



Submission to Australian Consumer Law Review Issues Paper

This submission was prepared by Professor Stephen Corones, Professor Sharon Christensen and Nicola Howell on behalf of the Commercial and Property Law Research Centre (CPLRC) at QUT.

The CPLRC is a specialist network of researchers with a vision to reform legal and regulatory frameworks in the commercial and property law sector through high-impact applied research.

The submission addresses particular issues and questions from the Issues Paper related to Lemon Laws, transactions involving digital content and the sharing economy, and financial services.

The numbering of questions from the Issues Paper has been adopted.

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Lemon Laws – Professor Stephen Corones

12. Does the ACL need a ‘lemon’ laws provision and, if so, what should it cover?

In relation to ‘lemon’ motor vehicles, information asymmetry, that is where one party to the transaction knows more than the other party, is a source of market failure. Motor vehicles have become increasingly computerised and complex over recent decades. Manufacturers are not obliged to share the technical information, software codes, or other information they might have concerning common problems with particular models or batches of vehicle. Information asymmetry makes it difficult for consumers to verify the quality of the new car they are purchasing, or bargain for terms that are more protective of their rights.

In 2015-16, *Choice* conducted a survey of 1,505 consumers who purchased a new motor vehicle in the five year period January 2011 to January 2016.¹ Some 66 per cent of those surveyed reported that they had experienced problems with their cars in the first five years of ownership. One of the most common problems reported was in-car technology. According to *Choice’s* research, “...on average car owners spent \$858 and 31 hours trying to resolve their problems”.

A consumer’s right to have a motor vehicle repaired is not a satisfactory remedy in the case of a ‘lemon’ motor vehicle because of the uncertainty and frustration suffered by a consumer who must continually deal with recurring faults. For many consumers, the purchase of a new motor vehicle is their most expensive outlay after their principal place of residence. Many consumers depend on a motor vehicle for transportation to and from their place of work, or use a motor vehicle in

¹ See *Choice* (April 2016), p28.



association with their work. Consumer detriment in the case of 'lemons' consists of emotional and financial stress, which can have a detrimental impact on their well-being and state of mind.

Manufacturers and suppliers of motor vehicles are obligated under the ACL to meet statutory minimum standards in relation to them. For example, the guarantee of acceptable quality in s 54 of the ACL is not a guarantee that the motor vehicle supplied will be perfect, and absolutely free from defects. Rather, it is a guarantee that the motor vehicle supplied is of a quality that a reasonable consumer would consider acceptable, taking into account the circumstances of the particular transaction. In particular, the vehicle must be:

- fit for all the purposes for which vehicles of that kind are commonly supplied;
- acceptable in appearance and finish;
- free from defects;
- safe; and
- durable.

The test takes into account:

- the nature of the motor vehicle;
- the price of the motor vehicle;
- representations made about the vehicle (for example, in any advertising, on the manufacturer's or dealer's website or in the vehicle manual);
- anything the dealer told the consumer about the vehicle before purchase, and
- any other relevant facts, such as the way the consumer has driven or used the vehicle.

The flexibility of the reasonableness test in the guarantee of acceptable quality is intended to protect consumers as well manufacturers and suppliers: to protect consumers while not imposing unrealistic standards on manufacturers and suppliers.

Where there is a failure to comply with the guarantee of acceptable quality, the consumer has a choice. The consumer can seek recourse against the manufacturer, or pursue the person who supplied the goods to the consumer (typically, a retailer or dealer). The consumer's rights against the supplier are more extensive than they are against the manufacturer. The consumer can only recover his or her losses (monetary damages) from the manufacturer, whereas the consumer has specific repair, replacement and refund rights against the supplier.

The consumer's specific rights and remedies against the supplier depend on whether the fault is major, or not major. Section 259 (3) of the ACL provides that if the fault is *major* and cannot be remedied within a reasonable time, the **consumer** can either:



- reject the goods (in which case the supplier would have to collect the goods at the supplier's expense if the goods cannot be returned or removed without significant cost to the consumer), and, at the consumer's election, obtain a refund or have the goods replaced at the supplier's cost; or
- keep the goods and ask for compensation to make up the difference in value caused by the failure.
- ACL, s 259 (2) provides if the failure to comply with a guarantee is **not major** and the goods can be fixed, the **supplier** may choose between either:
 - repairing the goods within a reasonable time at the supplier's cost; or
 - replacing the goods; or
 - giving a refund.

ACL, s 259 (6) provides in all cases (whether the failure is major or not major) the consumer has in addition, a right to sue the supplier for any reasonably foreseeable consequential loss or damage.

The existing consumer guarantees regime is a 'lemon law' in the sense that the dealer is not entitled to make any number of attempts to repair a defective motor vehicle. Section 259 (2)(b) provides that if the supplier refuses or fails to remedy the failure **within a reasonable time** the consumer may choose between:

- having the goods repaired by a third party and recover the costs incurred from the supplier, or
- notify the supplier that the consumer rejects the goods, and of the ground or grounds for the rejection.

Where a consumer exercises his or her rights against the supplier, the supplier will have a right of indemnity against the manufacturer. Sections 271(1) and (2) of the ACL provide that the manufacturer is liable to indemnify the supplier in respect of the liability of the supplier to a consumer if the supplier is liable for a failure of the goods to comply with the guarantee of acceptable quality in s 54 of the ACL. Section 274(3) of the ACL states that the manufacturer's liability to indemnify the supplier is the same as if it had arisen under a contract of indemnity made between the supplier and the manufacturer. This means that the manufacturer must hold the supplier harmless in relation to the failure to comply with the consumer guarantee.

The consumer's specific rights against the manufacturer depend on whether the manufacturer has agreed to provide an express warranty. Manufacturers generally prefer to repair or replace faulty goods rather than pay damages. Section 271(6) provides that where the manufacturer provides an express warranty specifying that they will remedy a fault by repair or replacement of the goods, they must remedy the failure **within a reasonable time**. Where the manufacturer has not provided an express warranty, or fails to remedy the failure within a reasonable time, the consumer may recover damages against the manufacturer in accordance with s 272(1)(a) of the ACL, for any reduction in



value of the goods resulting from the failure to comply with the guarantee. In addition, the consumer will be able to recover any reasonably foreseeable consequential loss or damage against the manufacturer pursuant to s 272(1)(b) of the ACL.

Lack of clarity under the existing law

The consumer guarantees law contains a number complexities and uncertainties that limit its usefulness as a consumer protection measure. These include:

- A particular difficulty with the definition of “acceptable quality” in ACL, s 54 is that a motor vehicle must be **durable**. There is no definition of ‘durable’. Durability is determined by how long a ‘reasonable’ consumer would expect a motor vehicle to last taking into account the price paid by the consumer and any representations that were made at the time of purchase. It is unclear how long a motor vehicle should last and continue to perform well and not break down.
- The onus is on the consumer to prove that the motor vehicle was not of **acceptable quality** and that it had a defect at the time it was supplied (a latent defect).
- If the defect is **not major** the supplier is entitled to remedy the defect, but there is no guidance as what constitutes a **reasonable period** for allowing the supplier to remedy the defect. It is also unclear how many times the dealer is entitled to attempt to repair the vehicle and what constitutes a ‘reasonable’ time to effect the repairs.
- A failure in a motor vehicle is **major** if a reasonable consumer who knew the full extent of the problem would not have purchased the vehicle. The supplier or manufacturer who does not want to give a refund is likely to dispute a claim by the consumer that it cannot be remedied and is a major failure.
- Where it is a major failure the consumer may nevertheless lose the right to a refund if the rejection period has passed. The provisions regarding **loss of right to reject** the motor vehicle and ascertaining the rejection period are complex.

Reform to Reduce Consumer Detriment

There are a number of possible reforms to deal with the issues identified. First, a consumer should be entitled to a remedy for a **deemed major failure** of the guarantee of acceptable quality if they satisfy threshold criteria.

As part of the Victorian Lemon Law Inquiry, CAV proposed that Pt 2A of the FTA (Vic) be amended to create a deemed breach of the merchantable quality implied term as follows:

...a deemed breach where the purchaser identifies defect(s) that substantially impair the vehicle's use, value or safety within a reasonable time after purchase and the dealer and the manufacturer/importer are unable to repair the defect (s) within a reasonable time.

However, this leaves open a number of questions. What does "substantially impair" mean? What is a "reasonable time" after purchase? What is a "reasonable time" in which to have the defect(s) repaired? Uncertainties under the current consumer guarantees regime should be clarified.

What is required a set criteria or an objective standard by which the faults in a motor vehicle can be determined to be a "major" failure, e.g., a deemed major failure if fault cannot be repaired after **three attempts**. A reasonable period to allow the dealer to attempt to remedy the defect in the motor vehicle should be specified, such as **three months**.

25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?

Generally, the sums involved in relation to motor vehicles that are not of acceptable quality will not warrant the time and expense involved in bringing proceedings in the superior courts in Australia. Most motor vehicle disputes will fall into the category of 'minor civil disputes'. For example, QCAT has jurisdiction to hear to hear minor civil disputes under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). Sch 3 (definition of 'minor civil dispute' and 'prescribed amount')

Minor civil dispute means—

(b) a claim arising out of a contract between a consumer and trader, or a contract between 2 or more traders, that is—

(i) for payment of money of a value not more than the prescribed amount; or

[...]

(iii) for performance of work of a value not more than the prescribed amount to rectify a defect in goods supplied or services provided; or

(iv) for return of goods of a value not more than the prescribed amount; or

(v) for a combination of any 2 or more claims mentioned in subparagraphs (i) to (iv) where the total value of the combined claim is not more than the prescribed amount; or

The *prescribed amount* means \$25,000.

No specific information is publicly available as to the exact number of motor vehicle disputes brought before tribunals. Claims concerning repairs or refunds for defects in motor vehicles are classified as 'minor civil disputes'. However, the relatively small number of reported cases strongly suggests that the tribunals are overly formal bodies that are no longer a low-cost alternative to the courts not effective. The following four barriers are faced by consumers bringing proceedings in the tribunals:



- evidentiary issues;
- consumer risk as to a cost award;
- period of time taken for a decision to be rendered; and
- low monetary limits.

Evidentiary Issues

The first barrier faced by consumers seeking a refund in court and tribunal proceedings is the evidentiary burden they must satisfy in proving that a motor vehicle was not of acceptable quality and that the failure to comply with the consumer guarantee amounts to a 'major failure'.

