory approach in the US relies on the application of existing consumer protection laws to internet based transactions and digital products. The US is primarily focused on improving information asymmetry through a three pronged strategy: (i) aggressive enforcement of existing regulations, (ii) consumer education, and (iii) business education.⁴⁶³ The US is focused on product quality through the application of implied warranties applicable to goods sold by traders and the enforcement of obligations imposed on traders, including those carrying on business online. There is some harmonisation at a Federal level, but application of these provisions within individual states requires each state to adopt the provisions.

The relevant laws are:

Implied warranties

- *Uniform Commercial Code ss 2-314 — 2-315 (UCC)* (imposes an implied warranty of merchantability and fitness for particular purpose in relation to goods);⁴⁶⁴
- *Magnuson-Moss Warranty Act (15 USC Ch 50 (Legal Information Institute (2015)))* (regulates consumer warranties by amending and complementing the UCC

Information Disclosure

- *Federal Trade Commission Act (US) ('FTCA')* (dealing with unfair or deceptive acts or practices);
- *Dot.com disclosure information about online advertising* (to provide guidance on the application of the FTA to online advertising).

462 These regulations implement the EU 'E-commerce Directive' (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internet Market [2000] OJ L 178/1).

463 Eileen Harrington, 'Federal Trade Commission on Consumer Protection in Cyberspace: Combating Fraud on the Internet', Statement prepared for the Telecommunications, Trade and Consumer Protection Subcommittee of the House Committee on Commerce, 25 June 1998
www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-consumer-protection-cyberspace-combating-fraud-internet/test.623.pdf.

464 Each state has codified its own version of Article 2 of the UCC.

4.2.4.1 General protection — Uniform Commercial Code

Articles 2-314 and 2-315 of the *Uniform Commercial Code* imply certain warranties relating to merchantability and fitness for particular purpose into contracts of sale between suppliers (known as ‘merchants’) who deal in goods of that kind and buyers. A merchant is ‘a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction’. This means the seller of goods is required to be in the business of selling goods of the kind offered for sale. Unlike the UK and Australia the party buying the goods may be purchasing them for any purpose and is not required to be a consumer. There are no specific provisions applicable to digital products or content. Application of the implied warranties to traditional goods and services provided by the internet does not present any difficulties, except that traders can contract out of the provisions.

Regulators continue to rely on existing provisions and are yet to review the UCC for internet transactions. A number of points of difference to the UK and Australian positions should be noted:

- (a) These provisions have been held to apply to a sale of goods via the internet, including software,⁴⁶⁵ but the application of the provisions to digital content is doubted.⁴⁶⁶ Article 2 of the UCC applies to ‘transactions in goods’, however, ‘goods’ are defined to include tangible personal property that is moveable at the time it is identified to the contract.⁴⁶⁷ This definition does not expressly include intangible goods such as software and electronic applications. However, as US courts are willing to include software in the definition of ‘transactions in goods’, there has also been a move to expressly exclude such intangibles from the definition in article 2 of the UCC. In 2002, the American Law Institute (ALI) approved revisions to article 2 that sought to exclude many computer information transactions explicitly from its scope. However, the National Conference of Commissioners on Uniform State Laws rejected these revisions.
- (b) As a result, there remains doubt regarding whether article 2 of the UCC should be applied to transactions in downloadable software, absent tangible media.⁴⁶⁸
- (c) Unlike the UK provisions and the *Australian Consumer Law* the implied warranties can be contracted out of, unless unreasonable (article 2-316).
- (d) The warranty of fitness in s2-314 UCC applies to supplies by all sellers, unlike the warranty of merchantability in s2-315 that applies only to professional merchants. The justification for this distinction has been the subject of much academic discussion but has concluded that ‘the drafters did not draft the merchant restriction because buyers from non-merchant sellers could not have reasonable quality expectations’.⁴⁶⁹ Notwithstanding the lack of rationale for this distinction, there is a push amongst academics and practitioners for the distinction to be removed so that all sellers will be imposed with a minimum quality responsibility.⁴⁷⁰ This becomes relevant in the context of increased internet sales by seller’s who are not engaged in trade or commerce.

465 *MA Mortenson Company v Timberline Software Corporation* 970 P 2d 305, 310 (Wash. Crt App 2000); *Advent Systems Ltd v Unisys Corp* 925 F 2d 670 (1991).

466 Michael Seringhaus, ‘E-Book Transactions: Amazon ‘Kindles’ the Copy Ownership Debate’ (2009) 12 *Yale JL&Tech* 147.

467 Jennifer S Martin, ‘Sales’ (2011) 66(4) *Business Lawyer* 1083.

468 See, for example, *Specht v Netscape Communications Corp*, 306 F 3d 17, 30 (2d Cir 2002) where the court declined to decide whether article 2 applies to Internet transactions in downloadable products.

469 Ingrid Michelsen Hillinger, ‘The Merchant of Section 2-314: Who Needs Him?’ (1983) *Faculty Publications Paper* 972, 769.

470 Ingrid Michelsen Hillinger, ‘The Merchant of Section 2-314: Who Needs Him?’ (1983) *Faculty Publications Paper* 972, 807.

Daniel Wiig⁴⁷¹ argues that Internet-based sellers should be obligated to take additional steps including:

- disclosing their identity, profession and other related experiences so a consumer can determine whether the goods they sell are captured by the implied warranties; and
- most relevantly to this section of the report, to describe the goods with particularity rather than using subjective terms such as 'mint' condition, 'rare', 'excellent condition' etc and, when such words are used, providing the proper meaning in the description of the good advertised.

He argues this position on the basis that often sellers on person-to-person sites, such as eBay, are merchants who own face-to-face stores as well as Internet-based stores and therefore would fall within the definition of merchant for the purposes of the implied warranty of merchantability. But for the additional identity disclosure proposed by Wiig, a consumer would not have sufficient information to determine whether they are buying goods from a merchant or simply goods from a consumer.

The fact that goods must be clearly described has already been identified as a regulatory issue by the US. However, once a seller on a person-to-person site identifies as a merchant then they must also comply with the requirements of the FTCA in relation to describing goods and, as Wiig would have it, provide proper meanings for the words used to describe the goods on the relevant site.⁴⁷²

4.2.4.2 General protection — unfair or deceptive commercial practices

The FTC relies upon the unfair or deceptive practices in commerce provisions of the *Federal Trade Commission Act 15 USC* to take action against traders engaged in unfair practices via the internet. The broad provisions allow the FTC to take action for misleading representations or omissions that are material to a consumer's choice of a product; and any inaccurate or false information placed on websites, unfair pricing practices, other unfair practices aimed at tricking consumers and consumer fraud.⁴⁷³

Enforcement powers of the FTC are also broadly cast allowing the FTC to bring proceedings against any person who has, in their view, breached § 45 of the FTCA and seek orders that the advertisement cease or to obtain a temporary restraining order or injunction (§ 53). The court can also order penalties for false advertising of not more than \$5,000 or 6 months imprisonment (§ 54).

Although the powers of the FTC as a national regulator are strong the adoption of the FTCA provisions within State legislation is inconsistent. Many of the equivalent state provisions are viewed as weak due to the many exceptions in the legislation or judicial decisions reading down the provisions. Gaps in the state legislation mean there is a low level of harmonization and loop holes for suppliers using the internet to avoid liability.

471 'Essays: UCC Article 2 Warranties and Internet-Based Transactions: Do The Article 2 Warranties Sufficiently Protect Internet-Based Transactions With Unprofessional Internet Merchants?' (2007) 12(4) *Fordham Journal of Corporate & Financial Law*, 717, 731-732.

472 See also, Gary Sullivan, 'Purchasing from Merchants On Ebay and the Implied Warranty of Merchantability: A Overview' (2009) 70(4) *Alabama Lawyer* 266-272.

473 *Federal Trade Commission Act 15 USC* §45 (1) & (2), §52

4.2.5 Canada

The Canadian government's overall policy approach to e-commerce is to ensure that consumers are afforded the same protection whether transacting face to face or online. The Canadian government undertook a review of their consumer protection framework to ensure it fosters growth in the e-economy and to harmonise Canadian consumer law with best practice international approaches.⁴⁷⁴

At a Federal level the regulatory approach is based primarily upon improving the quality of information provided to consumers. The *Competition Act RSC 1985* primarily regulates conduct of traders by prohibiting false or misleading representations. This is analogous to the misleading conduct provisions of the ACL. Warranties of quality and fitness for purpose are regulated at a provincial level under the *Sales of Goods* legislation. A majority of provinces have also adopted the *Internet Sales Contract Harmonization Template* which supports the Competition Act provisions aimed at ensuring consumers are provided with adequate information about the goods being purchased, the price and other material terms of the contract.

4.2.5.1 General Protections — Competition Act

The relevant law at a federal level is the *Competition Act RSC 1985* c C-34. The Act governs the conduct and commercial practices of businesses in Canada with the purpose of providing consumers with, amongst other things, competitive prices and product choices and, in the context of the quality of goods and services, making misleading advertisements unlawful. These provisions apply broadly to conduct in commercial situations irrespective of the medium in which the conduct occurs.

In relation to the quality of goods and services, the *Competition Act* provides that a person who makes representations that are false or misleading in a material respect in the course of promoting the supply or use of a product engages in 'reviewable conduct' (ss 74.01 — 74.02), which can result in administrative remedies including orders to cease such conduct and the payment of monetary penalties (section 74.1(1)). Such representations are deemed to be made by the person who causes the representations to be expressed, unless that person is outside Canada, in which case the person who imports the goods will be held responsible (section 74.03(2)). Product is defined to include an 'article' and a 'service'. An article is 'real and personal property of every description.' This definition is wide enough to apply to computer software.⁴⁷⁵ The provisions are applicable if a person makes a misleading representation about goods or services but does not impose a standard of acceptable quality for those goods.

Canada has also implemented the *Internet Sales Contract Harmonization Template* that has been ratified by the federal and provincial governments. The Harmonization Template requires, amongst other things, a 'fair and accurate description' of the goods or services to be provided (section 3(1)a)iv). For the Template to be effective within a Canadian province it must be formally adopted, which has only occurred in six provinces and even in those cases there are a number of differences in the legislation particularly related to enforcement across provincial borders.⁴⁷⁶

474 Working Group on Electronic Commerce and Consumers, 'Principles of Consumer Protection for Electronic Commerce: A Canadian Framework' (Principles of Consumer Protection, Office of Consumer Affairs of Industry Canada, 2009) 2. The Canadian government also considers it important that any Canadian response to drip-pricing should be consistent with directions in consumer protection established by international bodies such as the Organisation for Economic Co-operation and Development.

475 *PCM Technologies Inc v O'Toole* [2012] ONSC 2543

476 Refer to the summary in the research report by *Option consommateurs* entitled 'The Views Of Canadians On The Harmonization Of Consumer Protection Standards' (2015)

The provisions of the *Competition Act* apply to any business operating within Canada and selling to Canadian citizens.

4.2.5.2 Provincial Legislation

Application of provincial legislation to internet contracts is uneven. Where legislative provisions have been enacted to apply to internet or distance contract, focus has been on the information a supplier should disclose to a consumer rather than warranties of quality. For example in Ontario the *Consumer Protection Act* regulates abusive business practices both in face-to-face transactions and those that occur online (known as 'internet agreements' and 'remote agreements'). The Act:

- requires that suppliers disclose certain prescribed information (including a fair and accurate description of the goods and services (including technical requirements)) before the consumer enters into a contract;⁴⁷⁷ and
- deems certain conditions (in the case of goods) and warranties (in relation to goods and services) to apply to the quality of goods and services. The warranties are those already existing in the *Sale of Goods Act*.

These implied warranties and conditions relating to the quality or fitness for any particular purpose of goods supplied under a contract of sale only apply:

- Where the buyer makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (but this condition does not apply in the sale of a specified article under its patent or other trade name;⁴⁷⁸
- Where goods are bought by description from a seller who deals in goods of that description unless the buyer has examined the goods and such examination ought to have revealed the defects;⁴⁷⁹
- An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.⁴⁸⁰

The definition of goods is unchanged and means 'all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale'. This definition is unlikely to apply to computer software or other digital content. A similar position exists in British Columbia under the *Business Practices and Consumer Protection Act* and the *Sale of Goods Act*. The emphasis in the provinces, similar to the Federal level, has been on disclosure requirements related to description of the goods or services to be supplied under the contract including any relevant technical or system specifications.

There is minimal case law in an internet context applying consumer laws and the existing case law related to distance sales contracts has been criticised as showing 'a worrisome lack of understanding on the part of the courts with respect to electronic distance selling.'⁴⁸¹ Rather than interpreting the unique characteristics of Internet sales contracts, the courts seem to be blindly

477 See, for example, section 38(1) and regulation 32(1) of the *Consumer Protection Act Regulations 2002 17/05*.

478 *Sale of Goods Act RSO 1990*, c S.1, s 15.1.

479 *Ibid* c S.1, s 15.2

480 *Ibid* c S.1, s 15.3.

481 Ioana Delapeta and Marcel Boucher, 'Regulating Distance Contracts: Time to Take Stock' (Final Report of the Research Project, Union des consommateurs, June 2014), 46.

transposing the contractual principles applicable to paper contracts and attempting to draw analogies between the two (which can be difficult in many cases).⁴⁸²

4.2.6 Singapore

Singapore's primary policy objective is that disclosure should include complete and accurate information about the trader's business, about the goods or services for sale and about how the transaction is made. What this means, amongst other things, is that e-customers should have enough information to make an informed decision.⁴⁸³ This policy position has been given effect by reliance on existing consumer protection regulations within the *Consumer Protection (Fair Trading) Act* and the *Sale of Goods Act*.

4.2.6.1 General protections — quality of goods

The *Consumer Protection (Fair Trading) Act* (CPFTA) (known locally as the *Lemon Law*) provides the legislative framework to safeguard small consumers against unfair practices.

Unfair practices prohibited by s 4 include misleading or deceiving a consumer, making false claims or taking advantage of a consumer who is unable to protect their own interests. These provisions would apply to misleading conduct or false claims about the quality of products sold online.

The CPFTA also responds to the issue of quality and fitness by providing statutory remedies for consumers where goods do not conform to the contract at the time of delivery. Goods are deemed to not conform to the contract if there is a breach of an express term or a term implied by the *Sale of Goods Act*, s 13, 14 and 15. These sections of the *Sale of Goods Act* apply to contracts of sale, including auctions, for consideration and by virtue of s 14 are subject to an implied condition of satisfactory quality⁴⁸⁴ if purchased from a seller in the course of a business. Goods are defined in section 61(1) to include all personal chattels apart from things in action and money. Computer software may be included in this definition if provided on a disc or USB, but a digital download is unlikely to fall within the provisions. Parties can contract out of the implied conditions unless the contract is governed by the *Unfair Contract Terms Act* (UCTA). Under s 5 of the UCTA liability for loss or damage arising from a defect in goods of a type ordinarily supplied for private use cannot be contracted out of.

The statutory remedies in the CPFTA are only available to a buyer who 'deals as a consumer'.⁴⁸⁵ To fall within this requirement the buyer must not be purchasing in the course of a business and in the case of a sale of goods the good must be of a type ordinarily supplied for private use or consumption. Further a buyer purchasing at an auction is not a consumer. The combined effect of s 13 of the CPFTA and s 5 UCTA is that a supplier is unable to contract out of the statutory remedies or rights of consumers in the CPFTA.

482 Vincent Gautrais, 'Le vouloir électronique selon l'affaire Dell Computer: dommage!' (2007) 37(2) *Revue générale de droit*, 1, 14 quoted in Ioana Delapeta and Marcel Boucher, 'Regulating Distance Contracts: Time to Take Stock' (Final Report of the Research Project, Union des consommateurs, June 2014), 46.

483 Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2.

484 This is subject to some exceptions set out in s 14(2C) where defects are specifically disclosed or the buyer examines the goods before contract and an examination should reveal the defect.

485 Defined in the Unfair Contract Terms Act (Singapore), s 12.

4.2.7 Comparison of regulatory approaches

4.2.7.1 Common aspects

- (1) All jurisdictions, including Australia, maintain one common legal framework for regulating product quality in online and face to face transactions. The predominant view is that goods or digital content purchased over the internet should have the same protections and the value of a parallel scheme applicable only to online purchases is not desirable.⁴⁸⁶ The statutory definition of quality concepts such as acceptable quality, merchantable quality, fitness for purposes and compliance with description are largely unchanged in each jurisdiction on the basis they are broad enough to apply irrespective of the medium used to purchase the goods.
- (2) National and international harmonization of laws is a common goal and viewed as a strategy to minimise opting out of warranties or guarantees into low regulatory jurisdictions. At a national level in the UK consistent consumer protection provisions across legislative instruments, with the intention of achieving overall a simple, coherent framework of consumer legislation was a key rationale for the *Consumer Rights Act 2015*. Harmonisation was an important issue for the UK due to the close relationship with the EU and the high probability of suppliers choosing to utilize the law of other EU jurisdictions to escape liability for defective products. The Canadian government considers it important that any Canadian laws relating to the quality of goods and services should be consistent with directions in consumer protection established by international bodies such as the Organisation for Economic Co-operation and Development.⁴⁸⁷
- (3) In the United States, United Kingdom, Canada and Singapore traders in online transactions are required to provide additional information to consumers. In the US advertising online must be in a clear and conspicuous manner (including disclaimers that must be legible and understandable). In Canada online transactions are treated in the same way as distance selling transactions, which have additional disclosure obligations due to an inability for the consumer to inspect the product. In contrast in Singapore, suppliers only need to disclose sufficient information to describe the goods and services, but they do not need to disclose information that is not likely to affect a consumer's decision regarding the acquisition of those goods or services.⁴⁸⁸ This is despite acknowledging that information asymmetry issues exist for consumers purchasing online.⁴⁸⁹

Whether greater information disclosure obligations corresponds to more effective consumer protection is yet to be determined. In many cases consumers do not read terms and conditions before agreeing to them either because they cannot find the terms, or they are written in legalese or consumers realise they cannot negotiate and will have to agree to the terms. This highlights the importance of having standard warranties related to quality, which suppliers cannot contract out of.

486 Ursula Pachl, Agustin Reyna and Christoph Schmon 'European Commission's Public Consultation on Contract Rules for Online Purchases of Digital Content and Tangible Goods: BEUC Response' (BEUC Response, Bureau Europeen Des Unions de Consommateurs AISBL, 3 September 2015) 1.

487 Working Group on Electronic Commerce and Consumers, 'Principles of Consumer Protection for Electronic Commerce: A Canadian Framework' (Principles of Consumer Protection, Office of Consumer Affairs of Industry Canada, 2009) 2.

488 Explanatory Notes, Consumer Protection (Fair Trading) Bill [19].

489 Consumers Association of Singapore, *CPFTA & Lemon Law*, (2013) Consumers Association of Singapore www.case.org.sg/consumer_guides_cpfta.aspx.

4.2.7.2 Differences

- (1) No significant change has been made in the United States, Canada, Singapore or Australia to the scope of existing consumer warranties. In Australia consumer guarantees have applied to 'computer software' since 2011, but this will not be wide enough to apply to non-executable data.⁴⁹⁰ In contrast the UK has recently reviewed its consumer protection legislation to ensure application of consumer warranties of acceptable quality to digital content.⁴⁹¹
- (2) Only Australia, the UK and Singapore provide that statutory guarantees and implied warranties respectively cannot be contracted out of by the parties. Jurisdictions such as the US⁴⁹² and Canada have only recently considered the issue in the context of online transactions.
- (3) There is no additional information disclosure obligation imposed on traders in Australia where the transaction takes place online.

4.2.7.3 Emerging issues

No reviewed jurisdiction has removed the restriction on application of statutory guarantees to sale by auction for the online context⁴⁹³ or imposed warranties of quality for goods sold by individuals not engaged in business activities.

4.3 Unfair or misleading pricing practices

4.3.1 Issues

Unfair or misleading pricing practices are problems in all forms of commerce. The prevalence of misleading pricing practices, such as drip pricing and surge pricing, appears to increase in online transactions. Most jurisdictions have recognised *drip pricing* and *surge pricing* as problems and varying regulatory approaches have been adopted. In this section we explain drip pricing and surge pricing and, compare the policy and regulatory approaches of each jurisdiction to both practices.

