



Queensland University of Technology  
Faculty of Law

# COMPARATIVE ANALYSIS OF OVERSEAS CONSUMER POLICY FRAMEWORKS

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# Part 1: Introduction

## 1.1 Structure of the report

The Commonwealth Department of Treasury (Commonwealth Treasury) on behalf of Consumer Affairs Australia and New Zealand (CAANZ) has engaged the Queensland University of Technology (QUT) to conduct a comparative review of international consumer policy frameworks.

The principal jurisdictions identified for the purposes of the comparison are the European Union, the United Kingdom, the United States of America, Canada, and Singapore.

This comparative analysis identifies emerging issues and key developments in consumer policy and possible alternative approaches for providing consumer protection. It highlights where the chosen jurisdictions adopt different approaches to Australia, but does not identify best practice models in other jurisdictions.

The following four principal issues are considered in this review:

### Issue 1: Approaches to unconscionable or highly unfair trading practices (Professor Stephen Corones, Faculty of Law, Queensland University of Technology)

The first issue for analysis is:

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

### Issue 2: Approaches to regulation of e-commerce and peer-to-peer transactions (Professor Sharon Christensen, Faculty of Law, Queensland University of Technology)

The second issue for analysis is:

- How consumer laws have responded to the challenges of **e-commerce and peer-to-peer transactions**:
  - online payments and disclosure of prices in online transactions e.g. drip pricing;
  - regulatory approaches that are flexible enough to accommodate technical solutions to the problem being regulated and not inhibit innovation or protect existing business models; and
  - challenges with obtaining a remedy for breaches of the law overseas/ international reach of domestic consumer protection laws.

### Issue 3: Institutional structures relating to the administration and enforcement of consumer laws

(Professor Justin Malbon, Faculty of Law, Monash University and Mr Allan Asher)

The third issue for analysis is:

- **Institutional structures** relating to the administration and enforcement of consumer laws (e.g. breadth of regulator powers; whether it is an enforcement model, administrative model or judicial model).

### Issue 4: Measures to facilitate access to justice

(Associate Professor Jeannie Marie Paterson, Melbourne Law School, University of Melbourne)

The fourth issue for analysis is:

- Measures to facilitate access to justice, including
  - early intervention and consumer empowerment,
  - support for consumers in accessing dispute resolution, and
  - institutional support (e.g. from regulators or other third party advocates).

The structure of the report is to consider each issue in a separate Part. Within each part the relevant Australian law that applies to the issue identified is considered. Next, the laws of the principal comparator jurisdictions applicable to the issue are considered. Finally, the respective laws are compared and contrasted and similarities and differences are identified.

## 1.2 Consumer protection legislation in Australia

Under the Australian Constitution, legislative power in relation to consumer protection is divided between the Commonwealth and the State and Territory parliaments. The method adopted to achieve this for the ACL was to use the ‘application model’. Under this model, new legislation to apply universally throughout Australia is enacted by a lead legislator — in this case the Commonwealth, with the text of the ACL set out in Sch 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). This text is made the law of the Commonwealth and of each State and Territory law by their individual applications laws — laws that apply the Schedule within each particular jurisdiction.

Although the principal provisions of the ACL only came into effect on 1 January 2011, many of these provisions are not novel. Instead, they are based on the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (TPA), albeit in revised language. Other provisions, of the ACL are new at the Commonwealth level, but they have been modelled on provisions previously contained in State, Territory, or overseas legislation.

## 1.3 ACL as a National Uniform law

In the case of the Commonwealth, the application law is contained in Pt XI of the CCA. This restricts the application of Sch 2 by reference to the limits imposed on Commonwealth legislative power by the Australian Constitution and by reference to the policy decision to leave the regulation of financial services and products to the *Australian Securities and Investments Commission Act 2011* (Cth) (ASIC Act).

Section 131(1) of the CCA applies Sch 2 as a law of the Commonwealth only to ‘the conduct of corporations, and in relation to contravention of Chapters 2, 3 or 4 of Schedule 2 by corporations.’

## Part 2: Executive summary

### 2.1 Approaches to unconscionable or highly unfair trading practices

#### 2.1.1 General and specific protections

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

**Table 1: Comparison of general protections**

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

Table 2: Comparison of Specific Highly Unfair Trading Conduct

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

## 2.2 Misleading conduct

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

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

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

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

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

## 2.3 Unfair/unconscionable conduct

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

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

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

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

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

## 2.4 Role of codes of conduct in unfair/unconscionable conduct

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

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

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

## 2.5 Unfair terms and the requirement of good faith

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

## 2.6 Inclusion of punitive fees in contracts

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

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

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

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

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

## 2.7 Pyramid schemes

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

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

## 2.8 Unsolicited selling and cooling off periods

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

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

### 2.9.1 Summary

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

The main differences in approach are summarised below.

### 2.9.2 Product quality

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

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

# State/provincial Sale of Goods legislation

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

## 2.10 Unfair pricing

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

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

## 2.11 Fake reviews

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

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

## 2.12 Fraud

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

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

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

## 2.13 Peer-to-peer transactions

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

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

### 2.14.1 Summary and key observations

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

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

## 2.15 Jurisdictional comparisons

### 2.15.1 Comparison of main institutions for consumer protection

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

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

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

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

### 2.15.2 Legislation and jurisdictional comparisons

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

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

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

### 2.15.3 Comparative issues in policy and practice

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

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

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

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

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

## 2.16 The revised United Nations guidelines for consumer protection

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

## 2.17 United Nations sustainable development goals

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

## 2.18 Digital purchasing and digital products

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

## 2.19 Other interesting developments

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

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

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

## 2.20 Measures to facilitate access to justice

### 2.20.1 Summary

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

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

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

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

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

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

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

#### Measures to facilitate access to justice: new initiatives

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

## 2.21 The form and content of legislation

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

## 2.22 Information and education

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

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

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

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

## 2.23 Assistance and advice

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

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

## 2.24 Alternative dispute resolution

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

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

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

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

## **2.25 Regulatory oversight and enforcement**

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

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

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

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

The first issue for analysis is:

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

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

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

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

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

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

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

## 3.2 General protections in Australia

### 3.2.1 Introduction

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

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

The objective of the new national consumer policy framework is to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.

This overarching object is supported by six operational objects:

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

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

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

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

- misleading conduct
- unconscionable conduct
- unfair terms.

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

### 3.2.2 General protections in Australia — misleading conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, while s 18 of the ACL (and s 52 of the *TPA*) have been used to promote the interests of consumers by improving the conduct of businesses in relation to their advertising, selling practices and promotional activities generally, and by prohibiting them from engaging in sharp practices when dealing with individual consumers, their greatest use has been in connection with disputes of a commercial nature between competitors who are not consumers. In this regard s 52 the *TPA* was influenced by s 5 of the United States *Federal Trade Commission Act* and US law.<sup>11</sup>

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

### 3.2.3 General protections in Australia — unconscionable conduct

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

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

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

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

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

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

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

### 3.2.4 Different interpretations of statutory unconscionable conduct

Section 21(1) of the ACL provides:

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

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

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

According to the second line of authority, statutory unconscionable conduct does not necessarily require a ‘high level of moral obloquy’ and the statutory language needs to be given its ‘ordinary and natural interpretation’. In *ACCC v Lux Distributors Pty Ltd*, the Full Federal Court held that conduct is ‘unconscionable’ for the purposes of s 21 of the ACL if it is ‘not done in good conscience’.<sup>15</sup> Statutory unconscionable conduct is an evaluative standard to be understood by taking into account the values and norms that Parliament considered relevant when it identified the non-exhaustive list of factors in s 22 of the ACL, and s 12CC of the *ASIC Act*.<sup>16</sup> It is to be applied according to the particular context of the case by asking: what is the current moral or ethical standard in relation to the conduct at issue?

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

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

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

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

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

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

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

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

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

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

### 3.2.5 General protections in Australia — unfair terms

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

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

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

18 [2015] HCATrans 229.

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

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

21 *Ibid* 168-169, Recommendation 7.1.

22 *Ibid* 154.

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

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

Section 23 of the ACL provides:

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

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

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

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23 Ibid 151, 413-414.

24 Ibid 151, 414-423.

25 Ibid 151, 413-414.

26 Ibid 155.

27 Ibid 157.

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

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

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

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

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

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

28 CCA s 290A.

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

30 ACL s 24(1).

31 ACL s 24(2).

32 ACL s 24(2)(a).

33 ACL s 24(2)(b).

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

Edelman J said:

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

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

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

### 3.2.6 General protections in Australia — excluded terms

Section 26 of the ACL provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38 Second Explanatory Memorandum [5.62].

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

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

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

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

43 ACL s 25(1)(f).

### 3.3 Punitive fees in contracts

#### 3.3.1 Australia

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

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

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

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

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

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

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

45 *Ibid* [103].

46 *Ibid* [115].

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

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

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

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

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

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

According to Paterson:

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

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

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

48 *Ibid* [341].

49 *Ibid* [342].

50 *Ibid* [343].

51 *Ibid* [345].

52 *Ibid* [347].

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

54 *Ibid* 48 [4.160].

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

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

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

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

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

... to ensure that payment surcharges:

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

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

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

Section 55B(1) provides that:

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

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

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

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

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

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

### 3.3.5 European Union

#### 3.3.5.1 Introduction

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

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

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

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

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

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

57 Ibid.

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

59 Ibid art recitals 2-4.

60 Ibid art recital 11.

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

62 Ibid.

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

### 3.3.6 General protection — punitive fees

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

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

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

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

Article 2(h) defines professional diligence as ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity’. According to Abbamonte:

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

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

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

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

65 Ibid art 5(2).

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

67 Ibid 23.

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

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

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

or

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

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

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

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

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

69 Ibid art 5(4).

70 Ibid art 6.

71 Ibid.

72 Ibid art 6(1)(a).

73 Ibid art 6(1)(b).

74 Ibid art 6(1)(d).

75 Ibid art 7(1).

76 Ibid art 7(4)(a).

77 Ibid art 7(4)(c).

78 Ibid art 7(2).

79 Ibid art 5(5).

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

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

### 3.3.7 Specific protection — punitive fees

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

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

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

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

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

80 Ibid art 11.

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

82 Ibid art 3(3).

83 Ibid 1(e).

84 Ibid art 4(1).

85 Ibid art 4(2).

86 Ibid art 6.

87 Ibid art 7.

88 Ibid art 7(2).

## 3.4 United Kingdom

### 3.4.1 Introduction

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

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

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

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

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

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

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

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

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

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

95 *Ibid* para 9, 29.

### 3.4.2 General protection — punitive fees

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

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

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

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

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

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

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

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

97 Ibid.

98 Ibid r 2(5).

99 Ibid r 7.

100 Ibid r 5.

101 Ibid 5(2)(a).

102 Ibid r 5(4)(a).

103 Ibid r 5(4)(b).

104 Ibid r 5(4)(g).

105 Ibid r 6.

106 Ibid r 6(4)(a).

107 Ibid r 6(4)(d).

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

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

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

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

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

This consumer right to civil redress includes the right to:

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

### 3.4.3 Specific protection — punitive fees

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

108 Ibid r 6(1).

109 Ibid rr 8-12.

110 Ibid r 13.

111 Ibid rr 27A & 27B.

112 Ibid r 27E.

113 Ibid r 27I.

114 Ibid r 27J.

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

116 Ibid s 62(4).

117 Ibid s 62(5).

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

Section 63 provides for a ‘grey list’, found in Part 1 of Schedule 2 of the *CRA*, which contains ‘an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair’.<sup>120</sup> Regarding the inclusion of punitive fees in contracts, the ‘grey list’ relevantly contains ‘a term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation’.<sup>121</sup>

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

## 3.5 United States

### 3.5.1 Introduction

The consumer policy framework in the United States with regard to the inclusion of punitive fees in contracts to provide for a general protection and a number of industry-specific protections. General protection is provided by the *Federal Trade Commission Act* (‘*FTC Act*’), which prohibits ‘unfair or deceptive acts or practices in or affecting commerce’. As banks, savings and loan institutions, and Federal credit unions are exempted under the *FTC Act*, other specific federal acts, such as the *Truth in Lending Act*, the *Truth in Savings Act*, and Title 15 of the US Code, regulate the financial industry with respect to the inclusion of punitive fees in contracts. In addition, certain industries, such as civil aviation, are subject to specific codes, which refer to punitive fees.

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

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118 Ibid s 64.

119 Ibid s 64(6).

120 Ibid s 63(1).

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

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

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

124 Ibid regulation 10.

125 15 USC § 45.

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

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

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

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

### 3.5.2 General protection — punitive fees

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

According to the three-limb test set out in the FTC’s 1983 Policy Statement on Deception, an act or practice is deceptive if it involves:

- (1) ‘a representation, omission, or practice that is likely to mislead the consumer’;
- (2) ‘a consumer acting reasonably under the circumstances’; and
- (3) the representation, omission, or practice is material to the consumer’s choice of or conduct regarding a product or services.<sup>131</sup>

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

The test for ‘unfairness’ under the *FTC Act* was first expressed in the 1980 Policy Statement on Unfairness and later codified into the *FTC Act* in 1994 as 15 U.S.C. § 45(n).<sup>133</sup>

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

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

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

129 15 USC § 1639b(1)&(2).

130 15 USC § 45(1)&(2).

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

132 *Ibid.*

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

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

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

### 3.5.3 Financial regulation

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

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

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

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

135 Ibid.

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

137 15 USC § 1639b(e)(1).

138 15 USC 1632(a)

139 15 US Code § 1639c(c)(1).

140 15 US Code § 1639c(c)(4).

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

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

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

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

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

### 3.5.4 Industry Specific Regulation

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

## 3.6 Canada

### 3.6.1 Introduction

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

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

### 3.6.2 Banking Industry

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

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

146 14 CFR 399.85.

147 49 USC § 41712.

148 49 USC § 46301.

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

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

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

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

153 *Ibid* s 452(2).

154 *Ibid* s 452 (3).

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

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

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

### 3.7 Singapore

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

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

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

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

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

157 Ibid r 17.

158 Ibid r 18.

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

160 Ibid s 67(3).

161 Ibid s 67.2(1).

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

163 Ibid s 5(3)(b).

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

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

## 3.8 Pyramid selling

### 3.8.1 Australia

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

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

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

### 3.8.2 Specific protection — pyramid selling

Section 44 of the ACL provides:

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

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164 ACL s 18.

165 ACL s 21.

166 ACL s 29(1).

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

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

### 3.8.3 Meaning of ‘pyramid scheme’

Section 45 of the ACL defines a pyramid scheme:

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

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

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

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

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

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

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

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

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

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

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

### 3.8.4 Meaning of ‘entirely or substantially’

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

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

### 3.8.5 Meaning of ‘in relation to’

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

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

173 *Ibid* [156].

174 *Ibid* [130].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 3.9 European Union

### 3.9.1 Introduction

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

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

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

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

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

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

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

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

### 3.9.2 General protection — pyramid selling

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

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

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

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

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

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

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

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

185 Ibid art 5(2).

186 Ibid art 5(3).

187 Ibid art 5(4).

188 Ibid art 6.

189 Ibid art 6(1)(a).

190 Ibid art 6(1)(c).

191 Ibid art 6(1)(d).

192 Ibid art 7.

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

### 3.9.3 Specific protection — pyramid selling

Article 5(5) puts forward a third means by which a commercial practice may be found to be unfair: a ‘blacklist’, found in Annex I, of commercial practices which are to be considered unfair in all circumstances. This list is to be applied by all Member States without modification.<sup>195</sup> Relevantly, the UCPD blacklists the establishment, operation or promotion of a ‘pyramid promotional scheme’ which is defined as a scheme ‘where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products’.<sup>196</sup>

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

## 3.10 United Kingdom

### 3.10.1 Introduction

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

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

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193 Ibid art 8.

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

195 Ibid art 5(5).

196 Ibid annex I, pt 14.

197 Ibid art 11.

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

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

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

### 3.10.2 General protection — pyramid selling

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

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

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

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

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

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

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

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

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

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

203 Ibid r 3.

204 Ibid r 2(5).

205 Ibid r 7.

206 Ibid r 5.

207 Ibid r 5(4)(a).

208 Ibid r 5(4)(d).

209 Ibid r 5(4)(e).

210 Ibid r 5(4)(g).

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

### 3.10.3 Specific protection — pyramid selling

Regulation 3(4)(d) puts forward a third means by which a commercial practice may be found to be unfair: a ‘blacklist’, found in Schedule I, of specific commercial practices which are to be considered unfair in all circumstances. Relevantly, the CPR blacklists the establishment, operation or promotion of a pyramid scheme ‘where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products’.<sup>213</sup>

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

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

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

This consumer right to civil redress includes the right to:

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

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211 Ibid r 7(1).

212 Ibid r 7(2).

213 Ibid schedule 1, para 14.

214 Ibid rr 8-12.

215 Ibid r 13.

216 Ibid rr 27A & 27B.

217 Ibid r 27E.

218 Ibid r 27I.

219 Ibid r 27J.

## 3.11 United States of America

### 3.11.1 Introduction

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

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

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

### 3.11.2 General protection — pyramid selling

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

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

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

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

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

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

223 *Ibid.*

224 *Ibid.*

225 *Ibid.*

226 15 USC §§ 45(1) & (2).

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

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

The Court held:

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

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

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

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

## 3.12 Canada

### 3.12.1 Introduction

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

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

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

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

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

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

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

### 3.12.2 Specific protection — pyramid selling

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

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

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

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

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

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

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

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

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

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

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

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

## 3.13 Singapore

### 3.13.1 Introduction

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

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

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

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

### 3.13.2 Specific protection — pyramid selling

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

247 Ibid r 2(1)(c).

248 Ibid s 3(1).

249 Ibid s 4(1).

250 Ibid s 5(1).

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

252 Ibid s 6.

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

## 3.14 Unsolicited selling laws

### 3.14.1 Australia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3.14.2 General protections — unsolicited selling laws

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

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

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

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

### 3.14.3 Specific protection — unsolicited selling

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

Unsolicited consumer agreements may result from:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

266 ACL s 69(1)(c).

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

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

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

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

271 *Ibid.*

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

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

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

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

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

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

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

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

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

The ACL provides for the following express rights and obligations.

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

### 3.14.4 European Union

#### 3.14.4.1 Introduction

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

#### 3.14.4.2 General protection — unsolicited selling

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

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

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

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

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

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

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

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

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

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275 Ibid art 5(2).