Courts and tribunals determine rights on the basis of the facts and evidence presented by the parties. They provide a process for the resolution of disputes in relation to defective motor vehicles, but the process requires a hearing of each party's evidence and submissions. They are not investigative bodies. The time at which goods are to be of acceptable quality is the time at which the goods are supplied to the consumer. The onus is on the consumer to prove that there existed an inherent defect in the vehicle that was present at the time of supply and that it was the cause of the damage suffered by the applicant. However, where a supplier contends that a defect arose after it was supplied from abnormal use or lack of maintenance by the consumer, the supplier bears the onus of proving that fact.

In relation to motor vehicle disputes State civil and administrative tribunals operate on the basis that the applicant bears the onus of proof according to the civil standard, the balance of probabilities. If the applicant fails to adduce sufficient evidence to allow the tribunal to conclude that there has been a major failure to comply a statutory guarantee, the tribunal has no choice but to dismiss the application. Both parties are likely to give sworn evidence that is contradictory. The applicant may present evidence as the general nature of the problem and be accepted by the tribunal to be an honest witness. However, honesty is not enough. In order to obtain a refund the applicant must present *expert opinion evidence* that will persuade the tribunal that there is an inherent defect in the vehicle that was present at the time of supply; that it was the cause of the damage suffered; and that the defect constitutes a major failure to comply with a consumer guarantee.

The high cost of obtaining inspections and expert mechanical reports may deter some applicants from doing so. Motor vehicles are difficult and expensive to diagnose. Thus, a consumer may be reluctant to pay, especially where the purchase price of a vehicle is relatively low. In *Ross Hereford v Automobile Direct Wholesale Pty Ltd* the applicant purchased a used 2006 Honda Legend from the Respondent in 2014. The applicant drove the vehicle from Sydney to the north coast of NSW where he lived. On the drive, the applicant noticed noises emanating from the motor. Two days after purchase, the applicant took the vehicle to an independent mechanic. The vehicle was diagnosed 'as having a faulty timing belt tensioner, and a water leak from the cylinder heads'. A further \$1,900 was



required to determine the nature and extent of the damage to the engine. The applicant was not willing to pay this amount and therefore the precise extent of the damage was not known. As a result of the lack of evidence the applicant presented, the tribunal was not satisfied that the damage to the engine amounted to a major failure.

In *Freestone Auto Sales Pty Ltd v Musulin*, Ms Musulin purchased a used car for \$31,500. It was discovered that the vehicle had previously suffered major mechanical damage and was a “repaired write-off”. The dealer had purchased it at an insurance auction and subsequently replaced the engine. In 2012, the vehicle was leaking oil, and had difficulty starting. As a result, the applicant undertook investigations to determine the cause of the problems. The cost of the further inspections was \$2000 - \$3000. The New South Wales Court of Appeal noted it was arguable that the problems with the vehicle ‘were present, although latent, at the time of sale’ but the evidence was not sufficient to find that there was a failure to comply with the guarantee of acceptable quality.

Even if the applicant obtains an expert’s report there is no guarantee that the expert’s report will be admissible. In order to qualify as an expert the person must have ‘specialised knowledge’ by reason of ‘training, study or experience’. If the expert’s report is admissible, it may not be accepted by the tribunal.

Car manufacturers will generally attempt to repair a defect in a new motor vehicle if it is within the warranty period. They may even make multiple attempts at repair. They may be prepared to replace the vehicle if these attempts are unsuccessful, but they will resist providing a refund. To get a refund a consumer must go to court and prove that the defect constitutes a major failure to comply a consumer guarantee under the ACL.

The onus of proof in court proceedings rests with the consumer. The consumer must satisfy the civil standard of proof, that is, on the balance of probabilities. In order to succeed, the consumer must be able to diagnose the cause of the fault and prove that it was present at the time the motor vehicle was supplied. The consumer must also prove that the defect did not arise from abnormal use by the consumer, or from normal wear and tear. Furthermore, the consumer must prove that the defect constitutes a major failure to comply with a consumer guarantee. What constitutes a major failure is defined in the ACL in terms that are unclear.

Motor vehicles have become increasingly computerised and complex over recent decades. This means that diagnosing the cause of a fault, without access to the relevant diagnostic equipment, is an onerous and expensive task. Car manufacturers and dealers are not obliged to share with consumers this technical information, the software codes, and the other information they might have concerning common problems with particular models or batches of vehicle.

In litigation, the parties are adversaries. Both parties are likely to give sworn evidence that is contradictory. A consumer may present evidence as to the general nature of the problem. The consumer may be accepted by the court as being an honest witness. However, honesty is not enough. In order to obtain a refund the consumer must present expert opinion evidence that will



persuade the court that there was an inherent defect in the vehicle and that it was present at the time of supply.

If the consumer fails to adduce sufficient evidence to allow the court to conclude that there has been a major failure to comply with a consumer guarantee, the court has no choice but to dismiss the application. The court will not conduct its own independent investigation as to the cause of the defect.

How serious is the onus of proof problem in relation to defective motor vehicles? Since the ACL took effect on the first of January 2011, consumers have failed to satisfy the onus of proof in the majority of cases involving motor vehicles. For example, in New South Wales, there have been about 20 reported cases involving defective motor vehicles, 15 of which have been dismissed for failure to satisfy the onus of proof.²

Consumer risk as to an award of costs

The second barrier faced by consumers in court and tribunal proceedings is the risk that they may be exposed to an adverse award of costs if their application is dismissed. In superior courts, the usual rule is that 'costs follow the event' and an unsuccessful party is generally required to pay the costs of the opponent. Griggs, Freilich and Messel point out, the manufacturer possesses the upper-hand in circumstances where the consumer is seeking a refund rather than a replacement vehicle.³

Assume the manufacturer offers to provide a replacement vehicle and the offer is rejected by the consumer. If the consumer's claim is successful the consumer would be ordered to return of the vehicle and obtain a refund of the purchase price under s 259 of the ACL. In such circumstances, each party would usually bear their own costs. However, if the consumer's claim is unsuccessful the consumer may be exposed to a costs order to cover the manufacturer's costs.

The common law also provides a basis for this through "without prejudice" letters containing an offer to settle, referred to as Calderbank offers. Such letters can later be adduced in evidence at the costs stage of the proceedings to inform the court as to orders that should be made in relation to costs. Section 105 of the *QCAT Act 2009* (Qld) provides:

² See *Salim Investments Pty Ltd v MCM Autos Pty Ltd* [2015] NSWCATCD 115 (14 October 2015), [44], [55]–[56] (General Member Charles); *Freestone Auto Sales Pty Ltd v Musulin* [2015] NSWCA 160, [31]–[63] (Simpson J); *Hereford v Automobile Direct Wholesale Pty Ltd* [2015] NSWCATCD 58 (10 April 2015) [48] (General Member Sarginson); *Smith v Family Auto Group Pty Ltd* [2014] NSWCATCD 244 (19 December 2014) [34]–[35] (General Member Sarginson); *Mbogua v Mildren Prestige* [2013] NSWCTTT 293 (21 June 2013) [16]–[19] (Member Levingston); *Wise v Tapace Pty Ltd* [2013] NSWCTTT 309 [41] (Member Sarginson); *Minaway v Ford Motor Company of Australia Ltd* [2013] NSWCTTT 327 (4 July 2013) [28] (Member Eftimiou); *Brown v PPT Investments Pty Ltd* [2013] NSWCTTT 542 (31 October 2013) [21]–[22] (Member Ross); *Yaldwyn v Australian Warranty Network Pty Ltd* [2013] NSWCTTT 642 (16 December 2013) [15] (Member Holwell); *Cosgriff v Hyundai Motor Company of Australia Pty Ltd* [2012] NSWCTTT 51 (6 February 2012) [15] (Senior Member Durie); *Baxter v Mazda Australia Pty Ltd* [2012] NSWCTTT 251 (5 July 2010) [64] (Member O'Connor); *Sankari v GM Holden Ltd* [2011] NSWCTTT 186 (5 May 2011); *Alley v Quayside* [2011] NSWCTTT 228 (2 June 2011); *Hogan v PTH Pty Ltd* [2011] NSWCTTT 269 (27 June 2011); *Neang v Duc Nguyen Pty Ltd* [2011] NSWCTTT 363 (11 August 2011).

³ L Griggs, A Freilich and N Messel, Consumer guarantees - lessons to be learnt from afar (2015) 23 *Australian Journal of Competition and Consumer Law* 36, 41.



The rules may authorise the tribunal to award costs in other circumstances, including, for example, the payment of costs in a proceeding if an offer to settle the dispute the subject of the proceeding has been made but not accepted.

Time taken to resolve disputes

The third barrier faced by consumers in tribunal and court proceedings is the period of time taken for a decision to be rendered. Tribunals are intended to provide a process by which small claims can be dealt with quickly and efficiently in a short time frame. However, most tribunals attempt to resolve consumer dispute through mediation prior to the matter going to hearing. The period of time taken for a decision to be rendered varies. Some decisions take several months, however the period of time in others is significantly longer. The occurrence of a compulsory conference may extend the time taken for the conclusion of a dispute. Under the current Tribunal procedure a consumer is only likely to obtain adequate compensation after a lengthy and arduous process.

The Consumer Action Law Centre, in its submission to Consumer Affairs Victoria, in relation to the Victorian Lemon Law Inquiry stated:

Consumer Action does not support a mandatory requirement that consumers attend ADR before filing an application in VCAT. Requiring consumers to attend ADR before initiating VCAT action will cause delay in consumer claims being finalised, and attrition of claims. In Consumer Action's experience, consumers who have complaints about goods or services are often 'shunted' between a trader, advice service (such as CAV) and VCAT. This commonly results them giving up, with the consumer bearing the costs of defect goods or poor service. The goal for any dispute resolution process should be ensure that it is as seamless as possible from a consumer's perspective. Requiring pre-filing mediation simply imposes another hurdle in the path of consumers who wish to have a lemon vehicle replaced or the purchase price refunded. Making an application in VCAT is difficult enough, and will cause attrition of consumers who do not have the skills to make an application or who are overwhelmed by the process. Requiring mandatory pre-filing ADR will cause further attrition of consumers who are overwhelmed by the greater time and complexity this will inevitably introduce. Additionally, in Consumer Action's experience, a motor car trader that refuses to make a refund or replace a vehicle is unlikely to seriously negotiate until VCAT action has been initiated. We believe that introducing a requirement that consumers attend ADR as a condition precedent to filing a VCAT application will lead to valid cases not being pursued.