490 Refer to the decision of *ACCC v Valve Corporation* [2016] FCA 196.

491 For example electronic books, music and other forms of download. Althaf Marsoof, 'Digital Content and the Definition Dilemma Under The Sale of Goods Act 1979: Will the Consumer Rights Bill 2013 Remedy The Malady?' (2014) 9(4) *Journal of International Commercial Law and Technology* 285, 288-289; Ioana Delapeta and Marcel Boucher, 'Regulating Distance Contracts: Time to take stock' (Final Report of the Research Project Submitted to Industry Canada's Office of Consumer Affairs, Union des consommateurs, June 2014) 17).

492 William S Rogers and Sara A Colb, *Survey & Analysis of Modern Warranty Law under UCC ss 2-313-2-316* Day Pitney LLP, Boston < <http://www.princelobel.com/assets/attachments/212.pdf>> 6). (Reese Poyfair and Richards PLLC, *Understanding the Magnuson-Moss Warranty Act* (2015) MLMLaw.com www.mlmlaw.com/library/guides/ftc/warranties/undermag.htm).

493 The restriction on application of statutory guarantees to a sale by auction were removed from the *Consumer Guarantees Act 1993* (NZ) in 2013.

Drip pricing

The term ‘drip pricing’ is usually used to refer to where a headline price is advertised at the beginning of an online purchasing process and additional fees and charges, which may be unavoidable, but not mandatory are then incrementally disclosed (or ‘dripped’) to the consumer.⁴⁹⁴ Drip pricing is common in on-line transactions such as airline, car rental and accommodation booking websites.

Surge Pricing

Surge pricing (also known as dynamic pricing) is not a new concept. In fact, it has historically been linked to airline ticketing, hotel room pricing and the energy sector.⁴⁹⁵ More recently (and controversially) it has been associated with ridesharing platforms such as Uber. In that context, surge pricing occurs when ridesharing platforms add a multiplier (of, in the case of Uber, up to 900%) on to their standard fares at times of high demand to encourage drivers on to the road to meet that demand.⁴⁹⁶ This is of particular concern in the taxi industry where consumers are accustomed to uniform pricing. Most recent policy discussion of surge pricing has occurred in the context of riding sharing platforms.

Drip pricing and surge pricing are not new to online transactions. Most jurisdictions recognise drip pricing and surge pricing as problems for consumers. Consumer behaviour research suggests in the case of **drip pricing** that:

- **Consumers overspending on products and services (endowment effect):** Misleading prices may lead to consumers spending more than they need to, buying a product which is not best for them, wasting time or suffering annoyance, disappointment or regret.⁴⁹⁷ The Office of Fair Trading has estimated that UK consumers spent £300 million in 2009 on payment surcharges.⁴⁹⁸ Drip pricing was found to have the most egregious effect.
- **Consumers can be misled by cheap headline prices (anchoring):** Research suggests that consumer purchasing decisions are driven by which supplier is offering the cheapest headline prices.⁴⁹⁹ This occurs where the consumer focusses solely on the most important piece of information and disregards other potentially detrimental information.
- **Consumers who start a process are unlikely to walk away** (commitment and consistency)

Surge pricing is also recognised as a consumer problem in online transactions, but have been reluctant to regulate against such conduct. Although consumers are vulnerable to price exploitation in times of peak demand, research suggests that regulators should aim only to correct

494 Australian Competition & Consumer Commission, *Drip Pricing* (2015) ACCC www.accc.gov.au/consumers/online-shopping/drip-pricing.

495 Mark Alston, *What Do Hefty Electricity Charges and Uber's 'Surge' Pricing Have In Common?* (31 March 2015) Supply Management www.cips.org/en-AU/Supply-Management/Opinion/2015/March/What-do-hefty-electricity-charges-and-Ubers-surge-pricing-have-in-common/.

496 Uber, *What is Surge Pricing* Uber.com <https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdce119>.

497 Refer to Amelia Fletcher, *Drip pricing: UK experience* (21 May 2012) Federal Trade Commission www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/afletcher.pdf.

498 Office of Fair Trading *OFT to take action over passenger travel sector payment surcharges* (28 January 2011) WIREDOV www.wired-gov.net/wg/wg-news/1.nsf/0/13A505722AF49487802578BD0049001F?OpenDocument.

499 Refer to Amelia Fletcher, *Drip pricing: UK experience* (21 May 2012) Federal Trade Commission www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/afletcher.pdf.

market problems and go no further.⁵⁰⁰ From an economic perspective surge pricing is a normal part of supply and demand in the market. When supply is low and demand is high the price rises so as to ration supplies and encourage new supplies. In the case of ride sharing platforms, such as Uber, the surge in price is to encourage more drivers to provide services in times of peak demand

The regulatory approach in each jurisdiction is explained separately below. If available, e-commerce case examples are included.

4.3.2 Australia

In Australia, there are no specific legislative provisions regulating drip pricing or surge pricing in e-commerce. Both of these practices are potentially regulated by general prohibitions of misleading conduct or unconscionable conduct. Action can be taken by the ACCC for drip pricing or surge pricing either on the basis of misleading conduct or for contravention of single pricing laws in s 48 ACL. Non-regulatory guidance is also provided by the ACCC's *Advertising and Selling Guide*.⁵⁰¹ The Guide seeks to provide guidance to businesses within their respective jurisdictions about the application of relevant 'drip pricing' legislation.

4.3.2.1 General Protections — Drip pricing

In the case of drip pricing, the ACCC is likely to take action on the basis of misleading conduct rather than a breach of s 48. The ACCC considers drip pricing to be where a headline price is advertised at the beginning of an online⁵⁰² purchasing process and additional fees and charges, which may be unavoidable (but not mandatory and therefore not in breach of single pricing laws including section 48 of the *Australian Consumer Law*) are then incrementally disclosed (or 'dripped').⁵⁰³

Action has been taken by the ACCC for drip pricing pursuant to s 18 and s 29 ACL. Section 29 relevantly provides:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

.....

(i) make a false or misleading representation with respect to the price of goods or services.

.....

The regulatory approach of treating drip pricing as a form of misleading conduct has allowed the ACCC to successfully prosecute several persistent offenders and obtain enforceable undertakings from others to alter pricing on websites.

500 Nayeem Syed, 'Regulating Uberification' (2016) 22(1) *Computer and Telecommunications Law Review* 1, 10.

501 Australian Competition and Consumer Commission, *Advertising and selling guide* (17 April 2014) Australian Competition and Consumer Commission www.accc.gov.au/publications/advertising-selling.

502 See also *ACCC v AirAsia Berhad Company* [2012] FCA 1413 (14 December 2012) where the court found AirAsia had also engaged in drip pricing conduct that mislead consumers.

503 Refer to Australian Competition & Consumer Commission, *Drip Pricing* (2015) ACCC www.accc.gov.au/consumers/online-shopping/drip-pricing.

Case example

Two recent cases, *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263 and *Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd* [2015] FCA 1263, serve as useful examples of the application of the ACL, s 29 to drip pricing.

In both cases the online booking process imposed a 'booking and service fee' (\$8.50 and \$7.70 for domestic flights, respectively) on the majority of consumers for payments made by credit or debit cards and PayPal. In most cases, this fee was not clearly disclosed until the payment stage of the booking process. The Court held the airlines engaged in misleading 'drip pricing' practices under sections 18(1), 29(1)(i) and 29(1)(m) of the ACL by encouraging consumers to enter their online airfare booking system through the promotion of a prominent headline price, and progressively 'dripping' information (including the booking and service fee) to them later in the process.

Enforcement action and undertakings

The ACCC has also investigated drip pricing in a number of different industries and reached enforceable undertakings with those who were found to have engaged in misleading and deceptive conduct by failing to disclose mandatory fees prominently on their platforms. Most recently, the ACCC has entered enforceable undertakings with both Airbnb Ireland and a competitor, Vacaciones eDreams for failing to disclose service and cleaning fees on certain pages of their websites.

In late 2014, Ticketek and Ticketmaster agreed to improve their online pricing practices by including mandatory fees earlier in their booking processes.

The ACCC has completed a sweep of over 130 websites and mobile apps to determine whether any of those traders were engaging in misleading or deceptive conduct. Although the ACCC's findings indicate there has been an improvement in the online booking processes among the travel, tourism and leisure sectors, the sweep identified 15 traders for follow-up action.⁵⁰⁴

4.3.2.2 General Protections — Surge Pricing

In the case of surge pricing the only likely action by either consumers or the ACCC is based upon the general provisions of the *Australian Consumer Law* (ACL) prohibiting misleading conduct and false representations in trade or commerce. Situations in which surge pricing will constitute misleading or deceptive conduct or a misleading or false representation are limited. This may occur if the supplier were to advertise that prices are high due to high demand, when demand is not in fact high.⁵⁰⁵ There will be no misleading conduct if in fact demand is high. The problem for consumers is that a surcharge is being exacted in situations, such as public holidays or special events, where the supplier thinks consumers will have little choice but to pay the high fees. The fees usually exceed the actual cost to the supplier of increased expenses because of the increased demand or special event.

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- 504 Australian Competition & Consumer Commission, 'Internet sweep shows improvements to disclosure in online booking processes' (Media release, MR 258/15, 16 December 2015) www.accc.gov.au/media-release/internet-sweep-shows-improvements-to-disclosure-in-online-booking-processes.
- 505 Deloitte Access Economics, 'The Sharing Economy and the Competition and Consumer Act' (Research Report, Deloitte Access Economics, 2015) 27.

Although surge pricing is recognised as an issue for consumers no specific regulatory provisions have been enacted as part of the ACL. Sections 18 and 29 of the ACL may be relevant if there is any misleading conduct associated with the surge in pricing.

A number of Australian states have considered the regulatory impacts of Uber on existing taxi licensing regimes. These reviews have focussed on issues of safety, insurance and whether ride sharing services should be regulated in a similar manner to taxi services. Very few have focused on the pricing issues. As part of the Western Australian government Green Paper released in July 2015 consideration was given to regulating both traditional taxi services and ridesharing platforms. As part of that paper pricing transparency was considered and it was conceded that if ride sharing was allowed to operate current regulation imposing caps on fares should be removed.⁵⁰⁶ The issue of surge pricing was not considered.

4.3.3 United Kingdom

Similar to Australia, the UK has approached the problem of drip pricing and surge pricing by the application of existing consumer protection laws prohibiting misleading conduct. The rationale for this approach is based on the view that both drip pricing and surge pricing create issues of information asymmetry for consumers limiting their ability to make an informed choice to purchase. There are no specific laws regulating drip pricing or surge pricing in an e-commerce context. The UK's policy and legislative response to pricing practices aims to achieve the following outcomes:

- (a) ensuring consumers are fully informed of the total cost of the transaction early in the transaction; and
- (b) encouraging businesses to take a responsible approach to pricing based on transparent and honest pricing practices.⁵⁰⁷

This is achieved by application of general consumer protections for misleading conduct in the *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277 (CPR),⁵⁰⁸ issue of guidelines for business to implement fair and transparent pricing practices in accordance with the CPR (*Pricing Practices Guide* (PPG)) and a number of industry specific provisions, consistent with the CPR, to regulate industry specific pricing issues.

4.3.3.1 General Protections — unfair commercial practices

The CPR consolidates consumer protection legislation in the UK and implements the EU *Unfair Commercial Practices Directive* (2005/29/EC). They apply to unfair commercial behaviour that occurs before, during and after a contract is made.⁵⁰⁹ The CPRs are principle-based legislation cast in broad terms. The overall objective of enacting the CPRs was to improve consumer redress for unfair commercial practices and to harmonise the UK laws with the EU to improve consistency of consumer protection. The CPR adopted verbatim the EU *Unfair Commercial Practices Directive*. The general operation of these provisions was considered at [7.1] in relation to punitive fees.

⁵⁰⁶ Western Australia Department of Transport, 'On-demand Transport: A discussion paper for future innovation' (Discussion Paper, Western Australia Department of Transport, July 2015) 16.

⁵⁰⁷ (Chartered Trading Standards Institute, 'Consultation on the Draft Pricing Practices Guide' (Draft Guide for Consultation, Chartered Trading Standards Institute at the request of the Department for Business Innovation and Skills and the Consumer Protection Partnership, October 2015) 3.

⁵⁰⁸ These regulations implemented the EU *Unfair Commercial Practices Directive*.

⁵⁰⁹ Explanatory Memorandum, *The Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008*, 16.

1. Drip pricing

The CPR regulates drip pricing practices in e-commerce under the general prohibition of ‘unfair commercial practice’ in regulation 3.

Regulation 3 prohibits unfair commercial practices. A commercial practice is unfair if it distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product. This provision will apply if the practice causes, or is likely to cause, the average consumer to make a different decision. This may occur if a consumer chooses to enter a different shop to make additional ‘clicks’ through an online booking process.

A commercial practice is also unfair according to Reg 3(4) if the following apply:

- **Regulation 5** — Giving false information to, or deceiving, consumers (misleading actions). This regulation applies to drip pricing if it contains false information or the overall presentation is likely to deceive an average consumer in relation to price and causes the average consumer to take a transactional decision he or she would not have taken otherwise. eg. Advertising a product using a headline price and then revealing only during the purchasing process, or subsequent to this, that other compulsory charges, such as tax, apply which will increase the total price paid.
- **Regulation 6** — Giving insufficient information to consumers (misleading omissions) The omission or hiding of material information, or making material information unclear, unintelligible, ambiguous or untimely causes the average consumer to take a transactional decision he or she would not have taken. eg Failing to disclose the existence of any additional charges payable, such as postage and packing, insurance etc, until the point of sale.

There are also a number of deemed unfair commercial practices (the blacklist) in Schedule 1 but drip pricing is not included in the list.

2. Surge pricing

Although surge pricing is not expressly regulated the existing provisions prohibiting unfair commercial practices in the *Consumer Protection from Unfair Trading Regulations 2008* may apply if the supplier misleads the consumer by acts or omissions about the surge in pricing. A supplier who makes clear and transparent disclosure of the surge in pricing is unlikely to offend these provisions.

3. Reviews and enforcement

Although there is limited case law in this area, the UK’s Competition and Markets Authority (‘CMA’) has taken preliminary enforcement and investigatory action utilising the CPR. In 2014 the CMA conducted a review of the UK car rental sector to identify the main issues affecting consumers. That review identified, amongst other things, drip pricing and a general lack of transparency about the total price when making a booking (Consumers complained of additional charges such as a full tank of fuel, extra fees for picking up vehicles at premium locations, one-way fees and young driver surcharges only being revealed when they arrived at the pick-up desk.⁵¹⁰ The CMA initially worked closely with the EU’s 5 largest car rental companies to identify and remedy its concerns.⁵¹¹ The companies agreed to make changes to their online booking practices to, amongst other things, ensure the headline price includes all mandatory charges and that consumers are provided with

510 Competition and Markets Authority, ‘Short-term car rental in the European Union’ (Report, Competition and Markets Authority, July 2015) 2 and 26.

511 Avis-Budget, Enterprise Rent-a-Car, Europcar, Hertz and Sixt.

clearer information at an early stage of the booking process about optional extras and their prices, alongside the ability to purchase or pre-book them online rather than at the pick-up desk.⁵¹²

The above changes set a benchmark for others in the industry to follow (including brokers, price comparison websites and travel websites) and the CMA has indicated that it intends to share its findings with other members of the International Consumer Protection and Enforcement Network (ICPEN) (including Australia, Canada and the United States)⁵¹³ to assist the regulatory bodies in those jurisdictions to adopt similar approaches to drip pricing with short-term car rental companies.⁵¹⁴

4.3.3.2 Information disclosure — internet contracts

Contracts entered into online are subject to particular information disclosure obligations:

1. ***Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013***⁵¹⁵

The Regulations apply to a contract entered into over the internet between a trader and consumer. The purpose of the Regulation is to ensure consumers are provided with clear information about the main characteristics of the goods or digital content, the total price, delivery charges, total cost of a service or subscription over the period of the agreement and the total period of the contract. The trader must ensure the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. If the order is placed over the internet any button activating the order must be clearly labelled. A failure to comply with these requirements will allow the consumer to terminate the contract.

2. ***Electronic Commerce (EU Directive) Regulations 2002***⁵¹⁶

These Regulations establish legal rules that online retailers and service providers must comply with when dealing with consumers⁵¹⁷ in the 27 member countries of the European Union (EU). The Directive dictates the information that consumers must be provided with in online transactions. If a retailer/service provider fails to provide information required by the directive, its contract with the consumer may be invalid and it may be in breach of member state retail law. Prescribed information includes price, shipping and any other costs. Any breach of these requirements is considered a breach of statutory duty. If the consumer is not informed of how they can amend errors in an order, the contract can be voided.

These provisions apply to all UK businesses operating websites irrespective of where their website server is located. There is no requirement to comply with the laws of other EU members states where the directive is implemented. However this does not apply to the consumer law outlined above. A UK business operating a website and selling to consumers in other parts of the EU will need to comply with requirements of the UK and any other

512 Competition and Markets Authority, 'Short-term car rental in the European Union' (Report, Competition and Markets Authority, July 2015) 53.

513 Singapore is not yet a member of ICPEN.

514 Competition and Markets Authority, 'Short-term car rental in the European Union' (Report, Competition and Markets Authority, July 2015) 66.

515 Which implements most provisions of the EU Consumer Rights Directive (the remaining provisions are implemented in the *Consumer Rights (Payment Surcharges) Regulations 2012* and the *Enterprise Act 2002 (Part 8 EU Infringements) Order 2013*.

516 These regulations implement the EU 'E-commerce Directive' (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internet Market [2000] OJ L 178/1).

517 Services covered by the directive include paid-for and free online information services provision, and online selling of products and services such as advertising, professional services, entertainment, and Internet and telephony service provision.

member state in which the website is operating. As a result of the consumer contract exception, any site selling to, for example, French consumers must provide its terms and conditions in French, to comply with French consumer laws (though compliance with all French consumer laws will require more than just a translation).

4.3.3.3 *Specific protections — surcharges*

The *Consumer Rights (Payment Surcharges) Regulations 2012* came into force on 6 April 2013 (implementing article 19 of the EU *Directive on Consumer Rights*).⁵¹⁸ 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 (regulation 4). 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 and does not capture surge pricing. While not directly aimed at drip pricing the regulation limits the amount of a credit card surcharge that a supplier may add onto the price of the product supplies. Surcharges in breach of the regulation are unenforceable. (Regulation 10)

4.3.3.4 *Industry regulation*

The European Union *Air Services Regulation (EC Regulation 1008/2008)* was adopted by the UK. Article 23 essentially states that all charges, which are unavoidable and foreseeable at the time the headline price is displayed, should be included in that price, including taxes, surcharges and fees. Optional charges shall be communicated in a clear, transparent and unambiguous way at the start of the booking process and their acceptance by the customer will be on an 'opt-in' basis.

These provisions were used by the CMA in 2011 in enforcement action against 14 airlines for drip pricing practices.

4.3.3.5 *Pricing Practices Guide (PPG)*

The PPG recommends a set of good practices to traders in providing consumers with sufficient information about prices in various situations. Although it has no mandatory force, it clearly explains relevant legal obligations and provides recommended practices that are compatible with the CPR.⁵¹⁹

4.3.4 United States

Like the UK and Australia, the US has approached the problem of **drip pricing** by applying existing consumer protection laws in the *Federal Trade Commission Act (FTC Act)* which prohibit 'unfair or deceptive practices' to protect consumers from drip pricing in e-commerce.⁵²⁰ The Federal Trade Commission (FTC) recognises drip pricing as:

... a pricing technique in which firms advertise only part of a product's price and reveal other charges later as the customer goes through the buying process. The additional charges can be mandatory surcharges or fees for optional add-ons.⁵²¹

518 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.

519 Department for Business, Innovation & Skills, 'Pricing Practices Guide' (Guide, Department for Business, Innovation & Skill, November 2010, 1.

520 Federal Trade Commission and the Bureau of Consumer Protection, 'Advertising and Marketing on the Internet: Rules of the Road' (Guidance, Federal Trade Commission, September 2000) 2.

521 Howard A Shelanski et al, 'Economics at the FTC: Drug and PBM Mergers and Drip Pricing' (Report, Federal Trade Commission December 2012) 11.