276 Ibid art 5(3).

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

278 Ibid art 8.

279 Ibid art 9(a).

280 Ibid art 5(5).

281 Ibid annex I, pt 25.

282 Ibid annex I, pt 26.

283 Ibid annex I, pts 25-26.

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

#### 3.14.4.3 Specific protection — unsolicited selling

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

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

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

### 3.14.5 United Kingdom

#### 3.14.5.1 Introduction

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

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

284 Ibid art 11.

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

286 Ibid art 3(3)(d).

287 Ibid art 3(3)(e).

288 Ibid art 3((3)f).

289 Ibid art 3(4).

290 Ibid art 9(1).

291 Ibid art 9(2).

292 Ibid art 10(1).

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

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

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

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

### 3.14.6 General protection — unsolicited selling

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

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

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

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

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

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

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

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

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

300 *Ibid.*

301 *Ibid* r 2(5).

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

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

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

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

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

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

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

This consumer right to civil redress includes the right to:

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

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302 Ibid r 7.

303 Ibid r 7(1).

304 Ibid.

305 Ibid schedule I, para 25.

306 Ibid para 26.

307 Ibid para 25 & 26..

308 Ibid rr 8-12.

309 Ibid r 13.

310 Ibid rr 27A & 27B.

311 Ibid r27E.

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

### 3.14.7 Specific protection — unsolicited selling

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

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

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

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

### 3.14.8 United States

#### 3.14.8.1 Introduction

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

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312 Ibid r271.

313 Ibid r271.

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

315 Ibid r 6(1)(b).

316 Ibid r 6(1)(c).

317 Ibid r 6(1) (d).

318 Ibid r 29.

319 Ibid r 30.

320 Ibid r 31.

321 Ibid r 19(1).

322 Ibid r 19(2).

323 16 CFR §§ 310.3 & 310.4.

### 3.14.8.2 General protection — unsolicited selling

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

### 3.14.8.3 Specific protection — unsolicited selling

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

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

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

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324 15 USC § 45.

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

326 15 USC §§ 45(1) & (2).

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

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

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

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

331 16 CFR § 429.2(a).

332 16 CFR § 429.2(b).

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

### 3.14.8.4 Door-to-door sales

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

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

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

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

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

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334 16 CFR § 429.1.

335 16 CFR § 429.0(a).

336 16 CFR § 429.0(a).

337 16 CFR § 429.0(4).

338 16 CFR § 429.0(6).

339 16 CFR § 429.3.

340 16 CFR § 429.1.

341 16 CFR § 429.1(a).

342 16 CFR § 429.1(b).

343 16 CFR § 429.1(e).

344 16 CFR § 429.1(f).

345 16 CFR § 429.1(g).

346 15 USC § 45(1)&(2).

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

### 3.14.8.5 Telemarketing sales

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

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

## 3.14.9 Canada

### 3.14.9.1 Introduction

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

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

### 3.14.9.2 Specific protection — unsolicited selling

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

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

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

349 16 CFR §§ 310.3 & 310.4.

350 16 CFR § 310.4(1)(b)(i).

351 16 CFR § 310.4(1)(b)(ii).

352 16 CFR §310.4(1)(b)(iii).

353 16 CFR §310.4(1)(c).

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

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

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

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

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

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

## 3.14.10 Singapore

### 3.14.10.1 Introduction

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

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

358 Ibid 2(1).

359 Ibid 4.

360 Ibid 5(1).

361 Ibid 5(2).

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

363 Ibid c. 38, ss 41.2 to 41.7.

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

365 Ibid Part III, r 14.

366 Ibid Part III, r 23.

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

368 Ibid.

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

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

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

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

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

### 3.14.10.2 General protection — unsolicited selling

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

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

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

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

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

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

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

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

<sup>374</sup> *Ibid* s 5(3)(b).

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

### 3.14.10.3 Specific protection — unsolicited selling

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

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

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

## 3.15 Comparing and contrasting

### 3.15.1 Introduction

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

### 3.15.2 General protections

The Australian consumer policy framework has most in common with the EU, the UK and the US consumer policy frameworks. The *Unfair Commercial Practices Directive of the European Parliament and Council* (UCPD) takes a three-tiered approach which consists of a first tier general prohibition of unfair commercial practices, second tier prohibitions against misleading and aggressive practices, and a third tier blacklist of specific practices that are prohibited in all circumstances. The first tier general prohibition defines the conditions for determining whether a commercial practice is unfair. Article 5(2) provides that a commercial practice will be unfair if:

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

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

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

379 Ibid r 3(c).

380 Ibid r 3(d).

381 Ibid r 3 (h).

382 Ibid r 4(1).

383 Ibid 4(2).

384 Ibid r 5(1)(a).

385 Ibid Schedule 1.

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

Article 2(h) defines professional diligence as ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity’.

According to Abbamonte,

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

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

A significant difference between Australia and the EU/ UK position is that Australia does not have a first tier general prohibition of unfair commercial practices similar to art 5(2) of the UCPD, which some have suggested would be a useful addition to the ACL regime,<sup>389</sup> or a third tier black list of specific practices that are prohibited in all circumstances.

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

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

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

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

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

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

388 Paterson and Brody, above n1, 347.

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

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

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

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

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

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

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

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

- (1) ‘a representation, omission, or practice that is likely to mislead the consumer’;
- (2) ‘a consumer acting reasonably under the circumstances’; and
- (3) the representation, omission, or practice is material to the consumer’s choice of or conduct regarding a product or services.<sup>395</sup>

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

391 Ibid art 5(3).

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

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

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

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

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

### 3.15.4 Statutory unconscionable conduct v unfair commercial practice

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

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

It has been argued that the standard of ‘unfairness’ in the UCPD is lower than the standard of statutory unconscionable conduct, and that the adoption of the UCPD general prohibition of unfair commercial practices in Australia would increase the overall level of consumer protection.<sup>398</sup>

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

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

According to Paterson and Brody,

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

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

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

398 See Paterson and Brody, above n1, 351.

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

400 Paterson and Brody, above n1, 349.

### 3.15.5 Role for codes of conduct

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

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

In some EU Member States codes of conduct are used to set standards of good business behaviour in a particular sector. According to Abbamonte,

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

In Australia, assessing whether conduct meets the standard of statutory unconscionable conduct in s 21 of the ACL, is an evaluative task to be understood by taking into account the values and norms that Parliament considered relevant when it identified the non-exhaustive list of factors in s 22 of the ACL, and s 12CC of the *ASIC Act*.<sup>403</sup> One of the factors listed in s 22(1)(g) and (2)(g) of the ACL that a court may have regard to is the requirements of any applicable industry code. Mandatory and voluntary industry codes of conduct are regulated by Pt IVB of the *CCA*, and do not form part of the ACL. They are generally concerned with protecting small business owners rather than consumers. In *ACCC v South East Melbourne Cleaning Pty Ltd (in liq)*<sup>404</sup> Murphy J observed that the Franchising Code provides a normative standard of conscience for the purposes of assessing whether conduct is unconscionable.

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

### 3.15.6 Aggressive commercial practices

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

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

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

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

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

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

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

406 *Ibid* art 8.

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

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

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

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

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

### 3.15.7 Unfair terms and the requirement of good faith

The definition of an unfair term in the *Consumer Rights Act 2015* United Kingdom has an additional requirement that the term must be ‘contrary to the requirement of good faith’ which is not present in the definition of an unfair term in s 24 of the ACL. Does the absence of the requirement of good faith in the Australian definition of unfair term make Australia’s general protection narrower or broader than its UK equivalent?

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

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

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

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

409 Ibid r 7(1).

410 Ibid r 7(2).

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

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

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

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

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

The UTCCD requirement of good faith requires ‘an overall evaluation of the different interests involved’. The unfair terms regime in the ACL already imposes such a requirement. In applying the test of unfairness s 24(2)(b) of the ACL requires the court to consider the term in the context of the contract as a whole. Some contractual terms that appear to be unfair when viewed in isolation, might be considered to be fair in the context of the agreement as a whole: a harsh term may be necessary to ensure that the consumer obtains the goods or services at a lower price. The lower price is the trade-off for the harsh term.

### 3.15.8 Inclusion of punitive fees in contracts

The EU and UK include a grey list include ‘a term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation’ which is included in the UK grey list.<sup>414</sup>

The Australian grey list includes ‘a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract’.<sup>415</sup>

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

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

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

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

413 *Ibid* [1010].

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

415 ACL s 25(1)(c).

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

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

In the EU, the UCPD blacklist includes the establishment, operation or promotion of a ‘pyramid promotional scheme’ which is defined as a scheme ‘where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products’.<sup>416</sup>

In the UK, the CPR blacklist includes the establishment, operation or promotion of a pyramid scheme ‘where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products’.<sup>417</sup>

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

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

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

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

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

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

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

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

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

### 3.15.10 Unsolicited selling and cooling off periods

Most jurisdictions adopt a combination of general and specific protections in relation to unsolicited selling all provide for a ‘cooling off’ period in which the consumer can withdraw from a contract entered into away from the seller’s permanent business location, including a consumer’s home. All jurisdictions recognise that consumers are more vulnerable to aggressive sales tactics when confronted at their own home, since they cannot leave the sales location, unlike a permanent business location.

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

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

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

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

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

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

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

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

420 Ibid annex I, pt 26.

421 Ibid annex I, pts 25-26.

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

423 Ibid schedule I, para 26.

424 Ibid para 25 & 26.

425 16 CFR § 429.1.

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

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

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

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

Issue 2: Professor Sharon Christensen, Faculty of law, Queensland University of Technology\*

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

### 4.1 Introduction — regulatory approaches to e-commerce

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

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

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

#### 1. Product quality

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

#### 2. Misleading information and practices

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

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\* I gratefully acknowledge the research assistance provided by Amanda-Jayne Bull for the preparation of Part 4.

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

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

### 3. Sharing economy

The rapid growth of the sharing economy<sup>429</sup> through peer to peer platforms<sup>430</sup>, such as Uber and Airbnb, presents different challenges for the existing regulatory model. In addition to the issues of product quality and misleading practices, questions about the application and suitability of existing business to consumer (B2C) regulatory frameworks arise. The report considers the following issues:

- Should regulation treat all suppliers of goods or services, whether a large corporation or an inexperienced individual, in the same way? Does the variation in the market between sharing of assets by individuals via peer to peer platforms and business to business transactions<sup>431</sup> mean there is too much complexity for a one size fits all regulatory model?
- Should the regulatory model include some protection for consumers transacting with other consumers? Minimum standard or quality or minimum information disclosure requirements?
- What is the role of the platform provider in the transaction? Should the platform provider bear responsibility for the conduct of suppliers using the platform?

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

## 4.2 Product quality in e-commerce

### 4.2.1 Issues

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

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

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429 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...))

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

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

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

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

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

- (1) Online or digital products may not fall easily within traditional concepts of 'goods' or 'services' resulting in uncertainty about the application of consumer guarantees. This can arise in a number of situations:
  - i. Some common products, such as refrigerators now may also include the acquisition of software connecting the fridge to the internet. Is this a purchase of goods or services or both?
  - ii. Case law has struggled with the legal characterisation of digital content supplied through a download from the internet. The definition of 'goods' in the ACL includes computer software, which means that software provided by way of a disc or a download is included as 'goods'. Despite this there is a potential lack of clarity about the nature of data, such as music, information or advice, downloaded via the internet, which does not include software. If this type of information does not fall within the definition of goods guarantees of acceptable quality will not apply.
  - iii. Transactions occurring via peer to peer platforms<sup>434</sup> need careful consideration. The nature of the supply may vary depending upon whether a person is supplying a product (such as selling their car on Gumtree); selling by 'auction' on a shared marketplace or 'sharing' their car via ride sharing platform or a car sharing platform. What guarantees of quality is the consumer entitled to expect?  
  
The only jurisdiction to enact specific legislation to regulate product quality for digital content is the United Kingdom.
- (2) Consumers are often dealing with suppliers who are unknown to the consumer: Should online suppliers be required to provide additional or more detailed information to consumers about their products, the contract terms or their business?
- (3) Increased reliance is placed by consumers on the description of products on supplier websites, consumer reviews, 'independent' comparison websites, and other online tools raising the need to consider if laws regulating misleading conduct and other unfair practices are sufficiently broad and adaptable so as to apply to new online selling and advertising practices.<sup>435</sup> Increased provision of professional advice through cognitive digital platforms also raises issues about how to regulate the quality of the advice and the underlying algorithms.<sup>436</sup>
- (4) The increasing global operation of many online businesses and platforms raises jurisdictional issues for enforcement. Businesses operating in low regulatory jurisdictions, but supplying goods or services within high regulatory jurisdictions will attempt to exclude the operation of warranties or guarantees by choosing the law of another country as the applicable law. Jurisdictions have attempted to counter this behaviour by prohibiting contracting out, broadening extra territorial application of laws and ensuring harmonisation of laws at least nationally and in some cases within regions.

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

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

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

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

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

## 4.2.2 Australia

Under the *Australian Consumer Law* consumers purchasing online or in face to face transactions are provided with both general and specific protections in relation to the quality of goods and services. General protections are provided for misleading conduct occurring in trade or commerce<sup>437</sup> and unconscionable conduct in the supply of goods and services in trade or commerce.<sup>438</sup> Specific protection is provided by statutory guarantees applying to goods and services. In 2006 the *Australian Guidelines for Electronic Commerce* were issued with the purpose of enhancing consumer confidence in electronic commerce by providing guidance for business to consumer transactions. The guidelines do not alter the provisions of the *Australian Consumer Law*.

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

### 4.2.2.1 General protections — misleading conduct

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

The main issue arising in an application of the misleading conduct provisions is whether these provisions apply to international sellers located outside of Australia. Many disputes and enforcement actions in relation to online transactions will involve suppliers or customers who are in different states or more commonly, different countries. Many of the enforcement or civil penalty actions by the ACCC involve allegations of misleading conduct by suppliers<sup>440</sup> or potentially peer to peer platform operators who are domiciled in other countries.

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

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

439 See Part 3.

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

The ACL as a law of the Commonwealth<sup>441</sup> applies to the conduct of corporations. A corporation according to s 4(1) *Competition and Consumer Act 2010* includes a 'foreign corporation' which is defined by reference to the corporation's power in s 51(xx) of the *Australian Constitution*. Most corporations operating in online markets that are not Australian corporations will fall within this definition.

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

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

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

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

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

#### **4.2.2.2 Specific protections — statutory guarantees**

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

Guarantees for 'goods' are:

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

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

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

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

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

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

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

Guarantees for 'services' are:

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

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

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

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

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

#### **4.2.2.3 Application of statutory guarantees in e-commerce**

Statutory guarantees in the ACL apply where:

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

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

## 1. 'Supply'

A person will supply goods to another person where the goods are supplied (including re-supplied) by way of 'sale, exchange, lease, hire or hire-purchase'.<sup>447</sup> 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.<sup>448</sup> A supply of services occurs where the services are 'provided, granted or conferred'.

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

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

There is a lack of clarity about:

- **Sharing or exchange via a peer to peer platform.** Whether the person is 'supplying' goods or services may depend on the form of the interaction. The view taken by a court may be influenced by whether consideration is paid or operates in a commercial context. For example the sharing of household items<sup>449</sup> between individuals while resembling a lease or hire arrangement, may not be a supply if not money is paid. In contrast, a person who provides ride sharing services through Uber in exchange for payment will probably be considered by a court as supplying a service. Clarity about whether the transaction is for goods or services is relevant to the applicable guarantees.
- **Online auctions:** It should also be noted that a number of the statutory guarantees (ss 54-59 ACL) do not apply to goods sold by *auction*. *The phrase sale by auction is defined as, 'in relation to the supply of goods by a person, means a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means).'* The rationale for this approach is based upon the ability of a consumer for an auction to evaluate the value of the goods prior to auction. The continued application of this rationale to an online auction should be reconsidered. Whether an online auction, such as those that occur through eBay is actually an auction in accordance with the definition is also unclear.<sup>450</sup> Unlike a face to face auction, eBay does not actually sell the goods as agent for the seller, but merely provides an online platform for the seller to obtain bids from consumers and facilitates acceptance of a price.<sup>451</sup> On this basis a seller via eBay or similar website may not be engaged in a sale by auction.<sup>452</sup>

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

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

449 Gumtree, Etsy, The Clothing Exchange, TuShare.

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

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

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

## 2. 'Goods' and 'services'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **3. 'Consumer' and 'Trade or Commerce'**

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

This issue is particularly relevant in peer to peer transactions.

#### 4. Extraterritorial operation

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

If:

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

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

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

#### 4.2.3 United Kingdom

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

##### 4.2.3.1 General Protections — unfair commercial practices

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

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

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

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

#### 4.2.3.2 *Specific protections — Consumer Rights Act 2015*

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

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

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

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

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

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

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

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

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

### Approach to extra territorial operation

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

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

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

### Additional information disclosure requirements

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

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

#### 4.2.3.3 Information Disclosure Internet Contracts

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

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

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

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

#### 4.2.4 United States

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

The relevant laws are:

##### *Implied warranties*

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

##### *Information Disclosure*

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

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

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

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

#### 4.2.4.1 General protection — Uniform Commercial Code

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

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

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

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

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

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

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

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

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

Daniel Wiig<sup>471</sup> argues that Internet-based sellers should be obligated to take additional steps including:

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

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

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

#### **4.2.4.2 General protection — unfair or deceptive commercial practices**

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

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

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

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471 'Essays: UCC Article 2 Warranties and Internet-Based Transactions: Do The Article 2 Warranties Sufficiently Protect Internet-Based Transactions With Unprofessional Internet Merchants?' (2007) 12(4) *Fordham Journal of Corporate & Financial Law*, 717, 731-732.

472 See also, Gary Sullivan, 'Purchasing from Merchants On Ebay and the Implied Warranty of Merchantability: A Overview' (2009) 70(4) *Alabama Lawyer* 266-272.

473 *Federal Trade Commission Act 15 USC* §45 (1) & (2), §52

## 4.2.5 Canada

The Canadian government's overall policy approach to e-commerce is to ensure that consumers are afforded the same protection whether transacting face to face or online. The Canadian government undertook a review of their consumer protection framework to ensure it fosters growth in the e-economy and to harmonise Canadian consumer law with best practice international approaches.<sup>474</sup>

At a Federal level the regulatory approach is based primarily upon improving the quality of information provided to consumers. The *Competition Act RSC 1985* primarily regulates conduct of traders by prohibiting false or misleading representations. This is analogous to the misleading conduct provisions of the ACL. Warranties of quality and fitness for purpose are regulated at a provincial level under the *Sales of Goods* legislation. A majority of provinces have also adopted the *Internet Sales Contract Harmonization Template* which supports the Competition Act provisions aimed at ensuring consumers are provided with adequate information about the goods being purchased, the price and other material terms of the contract.