A case that illustrates the protracted nature of tribunal proceedings is *Rae v Volkswagen Group Australia Pty Ltd*. The case concerned a dispute about repairs to a new motor vehicle. The tribunal observed:

...it has been a protracted proceeding over some 2 1/2 years from October 2010 to April 2013 along the way accruing numerous intermediate steps, orders and directions as follows:

- Mediation December 2010.



- Compulsory conference February 2011.
- Directions December 2010, January 2011, February 2011, May 2011 (2) August 2011, September 2011, March 2012, July 2012.
- Non-compliance application February 2011.
- Application to dismiss April 2011.
- Tribunal orders with detailed reasons 7 February 2011 and 18 November 2011.
- Respondent's application to strike out February 2013.
- Listed for hearing 12, 13 and 14 March 2012 and 8 and 9 April 2013

In *Burton v Chad One Pty Ltd*, Mr Burton purchased a 1998 Nissan Patrol on 19 October 2012 the car initially experienced overheating on 28 January 2013. Substantial damage was discovered upon dismantling the engine. An action was commenced in the Consumer Trader and Tenancy Tribunal on 26 February 2013. The decision of the CTTT was appealed to the District Court of New South Wales. The district court concluded that the CTTT erred in finding that a *Motor Dealers Act 1974 (NSW)* form 8 excluded the application of consumer guarantees contained within the ACL. The district court remitted the matter to the NSW Civil and Administrative Tribunal. The matter was decided, and subsequently appealed again. The appeal was allowed on grounds that expert evidence was unwarrantedly rejected. As a result, the matter is to be remitted again for a further hearing.

Similarly, in *Freestone Auto Sales Pty Ltd v Musulin*, Ms Musulin purchased a used car in 2012. The vehicle was leaking oil, and had difficulty starting. An action was commenced in the Consumer Trader and Tenancy Tribunal on 1 October 2012. On 29 July 2013 the Tribunal delivered judgment dismissing Ms Mussulin's application. The decision of the CTTT was appealed to the District Court of New South Wales. A further appeal to the New South Wales Court of Appeal was decided on 11 June 2015.

Low monetary limits

The fourth barrier faced by consumers in some tribunal proceedings is that the monetary limits may pose a bar to many consumers seeking remedies. The upper limit for most tribunals is between \$25,000 and \$40,000. QCAT has jurisdiction over matters that are minor civil disputes. Minor civil disputes concern amounts up to the prescribed amount. The prescribed amount is \$25,000. At least two decisions have had the amount to be awarded reduced to reflect the statutory limit of QCAT and NSWCATCD respectively. A large percentage of cars cannot be purchased for less than \$25,000. As a result, the limit on amounts to be awarded may force consumers to seek remedies in courts of law, thereby exposing consumers to higher costs of filing claims and the requirement to seek legal representation to ensure that their claim will proceed successfully.

For example, in *Cicchini v Barbizon Pty Ltd* the applicant purchased a new or dealer demonstrator vehicle (Alfa Romeo) that had numerous problems. The vehicle was a 2008 model purchased in 2009



for \$41,050. The dealer dealt with most problems identified by the applicant, the most serious of which required a replacement transmission. The applicant's choice to reduce the amount claimed from \$41,050 (the price of the car) to the monetary limit of \$25,000.

Similarly, in *Taskovski v Otomobile Shoppe Pty Ltd* the applicant purchased a second hand vehicle for \$39,186. Upon collecting the vehicle and driving out of the Respondent's car yard, the applicant noticed several defects and immediately returned the car and demanded a refund. Ultimately, the applicant's claim was allowed. However, the applicant claimed \$52,044, exceeding the tribunal's limit of \$40,000. Accordingly, the sum awarded was reduced from \$52,044 to \$40,000.

The New Zealand Motor Vehicle Disputes Tribunal has jurisdiction to determine claims where one party to the dispute is a motor vehicle trader, and the sum of the claim does not exceed \$100,000. This limit is more appropriate in the context of motor vehicles than the current limits on tribunals in Australia.

The provision of an appropriate dispute resolution mechanism is an integral part of any consumer protection regime. Tribunals lack the specialised knowledge to resolve motor vehicle disputes, and consumers, who bear the costly evidentiary onus of proving that the defect was present at the time of supply and was not attributable to normal wear and tear. The way these issues are dealt with in the United States and Canada will be considered briefly in this part.

27. Are there any overseas initiatives that could be adopted in Australia?

The provision of an appropriate dispute resolution mechanism is an integral part of any consumer protection regime. Tribunals lack the specialised knowledge to resolve motor vehicle disputes, and consumers, bear the costly evidentiary onus of proving that the defect was present at the time of supply and was not attributable to normal wear and tear. The way these difficulties are dealt with in the United States of America ('US') and Canada will be considered briefly.

United States

In the United States of America there are state automobile lemon laws in all 50 states. At a Federal level, the Magnuson – Warranty Act 1975 provides protection for consumers who purchase cars that are not free of defects. At a State level the laws provided for the arbitration of disputes and mandatory buy back by manufacturers if the arbitrator finds in favour of the consumer. The US motor vehicle lemon laws are the subject of Chapter 3 of the Victorian Lemon Law Report. There are three main systems of arbitrating consumer disputes regarding lemons. The first and most common is administered by the Council for Better Business Bureaus. Another system is administered by the National Centre for Dispute Resolution. Further, separate systems exist in some states. In California, the Department of Consumer Affairs regulates arbitration programs. The Council for Better Business Bureaus is a national system, with state offices (Better Business Bureaus, BBB). BBB AUTO LINE is a system established by BBB to settle automotive warranty claims. It does not charge any fee to consumers. Funding is provided in advance by participating manufacturers in order to maintain



impartiality. Neutrality is said to be maintained as: BBB's value to the business community is based on our marketplace neutrality. Its purpose is not to act as an advocate for businesses or consumers but to act as a mutually trusted intermediary to resolve disputes and provide information to assist consumers in making wise buying decisions.

Ms Donna Stetslow provides a short summary of the Better Business Bureau Auto Line State Lemon Law arbitration procedure that exists for resolving disputes under US lemon laws and the legal framework supporting vehicle warranty arbitration through the program:

Initially, the arbitrator must consider whether the vehicle is eligible for relief under the lemon law. Most state lemon laws limit consumers' rights by the time and/or mileage on the new or newly leased vehicle, for example, within the first 12,000 miles or within a specified period of time.

Next, a vehicle problem considered initially eligible under most state lemon laws must qualify as a "nonconformity." A nonconformity is commonly defined under lemon law statutes as a defect or condition that "substantially impairs" the "use, value or safety" of the vehicle." Thus, an arbitrator must consider "substantial impairment" as a result of a defect or condition. It should be noted that substantial impairment is not limited to mechanical defects or drivability; arbitrators are trained to understand that sometimes cosmetic defects or problems with interior accessories can be found substantial enough to constitute a nonconformity.

If a nonconformity is found to exist, the manufacturer (through a dealer) must have been afforded "a reasonable number of attempts" to repair the nonconformity and not have done so. The Pennsylvania lemon law creates a presumption of reasonable number of attempts if:

1. "the same nonconformity has been subject to repair three times by the manufacturer, its agents or authorized dealers and the nonconformity still exists"; or
2. "the vehicle is out-of-service by reason of any nonconformity for a cumulative total of 30 or more calendar days."

Finally, if the manufacturer can establish that the nonconformity is the result of the consumer's abuse, neglect, or modification of the vehicle, the consumer is not entitled to remedies under state lemon laws".⁴

⁴ Donna Stetslow, "My Car is a Lemon! Use of the Better Business Bureau's Auto Line Program as a Pedagogical Model of ADR" (2010) 27 (1) *Journal of Legal Studies Education* 105 at 114 (footnotes omitted).



Canada

The Canadian Motor Vehicle Arbitration Plan (CAMVAP) is "...a national dispute resolution program through which disputes between consumers and vehicle manufacturers - related to allegations of manufacturing defects or how the manufacturer is implementing the new vehicle warranty - can be resolved through binding arbitration." Most major manufacturers participate in the scheme. CAMVAP is available to owners and lessees of new and used vehicles. CAMVAP is voluntary, and consumers are entitled to choose between litigation or using CAMVAP.

If a consumer chooses CAMVAP they must meet the following eligibility requirements:

1. The consumer must be the 'registered Owner of [the] Vehicle when the dispute arose' or 'a single user Lessee under a lease agreement with a term of not less than 12 months and the Lessor has signed the Claim Form';
 - a. The consumer must continue to own or lease the vehicle throughout the arbitration.
2. The dispute with the manufacturer must be about 'allegations of a Current Defect in Vehicle Assembly or Materials specific to Your Vehicle as delivered by the Manufacturer to an Authorized Dealer'; The consumer must 'live in a Canadian province or territory'. The vehicle must have been originally purchased from a manufacturer authorised dealer in Canada;
3. The vehicle must primarily be used for personal or family use;
4. The vehicle must be from the current or four previous model years;
5. The vehicle must not have travelled more than 160,000km;
6. The manufacturer's dispute resolution process must have been followed; and
7. The consumer must have provided the dealer and manufacturer 'a reasonable amount of time and opportunity to resolve the problem'

According to CAMVAP Annual Report 2012-2013, in 2012 there were 203 arbitrated cases, 16 conciliated cases and 20 consent awards were issued. An additional 36 cases were withdrawn by the consumer and 5 cases were found to be ineligible for the program during the processing stages before arbitration.

CAMVAP aims for a dispute resolution time of 70 days. Consumers and manufacturers may call witnesses and give evidence. Evidence given at a hearing 'will be the most persuasive and determinative evidence.' It is given under oath or by affirmation. Arbitrator's may also inspect a vehicle, or order a technical inspection of the vehicle. This includes allowing an arbitrator to drive or operate the vehicle.

Consumers 'are not required to pay any costs relating to the arbitration' as all costs are fully paid by participating manufacturers. Consumers are still responsible for all costs incurred on their own, such as the cost of: (i) witnesses attending to give evidence on a consumer's behalf; (ii) legal fees; (iii) travel and accommodation expenses; (iv) interpreter fees, if an interpreter is requested; and (v) any amount in excess of \$100 for summoning a witness to a hearing, as a \$100 reimbursement is available.

Arbitrators may order the manufacturer to:

- Repair the vehicle at an authorised dealer at the manufacturer's expense;
- Buy back the vehicle;
- Reimburse the consumer for the cost of repairs already undertaken;
- Reimburse the consumer for out of pocket expenses incurred prior to the hearing, not exceeding \$500;

The Arbitrator can order that the manufacturer has no liability, or that the vehicle is not eligible for arbitration.