In response to behavioural economics research, which indicates consumers are disadvantaged by drip pricing practices, the US has focussed on policies that are aimed at addressing information imbalances between traders and consumers. General protections in the FTC are used to ensure consumers are provided with sufficient information about price prior to embarking upon the transaction.⁵²² The general protections are supplemented in the context of e-commerce by the *Dot.com* guidelines.⁵²³

Surge pricing has not received the same regulatory attention despite the US acknowledging the same consumer issues as the UK and Australia. Although there have been a number of attempts to regulate a ceiling for surge pricing, primarily in the context of ride sharing, none have succeeded. Difficulties arise in balancing the need to protect passengers from outrageous pricing and the desire to maintain dynamic pricing and efficient allocation of resources within the market in times of scarcity.⁵²⁴

The general protection for unfair or deceptive practices has been considered sufficient to ensure customers are advised of a surcharge prior to deciding to accept the service. Although unfair practices that mislead consumers about price or a surcharge are monitored by the FTC there seems a reluctance to intervene further in the area of surge pricing, which has occurred primarily in the ride sharing market.

4.3.4.1 General Protections — unfair pricing practices

The FTCA provides that ‘unfair or deceptive acts or practices in commerce’ are unlawful and empowers the Federal Trade Commission (FTC) to prevent persons from using such acts or practices.⁵²⁵ Drip pricing or surge pricing practices are potentially unfair or deceptive practices if they mislead consumers and the practice is material to the consumer’s choice (acting reasonably) of or conduct regarding a product or service.⁵²⁶ The section can be used in the case of online transactions irrespective of the location of the fraudulent party if the deceptive practice is likely to cause reasonably foreseeable injury within the US or involve material conduct occurring in the US.

The dissemination of any false advertisement by any means for the purpose of inducing the purchase of goods or services is an unfair or deceptive act or practice for the purposes of § 45 FTCA.⁵²⁷

The FTC has taken an active role in minimising drip-pricing practices and ensuring that consumers are provided with an all-inclusive headline price for the product or service they are purchasing (whether that be online or through more traditional media sources). US government agencies have taken action against drip pricing practices as unfair or deceptive practices in reliance upon § 52 FTCA:

- (1) Hotels:** In November 2012, the FTC warned 22 hotel operators that their online reservation sites may violate the law by providing a deceptively low estimate of what consumers can

522 Federal Trade Commission, ‘FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and other Mandatory Surcharges May Be Deceptive’ (Media Release, 28 November 2012) 1.

523 Howard A Shelanski et al, ‘Economics at the FTC: Drug and PBM Mergers and Drip Pricing’ (Report, Federal Trade Commission, December 2012) 21.

524 Will Brunelle and Dana Rubinstein, ‘Bill would ban ‘surge pricing’ by Uber, rideshare services’, *Politico New York* (online), 13 February 2015
www.capitalnewyork.com/article/albany/2015/02/8562248/bill-would-ban-surge-pricing-uber-rideshare-services.

525 15 USC § 45(1), (2).

526 Federal Trade Commission, ‘FTC Policy Statement on Deception’ (14 October 1983)
www.ftc.gov/putlci-statements/1983/10/ftc-policy-statement-deception; Further discussion of the unfairness test appears at [8.2] under Punitive Fees.

527 15 USC §52(2)(b).

expect to pay for their hotel rooms. Many hotels failed to include mandatory fees for amenities such as newspapers, use of onsite exercise or pool facilities or internet access (sometimes referred to as ‘resort fees’).⁵²⁸

- (2) **Airlines:** Following the sudden rise in fuel prices, many airlines started carving out a portion of a true airfare by labeling it a ‘fuel surcharge’ and excluding that amount from their price promotions and displays. The US Department of Transportation quickly took decisive action to outlaw such false price advertising and now requires that airlines include all applicable non-optional fees and taxes in its price displays, including those they collect on behalf of governmental taxing authorities.⁵²⁹
- (3) **Cruise Lines:** In 1997, the Florida State Attorney General’s office entered into agreements with six large cruise lines to stop drip pricing. Under the agreements, the cruise lines can no longer charge customers any fees in addition to the advertised initial ticket price except those fees actually passed on by the company to a governmental agency.⁵³⁰

At the Federal level there is no specific regulation of surge pricing and any action by the FTC would be based upon the unfair and deceptive practices provisions of the FTCA. No record of action by the FTC in relation to surge pricing was found. This is largely due to the fact surge pricing has arising mainly in the taxi and ride sharing context which is viewed within state jurisdiction.

4.3.4.2 Guidelines — Dot.com Guide

The *Dot.com Guide* is a Federal Trade Commission (‘FTC’) staff guidance document that explains the how businesses should develop advertisements for online media to ensure compliance with the FTCA. In the context of drip-pricing, this includes guidance on what constitutes ‘clear and conspicuous’ presentation of information and the displaying of disclosures prior to purchase. The use of hyperlinks to provide important information, such as cost and any additional expenses, is not recommended.

4.3.4.3 State based protections — Surge pricing

New York has been active in the area of surge pricing particularly in the ride sharing context. There have been two failed attempts to introduce legislative provisions to regulate surge pricing in the ride sharing industry. The Bills proposed maximum caps on the amount pricing could increase in times of high demand.⁵³¹

There are also suggestions that the New York *General Business Law* passed in 1978-79 in response to escalating heating oil prices is potentially applicable to surge pricing in other areas.⁵³² During an

528 Federal Trade Commission, ‘FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and other Mandatory Surcharges May Be Deceptive’ (Media Release, 28 November 2012) 1.

529 U.S. Department of Transportation, ‘Enhancing Airline Passenger Protections’ (Docket DOT-OST-2010-0140, Department of Transportation, 25 April 2011).

530 Jill Jordan Spitz, ‘6 Cruise Lines Changing Ads to Settle Dispute’, *Orlando Sentinel* (online), 6 February 1997 http://articles.orlandosentinel.com/1997-02-06/business/9702051296_1_cruise-lines-port-charges-carnival-cruise and Letter from the Business Travel Coalition to the Honorable Jon Leibowitz (Chairman of the Federal Trade Commission), 27 August 2012, 1.

531 Erin Durkin, ‘Uber ‘surge pricing’ ban proposed by Brooklyn Councilman’, *New York Daily News* (online), 25 November 2014 www.nydailynews.com/news/politics/uber-surge-pricing-ban-proposed-city-councilman-article-1.2024118?cid=bitly;531 Assembly Member Felix W Ortiz, *A03472 Memorandum in Support of Legislation*, (23 January 2015) New York State Assembly http://assembly.state.ny.us/leg/?default_fld=&bn=A03472&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y

532 Yoav Gonen, ‘Legislator wants to slam brakes on Uber’s surge pricing’, *New York Post* (online), 25 November 2014 <http://nypost.com/2014/11/25/legislator-wants-to-slam-brakes-on-ubers-surge-pricing/>.

abnormal disruption of the market,⁵³³ all parties within the chain of distribution of any essential consumer goods or services are prohibited from charging ‘unconscionably excessive prices.’⁵³⁴ The purpose of this law was to prevent price gouging by suppliers of essential services during period of natural disaster, war or other emergencies. Whether it represents appropriate regulatory policy in the context of non-essential services in periods of high demand is not clear.

4.3.4.4 Market and industry intervention

Market and industry responses to surge pricing in the context of ride sharing have occurred:

- a new App was released in the US on 10 November 2014 called SurgeProtector⁵³⁵ that identifies the location closest to the user that is not within the ridesharing platform’s surge pricing zone.
- In California, the Los Angeles Board of Taxicab Commissioners has implemented new rules requiring that all taxi drivers sign up with a certified e-hail app by 20 August 2015, allowing taxi companies to compete directly with ridesharing platforms.⁵³⁶
- New York taxi drivers have also aligned themselves with similar apps (known as Arro (operates with 13,000 of New York’s yellow taxis) and Way2Ride (operates with approximately 14,000 city taxis).⁵³⁷
- In 2014, the New York Attorney-General, entered into an agreement with Uber to implement a new formula limiting prices to a ‘normal range’ during emergencies and natural disasters. The agreement essentially prevents Uber’s ‘surge pricing’ algorithm from operating during ‘abnormal disruptions of the market’ (adopting the same definition contained in the *General Business Law*) and resulted in Uber adopting the policy at a nationwide level.⁵³⁸

4.3.5 Canada

The primary concern in Canada about drip pricing practices is that information about price can be difficult for consumers to locate on a website and in some cases is it hidden or consumers can only access this information through a series of hyperlinks which may be confusing.⁵³⁹ Consequently, Canada continues to rely on statutory prohibitions of misleading advertising (both at a federal and provincial level) together with the implementation of the *Internet Sales Contract Harmonization Template* to protect consumers against drip pricing and surge pricing practices. The only exception is in the airline industry where the *Air Transport Regulations SOR/2012* operate.

533 ‘Abnormal disruption of the market’ is defined as any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.

534 Attorney General Eric Schneiderman, ‘A G Schneiderman Announces Agreement With Uber To Cap Pricing During Emergencies And Natural Disasters’ (Press Release, 8 July 2014) <http://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and-natural>.

535 See <https://itunes.apple.com/us/app/id925613132>.

536 John Schreiber, ‘LA taxis will be required to use e-hail smartphone apps’ *MynewsLA.com* (online), 19 February 2015 <http://mynewsLA.com/government/2015/02/19/l-taxis-now-required-use-e-hail-smartphone-apps/>.

537 David A Arnott, ‘For New York’s yellow taxis, a second e-hail app’, *New York Business Journal* (online), 14 September 2015 www.bizjournals.com/newyork/news/2015/09/14/for-new-yorks-yellow-taxis-a-second-e-hail-app.html.

538 Attorney General Eric Schneiderman, ‘A G Schneiderman Announces Agreement With Uber To Cap Pricing During Emergencies And Natural Disasters’ (Press Release, 8 July 2014) <http://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and-natural>. A copy of the agreement can be found here: http://ag.ny.gov/pdfs/Uber_Letter_Agreement.pdf.

539 Ioana Delapeta and Marcel Boucher, ‘Regulating Distance Contracts: Time to Take Stock’ (Final Report of the Research Project, Union des consommateurs, June 2014), 13.

Canada has not implemented any laws at a Federal level to regulate surge pricing nor has it prosecuted any ridesharing companies under existing regulations for the practice. Any consideration of surge pricing has been subsidiary to the issue of whether ride sharing platforms should be regulated in the same way as taxi services. Like other jurisdictions Canadian regulators are of the view that taxi regulations play an important role in addressing market failures⁵⁴⁰ any new regulation in this area needs to strike a balance between protecting passengers and allowing innovation.⁵⁴¹

4.3.5.1 General protections — drip pricing in e-commerce

The regulatory approach of the Canadian government is similar to the UK and US. Legislative provisions prohibiting misleading advertising are used to challenge drip pricing in an online context. Unlike the US there is an attempt to harmonise the different provincial jurisdictions through standard contract terms and a code for e-commerce. Consumer protection laws at both a Federal and provincial level regulate e-commerce transactions in Canada. The report considers the Federal laws and examples of different approaches in Ontario and British Columbia.

Competition Act RSC 1985 (Federal)

The *Competition Act RSC 1985* is a federal law governing business conduct in Canada with the purpose of providing consumers with, amongst other things, competitive prices and product choices and, in the context of drip-pricing, making misleading advertisements unlawful. The misleading advertising provisions of the *Competition Act* apply equally to new technologies, including emerging advertising technologies, such as geo fencing, and mobile devices.⁵⁴²

Section s 74.01 of the *Competition Act RSC 1985* is widely drafted. A person engages in reviewable conduct if ‘for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever (a) makes a representation to the public that is false or misleading in a material matter’. A person will also engage in reviewable conduct under s 74.011 where the person sends or causes to be sent false or misleading representations in the sender information or subject matter information of an electronic message. This provision was relied upon by the Competition Bureau to commence an action against rental car companies placing misleading headline prices in email communications.

540 Competition Bureau, *Modernizing Regulation in The Canadian Taxi Industry* (26 November 2015) Competition Bureau www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04007.html.

541 CBC News, ‘Uber’s arrival in BC inevitable, says Transportation Minister Todd Stone’, *CBC News British Columbia* (online), 21 January 2016 www.cbc.ca/news/canada/british-columbia/uber-s-arrival-in-b-c-inevitable-says-transportation-minister-todd-stone-1.3413425.

542 This approach is consistent with the 2009 updates to the Bureau’s Internet advertising guidelines (*Application of the Competition Act to Representations on the Internet*), which remain its leading statement on advertising on the Internet.

Short-term car rental industry: The Commissioner of Competition v Aviscar Inc [2016] Comp. Trib. 1

On 10 March 2015, the Competition Bureau brought a misleading advertising application before the Canadian Competition Tribunal against Aviscar Inc. and Budgetcar Inc. The Bureau alleges that Avis and Budget promote car rentals at prices and discounts that are not attainable because customers are required to pay additional fees over the initial advertised rental price in breach of sections 74.01(1)(a), 74.05 and 74.011(1) and (2) of the *Competition Act*. The Bureau further alleges that Avis and Budget mischaracterise such non-optional fees as taxes and surcharges that car rental companies are required to collect from consumers by governments or third parties, when in actual fact Avis and Budget are electing to impose these fees to recoup part of their operating costs.

Although, a decision in this case is not expected until September 2016, of particular interest is the Bureau's reliance on recent amendments to s74.011 designed to address false or misleading commercial representations made in the subject line of email communications. It appears as if the Bureau will be relying on these amendments moving forward to prosecute companies who use misleading email subject lines to attract consumer attention.

Canada's implementation and amendment of existing consumer protection laws to cover technological advances in line with relevant EU directives demonstrates Canada's commitment to ensuring that consumers are afforded the same protection as more traditional forms of commerce.

Consumer Protection Act, SO 2002 (Ontario)

In Ontario the *Consumer Protection Act*, SO 2002 regulates business practices in both face-to face transactions and online transactions. The *Consumer Protection Act* includes general prohibitions on misleading advertising like the *Competition Act RSC 1985*, but also imposes an obligation on suppliers under internet agreements and remote agreements to disclose certain prescribed information to a consumer before the consumer enters into the contract. An internet agreement is defined widely as a consumer agreement formed by text based internet communications (s 20), which means it will apply to any supply of goods or services to a consumer over \$50 (s 37). 'Goods' is defined as any type of property and 'services' is anything that is not goods including a right, entitlement or benefit (s 1). Under these broad definitions, any type of computer software or digital products or service supplied to a consumer will be subject to the provisions, but the obligation will not apply to:

- a sale to a person or corporation carrying on a business; or
- purchases by a consumer under \$50.

The information a supplier must provide is detailed in the *Consumer Protection Act Regulations*, O. Reg. 17/05 and includes an itemised list of the all-inclusive price and any taxes or additional charges that may apply (s 32 *Consumer Protection Act Regulations*). If the supplier fails to provide the prescribed information a consumer is entitled to terminate the agreement at any time after the contract is entered into and before the expiry of 7 days after a copy of the agreement is received by the consumer (s 40).

Travel website: Magill v Expedia [2013] ONSC 683

The Ontario drip pricing case of *Magill v Expedia Inc* [2013] ONSC 683 was a class action brought by 1,500,000 Canadian citizens against Expedia (an online travel company that acts as an intermediary between travellers and travel providers around the world) for failing to include a tax recovery charge or service fee in the final price for hotel bookings made online between June 2007 and October 2007 (when the terms of use did not refer to either charge) and October 2007 and March 2011 (where the terms of use referred to those charged but in a manner that did not clearly explain the total amounts).

Expedia claimed that:

- the **tax recovery rate** is an estimate of the taxes that the hotel is required to collect and remit on the confidential rate agreed between the hotel and Expedia and so the exact amount cannot be determined at the time of booking. Expedia uses the tax recovery rate to pay the hotel the taxes charged on the customer's hotel room after checkout and, if the actual charges exceed the tax recovery amount, then Expedia pays the hotel the difference without charging the customer; and
- the **service fee** is an additional amount retained by Expedia to offset its costs in providing hotel content on its websites. The calculation of that fee is a highly confidential trade secret.

A single amount for the tax recovery rate and service fee is included in invoices to customers. Expedia argued that it adopts that approach to prevent customers and competitors from reverse-engineering the net rate and putting Expedia in a position where it is potentially breaching confidentiality agreements with hotels. The plaintiffs claimed Expedia actually profited from the combined fee as it was in excess of the combined total of the taxes actually paid and the costs actually incurred by Expedia as a service fee. Such conduct was said to breach section 14(1) of the Ontario *Consumer Protection Act 2002* ('unfair practice' by making a false, misleading or deceptive representation) and section 38(1)(failing to disclose prescribed information).

Although the case turned on whether it was a class action under the relevant Canadian legislation, it was held that Expedia didn't breach its obligations under the *Consumer Protection Act 2002* as the total amount was included in the customer invoice. However, in reaching that decision Perell J noted that any costs awarded should be modest as the claim might have been avoided if Expedia had more thoroughly explained the tax recovery charge and service fee in its contract.

Business Practices and Consumer Protection Act 2004 (British Columbia)

The *Business Practices and Consumer Protection Act 2004* prohibits unfair business practices. Similar to the Federal *Competition Act*, drip pricing practices may be subject to the general deceptive act or practice provisions that apply if there is a false representation about the total price of goods or services (s 4(3)). The Act also provides for the disclosure of an itemised price for goods or services supply through a 'distance sales contract' (s 46). Internet transactions are included in the definition of 'distance sales contract' which applies to a contract entered into between a supplier and consumer where there is no opportunity to inspect the goods before the contract is entered into (s 17). Like Ontario the provisions do not apply to sales to persons for business purposes.

4.3.5.2 Specific protections — Airline industry

Since late 2012, the *Air Transport Regulations SOR/2012* has required Canadian airlines to show the full cost of the flight, including mandatory taxes, airport fees and fuel surcharges, in the advertised headline price for the flight. The *Air Transport Regulations* create an appropriate level of harmonisation with air price advertising formats found in the United States and European markets.⁵⁴³ Clear guidance for compliance with the regulations is provided by the Interpretation Note issued by Canada's Transportation Agency.⁵⁴⁴

4.3.5.3 General protections- Surge pricing in e-commerce

Any challenge to surge pricing practices by the Canadian Competition Bureau may occur on the basis of misleading conduct by the supplier or platform operator in contravention of the *Competition Act RSC 1985, s 74.01*. The mere charging of a surge is unlikely to be misleading, other misleading conduct about whether and when a surge will be charged would be required.

4.3.5.4 Codes and guidelines

In Canada there are two relevant voluntary codes and guidelines.

- (a) The *Internet Sales Contract Harmonization Template* was approved by Federal, provincial and territorial ministers in 2001 with a view to instituting a harmonised approach to consumer protection in e-commerce across Canada. The Harmonization Template, It is a common template that covers contract formation, cancellation rights, credit card charge-backs and information provision and, requires clear and up-front price disclosure for online transactions. The template while endorsed by all levels of government requires each jurisdiction to indicate the application and scope of the template.
- (b) The *Canadian Code of Practice for Consumer Protection in Electronic Commerce* establishes benchmarks for good business practice for suppliers conducting commercial activities with consumers online. The Code does not alter the provisions under the Competition Act or other industry specific codes that may exist. The Code is based on the *Principles of Consumer Protection for Electronic Commerce: A Canadian Framework*, which was approved in August 1999. The Code is also consistent with the OECD's *Guidelines for Consumer Protection in the Context of Electronic Commerce*. The Code was endorsed¹ by federal, provincial and territorial Ministers in 2004. The Code can be endorsement for use by private sector organisations as representing good practice benchmarks for businesses engaging in e-commerce. Relevant to pricing practices the Code requires sufficient information to be provided to consumers so as to make an informed choice. The information should be conspicuous and easily accessible on a website and provided at an appropriate stage of the decision making process. In particular the code requires price and any cost of currency exchange, shipping charges and taxes to be confirmed to consumers prior to the conclusion of the transaction.

4.3.6 Singapore

Singapore, like other jurisdictions, has identified information asymmetry as the fundamental consumer issue for drip-pricing. The Singapore government implemented the *Consumer Protection (Fair Trading) Act* to counteract an observable increase in the number of errant traders and

543 Canadian Transportation Agency Q&A: *All-inclusive air price advertising* (21 May 2014) Canadian Transportation Agency www.otc-cta.gc.ca/eng/aspar-q-and-a.

544 See, Canadian Transportation Authority, 'Air Transportation Regulations — Air Services Price Advertising: Interpretation Note' (Interpretation Note, Canadian Transportation Agency, 2 October 2015) Appendix II.

unethical business practices.⁵⁴⁵ Like other jurisdictions, the Singapore government also adopts the approach that e-commerce transactions should be subject to the same regulatory framework as face-to face transactions.