### 4.2.5.1 General Protections — Competition Act

The relevant law at a federal level is the *Competition Act RSC 1985 c C-34*. The Act governs the conduct and commercial practices of businesses in Canada with the purpose of providing consumers with, amongst other things, competitive prices and product choices and, in the context of the quality of goods and services, making misleading advertisements unlawful. These provisions apply broadly to conduct in commercial situations irrespective of the medium in which the conduct occurs.

In relation to the quality of goods and services, the *Competition Act* provides that a person who makes representations that are false or misleading in a material respect in the course of promoting the supply or use of a product engages in 'reviewable conduct' (ss 74.01 — 74.02), which can result in administrative remedies including orders to cease such conduct and the payment of monetary penalties (section 74.1(1)). Such representations are deemed to be made by the person who causes the representations to be expressed, unless that person is outside Canada, in which case the person who imports the goods will be held responsible (section 74.03(2)). Product is defined to include an 'article' and a 'service'. An article is 'real and personal property of every description.' This definition is wide enough to apply to computer software.<sup>475</sup> The provisions are applicable if a person makes a misleading representation about goods or services but does not impose a standard of acceptable quality for those goods.

Canada has also implemented the *Internet Sales Contract Harmonization Template* that has been ratified by the federal and provincial governments. The Harmonization Template requires, amongst other things, a 'fair and accurate description' of the goods or services to be provided (section 3(1)a)iv)). For the Template to be effective within a Canadian province it must be formally adopted, which has only occurred in six provinces and even in those cases there are a number of differences in the legislation particularly related to enforcement across provincial borders.<sup>476</sup>

474 Working Group on Electronic Commerce and Consumers, 'Principles of Consumer Protection for Electronic Commerce: A Canadian Framework' (Principles of Consumer Protection, Office of Consumer Affairs of Industry Canada, 2009) 2. The Canadian government also considers it important that any Canadian response to drip-pricing should be consistent with directions in consumer protection established by international bodies such as the Organisation for Economic Co-operation and Development.

475 *PCM Technologies Inc v O'Toole* [2012] ONSC 2543

476 Refer to the summary in the research report by *Option consommateurs* entitled 'The Views Of Canadians On The Harmonization Of Consumer Protection Standards' (2015)

The provisions of the *Competition Act* apply to any business operating within Canada and selling to Canadian citizens.

#### 4.2.5.2 Provincial Legislation

Application of provincial legislation to internet contracts is uneven. Where legislative provisions have been enacted to apply to internet or distance contract, focus has been on the information a supplier should disclose to a consumer rather than warranties of quality. For example in Ontario the *Consumer Protection Act* regulates abusive business practices both in face-to-face transactions and those that occur online (known as 'internet agreements' and 'remote agreements'). The Act:

- requires that suppliers disclose certain prescribed information (including a fair and accurate description of the goods and services (including technical requirements)) before the consumer enters into a contract;<sup>477</sup> and
- deems certain conditions (in the case of goods) and warranties (in relation to goods and services) to apply to the quality of goods and services. The warranties are those already existing in the *Sale of Goods Act*.

These implied warranties and conditions relating to the quality or fitness for any particular purpose of goods supplied under a contract of sale only apply:

- Where the buyer makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (but this condition does not apply in the sale of a specified article under its patent or other trade name;<sup>478</sup>
- Where goods are bought by description from a seller who deals in goods of that description unless the buyer has examined the goods and such examination ought to have revealed the defects;<sup>479</sup>
- An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.<sup>480</sup>

The definition of goods is unchanged and means 'all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale'. This definition is unlikely to apply to computer software or other digital content. A similar position exists in British Columbia under the *Business Practices and Consumer Protection Act* and the *Sale of Goods Act*. The emphasis in the provinces, similar to the Federal level, has been on disclosure requirements related to description of the goods or services to be supplied under the contract including any relevant technical or system specifications.

There is minimal case law in an internet context applying consumer laws and the existing case law related to distance sales contracts has been criticised as showing 'a worrisome lack of understanding on the part of the courts with respect to electronic distance selling.'<sup>481</sup> Rather than interpreting the unique characteristics of Internet sales contracts, the courts seem to be blindly

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477 See, for example, section 38(1) and regulation 32(1) of the *Consumer Protection Act Regulations 2002 17/05*.

478 *Sale of Goods Act RSO 1990*, c S.1, s 15.1.

479 *Ibid* c S.1, s 15.2

480 *Ibid* c S.1, s 15.3.

481 Ioana Delapeta and Marcel Boucher, 'Regulating Distance Contracts: Time to Take Stock' (Final Report of the Research Project, Union des consommateurs, June 2014), 46.

transposing the contractual principles applicable to paper contracts and attempting to draw analogies between the two (which can be difficult in many cases).<sup>482</sup>

## 4.2.6 Singapore

Singapore's primary policy objective is that disclosure should include complete and accurate information about the trader's business, about the goods or services for sale and about how the transaction is made. What this means, amongst other things, is that e-customers should have enough information to make an informed decision.<sup>483</sup> This policy position has been given effect by reliance on existing consumer protection regulations within the *Consumer Protection (Fair Trading) Act* and the *Sale of Goods Act*.

### 4.2.6.1 General protections — quality of goods

The *Consumer Protection (Fair Trading) Act* (CPFTA) (known locally as the *Lemon Law*) provides the legislative framework to safeguard small consumers against unfair practices.

Unfair practices prohibited by s 4 include misleading or deceiving a consumer, making false claims or taking advantage of a consumer who is unable to protect their own interests. These provisions would apply to misleading conduct or false claims about the quality of products sold online.

The CPFTA also responds to the issue of quality and fitness by providing statutory remedies for consumers where goods do not conform to the contract at the time of delivery. Goods are deemed to not conform to the contract if there is a breach of an express term or a term implied by the *Sale of Goods Act*, s 13, 14 and 15. These sections of the *Sale of Goods Act* apply to contracts of sale, including auctions, for consideration and by virtue of s 14 are subject to an implied condition of satisfactory quality<sup>484</sup> if purchased from a seller in the course of a business. Goods are defined in section 61(1) to include all personal chattels apart from things in action and money. Computer software may be included in this definition if provided on a disc or USB, but a digital download is unlikely to fall within the provisions. Parties can contract out of the implied conditions unless the contract is governed by the *Unfair Contract Terms Act* (UCTA). Under s 5 of the UCTA liability for loss or damage arising from a defect in goods of a type ordinarily supplied for private use cannot be contracted out of.

The statutory remedies in the CPFTA are only available to a buyer who 'deals as a consumer'.<sup>485</sup> To fall within this requirement the buyer must not be purchasing in the course of a business and in the case of a sale of goods the good must be of a type ordinarily supplied for private use or consumption. Further a buyer purchasing at an auction is not a consumer. The combined effect of s 13 of the CPFTA and s 5 UCTA is that a supplier is unable to contract out of the statutory remedies or rights of consumers in the CPFTA.

482 Vincent Gautrais, 'Le vouloir électronique selon l'affaire Dell Computer: dommage!' (2007) 37(2) *Revue générale de droit*, 1, 14 quoted in Ioana Delapeta and Marcel Boucher, 'Regulating Distance Contracts: Time to Take Stock' (Final Report of the Research Project, Union des consommateurs, June 2014), 46.

483 Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2.

484 This is subject to some exceptions set out in s 14(2C) where defects are specifically disclosed or the buyer examines the goods before contract and an examination should reveal the defect.

485 Defined in the Unfair Contract Terms Act (Singapore), s 12.

## 4.2.7 Comparison of regulatory approaches

### 4.2.7.1 Common aspects

- (1) All jurisdictions, including Australia, maintain one common legal framework for regulating product quality in online and face to face transactions. The predominant view is that goods or digital content purchased over the internet should have the same protections and the value of a parallel scheme applicable only to online purchases is not desirable.<sup>486</sup> The statutory definition of quality concepts such as acceptable quality, merchantable quality, fitness for purposes and compliance with description are largely unchanged in each jurisdiction on the basis they are broad enough to apply irrespective of the medium used to purchase the goods.
- (2) National and international harmonization of laws is a common goal and viewed as a strategy to minimise opting out of warranties or guarantees into low regulatory jurisdictions. At a national level in the UK consistent consumer protection provisions across legislative instruments, with the intention of achieving overall a simple, coherent framework of consumer legislation was a key rationale for the *Consumer Rights Act 2015*. Harmonisation was an important issue for the UK due to the close relationship with the EU and the high probability of suppliers choosing to utilize the law of other EU jurisdictions to escape liability for defective products. The Canadian government considers it important that any Canadian laws relating to the quality of goods and services should be consistent with directions in consumer protection established by international bodies such as the Organisation for Economic Co-operation and Development.<sup>487</sup>
- (3) In the United States, United Kingdom, Canada and Singapore traders in online transactions are required to provide additional information to consumers. In the US advertising online must be in a clear and conspicuous manner (including disclaimers that must be legible and understandable). In Canada online transactions are treated in the same way as distance selling transactions, which have additional disclosure obligations due to an inability for the consumer to inspect the product. In contrast in Singapore, suppliers only need to disclose sufficient information to describe the goods and services, but they do not need to disclose information that is not likely to affect a consumer's decision regarding the acquisition of those goods or services.<sup>488</sup> This is despite acknowledging that information asymmetry issues exist for consumers purchasing online.<sup>489</sup>

Whether greater information disclosure obligations corresponds to more effective consumer protection is yet to be determined. In many cases consumers do not read terms and conditions before agreeing to them either because they cannot find the terms, or they are written in legalese or consumers realise they cannot negotiate and will have to agree to the terms. This highlights the importance of having standard warranties related to quality, which suppliers cannot contract out of.

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486 Ursula Pahl, Agustin Reyna and Christoph Schmon 'European Commission's Public Consultation on Contract Rules for Online Purchases of Digital Content and Tangible Goods: BEUC Response' (BEUC Response, Bureau Europeen Des Unions de Consommateurs AISBL, 3 September 2015) 1.

487 Working Group on Electronic Commerce and Consumers, 'Principles of Consumer Protection for Electronic Commerce: A Canadian Framework' (Principles of Consumer Protection, Office of Consumer Affairs of Industry Canada, 2009) 2.

488 Explanatory Notes, Consumer Protection (Fair Trading) Bill [19].

489 Consumers Association of Singapore, *CPFTA & Lemon Law*, (2013) Consumers Association of Singapore [www.case.org.sg/consumer\\_guides\\_cpfta.aspx](http://www.case.org.sg/consumer_guides_cpfta.aspx).

#### 4.2.7.2 Differences

- (1) No significant change has been made in the United States, Canada, Singapore or Australia to the scope of existing consumer warranties. In Australia consumer guarantees have applied to 'computer software' since 2011, but this will not be wide enough to apply to non-executable data.<sup>490</sup> In contrast the UK has recently reviewed its consumer protection legislation to ensure application of consumer warranties of acceptable quality to digital content.<sup>491</sup>
- (2) Only Australia, the UK and Singapore provide that statutory guarantees and implied warranties respectively cannot be contracted out of by the parties. Jurisdictions such as the US<sup>492</sup> and Canada have only recently considered the issue in the context of online transactions.
- (3) There is no additional information disclosure obligation imposed on traders in Australia where the transaction takes place online.

#### 4.2.7.3 Emerging issues

No reviewed jurisdiction has removed the restriction on application of statutory guarantees to sale by auction for the online context<sup>493</sup> or imposed warranties of quality for goods sold by individuals not engaged in business activities.

### 4.3 Unfair or misleading pricing practices

#### 4.3.1 Issues

Unfair or misleading pricing practices are problems in all forms of commerce. The prevalence of misleading pricing practices, such as drip pricing and surge pricing, appears to increase in online transactions. Most jurisdictions have recognised *drip pricing* and *surge pricing* as problems and varying regulatory approaches have been adopted. In this section we explain drip pricing and surge pricing and, compare the policy and regulatory approaches of each jurisdiction to both practices.

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490 Refer to the decision of *ACCC v Valve Corporation* [2016] FCA 196.

491 For example electronic books, music and other forms of download. Althaf Marsoof, 'Digital Content and the Definition Dilemma Under The Sale of Goods Act 1979: Will the Consumer Rights Bill 2013 Remedy The Malady?' (2014) 9(4) *Journal of International Commercial Law and Technology* 285, 288-289; Ioana Delapeta and Marcel Boucher, 'Regulating Distance Contracts: Time to take stock' (Final Report of the Research Project Submitted to Industry Canada's Office of Consumer Affairs, Union des consommateurs, June 2014) 17).

492 William S Rogers and Sara A Colb, *Survey & Analysis of Modern Warranty Law under UCC ss 2-313-2-316* Day Pitney LLP, Boston < <http://www.princelobel.com/assets/attachments/212.pdf>> 6). (Reese Poyfair and Richards PLLC, *Understanding the Magnuson-Moss Warranty Act* (2015) MLMLaw.com [www.mlmlaw.com/library/guides/ftc/warranties/undermag.htm](http://www.mlmlaw.com/library/guides/ftc/warranties/undermag.htm)).

493 The restriction on application of statutory guarantees to a sale by auction were removed from the *Consumer Guarantees Act 1993* (NZ) in 2013.

### Drip pricing

The term ‘drip pricing’ is usually used to refer to where a headline price is advertised at the beginning of an online purchasing process and additional fees and charges, which may be unavoidable, but not mandatory are then incrementally disclosed (or ‘dripped’) to the consumer.<sup>494</sup> Drip pricing is common in on-line transactions such as airline, car rental and accommodation booking websites.

### Surge Pricing

Surge pricing (also known as dynamic pricing) is not a new concept. In fact, it has historically been linked to airline ticketing, hotel room pricing and the energy sector.<sup>495</sup> More recently (and controversially) it has been associated with ridesharing platforms such as Uber. In that context, surge pricing occurs when ridesharing platforms add a multiplier (of, in the case of Uber, up to 900%) on to their standard fares at times of high demand to encourage drivers on to the road to meet that demand.<sup>496</sup> This is of particular concern in the taxi industry where consumers are accustomed to uniform pricing. Most recent policy discussion of surge pricing has occurred in the context of riding sharing platforms.

Drip pricing and surge pricing are not new to online transactions. Most jurisdictions recognise drip pricing and surge pricing as problems for consumers. Consumer behaviour research suggests in the case of **drip pricing** that:

- **Consumers overspending on products and services (endowment effect):** Misleading prices may lead to consumers spending more than they need to, buying a product which is not best for them, wasting time or suffering annoyance, disappointment or regret.<sup>497</sup> The Office of Fair Trading has estimated that UK consumers spent £300 million in 2009 on payment surcharges.<sup>498</sup> 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.<sup>499</sup> This occurs where the consumer focusses solely on the most important piece of information and disregards other potentially detrimental information.
- **Consumers who start a process are unlikely to walk away** (commitment and consistency)

**Surge pricing** is also recognised as a consumer problem in online transactions, but have been reluctant to regulate against such conduct. Although consumers are vulnerable to price exploitation in times of peak demand, research suggests that regulators should aim only to correct

494 Australian Competition & Consumer Commission, *Drip Pricing* (2015) ACCC [www.accc.gov.au/consumers/online-shopping/drip-pricing](http://www.accc.gov.au/consumers/online-shopping/drip-pricing).

495 Mark Alston, *What Do Hefty Electricity Charges and Uber's 'Surge' Pricing Have In Common?* (31 March 2015) Supply Management [www.cips.org/en-AU/Supply-Management/Opinion/2015/March/What-do-hefty-electricity-charges-and-Ubers-surge-pricing-have-in-common/](http://www.cips.org/en-AU/Supply-Management/Opinion/2015/March/What-do-hefty-electricity-charges-and-Ubers-surge-pricing-have-in-common/).

496 Uber, *What is Surge Pricing* Uber.com <https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdce119>.

497 Refer to Amelia Fletcher, *Drip pricing: UK experience* (21 May 2012) Federal Trade Commission [www.ftc.gov/sites/default/files/documents/public\\_events/economics-drip-pricing/afletcher.pdf](http://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/afletcher.pdf).

498 Office of Fair Trading *OFT to take action over passenger travel sector payment surcharges* (28 January 2011) WIREDOV [www.wired-gov.net/wg/wg-news/1.nsf/0/13A505722AF49487802578BD0049001F?OpenDocument](http://www.wired-gov.net/wg/wg-news/1.nsf/0/13A505722AF49487802578BD0049001F?OpenDocument).

499 Refer to Amelia Fletcher, *Drip pricing: UK experience* (21 May 2012) Federal Trade Commission [www.ftc.gov/sites/default/files/documents/public\\_events/economics-drip-pricing/afletcher.pdf](http://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/afletcher.pdf).

market problems and go no further.<sup>500</sup> From an economic perspective surge pricing is a normal part of supply and demand in the market. When supply is low and demand is high the price rises so as to ration supplies and encourage new supplies. In the case of ride sharing platforms, such as Uber, the surge in price is to encourage more drivers to provide services in times of peak demand

The regulatory approach in each jurisdiction is explained separately below. If available, e-commerce case examples are included.

### 4.3.2 Australia

In Australia, there are no specific legislative provisions regulating drip pricing or surge pricing in e-commerce. Both of these practices are potentially regulated by general prohibitions of misleading conduct or unconscionable conduct. Action can be taken by the ACCC for drip pricing or surge pricing either on the basis of misleading conduct or for contravention of single pricing laws in s 48 ACL. Non-regulatory guidance is also provided by the ACCC's *Advertising and Selling Guide*.<sup>501</sup> The Guide seeks to provide guidance to businesses within their respective jurisdictions about the application of relevant 'drip pricing' legislation.

#### 4.3.2.1 General Protections — Drip pricing

In the case of drip pricing, the ACCC is likely to take action on the basis of misleading conduct rather than a breach of s 48. The ACCC considers drip pricing to be where a headline price is advertised at the beginning of an online<sup>502</sup> purchasing process and additional fees and charges, which may be unavoidable (but not mandatory and therefore not in breach of single pricing laws including section 48 of the *Australian Consumer Law*) are then incrementally disclosed (or 'dripped').<sup>503</sup>

Action has been taken by the ACCC for drip pricing pursuant to s 18 and s 29 ACL. Section 29 relevantly provides:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

.....

(i) make a false or misleading representation with respect to the price of goods or services.

.....

The regulatory approach of treating drip pricing as a form of misleading conduct has allowed the ACCC to successfully prosecute several persistent offenders and obtain enforceable undertakings from others to alter pricing on websites.