Reforms to Reduce Consumer Detriment

There are a number of possible reforms to deal with the issues identified. First, a consumer should be entitled to a remedy for a deemed major failure of the guarantee of acceptable quality if they satisfy threshold criteria. The second reform is the appointment of independent assessors to deal with the issues of how consumers prove that they meet the threshold criteria. The courts and tribunals have not proved satisfactory for hearing motor vehicle disputes because they have no power to investigate and no specialised knowledge in relation to motor vehicle disputes. The third reform is the establishment of an industry-based consumer dispute resolution scheme.

- **Burden of proof**

One possibility is amending the law to provide clearer rules on the burden of proof. In Singapore the *Consumer Protection (Fair Trading) Act* (CPFTA) (known locally as the Lemon Law) provides clearer rules on the burden of proof. If a defect is detected within six months of delivery it is assumed that the defect existed at the time of delivery; if the defect is detected after six months of delivery, the consumer must prove that it existed at the time of delivery.⁵

- **Independent assessors**

A second possibility is amending the law to require the courts to appoint an independent assessor to assist in identifying the cause of the fault. The assessor would not form part of the court, but would merely be an advisor to it.

⁵ See *Comparative Analysis of Overseas Consumer Policy Frameworks* (April 2016) at 5.6.4.3. Available at <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/projects/>.

The cost of securing proof that a consumer has been sold a lemon may prevent a purchaser of a lemon from securing justice. The Victorian Lemon Law Inquiry considered the appointment of independent assessors to deal with the issues of how consumers prove that they have met the threshold criteria set out in the Victorian Lemon Law Report. CCAAC made a similar recommendation to the Minister for Competition and Consumer Affairs that: “State and Territory governments should give active consideration to the appointment of specialist adjudicators and assessors to deal with disputes involving motor vehicles and statutory consumer guarantees”. Such assessors would be able to provide impartial advice where the consumer and the manufacturer provide conflicting evidence as to the threshold criteria issues.

- **Industry-based consumer dispute resolution scheme**

A third possibility is the establishment of an industry-funded, permanent body to investigate and arbitrate motor vehicle disputes. This is the approach that has been adopted in the US, and Canada. In Australia, under the current arrangements, a consumer faced with an intransigent car manufacturer has little prospect of success in the tribunals and courts. Technical problems in motor vehicles are difficult and expensive to diagnose. Consumers are reluctant to incur these costs. Under the current arrangements, the cheapest solution for the consumer is to trade in the ‘lemon’ motor vehicle on a new motor vehicle, and pass the ‘lemon’ motor vehicle on to somebody else.

Chapter 5 of the Victorian Lemon Law Report sets out the dispute resolution process that was preferred by the various stakeholders who made submissions in response to the Issues Paper. The model preferred by many stakeholders was mediation/ conciliation/ adjudication with existing bodies to administer the scheme. CAV would act as the mediator and VCAT as the adjudicator if CAV was unable to resolve the dispute and the consumer wished to seek a legal decision.

However, in its submission to the Victorian Lemon Law Inquiry, CALC proposed a different basis of dispute resolution. CALC proposed that an industry- based external dispute resolution scheme be introduced:

Consumer Action does believe more could be done to improve dispute resolution in the motor car industry. In particular, we believe the introduction of a compulsory industry-based external dispute resolution (EDR) scheme would be an excellent way of improving the resolution of consumer disputes in relation to motor cars. Industry-based EDR schemes exist in many other industries, including energy, water, telecommunications and financial services. Generally, such schemes are supported by consumers and industry alike, as they provide cheap, fair and accessible dispute resolution...The Victorian Government could introduce an industry-based EDR in the motor vehicle industry by making membership of such a scheme a condition of holding a licence to trade in motor vehicles. If such a scheme were introduced, consumers would have access to a cost free dispute resolution service (all costs being paid by industry), that is independent, and that can make decisions binding on the industry member. We strongly welcome further consideration of such a scheme as part of the current consultations”.



Industry-funded ADR schemes do not simply mediate or conciliate disputes; they investigate the facts of a particular dispute. The Productivity Commission in its *Review of Australia's Consumer Policy Framework*, strongly supported the use of alternative dispute resolution (ADR) schemes since they "...generally offer relatively economical, accessible, fast arrangements for dealing with individual complaints that could not be cost effectively tackled using any other method".⁶

Transactions related to digital content – Professor Sharon Christensen

11. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

Many of the specific protections provided by the ACL rely upon the definitions of 'consumer', 'goods' and 'services'. Uncertainty can arise about the application of the specific protections, particularly statutory guarantees to products with digital content. There is a need for the review to address the application of specific protections to both digital products and traditional products incorporating digital content.

There are a number of **key issues** which should be considered in relation to the application of statutory guarantees in the digital economy:

- Which statutory guarantees apply to digital products and services? This requires a re-consideration of the definitions of 'goods' and 'services'. The characterisation of digital products as either 'goods' or 'services' impacts the type of guarantee that is applicable.
- 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 requires a consideration of the definition of 'supply', the auction exclusion for some guarantees and the 'trade or commerce' requirement particularly in the case of transactions within the sharing economy.
- Does the current statutory guarantee regime offer effective protection for Australian consumers purchasing from overseas providers?

A. Digital products – the definitions of goods and services

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:

⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report No 45 (2008) vol 2, 199.



- 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 both nationally and internationally has struggled with the legal characterisation of digital content supplied via a download from the internet. The definition of 'goods' in the ACL currently includes 'computer software', which means that software provided by way of a disc or a download is within the definition. Despite this extension of the definition, recent case law highlights the continuing potential for a 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' the guarantee of acceptable quality will not apply.

The only jurisdiction to enact specific legislation to regulate product quality for digital content is the United Kingdom (*Consumer Rights Act 2015* (UK)).

- **Why is the characterisation of digital content important?**

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.⁷ 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.

- **Does digital content fall within 'goods'?**

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'.⁸

'Services' is also broadly defined in s 2 ACL so that any item not categorised as 'goods' will be services.⁹ It is important to note that a supply of goods cannot also be a supply of services. The two are mutually

⁷ *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1969] 2 AC 31, 78-79.

⁸ 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.⁸ 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

⁹ The definition of services does not include financial services which are regulated under the *ASIC Act*.

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.¹⁰

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* [2016] FCA 196. 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 alleged that “goods” were supplied by Valve Corporation either because software was supplied, or because Valve Corporation bundled software and services, and the definition of “goods” includes computer software. Valve Corporation denied that it supplied “goods” within the meaning of “goods” in s 2(1) of the ACL alleging that it supplied “online access to video games via a subscription service”. Valve argued that their product was a “service” within s 2(1) of the ACL so that the consumer guarantee of acceptable quality in s 54 did 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 forensic analysis of the nature of the digital product provided by Valve and the court acknowledged that other non-executable data, such as music and pictures did not necessarily fall within the definition of ‘goods’.

Although the decision in *Value* provide some further certainty about the approach a court may take it is clear that whether a particular digital product is ‘computer software’ or some other type of digital content will depend in each case on the particular product. Ultimately this does not provide the required level of certainty and simplicity for the ordinary consumer to be able to determine if they are acquiring goods to which the guarantee of acceptable quality applies.

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

¹⁰ *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.



- I. 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?

 - II. 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 characterised 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.

 - III. 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.
- **International solutions**

The only jurisdiction to specifically enact legislation to overcome the difficulty of characterisation of digital content is the UK. The Consumer Rights Act 2015 introduced a new definition of 'digital content' and specific consumer protections, including statutory warranties. Digital content is defined as 'data produced and supplied in digital form'. This broad definition applies to digital data or content irrespective of the delivery method for the data.

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).

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.

The UK provides a potential model for consideration as part of the ACL Review.

B. Impact of online sales methods on threshold concepts

The increased transformation of consumer transactions to online mediums has resulted in a number of significant changes to the traditional sales model used by traders or retailers. This in turn impacts on the responsiveness of a consumer protection framework based upon concepts developed in a traditional face to face model. At a policy level this requires a reconsideration of the types of transactions to which statutory guarantees should apply. Under the current regime statutory guarantees are applicable only to the 'supply' of goods or services to a 'consumer' and in some cases the supply must be in 'trade or commerce' and cannot be a 'sale by auction'.

Are these threshold requirements for the application of statutory guarantees necessary or desirable in a digital environment?

Each of the threshold requirements is considered in the context of online transactions.

i. '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'.¹¹ 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.¹² 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.

Potentially the definition of supply means that the following transactions fall outside of the ACL:

- **Sharing or exchange via a peer to peer platform.**

¹¹ Supply is defined in s 2 of the *Australian Consumer Law*.

¹² 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.

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 items¹³ between individuals while resembling a lease or hire arrangement, may not be a supply if no 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.

The uncertainty created for consumers in the context of transactions via peer to peer platforms needs 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?

- **Online auctions**

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 justification for excluding auctions from statutory guarantees is that the consumer has an opportunity prior to the auction to evaluate the value of the goods. Online auctions by their nature do not allow a potential buyer to inspect the goods. While the rationale may continue to have relevance in a physical auction, buyers of goods through any online medium and irrespective of the method of sale are unable to inspect the goods prior to agreeing to buy. Even though some online auctions may not fall within the definition of 'sale by auction'¹⁴ there are cogent reasons for removing the distinction in the context of online transactions and maybe for all transactions.¹⁵

ii. '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. Transactions where the seller is engaged in a private sale or where the buyer is a business will not gain the benefit of the statutory guarantees. In the context of online transactions the requirement for the transaction to be in trade or commerce allocates risks to consumers as it is 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.

Similarly the definition of 'consumer' as discussed above means that small business owners

¹³ Gumtree, Etsy, The Clothing Exchange, TuShare.

¹⁴ *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. *Malam v Graysonline, Rumbles Removals and Storage* [2012] NSWCTTT 197.

¹⁵ 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.

purchasing goods or services online (above the relevant threshold amount) are unable to obtain the benefit of the guarantees. This ignores the fact that in the case of online transactions all buyers, whether consumers or business are in a similar position. Usually there is little opportunity to negotiate the terms of the agreement and no opportunity to inspect the goods. Whilst many online sellers offer to accept returns and provide refunds if the goods are not acceptable, this is not a consistent practice.