Singapore's specifically regulates surge pricing in the taxi industry with the aim of striking a balance between protecting passengers from high and unexpected prices and allowing innovation.⁵⁴⁶ The resulting regulation focusses on maximising benefits to consumers and taxi drivers and less on protecting a particular business model or existing taxi operators.⁵⁴⁷ The legislative approach also gives effect to Singapore's policy that e-commerce transactions and face to face transactions should be subject to the same regulatory framework.

4.3.6.1 General protections — Drip pricing

The Singapore policy position is given effect by reliance on a combination of existing unfair practice regulations in the *Consumer Protection (Fair Trading) Act* ('CPFTA') together with self-regulation under the Singapore Code of Advertising Practice. Singapore's primary policy objective is that consumers should be fully informed of relevant information about a transaction prior to making a decision to purchase. This should include complete and accurate information about the trader's business, about the goods or services for sale and about how the transaction is made. What this means, amongst other things, is that e-customers should have enough information to make an informed decision to purchase goods or services.⁵⁴⁸

Section 4 of the CFTA provides that it is an unfair practice for a supplier in relation to a consumer transaction to 'do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled'. This general provision may apply to a situation where a headline price advertised by the supplier does not include other mandatory charges which increase the price. An unfair practice will also arise if one of the situations listed in the Second Schedule to the Act applies. This includes 'representing that a price benefit or advantage exists respecting goods or services where the price benefit or advantage does not exist' and 'charging a price for goods or services that is substantially higher than an estimate provided to the consumer, except where the consumer has expressly agreed to the higher price in advance'. Again these provisions may apply in a drip pricing situation if the price represented by the supplier is different to the actual price a consumer will have to pay.

There is very limited case law on the application of section 4(a) to drip or partition pricing. Rather, Singapore's focus has instead been on the most prevalent misleading conduct in that jurisdiction namely, misleading labels and advertising generally⁵⁴⁹ and on the proposed harmonisation of e-commerce laws in ASEAN.⁵⁵⁰

545 Consumers Association of Singapore, *CPFTA & Lemon Law*, (2013) Consumers Association of Singapore www.case.org.sg/consumer_guides_cpfta.aspx.

546 Singapore, Second Reading for Third Party Taxi Booking Service Providers Bill by Minister for Transport, Parliament, 11 May 2015, para 5 (Lui Tuck Yew).

547 Ibid.

548 Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2.

549 Consumers International, 'Roadmapping Capacity Building Needs in Consumer Protection in ASEAN' (Regional Report (FINAL), ASEAN Australian Development Cooperation Program Phase II (AADCP), 15 June 2011) 45.

550 See, for example Consumers International, 'Roadmapping Capacity Building Needs in Consumer Protection in ASEAN' (Regional Report (FINAL), ASEAN Australian Development Cooperation Program Phase II (AADCP), 15 June 2011) XVII.

4.3.6.2 Specific protections — surge pricing

Singapore enacted the *Third-Party Taxi Booking Service Providers Act* (Singapore, S 528, 2015 electronic ed) in 2015 as a ‘light touch’ regulatory measure to protect consumers from, amongst other things, surge and dynamic pricing in taxi services. The legislation applies in addition to the *Consumer Protection (Fair Trading) Act* which provides consumers with remedies for unfair practices including misleading conduct. Operators of taxis are required to comply with the legislation and are subject to the restrictions imposed on pricing.

Under the *Third-Party Taxi Booking Service Providers Act*:

- taxi-booking fees charged by service providers cannot exceed those charged by taxi companies; and
- all information on the fare rates, surcharges and fees payable for the journey must be specified to consumers upfront, before they accept the dispatched taxi. These include the flag-down fare, distance and time rates, the booking fee charged by the service provider, and where applicable, peak period and location surcharges.⁵⁵¹

Third-party taxi service providers who do not comply with the regulatory framework are liable to penalties of up to \$100,000 per contravention.

The *Third-Party Taxi Booking Service Providers Act* only regulates taxi services that use third party apps. That means that ridesharing platforms, such as Uber, are free to operate ‘chauffeur’ services (that are very similar to Uber’s standard services in the UK, US and Canada) free of this regulation.

4.3.6.3 Codes and guidelines

The Singapore Code of Advertising Practice (the Code) seeks to promote a high standard of ethics in advertising through industry self-regulation. The Code was formulated to provide guidance regarding compliance with the Lemon Law. The Code applies to all advertisements for goods, services and facilities and, although voluntary, is strictly policed by Singapore’s Advertising Standards Authority. The Code provides a set of rules that promote legal, decent, honest and truthful advertising consistent with the *Consumer Protection (Fair Trading) Act* (Singapore).

In relation to drip-pricing the Code provides that advertisements must not mislead consumers about the price of goods or services or underestimate the actual total cost to be paid (see, for example, rule 5.1 — Truthful presentation). This is consistent with the unfair practices provisions of the Lemon law.

This method of self-regulation has been effective largely because it has the majority of Singapore’s media owners, advertising agencies, government agencies and some industry-specific agencies as members and it grants its policing body, the Advertising Standards Authority of Singapore (ASAS) the power to:

- ask that advertisements contravening the Code be taken down or withheld from publication until they are modified (with the support of media owners);
- publish the names of those parties who have breached the Code; and

551 Land Transport Authority, ‘New Regulatory Framework for Third-Party Booking Services to Protect the Safety and Interests of Commuters’ (News Release, 21 November 2014), [2].

- request its members sanction parties who violate the Code including withdrawal of facilities, rights or services from parties concerned subject to legal constraints.⁵⁵²

However, notwithstanding the fact that the Code has served the industry well, it does not expressly deal with online and digital advertising. As a result the Code is currently under review and new guidelines for digital and social media advertising have been circulated for consultation. The Guidelines draw upon similar codes of conduct for advertising in Australia and the UK, as well as some of those used by social media channels.⁵⁵³

4.3.7 Comparison — Drip pricing and surge pricing in e-commerce

4.3.7.1 Common aspects

Drip pricing

- (1) In all of the reviewed jurisdictions including Australia the regulatory approach to drip pricing is similar. The problem of drip pricing is regulated through existing provisions applying to misleading conduct or in the case of the UK and US, the unfair commercial practices provisions, which include misleading conduct.
- (2) All jurisdictions also provide non-regulatory pricing practice guides to assist business to comply with their obligations under relevant statutory provisions.

Surge pricing

- (1) In Australia, UK, US and Canada the issue of surge pricing is not specifically regulated. Most regulators and economists view surge pricing as part of a normal functioning market and the intervention of regulation may have a detrimental effect on the market.
- (2) Any regulation or consideration of surge pricing has generally been in the context of ride sharing and whether new regulation is required similar to the taxi industry.

4.3.7.2 Differences

Drip pricing

- (1) In the US there are no industry or platform specific regulations to provide clear guidance to specific industries where the problem is prevalent. Before implementing new regulations the FTC has determined that it needs to obtain further empirical data because much depends on the context in which drip pricing is used, whether there is competition for the particular
- (2) Product at issue and whether the purchasers are sophisticated consumers or not. For example, a firm that engages in drip pricing might prompt a competitor to offer services without such add-on charges, thereby giving consumers a choice.⁵⁵⁴

552 See section 4 of the Singapore Code of Advertising Practice and, in relation to recent enforcement action: Baker & McKenzie, Wong & Leow, *Developments in Consumer Protection: Recent enforcement actions taken against errant advertisers*. (July 2015) Baker & McKenzie www.bakermckenzie.com/files/Uploads/Documents/Singapore/AL_Singapore_DevelopmentsConsumerProtection_Jul15.pdf; Tan Chak Lim, 'Letter to The Straits Times, 4 August 2015' (Letter, 4 August 2015) 1.

553 Advertising Standards Authority of Singapore, *Consultation on Draft Digital and Social Media Advertising Guidelines* (7 December 2015) Advertising Standards Authority of Singapore <<https://asas.org.sg/news/post=429>> 3.2(a)-(d) inclusive). Final guidelines were not issued as at the date of this report.

554 Federal Trade Commission, *Drip, drip, drip ... Those charges really add up...* (30 May 2012) FTC: Watch www.law.csuohio.edu/sites/default/files/facultystaff/sagers_ftc_article.pdf.

- (3) In contrast to Australia, Canada has a statutory requirement for disclosure of price including an itemised list of the prices at which goods and services are proposed to be supplied to the consumer including taxes, shipping charges, customs duties, brokerage fees together with the total amount the supplier knows to be payable by the consumer is enacted in Ontario and British Columbia. Similar guidelines exist in the *Internet Sales Harmonization Template and the Canadian Code of Practice for Consumer Protection in Electronic Commerce*. These provisions apply specifically to internet sales and create a positive duty to disclose the full details of price at the appropriate decision making point.
- (4) The UK has a number of industry-specific regulations addressing specific issues, including drip pricing in those industries. This has precipitated investigation by the regulator into drip pricing practices in those industries and allowed the regulator to work with the main industry bodies to implement best practice guidelines. It appears that initial collaboration has resulted in fewer formal court proceedings being instituted in those industries.
- (5) Under the UK CPRs pricing practices that may constitute drip pricing can be challenged on the basis of misleading conduct (acts or omissions) or under the broader prohibition of unfair commercial practices provision (reg 3 CPRs). The concept of an unfair commercial practice potentially extends the circumstances in which redress may be sort by a consumer or regulator. It is not necessary for the commercial practice to be misleading in order to prove that it 'materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product'. Evidence of consumer biases will be relevant in demonstrating the behavioural response of the average consumer.

Canada is the only jurisdiction to attempt to regulate the terms of internet contracts through the Internet Sales Harmonization Template.

4.4 Online reviews and endorsements

4.4.1 Issues

Online reviews and endorsements 'provide consumers with information about products, services and businesses based on the experiences of other consumers'⁵⁵⁵ and are an important tool for consumers in an online market. There is a range of review mechanisms available ranging from customer reviews and endorsements on product websites to independent websites that conduct reviews of products⁵⁵⁶ or allow consumers to post reviews.⁵⁵⁷ More recently, as the benefit of positive endorsements to suppliers has been realised it has become more common for feedback left on websites and other peer-to-peer platforms to be untrue or not wholly reflective of the suppliers conduct or reputation.⁵⁵⁸ According to research conducted by the University of Illinois at Chicago,⁵⁵⁹ almost 30% of reviews and endorsements are posted by individuals employed to write them. For example, sites such as freelancer.com welcome businesses to offer jobs for writing fake

555 Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews.

556 For example, Choice (www.choice.com.au); Product Review (www.productreview.com.au).

557 This is common in the travel industry with websites such as Tripadvisor, Expedia and Trivago.

558 Kat Kane 'The Big Hidden Problem with Uber? Insincere 5-Star Ratings', *Wired* (online), 19 March 2015 < www.wired.com/2015/03/bogus-uber-reviews/; Cohen, Schneider & O'Neill LLP, *Product Reviews, Endorsements and Astroturfing* (30 October 2015) Cohen Schneider & O'Neill LLP www.cohenschneider.com/product-reviews-endorsements-and-astroturfing/.

559 Karen Weise, 'A Lie Detector Test for Online Reviewers', *BusinessWeek Magazine* (online), 29 September 2011 www.bloomberg.com/bw/magazine/a-lie-detector-test-for-online-reviewers-09292011.html.

reviews and there are a number of fake review writers who offer their services on websites such as Fiverr.com in exchange for free products or services.⁵⁶⁰

Fake reviews and endorsements are most commonly used in travel, electronics and home repairs⁵⁶¹ but can be found across almost all platforms selling goods or services over the Internet.

Four main practices have been identified as leading to fake reviews:

- Businesses commission or write fake negative reviews about other businesses. These reviews make false, negative claims about an experience with a product, service or business;
- Businesses commission or write fake positive reviews about themselves which make false, positive claims about an experience with a product, service or business;⁵⁶²
- Review sites or businesses cherry pick positive reviews and suppress negative reviews without making it clear negative reviews are not included;
- Endorsements are commissioned where the reviewer is offered an incentive, or has a commercial relationship with the business whose goods or services are being reviewed.⁵⁶³

Most regulators recognise the importance of customer reviews, endorsements and comparator websites in online markets. In the UK research reveals that more than 80% of consumers read online reviews before deciding to buy⁵⁶⁴ and US literature asserts that only 50% of consumers can identify a false or fake review. The increase in online transactions and the significance of reviews to online business success contributes to the potentially detrimental effect of false or fake reviews. Fake reviews are estimated to represent between 1% — 16% of all consumer reviews,⁵⁶⁵ which has the potential to detrimentally affect decision making by consumers and distort markets.

The regulatory approach in each jurisdiction is similar. In most jurisdictions false or misleading reviews or claims to endorsement in e-commerce are treated as forms of misleading conduct and offenders are prosecuted under existing regulations prohibiting misleading conduct, representations or advertising. No specific modifications have been introduced for the application of these laws to e-commerce due to the broad drafting of the prohibitions in the UK, US, Canada and Australia. No specific extension of jurisdictional limits for enforcement against operators outside of the jurisdiction has been enacted. Most jurisdictions also have codes or guidelines, generally for advertising standards which deal specifically with online reviews and endorsements as part of ensuring compliance with general prohibitions.

560 David Streitfield, 'For \$2 a Star, an Online Retailer Gets 5-Star Product Reviews', *New York Times* (online), 26 January 2012 www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html?_r=2&hp; Mary Pilon, 'A Fake Amazon Reviewer Confesses'. *The Wall Street Journal* (online), 9 July 2009 <http://blogs.wsj.com/wallet/2009/07/09/delonghis-strange-brew-tracking-down-fake-amazon-raves/>.

561 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 29.

562 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 21.

563 Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews.

564 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' Report, Competition and Markets Authority, 19 June 2015 2.

565 European Parliament Think Tank, *Online consumer reviews: The case of misleading or fake reviews* (6 January 2016) European Parliament [www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2015\)571301](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)571301).

4.4.2 Australia

In Australia fake online reviews and endorsements are subject to the misleading conduct provisions of the *Australian Consumer Law*.

4.4.2.1 General Protections — misleading conduct

The prohibition on misleading conduct in trade or commerce in s 18 of the ACL is sufficiently broad to apply to direct conduct engaged in by a supplier or their agents to produce a fake or misleading review as well as where a supplier is aware of a fake review or endorsement and allows it to remain publicly available. The ACCC considers that a fake review is misleading conduct on the basis that such conduct ‘may ‘mislead consumers if they are presented as impartial, but were, in fact, written by the reviewed business, a competitor, someone paid to write a review who has not used the product or someone who has used the product but written an inflated review to receive financial or non-financial benefit’.⁵⁶⁶ This will apply to each of the identified types of fake review.

A range of enforcement action can be taken by the ACCC for a contravention of s 18 or any of the specific protections in Part 3 of the ACL. A consumer or the regulator may also take action relying upon the specific unfair practices provisions in Part 3.⁵⁶⁷ Action of this nature may however be difficult where the supplier is based outside Australia or there is no clear evidence of the supplier’s involvement in the misleading review. In the case of fake reviews or endorsements specific provision is made in s 29 ACL which relevantly provides:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

....

- (e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or
- (f) make a false or misleading representation concerning:
 - (i) a testimonial by any person; or
 - (ii) a representation that purports to be such a testimonial;
 - (iii) relating to goods or services; ...

Section 29 of the ACL specifically prohibits making of a false or misleading representation that purports to be a testimonial or relates to a testimonial by another person. The same conduct will be an offence under s 151(1)(e) and (f) of the ACL.

Application of the section is limited to:

- (i) supply of goods or services in trade or commerce; and
- (ii) false or misleading representations.

A broad range of enforcement mechanisms are available to the regulator under the ACL, including corrective advertising, disclosure orders, agreement to a compliance/education program for employees, undertakings to remove the reviews, the imposition of civil penalties or a criminal

⁵⁶⁶ Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews.

⁵⁶⁷ In the context of fake online reviews this will most likely be s 29(1)(e) or (f) ACL.

prosecution. While enforcement action may be based on a contravention of the general misleading conduct provision in s 18 ACL or the specific protections in s 29 ACL, a civil penalty is not available for a contravention of s 18 ACL. This means that a civil penalty can only be sought for a positive false or misleading representation and not silence or inaction in relation to a testimonial or review.

The ACCC has taken enforcement action against several companies for misleading reviews and testimonials. The Advertising Medical Institute, Citymove Pty Ltd,⁵⁶⁸ Electrodry⁵⁶⁹ and Euro Solar/Australian Solar Panels⁵⁷⁰ provide useful examples of fake online reviews and endorsements in the Australian context the range of enforcement remedies obtained.

4.4.2.2 Consumer guidance and education

In 2013, the ACCC in their Annual Report prioritised online consumer issues and in 2014 comparator websites. In 2013 the ACCC issued a compliance guideline, *Online reviews—a guide for business and review platforms* to assist business with compliance and followed up with a report in 2014 examining the comparator website industry in Australia.

Consumer tips for online product reviews were added to the ACCC's website, which encourage consumers to seek information from multiple sources and to look at multiple reviews, as well as to check whether review platforms have commercial arrangements with reviewed businesses. The ACCC identified concerns about specific online review practices related to country of origin claims that were escalated for further investigation resulting in civil penalties.

4.4.3 United Kingdom

The regulatory approach of the UK government has been to ensure that existing legislative provisions within the *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277 ('CPR') prohibiting unfair commercial practices apply to fake reviews published in any medium. To assist with compliance the Competition and Market's authority has issued guidance notes confirming that 'review sites should be clear about how reviews are obtained and checked, publish all reviews (even negative ones) provided they are genuine and lawful and explain the circumstances in which reviews might not be published or might be edited, make sure there is not an unreasonable delay in publishing reviews, disclose commercial relationships, clearly identify all advertising and paid promotions and have appropriate procedures in place to detect and remove fake reviews and endorsements'.⁵⁷¹ The UK regulator has made it clear that 'businesses (and anyone acting on their behalf) should not pretend to be a customer and write fake reviews about their own or other businesses' goods and services'.⁵⁷²

A separate voluntary code, Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, is also available for guidance.

568 Australian Competition and Consumer Commission, ACCC: *Removalist admits publishing false testimonials* (9 November 2011) Australian Competition and Consumer Commission www.accc.gov.au/media-release/accc-removalist-admits-publishing-false-testimonials.

569 *ACCC v A Whistle & Co (1979) Pty Limited* [2015] FCA 1447, 1449 and 1450 [6], [7] and [10].

570 *ACCC v P & N Pty Ltd & Ors* [2014] FCA 6, 11.

571 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 29 -30.

572 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 29.

4.4.3.1 General Protections — unfair commercial practices

Regulation 3 of the CPR is a general provision prohibiting unfair commercial practices that cause, or are likely to cause, the average consumer to make a different decision. Where the supplier gives false or misleading information or omits or hides information material to a consumer's decision to purchase a product this conduct will be an unfair practice under regulations 5 and 6. These provisions potentially apply to a range of business practices involving fake reviews. In addition unfair practices listed in Schedule 1 of the CPRs are deemed by regulation 3(4)(d) to be an unfair practice. Included in this blacklist are:

- **4.** Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim without complying with the terms of the approval, endorsement or authorisation
- **11.** Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).
- **22.** Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

The UK's Competition and Markets Authority ('CMA') has been active in taking action against businesses and organisations that have published fake online reviews and endorsements and those that have been involved in their publication.

- **Online reviews:** Evidence of fake reviews being posted to Trip Advisor led the UK regulator Advertising Standards Authority (ASA) to order TripAdvisor to stop claiming that its reviews were 'honest'. TripAdvisor has since removed its slogan, 'world's most trusted travel advice', from its banner.⁵⁷³
- **Online endorsements — social media:** In December 2010, the UK's Office of Fair Trading (the predecessor to the Competition and Consumer Commission) obtained undertakings from an operator of a commercial blogging network, Handpicked Media, 'requiring them to clearly identify when promotional comments have been paid for';⁵⁷⁴ and
- **Online endorsements — affiliates paid for positive reviews:** The Advertising Standards Authority found that Mondelez UK Ltd had breached the *UK Code* by allowing a number of its paid vloggers to create and publish vlogs that featured, and were intended to advertise, Oreo biscuits. The Advertising Standards Authority made it clear that a link in a 'show more' button that stated 'Thanks to Oreo for making this video possible' and 'Check out the Oreo site for more licking action' were not sufficient disclosure of the vlogger's commercial relationship with the makers of Oreo biscuits;⁵⁷⁵ and

573 Kate Springer, *Fake travel reviews* (2016) SmartTravelAsia <<http://www.smarttravelasia.com/FakeReviews.htm>>.

574 Office of Fair Trading, *OFT secures promotional blogging disclosures* (13 December 2010) Office of Fair Trading <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/news-and-updates/press/2010/134-10>.