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500 Nayeem Syed, 'Regulating Uberification' (2016) 22(1) *Computer and Telecommunications Law Review* 1, 10.

501 Australian Competition and Consumer Commission, *Advertising and selling guide* (17 April 2014) Australian Competition and Consumer Commission [www.accc.gov.au/publications/advertising-selling](http://www.accc.gov.au/publications/advertising-selling).

502 See also *ACCC v AirAsia Berhad Company* [2012] FCA 1413 (14 December 2012) where the court found AirAsia had also engaged in drip pricing conduct that mislead consumers.

503 Refer to Australian Competition & Consumer Commission, *Drip Pricing* (2015) ACCC [www.accc.gov.au/consumers/online-shopping/drip-pricing](http://www.accc.gov.au/consumers/online-shopping/drip-pricing).

**Case example**

Two recent cases, *Australian Competition and Consumer Commission v Jetstar Airways Pty Ltd* [2015] FCA 1263 and *Australian Competition and Consumer Commission v Virgin Australia Airlines Pty Ltd* [2015] FCA 1263, serve as useful examples of the application of the ACL, s 29 to drip pricing.

In both cases the online booking process imposed a 'booking and service fee' (\$8.50 and \$7.70 for domestic flights, respectively) on the majority of consumers for payments made by credit or debit cards and PayPal. In most cases, this fee was not clearly disclosed until the payment stage of the booking process. The Court held the airlines engaged in misleading 'drip pricing' practices under sections 18(1), 29(1)(i) and 29(1)(m) of the ACL by encouraging consumers to enter their online airfare booking system through the promotion of a prominent headline price, and progressively 'dripping' information (including the booking and service fee) to them later in the process.

**Enforcement action and undertakings**

The ACCC has also investigated drip pricing in a number of different industries and reached enforceable undertakings with those who were found to have engaged in misleading and deceptive conduct by failing to disclose mandatory fees prominently on their platforms. Most recently, the ACCC has entered enforceable undertakings with both Airbnb Ireland and a competitor, Vacaciones eDreams for failing to disclose service and cleaning fees on certain pages of their websites.

In late 2014, Ticketek and Ticketmaster agreed to improve their online pricing practices by including mandatory fees earlier in their booking processes.

The ACCC has completed a sweep of over 130 websites and mobile apps to determine whether any of those traders were engaging in misleading or deceptive conduct. Although the ACCC's findings indicate there has been an improvement in the online booking processes among the travel, tourism and leisure sectors, the sweep identified 15 traders for follow-up action.<sup>504</sup>

**4.3.2.2 General Protections — Surge Pricing**

In the case of surge pricing the only likely action by either consumers or the ACCC is based upon the general provisions of the *Australian Consumer Law* (ACL) prohibiting misleading conduct and false representations in trade or commerce. Situations in which surge pricing will constitute misleading or deceptive conduct or a misleading or false representation are limited. This may occur if the supplier were to advertise that prices are high due to high demand, when demand is not in fact high.<sup>505</sup> There will be no misleading conduct if in fact demand is high. The problem for consumers is that a surcharge is being exacted in situations, such as public holidays or special events, where the supplier thinks consumers will have little choice but to pay the high fees. The fees usually exceed the actual cost to the supplier of increased expenses because of the increased demand or special event.

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- 504 Australian Competition & Consumer Commission, 'Internet sweep shows improvements to disclosure in online booking processes' (Media release, MR 258/15, 16 December 2015) [www.accc.gov.au/media-release/internet-sweep-shows-improvements-to-disclosure-in-online-booking-processes](http://www.accc.gov.au/media-release/internet-sweep-shows-improvements-to-disclosure-in-online-booking-processes).
- 505 Deloitte Access Economics, 'The Sharing Economy and the Competition and Consumer Act' (Research Report, Deloitte Access Economics, 2015) 27.

Although surge pricing is recognised as an issue for consumers no specific regulatory provisions have been enacted as part of the ACL. Sections 18 and 29 of the ACL may be relevant if there is any misleading conduct associated with the surge in pricing.

A number of Australian states have considered the regulatory impacts of Uber on existing taxi licensing regimes. These reviews have focussed on issues of safety, insurance and whether ride sharing services should be regulated in a similar manner to taxi services. Very few have focused on the pricing issues. As part of the Western Australian government Green Paper released in July 2015 consideration was given to regulating both traditional taxi services and ridesharing platforms. As part of that paper pricing transparency was considered and it was conceded that if ride sharing was allowed to operate current regulation imposing caps on fares should be removed.<sup>506</sup> The issue of surge pricing was not considered.

### 4.3.3 United Kingdom

Similar to Australia, the UK has approached the problem of drip pricing and surge pricing by the application of existing consumer protection laws prohibiting misleading conduct. The rationale for this approach is based on the view that both drip pricing and surge pricing create issues of information asymmetry for consumers limiting their ability to make an informed choice to purchase. There are no specific laws regulating drip pricing or surge pricing in an e-commerce context. The UK's policy and legislative response to pricing practices aims to achieve the following outcomes:

- (a) ensuring consumers are fully informed of the total cost of the transaction early in the transaction; and
- (b) encouraging businesses to take a responsible approach to pricing based on transparent and honest pricing practices.<sup>507</sup>

This is achieved by application of general consumer protections for misleading conduct in the *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277 (CPR),<sup>508</sup> issue of guidelines for business to implement fair and transparent pricing practices in accordance with the CPR (*Pricing Practices Guide* (PPG)) and a number of industry specific provisions, consistent with the CPR, to regulate industry specific pricing issues.

#### 4.3.3.1 General Protections — unfair commercial practices

The CPR consolidates consumer protection legislation in the UK and implements the EU *Unfair Commercial Practices Directive* (2005/29/EC). They apply to unfair commercial behaviour that occurs before, during and after a contract is made.<sup>509</sup> The CPRs are principle-based legislation cast in broad terms. The overall objective of enacting the CPRs was to improve consumer redress for unfair commercial practices and to harmonise the UK laws with the EU to improve consistency of consumer protection. The CPR adopted verbatim the EU *Unfair Commercial Practices Directive*. The general operation of these provisions was considered at [7.1] in relation to punitive fees.

<sup>506</sup> Western Australia Department of Transport, 'On-demand Transport: A discussion paper for future innovation' (Discussion Paper, Western Australia Department of Transport, July 2015) 16.

<sup>507</sup> (Chartered Trading Standards Institute, 'Consultation on the Draft Pricing Practices Guide' (Draft Guide for Consultation, Chartered Trading Standards Institute at the request of the Department for Business Innovation and Skills and the Consumer Protection Partnership, October 2015) 3.

<sup>508</sup> These regulations implemented the EU *Unfair Commercial Practices Directive*.

<sup>509</sup> Explanatory Memorandum, *The Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008*, 16.

## 1. Drip pricing

The CPR regulates drip pricing practices in e-commerce under the general prohibition of ‘unfair commercial practice’ in regulation 3.

**Regulation 3** prohibits unfair commercial practices. A commercial practice is unfair if it distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product. This provision will apply if the practice causes, or is likely to cause, the average consumer to make a different decision. This may occur if a consumer chooses to enter a different shop to makes additional ‘clicks’ through an online booking process.

A commercial practice is also unfair according to Reg 3(4) if the following apply:

- **Regulation 5** — Giving false information to, or deceiving, consumers (misleading actions). This regulation applies to drip pricing if it contains false information or the overall presentation is likely to deceive an average consumer in relation to price and causes the average consumer to take a transactional decision he or she would not have taken otherwise. eg. Advertising a product using a headline price and then revealing only during the purchasing process, or subsequent to this, that other compulsory charges, such as tax, apply which will increase the total price paid.
- **Regulation 6** — Giving insufficient information to consumers (misleading omissions) The omission or hiding of material information, or making material information unclear, unintelligible, ambiguous or untimely causes the average consumer to take a transactional decision he or she would not have taken. eg Failing to disclose the existence of any additional charges payable, such as postage and packing, insurance etc, until the point of sale.

There are also a number of deemed unfair commercial practices (the blacklist) in Schedule 1 but drip pricing is not included in the list.

## 2. Surge pricing

Although surge pricing is not expressly regulated the existing provisions prohibiting unfair commercial practices in the *Consumer Protection from Unfair Trading Regulations 2008* may apply if the supplier misleads the consumer by acts or omissions about the surge in pricing. A supplier who makes clear and transparent disclosure of the surge in pricing is unlikely to offend these provisions.

## 3. Reviews and enforcement

Although there is limited case law in this area, the UK’s Competition and Markets Authority (‘CMA’) has taken preliminary enforcement and investigatory action utilising the CPR. In 2014 the CMA conducted a review of the UK car rental sector to identify the main issues affecting consumers. That review identified, amongst other things, drip pricing and a general lack of transparency about the total price when making a booking (Consumers complained of additional charges such as a full tank of fuel, extra fees for picking up vehicles at premium locations, one-way fees and young driver surcharges only being revealed when they arrived at the pick-up desk.<sup>510</sup> The CMA initially worked closely with the EU’s 5 largest car rental companies to identify and remedy its concerns.<sup>511</sup> The companies agreed to make changes to their online booking practices to, amongst other things, ensure the headline price includes all mandatory charges and that consumers are provided with

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510 Competition and Markets Authority, ‘Short-term car rental in the European Union’ (Report, Competition and Markets Authority, July 2015) 2 and 26.

511 Avis-Budget, Enterprise Rent-a-Car, Europcar, Hertz and Sixt.

clearer information at an early stage of the booking process about optional extras and their prices, alongside the ability to purchase or pre-book them online rather than at the pick-up desk.<sup>512</sup>

The above changes set a benchmark for others in the industry to follow (including brokers, price comparison websites and travel websites) and the CMA has indicated that it intends to share its findings with other members of the International Consumer Protection and Enforcement Network (ICPEN) (including Australia, Canada and the United States)<sup>513</sup> to assist the regulatory bodies in those jurisdictions to adopt similar approaches to drip pricing with short-term car rental companies.<sup>514</sup>

#### 4.3.3.2 Information disclosure — internet contracts

Contracts entered into online are subject to particular information disclosure obligations:

1. ***Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013***<sup>515</sup>

The Regulations apply to a contract entered into over the internet between a trader and consumer. The purpose of the Regulation is to ensure consumers are provided with clear information about the main characteristics of the goods or digital content, the total price, delivery charges, total cost of a service or subscription over the period of the agreement and the total period of the contract. The trader must ensure the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. If the order is placed over the internet any button activating the order must be clearly labelled. A failure to comply with these requirements will allow the consumer to terminate the contract.

2. ***Electronic Commerce (EU Directive) Regulations 2002***<sup>516</sup>

These Regulations establish legal rules that online retailers and service providers must comply with when dealing with consumers<sup>517</sup> in the 27 member countries of the European Union (EU). The Directive dictates the information that consumers must be provided with in online transactions. If a retailer/service provider fails to provide information required by the directive, its contract with the consumer may be invalid and it may be in breach of member state retail law. Prescribed information includes price, shipping and any other costs. Any breach of these requirements is considered a breach of statutory duty. If the consumer is not informed of how they can amend errors in an order, the contract can be voided.

These provisions apply to all UK businesses operating websites irrespective of where their website server is located. There is no requirement to comply with the laws of other EU members states where the directive is implemented. However this does not apply to the consumer law outlined above. A UK business operating a website and selling to consumers in other parts of the EU will need to comply with requirements of the UK and any other

512 Competition and Markets Authority, 'Short-term car rental in the European Union' (Report, Competition and Markets Authority, July 2015) 53.

513 Singapore is not yet a member of ICPEN.

514 Competition and Markets Authority, 'Short-term car rental in the European Union' (Report, Competition and Markets Authority, July 2015) 66.

515 Which implements most provisions of the EU Consumer Rights Directive (the remaining provisions are implemented in the *Consumer Rights (Payment Surcharges) Regulations 2012* and the *Enterprise Act 2002 (Part 8 EU Infringements) Order 2013*.

516 These regulations implement the EU 'E-commerce Directive' (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internet Market [2000] OJ L 178/1).

517 Services covered by the directive include paid-for and free online information services provision, and online selling of products and services such as advertising, professional services, entertainment, and Internet and telephony service provision.

member state in which the website is operating. As a result of the consumer contract exception, any site selling to, for example, French consumers must provide its terms and conditions in French, to comply with French consumer laws (though compliance with all French consumer laws will require more than just a translation).

#### 4.3.3.3 *Specific protections — surcharges*

The *Consumer Rights (Payment Surcharges) Regulations 2012* came into force on 6 April 2013 (implementing article 19 of the EU *Directive on Consumer Rights*).<sup>518</sup> The *Payment Surcharges Regulation* makes it an offence for a trader to charge consumers any payment or fees that exceed the cost borne by the trader for the use of that good or service (regulation 4). While the language in regulation 4 is drafted quite broadly, the explanatory notes to this regulation indicate that its main focus is on surcharges relating to particular payment methods and does not capture surge pricing. While not directly aimed at drip pricing the regulation limits the amount of a credit card surcharge that a supplier may add onto the price of the product supplies. Surcharges in breach of the regulation are unenforceable. (Regulation 10)

#### 4.3.3.4 *Industry regulation*

The European Union *Air Services Regulation (EC Regulation 1008/2008)* was adopted by the UK. Article 23 essentially states that all charges, which are unavoidable and foreseeable at the time the headline price is displayed, should be included in that price, including taxes, surcharges and fees. Optional charges shall be communicated in a clear, transparent and unambiguous way at the start of the booking process and their acceptance by the customer will be on an ‘opt-in’ basis.

These provisions were used by the CMA in 2011 in enforcement action against 14 airlines for drip pricing practices.

#### 4.3.3.5 *Pricing Practices Guide (PPG)*

The PPG recommends a set of good practices to traders in providing consumers with sufficient information about prices in various situations. Although it has no mandatory force, it clearly explains relevant legal obligations and provides recommended practices that are compatible with the CPR.<sup>519</sup>

### 4.3.4 United States

Like the UK and Australia, the US has approached the problem of **drip pricing** by applying existing consumer protection laws in the *Federal Trade Commission Act (FTC Act)* which prohibit ‘unfair or deceptive practices’ to protect consumers from drip pricing in e-commerce.<sup>520</sup> The Federal Trade Commission (FTC) recognises drip pricing as:

... a pricing technique in which firms advertise only part of a product’s price and reveal other charges later as the customer goes through the buying process. The additional charges can be mandatory surcharges or fees for optional add-ons.<sup>521</sup>

518 Council Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64, art 19.

519 Department for Business, Innovation & Skills, ‘Pricing Practices Guide’ (Guide, Department for Business, Innovation & Skill, November 2010, 1.

520 Federal Trade Commission and the Bureau of Consumer Protection, ‘Advertising and Marketing on the Internet: Rules of the Road’ (Guidance, Federal Trade Commission, September 2000) 2.

521 Howard A Shelanski et al, ‘Economics at the FTC: Drug and PBM Mergers and Drip Pricing’ (Report, Federal Trade Commission December 2012) 11.

In response to behavioural economics research, which indicates consumers are disadvantaged by drip pricing practices, the US has focussed on policies that are aimed at addressing information imbalances between traders and consumers. General protections in the FTC are used to ensure consumers are provided with sufficient information about price prior to embarking upon the transaction.<sup>522</sup> The general protections are supplemented in the context of e-commerce by the *Dot.com* guidelines.<sup>523</sup>

**Surge pricing** has not received the same regulatory attention despite the US acknowledging the same consumer issues as the UK and Australia. Although there have been a number of attempts to regulate a ceiling for surge pricing, primarily in the context of ride sharing, none have succeeded. Difficulties arise in balancing the need to protect passengers from outrageous pricing and the desire to maintain dynamic pricing and efficient allocation of resources within the market in times of scarcity.<sup>524</sup>

The general protection for unfair or deceptive practices has been considered sufficient to ensure customers are advised of a surcharge prior to deciding to accept the service. Although unfair practices that mislead consumers about price or a surcharge are monitored by the FTC there seems a reluctance to intervene further in the area of surge pricing, which has occurred primarily in the ride sharing market.

#### 4.3.4.1 General Protections — unfair pricing practices

The FTCA provides that ‘unfair or deceptive acts or practices in commerce’ are unlawful and empowers the Federal Trade Commission (FTC) to prevent persons from using such acts or practices.<sup>525</sup> Drip pricing or surge pricing practices are potentially unfair or deceptive practices if they mislead consumers and the practice is material to the consumer’s choice (acting reasonably) of or conduct regarding a product or service.<sup>526</sup> The section can be used in the case of online transactions irrespective of the location of the fraudulent party if the deceptive practice is likely to cause reasonably foreseeable injury within the US or involve material conduct occurring in the US.

The dissemination of any false advertisement by any means for the purpose of inducing the purchase of goods or services is an unfair or deceptive act or practice for the purposes of § 45 FTCA.<sup>527</sup>

The FTC has taken an active role in minimising drip-pricing practices and ensuring that consumers are provided with an all-inclusive headline price for the product or service they are purchasing (whether that be online or through more traditional media sources). US government agencies have taken action against drip pricing practices as unfair or deceptive practices in reliance upon § 52 FTCA:

- (1) Hotels:** In November 2012, the FTC warned 22 hotel operators that their online reservation sites may violate the law by providing a deceptively low estimate of what consumers can

522 Federal Trade Commission, ‘FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and other Mandatory Surcharges May Be Deceptive’ (Media Release, 28 November 2012) 1.

523 Howard A Shelanski et al, ‘Economics at the FTC: Drug and PBM Mergers and Drip Pricing’ (Report, Federal Trade Commission, December 2012) 21.

524 Will Brunelle and Dana Rubinstein, ‘Bill would ban ‘surge pricing’ by Uber, rideshare services’, *Politico New York* (online), 13 February 2015  
[www.capitalnewyork.com/article/albany/2015/02/8562248/bill-would-ban-surge-pricing-uber-rideshare-services](http://www.capitalnewyork.com/article/albany/2015/02/8562248/bill-would-ban-surge-pricing-uber-rideshare-services).

525 15 USC § 45(1), (2).

526 Federal Trade Commission, ‘FTC Policy Statement on Deception’ (14 October 1983)  
[www.ftc.gov/putlci-statements/1983/10/ftc-policy-statement-deception](http://www.ftc.gov/putlci-statements/1983/10/ftc-policy-statement-deception); Further discussion of the unfairness test appears at [8.2] under Punitive Fees.