- **Trade or commerce**

Generally the statutory guarantees in the ACL 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.¹⁶ 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.¹⁷ 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 Australia¹⁸ 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

¹⁶ *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Bond Corporation Pty Ltd v Theiss Contractors Pty Ltd* (1987) 14 FCR 215.

¹⁷ This should be contrasted with the statement in *Consumer Guarantees – A guide for business and legal practitioners* http://www.consumerlaw.gov.au/content/the_ACL/downloads/consumer_guarantees_guide.pdf 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’ [8].

¹⁸ See most recently *Williams v Pisano* [2015] NSWCA 177.

point a person's activities move from personal to commercial in 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?

Sales of goods by non-business entities continue to be subject to the implied terms regime of under the relevant Sale of Goods Act in each state. Whilst it is possible to contract out of these implied terms, non-business entities are unlikely to include such exclusions in their contracts of sale unless advised to do so. Consequently these sales are likely to be subject to similar warranties of quality and fitness for purpose but the specific remedies provided by the ACL are not available to the buyer.

iii. Other models

The Consumer Rights Act 2015 similarly limits the operation of statutory guarantees to supplies by traders to consumers. The consequence of this approach is that only consumers who acquire goods from traders are entitled to the remedies provided in the Act.

iv. An alternative approach

If the policy were to ensure application of guarantees of acceptable quality in most transactions, particularly online, an alternative approach the Review may consider is to broaden the application of the guarantees but differentiate the available remedies. Differentiation occurs to some extent already within the ACL in relation to contracting out of contracts for consumer goods (s 64) compared to contracts for non-consumer goods (s 64A).

C. Application to overseas suppliers

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:

- (i) If the law of Australia is the proper law of the contract s 67(a) will make a clause that chooses the law of another contract invalid;
- (ii) If a clause of a contract specifies the law of another country as the law of the contract or specifies provisions of another law of a contract as applicable, s 67(b) will render the clause ineffective.

The only situation in which s 67 will not apply is if the proper law of the contract is the law of another country and there is no governing law clause in the contract to which s 67 can apply. In *ACCC v Valve* the proper law of the contract was Washington but the clause specifying Washington law as applicable to the contract was struck out by s 67(b) and the law of Australia was substituted.

Whilst the decision in *Valve* clarifies the operation of s 67, it also demonstrated the complexity of its application for the average consumer.

An alternative is to provide, similar to the UK and European Union regulations, for all relevant contracts entered into with Australian consumers to be subject to the statutory guarantees, irrespective of the locality or business operation of the supplier.

Online shopping – Professor Sharon Christensen

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

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

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.

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.¹⁹ The Office of

¹⁹ Refer to Amelia Fletcher, *Drip pricing: UK experience* (21 May 2012) Federal Trade Commission https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/afletcher.pdf.

Fair Trading has estimated that UK consumers spent £300 million in 2009 on payment surcharges.²⁰ 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.²¹ 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. Although consumers are vulnerable to price exploitation in times of peak demand, research suggests that regulators should aim only to correct market problems and go no further.²² 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

A. Current approach

To date the ACCC has taken action successfully in relation to drip pricing practices in the airline industry. (*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). These proceedings were based upon s 18 and 29 of the ACL and require the pricing practice of the trader to mislead consumers. The advantage of this approach is that the lack of a positive obligation to disclose pricing information at a certain point in the transaction allows flexibility to business in development of websites. Disadvantages exist however for the regulator which must undertake time intensive investigations and evidence of misleading conduct to encourage changes in practice.

B. Alternative approach

The UK approaches the issues of pricing through a combination of prohibitions on unfair commercial practice and a requirement for online traders to disclose certain price information to the consumer early in the transaction. The justification for imposing price disclosure is based on the view that both drip pricing and surge pricing create issues of information asymmetry for consumers limiting their

²⁰ Office of Fair Trading *OFT to take action over passenger travel sector payment surcharges* (28 January 2011) <http://www.wired.gov.net/wg/wg-news-1.nsf/0/13A505722AF49487802578BD0049001F?OpenDocument>.

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

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



ability to make an informed choice to purchase. This fact is further justified by reference to consumer behaviour research.

Prohibition on unfair commercial practice

- ***Consumer Protection from Unfair Trading Regulations 2008 (UK) SI 2008/1277 ('CPR'),***

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 sought 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.

- ***Pricing Practices Guide ('PPG')*** - guidelines for business to implement fair and transparent pricing practices in accordance with the CPR

Information disclosure for internet contracts

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

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.

- ***Electronic Commerce (EU Directive) Regulations 2002***

These Regulations establish legal rules that online retailers and service providers must comply with when dealing with consumers²³ 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,

²³ 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



the contract can be voided.

Similar disclosure obligations exist in Canada for distance selling contracts, which is applicable to internet contracts.

C. Potential issues for further consideration

As part of the ACL Review the following issues may be further investigated:

- (i) Whether the general prohibition on misleading conduct is sufficient to guard against drip pricing. A specific protection on the basis of an unfair commercial practice could be considered. The broader definitions of unfair commercial practice in the UK and US are potentially wider
- (ii) Whether s 29(1) of the ACL should be expanded to false or misleading conduct to allow a civil penalty for misleading omissions.
- (iii) Whether a requirement for disclosure of all elements of the price prior to ordering goods should be introduced. Proof of non-compliance with this type of provision is easier for regulators as compared to proving a dripped pricing approach is misleading or deceptive. Although there has been success with misleading conduct in Australia, prosecution for failure to comply with a positive disclosure regime is in most cases more effective.

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

Online reviews and endorsements 'provide consumers with information about products, services and businesses based on the experiences of other consumers'²⁴ and are an important tool for consumers in an online market. Review mechanisms available range from customer reviews and endorsements on product websites to independent websites that conduct reviews of products²⁵ or allow consumers to post reviews.²⁶ 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.²⁷ According to research conducted by the University of Illinois at Chicago,²⁸ almost 30% of reviews and endorsements are posted by individuals employed to write them. For example, sites

²⁴ Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission <https://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews>.

²⁵ For example, Choice (www.choice.com.au); Product Review (www.productreview.com.au).

²⁶ This is common in the travel industry with websites such as Tripadvisor, Expedia and Trivago.

²⁷ Kat Kane 'The Big Hidden Problem with Uber? Insincere 5-Star Ratings', *Wired* (online), 19 March 2015 <http://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 <http://www.cohenschneider.com/product-reviews-endorsements-and-astroturfing/>.

²⁸ Karen Weise, 'A Lie Detector Test for Online Reviewers', *BusinessWeek Magazine* (online), 29 September 2011 <http://www.bloomberg.com/bw/magazine/a-lie-detector-test-for-online-reviewers-09292011.html>.

such as freelancer.com welcome businesses to offer jobs for writing fake 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.²⁹

Fake reviews and endorsements are most commonly used in travel, electronics and home repairs³⁰ but can be found across almost all platforms selling goods or services over the Internet.

The current approach to regulation and enforcement includes a combination of:

- General prohibition of misleading conduct/representations (s 18 and s29 ACL)
- Specific prohibitions related to false and misleading advertising, testimonials or claims of endorsement
- Guidelines/codes specifically directed as ensuring traders understand how to guard against fake online reviews or endorsements
- Detailed consumer information readily accessible on regulators website which assists consumers to identify fake or false reviews, best practice for obtaining accurate reviews of products online, reputable trusted comparator websites.
- 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 prosecution

This combined approach is consistent with the approach in other jurisdictions and appears to allow action to be taken by the regulator in relation to the main practices 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;³¹
- 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.³²

²⁹ David Streitfield, 'For \$2 a Star, an Online Retailer Gets 5-Star Product Reviews', *New York Times* (online), 26 January 2012 http://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/>.

³⁰ 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.

³¹ 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.

³² Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission <https://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews>.

Sharing Economy – Professor Sharon Christensen

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

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

The rapid growth of the sharing economy³³ through peer to peer platforms, such as Uber and Airbnb, presents challenges for the existing consumer protection model. Similar issues of product quality, misleading pricing and other practices and misleading reviews as apply to other online transactions also apply to the sharing economy. An important consideration in any review of these provisions is to ensure application consistently to all forms of digital or online transactions.

The different nature of sharing platforms raises several policy questions that may be considered:

1. **Consistent regulatory model:** 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 transactions³⁴ mean there is too much complexity for a one size fits all regulatory model?
2. **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?
3. **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? Should the regulatory model include some protection for consumers transacting with other consumers? Minimum standard or quality or minimum information disclosure requirements?
4. **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?
5. **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.

Many countries have been grappling with the balance between encouraging and fostering

³³ Sharing economy has been defined as ‘online platforms that help people share access to assets, resources, time and skills. (Debbie Woskow, *Unlocking the Sharing Economy: An Independent Review*. (available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf)

³⁴ 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).



innovation within a digital economy and the need to build consumer trust³⁵ in online transactions and maintain consumer protections where appropriate. Most international 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.³⁶

Most commentators recommend a flexible regulatory regime which is capable of dealing with unique issues that arise from each platform type,³⁷ 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.³⁸ 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.

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.

³⁵ Trust in a sharing platform is identified as one of the major issues for consumers by PWC in *The Sharing Economy* (2014), available at <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf>.

³⁶ D Woskowiak (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.

³⁷ Anna Fellander, Claire Ingram and Robin Teigland, 'Sharing Economy: Embracing Change with Caution' (Naringspolitiskt Forum Rapport 11, Entreprenörskaps Forum, 2015), 59; Vanessa Katz, 'Regulating the Sharing Economy' (2015) 30 *Berkley Technology Law Journal Annual Review* 2015 1067, 1087.

³⁸ (Will Coldwell, 'Airbnb's legal troubles: what are the issues?' *The guardian* (online), 8 July 2014 < <http://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 < http://www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html?_r=0>).

ACL and Financial Services – Ms Nicola Howell

2.4.2 Interaction between the ACL and ASIC Act

This part of the submission discusses the relationship between the Australian Consumer Law ('ACL') and the consumer protection provisions of the Australian Securities and Investments Commission Act 1988 (Cth) ('ASIC Act'). It is therefore most relevant to issue 2.4.2 (Interaction between the ACL and ASIC Act) in the Issues Paper.

The Issues Paper includes specific reference to the differential treatment of financial services compared to the rest of the economy in a number of places, and includes reference to:

- The exclusions on insurance contracts from the prohibition against unfair contract terms (p16)
- A reference to the fact that quality for financial services is addressed through an implied terms regime, rather than the consumer guarantees regime introduced in the ACL, and whether the consumer guarantees should be extended to financial services (p21); and
- A question on whether the current approach to defining a financial service in the *ASIC Act* creates unnecessary complexity (p34).