575 Advertising Standards Authority, *ASA Ruling on Mondelez UK Ltd* (26 November 2014) ASA www.asa.org.uk/Rulings/Adjudications/2014/11/Mondelez-UK-Ltd/SHP_ADJ_275018.aspx#.VspphRyb_ql.

4.4.3.2 Voluntary Code

Section 3 of the UK *Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing* specifically deals with fake reviews and endorsements. Although compliance is voluntary, it prohibits misleading claims (section 3.47) and requires all signatories to retain evidence that a testimonial is genuine and hold contact details for the person or organisation who provided it (section 3.45).

4.4.3.3 Regulatory Guides

The UK government has also implemented a number of regulatory guides including:

- **Codes and trustmarks to improve consumer confidence:** The Department for Business, Innovation and Skills has recently asked British Standards to consider common issues experienced by consumers when making online purchasing decisions and explore whether these could be addressed by a new BSI standard or mark that could be displayed on approved websites.⁵⁷⁶
- **Guidance for bloggers and industry guidelines on paid promotions:** In March 2014, the UK Committee of Advertising Practice released guidance for bloggers in response to a significant number of queries they had received regarding blogger's obligations under the *UK Code*.⁵⁷⁷ The International Advertising Bureau UK has also issued best practice guides in relation to Affiliate Audits⁵⁷⁸ and paid promotions in social media.⁵⁷⁹
- **Self-regulation:** A number of the most reputable sites have started to self-regulate reviews on their websites. A number of different approaches have been adopted including allowing users to self-police reviews by placing a mark next to suspicious reviews, conducting investigations in response to complaints from businesses or notifications or suspicious reviews, using manual checks or software designed to spot anomalies, stop suspicious reviews from being posted or remove them and terminate the submitter's membership.⁵⁸⁰

4.4.4 United States

Similar to the UK and Australia, the US has approached the increase in fake online reviews and endorsements through a combination of existing consumer protection laws, amended regulations and educational materials. Fake reviews and endorsement are referred to in the US as '*astroturfing*'. The significant reliance on fake reviews and endorsements has been identified as a major problem for US consumers, as research suggests that the average person can only identify fake reviews at a rate of 50 per cent.⁵⁸¹ US regulators recognise that the imbalance of information for consumers about the origin of a review and the inability of a consumer to ascertain this information to determine authenticity in an online environment have significant potential detrimental effects for the particular market.

576 BSI Group, *Delivering approval schemes that promote consumer trust* (15 June 2015) BSI. www.bsigroup.com/en-GB/our-services/events/2015/2015-06-15-Delivering-approval-schemes-that-promote-consumer-trust/.

577 Advertising Standards Authority, *New words on the blog ...* (19 March 2014) Committee of Advertising Practice www.cap.org.uk/News-reports/Media-Centre/2014/New-words-on-the-blog.aspx#.Vsppdhyb_qI.

578 Individuals or corporations who promote programs/campaigns on behalf of others such as bloggers and vloggers: Internet Advertising Bureau UK, 'Best Practice Guides: Affiliate Audits' (Guidelines, Internet Advertising Bureau UK, May 2015).

579 Internet Advertising Bureau UK, 'Paid Promotions in Social Media' (Bitesize Guide, Internet Advertising Bureau UK, 12 July 2012).

580 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 23-24.

581 Ibid 3.

4.4.4.1 General protections — unfair or deceptive acts or practices

The US has responded to the issue of fake online reviews by using existing prohibitions on ‘unfair or deceptive practices’ in the *Federal Trade Commission Act (FTC Act)* but supplementing them with guidelines aimed specifically at educating suppliers about appropriate use of online reviews and potential liability if the guidelines are not followed.

The FTCA provides that ‘unfair or deceptive acts or practices in commerce’ are unlawful and empowers the Federal Trade Commission (FTC) to prevent persons from using such acts or practices.⁵⁸² The dissemination of any false advertisement by any means for the purpose of inducing the purchase of goods or services is an unfair or deceptive act or practice for the purposes of § 45.⁵⁸³

Reviews or endorsements are potentially unfair or deceptive practices if they mislead consumers and the practice is material to the consumer’s choice (acting reasonably) of or conduct regarding a product or service.⁵⁸⁴ US government agencies have taken action in reliance upon s 52 FTCA against businesses engaged in the use of fake reviews in the online environment to promote their business:

- **Public Relations Firm:** This was the FTC’s case focusing solely on fake product reviews. In this case, Reverb (a public relations firm) was hired to promote certain iPhone apps on the Apple iTunes store. The FTC alleged that Reverb engaged in deceptive advertising by having its employees pose as consumers without disclosing the commercial relationship Reverb had with the app developer. As part of that settlement Reverb agreed to remove all reviews that violated the disclosure requirements and agreed not to post similar items without proper disclosures in the future.⁵⁸⁵
- **Online Music Lessons:** In 2011 the FTC took action against Legacy Learning Systems Inc, a business that recruited affiliates to promote its online learning courses in articles, blogs and other online material under the pretence they were ordinary consumers or independent reviewers. The promotions also failed to disclose that the reviewers had been paid for every sale they generated.⁵⁸⁶ The matter was settled in March 2011 with Legacy Learning required to pay \$250,000 in penalties,⁵⁸⁷
- **New York (Operation Clean Turf):** In October 2013 the New York Attorney-General entered into Assurances of Discontinuance with 19 companies to cease writing fake reviews for businesses on consumer-review websites and to pay more than \$350,000 in penalties. The year-long investigation by the Attorney-General’s office identified that reviews were often written by the companies’ employees and freelance writers in Bangladesh, Eastern Europe and the Philippines for between \$1 and \$10 per review and were published on websites like Yelp, Google Local and CitySearch.⁵⁸⁸

582 15 USC § 45(1), (2).

583 15 USC §52(2)(b).

584 Federal Trade Commission, ‘FTC Policy Statement on Deception’ (14 October 1983) www.ftc.gov/putlci-statements/1983/10/ftc-policy-statement-deception. Further discussion of the unfairness test appears at [8.2] under Punitive Fees.

585 Federal Trade Commission v Reverb Communications Inc and Tracie Snitker FTC Docket No. C-4310 (Nov. 22, 2010) (consent order).

586 Competition and Markets Authority, ‘Online reviews and endorsements: Report on the CMA’s call for information’ (Report, Competition and Markets Authority, 19 June 2015) 57.

587 Federal Trade Commission, ‘Firm to Pay FTC \$250,000 to Settle Charges That it Used Misleading Online ‘Consumer’ and ‘Independent’ Reviews’ (Press Release, 15 March 2011).

588 Eric T Schneiderman, ‘A G Schneiderman Announces Agreement with 19 Companies To Stop Writing Fake Online Reviews And Pay More Than \$350,000 In Fines’ (Press Release, 23 September 2013) 1.

4.4.4.2 Endorsement Guide

The *Electronic Code of Federal Regulations* Guides concerning use of endorsements and testimonials in advertising 16 CFR 255 (2015) (*'Endorsement Guide'*), revised in 2009, offers practical advice to businesses on endorsements by consumers, celebrities, and explains in general terms when the FTC may find endorsements or testimonials unfair or deceptive for the purposes of section 52 of the FTCA. Relevantly, the *Endorsement Guide* responds directly to some of the regulatory issues identified above by requiring:

- Endorsements to reflect the honest opinions, beliefs or experience of the endorser (s 255.1(a));
- Requires the endorser to be a bona fide user of the good or service at the time the endorsement was given (s 255.1(c));
- Requires advertisers, endorsers and sellers to disclose material connections between themselves (s 255.1(d) and s 255.5). A 'material connection' is defined as a relationship that might affect the weight or credibility of the endorsement. For example, if an endorser is an employee or relative of the advertiser, that fact must be disclosed because it is relevant to how much weight a consumer would give to the endorsement. Similarly, an advertiser must disclose if a consumer has been paid for giving an endorsement;
- Requires consumer endorsements to be substantiated by, when relevant, relevant scientific evidence (s 255.2 (a) and (b)); and
- Requires consumers and experts to be 'actual consumers' and experts in the field respectively (s 255.2(c)) and s255.3).

The *Endorsement Guide* also provides a number of examples to demonstrate what the FTC considers to be a misleading review or endorsement (s 255.0).

4.4.4.3 Dot.com disclosure information

The *Dot.com Guide* is a Federal Trade Commission (*'FTC'*) staff guidance document that explains the information businesses should consider as they develop advertisements for online media to ensure compliance with the FTCA. In the context of online reviews the Dot.com guide provides guidance about how to make effective disclosures in digital advertising. Relevantly, it provides general guidance regarding endorsements and online reviews and, in relation to specific detail, refers to the *Endorsement Guide*. Examples are provided in the guide of appropriate disclosure of commercial benefits.

4.4.4.4 Other Regulator Action

In addition to regulatory enforcement the US government, as part of its membership of ICPEN, participates in annual sweeps of its domestic websites to identify misleading conduct.⁵⁸⁹ Each annual sweep focuses on a different theme, including endorsements and trustmarks.⁵⁹⁰ In addition to the annual sweeps, Cornell University has also developed software to specifically identify and flag false reviews.⁵⁹¹

589 See www.icpen.org/for-consumers/what-icpen-does-for-you/international-internet-sweeps.

590 International Consumer Protection and Enforcement Network 'I Bought what!?: Targeting misleading and inadequate information disclosure in the online mobile worlds' (International Sweep Kit #14, International Consumer Protection and Enforcement Network, 2012) 13.

591 See Myle Ott et al, 'Finding Deceptive Opinion Spam by Any Stretch of the Imagination' (Research Report, Cornell University, 19 June 2011).

4.4.5 Canada

The Canadian government's regulatory approach to fake online reviews and endorsements is consistent with their overall policy approach to e-commerce. The laws are drafted to ensure consistent protections for consumers irrespective of the medium in which the transaction is conducted. Consistent with the approach in the UK, Australia and the US, Canada has, to date regulated fake reviews and endorsements using existing regulation (the *Competition Act*) together with the voluntary *Code of Advertising Standards*, which deals specifically with endorsements.

4.4.5.1 General protections — Competition Act

Fake reviews and endorsements can be challenged under the general misleading conduct provisions of the *Competition Act RSC 1985*. Section s 74.01 of the *Competition Act RSC 1985* is widely drafted. A person engages in reviewable conduct if 'for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever (a) makes a representation to the public that is false or misleading in a material matter'. Misleading advertising or fake reviews may be subject to both civil and criminal proceedings under (sections 52(1) (criminal) and s 74.01(1)(a) (civil)).

The Competition Act also includes specific provisions dealing with testimonials (section 74.02). Those provisions prohibit using testimonials unless the publisher can show that the testimonial was previously made or published (or approved and written permission obtained) and generally accords with what is actually published or approved.

The Canadian Competition Bureau has provided additional information and explanation of the operation of these provisions in the context of website reviews. Compliance with the provisions of the Act requires all representations made in endorsements or testimonials to 'be free from ambiguity' and 'contain all of the information necessary to enable a reasonable purchaser to make a sound purchasing decision'.⁵⁹²

4.4.5.2 Canadian Code of Advertising Standards

The *Canadian Code of Advertising Standards* sets out criteria for acceptable advertising in Canada. The Code was created by the advertising industry in 1963 to promote the professional practice of advertising and is a voluntary code that can be adopted by advertising businesses. Administered by Advertising Standards Canada, the *Code* is regularly updated to ensure it is current and contemporary.

Section 2 of the Code prohibits the presentation of concealed or disguised advertisements. Although the Interpretation Guidelines don't clarify the scope of 'disguised advertisements' some of Advertising Standards Canada's enforcement action makes it clear that it extends to 'native advertising' and endorsements.

Advertising Standards Canada ('ASC') has investigated a number of consumer complaints regarding 'disguised advertising'.⁵⁹³

592 Canadian Competition Bureau, *False or Misleading Representations* (5 November 2015) Competition Bureau www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00513.html [2] and [3].

593 Disguised advertising is where the commercial intent of the advertising is concealed by way of its format or content: *Canadian Code of Advertising Standards, clause 2*.

4.4.5.3 Consumer education

In addition to enforcement action, the Canadian Competition Bureau has focused its attention on preventing consumers from being influenced by fake online reviews and endorsements. In the Bureau's *False or Misleading Representations and Deceptive Marketing Practices* guide, the Bureau describes how fake reviews and endorsements can be caught under Canadian competition law and provides guidance as to how to ensure testimonials comply with the *Competition Act*.⁵⁹⁴ Further, in 2014, the Competition Bureau issued a press notice regarding fake online reviews.⁵⁹⁵

4.4.6 Singapore

The Singapore government considers existing laws and codes already satisfactorily regulate fake online reviews and endorsements.⁵⁹⁶ The regulatory issues are generally consistent with those identified in other areas of this report. The Singapore government's policy objectives again mirror those identified in relation to general misleading, unfair and deceptive practices, namely that consumers:

- must be protected against such practices;
- must be provided with sufficient information to make an informed decision;⁵⁹⁷ and
- should be able to operate in a fair and equitable trading environment.⁵⁹⁸

4.4.6.1 General Protections — Online reviews and endorsements

The Singapore government and its associated agencies have treated fake reviews and endorsements in the same manner as general misleading, unfair and deceptive practices.

The *Consumer Protection (Fair Trading) Act* (Singapore), s 4(a) provides a general prohibition against unfair practices including, relevantly, doing or saying anything, or omitting to do or say anything, if such statements or omissions might reasonably mislead a consumer. This general provision is supplemented by examples contained in Schedule 2 to the Act. The relevant examples here include:

- making a representation that appears to be objective, but which is primarily made to sell goods or services (example 14);
- representing that a particular person has offered or agreed to acquire goods or services if they have not (example 15); and
- using small print to conceal a material fact from a consumer (example 20).

594 Canadian Competition Bureau, *False or Misleading Representations and Deceptive Marketing Practices* (5 November 2015) Canadian Competition Bureau www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html.

595 Canadian Competition Bureau, *Don't buy into fake online endorsements: Not all reviews are from legitimate consumers* (28 July 2014) Canadian Competition Bureau www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03782.html.

596 Advertising Standards Authority of Singapore, 'Singapore Code of Advertising Practice' (Code (3rd ed), Advertising Standards Authority of Singapore, February 2008) 15.

597 Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2.

598 Consumers Association of Singapore, *CPFTA & Lemon Law*, (2013) Consumers Association of Singapore www.case.org.sg/consumer_guides_cpfta.aspx.

Notwithstanding the fact that the above examples (particularly examples 14 and 15) quite clearly deal with fake online reviews and endorsements, the Singapore Advertising Standards Authority has recently called for public consultation on new guidelines focused on social media and digital advertisements. The guidelines were drafted in response to a perceived gap in Singapore's regulatory regime.

4.4.6.2 Voluntary code

Singapore's voluntary Code of Advertising Practice sets out guidelines regarding, amongst other issues, the use of testimonials and expressions of opinion. The Code requires testimonials to be genuine, reflect general consumer experience and relate to the current personal experience of the party who provided the testimonial or endorsements (guideline 3.1, 3.2 and 3.4).

Singapore's government agencies are yet to enforce their regulations relating to unfair use of testimonials. However, the Advertising Standards Authority has finalised its draft 'Digital and Social Media Guidelines' (that expressly cover online reviews and endorsements) on which it sought public consultation. The consultation process ran from 7 December 2015 and closed on 8 January 2015. The Advertising Authority is yet to release its report.

In summary, the draft guidelines require all commercial relationships between blog writers, social media platforms and advertisers to be disclosed and that all paid advertisements are identified as such (see, for example, clause 3.1).

4.4.7 Comparison

4.4.7.1 Common aspects

There is a high level of consistency in the regulatory approach of each reviewed jurisdiction.

- (1) All jurisdictions have general protections cast in broad terms and which are applicable to misleading or deceptive conduct in any medium. In each jurisdiction the following type of conduct is prohibited:
 - (i) Supplier writes or engages another person to write a positive review and claims it is a consumer review
 - (ii) Supplier writes a detrimental review of a competitor
 - (iii) Supplier approves or endorses a review of their business they know to be false
 - (iv) Supplier approves or endorses a review of their business they suspect to be false (misleading impression)
 - (v) Supplier fails to take action to remove or dis-endorse a fake review
 - (vi) Advertorials
- (2) No specific modifications have been introduced for the application of these laws to e-commerce due to the broad drafting of the prohibitions. This has allowed the UK and Canada to maintain its policy of a consistent consumer protection approach to traditional transactions and online transactions.
- (3) No jurisdiction has altered existing jurisdictional limits of the general protections. No significant issue has arisen where a regulator has been unable to take action on the basis of a lack of jurisdiction. This may be to a large extent attributable to the willingness of regulators to cooperate and the similarities in scope of the prohibitions and regulatory powers.

- (4) All jurisdictions provide some level of online consumer education and guides to assist consumers to recognise fake reviews.

4.4.7.2 Differences

Differences in approach appear in the use of codes or guidelines by jurisdictions:

- (1) Voluntary codes for advertising in all mediums have been used effectively in the UK and Singapore. The codes are consistent with the general statutory prohibitions and aim to improve compliance. The UK Code has been reviewed for application to online and other electronic mediums. However, Singapore's Advertising Standards Authority has identified gaps in its regime dealing with, amongst other things, advertising on blogs and social media platforms.

The 'gaps' largely relate to the broad language currently used in Singapore's regulatory regime. For example, unlike the ACL that refers specifically to 'testimonials', the CPFTA simply refers to 'representations'. The CPFTA's extension to social media and digital marketing has also not been considered by the Singapore judiciary.

- (2) In addition to general prohibitions of misleading conduct, specific prohibitions of false or misleading testimonials exists in Australia, the UK and Canada. The specific application of general prohibitions to testimonials improves the effectiveness of the statutory provisions in an e-commerce context.
- (3) The Endorsement Guide in the United States has been particularly effective in conveying the requirements for appropriate endorsements. It assists in making clear that endorsements must be honest and represent the beliefs of the endorser, requires the endorser to be a bona fide user or actual consumer of the goods or services and requires material connections to be disclosed. The guide makes explicit what is implicit within the legal test of 'unfair commercial practice'.

4.5 Consumer fraud

4.5.1 Issues

Internet fraud has been defined as an intentional deception, done for personal gain for the purposes of damaging another individual committed on the Internet.⁵⁹⁹ There are numerous examples of fraudulent or deceptive practices, which utilise the internet to defraud or scam other people.⁶⁰⁰ A common theme in most scams is that the scammer uses a hoax, ruse or other form of subterfuge to extract money from the unsuspecting person. There is considerable overlap between consumer protection regulations and criminal offences that relate to obtaining advantage in the marketplace by deception.⁶⁰¹ For the most part, online fraud is covered by the relevant criminal laws of the jurisdictions discussed in this report.

599 European Consumer Centres Network, 'Fraud in Cross-Border E-Commerce' (Report, European Consumer Centres Network, 12 December 2014) 3; Adam Graycar and Marianne James, 'Older People and Consumer Fraud' (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Canberra, 21-22 June 2001), 2.

600 Refer to a list of examples on the ACCC website at www.scamwatch.gov.au/types-of-scams.

601 Australian Competition & Consumer Commission, Submission No 46 to House of Representatives Standing Committee on Communications, *Inquiry into cyber crime*, July 2009, 3.