527 15 USC §52(2)(b).

expect to pay for their hotel rooms. Many hotels failed to include mandatory fees for amenities such as newspapers, use of onsite exercise or pool facilities or internet access (sometimes referred to as ‘resort fees’).<sup>528</sup>

- (2) **Airlines:** Following the sudden rise in fuel prices, many airlines started carving out a portion of a true airfare by labeling it a ‘fuel surcharge’ and excluding that amount from their price promotions and displays. The US Department of Transportation quickly took decisive action to outlaw such false price advertising and now requires that airlines include all applicable non-optional fees and taxes in its price displays, including those they collect on behalf of governmental taxing authorities.<sup>529</sup>
- (3) **Cruise Lines:** In 1997, the Florida State Attorney General’s office entered into agreements with six large cruise lines to stop drip pricing. Under the agreements, the cruise lines can no longer charge customers any fees in addition to the advertised initial ticket price except those fees actually passed on by the company to a governmental agency.<sup>530</sup>

At the Federal level there is no specific regulation of surge pricing and any action by the FTC would be based upon the unfair and deceptive practices provisions of the FTCA. No record of action by the FTC in relation to surge pricing was found. This is largely due to the fact surge pricing has arising mainly in the taxi and ride sharing context which is viewed within state jurisdiction.

#### 4.3.4.2 Guidelines — Dot.com Guide

The *Dot.com Guide* is a Federal Trade Commission (‘FTC’) staff guidance document that explains the how businesses should develop advertisements for online media to ensure compliance with the FTCA. In the context of drip-pricing, this includes guidance on what constitutes ‘clear and conspicuous’ presentation of information and the displaying of disclosures prior to purchase. The use of hyperlinks to provide important information, such as cost and any additional expenses, is not recommended.

#### 4.3.4.3 State based protections — Surge pricing

New York has been active in the area of surge pricing particularly in the ride sharing context. There have been two failed attempts to introduce legislative provisions to regulate surge pricing in the ride sharing industry. The Bills proposed maximum caps on the amount pricing could increase in times of high demand.<sup>531</sup>

There are also suggestions that the New York *General Business Law* passed in 1978-79 in response to escalating heating oil prices is potentially applicable to surge pricing in other areas.<sup>532</sup> During an

528 Federal Trade Commission, ‘FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and other Mandatory Surcharges May Be Deceptive’ (Media Release, 28 November 2012) 1.

529 U.S. Department of Transportation, ‘Enhancing Airline Passenger Protections’ (Docket DOT-OST-2010-0140, Department of Transportation, 25 April 2011).

530 Jill Jordan Spitz, ‘6 Cruise Lines Changing Ads to Settle Dispute’, *Orlando Sentinel* (online), 6 February 1997 [http://articles.orlandosentinel.com/1997-02-06/business/9702051296\\_1\\_cruise-lines-port-charges-carnival-cruise](http://articles.orlandosentinel.com/1997-02-06/business/9702051296_1_cruise-lines-port-charges-carnival-cruise) and Letter from the Business Travel Coalition to the Honorable Jon Leibowitz (Chairman of the Federal Trade Commission), 27 August 2012, 1.

531 Erin Durkin, ‘Uber ‘surge pricing’ ban proposed by Brooklyn Councilman’, *New York Daily News* (online), 25 November 2014 [www.nydailynews.com/news/politics/uber-surge-pricing-ban-proposed-city-councilman-article-1.2024118?cid=bitly;531](http://www.nydailynews.com/news/politics/uber-surge-pricing-ban-proposed-city-councilman-article-1.2024118?cid=bitly;531) Assembly Member Felix W Ortiz, *A03472 Memorandum in Support of Legislation*, (23 January 2015) New York State Assembly [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A03472&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A03472&term=&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y)

532 Yoav Gonen, ‘Legislator wants to slam brakes on Uber’s surge pricing’, *New York Post* (online), 25 November 2014 <http://nypost.com/2014/11/25/legislator-wants-to-slam-brakes-on-ubers-surge-pricing/>.

abnormal disruption of the market,<sup>533</sup> all parties within the chain of distribution of any essential consumer goods or services are prohibited from charging ‘unconscionably excessive prices.’<sup>534</sup> The purpose of this law was to prevent price gouging by suppliers of essential services during period of natural disaster, war or other emergencies. Whether it represents appropriate regulatory policy in the context of non-essential services in periods of high demand is not clear.

#### 4.3.4.4 Market and industry intervention

Market and industry responses to surge pricing in the context of ride sharing have occurred:

- a new App was released in the US on 10 November 2014 called SurgeProtector<sup>535</sup> that identifies the location closest to the user that is not within the ridesharing platform’s surge pricing zone.
- In California, the Los Angeles Board of Taxicab Commissioners has implemented new rules requiring that all taxi drivers sign up with a certified e-hail app by 20 August 2015, allowing taxi companies to compete directly with ridesharing platforms.<sup>536</sup>
- New York taxi drivers have also aligned themselves with similar apps (known as Arro (operates with 13,000 of New York’s yellow taxis) and Way2Ride (operates with approximately 14,000 city taxis).<sup>537</sup>
- In 2014, the New York Attorney-General, entered into an agreement with Uber to implement a new formula limiting prices to a ‘normal range’ during emergencies and natural disasters. The agreement essentially prevents Uber’s ‘surge pricing’ algorithm from operating during ‘abnormal disruptions of the market’ (adopting the same definition contained in the *General Business Law*) and resulted in Uber adopting the policy at a nationwide level.<sup>538</sup>

#### 4.3.5 Canada

The primary concern in Canada about drip pricing practices is that information about price can be difficult for consumers to locate on a website and in some cases is it hidden or consumers can only access this information through a series of hyperlinks which may be confusing.<sup>539</sup> Consequently, Canada continues to rely on statutory prohibitions of misleading advertising (both at a federal and provincial level) together with the implementation of the *Internet Sales Contract Harmonization Template* to protect consumers against drip pricing and surge pricing practices. The only exception is in the airline industry where the *Air Transport Regulations SOR/2012* operate.

533 ‘Abnormal disruption of the market’ is defined as any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.

534 Attorney General Eric Schneiderman, ‘A G Schneiderman Announces Agreement With Uber To Cap Pricing During Emergencies And Natural Disasters’ (Press Release, 8 July 2014) <http://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and-natural>.

535 See <https://itunes.apple.com/us/app/id925613132>.

536 John Schreiber, ‘LA taxis will be required to use e-hail smartphone apps’ *MynewsLA.com* (online), 19 February 2015 <http://mynewsLA.com/government/2015/02/19/l-taxis-now-required-use-e-hail-smartphone-apps/>.

537 David A Arnott, ‘For New York’s yellow taxis, a second e-hail app’, *New York Business Journal* (online), 14 September 2015 [www.bizjournals.com/newyork/news/2015/09/14/for-new-yorks-yellow-taxis-a-second-e-hail-app.html](http://www.bizjournals.com/newyork/news/2015/09/14/for-new-yorks-yellow-taxis-a-second-e-hail-app.html).

538 Attorney General Eric Schneiderman, ‘A G Schneiderman Announces Agreement With Uber To Cap Pricing During Emergencies And Natural Disasters’ (Press Release, 8 July 2014) <http://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and-natural>. A copy of the agreement can be found here: [http://ag.ny.gov/pdfs/Uber\\_Letter\\_Agreement.pdf](http://ag.ny.gov/pdfs/Uber_Letter_Agreement.pdf).

539 Ioana Delapeta and Marcel Boucher, ‘Regulating Distance Contracts: Time to Take Stock’ (Final Report of the Research Project, Union des consommateurs, June 2014), 13.

Canada has not implemented any laws at a Federal level to regulate surge pricing nor has it prosecuted any ridesharing companies under existing regulations for the practice. Any consideration of surge pricing has been subsidiary to the issue of whether ride sharing platforms should be regulated in the same way as taxi services. Like other jurisdictions Canadian regulators are of the view that taxi regulations play an important role in addressing market failures<sup>540</sup> any new regulation in this area needs to strike a balance between protecting passengers and allowing innovation.<sup>541</sup>

#### **4.3.5.1 General protections — drip pricing in e-commerce**

The regulatory approach of the Canadian government is similar to the UK and US. Legislative provisions prohibiting misleading advertising are used to challenge drip pricing in an online context. Unlike the US there is an attempt to harmonise the different provincial jurisdictions through standard contract terms and a code for e-commerce. Consumer protection laws at both a Federal and provincial level regulate e-commerce transactions in Canada. The report considers the Federal laws and examples of different approaches in Ontario and British Columbia.

##### **Competition Act RSC 1985 (Federal)**

The *Competition Act RSC 1985* is a federal law governing business conduct in Canada with the purpose of providing consumers with, amongst other things, competitive prices and product choices and, in the context of drip-pricing, making misleading advertisements unlawful. The misleading advertising provisions of the *Competition Act* apply equally to new technologies, including emerging advertising technologies, such as geo fencing, and mobile devices.<sup>542</sup>

Section s 74.01 of the *Competition Act RSC 1985* is widely drafted. A person engages in reviewable conduct if ‘for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever (a) makes a representation to the public that is false or misleading in a material matter’. A person will also engage in reviewable conduct under s 74.011 where the person sends or causes to be sent false or misleading representations in the sender information or subject matter information of an electronic message. This provision was relied upon by the Competition Bureau to commence an action against rental car companies placing misleading headline prices in email communications.

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540 Competition Bureau, *Modernizing Regulation in The Canadian Taxi Industry* (26 November 2015) Competition Bureau [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04007.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04007.html).

541 CBC News, ‘Uber’s arrival in BC inevitable, says Transportation Minister Todd Stone’, *CBC News British Columbia* (online), 21 January 2016 [www.cbc.ca/news/canada/british-columbia/uber-s-arrival-in-b-c-inevitable-says-transportation-minister-todd-stone-1.3413425](http://www.cbc.ca/news/canada/british-columbia/uber-s-arrival-in-b-c-inevitable-says-transportation-minister-todd-stone-1.3413425).

542 This approach is consistent with the 2009 updates to the Bureau’s Internet advertising guidelines (*Application of the Competition Act to Representations on the Internet*), which remain its leading statement on advertising on the Internet.

**Short-term car rental industry: The Commissioner of Competition v Aviscar Inc [2016] Comp. Trib. 1**

On 10 March 2015, the Competition Bureau brought a misleading advertising application before the Canadian Competition Tribunal against Aviscar Inc. and Budgetcar Inc. The Bureau alleges that Avis and Budget promote car rentals at prices and discounts that are not attainable because customers are required to pay additional fees over the initial advertised rental price in breach of sections 74.01(1)(a), 74.05 and 74.011(1) and (2) of the *Competition Act*. The Bureau further alleges that Avis and Budget mischaracterise such non-optional fees as taxes and surcharges that car rental companies are required to collect from consumers by governments or third parties, when in actual fact Avis and Budget are electing to impose these fees to recoup part of their operating costs.

Although, a decision in this case is not expected until September 2016, of particular interest is the Bureau's reliance on recent amendments to s74.011 designed to address false or misleading commercial representations made in the subject line of email communications. It appears as if the Bureau will be relying on these amendments moving forward to prosecute companies who use misleading email subject lines to attract consumer attention.

Canada's implementation and amendment of existing consumer protection laws to cover technological advances in line with relevant EU directives demonstrates Canada's commitment to ensuring that consumers are afforded the same protection as more traditional forms of commerce.

**Consumer Protection Act, SO 2002 (Ontario)**

In Ontario the *Consumer Protection Act*, SO 2002 regulates business practices in both face-to face transactions and online transactions. The *Consumer Protection Act* includes general prohibitions on misleading advertising like the *Competition Act RSC 1985*, but also imposes an obligation on suppliers under internet agreements and remote agreements to disclose certain prescribed information to a consumer before the consumer enters into the contract. An internet agreement is defined widely as a consumer agreement formed by text based internet communications (s 20), which means it will apply to any supply of goods or services to a consumer over \$50 (s 37). 'Goods' is defined as any type of property and 'services' is anything that is not goods including a right, entitlement or benefit (s 1). Under these broad definitions, any type of computer software or digital products or service supplied to a consumer will be subject to the provisions, but the obligation will not apply to:

- a sale to a person or corporation carrying on a business; or
- purchases by a consumer under \$50.

The information a supplier must provide is detailed in the *Consumer Protection Act Regulations*, O. Reg. 17/05 and includes an itemised list of the all-inclusive price and any taxes or additional charges that may apply (s 32 *Consumer Protection Act Regulations*). If the supplier fails to provide the prescribed information a consumer is entitled to terminate the agreement at any time after the contract is entered into and before the expiry of 7 days after a copy of the agreement is received by the consumer (s 40).

**Travel website: Magill v Expedia [2013] ONSC 683**

The Ontario drip pricing case of *Magill v Expedia Inc* [2013] ONSC 683 was a class action brought by 1,500,000 Canadian citizens against Expedia (an online travel company that acts as an intermediary between travellers and travel providers around the world) for failing to include a tax recovery charge or service fee in the final price for hotel bookings made online between June 2007 and October 2007 (when the terms of use did not refer to either charge) and October 2007 and March 2011 (where the terms of use referred to those charged but in a manner that did not clearly explain the total amounts).

Expedia claimed that:

- the **tax recovery rate** is an estimate of the taxes that the hotel is required to collect and remit on the confidential rate agreed between the hotel and Expedia and so the exact amount cannot be determined at the time of booking. Expedia uses the tax recovery rate to pay the hotel the taxes charged on the customer's hotel room after checkout and, if the actual charges exceed the tax recovery amount, then Expedia pays the hotel the difference without charging the customer; and
- the **service fee** is an additional amount retained by Expedia to offset its costs in providing hotel content on its websites. The calculation of that fee is a highly confidential trade secret.

A single amount for the tax recovery rate and service fee is included in invoices to customers. Expedia argued that it adopts that approach to prevent customers and competitors from reverse-engineering the net rate and putting Expedia in a position where it is potentially breaching confidentiality agreements with hotels. The plaintiffs claimed Expedia actually profited from the combined fee as it was in excess of the combined total of the taxes actually paid and the costs actually incurred by Expedia as a service fee. Such conduct was said to breach section 14(1) of the Ontario *Consumer Protection Act 2002* ('unfair practice' by making a false, misleading or deceptive representation) and section 38(1)(failing to disclose prescribed information).

Although the case turned on whether it was a class action under the relevant Canadian legislation, it was held that Expedia didn't breach its obligations under the *Consumer Protection Act 2002* as the total amount was included in the customer invoice. However, in reaching that decision Perell J noted that any costs awarded should be modest as the claim might have been avoided if Expedia had more thoroughly explained the tax recovery charge and service fee in its contract.

**Business Practices and Consumer Protection Act 2004 (British Columbia)**

The *Business Practices and Consumer Protection Act 2004* prohibits unfair business practices. Similar to the Federal *Competition Act*, drip pricing practices may be subject to the general deceptive act or practice provisions that apply if there is a false representation about the total price of goods or services (s 4(3)). The Act also provides for the disclosure of an itemised price for goods or services supply through a 'distance sales contract' (s 46). Internet transactions are included in the definition of 'distance sales contract' which applies to a contract entered into between a supplier and consumer where there is no opportunity to inspect the goods before the contract is entered into (s 17). Like Ontario the provisions do not apply to sales to persons for business purposes.

#### 4.3.5.2 Specific protections — Airline industry

Since late 2012, the *Air Transport Regulations SOR/2012* has required Canadian airlines to show the full cost of the flight, including mandatory taxes, airport fees and fuel surcharges, in the advertised headline price for the flight. The *Air Transport Regulations* create an appropriate level of harmonisation with air price advertising formats found in the United States and European markets.<sup>543</sup> Clear guidance for compliance with the regulations is provided by the Interpretation Note issued by Canada's Transportation Agency.<sup>544</sup>

#### 4.3.5.3 General protections- Surge pricing in e-commerce

Any challenge to surge pricing practices by the Canadian Competition Bureau may occur on the basis of misleading conduct by the supplier or platform operator in contravention of the *Competition Act RSC 1985, s 74.01*. The mere charging of a surge is unlikely to be misleading, other misleading conduct about whether and when a surge will be charged would be required.

#### 4.3.5.4 Codes and guidelines

In Canada there are two relevant voluntary codes and guidelines.

- (a) The *Internet Sales Contract Harmonization Template* was approved by Federal, provincial and territorial ministers in 2001 with a view to instituting a harmonised approach to consumer protection in e-commerce across Canada. The Harmonization Template, It is a common template that covers contract formation, cancellation rights, credit card charge-backs and information provision and, requires clear and up-front price disclosure for online transactions. The template while endorsed by all levels of government requires each jurisdiction to indicate the application and scope of the template.
- (b) The *Canadian Code of Practice for Consumer Protection in Electronic Commerce* establishes benchmarks for good business practice for suppliers conducting commercial activities with consumers online. The Code does not alter the provisions under the Competition Act or other industry specific codes that may exist. The Code is based on the *Principles of Consumer Protection for Electronic Commerce: A Canadian Framework*, which was approved in August 1999. The Code is also consistent with the OECD's *Guidelines for Consumer Protection in the Context of Electronic Commerce*. The Code was endorsed<sup>1</sup> by federal, provincial and territorial Ministers in 2004. The Code can be endorsement for use by private sector organisations as representing good practice benchmarks for businesses engaging in e-commerce. Relevant to pricing practices the Code requires sufficient information to be provided to consumers so as to make an informed choice. The information should be conspicuous and easily accessible on a website and provided at an appropriate stage of the decision making process. In particular the code requires price and any cost of currency exchange, shipping charges and taxes to be confirmed to consumers prior to the conclusion of the transaction.

### 4.3.6 Singapore

Singapore, like other jurisdictions, has identified information asymmetry as the fundamental consumer issue for drip-pricing. The Singapore government implemented the *Consumer Protection (Fair Trading) Act* to counteract an observable increase in the number of errant traders and

543 Canadian Transportation Agency Q&A: *All-inclusive air price advertising* (21 May 2014) Canadian Transportation Agency [www.otc-cta.gc.ca/eng/aspar-q-and-a](http://www.otc-cta.gc.ca/eng/aspar-q-and-a).

544 See, Canadian Transportation Authority, 'Air Transportation Regulations — Air Services Price Advertising: Interpretation Note' (Interpretation Note, Canadian Transportation Agency, 2 October 2015) Appendix II.

unethical business practices.<sup>545</sup> Like other jurisdictions, the Singapore government also adopts the approach that e-commerce transactions should be subject to the same regulatory framework as face-to face transactions.