The following addresses each of these specific issues, but also make some broader comments on the way in which the carve-out of financial services from general consumer protection legislation has been implemented.

General approach

The primary submission in this section is that the generally applicable consumer protections should apply to financial services in the same way that they apply for all other goods and services in the economy. There should not be a differentiation in the broad consumer law standards applicable to financial services when compared to other goods and services, unless there is a strong, evidence-based policy justification for any divergence. However, as is discussed below, there is currently a divergence, with limited policy justification given. Indeed, much of the explanatory material for the ACL reforms supports the existence of consistent standards for financial services and for other goods and services.

For example, the 2009 Intergovernmental Agreement for the Australian Consumer Law required the Commonwealth Government to amend the ASIC Act (and as necessary, the Corporations Act) to ensure that they were consistent with the ACL.³⁹ Similarly, the explanatory memorandum for the Trade Practices Amendment (Australian Consumer Law) Bill (2009) notes 'The Bill also amends the consumer protection provisions of the Australian Securities and Investments Act 2001 (ASIC Act) to make them consistent with the TP Act and the ACL'.⁴⁰

In the Explanatory Memorandum to the 2010 Bill it is explained that amendments to the ASIC Act and the *Corporations Act 2001 (Cth)* ('CA') will be made 'where appropriate', but apart from a

³⁹ Clause 3.1.3.

⁴⁰ At page 3, emphasis added.



reference to the constitutional reasons for including the consumer protection provisions in the ASIC Act rather than the *Competition and Consumer Act 2010* (Cth) ('CCA'), there is no discussion of the circumstances in which it would be 'appropriate' to have differences between the substantive law in the ASIC Act compared to the ACL in the CCA.⁴¹ The Explanatory Memorandum notes that 'the IGA does not require the corporations legislation to be identical to the ACL legislation', and that the IGA 'reflects that financial products and services will be carved-out of the scope of the ACL as a result of the separate legislative arrangements that exist in respect of financial products and services under the Corporations Agreement 2002'.⁴² However, there is no substantive discussion about the reasons behind having different standards for financial products and services.

Consistency of general consumer protection standards across the financial services sector and the rest of the economy is also consistent with the recommendation of the Productivity Commission in its 2007 Review of Consumer Policy that a new generic national consumer law should apply to all sectors of the economy, including financial services⁴³ and with the 1997 Financial System Inquiry ('the Wallis Inquiry'). Prior to the implementation of the recommendations of the Wallis Inquiry, the economy-wide consumer protection standards in the then *Trade Practices Act 1974* (Cth) ('TPA') applied to the entire economy, including the financial services sector. The Wallis Inquiry recommended a separate consumer protection regulator and regulation for financial services, but did not recommend any change in the *substance* of the general consumer protection laws as they applied to financial services.⁴⁴

The policy justification for treating investors and consumers differently

One possible justification for differential treatment of the financial services sector has traditionally been that those purchasing financial products and services are considered to be investors, rather than consumers, and that investment is different to consumption. Investment is about risk-taking; no investment is risk-free; and there is no guarantee of positive outcomes in the case of investment products. This was clearly the view of the Wallis Committee, which explained:

Unlike the consumption of products or services in general, many investments provide a return to investors based on their bearing a share of the risks which are intrinsic to financial activity. This clearly distinguishes the act of investment from the act of consumption. Among the risks that investors may be rewarded for bearing are those deriving from imperfect information. It is vital to economic efficiency that regulation not unduly interfere with this risk allocation function of the financial system.⁴⁵

⁴¹ At page 4.

⁴² At page 456.

⁴³ Productivity Commission (2008) *Review of Australia's Consumer Policy Framework* (Final Report, Vol 2, April), Recommendation 4.2.

⁴⁴ See discussion in Productivity Commission, *ibid*, 75.

⁴⁵ Commonwealth of Australia (1997), *Financial System Inquiry* (Final Report, March), 177; see also the discussion in Dimity Kingsford Smith (2011) 'ASIC regulation for the investor as consumer' 29 *Company and Securities Law Journal* 327, 333-4.

As Gail Pearson has suggested 'The statement implies that there should be differing rights to protective measures to mitigate risk depending on whether the activity is investment or consumption'.⁴⁶

However, even if this view is accepted, it is not sufficient justification for imposing a different level of base consumer protection for all financial services than for other goods and services. This is because many of the financial products that are regulated by the *ASIC Act* rather than the *ACL(Cth)* have no or minimal investment component, including deposit and transaction accounts, consumer credit and consumer leases, general insurance, and risk life insurance.⁴⁷ And one of the largest parts of the financial services sector – superannuation – is underpinned by compulsory arrangements, so that all workers in Australia are required to engage in a level of financial investment, whether or not they wish to do so, and/or whether or not they have the capacity or aptitude for risk-taking or not. As Kingsford Smith notes in relation to the superannuation system:

... all Australian employees have had to become investors either indirectly during the contribution phase of their lives, or directly in the retirement phase...⁴⁸

As many studies have pointed out, the level of financial sophistication and financial literacy varies considerably in Australia,⁴⁹ and the compulsory nature of investment through superannuation means that the treatment of *all* investors as needing less protection than consumers of other goods and services may no longer be appropriate.⁵⁰

The financial services sector is one of the largest sectors of the economy, and it is a sector that provides products and services to people of all levels of financial sophistication. This pervasive nature of the financial services sector makes the case for a consistency of general consumer protection standards between financial services and the rest of the economy even more pressing.

2.2 General Protections of the ACL

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

2.2.3 Protecting consumers from unfair contract terms

Should insurance contracts be treated in the same way as other standard form contracts

⁴⁶ Gail Pearson (2006) 'Risk and the Consumer in Australian Financial Services Reform' 28 *Sydney Law Review* 99, 105.

⁴⁷ See also Pearson, *ibid*.

⁴⁸ Kingsford Smith, above n 45, 327-8.

⁴⁹ For example, see Kingsford Smith, *ibid* 329-330, and the studies discussed therein. See also The Social Research Centre and ANZ (2014) *ANZ Survey of Financial Literacy in Australia*, available at <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>.

⁵⁰ For example, Matthew Peckham (2015) 'From the Wallis report to the Murray report: a critical analysis of the financial services regime between two financial system inquiries' 33 *Company and Securities Law Journal* 478, 499.

Insurance contracts are currently excluded from the provisions in the ASIC Act and ACL dealing with unfair contracts terms, implied warranties, and consumer guarantees. *The Insurance Contracts Act 1984 (Cth)* also specifically excludes laws about contractual ‘unfairness’ from apply to insurance contracts regulated under that Act (s15). The policy justification for these exclusions has been the existence of the duty of utmost good faith that is imposed by the Insurance Contracts Act; a duty that is not imposed for other financial services. In 2013, a draft Bill (Insurance Contracts Amendment (Unfair Terms) Bill) was released for consultation. If implemented, the proposed legislation would have inserted an unfair contracts terms regime into the Insurance Contracts Act, equivalent to that in the ASIC Act. However, this Bill did not progress.

As already mentioned, the ACL provisions, including the protection against unfair terms, should be regarded as bedrock consumer protections for financial services. Currently, the exclusion of insurance contracts from a number of the ACL protections is not consistent with the policy objective of the ACL, and this situation should be remedied.

2.3 The ACL’s specific protections

Consumer guarantees and financial services

11. Are there any changes that could be made to improve their effectiveness or address any issues raised in section 2.3? Are there any gaps that need to be addressed or overseas models that could provide a useful guide?

This section specifically addresses section 2.3.3: Whether the consumer guarantees should be extended to goods and services currently excluded, including financial services

The most significant difference between the consumer protections in the *ASIC Act* and those in the *ACL* is the failure to extend the consumer guarantees regime to financial services. Instead, for financial services, the generic consumer rights in relation to quality of services are provided by an implied terms regime, in a similar form to that existing in the *Trade Practices Act* prior to the introduction of the ACL. As has been noted previously by Stephen Corones, this situation is ‘at odds with the policy objectives of consistency and uniformity which the ACL was intended to achieve’.⁵¹

The explanatory material for the ACL and ASIC Act amendments make no specific references to any reason for excluding financial services from a consumer guarantees regime.

Given that both the implied terms regime and the consumer guarantees regime use some similar terminology in describing the standards that are required (for example, ‘due care and skill’), it might be argued that the absence of a consumer guarantees regime in the financial services sector has little impact in practice. Indeed, the proposal to introduce consumer guarantees in the ACL was not

⁵¹ Stephen Corones (2013) *The Australian Consumer Law* (Second edition, Thomson Reuters, Pyrmont NSW), 19.

intended to lead to a difference in the substantive rights and obligations applicable.⁵² However, the rationale for replacing the former implied terms regime for the rest of the economy applies with equal force for the financial services sector.

In its report on the implied terms law, the Commonwealth Consumer Affairs Advisory Council ('CCAAC') argued that the implied terms regime was problematic because:

- The law was complex, and caused confusion and uncertainty in the marketplace;
- The complexity of the law had contributed to a widespread lack of consumer understanding and awareness of their rights and obligations;
- There were problems associated with individual redress; and
- There was a lack of incentives for retailers and manufacturers to comply with the law and assist consumers.⁵³

These primary arguments for change generally apply equally in the financial services sector. One area where the financial services sector has perhaps a more positive outcome is in relation to the existence of cost effective dispute resolution mechanisms for consumers – the establishment of industry ombudsman schemes in the financial services sector has addressed this problem to some extent. However, even with the external dispute resolution schemes in the financial services sector, a statutory guarantees regime is preferable to an implied terms regime. As CCAAC noted, a consumer guarantees regime allows consumer to 'build stronger cases when bringing a matter to an ombudsman',⁵⁴

Further, the CCAAC report did not suggest that financial services should be excluded from its recommendation. Instead, CCAAC argued that: "Consistent with the intention of the Australian Consumer Law, the new statutory consumer guarantees should apply to all sectors of the economy."⁵⁵

CCAAC's support of economy-wide application of consumer guarantees is also evident from its recommendation that the consumer guarantees regime should apply to sectors where there was already regulation of quality (specifically electricity, gas and telecommunications).⁵⁶ CCAAC also envisaged that the consumer guarantees regime would apply to financial services, as it referred to ASIC as one of the government agencies to be involved in developing information material, identify emerging issues in relation to consumer guarantees, and coordinating regulatory and enforcement responses to these issues.⁵⁷

Since the CCAAC report, the industry specific obligations relating to quality have arguably become even more onerous in the financial services sector, including through the introduction of the best interests duty and other changes in the Future of Financial Advice ('FOFA') Reforms. However, this does not obviate the need for the generally applicable consumer protections to apply, including the

⁵² See, for example, discussion of the relevant policy documents on this point in Corones, *ibid*, 373-4.