Most jurisdictions have developed coordinated policies for enforcement, prosecution and consumer education and remedies for fraud. In most cases the policy approach to fraud in e-commerce is consistent with other mediums. Specific issues identified within an online environment and which regulators have considered are:

- **Do online transactions increase the risk of fraud?** The remote nature of an online transaction, where the parties never meet and goods are sold sight unseen, has the potential to allow fraudsters to more easily and successfully engage in deceptive conduct. The risk of fraudulent activity potentially increases for both a buyer and seller online i.e. a fake listings and from the supplier's perspective i.e. non-payment;
- **Changes in technology present new opportunities for fraud:** The Internet's promise of substantial consumer benefits is, however, coupled with the potential for fraud and deception. Fraud operators are always opportunists and are among the first to appreciate the potential of a new technology;⁶⁰²
- **Online auction websites present the most likely breeding ground for fraud:** Fraudulent schemes appearing on online auction websites are among the most frequently reported form of mass-marketing fraud;⁶⁰³ and
- **Potential impact of internet fraud is compounded by access to a global market:** There is nothing new about most types of Internet fraud the Commission has seen to date. What is new -- and striking -- is the size of the potential market and the relative ease, low cost, and speed with which a scam can be perpetrated.⁶⁰⁴

The clear difference between previous forms of scams and those perpetrated online is the speed with which new forms of fraud are executed and the increased size of the potential financial loss that may be incurred. Accordingly, the predominant policy consideration of regulators is the need to maintain consumer confidence in online markets and ensure that fraudulent activities do not inhibit growth and innovation within online markets.⁶⁰⁵

A common regulatory approach is evident within the jurisdictions reviewed. A purely legislative approach has been considered inadequate due to the speed at which new forms of fraud emerge and also because statutory provisions prohibiting fraud will do little to discourage new scams. A coordinated approach between business, government and consumer groups is common and usually includes:

- (a) coordinated law enforcement against fraud and deception comprising both criminal sanctions and civil remedies;
- (b) private initiatives and public/private partnerships; and

602 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, *Consumer Protection in Cyberspace: Combating Fraud on the Internet*, 25 June 1998.

603 The United States Department of Justice, *Mass Marketing Fraud* (2 November 2015) The United States Department of Justice www.justice.gov/criminal-fraud/mass-marketing-fraud.

604 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, *Consumer Protection in Cyberspace: Combating Fraud on the Internet*, 25 June 1998.

605 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, *Consumer Protection in Cyberspace: Combating Fraud on the Internet*, 25 June 1998. **UK:** *Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council* [2005] OJ L 149/22 http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm.

- (c) consumer education through the combined efforts of government, business and consumer groups⁶⁰⁶ and by granting government agencies the authority and resources to take vigorous action to against consumer fraud and requiring that businesses are held responsible for any abuse of their services.⁶⁰⁷

Existing legislative provisions prohibiting deceptive conduct or unfair business practices are used by regulators in each jurisdiction to prosecute fraudsters and seek remedies for consumers where possible. Generally the existing legislative provisions have been cast broadly enough to apply to scams and fraud perpetrated via the internet either within the jurisdiction or as against persons residing in the jurisdiction.

Regulators are also generally very active in providing consumer education, either as support to consumer groups or directly through websites, explaining how to recognise common scams and steps for consumers to take to avoid loss.

4.5.2 Australia

Australia's approach to the issue of consumer fraud parallels the approach in the other reviewed jurisdictions. The ACCC uses a multipronged approach to attack the issue of consumer fraud including regulatory prohibitions, civil and criminal penalties and consumer education.⁶⁰⁸

General misleading and deceptive conduct provisions (s 18 and s 29) or unconscionable conduct provisions (ss21 and 22) provide a basis for civil and criminal action (s 151) against parties involved in fraudulent activity. Many of the consumer fraud examples outlined above are prohibited by either the general provisions of the *Australian Consumer Law* or specific provisions aimed at unfair or deceptive practices. In most cases these provisions apply to consumer fraud engaged in through any medium. The only exception is the unsolicited consumer agreement provisions which only apply where a consumer is pressured into signing an agreement by a salesperson either over the phone or face to face, where the salesperson was not invited to call or attend their residence.⁶⁰⁹ Unsolicited emails are however regulated under the *Spam Act 2003* (Cth).

4.5.3 United Kingdom

The regulatory approach in the UK is largely focused on boosting consumer confidence and curbing unfair business practices generally rather than being specifically focussed on consumer fraud.⁶¹⁰ Prosecution for fraudulent activity is usually undertaken as a criminal offence by police or other security agencies and is outside the authority of the regulator.

606 Federal Trade Commission Staff, 'Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace' (Report volume 1, Federal Trade Commission, May 1996), exhibit 1. **Australia** — See ACCC Scamwatch website www.scamwatch.gov.au/.

607 Consumer Federation of America, Fraud (2015) Consumer Federation of America <http://consumerfed.org/issues/consumer-protection/fraud/>.

608 See, for example the Australasian Consumer Fraud Taskforce, www.scamwatch.gov.au/about-scamwatch/australasian-consumer-fraud-taskforce.

609 Refer to the examination of these provisions at [17].

610 Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council [2005] OJ L 149/22 http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm.

4.5.3.1 General Protection — unfair commercial behaviour

Consistent with the approach in the reviewed jurisdictions the CPR applies to unfair commercial behaviour that occurs before, during and after a contract is made.⁶¹¹ In the context of consumer fraud unfair commercial practices will include misleading actions and omissions such as establishing fake websites to sell goods or services that are never provided (refer to regulations 5 and 6), aggressive commercial practices (see regulation 7) and skill bidding (commercial practice 22 of schedule 1).

4.5.3.2 Industry regulation

A number of self-regulatory bodies in the UK require compliance with laws such as the *Electronic-Commerce (EC Directive) Regulations 2002* in their codes of practice.⁶¹² The Internet Service Providers and other platform operators have responded to such requirements by imposing their own 'User Agreements' that set the ground rules for the sale of products.⁶¹³ However, the difficulty for the Internet Service Providers and platform operators is that those involved in fraudulent activity rarely have regard for the law,⁶¹⁴ which is why the majority of these agreements generally purport to exclude or exempt the platform operator's liability for fraudulent activity.⁶¹⁵

4.5.3.3 Consumer Education

Consumer education is provided by the European Consumer Centres Network which focusing on 'minimising the risk to consumers by increasing their awareness and their knowledge on how to shop safely online'.⁶¹⁶

4.5.4 United States

Similar to the UK, the US approaches consumer fraud predominantly from a criminal perspective. The primary consumer policy objective is the need to address Internet fraud promptly before it discourages new consumers from using the Internet and inhibits the impressive commercial growth and innovation currently being experienced in that area.⁶¹⁷

Consistent with the other reviewed jurisdictions the US employs a coordinated multipronged approach across statutory regulation, public private partnerships and consumer education. This policy has been given effect by expansion of the remedies contained in the *Uniform Commercial Code* s 2-271 to apply in the case of fraud and interpreting s45 of the *Federal Trade Commission Act* 15 USC (*FTC Act*) to include e-commerce transactions.

611 See detailed explanation at [26.5].

612 See, for example, the Internet Service Providers' Association Code of Practice, paragraph 2.1 (found at www.ispa.org.uk/about-us/ispa-code-of-practice/).

613 Kanchana Kariyawasam and Scott Guy, 'The Contractual Legalities of Buying and Selling on eBay Online Auctions and the Protection of Consumers' (2008) 19 *Journal of Law, Information and Science* 42 www.austlii.edu.au/au/journals/JILawInfoSci/2008/4.html.

614 European Consumer Centres Network, 'Fraud in Cross-Border E-Commerce' (Report, European Consumer Centres Network, 12 December 2014), 20.

615 See, for example, eBay UK, *User Agreement* (20 October 2015) eBay UK http://pages.ebay.co.uk/help/policies/user-agreement.html#listing_liability. However, see, Andres Guadamuz Gonzalez, *eBay Law: The Legal Implications of the C2C Electronic Commerce Model*, University of Edinburgh www.era.lib.ed.ac.uk/bitstream/handle/1842/2259/eBaylaw.pdf?sequence=1, 9, as to whether such an exclusion or exemption is effective under UK law.

616 European Consumer Centres Network, 'Fraud in Cross-Border E-Commerce' and referring fraud cases, originating from dishonest traders to the police or criminal enforcement authorities (Report, European Consumer Centres Network, 12 December 2014) 23.

617 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, Consumer Protection in Cyberspace: Combating Fraud on the Internet, 25 June 1998.

4.5.4.1 General Protection

Section 2-721 of the *Uniform Commercial Code* (UCC) provides that the remedies for material misrepresentation or fraud include all remedies available under article 2 of the UCC for non-fraudulent breach. That section covers situations where one party to a transaction is fraudulently induced to enter a contract of sale by the other party⁶¹⁸ and allows the defrauded party to rely on other remedies, such as rescission of the contract or rejection or return of the goods, in addition to any claim for damages or other remedy.

Section 45(1) of the *FTC Act* provides generally that unfair or deceptive acts or practices in or affecting commerce are unlawful. Consumer fraud is clearly within the section. The section can be used in the case of online transactions irrespective of the location of the fraudulent party if the deceptive practice is likely to cause reasonably foreseeable injury with the US or involve material conduct occurring in the US.

Examples of actions taken by the FTC in reliance upon these provisions include:

Deceptive emails:

In January 2000, the FTC settled a deceptive SPAM charge with ReverseAuction.com. FTC alleged that ReverseAuctions has violated consumer's privacy by harvesting consumers' personal information from a competitor's site and then sending deceptive spam to those consumers soliciting their business. The settlement bars ReverseAuction from engaging in such unlawful practices in the future, to delete the personal consumer information of consumers who received the spam but declined to register with ReversAuction, and to give those who did register, notice of the FTC charges and an opportunity to cancel their registration.⁶¹⁹

Fake News Websites used to advertise Weight-Loss products:

In February 2013 the FTC settled a clam against Beony International (and owner Mario Milanovis and employee Cody Adams) relating to that company's use of fake news websites to market an acai berry supplement and other weight-loss products. Beony International, Mr Milanovis and Mr Adams have agreed to pay the FTC \$1.6 million and sell a 2008 Porsche in settlement of the matter.⁶²⁰

618 Larry Schiffer, 'The Availability of Benefit of the Bargain damages in a fraud action under section 2-721 of the Uniform Commercial Code' (1978-79) 43 Albany Law Review 930, 931.

619 Federal Trade Commission, *Online Auction Site Settles FTC Privacy Charges* (6 January 2000) Federal Trade Commission www.ftc.gov/news-events/press-releases/2000/01/online-auction-site-settles-ftc-privacy-charges.

620 Federal Trade Commission, *FTC Permanently Stops Fake News Website Operator that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products* (7 February 2013) Federal Trade Commission www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly.

Fake eBay listings

In February 2010, a Brazilian businessman living in Florida, was sentenced to 68 months in prison by a federal court in Miami, for operating an eBay auction fraud scheme.

From October 2003 through to June 2008, the defendant sold more than 5,500 items on eBay using over 200 different eBay accounts, earning approximately \$717,000.

None of those goods were ever shipped or delivered. The defendant kept the money for personal use.⁶²¹

4.5.5 Canada

Canada relies on existing misrepresentation laws to police consumer fraud and has implemented specific laws at the provincial level to protect consumers against financial fraud arising in the crowdfunding context. Consistent with the other reviewed jurisdictions consumer regulators are focused on creating a climate of trust among consumers and businesses that foster economic growth⁶²² whilst recognising that e-commerce provides a perfect vehicle for fraudsters looking to target less-knowledgeable or naïve consumers.⁶²³ The Canadian government is also conscious that any consumer protection framework that it implements should be consistent at an international level.⁶²⁴

In giving effect to its policy objectives the Canadian government has adapted existing consumer protection laws to apply to electronic commerce and harmonised those provisions across provinces rather than implementing a new regulatory regime to deal with consumer fraud.⁶²⁵

This policy has been given effect by interpreting the existing misrepresentation regime at both a Federal and Provincial level as applying to e-commerce and, specifically, consumer fraud.

4.5.5.1 General Protection

The *Competition Act RSC 1985 c C-34* is a federal law governing business conduct in Canada with the purpose of providing consumers with protection against misleading advertisements and deceptive practices (section 74.01). It also extends this protection to misleading or deceptive conduct arising in the sender or subject matter of an email (section 74.011).

In relation to consumer fraud, the *Competition Act* provides two regimes to address consumer fraud: the first is a criminal regime and the second, a civil regime:

- (1) **Criminal regime:** The provisions prohibit all materially false or misleading representations made knowingly or recklessly (section 52), forbids deceptive telemarketing (section 52.1), deceptive notices of prize winnings (section 53), double ticketing (section 54) and pyramid

621 Gordon Gibb, *Largest Internet Scam in eBay History Finally Cracked* (25 February 2010) [Laweyrsandsettlements.com www.laweyrsandsettlements.com/articles/internet-technology/internet-lawyers-technology-lawyer-information-13664.html](http://Laweyrsandsettlements.com/www.laweyrsandsettlements.com/articles/internet-technology/internet-lawyers-technology-lawyer-information-13664.html).

622 Industry Canada. 'The Challenge of Change: Building the Century Economy', (Conference Background Paper presented at e-Commerce to e-Economy Strategies for the 21st Century, Ottawa Canada, 27–28 September, 2004), page i. www.ic.gc.ca/eic/site/ecic-ceac.n2013.

623 In the crowdfunding context see Arshy Mann: *Untangling Canada's proposed new crowdfunding laws* (21 March 2014) [Canadian Business www.canadianbusiness.com/companies-and-industries/crowdfunding-securities-regulator-rules-faq/](http://CanadianBusiness/www.canadianbusiness.com/companies-and-industries/crowdfunding-securities-regulator-rules-faq/).

624 (Working Group on Electronic Commerce and Consumers, 'Principles of Consumer Protection for Electronic Commerce: A Canadian Framework' (Principles of Consumer Protection, Office of Consumer Affairs of Industry Canada, 2009) 2.

625 *Ibid.*

schemes (section 55⁶²⁶). Under this regime, misleading practices are brought before the criminal courts, requiring proof of each element of the offence beyond a reasonable doubt and can result in penalties ranging from CAD\$200,000 to imprisonment of up to 14 years (section 52(5)).

- (2) **Civil regime:** The civil regime provides that a person who makes certain misleading representations to the public engages in 'reviewable conduct' (sections 74.01) relevantly including bait and switch selling (section 74.04(2)), which can result in administrative remedies including orders to cease such conduct and the payment of monetary penalties (section 74.1(1)). Such representations are deemed to be made by the person who causes the representations to be expressed, unless that person is outside Canada, in which case the person who imports (or fails to import) the goods will be held responsible (section 74.03(2)).
- (3) Proceedings under this regime may be brought before the Competition Tribunal, the Federal Court or the superior court of a province and requires that each element of conduct be proven on a balance of probabilities.⁶²⁷ The penalties range from an order to cease the activity up to a monetary penalty of CAN1,000,000 for individuals and CAN15,000,000 for corporations (section 74.1(1)(c)).

Examples of action taken by the Competition Bureau under the Competition Act include:

- **Fake website:** In June 2013, the Competition Bureau convicted the owner of a website (www.oilcareer.com) who was running an employment scam of making false or misleading representations with respect to finding employment in the oil and gas industry.⁶²⁸ The Bureau was subsequently able to obtain restitution for the 1500 victims located in over 60 countries of over \$185,000. The defendant was also sentenced to 30 months imprisonment and fined an additional \$164,000.⁶²⁹
- **Cross-border fraud:** During 2013 the Consumer Bureau assisted the US Federal Trade Commission to find a Toronto man guilty of consumer fraud arising from telephone calls made to US residents with credit problems offering them Visa or Mastercards for an advanced fee of several hundred dollars. The cards were never provided. The defendant was subsequently sentenced by the US Federal district court in Illinois to 10 years in prison for his role in an advanced credit card fee scam that defrauded thousands of US consumers of more than US\$10,000,000.⁶³⁰

4.5.5.2 Fraud Prevention Forum

The Canadian Competition Bureau established and chairs the Fraud Prevention Forum. The Forum has over 125 members comprised of private sector firms, consumer and volunteer groups, government agencies and law enforcement organisations whose aim is to 'prevent Canadians from

626 Pyramid selling in Canada is examined at [15] of this Report.

627 Competition Bureau of Canada, *False or Misleading Representations and Deceptive Marketing Practices* (5 November 2015) Competition Bureau of Canada www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html

628 Competition Bureau of Canada, *Alberta Man Found Guilty of Misleading Representations and Breach of Consent Agreement* (25 June 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03579.html>>.

629 Competition Bureau of Canada, *Bureau Investigation Leads to Restitution for Victims of Online Jobs Scam* (4 June 2014) www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03761.html.

630 Competition Bureau of Canada, *Toronto man receives 10 years in US prison following cross-border fraud investigation* (31 January 2014) www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03654.html.

becoming victims of fraud by educating them on how to recognize it, report it and stop it'.⁶³¹ This model has been adopted around the world including in the US, Australia and the UK.

4.5.5.3 International co-operation

The Canadian Competition Bureau has recognised that in order to fulfil its law enforcement mandate under the *Competition Act* it must collaborate closely with competition and consumer protection authorities around the world. To give effect to that approach, the Canadian Competition Bureau has entered into a number of international cooperation agreements with, amongst others, Australia,⁶³² the UK⁶³³ and the US.⁶³⁴ These agreements encourage the sharing of information between the parties in relation to, amongst other things, consumer protection and fraud.

4.5.6 Singapore

Singapore relies on a combination of existing and new regulations to combat consumer fraud. As with the other jurisdictions, the majority of fraud related offences are caught by the criminal regime⁶³⁵ as fraud is considered to fall outside the ambit of consumer protection at an ASEAN level.⁶³⁶ While there is recognition of the same issues arising from consumer fraud on the internet the Singapore policy response is to bundle fraud into other unfair business practices and apply existing consumer provisions in the *Consumer Protection (Fair Trading) Act*. The primary aim of this legislation is to allow consumers and businesses to operate in a fair and equitable trading environment⁶³⁷ and be provided with enough truthful and accurate information to make an informed decision.⁶³⁸

4.5.6.1 General Protection

Section 4 of the *Consumer Protection (Fair Trading) Act* contains a general prohibition against unfair practices, including false claims, and paragraph 5 of schedule 2 expands the definition of unfair practice to include other fraud-related activities such as:

- bait advertising;
- taking advantage of a consumer by including harsh or oppressive provisions in an agreement or by exerting undue pressure or undue influence to enter into the transaction;
- representing that a particular person (such as celebrity or specialist in the area) has agreed to acquire goods or services when they have not;

631 Competition Bureau of Canada, *Fraud Prevention Forum* (19 November 2015) Competition Bureau of Canada www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03662.html.

632 See Competition Bureau of Canada, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01595.html.

633 See Competition Bureau of Canada, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#Kingdom.

634 See Competition Bureau of Canada, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#States.

635 See for example, Computer Misuse and Cybersecurity Act, ss 4(1) and (2) (access to computer with intent to commit or facilitate commission of offence and the financial securities regime, see: Securities and Futures Act (Singapore, cap 289, 2006 rev ed) ss 6 (Monetary Authority of Singapore approval required for issue) and 46C (Licensing requirement for equity based crowdfunding and the House to House and Street Collections Act (Singapore) cap 128, 2014 rev ed (Donations based crowdfunding only).

636 In relation to the ASEAN approach see: ASEAN-Australia Development Cooperation Program Phase II, 'Consumer Protection Digests and Case Studies: A Policy Guide (Volume 1)' (Policy Guide, ASEAN and Australia Aid, November 2014) 30).

637 Consumers Association of Singapore, CPFTA & Lemon Law, (2013) Consumers Association of Singapore. www.case.org.sg/consumer_guides_cpfta.aspx.

638 (Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2).

- offering gifts, prizes or other free items in connection with the supply of goods or services if the supplier knows those items will not be provided; and
- generally using small print to conceal a material fact from a consumer or to mislead a consumer.

The provisions are not limited to internet fraud.

4.5.7 Comparison

4.5.7.1 Common aspects

The Federal Trade Commission, UK regulator and Canadian regulator have focussed attention on international consumer protection issues arising from the use of the Internet and various platforms contained on it. This is the same approach Australia has adopted having recognised the increasing importance of such inter-agency cooperation to achieve positive outcomes in this area.⁶³⁹

A majority of the reviewed jurisdictions have a similar regulatory approach to the issue of consumer fraud. The elements of this common approach are:

- (a) coordinated law enforcement against fraud and deception comprising both criminal sanctions and civil remedies;
- (b) remedies available to consumers in the case of fraud mirrors the remedies available for misleading conduct in a civil case;
- (c) existing consumer protection provisions for deceptive conduct and unfair commercial practices are reviewed to ensure clear application to fraudulent conduct occurring over the internet;
- (d) consumer education through the combined efforts of government, business and consumer groups⁶⁴⁰ and by granting government agencies the authority and resources to take vigorous action to against consumer fraud and requiring that businesses are held responsible for any abuse of their services.⁶⁴¹

The effectiveness of the regulatory frameworks instituted on a national basis is further enhanced if:

- (a) the framework is consistent with international regimes for monitoring and prosecuting fraudsters; and
- (b) the regulator is willing to cooperate on an international level with other regulators to share information and coordinate enforcement and prosecution of fraudsters operating internationally.