Singapore's specifically regulates surge pricing in the taxi industry with the aim of striking a balance between protecting passengers from high and unexpected prices and allowing innovation.<sup>546</sup> The resulting regulation focusses on maximising benefits to consumers and taxi drivers and less on protecting a particular business model or existing taxi operators.<sup>547</sup> The legislative approach also gives effect to Singapore's policy that e-commerce transactions and face to face transactions should be subject to the same regulatory framework.

#### 4.3.6.1 General protections — Drip pricing

The Singapore policy position is given effect by reliance on a combination of existing unfair practice regulations in the *Consumer Protection (Fair Trading) Act* ('CPFTA') together with self-regulation under the Singapore Code of Advertising Practice. Singapore's primary policy objective is that consumers should be fully informed of relevant information about a transaction prior to making a decision to purchase. This should include complete and accurate information about the trader's business, about the goods or services for sale and about how the transaction is made. What this means, amongst other things, is that e-customers should have enough information to make an informed decision to purchase goods or services.<sup>548</sup>

Section 4 of the CFTA provides that it is an unfair practice for a supplier in relation to a consumer transaction to 'do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled'. This general provision may apply to a situation where a headline price advertised by the supplier does not include other mandatory charges which increase the price. An unfair practice will also arise if one of the situations listed in the Second Schedule to the Act applies. This includes 'representing that a price benefit or advantage exists respecting goods or services where the price benefit or advantage does not exist' and 'charging a price for goods or services that is substantially higher than an estimate provided to the consumer, except where the consumer has expressly agreed to the higher price in advance'. Again these provisions may apply in a drip pricing situation if the price represented by the supplier is different to the actual price a consumer will have to pay.

There is very limited case law on the application of section 4(a) to drip or partition pricing. Rather, Singapore's focus has instead been on the most prevalent misleading conduct in that jurisdiction namely, misleading labels and advertising generally<sup>549</sup> and on the proposed harmonisation of e-commerce laws in ASEAN.<sup>550</sup>

545 Consumers Association of Singapore, *CPFTA & Lemon Law*, (2013) Consumers Association of Singapore [www.case.org.sg/consumer\\_guides\\_cpfta.aspx](http://www.case.org.sg/consumer_guides_cpfta.aspx).

546 Singapore, Second Reading for Third Party Taxi Booking Service Providers Bill by Minister for Transport, Parliament, 11 May 2015, para 5 (Lui Tuck Yew).

547 Ibid.

548 Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2.

549 Consumers International, 'Roadmapping Capacity Building Needs in Consumer Protection in ASEAN' (Regional Report (FINAL), ASEAN Australian Development Cooperation Program Phase II (AADCP), 15 June 2011) 45.

550 See, for example Consumers International, 'Roadmapping Capacity Building Needs in Consumer Protection in ASEAN' (Regional Report (FINAL), ASEAN Australian Development Cooperation Program Phase II (AADCP), 15 June 2011) XVII.

#### 4.3.6.2 Specific protections — surge pricing

Singapore enacted the *Third-Party Taxi Booking Service Providers Act* (Singapore, S 528, 2015 electronic ed) in 2015 as a ‘light touch’ regulatory measure to protect consumers from, amongst other things, surge and dynamic pricing in taxi services. The legislation applies in addition to the *Consumer Protection (Fair Trading) Act* which provides consumers with remedies for unfair practices including misleading conduct. Operators of taxis are required to comply with the legislation and are subject to the restrictions imposed on pricing.

Under the *Third-Party Taxi Booking Service Providers Act*:

- taxi-booking fees charged by service providers cannot exceed those charged by taxi companies; and
- all information on the fare rates, surcharges and fees payable for the journey must be specified to consumers upfront, before they accept the dispatched taxi. These include the flag-down fare, distance and time rates, the booking fee charged by the service provider, and where applicable, peak period and location surcharges.<sup>551</sup>

Third-party taxi service providers who do not comply with the regulatory framework are liable to penalties of up to \$100,000 per contravention.

The *Third-Party Taxi Booking Service Providers Act* only regulates taxi services that use third party apps. That means that ridesharing platforms, such as Uber, are free to operate ‘chauffeur’ services (that are very similar to Uber’s standard services in the UK, US and Canada) free of this regulation.

#### 4.3.6.3 Codes and guidelines

The Singapore Code of Advertising Practice (the Code) seeks to promote a high standard of ethics in advertising through industry self-regulation. The Code was formulated to provide guidance regarding compliance with the Lemon Law. The Code applies to all advertisements for goods, services and facilities and, although voluntary, is strictly policed by Singapore’s Advertising Standards Authority. The Code provides a set of rules that promote legal, decent, honest and truthful advertising consistent with the *Consumer Protection (Fair Trading) Act* (Singapore).

In relation to drip-pricing the Code provides that advertisements must not mislead consumers about the price of goods or services or underestimate the actual total cost to be paid (see, for example, rule 5.1 — Truthful presentation). This is consistent with the unfair practices provisions of the Lemon law.

This method of self-regulation has been effective largely because it has the majority of Singapore’s media owners, advertising agencies, government agencies and some industry-specific agencies as members and it grants its policing body, the Advertising Standards Authority of Singapore (ASAS) the power to:

- ask that advertisements contravening the Code be taken down or withheld from publication until they are modified (with the support of media owners);
- publish the names of those parties who have breached the Code; and

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551 Land Transport Authority, ‘New Regulatory Framework for Third-Party Booking Services to Protect the Safety and Interests of Commuters’ (News Release, 21 November 2014), [2].

- request its members sanction parties who violate the Code including withdrawal of facilities, rights or services from parties concerned subject to legal constraints.<sup>552</sup>

However, notwithstanding the fact that the Code has served the industry well, it does not expressly deal with online and digital advertising. As a result the Code is currently under review and new guidelines for digital and social media advertising have been circulated for consultation. The Guidelines draw upon similar codes of conduct for advertising in Australia and the UK, as well as some of those used by social media channels.<sup>553</sup>

### 4.3.7 Comparison — Drip pricing and surge pricing in e-commerce

#### 4.3.7.1 Common aspects

##### Drip pricing

- (1) In all of the reviewed jurisdictions including Australia the regulatory approach to drip pricing is similar. The problem of drip pricing is regulated through existing provisions applying to misleading conduct or in the case of the UK and US, the unfair commercial practices provisions, which include misleading conduct.
- (2) All jurisdictions also provide non-regulatory pricing practice guides to assist business to comply with their obligations under relevant statutory provisions.

##### Surge pricing

- (1) In Australia, UK, US and Canada the issue of surge pricing is not specifically regulated. Most regulators and economists view surge pricing as part of a normal functioning market and the intervention of regulation may have a detrimental effect on the market.
- (2) Any regulation or consideration of surge pricing has generally been in the context of ride sharing and whether new regulation is required similar to the taxi industry.

#### 4.3.7.2 Differences

##### Drip pricing

- (1) In the US there are no industry or platform specific regulations to provide clear guidance to specific industries where the problem is prevalent. Before implementing new regulations the FTC has determined that it needs to obtain further empirical data because much depends on the context in which drip pricing is used, whether there is competition for the particular
- (2) Product at issue and whether the purchasers are sophisticated consumers or not. For example, a firm that engages in drip pricing might prompt a competitor to offer services without such add-on charges, thereby giving consumers a choice.<sup>554</sup>

552 See section 4 of the Singapore Code of Advertising Practice and, in relation to recent enforcement action: Baker & McKenzie, Wong & Leow, *Developments in Consumer Protection: Recent enforcement actions taken against errant advertisers*. (July 2015) Baker & McKenzie [www.bakermckenzie.com/files/Uploads/Documents/Singapore/AL\\_Singapore\\_DevelopmentsConsumerProtection\\_Jul15.pdf](http://www.bakermckenzie.com/files/Uploads/Documents/Singapore/AL_Singapore_DevelopmentsConsumerProtection_Jul15.pdf); Tan Chak Lim, 'Letter to The Straits Times, 4 August 2015' (Letter, 4 August 2015) 1.

553 Advertising Standards Authority of Singapore, *Consultation on Draft Digital and Social Media Advertising Guidelines* (7 December 2015) Advertising Standards Authority of Singapore <<https://asas.org.sg/news/post=429>> 3.2(a)-(d) inclusive). Final guidelines were not issued as at the date of this report.

554 Federal Trade Commission, *Drip, drip, drip ... Those charges really add up...* (30 May 2012) FTC: Watch [www.law.csuohio.edu/sites/default/files/facultystaff/sagers\\_ftc\\_article.pdf](http://www.law.csuohio.edu/sites/default/files/facultystaff/sagers_ftc_article.pdf).

- (3) In contrast to Australia, Canada has a statutory requirement for disclosure of price including an itemised list of the prices at which goods and services are proposed to be supplied to the consumer including taxes, shipping charges, customs duties, brokerage fees together with the total amount the supplier knows to be payable by the consumer is enacted in Ontario and British Columbia. Similar guidelines exist in the *Internet Sales Harmonization Template and the Canadian Code of Practice for Consumer Protection in Electronic Commerce*. These provisions apply specifically to internet sales and create a positive duty to disclose the full details of price at the appropriate decision making point.
- (4) The UK has a number of industry-specific regulations addressing specific issues, including drip pricing in those industries. This has precipitated investigation by the regulator into drip pricing practices in those industries and allowed the regulator to work with the main industry bodies to implement best practice guidelines. It appears that initial collaboration has resulted in fewer formal court proceedings being instituted in those industries.
- (5) Under the UK CPRs pricing practices that may constitute drip pricing can be challenged on the basis of misleading conduct (acts or omissions) or under the broader prohibition of unfair commercial practices provision (reg 3 CPRs). The concept of an unfair commercial practice potentially extends the circumstances in which redress may be sort by a consumer or regulator. It is not necessary for the commercial practice to be misleading in order to prove that it ‘materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product’. Evidence of consumer biases will be relevant in demonstrating the behavioural response of the average consumer.

Canada is the only jurisdiction to attempt to regulate the terms of internet contracts through the Internet Sales Harmonization Template.

## 4.4 Online reviews and endorsements

### 4.4.1 Issues

Online reviews and endorsements ‘provide consumers with information about products, services and businesses based on the experiences of other consumers’<sup>555</sup> and are an important tool for consumers in an online market. There is a range of review mechanisms available ranging from customer reviews and endorsements on product websites to independent websites that conduct reviews of products<sup>556</sup> or allow consumers to post reviews.<sup>557</sup> 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.<sup>558</sup> According to research conducted by the University of Illinois at Chicago,<sup>559</sup> almost 30% of reviews and endorsements are posted by individuals employed to write them. For example, sites such as freelancer.com welcome businesses to offer jobs for writing fake

555 Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission [www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews](http://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews).

556 For example, Choice ([www.choice.com.au](http://www.choice.com.au)); Product Review ([www.productreview.com.au](http://www.productreview.com.au)).

557 This is common in the travel industry with websites such as Tripadvisor, Expedia and Trivago.

558 Kat Kane ‘The Big Hidden Problem with Uber? Insincere 5-Star Ratings’, *Wired* (online), 19 March 2015 < [www.wired.com/2015/03/bogus-uber-reviews/](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 [www.cohenschneider.com/product-reviews-endorsements-and-astroturfing/](http://www.cohenschneider.com/product-reviews-endorsements-and-astroturfing/).

559 Karen Weise, ‘A Lie Detector Test for Online Reviewers’, *BusinessWeek Magazine* (online), 29 September 2011 [www.bloomberg.com/bw/magazine/a-lie-detector-test-for-online-reviewers-09292011.html](http://www.bloomberg.com/bw/magazine/a-lie-detector-test-for-online-reviewers-09292011.html).

reviews and there are a number of fake review writers who offer their services on websites such as Fiverr.com in exchange for free products or services.<sup>560</sup>

Fake reviews and endorsements are most commonly used in travel, electronics and home repairs<sup>561</sup> but can be found across almost all platforms selling goods or services over the Internet.

Four main practices have been identified as leading to fake reviews:

- Businesses commission or write fake negative reviews about other businesses. These reviews make false, negative claims about an experience with a product, service or business;
- Businesses commission or write fake positive reviews about themselves which make false, positive claims about an experience with a product, service or business;<sup>562</sup>
- 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.<sup>563</sup>

Most regulators recognise the importance of customer reviews, endorsements and comparator websites in online markets. In the UK research reveals that more than 80% of consumers read online reviews before deciding to buy<sup>564</sup> and US literature asserts that only 50% of consumers can identify a false or fake review. The increase in online transactions and the significance of reviews to online business success contributes to the potentially detrimental effect of false or fake reviews. Fake reviews are estimated to represent between 1% — 16% of all consumer reviews,<sup>565</sup> which has the potential to detrimentally affect decision making by consumers and distort markets.

The regulatory approach in each jurisdiction is similar. In most jurisdictions false or misleading reviews or claims to endorsement in e-commerce are treated as forms of misleading conduct and offenders are prosecuted under existing regulations prohibiting misleading conduct, representations or advertising. No specific modifications have been introduced for the application of these laws to e-commerce due to the broad drafting of the prohibitions in the UK, US, Canada and Australia. No specific extension of jurisdictional limits for enforcement against operators outside of the jurisdiction has been enacted. Most jurisdictions also have codes or guidelines, generally for advertising standards which deal specifically with online reviews and endorsements as part of ensuring compliance with general prohibitions.

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560 David Streitfield, 'For \$2 a Star, an Online Retailer Gets 5-Star Product Reviews', *New York Times* (online), 26 January 2012 [www.nytimes.com/2012/01/27/technology/for-2-a-star-a-retailer-gets-5-star-reviews.html?\\_r=2&hp](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/>.

561 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 29.

562 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 21.

563 Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission [www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews](http://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews).

564 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' Report, Competition and Markets Authority, 19 June 2015 2.

565 European Parliament Think Tank, *Online consumer reviews: The case of misleading or fake reviews* (6 January 2016) European Parliament [www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2015\)571301](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)571301).

## 4.4.2 Australia

In Australia fake online reviews and endorsements are subject to the misleading conduct provisions of the *Australian Consumer Law*.

### 4.4.2.1 General Protections — misleading conduct

The prohibition on misleading conduct in trade or commerce in s 18 of the ACL is sufficiently broad to apply to direct conduct engaged in by a supplier or their agents to produce a fake or misleading review as well as where a supplier is aware of a fake review or endorsement and allows it to remain publicly available. The ACCC considers that a fake review is misleading conduct on the basis that such conduct ‘may ‘mislead consumers if they are presented as impartial, but were, in fact, written by the reviewed business, a competitor, someone paid to write a review who has not used the product or someone who has used the product but written an inflated review to receive financial or non-financial benefit’.<sup>566</sup> This will apply to each of the identified types of fake review.

A range of enforcement action can be taken by the ACCC for a contravention of s 18 or any of the specific protections in Part 3 of the ACL. A consumer or the regulator may also take action relying upon the specific unfair practices provisions in Part 3.<sup>567</sup> Action of this nature may however be difficult where the supplier is based outside Australia or there is no clear evidence of the supplier’s involvement in the misleading review. In the case of fake reviews or endorsements specific provision is made in s 29 ACL which relevantly provides:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

....

- (e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or
- (f) make a false or misleading representation concerning:
  - (i) a testimonial by any person; or
  - (ii) a representation that purports to be such a testimonial;
  - (iii) relating to goods or services; ...

Section 29 of the ACL specifically prohibits making of a false or misleading representation that purports to be a testimonial or relates to a testimonial by another person. The same conduct will be an offence under s 151(1)(e) and (f) of the ACL.

Application of the section is limited to:

- (i) supply of goods or services in trade or commerce; and
- (ii) false or misleading representations.

A broad range of enforcement mechanisms are available to the regulator under the ACL, including corrective advertising, disclosure orders, agreement to a compliance/education program for employees, undertakings to remove the reviews, the imposition of civil penalties or a criminal

<sup>566</sup> Australian Competition and Consumer Commission, *Managing online reviews*, Australian Competition and Consumer Commission [www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews](http://www.accc.gov.au/business/advertising-promoting-your-business/managing-online-reviews).

<sup>567</sup> In the context of fake online reviews this will most likely be s 29(1)(e) or (f) ACL.

prosecution. While enforcement action may be based on a contravention of the general misleading conduct provision in s 18 ACL or the specific protections in s 29 ACL, a civil penalty is not available for a contravention of s 18 ACL. This means that a civil penalty can only be sought for a positive false or misleading representation and not silence or inaction in relation to a testimonial or review.

The ACCC has taken enforcement action against several companies for misleading reviews and testimonials. The Advertising Medical Institute, Citymove Pty Ltd,<sup>568</sup> Electrodry<sup>569</sup> and Euro Solar/Australian Solar Panels<sup>570</sup> provide useful examples of fake online reviews and endorsements in the Australian context the range of enforcement remedies obtained.

#### 4.4.2.2 Consumer guidance and education

In 2013, the ACCC in their Annual Report prioritised online consumer issues and in 2014 comparator websites. In 2013 the ACCC issued a compliance guideline, *Online reviews—a guide for business and review platforms* to assist business with compliance and followed up with a report in 2014 examining the comparator website industry in Australia.

Consumer tips for online product reviews were added to the ACCC's website, which encourage consumers to seek information from multiple sources and to look at multiple reviews, as well as to check whether review platforms have commercial arrangements with reviewed businesses. The ACCC identified concerns about specific online review practices related to country of origin claims that were escalated for further investigation resulting in civil penalties.

#### 4.4.3 United Kingdom

The regulatory approach of the UK government has been to ensure that existing legislative provisions within the *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277 ('CPR') prohibiting unfair commercial practices apply to fake reviews published in any medium. To assist with compliance the Competition and Market's authority has issued guidance notes confirming that 'review sites should be clear about how reviews are obtained and checked, publish all reviews (even negative ones) provided they are genuine and lawful and explain the circumstances in which reviews might not be published or might be edited, make sure there is not an unreasonable delay in publishing reviews, disclose commercial relationships, clearly identify all advertising and paid promotions and have appropriate procedures in place to detect and remove fake reviews and endorsements'.<sup>571</sup> The UK regulator has made it clear that 'businesses (and anyone acting on their behalf) should not pretend to be a customer and write fake reviews about their own or other businesses' goods and services'.<sup>572</sup>

A separate voluntary code, Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, is also available for guidance.

568 Australian Competition and Consumer Commission, ACCC: *Removalist admits publishing false testimonials* (9 November 2011) Australian Competition and Consumer Commission [www.accc.gov.au/media-release/accc-removalist-admits-publishing-false-testimonials](http://www.accc.gov.au/media-release/accc-removalist-admits-publishing-false-testimonials).

569 *ACCC v A Whistle & Co (1979) Pty Limited* [2015] FCA 1447, 1449 and 1450 [6], [7] and [10].