⁵³ Commonwealth Consumer Affairs Advisory Council (2009) *Consumer rights: reforming statutory implied conditions and warranties* (Final Report, October 2009), 4-13.

⁵⁴ *Ibid* 73.

⁵⁵ *Ibid* 124.

⁵⁶ *Ibid* 122.

⁵⁷ *Ibid* 124.

consumer guarantees. Apart from anything else, there are likely to be many transactions in the financial services sector where the FOFA obligations do not apply.⁵⁸ There are also many other service sectors that have detailed industry-specific regulation of quality, but still also have the consumer guarantees as providing the bedrock, basic protection for consumers, including the legal and insolvency professions, builders and other trades, and others.

CCAAC also noted the importance of a consumer guarantees regime for dispute resolution. As noted above, Ombudsman schemes are particularly prevalent in the financial services sector, and financial services consumers should equally have access to a consumer guarantees regime that.

In relation to the rationale for not extending the consumer guarantees to financial services, Paterson and Tokeley have suggested that 'presumably it was considered inappropriate to guarantee the fitness or quality of a financial product'.⁵⁹ However, even if this argument were to be accepted, this would not be an argument for excluding financial services from the services-related guarantees. Indeed, the implied terms in the ASIC Act only incorporate the former TPA implied terms as they relate to services, not goods.

Given that the quality expectation imposed by the statutory guarantees for services (eg, due care and skill) is the same as the quality expectation in the implied warranties, the failure to extend the at least the services component of the consumer guarantees regime to financial services is not justified, and should be remedied through this Review.

Other ACL provisions that have no equivalent in the ASIC Act

This section specifically addresses sections 2.3.5 (Providing consumers with rights when a salesperson approaches uninvited) and 2.3.6 (Other consumer rights in transacting with a supplier) in the Issues Paper

There are also a number of other provisions in the ACL that have no equivalent in the *ASIC Act*. Some of these apply only in the case of goods, and so would be inappropriate to include in the *ASIC Act* (absent a policy decision that financial products should be considered goods). However, others apply to both goods and services, and thus would appear to have relevance for financial services. These include provisions dealing with single pricing (s48 ACL), unsolicited consumer agreements (Part 3-2, Division 2 ACL), proof of transaction (s100 ACL), and information standards (Part 3-4 ACL).

In some cases, there are provisions that seek to address a similar policy issue for financial services in the Corporations Act 2001 (Cth) ('CA') and/or National Consumer Credit Protection Act 2009 (Cth) ('NCCPA'), including the National Credit Code ('NCC').

⁵⁸ For example, the FOFA obligations only apply when personal advice is being provided; they have no application in the case of general advice or transactions that do not involve advice (CA s961(1)).

⁵⁹ Jeannie Paterson and Kate Tokeley, 'Consumer guarantees' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (The Federation Press 2013), 103-4.

- *Single Pricing*: Neither the Corporations Act nor the NCCPA specifically include a provision dealing with single pricing. However, both pieces of legislation provide for mandatory disclosure documents that must include all relevant costs of a product or service (eg, Product Disclosure Statement, Financial Services Guide, Credit Guide, pre-contractual statements, credit contract). The NCCPA also provides for restrictions on advertising of prices (for example, if an advertisement contains repayment amounts, it must also contain the interest rate (s150(3) NCC)).
- *Unsolicited sales*: Similarly, both the Corporations Act and the NCCPA have provisions dealing with unsolicited sales (for example, Corporations Act ss 736, 992A, 992AA; NCC s156). However, the NCC applies only to visits to a consumer's home, whereas the CA and ACL provisions also apply to unsolicited telephone calls. There are other variations between the provisions, as to disclosure requirements, a presumption that the agreement is an unsolicited agreement, and other matters. It is also important to note that the Issues Paper asks whether the current provisions in the ACL are sufficient to deal with new modes of business – these issues may apply equally to financial services.
- *Proof of transaction*: The CA requires a confirmation of transactions involving a financial product (s1017F), and both the Corporations Act and NCCPA oblige financial services providers to regular statements of account, which confirm individual transactions (Corporations Act s 1017D; NCC s33), and to provide a written statement of the remuneration for advice and assistance services (eg Corporations Act, s942 (Product Disclosure Statement); NCCPA, s113 (Credit Guide), s114 (Credit Quote)).
- *Information standards*: There does not appear to be any equivalent in the CA or NCCPA to the broad information standards power contained in Part 3-4 ACL. However, some information standards have effectively been introduced for particular products – for example, suppliers of small amount credit contracts must include a specified statement on their premises and websites (NCCPA s133CB), and both the CA and NCCPA provide for mandatory warnings and information to be disclosed in certain circumstances (eg, CA s949A (warning about general advice); NCCPA s163 (warning about the comparison rate)). Additionally, the proposed product intervention power and product design and distribution obligation (recommended in the 2014 Financial System Inquiry, and agreed to by the Commonwealth Government) could be mechanisms for providing mandatory information standards.⁶⁰

It is, however, important to ensure that these alternative mechanisms of addressing the policy issues covered by the ACL provisions do not result in gaps in protection for financial services consumers. In the case of unsolicited sales for example, two obvious gaps are that, for consumer credit contracts, there is no prohibition on unsolicited telephone sales; and for both consumer credit and financial products, there is no rebuttable presumption that the agreement was unsolicited. Other gaps might exist because of the different standards applicable, and differences in the scope of the persons to whom protection is extended. The ACL Review should take the opportunity to

⁶⁰ For example, the Financial System Inquiry suggested that a product intervention power could include powers to 'require or impose amendments to marketing and disclosure materials, warnings to consumers, and labelling or terminology changes, distribution restrictions and product banning': Commonwealth of Australia (2014) *Financial System Inquiry* (Final Report, December), 206.



address this by ensuring that substantively the same provisions apply to financial services and to other goods and services, and that any alternative provisions in the CA or NCCPA provide equivalent or better coverage.

2.4 Other issues

2.4.2 Interaction between the ACL and ASIC Act

17. Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining whether certain conduct falls within the scope of the ASIC Act or the ACL? How could this be addressed?

If financial services are to continue being regulated by the ASIC Act, it is critical that there is a uniform definition in the ASIC Act and ACL. Without a uniform definition, there is a risk of gaps in coverage.

This issue of the complexity of the definition of financial service in the ASIC Act cannot be examined without also considering the definition of financial service in the Corporations Act, as this broadly mirrors the *ASIC Act* definition, at least in structure. This consistency in structure should preferably be maintained.

The complexity of the definitions and the consumer protection regulation of financial services generally, was strongly criticised by Rares J in his summary in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028 (21 September 2012). In relation to the claims of misleading or deceptive conduct in the case, Rares J notes:

The repealed, simple and comprehensive s 52 of the *Trade Practices Act 1974* (Cth) that prohibited corporations engaging in misleading or deceptive conduct in trade or commerce has been done away with by a morass of dense, difficult to understand legislation. Those Acts, that now deal with misleading and deceptive conduct, apply differently depending on distinctions such as whether the alleged misleading conduct is in relation to “a financial product or a financial service” (s 1041H(1) of the *Corporations Act 2001* (Cth)) or “financial services” (s 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth)). Those apparently simple terms are nothing of the sort. A “financial product” is defined in mind-boggling detail in 7 pages of small type in Div 3 of Pt 7.1 of the *Corporations Act* while a “financial service” takes another 6 pages to be defined in Div 4 of Pt 7.1. The *ASIC Act* only takes about 4 pages to define “financial service” in s 12BAB. Obviously, there are differences in what each of these Acts and definitions cover – but why? The cost to the community, business, the parties and their lawyers, and the time for courts to work out which law applies have no rational or legal justification. The Parliament should consider returning to a simple clear two line long universal norm of conduct, as was contained in s 52, if it considers that misleading and deceptive conduct in trade or commerce ought be prohibited.

As Rares J notes, the definitions of financial service (and of financial product) in the CA are more complex than those in the ASIC Act, and are narrower in scope. A major difference between the



definitions in the ASIC Act and Corporations Act is the *inclusion* of 'credit facility' in the definition of financial product in the ASIC Act, but the *exclusion* of 'credit facility' from the equivalent definition in the CA. However, this is not the only difference between the definitions.

The ASIC Act and CA play different roles in consumer / investor protection in the financial services, and this necessitates there being a different level of coverage of products/services between the two Acts. The ASIC Act imposes the general consumer obligations – applicable to both financial services in the traditional sense, and credit products and services, and, in most cases, able to be taken advantage of by businesses as well as consumers. In contrast, the detailed, industry specific regulation is contained in the CA (for financial products and services) and in the NCCPA (for consumer credit products and services), and these protections are only available to retail investors / consumers.

In the absence of a policy decision that financial products and services (in the more traditional sense) and credit products and services should both operate under the same regulatory regime, it would not be appropriate to have the more expansive definition of financial service in the CA. Equally, imposing the narrower CA definition of financial product in the ASIC Act would result in credit products being regulated by the ACL(Cth) and ACCC, rather than ASIC, which is clearly unwarranted in light of ASIC's regulatory responsibility for the NCCPA.

However, there is potential to simplify improve the way in which the general and industry-specific consumer protections are provided in financial services, including through amending the different definitions of financial product and service.

One option might be to amend the definition of financial service so that it is a simplified, broader, purpose-focused definition. This approach has been suggested by Emily Klotz, in the context of her review of the overlap between the ASIC Act and CA in prohibition of misleading or deceptive conduct.⁶¹ Klotz suggests that 'A broad, purpose-focused definition removes the need to wade through technical provisions and allows courts to consider whether a facility was used for a particular purpose that parliament intended ASIC regulate'.⁶² However, it is arguable that the current definitions are in fact purpose-focused. In addition, leaving it to the courts to determine whether a facility 'was used for a particular purpose that parliament intended ASIC regulate' seems liable to create significant commercial uncertainty, at least in relation to issues about whether the obligations in Chapter 7 of the CA will be imposed on a particular facility.