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

640 Federal Trade Commission Staff, 'Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace' (Report volume 1, Federal Trade Commission, May 1996), exhibit 1. **Australia** — See ACCC Scamwatch www.scamwatch.gov.au/.

641 Consumer Federation of America, *Fraud (2015)* Consumer Federation of America <http://consumerfed.org/issues/consumer-protection/fraud/>.

4.5.7.2 Emerging Issues

There are a number of emerging issues:

Consumer to Consumer transactions

The increase in peer to peer transactions raises for consideration whether consumer to consumer transactions should be regulated.⁶⁴² In the context of consumer fraud, the criminal regimes applicable to cyber/internet crime (outside of consumer protection legislation) do not distinguish between conduct in the course of a business and conduct between private individuals. Offence provisions within consumer protection legislation are generally restricted to conduct occurring in trade or commerce (or some similar phrase). Not all consumer fraud scenarios will naturally fall within a trade or commerce paradigm and consideration needs to be given to whether, at least for criminal prosecutions, application to C2C transactions should be included. This may be warranted in circumstances where there is no other applicable criminal provision upon which to prosecute the fraudster.

Liability of platform providers for deceptive conduct

The question of whether a platform provider, such as Facebook, eBay or Airbnb, should bear any liability for the conduct of its users arises in a number of contexts. Whether this potential liability should extend to fraudulent activity engaged in using the platform arose in a recent Court of Justice of the European Union (CJEU) decision (upon referral from the High Court of England and Wales) dealing with intellectual property breaches.⁶⁴³ In *L’Oreal SA, Lancome parfums et beauté & Cie, Laboratoire Garnier & Cie, L’Oreal (UK) Limited v eBay International AG, eBay Europe SARL and eBay (UK) Limited*⁶⁴⁴ the European Court considered whether eBay was liable for alleged infringement of L’Oreal’s intellectual property rights by its users under article 14 of the EU’s *E-Commerce Directive*.⁶⁴⁵ Article 14 relevantly provides that intermediaries may avoid liability for the information they host or store if ‘upon obtaining [actual] knowledge or awareness of [illegal activities they act] expeditiously to remove or to disable access to the information’. This provides a defence to any civil or criminal liability imposed by other statutory provisions or the law for hosting the information. No liability is imposed by the *E-Commerce Directive* directly.

The decision confirmed that online market platforms are not required to police the sale of items on their website for trademark infringements or other activity. However, the defence in Article 14 was not considered to be available if the online market operator:

- has taken an active role in the relationship between buyers and sellers. This may occur where the online market operation provides assistance to optimize the presentation of offers for sale beyond purely administrative or technical assistance; or

642 Refer to [29.3] which examines the consumer to consumer issue in the context of peer to peer transactions.

643 See, European Parliament and Council Directive 2008/95/EC 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L 299/25, art 5(a) (Rights conferred by a Trade Mark) and Council Regulation (EC) No40/94 of 20 December 1993 on the Community Trade Mark [1993] OJ L 011/1, art 9(1)(a) (Rights conferred by a Community Trade Mark) (implemented as UK law in the Trade Marks Act 1994 (UK) c 26, s 9 and Part II).

644 (C-324/09) [2011] EUECJ 474.

645 Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1, art14(1) incorporated in UK law by the Electronic Commerce (EC Directive) Regulations 2002 SI 2002/2013, regulation 19.

- is aware of facts or circumstances on the basis of which ‘a diligent economic operator should have identified’ an unlawful activity and did not act to remove or disable the infringing information.⁶⁴⁶ This may occur where an operator finds infringements through a monitoring process or infringements are notified by other users or consumers.

4.6 Peer-to-peer transactions and the sharing economy

4.6.1 Overview

The *sharing economy* has been defined as ‘online platforms that help people share access to assets, resources, time and skills’.⁶⁴⁷ These platforms have been established due to advances in technology which allow buyers and sellers (both individual and businesses) to provide goods and services at lower costs. Many ‘suppliers’ of goods or services via peer to peer platforms are individuals who are not engaged in traditional business activities but are ‘sharing’ their existing assets for monetary gain. High profile examples like Uber and Airbnb allow individuals to share their cars or property with other individuals for consideration.⁶⁴⁸ Other examples are peer to peer lending, task services and the sharing of household goods. Most commentators agree that the sharing economy will continue to grow⁶⁴⁹ which in turn will drive changes to business models employed by suppliers using these platforms.

Concerns have been raised in a number of forums about the application of existing laws to the sharing economy business model. Laws developed for traditional business models have in some cases been circumvented by platform operators, particularly in relation to licensing regimes. This has caused significant concern globally in relation to the applicability of laws related to public safety, insurance, tax avoidance and employment. A number of countries have undertaken reviews of sharing economy platforms to understand the issues within the different markets.⁶⁵⁰ Reference is made to these reviews where relevant to consumer issues in this report. While the issues canvassed in these reports are important for consumer welfare they are the subject of regulatory regimes outside of the *Australian Consumer Law*. The focus of this report is on the consumer protection issues that are of most relevance to the *Australian Consumer Law*.

Many countries have been grappling with the balance between encouraging and fostering innovation within a digital economy and the need to build consumer trust⁶⁵¹ in online transactions and maintain consumer protections where appropriate. In this section we explain the consumer protection issues in peer to peer transactions, compare the policy and regulatory approaches of the reviewed jurisdictions to these issues and conclude with a summary.

646 Osborne Clarke, *But was it worth it? The significance of the L’Oreal v eBay trade mark ruling for brand owners and online marketplaces* (19 July 2011) Osborne Clarke www.osborneclarke.com/connected-insights/publications/but-was-it-worth-it-the-significance-of-the-loreal-v-ebay-trade-mark-ruling-for-brand-owners-and-online-marketplaces/#sthash.j6M4DAE9.dpufz.

647 Debbie Woskrow, *Unlocking the Sharing Economy: An Independent Review*, (available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf). Other terminology is commonly used such as ‘peer to peer economy’, ‘individual to individual services’ and ‘collaborative economy’.

648 Not all platforms operate on a commercial model some enable individuals to share assets gratuitously.

649 Deloitte Access Economics, ‘The sharing economy and the Competition and Consumer Act 2015’ Deloitte (NSW).

650 D Woskrow (2014) *Unlocking the sharing economy — an independent review*, Report for the Minister of State for Business, Enterprise and Energy; Deloitte Access Economics *The sharing economy and the Competition and Consumer Act 2015*; Deloitte (NSW).

651 Trust in a sharing platform is identified as one of the major issues for consumers by PWC in *The Sharing Economy* (2014), available at www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf.

4.6.2 Peer to peer platforms — Scope of report

Before considering the consumer issues within the sharing economy a brief explanation of the types of platforms is warranted. A common characteristic of peer to peer transactions is the existence of a platform which is used to connect the parties to the transaction. The benefit of the platform to the sellers is that transactions costs such as advertising, bargaining, decision costs and enforcement are borne by the platform reducing the costs to the seller. Platforms usually allow owners of idle assets to better utilize excess capacity of those assets to a potentially global market. To be regarded as part of the sharing economy the platform should be owned and operated separate to ownership of the assets being shared. This differentiates this type of transaction from other online transactions which may be conducted through online networks or platforms owned by the seller.

There are a broad range of peer to peer platforms.

Type of platform	Description
Ridesharing platforms *Uber, Lyft, Blablacar and Sidecar	Transport network companies that operate a platform which allows consumers with smart phones to submit a trip request that is then sent to drivers who use their own cars. <ul style="list-style-type: none"> Prices may or may not be set by the platform operator; Consumers may or may not choose the driver; Payment is usually made via the application using the consumer's payment details contained in their profile.⁶⁵²
Car sharing platforms *GoGet, *GreenShareCar, *Flexicar	Allows users to rent cars for short period of time, usually by the hour from commercial operators
Peer to peer car sharing DriveMyCar, Car Next Door	Individuals make their vehicles available for other to rent for short periods of time. Users are matched via a platform.
Accommodation platforms *Airbnb, HomeAway and Flipkey, VacationRentalsm VRBO, Couchsurfing	Online platforms that connect travellers with hosts who offer their home (or a part of it) as a place to stay. ⁶⁵³ This has also extended to platforms facilitating short term letting of commercial space and car parking (*ParkHound, *Divvy, MonkeyParking, JusTPark, Open Shed).
Crowdfunding Gofundme, *Kickstarter, *Indiegogo, *Pozible, *OzCrowd, *VentureCrowd, *EverydayHero, *BrickX	Crowdfunding platforms allow persons seeking funding to showcase projects or companies on an Internet platform and members of the public provide funding through that platform. There are 2 main types of crowdfunding platforms: ⁶⁵⁴ <ul style="list-style-type: none"> Donations or rewards model: individuals provide money for benevolent reasons;⁶⁵⁵ Investment model: individuals make investments in return for a share in the profits or revenue generated by the company/project.⁶⁵⁶

652 Lauren Goode 'Worth It? An App to Get a Cab', *The Wall Street Journal* (online), 17 June 2011 <http://blogs.wsj.com/digits/2011/06/17/worth-it-an-app-to-get-a-cab/>.

653 Airbnb, *About Us* (2015) Airbnb www.airbnb.com.au/about/about-us.

654 Osborne Clarke, 'The regulation of crowdfunding in the UK' (Report, Osborne Clarke, 4 December 2014) 2 www.osborneclarke.com/connected-insights/publications/regulation-crowdfunding-uk/.

655 The most popular example of a donation-based funding model is gofundme www.gofundme.com or for a non-monetary reward; See, for example, Kickstarter www.kickstarter.com/ and Indiegogo www.indiegogo.com.

Type of platform	Description
Peer to Peer lending *SocietyOne, *RateSetter Australia, *DirectMoney, *ThinCats, *Marketland	Individuals lend money to a company or project in return for repayment of the loan and interest on their investment; ⁶⁵⁷
Labour hire and services *Airtasker, *Hipages,*TradeEzi	
Peer to Peer Marketplaces *Gumtree, *eBay, *Etsy Peer to Peer sharing *The Clothing Exchange, *Garage Sale Trail, *TuShare	Online auction and shopping websites Online exchange of goods and services for consideration or for free.

*Indicates those platforms currently operating in Australia

This report considers a number of regulatory issues that apply generally to peer to peer transactions across the different aspects of the sharing economy.

Crowdfunding and Peer to peer lending are not considered as part of this report. Peer to peer lending or crowdfunding may occur in a range of situations including, donations or gifts, raising of investment capital for new business, and loans on commercial terms. In the cases of lending and investment the regulatory issues will fall outside the ACL on the basis the platform or the party seeking the money will be engaged in a financial service or a managed investment. Different legislative frameworks apply in Australia to managed investments (*Corporations Act 2001* (Cth)) and financial services (*Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act)). Amendments proposed to the *Corporations Act 2001* (Corporations Amendment (Crowd-sourced funding) Bill 2016) aim to regulate crowdfunding for investment as a managed investment scheme. A similar approach is adopted in other jurisdictions⁶⁵⁸ where specific legislation applying to financial services or investment are considered more applicable to the issues arising in peer to peer lending.

656 See for example, Seedrs www.seedrs.com/ and FundedByMe www.fundedbyme.com/. This is the type of crowdfunding most commonly referred to as peer-to-peer lending Leigh Schulz and Domenic Mollica, 'Ask the Expert: The regulation of crowdfunding in Australia: where are we and what's to come?' (2015) 31(7) *Australian Banking & Finance Law Bulletin* 130, 137.

657 Commonly known as peer-to-peer lending. Some popular examples include Zopa www.zopa.com/lending/grow-your-savings?utm_campaign=AFFThisIsMoney&utm_medium=partner&utm_source=AFFThisIsMoney, RateSetter www.ratesetter.com/lend?tsr=MailOnline&tc=Lend and Funding Circle www.fundingcircle.com/uk/investors/?utm_source=ThisIsMoney&utm_medium=Affiliate&utm_content=p2pWebInvestor%C2%A0&utm_campaign=FebTest.

658 **UK:** *Financial Services and Markets Act 2000* (UK) c 8 (amended on 1 April 2014 to include peer-to-peer lending models); UK Crowdfunding, *Code of Practice* (2015) UKCFA www.ukcfa.org.uk/code-of-practice-2; and self-regulation (in relation to donations and reward crowdfunding models that fall outside the scope of the financial services regime because they do not involve any form of financial investment return: Osborne Clarke, 'The regulation of crowdfunding in the UK' (Report, Osborne Clarke, 4 December 2014) 2 www.osborneclarke.com/connected-insights/publications/regulation-crowdfunding-uk/. **US:** *Jumpstart our Business Startups Act 15 USC ss 78a* (2012). **Canada:** only provincial level legislation **Ontario:** *Multilateral Instrument 45-108 Crowdfunding*; This law is substantially harmonised across Manitoba, Quebec, New Brunswick and Nova Scotia (with Saskatchewan pending) but not British Columbia **British Columbia:** *Securities Act RSB 1996, c418 and Start-up Crowdfunding Registration and Prospectus Exemptions (Multilateral CSA Notice 45-316)*. **Singapore:** *Securities and Futures Act* (Singapore, cap 289, 2006 rev ed); Monetary Services Authority's *Guidelines on Criteria for the Grant of a Capital Markets Services Licence*; and *House to House and Street Collections Act* (Singapore) cap 128, 2014 rev ed). (Donations-based crowdfunding only).

Platforms that facilitate donations or gifts will not fall within the definition of financial services or managed investments. As these interactions are unlikely to be in trade or commerce they will also fall outside of the ACL.

4.6.3 Consumer issues in peer to peer transactions

The sectors in which sharing platforms operate are diverse and can give rise to issues unique to the type of asset or service being shared.⁶⁵⁹ There are a number of common consumer issues across the different types of platforms as well as some issues unique to the particular type of platform transaction. A number of these issues are similar to those already examined under product quality, misleading pricing practices, fake reviews and fraud. Consumer issues and the relevant sharing platforms to which the issue relates are summarised in the table below. Unless otherwise specified the consumer issues identified are similar to those examined in relation to e-commerce transactions earlier in the report.

Consumer issue	Platform type
Product quality and safety	Ride sharing, ⁶⁶⁰ accommodation sharing ⁶⁶¹ , peer to peer marketplaces
Drip pricing	Ride sharing, accommodation sharing
Surge (dynamic) pricing	Ride sharing
Fake reviews and fraudulent listings	Accommodation sharing ⁶⁶²
Misleading information and deceptive practices	Crowdfunding, peer to peer lending, accommodation sharing, ride sharing
Standard form contracts	Crowdfunding, peer to peer lending, accommodation sharing, ride sharing

As demonstrated in the table, the consumer issues arising in the case of sharing platforms are also issues in e-commerce transactions generally. The report has previously examined regulatory practices in each jurisdiction related to:

⁶⁵⁹ For a more detailed list of the types of platforms emerging refer to (NSW) report.

⁶⁶⁰ The main consumer protection issue, in addition to recent issues about pricing on days of high demand, has been public safety for consumers, which is an issue that falls outside the scope of this report. Refer to the relevant regulation in each of the jurisdictions: **UK:** *Private Hire Vehicles (London) Act 1998* (more particularly Transport for London's review of that legislation in regard to the sharing economy), **US:** California's *Decision adopting rules and regulations to protect public safety while allowing new entrants to the transportation industry* and **Singapore:** *Third Party Taxi Booking Service Provider Act 2015* (Singapore). For a more general discussion of the regulatory issues at a State or local level see: Mark MacMurdo, 'Hold the Phone! 'Peer-to-Peer' Ridesharing Services, Regulation, and Liability' (2015) 76 *Louisiana Law Review* 307, 323; Erin Mitchell, 'Comment: Uber's Loophole in the Regulatory System' (2015) 6 *Houston Law Review: Off The Record* 75, 94; Catherine Lee Rassman, 'Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance 'Gap' and Why Pennsylvania Should Get on Board' (2014-2015) 15 *Pittsburgh Journal of Technology & Policy* 81, 88).

⁶⁶¹ Significant issues for accommodation sharing are also compliance with planning laws, noise impact of short term letting, fire and insurance compliance.

⁶⁶² Fraud and fake reviews and endorsements (including whether the property meets the description on the website, whether the listing is genuine and loss of payments) and public safety have been significant issues in accommodation sharing platforms. See Joseph Shuford, 'Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina and the Constitution' (April 2015) 16 *North Carolina Journal of Law & Technology (Online Edition)* 1, 8; Brittany McNamara, 'Airbnb: A Not-so-safe Resting Place' (2015) 13 *Colorado Journal on Telecommunications and High Technology Law* 149, 152.

- (a) Application of product quality regulation to goods and services [25];
- (b) Reliance on user reviews and the regulatory protections for fake reviews [27];
- (c) Drip pricing and surge (dynamic) pricing practices [26];
- (d) Use of standard form contracts with unfair terms [4.5];
- (e) Fraud [28].

There are a number of particular consumer issues arising from the nature of peer to peer transactions:

- (a) **Platform liability:** Should the regulatory provisions of the ACL (or similar legislation in other jurisdictions) apply to both the supplier and the platform provider? What should the responsibilities of the platform provider be for the conduct of the supplier?
- (b) **Consumer to consumer:** Should the regulatory regimes traditionally focused on business to consumer transactions be broadened to clearly apply to peer to peer transactions, where the supplier may not be in the business of providing the goods or services?
- (c) **Balance of Regulation and self-regulation:** Is there a need to adopt a different regulatory model for e-commerce? Is a different balance required between government regulation and industry self-regulation to encourage innovation?
- (d) **Multi- jurisdiction compliance:** the ability or willingness of platform operators to comply with laws of the various jurisdictions in which they operator are low. This encourages platform operators to disclaim or contract out of regulatory requirements.

Most jurisdictions have adopted a cautious approach to intervention in the sharing economy and peer to peer transactions. Regulators globally have commissioned reports investigating the nature of the sharing economy and identifying potential market issues with a view to determining the nature and extent of consumer related issues within the sharing economy.⁶⁶³

Most commentators recommend a flexible regulatory regime which is capable of dealing with unique issues that arise from each platform type,⁶⁶⁴ provides adequate protection for consumers but does not create barriers to innovation and further development of the sharing economy. Traders within existing markets disrupted by new platform entrants have a different view and have called for equality in application of regulation, particularly in the context of licensing regimes. Most jurisdictions have responded to consumer protection concerns arising from peer-to-peer platforms by attempting to apply existing laws and regulations.⁶⁶⁵ In Australia the existing general protections and specific protections have been successfully used to ensure compliance by e-commerce businesses and peer to peer platforms. Educational campaigns are also used to ensure consumers and small businesses are fully aware of both their rights and responsibilities under the ACL, and to encourage compliance by businesses.

663 D Woskow (2014) Unlocking the sharing economy — an independent review, Report for the Minister of State for Business, Enterprise and Energy; Deloitte Access Economics The sharing economy and the Competition and consumer Act 2015; Deloitte Access Economics, *Review of the Collaborative Economy in NSW*, 2015; Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The case for Policy Change*, Mercatus Research 2014.

664 Anna Fellander, Claire Ingram and Robin Teigland, 'Sharing Economy: Embracing Change with Caution' (Naringspolitiskt Forum Rapport 11, Entreprenorskaps Forum, 2015), 59; Vanessa Katz, 'Regulating the Sharing Economy' (2015) 30 *Berkley Technology Law Journal Annual Review* 1067, 1087.

665 (Will Coldwell, 'Airbnb's legal troubles: what are the issues?' *The guardian* (online), 8 July 2014 < www.theguardian.com/travel/2014/jul/08/airbnb-legal-troubles-what-are-the-issues); Raphael Minder and Mark Scott, 'Sharing Economy Faces Patchwork of Guidelines in European Countries' *New York Times* (online) 21 September 2014 www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html?_r=0).

As most consumer problems are not unique and are common to other e-commerce transactions this approach has so far not created significant issues. In relation to ridesharing and accommodation platforms, the UK, Singapore and some states of the US have adopted a 'light touch' approach to regulation by acknowledging the legality of the platforms, but not imposing regulation similar to existing market participants.

The primary difficulty in the context of a peer to peer transaction is whether existing laws apply to the platform operator as well as the seller of the goods or services who may be an individual not engaged in trade or commerce.