570 *ACCC v P & N Pty Ltd & Ors* [2014] FCA 6, 11.

571 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 29 -30.

572 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 29.

#### 4.4.3.1 General Protections — unfair commercial practices

Regulation 3 of the CPR is a general provision prohibiting unfair commercial practices that cause, or are likely to cause, the average consumer to make a different decision. Where the supplier gives false or misleading information or omits or hides information material to a consumer's decision to purchase a product this conduct will be an unfair practice under regulations 5 and 6. These provisions potentially apply to a range of business practices involving fake reviews. In addition unfair practices listed in Schedule 1 of the CPRs are deemed by regulation 3(4)(d) to be an unfair practice. Included in this blacklist are:

- **4.** Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim without complying with the terms of the approval, endorsement or authorisation
- **11.** Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).
- **22.** Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

The UK's Competition and Markets Authority ('CMA') has been active in taking action against businesses and organisations that have published fake online reviews and endorsements and those that have been involved in their publication.

- **Online reviews:** Evidence of fake reviews being posted to Trip Advisor led the UK regulator Advertising Standards Authority (ASA) to order TripAdvisor to stop claiming that its reviews were 'honest'. TripAdvisor has since removed its slogan, 'world's most trusted travel advice', from its banner.<sup>573</sup>
- **Online endorsements — social media:** In December 2010, the UK's Office of Fair Trading (the predecessor to the Competition and Consumer Commission) obtained undertakings from an operator of a commercial blogging network, Handpicked Media, 'requiring them to clearly identify when promotional comments have been paid for';<sup>574</sup> and
- **Online endorsements — affiliates paid for positive reviews:** The Advertising Standards Authority found that Mondelez UK Ltd had breached the *UK Code* by allowing a number of its paid vloggers to create and publish vlogs that featured, and were intended to advertise, Oreo biscuits. The Advertising Standards Authority made it clear that a link in a 'show more' button that stated 'Thanks to Oreo for making this video possible' and 'Check out the Oreo site for more licking action' were not sufficient disclosure of the vlogger's commercial relationship with the makers of Oreo biscuits;<sup>575</sup> and

573 Kate Springer, *Fake travel reviews* (2016) SmartTravelAsia <<http://www.smarttravelasia.com/FakeReviews.htm>>.

574 Office of Fair Trading, *OFT secures promotional blogging disclosures* (13 December 2010) Office of Fair Trading <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2010/134-10>.

575 Advertising Standards Authority, *ASA Ruling on Mondelez UK Ltd* (26 November 2014) ASA [www.asa.org.uk/Rulings/Adjudications/2014/11/Mondelez-UK-Ltd/SHP\\_ADJ\\_275018.aspx#.VspphRyb\\_ql](http://www.asa.org.uk/Rulings/Adjudications/2014/11/Mondelez-UK-Ltd/SHP_ADJ_275018.aspx#.VspphRyb_ql).

#### 4.4.3.2 Voluntary Code

Section 3 of the UK *Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing* specifically deals with fake reviews and endorsements. Although compliance is voluntary, it prohibits misleading claims (section 3.47) and requires all signatories to retain evidence that a testimonial is genuine and hold contact details for the person or organisation who provided it (section 3.45).

#### 4.4.3.3 Regulatory Guides

The UK government has also implemented a number of regulatory guides including:

- **Codes and trustmarks to improve consumer confidence:** The Department for Business, Innovation and Skills has recently asked British Standards to consider common issues experienced by consumers when making online purchasing decisions and explore whether these could be addressed by a new BSI standard or mark that could be displayed on approved websites.<sup>576</sup>
- **Guidance for bloggers and industry guidelines on paid promotions:** In March 2014, the UK Committee of Advertising Practice released guidance for bloggers in response to a significant number of queries they had received regarding blogger's obligations under the *UK Code*.<sup>577</sup> The International Advertising Bureau UK has also issued best practice guides in relation to Affiliate Audits<sup>578</sup> and paid promotions in social media.<sup>579</sup>
- **Self-regulation:** A number of the most reputable sites have started to self-regulate reviews on their websites. A number of different approaches have been adopted including allowing users to self-police reviews by placing a mark next to suspicious reviews, conducting investigations in response to complaints from businesses or notifications or suspicious reviews, using manual checks or software designed to spot anomalies, stop suspicious reviews from being posted or remove them and terminate the submitter's membership.<sup>580</sup>

#### 4.4.4 United States

Similar to the UK and Australia, the US has approached the increase in fake online reviews and endorsements through a combination of existing consumer protection laws, amended regulations and educational materials. Fake reviews and endorsement are referred to in the US as '*astroturfing*'. The significant reliance on fake reviews and endorsements has been identified as a major problem for US consumers, as research suggests that the average person can only identify fake reviews at a rate of 50 per cent.<sup>581</sup> US regulators recognise that the imbalance of information for consumers about the origin of a review and the inability of a consumer to ascertain this information to determine authenticity in an online environment have significant potential detrimental effects for the particular market.

576 BSI Group, *Delivering approval schemes that promote consumer trust* (15 June 2015) BSI. [www.bsigroup.com/en-GB/our-services/events/2015/2015-06-15-Delivering-approval-schemes-that-promote-consumer-trust/](http://www.bsigroup.com/en-GB/our-services/events/2015/2015-06-15-Delivering-approval-schemes-that-promote-consumer-trust/).

577 Advertising Standards Authority, *New words on the blog ...* (19 March 2014) Committee of Advertising Practice [www.cap.org.uk/News-reports/Media-Centre/2014/New-words-on-the-blog.aspx#.Vsppdhyb\\_qI](http://www.cap.org.uk/News-reports/Media-Centre/2014/New-words-on-the-blog.aspx#.Vsppdhyb_qI).

578 Individuals or corporations who promote programs/campaigns on behalf of others such as bloggers and vloggers: Internet Advertising Bureau UK, 'Best Practice Guides: Affiliate Audits' (Guidelines, Internet Advertising Bureau UK, May 2015).

579 Internet Advertising Bureau UK, 'Paid Promotions in Social Media' (Bitesize Guide, Internet Advertising Bureau UK, 12 July 2015).

580 Competition and Markets Authority, 'Online reviews and endorsements: Report on the CMA's call for information' (Report, Competition and Markets Authority, 19 June 2015) 23-24.

581 Ibid 3.

#### 4.4.4.1 General protections — unfair or deceptive acts or practices

The US has responded to the issue of fake online reviews by using existing prohibitions on ‘unfair or deceptive practices’ in the *Federal Trade Commission Act (FTC Act)* but supplementing them with guidelines aimed specifically at educating suppliers about appropriate use of online reviews and potential liability if the guidelines are not followed.

The FTCA provides that ‘unfair or deceptive acts or practices in commerce’ are unlawful and empowers the Federal Trade Commission (FTC) to prevent persons from using such acts or practices.<sup>582</sup> The dissemination of any false advertisement by any means for the purpose of inducing the purchase of goods or services is an unfair or deceptive act or practice for the purposes of § 45.<sup>583</sup>

Reviews or endorsements are potentially unfair or deceptive practices if they mislead consumers and the practice is material to the consumer’s choice (acting reasonably) of or conduct regarding a product or service.<sup>584</sup> US government agencies have taken action in reliance upon s 52 FTCA against businesses engaged in the use of fake reviews in the online environment to promote their business:

- **Public Relations Firm:** This was the FTC’s case focusing solely on fake product reviews. In this case, Reverb (a public relations firm) was hired to promote certain iPhone apps on the Apple iTunes store. The FTC alleged that Reverb engaged in deceptive advertising by having its employees pose as consumers without disclosing the commercial relationship Reverb had with the app developer. As part of that settlement Reverb agreed to remove all reviews that violated the disclosure requirements and agreed not to post similar items without proper disclosures in the future.<sup>585</sup>
- **Online Music Lessons:** In 2011 the FTC took action against Legacy Learning Systems Inc, a business that recruited affiliates to promote its online learning courses in articles, blogs and other online material under the pretence they were ordinary consumers or independent reviewers. The promotions also failed to disclose that the reviewers had been paid for every sale they generated.<sup>586</sup> The matter was settled in March 2011 with Legacy Learning required to pay \$250,000 in penalties,<sup>587</sup>
- **New York (Operation Clean Turf):** In October 2013 the New York Attorney-General entered into Assurances of Discontinuance with 19 companies to cease writing fake reviews for businesses on consumer-review websites and to pay more than \$350,000 in penalties. The year-long investigation by the Attorney-General’s office identified that reviews were often written by the companies’ employees and freelance writers in Bangladesh, Eastern Europe and the Philippines for between \$1 and \$10 per review and were published on websites like Yelp, Google Local and CitySearch.<sup>588</sup>

582 15 USC § 45(1), (2).

583 15 USC §52(2)(b).

584 Federal Trade Commission, ‘FTC Policy Statement on Deception’ (14 October 1983) [www.ftc.gov/putlci-statements/1983/10/ftc-policy-statement-deception](http://www.ftc.gov/putlci-statements/1983/10/ftc-policy-statement-deception). Further discussion of the unfairness test appears at [8.2] under Punitive Fees.

585 Federal Trade Commission v Reverb Communications Inc and Tracie Snitker FTC Docket No. C-4310 (Nov. 22, 2010) (consent order).

586 Competition and Markets Authority, ‘Online reviews and endorsements: Report on the CMA’s call for information’ (Report, Competition and Markets Authority, 19 June 2015) 57.

587 Federal Trade Commission, ‘Firm to Pay FTC \$250,000 to Settle Charges That it Used Misleading Online ‘Consumer’ and ‘Independent’ Reviews’ (Press Release, 15 March 2011).

588 Eric T Schneiderman, ‘A G Schneiderman Announces Agreement with 19 Companies To Stop Writing Fake Online Reviews And Pay More Than \$350,000 In Fines’ (Press Release, 23 September 2013) 1.

#### 4.4.4.2 Endorsement Guide

The *Electronic Code of Federal Regulations* Guides concerning use of endorsements and testimonials in advertising 16 CFR 255 (2015) (*'Endorsement Guide'*), revised in 2009, offers practical advice to businesses on endorsements by consumers, celebrities, and explains in general terms when the FTC may find endorsements or testimonials unfair or deceptive for the purposes of section 52 of the FTCA. Relevantly, the *Endorsement Guide* responds directly to some of the regulatory issues identified above by requiring:

- Endorsements to reflect the honest opinions, beliefs or experience of the endorser (s 255.1(a));
- Requires the endorser to be a bona fide user of the good or service at the time the endorsement was given (s 255.1(c));
- Requires advertisers, endorsers and sellers to disclose material connections between themselves (s 255.1(d) and s 255.5). A 'material connection' is defined as a relationship that might affect the weight or credibility of the endorsement. For example, if an endorser is an employee or relative of the advertiser, that fact must be disclosed because it is relevant to how much weight a consumer would give to the endorsement. Similarly, an advertiser must disclose if a consumer has been paid for giving an endorsement;
- Requires consumer endorsements to be substantiated by, when relevant, relevant scientific evidence (s 255.2 (a) and (b)); and
- Requires consumers and experts to be 'actual consumers' and experts in the field respectively (s 255.2(c)) and s255.3).

The *Endorsement Guide* also provides a number of examples to demonstrate what the FTC considers to be a misleading review or endorsement (s 255.0).

#### 4.4.4.3 Dot.com disclosure information

The *Dot.com Guide* is a Federal Trade Commission (*'FTC'*) staff guidance document that explains the information businesses should consider as they develop advertisements for online media to ensure compliance with the FTCA. In the context of online reviews the Dot.com guide provides guidance about how to make effective disclosures in digital advertising. Relevantly, it provides general guidance regarding endorsements and online reviews and, in relation to specific detail, refers to the *Endorsement Guide*. Examples are provided in the guide of appropriate disclosure of commercial benefits.

#### 4.4.4.4 Other Regulator Action

In addition to regulatory enforcement the US government, as part of its membership of ICPEN, participates in annual sweeps of its domestic websites to identify misleading conduct.<sup>589</sup> Each annual sweep focuses on a different theme, including endorsements and trustmarks.<sup>590</sup> In addition to the annual sweeps, Cornell University has also developed software to specifically identify and flag false reviews.<sup>591</sup>

589 See [www.icpen.org/for-consumers/what-icpen-does-for-you/international-internet-sweeps](http://www.icpen.org/for-consumers/what-icpen-does-for-you/international-internet-sweeps).

590 International Consumer Protection and Enforcement Network 'I Bought what!?: Targeting misleading and inadequate information disclosure in the online mobile worlds' (International Sweep Kit #14, International Consumer Protection and Enforcement Network, 2012) 13.

591 See Myle Ott et al, 'Finding Deceptive Opinion Spam by Any Stretch of the Imagination' (Research Report, Cornell University, 19 June 2011).

#### 4.4.5 Canada

The Canadian government's regulatory approach to fake online reviews and endorsements is consistent with their overall policy approach to e-commerce. The laws are drafted to ensure consistent protections for consumers irrespective of the medium in which the transaction is conducted. Consistent with the approach in the UK, Australia and the US, Canada has, to date regulated fake reviews and endorsements using existing regulation (the *Competition Act*) together with the voluntary *Code of Advertising Standards*, which deals specifically with endorsements.

##### 4.4.5.1 General protections — Competition Act

Fake reviews and endorsements can be challenged under the general misleading conduct provisions of the *Competition Act RSC 1985*. Section s 74.01 of the *Competition Act RSC 1985* is widely drafted. A person engages in reviewable conduct if 'for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever (a) makes a representation to the public that is false or misleading in a material matter'. Misleading advertising or fake reviews may be subject to both civil and criminal proceedings under (sections 52(1) (criminal) and s 74.01(1)(a) (civil)).

The Competition Act also includes specific provisions dealing with testimonials (section 74.02). Those provisions prohibit using testimonials unless the publisher can show that the testimonial was previously made or published (or approved and written permission obtained) and generally accords with what is actually published or approved.

The Canadian Competition Bureau has provided additional information and explanation of the operation of these provisions in the context of website reviews. Compliance with the provisions of the Act requires all representations made in endorsements or testimonials to 'be free from ambiguity' and 'contain all of the information necessary to enable a reasonable purchaser to make a sound purchasing decision'.<sup>592</sup>

##### 4.4.5.2 Canadian Code of Advertising Standards

The *Canadian Code of Advertising Standards* sets out criteria for acceptable advertising in Canada. The Code was created by the advertising industry in 1963 to promote the professional practice of advertising and is a voluntary code that can be adopted by advertising businesses. Administered by Advertising Standards Canada, the *Code* is regularly updated to ensure it is current and contemporary.

Section 2 of the Code prohibits the presentation of concealed or disguised advertisements. Although the Interpretation Guidelines don't clarify the scope of 'disguised advertisements' some of Advertising Standards Canada's enforcement action makes it clear that it extends to 'native advertising' and endorsements.

Advertising Standards Canada ('ASC') has investigated a number of consumer complaints regarding 'disguised advertising'.<sup>593</sup>

592 Canadian Competition Bureau, *False or Misleading Representations* (5 November 2015) Competition Bureau [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00513.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00513.html) [2] and [3].

593 Disguised advertising is where the commercial intent of the advertising is concealed by way of its format or content: *Canadian Code of Advertising Standards, clause 2*.

#### 4.4.5.3 Consumer education

In addition to enforcement action, the Canadian Competition Bureau has focused its attention on preventing consumers from being influenced by fake online reviews and endorsements. In the Bureau's *False or Misleading Representations and Deceptive Marketing Practices* guide, the Bureau describes how fake reviews and endorsements can be caught under Canadian competition law and provides guidance as to how to ensure testimonials comply with the *Competition Act*.<sup>594</sup> Further, in 2014, the Competition Bureau issued a press notice regarding fake online reviews.<sup>595</sup>

#### 4.4.6 Singapore

The Singapore government considers existing laws and codes already satisfactorily regulate fake online reviews and endorsements.<sup>596</sup> The regulatory issues are generally consistent with those identified in other areas of this report. The Singapore government's policy objectives again mirror those identified in relation to general misleading, unfair and deceptive practices, namely that consumers:

- must be protected against such practices;
- must be provided with sufficient information to make an informed decision;<sup>597</sup> and
- should be able to operate in a fair and equitable trading environment.<sup>598</sup>

##### 4.4.6.1 General Protections — Online reviews and endorsements

The Singapore government and its associated agencies have treated fake reviews and endorsements in the same manner as general misleading, unfair and deceptive practices.

The *Consumer Protection (Fair Trading) Act* (Singapore), s 4(a) provides a general prohibition against unfair practices including, relevantly, doing or saying anything, or omitting to do or say anything, if such statements or omissions might reasonably mislead a consumer. This general provision is supplemented by examples contained in Schedule 2 to the Act. The relevant examples here include:

- making a representation that appears to be objective, but which is primarily made to sell goods or services (example 14);
- representing that a particular person has offered or agreed to acquire goods or services if they have not (example 15); and
- using small print to conceal a material fact from a consumer (example 20).

594 Canadian Competition Bureau, *False or Misleading Representations and Deceptive Marketing Practices* (5 November 2015) Canadian Competition Bureau [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html).

595 Canadian Competition Bureau, *Don't buy into fake online endorsements: Not all reviews are from legitimate consumers* (28 July 2014) Canadian Competition Bureau [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03782.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03782.html).

596 Advertising Standards Authority of Singapore, 'Singapore Code of Advertising Practice' (Code (3<sup>rd</sup> ed), Advertising Standards Authority of Singapore, February 2008) 15.

597 Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2.

598 Consumers Association of Singapore, *CPFTA & Lemon Law*, (2013) Consumers Association of Singapore [www.case.org.sg/consumer\\_guides\\_cpfta.aspx](http://www.case.org.sg/consumer_guides_cpfta.aspx).

Notwithstanding the fact that the above examples (particularly examples 14 and 15) quite clearly deal with fake online reviews and endorsements, the Singapore Advertising Standards Authority has recently called for public consultation on new guidelines focused on social media and digital advertisements. The guidelines were drafted in response to a perceived gap in Singapore's regulatory regime.

#### **4.4.6.2 Voluntary code**

Singapore's voluntary Code of Advertising Practice sets out guidelines regarding, amongst other issues, the use of testimonials and expressions of opinion. The Code requires testimonials to be genuine, reflect general consumer experience and relate to the current personal experience of the party who provided the testimonial or endorsements (guideline 3.1, 3.2 and 3.4).

Singapore's government agencies are yet to enforce their regulations relating to unfair use of testimonials. However, the Advertising Standards Authority has finalised its draft 'Digital and Social Media Guidelines' (that expressly cover online reviews and endorsements) on which it sought public consultation. The consultation process ran from 7 December 2015 and closed on 8 January 2015. The Advertising Authority is yet to release its report.