Klotz has also argued that the definition of financial service in the CA and ASIC Act should be the same, at least for the prohibition against misleading or deceptive conduct. However, she also acknowledges that this approach of a single definition in the ASIC Act and CA would not be appropriate for other parts of the CA (including chapter 7). Apart from anything else, to have the same definition across the ASIC Act and CA would result in the licensing, disclosure and conduct

⁶¹ Emily Klotz (2015) 'Misleading or deceptive conduct in the provision of financial services: an empirical and theoretical critique of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth)' 33 *Company and Securities Law Journal* 451, 477.

⁶² *Ibid.*



obligations in chapter 7 also applying to credit products. Avoiding this would require separate definitions of financial service for the detailed Ch. 7 protections compared to the general (ACLO-like) consumer protections in the CA; and this seems likely to add further difficulties, costs and uncertainties.

Another option might be to have the same definition of financial product / financial service in the ASIC Act and CA, with that definition being linked to the products and services that are to be regulated under chapter 7 of the CA. To give the ASIC Act the broader coverage that it requires, the ASIC Act could then apply to financial products / services as defined in the CA, *as well as* credit facilities, and any other financial (in the broad sense) products/ services that are to be excluded from Ch. 7.

If an approach along these lines was taken, s12DA(1) ASIC Act could be amended in the following way:

A person must not, in trade or commerce, engage in conduct in relation to:

- (a) Financial services;
- (b) Credit services;
- (c) [Any other products / services that need to be excluded from Ch. 7 coverage]

that is misleading or deceptive or is likely to mislead or deceive.

However, while simplifying some aspects, this approach may still result in complex definition provisions in the ASIC Act if, for example, there are a large number of different types of facilities that need to be excluded from the provisions in chapter 7 of the CA.

A simpler solution seems possible. As between the ASIC Act and the ACL, the major difficulty caused by the complexity of the definition of financial service is that it creates additional costs and time in determining whether the ACCC or ASIC is best placed to take action, whether or not a delegation of powers between the ACCC and ASIC is required, and whether claims are to be made under the ASIC Act or the ACL(Cth).⁶³ In the context of misleading or deceptive conduct, where the substantive law is the same in the ASIC Act and the ACL, Klotz suggests that this considerable attention to threshold issues has not substantially benefited claimants.⁶⁴

If it is an accepted policy position that the substance of the ACL provisions should apply to financial services in the same way that they apply to other goods and services, these difficulties and costs could be overcome by repealing both Part 2, Div 2 of the ASIC Act and s131A of the CCA. In this way, the ACL (Cth) would apply to all products and services in the economy, including financial services.

ASIC could retain responsibility for enforcing and administering the ACL as it applies to financial service and credit services, but this could be put in place through administrative arrangements, including the ASIC-ACCC Memorandum of Understanding. A broad definition of the products and

⁶³ For a detailed discussion of these costs in particular cases, see Klotz, *ibid* 458-463.

⁶⁴ *Ibid* 452.

services that ASIC would take responsibility for could be developed for the purposes of the administrative arrangements; among other things, it would clearly be appropriate for ASIC to take responsibility for matters that involve both contraventions of the CA or NCCPA and contraventions of the general consumer protections in the ACL, or that involve holders of an AFSL or ACL. There would be no need for a definition of financial product or financial service in the ACL itself.

Further, the current exclusion of the mandatory disclosure documents in the ASIC Act (eg, s12DA(2)) could be introduced as part of s18 ACL, again with requiring any definition of financial product or service in the ACL.

As well as addressing the uncertainty and costs associated with inadvertently proceeding under the wrong legislation, or pleading under numerous pieces of legislation, where there is doubt; this approach would ensure that the basic consumer protections apply equally to financial services as to other goods and services, and eliminate the delays that have sometimes been caused when amendments to the ACL provisions are not implemented at the same time in the ASIC Act (as was the case with changes to the unconscionability provisions). This approach would ensure that the basic bedrock of consumer protection standards applies equally across the economy.

A uniform application of the ACL(Cth) to all sectors of the economy, with enforcement responsibility shared between ASIC (for credit and financial services) and the ACCC seems to provide a more effective solution than the current arrangements.

Of course, this approach would not change the complexity of the definitions of financial product and financial service in the CA. A separate project might be needed here. However, given ASIC's powers to issue class orders to clarify the application of the provisions in chapter 7 to particular products, this is perhaps less of an immediate concern. This solution perhaps also raises an issue for the future as to the extent to which financial products might be considered to be 'goods' (and thus subject to, for example, the consumer guarantees of acceptable quality). Again, this is perhaps a larger project, but it seems unlikely that the current interpretation of 'goods' in the ACL would extend to cover financial products, without specific amendment to the ACL.

Other matters relevant to the ACL and financial services

Structure and wording of ASIC Act provisions

If the proposal for financial services to be included in the ACL is not accepted, it will be important to make changes to the ASIC Act to ensure that there is consistency of coverage between the ASIC Act and the ACL. In addition to the absence of the particular obligations discussed above, the ASIC Act provisions also differ in their structure and specific wording in some areas where the policy coverage is similar. The ACL is structured in a more coherent and easy to navigate layout when compared to the ASIC Act; in particular, the division of the ACL into general protections and specific protections is



a useful approach. However, the consumer protection provisions in the ASIC Act have not been similarly structured, making them more difficult to navigate and to understand.

Further, with the introduction of the ACL, some of the long-standing provisions in the *Trade Practices Act* were amended to clarify the operation of the provisions (for example, the pyramid selling provisions in ss44-46 ACL). However, these changes have not been made in the ASIC Act.

The differences between similar provisions in the ASIC Act and ACL could lead to confusion and inconsistent outcomes, and are unnecessary. With the exception of text that only has application to goods, the text of the substantive obligations in the ASIC Act and the ACL should be the same. Amendments should be made to ensure that the general consumer protections in the ASIC Act have the same wording (subject to references to goods) as the equivalent provisions in the ACL.

The role of the State and Territory Fair Trading Agencies in the context of financial services

Financial services are excluded from the ACL only insofar as the ACL is relied on as Commonwealth legislation. Section 131A of the Competition and Consumer Act has no application to the ACL when it is relied on as a law of a State or Territory (for example, *Fair Trading Act 1989* (Qld), s16). Further, the various State and Territory Fair Trading Acts do not exempt financial services from the ACL as a State or Territory law.⁶⁵ The Issues Paper also notes that the exclusion in s131A CCA 'does not affect the powers of the state and territory regulators with regard to the ACL, as applied at the State and Territory level'.

This creates an anomalous situation. For example, on their face, it appears that the consumer guarantees do not apply to financial services under the ACL(Cth), but they could apply to financial services under the ACL(Qld).⁶⁶ Thus, where there are differences between the ASIC Act and the ACL, different outcomes could result if matters proceeded under the State legislation rather than the ASIC Act. Even if the State and Territory agencies determine not to take any action in relation to financial products, this would not prevent private action under the relevant State or Territory legislation.

This anomaly needs to be clarified. Re-incorporating financial services into the ACL would be one way to minimise the consequences of any regulatory uncertainty on this point. However, if this change is not accepted, it will be important that the ASIC Act provisions are consistent with those in the ACL to remove the risk of differential outcomes depending on whether the ASIC Act or the State/Territory legislation is relied upon.

⁶⁵ For example, there is no reference to financial products or services in the *Fair Trading Act* (Qld).

⁶⁶ This has also been suggested by Paterson and Tokeley, above n 59, 104 (footnote 49).



Industry codes of practice

The place of industry codes in the consumer law framework is unclear. The CCA provides for the establishment of mandatory and voluntary industry codes, with contravention of an applicable industry code prohibited (Part IVB CCA). However, the codes that have prescribed under Part IVB are few in number, and the majority cover relationships between businesses, rather than relationships between businesses and consumers.

Industry codes have played a larger role in other sectors – including the telecommunications and financial services sector. In the case of the financial services sector, there are a number of long-standing industry codes, which are voluntary in application, but are, theoretically at least, binding upon a business that has subscribed to the relevant Code.⁶⁷ Both the CA and NCCPA give ASIC powers to approve a code,⁶⁸ but there is no regulatory requirement to belong to an approved code.⁶⁹

Non-compliance with a financial services code can be considered by the relevant code compliance body, but these often have limited sanctioning powers.⁷⁰ Non-compliance can also be considered by an External Dispute Resolution scheme when determining how a dispute should be resolved. In a litigation context, non-compliance with an industry code may also be relevant to a claim of unconscionable conduct (eg, s12CC(1)(h) ASIC Act), and/or a claim of misleading or deceptive conduct (eg, s12DA ASIC Act).⁷¹ More recently, claimants have also been raising breaches of the Banking Code as a defence in litigation. Here, the argument that, as the Code is incorporated into the terms and conditions of a product or service with a bank, non-compliance with a provision of the Code amounts to a breach of contract, with the result that contractual remedies such as damages or termination may be available. However, these arguments have not always been successful in the courts, and there has not been a consistent approach by the courts to the status and enforceability of the Code.⁷²

The ACL Review provides an opportunity to consider the role of codes generally, and in the financial services sector specifically. In particular, consideration should be given to ways in which there could be greater encouragement for suppliers to seek approval or registration of codes, and more serious consequences for contravening a code that has been approved or registered. Without a genuine enforcement and sanctioning method behind them, industry codes can be merely promotional vehicles with little real substance for the consumers who are designed to benefit from those codes.

⁶⁷ See, for example, Code of Banking Practice 2013, cl 12.3.

⁶⁸ CA s1011A; NCCPA s 241.

⁶⁹ Note that this contrasts with the situation for dispute resolution – all AFSL and ACL licence holders must belong to an ASIC-approved EDR scheme if they provide services to retail clients / consumers: CA s912A(1)(g); NCCPA s47(1)(i).

⁷⁰ For example, the only sanction available to the Code Compliance Monitoring Committee is to name a bank: Code of Banking Practice 2013, cl 36(j).

⁷¹ See ASIC RG183 'Approval of financial services sector codes of conduct' (March 2013), RG183.148-9.

⁷² See the discussion in Nicola Howell (2014) 'Revisiting the Australian Code of Banking Practice: Is self-regulation still relevant for improving consumer standards?' 38 (2) *UNSW Law Journal* 544, 582.



Recommendations from the Financial System Inquiry

This Review also provides the opportunity to consider whether recommendations from the recent Financial System Inquiry may also have wider application, and be appropriate for consideration in the ACL. This includes the recommendations to provide the regulator with a product intervention power (recommendation 22) and to impose a principles-based product design and distribution obligation on suppliers (recommendation 21).