4.6.3.1 Regulation of Platform Operator

Application of existing regulation to platform operators depends on the business model adopted for the platform. A difference arises between platforms that are active in the transaction and those that coordinate or facilitate. The issue largely depends on whether the platform operator is considered to be engaged or active in the relevant industry (engaged in trade or commerce), for example, ridesharing, accommodation or crowdfunding⁶⁶⁶ or whether the platform operators are simply passive intermediaries (which is the argument raised by the ridesharing and accommodation platform operators to date).

There are no specific regulatory provisions in any of the reviewed jurisdictions that impose liability on a platform operator for the conduct of their users. Under the existing general protections of the *Australian Consumer Law* for misleading conduct, a platform operator will only incur liability if the operator:

- (i) makes misleading representations on their own behalf to the market;
- (ii) adopts a misleading representation of another person as their own
- (iii) Is knowingly involved in a misleading representation by another person.

A platform operator is unlikely to be liable for misleading statements made by a user of the platform about the product being offered for supply.⁶⁶⁷ For example, Airbnb is unlikely to engage in misleading conduct if a person offers for rent a house claiming it to be 4 bedrooms and a pool when in fact it is 3 bedrooms and no pool. To date Australian courts have excluded intermediaries who broadcast advertisements from liability where the advertisement is misleading or false, and the intermediary is not adopting the advertising as their own.

The position may be different if the format of the platform website leads to a consumer being misled. A potential example is where the headline price for accommodation on Airbnb does not include all of the costs in the headline. If the website is structured by Airbnb to only allow the price to be dripped to the consumer, there is potential for Airbnb to be involved in a contravention with a user.

To date there have been very few decisions against platform operators that could inform the possible direction the courts may take on these issues.

666 Crowdfunding operators are already largely caught within the scope of existing financial services legislation and so won't be discussed further in this section of the report (See Corporations and Markets Advisory Committee, 'Crowd sourced equity funding' (Report, Corporations and Markets Advisory Committee, May 2014) 109-110.

667 See *Google Inc v ACCC* (2013) CLR 435. High Court held that Google was not responsible for misleading representations made in advertisements displayed on its search engine pages.

Three potential types of platform types are considered and the relevant regulatory provisions in the reviewed jurisdictions which may apply.

Approach 1 — Platform as an intermediary

If a platform operator is not engaged in the transaction, but instead simply acts as an intermediary or conduit for the supplier and consumer, then those operators may fall outside the scope of existing regulation (particularly in the ridesharing and short-term accommodation space). In other contexts Uber drivers and Airbnb hosts in the United Kingdom have been held personally liable for breaches of the relevant local taxi, taxation and accommodation laws.⁶⁶⁸ Whether a person providing ride sharing or accommodation services is subject to existing consumer protection laws will in most jurisdictions depend on whether the consumer is acting in trade or commerce.

If this approach is adopted a platform operator would bear no responsibility or liability for product quality as liability attaches to the person supplying the goods or services to the consumer. A platform provider may however have liability for unfair pricing practices instituted by the operator, misleading statements appearing on the platform and potentially for fake reviews of which the platform operator is aware.

Approach 2 — Platform as active participant

Where a platform operator is an active participant in the business there is greater scope for liability. An example of this type of platform arises in the context of ride sharing where Uber (or similar operator) collects the fares for the drivers and provides the digital platform used by the customer and through which information is provided. In The US and Canada various state jurisdictions are considering the issue of liability in the context of customer safety as well as misleading statements. The California Public Utilities Commission considers it has jurisdiction to regulate passenger transportation over public roadways even when that service is facilitated through a software platform.⁶⁶⁹ This opens the platform operator to potential liability for deceptive advertising or unlawful or fraudulent business acts or practices of the participants.⁶⁷⁰

In Ottawa Transportation Network Companies (TNCs) are regulated to ensure the platform and drivers are subject to safety and consumer protection rules similar to those that apply to taxis including in relation to minimum insurance requirements, criminal and driving background checks on drivers, and vehicle inspections.⁶⁷¹

Approach 3: Platform has positive obligation for participants

Another regulatory response is analogous to liability imposed on Internet Service Providers where subscribers infringe laws (in particular copyright laws) when they have either induced the use of the platform for the infringing activity (intentional inducement liability) or have actual knowledge

668 Mark Duell, 'Uber drivers are 'breaking the law', says Boris: London Mayor claims taxis being hailed via the app is illegal because rules state only black cabs can be flagged down *Daily Mail* (online), 5 October 2015 www.dailymail.co.uk/news/article-3260239/Uber-drivers-breaking-law-says-Boris-London-Mayor-claims-taxis-hailed-app-ILLEGAL-rules-state-black-cabs-flagged-down.html; Hugo Gye, 'Airbnb 'landlords' face a huge tax bill: Families who let out their spare room could be hit after website hands over details to Irish taxman', *Daily Mail* (online), 11 August 2015 www.dailymail.co.uk/news/article-3193503/Airbnb-landlords-face-huge-tax-bill-crackdown-Ireland.html.

669 Decision adopting rules and regulations to protect public safety while allowing new entrants to the transportation industry (California) COM/MP1/avs Proposed Decision Agenda ID #12291 (Rev 4) Quasi-Legislative 9/19/2013 Item 39 at 13.

670 (*Unfair Competition Law*, Cal Business and Professions Code §§ 17200 et seq (1872))

671 City of Ottawa, 'Taxi and Limousine Regulations and Service Review: Case Studies' (Case Studies, City of Ottawa, 1 October 2015) 7-8.

of an infringement and have the ability to remove the infringement but fail to do so within a reasonable time.⁶⁷²

In the US, the Clinton Administration's Working Group on Intellectual Property released a White Paper concluding that because the platform operators were in a better position to police infringing users than copyright owners, the best policy would be to hold the platform provider liable.⁶⁷³ This approach has been embraced by academics who have indicated that platform operators, such as Pinterest, Facebook and eBay, may be liable for users' infringement through secondary liability, that is, vicarious liability (particularly in the case of ridesharing), contributory liability and intentional inducement liability.⁶⁷⁴

The UK has adopted a similar approach, drawing a distinction between those operators that actively participate versus those that passively participate in the industry.⁶⁷⁵

In the context of ridesharing and accommodation platforms, this could mean that platform operators such as Uber could be found to be actively engaged in the ridesharing industry because they provide the platform, the payment mechanism and conducts various background checks on its drivers before accepting them into the driving pool. In contrast an operator like Airbnb may not be liable for fraudulent listings on its site unless it has been made aware of them and has failed to remove the offending listing and/or supplier from its platform. Irrespective of which analysis is accepted, platform operators may accept some level of liability for their suppliers' conduct, particularly in the case of personal injury or property damage. For example, Airbnb provides Host Protection Insurance against liability claims up to \$USD1 million⁶⁷⁶ and Uber has public liability insurance that covers all Uber drivers for damage to third parties.⁶⁷⁷ Risk of injury and property damage are issues being considered by local and state government in the decision whether to enact laws to regulate.⁶⁷⁸

4.6.3.2 Consumer-to-consumer transactions

The second major result of an increase in peer-to-peer transactions is the increase in consumer to consumer transactions. This raises the question of the concept of a 'consumer' should be revisited.

672 Contributory liability; See *Inwood Laboratories Inc v Ives Laboratories Inc* 456 US 842, 2182; *Metro-Goldwyn-Mayer Studios Inc v V Groser Ltd* 545 US 913.

673 Bruce A Lehman, 'Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (Report, Information Infrastructure Task Force, September 1995) 117 referred to in Comment, 'Internet Copyright Infringement Liability: Is an Online Access Provider More Like a Landlord or a Dance Hall Operator?' (197) 27 *Golden Gate University Law Review* 555, 599.

674 Susanna Monseau, 'Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use' (2012) 12 *John Marshall Review of Intellectual Property Law* 70, 92

675 See, for example, *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch) (active); *Metropolitan International Schools v Designtecnica Corp* (passive).

676 Airbnb, *Host Protection Insurance* (2016) Airbnb.com <<https://www.airbnb.com.au/host-protection-insurance>>.

677 Uber, *Ridesharing with Uber: a safe, reliable and affordable transport option* (1 November 2015) Uber Newsroom <https://newsroom.uber.com/australia/ridesharing-with-uber-a-safe-reliable-and-affordable-transport-option>.

678 See foreign examples: **UK**: Private Hire Vehicles (London) Act 1998; **US**: Decision adopting rules and regulations to protect public safety while allowing new entrants to the transportation industry (California) COM/MP1/avs Proposed Decision Agenda ID #12291 (Rev 4) Quasi-Legislative 9/19/2013 Item 39; Residential Unit Conversion Ordinance, 41A San Fran Admin C ss 41A.1-41A.8 (American Legal Publishing Corporation, 2016); **Canada**: Passenger Transportation Act SBC 2004 ch 39; Sharing Economy Bill 2015 RSO; City of Vancouver Zoning & Development By Laws — By Law 10.21.6.

- (1) Often a person who supplies goods or services or shares goods or services via a peer to peer platform is a person not engaged in a business or other commercial activity. Is the supply or sharing of their existing asset (car or house) conduct in trade or commerce? This is particularly important to the application of statutory guarantees and the unfair practice provisions of the ACL.
- (2) If a consumer (under the current definition) purchases goods which are then 'shared', 'used', 'sold' to another person, does that person fall within the exception to the definition of 're-supply' in the ACL? If a consumer makes their car available for rent via a peer to peer car sharing platform, is that a 'lease or hire' of the vehicle within the definition of 're-supply'? This would exclude the statutory guarantee of acceptable quality from applying to the owners contract of purchase for the vehicle.

The issue is raised by commentators due to the increase in these types of transactions and the inability of consumers transacting on the internet to distinguish between sales by traders and other consumers. No jurisdiction has embraced any regulatory extension of existing consumer protection regimes to C2C transactions in the context of the sharing economy. Although the ACL does not extend to activities that are not 'in trade or commerce', consumer-to-consumer transactions remain caught by the *Sale of Goods Act* both in Australia and in the UK, Canada and Singapore. The rationale for excluding consumer-to-consumer transactions in these jurisdictions is that peers have equal bargaining power and do not require the level of protection afforded by the ACL (and equivalent primary consumer protection regulations in foreign jurisdictions).⁶⁷⁹

4.6.4 Australia

The majority of ACL consumer protections apply only to those transactions that occur 'in trade or commerce'. This includes:

- misleading and deceptive conduct;
- statutory guarantees⁶⁸⁰;
- unfair practices (single pricing, referral selling, bait advertising,);
- unconscionable conduct;
- unfair terms.

This means that sellers conducting private sales via online auction platforms such as eBay, are not subject to the ACL regime as sales by private persons to others are not 'in trade or commerce.'⁶⁸¹ In each case this will depend upon the characteristics of the seller's activities. In the context of ride sharing and accommodation sharing platforms, if a person is regularly engaged in sharing assets for consideration it is likely that the activities will gain some commercial or business flavour. For example, a seller who earns an income from regular driving for Uber is likely to be acting in 'trade or commerce' whereas a 'one off' sale on Ebay may not be commercial in nature.

The primary difficulty for consumers is that it is difficult to distinguish between those sellers who are operating in 'trade or commerce' and those that are acting in their own capacity or as a hobby: the former being liable under the ACL and the latter escaping liability.

679 Christine Riefa, *The Legal Classification of Online Auctions: Towards a Safer Legal Framework* (Ashgate Publishing, 2015) 23.

680 Statutory guarantees as to title (s 51), undisturbed possession (s 52) apply to all consumer sales.

681 Matthew Webster, *Internet auctions, consumer protection and the Trade Practices Act*, FindLaw Australia www.findlaw.com.au/articles/1833/internet-auctions-consumer-protection-and-the-trad.aspx.

Consumer

The definition of ‘consumer’ in s 3 of the *Australian Consumer Law* means that a person will acquire goods as a consumer where:

- (1) the amount paid for the goods is not more than \$40,000; or
- (2) if greater than \$40,000, the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption,

provided that the goods are not acquired for the purpose of re-supplying them; or using them up or transforming them in trade or commerce in the course of a process of production; or in the course of repairing or treating other goods or fixtures on land.

The effect of this definition is that if the goods are valued at less than \$40,000, the buyer will be a consumer, even if the equipment is for business or commercial purposes, provided the goods are not for re-supply or use in a process of production or repair.

Trade or commerce

Generally the statutory guarantees apply to the supply of goods or services in trade or commerce. Trade or commerce is defined in s 2 of the *Australian Consumer Law* to mean trade or commerce within Australia or between Australia and places outside Australia and includes any business or professional activity. The phrase is generally given a wide meaning and applies to activity that is of a business or commercial nature.⁶⁸² According to the existing authorities, a person will supply goods in trade or commerce where a person supplies goods in the course of any business or commercial transaction, even though the person is not in the business of supplying those or any other goods.⁶⁸³ This represents a significant change from the position under the implied warranties imposed by the *Trade Practices Act 1974*, which applied if goods were supplied to a consumer in the ‘course of a business’ carried on by the supplier. The use of ‘trade or commerce’ demonstrates an intention to broaden the scope of the guarantees.

The supply of goods or services by a business will fall within the concept of trade or commerce irrespective of whether it is online or through other means. The difficulty with the restriction to supplies in trade or commerce is that despite the relatively wide interpretation given by the courts a supply of goods or service by an individual, who is not carrying on any business, will not be subject to statutory guarantees. It is clear in Australia⁶⁸⁴ that private sales of goods, services or real property are not considered to be ‘in trade or commerce’ unless they form ‘part of a scheme or transaction engaged in for profit and the characteristics of the parties indicate the activities are commercial rather than personal in nature.

The increased use of peer to peer platforms mean that more consumer to consumer transactions are taking place that may fall outside of the statutory guarantee regime. It appears that Uber drivers generally and Airbnb hosts that rent rooms or dwellings for a number of occasions each year, are likely to be engaged in activities for profit that are commercial rather than personal in nature. If that is the case, then both the Uber drivers and the Airbnb hosts may be considered to be ‘engaged in trade or commerce’ and be caught by the relevant consumer protection provisions contained in the ACL. At what point a person’s activities move from personal to commercial in

682 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Bond Corporation Pty Ltd v Theiss Contractors Pty Ltd* (1987) 14 FCR 215.

683 This should be contrasted with the statement in *Consumer Guarantees — A guide for business and legal practitioners* www.consumerlaw.gov.au/content/the_ACL/downloads/consumer_guarantees_guide.pdf, 8 that ‘Trade or commerce means in the course of a supplier’s or manufacturer’s business or professional activity, including a non-profit business or activity’.

684 See most recently *Williams v Pisano* [2015] NSWCA 177.

nature is not a straightforward question and potentially creates uncertainty in the application of existing consumer protection provisions within peer to peer transaction. For example, if an Uber driver who drives as part of his/her main occupation picks up passengers in-transit between meetings, is this an activity which is commercial or merely sharing their empty vehicle with another person?

4.6.5 Other jurisdictions

There is little guidance to be obtained from the reviewed jurisdictions as the majority exclude consumer-to-consumer transactions from their primary consumer protection legislation and instead regulate those transactions under their Sale of Goods legislation.⁶⁸⁵ This provides some protection to consumers in relation to product quality, but these provisions can be excluded by the terms of the contract. The rationale for excluding consumer-to-consumer transactions from the scope of primary consumer protection legislation is that ‘businesses or consumers buying from peers are assumed to contract with equality of bargaining power’.⁶⁸⁶

Some State-based consumer protection laws in the US have been interpreted as applying to individual eBay sellers. One such case is that of *Lyle Real v Radir Wheels, Inc and Richard Conklin*⁶⁸⁷ in which the defendant was found liable for misrepresentation under section 56:8-2 of the New Jersey Consumer Fraud Act⁶⁸⁸ (CFA) when he sold a vintage car described as being in ‘good condition’ on eBay, but that was later discovered to have a number of significant defects that were not detailed in the relevant listing. In reaching that decision the Supreme Court of New Jersey noted the broad protective purpose of the CFA to ‘address sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind or selling or advertising practices.’ This approach has not yet been consistently followed in similar cases in other US States.⁶⁸⁹

One commentator has suggested the solution is to require platform operators to establish different websites for business and consumer sellers. The ‘business only’ website could then provide consumers with confidence that their transactions will be governed by the relevant consumer protection laws and the ‘consumer/individual only’ website would make it clear that only the relevant Sale of Goods Act provisions apply.⁶⁹⁰

685 See, the broad definitions of ‘buyer’ and ‘seller’ adopted in *Sale of Goods Act 1979* (UK) c 54; *Sale of Goods Act RSO 1990* c S-I; *Sale of Goods Act 1996* RSBC c 410; *Sale of Goods Act* (Singapore cap 393, 1999 rev ed).

686 Christine Riefa, *The Legal Classification of Online Auctions: Towards a Safer Legal Framework* (Ashgate Publishing, 2015) 23.

687 198 NJ 511, 969 A 2d 1069.

688 *Consumer Fraud Act* 56 NJ Stat Ann (Thomson West 2015).

689 *Smith v Marquross* 276 SW 3d 926, 927-28 (Tenn. Ct App 2008) (affirming the liability of the defendant, an individual seller, for breach of contract and failing to articulate the reason for which the plaintiff’s claim under the Tennessee Consumer Protection Act failed); *Evans v Matlock* No M2001-02631-COA-R9-CV, 2002 Tenn App LEXIS 906 at 1-2 (Tenn Ct App, 23 December 2002) (addressing only that eBay arbitration clause was inapplicable to consumers but failing to address plaintiff’s substantive claim that individual sellers were liable under the Tennessee Consumer Protection Act).

690 Fidelma White, ‘Selling on-line: Business compliance and consumer protection’ (2004-2005) 5 *Hibernian Law Journal* 223, 226.

4.6.6 Increased self-regulation

Online auction platforms, such as eBay have already attempted to implement a self-regulatory regime by encouraging business sellers to set up stores (<http://pages.ebay.com/help/account/how-to-register-business.html>). eBay provides guidance to sellers regarding whether they should register as a business or an individual and, in doing so, indicates that if a seller intends to sell items that they have bought to resell, sell items they have produced themselves, or sell a large amount of items on a regular basis then they should register as a business.⁶⁹¹ eBay also provides an easy process for upgrading an individual account to a business account (although it does not appear to enforce these guidelines against individuals who should be registered as businesses).⁶⁹²

4.6.7 Comparison

There is general acknowledgment by regulators in all jurisdictions that the rapid growth of the sharing economy through peer to peer platforms presents different challenges for existing regulatory models including:

- (1) Should regulation treat all suppliers of goods or services, whether a large corporation or an inexperienced individual, in the same way? Does the variation in the market between sharing of assets by individuals via peer to peer platforms and business to business transactions⁶⁹³ mean there is too much complexity for a one size fits all regulatory model?
- (2) Does the increase in 'sharing' of goods and services require a reconsideration of the application of guarantees/warranties of quality and fitness for purpose to all transactions similar to the *Sale of Goods Acts*?
- (3) What liability or responsibilities should be imposed on platform operators across a spectrum of business models. Regulators are considering the (i) suitability of existing liability models and (ii) any benefits to the sharing economy (trust and confidence of consumers) of imposing responsibility for the conduct of users; (iii) the appropriate extent of the responsibility. On particular concerns is whether requirements to remove infringing material or take action in the case of fake listing or fraud should be placed on platform operators.
- (4) Whether existing regulatory models are adaptable and agile so as to apply following advances in technology which may allow businesses to operate outside of traditional business models and in many cases disrupt those models. Significant advances have been made in particular in the areas of distributed ledger technology (Blockchain), Smart Contracts and cognitive digital technology (Artificial Intelligence). Questions are already being raised about whether regulatory models that rely on legal rules to govern behaviour and impose obligations on business entities will need to be supplemented by rules that govern technical code.⁶⁹⁴ A further issue is whether a combination of statutory laws and industry based codes or platform rules will be required. The speed of technical changes means that statutory regulation may not be sufficiently responsive and may need to be cast broadly and supplemented with codes, guidelines or rules promulgated by regulators, industry or individual operators.

691 eBay, *How to register as a business* eBay.com <http://pages.ebay.com/help/account/how-to-register-business.htm>.

692 eBay, *Changing your Account Type* eBay.com <http://pages.ebay.com/help/account/how-to-register-business.html>.

693 Some examples are BrandGathering (online platform that connects businesses to undertake joint marketing and branding activities helping to save money) and Nimber (sharing of logistics).

694 Refer to UK Government Office for Science report: *Distributed Ledger Technology: beyond block chain* (available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/492972/gs-16-1-distributed-ledger-technology.pdf).