In summary, the draft guidelines require all commercial relationships between blog writers, social media platforms and advertisers to be disclosed and that all paid advertisements are identified as such (see, for example, clause 3.1).

#### **4.4.7 Comparison**

##### **4.4.7.1 Common aspects**

There is a high level of consistency in the regulatory approach of each reviewed jurisdiction.

- (1) All jurisdictions have general protections cast in broad terms and which are applicable to misleading or deceptive conduct in any medium. In each jurisdiction the following type of conduct is prohibited:
  - (i) Supplier writes or engages another person to write a positive review and claims it is a consumer review
  - (ii) Supplier writes a detrimental review of a competitor
  - (iii) Supplier approves or endorses a review of their business they know to be false
  - (iv) Supplier approves or endorses a review of their business they suspect to be false (misleading impression)
  - (v) Supplier fails to take action to remove or dis-endorse a fake review
  - (vi) Advertorials
- (2) No specific modifications have been introduced for the application of these laws to e-commerce due to the broad drafting of the prohibitions. This has allowed the UK and Canada to maintain its policy of a consistent consumer protection approach to traditional transactions and online transactions.
- (3) No jurisdiction has altered existing jurisdictional limits of the general protections. No significant issue has arisen where a regulator has been unable to take action on the basis of a lack of jurisdiction. This may be to a large extent attributable to the willingness of regulators to cooperate and the similarities in scope of the prohibitions and regulatory powers.

- (4) All jurisdictions provide some level of online consumer education and guides to assist consumers to recognise fake reviews.

#### 4.4.7.2 Differences

Differences in approach appear in the use of codes or guidelines by jurisdictions:

- (1) Voluntary codes for advertising in all mediums have been used effectively in the UK and Singapore. The codes are consistent with the general statutory prohibitions and aim to improve compliance. The UK Code has been reviewed for application to online and other electronic mediums. However, Singapore's Advertising Standards Authority has identified gaps in its regime dealing with, amongst other things, advertising on blogs and social media platforms.

The 'gaps' largely relate to the broad language currently used in Singapore's regulatory regime. For example, unlike the ACL that refers specifically to 'testimonials', the CPFTA simply refers to 'representations'. The CPFTA's extension to social media and digital marketing has also not been considered by the Singapore judiciary.

- (2) In addition to general prohibitions of misleading conduct, specific prohibitions of false or misleading testimonials exists in Australia, the UK and Canada. The specific application of general prohibitions to testimonials improves the effectiveness of the statutory provisions in an e-commerce context.
- (3) The Endorsement Guide in the United States has been particularly effective in conveying the requirements for appropriate endorsements. It assists in making clear that endorsements must be honest and represent the beliefs of the endorser, requires the endorser to be a bona fide user or actual consumer of the goods or services and requires material connections to be disclosed. The guide makes explicit what is implicit within the legal test of 'unfair commercial practice'.

## 4.5 Consumer fraud

### 4.5.1 Issues

Internet fraud has been defined as an intentional deception, done for personal gain for the purposes of damaging another individual committed on the Internet.<sup>599</sup> There are numerous examples of fraudulent or deceptive practices, which utilise the internet to defraud or scam other people.<sup>600</sup> A common theme in most scams is that the scammer uses a hoax, ruse or other form of subterfuge to extract money from the unsuspecting person. There is considerable overlap between consumer protection regulations and criminal offences that relate to obtaining advantage in the marketplace by deception.<sup>601</sup> For the most part, online fraud is covered by the relevant criminal laws of the jurisdictions discussed in this report.

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599 European Consumer Centres Network, 'Fraud in Cross-Border E-Commerce' (Report, European Consumer Centres Network, 12 December 2014) 3; Adam Graycar and Marianne James, 'Older People and Consumer Fraud' (Paper presented at the 4<sup>th</sup> National Outlook Symposium on Crime in Australia, New Crimes or New Responses, Canberra, 21-22 June 2001), 2.

600 Refer to a list of examples on the ACCC website at [www.scamwatch.gov.au/types-of-scams](http://www.scamwatch.gov.au/types-of-scams).

601 Australian Competition & Consumer Commission, Submission No 46 to House of Representatives Standing Committee on Communications, *Inquiry into cyber crime*, July 2009, 3.

Most jurisdictions have developed coordinated policies for enforcement, prosecution and consumer education and remedies for fraud. In most cases the policy approach to fraud in e-commerce is consistent with other mediums. Specific issues identified within an online environment and which regulators have considered are:

- **Do online transactions increase the risk of fraud?** The remote nature of an online transaction, where the parties never meet and goods are sold sight unseen, has the potential to allow fraudsters to more easily and successfully engage in deceptive conduct. The risk of fraudulent activity potentially increases for both a buyer and seller online i.e. a fake listings and from the supplier's perspective i.e. non-payment;
- **Changes in technology present new opportunities for fraud:** The Internet's promise of substantial consumer benefits is, however, coupled with the potential for fraud and deception. Fraud operators are always opportunists and are among the first to appreciate the potential of a new technology;<sup>602</sup>
- **Online auction websites present the most likely breeding ground for fraud:** Fraudulent schemes appearing on online auction websites are among the most frequently reported form of mass-marketing fraud;<sup>603</sup> and
- **Potential impact of internet fraud is compounded by access to a global market:** There is nothing new about most types of Internet fraud the Commission has seen to date. What is new -- and striking -- is the size of the potential market and the relative ease, low cost, and speed with which a scam can be perpetrated.<sup>604</sup>

The clear difference between previous forms of scams and those perpetrated online is the speed with which new forms of fraud are executed and the increased size of the potential financial loss that may be incurred. Accordingly, the predominant policy consideration of regulators is the need to maintain consumer confidence in online markets and ensure that fraudulent activities do not inhibit growth and innovation within online markets.<sup>605</sup>

A common regulatory approach is evident within the jurisdictions reviewed. A purely legislative approach has been considered inadequate due to the speed at which new forms of fraud emerge and also because statutory provisions prohibiting fraud will do little to discourage new scams. A coordinated approach between business, government and consumer groups is common and usually includes:

- (a) coordinated law enforcement against fraud and deception comprising both criminal sanctions and civil remedies;
- (b) private initiatives and public/private partnerships; and

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602 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, *Consumer Protection in Cyberspace: Combating Fraud on the Internet*, 25 June 1998.

603 The United States Department of Justice, *Mass Marketing Fraud* (2 November 2015) The United States Department of Justice [www.justice.gov/criminal-fraud/mass-marketing-fraud](http://www.justice.gov/criminal-fraud/mass-marketing-fraud).

604 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, *Consumer Protection in Cyberspace: Combating Fraud on the Internet*, 25 June 1998.

605 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, *Consumer Protection in Cyberspace: Combating Fraud on the Internet*, 25 June 1998. **UK:** *Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council* [2005] OJ L 149/22 [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm).

- (c) consumer education through the combined efforts of government, business and consumer groups<sup>606</sup> and by granting government agencies the authority and resources to take vigorous action to against consumer fraud and requiring that businesses are held responsible for any abuse of their services.<sup>607</sup>

Existing legislative provisions prohibiting deceptive conduct or unfair business practices are used by regulators in each jurisdiction to prosecute fraudsters and seek remedies for consumers where possible. Generally the existing legislative provisions have been cast broadly enough to apply to scams and fraud perpetrated via the internet either within the jurisdiction or as against persons residing in the jurisdiction.

Regulators are also generally very active in providing consumer education, either as support to consumer groups or directly through websites, explaining how to recognise common scams and steps for consumers to take to avoid loss.

#### 4.5.2 Australia

Australia's approach to the issue of consumer fraud parallels the approach in the other reviewed jurisdictions. The ACCC uses a multipronged approach to attack the issue of consumer fraud including regulatory prohibitions, civil and criminal penalties and consumer education.<sup>608</sup>

General misleading and deceptive conduct provisions (s 18 and s 29) or unconscionable conduct provisions (ss21 and 22) provide a basis for civil and criminal action (s 151) against parties involved in fraudulent activity. Many of the consumer fraud examples outlined above are prohibited by either the general provisions of the *Australian Consumer Law* or specific provisions aimed at unfair or deceptive practices. In most cases these provisions apply to consumer fraud engaged in through any medium. The only exception is the unsolicited consumer agreement provisions which only apply where a consumer is pressured into signing an agreement by a salesperson either over the phone or face to face, where the salesperson was not invited to call or attend their residence.<sup>609</sup> Unsolicited emails are however regulated under the *Spam Act 2003* (Cth).

#### 4.5.3 United Kingdom

The regulatory approach in the UK is largely focused on boosting consumer confidence and curbing unfair business practices generally rather than being specifically focussed on consumer fraud.<sup>610</sup> Prosecution for fraudulent activity is usually undertaken as a criminal offence by police or other security agencies and is outside the authority of the regulator.

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606 Federal Trade Commission Staff, 'Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace' (Report volume 1, Federal Trade Commission, May 1996), exhibit 1. **Australia** — See ACCC Scamwatch website [www.scamwatch.gov.au/](http://www.scamwatch.gov.au/).

607 Consumer Federation of America, Fraud (2015) Consumer Federation of America <http://consumerfed.org/issues/consumer-protection/fraud/>.

608 See, for example the Australasian Consumer Fraud Taskforce, [www.scamwatch.gov.au/about-scamwatch/australasian-consumer-fraud-taskforce](http://www.scamwatch.gov.au/about-scamwatch/australasian-consumer-fraud-taskforce).

609 Refer to the examination of these provisions at [17].

610 Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council [2005] OJ L 149/22 [http://ec.europa.eu/consumers/consumer\\_rights/unfair-trade/unfair-practices/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm).

#### 4.5.3.1 General Protection — unfair commercial behaviour

Consistent with the approach in the reviewed jurisdictions the CPR applies to unfair commercial behaviour that occurs before, during and after a contract is made.<sup>611</sup> In the context of consumer fraud unfair commercial practices will include misleading actions and omissions such as establishing fake websites to sell goods or services that are never provided (refer to regulations 5 and 6), aggressive commercial practices (see regulation 7) and skill bidding (commercial practice 22 of schedule 1).

#### 4.5.3.2 Industry regulation

A number of self-regulatory bodies in the UK require compliance with laws such as the *Electronic-Commerce (EC Directive) Regulations 2002* in their codes of practice.<sup>612</sup> The Internet Service Providers and other platform operators have responded to such requirements by imposing their own 'User Agreements' that set the ground rules for the sale of products.<sup>613</sup> However, the difficulty for the Internet Service Providers and platform operators is that those involved in fraudulent activity rarely have regard for the law,<sup>614</sup> which is why the majority of these agreements generally purport to exclude or exempt the platform operator's liability for fraudulent activity.<sup>615</sup>

#### 4.5.3.3 Consumer Education

Consumer education is provided by the European Consumer Centres Network which focusing on 'minimising the risk to consumers by increasing their awareness and their knowledge on how to shop safely online'.<sup>616</sup>

### 4.5.4 United States

Similar to the UK, the US approaches consumer fraud predominantly from a criminal perspective. The primary consumer policy objective is the need to address Internet fraud promptly before it discourages new consumers from using the Internet and inhibits the impressive commercial growth and innovation currently being experienced in that area.<sup>617</sup>

Consistent with the other reviewed jurisdictions the US employs a coordinated multipronged approach across statutory regulation, public private partnerships and consumer education. This policy has been given effect by expansion of the remedies contained in the *Uniform Commercial Code* s 2-271 to apply in the case of fraud and interpreting s45 of the *Federal Trade Commission Act* 15 USC (*FTC Act*) to include e-commerce transactions.

611 See detailed explanation at [26.5].

612 See, for example, the Internet Service Providers' Association Code of Practice, paragraph 2.1 (found at [www.ispa.org.uk/about-us/ispa-code-of-practice/](http://www.ispa.org.uk/about-us/ispa-code-of-practice/)).

613 Kanchana Kariyawasam and Scott Guy, 'The Contractual Legalities of Buying and Selling on eBay Online Auctions and the Protection of Consumers' (2008) 19 *Journal of Law, Information and Science* 42 [www.austlii.edu.au/au/journals/JILawInfoSci/2008/4.html](http://www.austlii.edu.au/au/journals/JILawInfoSci/2008/4.html).

614 European Consumer Centres Network, 'Fraud in Cross-Border E-Commerce' (Report, European Consumer Centres Network, 12 December 2014), 20.

615 See, for example, eBay UK, *User Agreement* (20 October 2015) eBay UK [http://pages.ebay.co.uk/help/policies/user-agreement.html#listing\\_liability](http://pages.ebay.co.uk/help/policies/user-agreement.html#listing_liability). However, see, Andres Guadamuz Gonzalez, *eBay Law: The Legal Implications of the C2C Electronic Commerce Model*, University of Edinburgh [www.era.lib.ed.ac.uk/bitstream/handle/1842/2259/eBaylaw.pdf?sequence=1](http://www.era.lib.ed.ac.uk/bitstream/handle/1842/2259/eBaylaw.pdf?sequence=1), 9, as to whether such an exclusion or exemption is effective under UK law.

616 European Consumer Centres Network, 'Fraud in Cross-Border E-Commerce' and referring fraud cases, originating from dishonest traders to the police or criminal enforcement authorities (Report, European Consumer Centres Network, 12 December 2014) 23.

617 Federal Trade Commission, Prepared Statement before the Telecommunications, Trade, and Consumer Protection Subcommittee of the House Committee on commerce United States House of Representatives, Consumer Protection in Cyberspace: Combating Fraud on the Internet, 25 June 1998.

#### 4.5.4.1 General Protection

Section 2-721 of the *Uniform Commercial Code* (UCC) provides that the remedies for material misrepresentation or fraud include all remedies available under article 2 of the UCC for non-fraudulent breach. That section covers situations where one party to a transaction is fraudulently induced to enter a contract of sale by the other party<sup>618</sup> and allows the defrauded party to rely on other remedies, such as rescission of the contract or rejection or return of the goods, in addition to any claim for damages or other remedy.

Section 45(1) of the *FTC Act* provides generally that unfair or deceptive acts or practices in or affecting commerce are unlawful. Consumer fraud is clearly within the section. The section can be used in the case of online transactions irrespective of the location of the fraudulent party if the deceptive practice is likely to cause reasonably foreseeable injury with the US or involve material conduct occurring in the US.

Examples of actions taken by the FTC in reliance upon these provisions include:

##### Deceptive emails:

In January 2000, the FTC settled a deceptive SPAM charge with ReverseAuction.com. FTC alleged that ReverseAuctions has violated consumer's privacy by harvesting consumers' personal information from a competitor's site and then sending deceptive spam to those consumers soliciting their business. The settlement bars ReverseAuction from engaging in such unlawful practices in the future, to delete the personal consumer information of consumers who received the spam but declined to register with ReversAuction, and to give those who did register, notice of the FTC charges and an opportunity to cancel their registration.<sup>619</sup>

##### Fake News Websites used to advertise Weight-Loss products:

In February 2013 the FTC settled a clam against Beony International (and owner Mario Milanovis and employee Cody Adams) relating to that company's use of fake news websites to market an acai berry supplement and other weight-loss products. Beony International, Mr Milanovis and Mr Adams have agreed to pay the FTC \$1.6 million and sell a 2008 Porsche in settlement of the matter.<sup>620</sup>

618 Larry Schiffer, 'The Availability of Benefit of the Bargain damages in a fraud action under section 2-721 of the Uniform Commercial Code' (1978-79) 43 Albany Law Review 930, 931.

619 Federal Trade Commission, *Online Auction Site Settles FTC Privacy Charges* (6 January 2000) Federal Trade Commission [www.ftc.gov/news-events/press-releases/2000/01/online-auction-site-settles-ftc-privacy-charges](http://www.ftc.gov/news-events/press-releases/2000/01/online-auction-site-settles-ftc-privacy-charges).

620 Federal Trade Commission, *FTC Permanently Stops Fake News Website Operator that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products* (7 February 2013) Federal Trade Commission [www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly](http://www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly).

**Fake eBay listings**

In February 2010, a Brazilian businessman living in Florida, was sentenced to 68 months in prison by a federal court in Miami, for operating an eBay auction fraud scheme.

From October 2003 through to June 2008, the defendant sold more than 5,500 items on eBay using over 200 different eBay accounts, earning approximately \$717,000.

None of those goods were ever shipped or delivered. The defendant kept the money for personal use.<sup>621</sup>

**4.5.5 Canada**

Canada relies on existing misrepresentation laws to police consumer fraud and has implemented specific laws at the provincial level to protect consumers against financial fraud arising in the crowdfunding context. Consistent with the other reviewed jurisdictions consumer regulators are focused on creating a climate of trust among consumers and businesses that foster economic growth<sup>622</sup> whilst recognising that e-commerce provides a perfect vehicle for fraudsters looking to target less-knowledgeable or naïve consumers.<sup>623</sup> The Canadian government is also conscious that any consumer protection framework that it implements should be consistent at an international level.<sup>624</sup>

In giving effect to its policy objectives the Canadian government has adapted existing consumer protection laws to apply to electronic commerce and harmonised those provisions across provinces rather than implementing a new regulatory regime to deal with consumer fraud.<sup>625</sup>

This policy has been given effect by interpreting the existing misrepresentation regime at both a Federal and Provincial level as applying to e-commerce and, specifically, consumer fraud.

**4.5.5.1 General Protection**

The *Competition Act RSC 1985 c C-34* is a federal law governing business conduct in Canada with the purpose of providing consumers with protection against misleading advertisements and deceptive practices (section 74.01). It also extends this protection to misleading or deceptive conduct arising in the sender or subject matter of an email (section 74.011).

In relation to consumer fraud, the *Competition Act* provides two regimes to address consumer fraud: the first is a criminal regime and the second, a civil regime:

- (1) **Criminal regime:** The provisions prohibit all materially false or misleading representations made knowingly or recklessly (section 52), forbids deceptive telemarketing (section 52.1), deceptive notices of prize winnings (section 53), double ticketing (section 54) and pyramid

621 Gordon Gibb, *Largest Internet Scam in eBay History Finally Cracked* (25 February 2010) [Laweyrsandsettlements.com](http://Laweyrsandsettlements.com) [www.laweyrsandsettlements.com/articles/internet-technology/internet-lawyers-technology-lawyer-information-13664.html](http://www.laweyrsandsettlements.com/articles/internet-technology/internet-lawyers-technology-lawyer-information-13664.html).

622 Industry Canada. 'The Challenge of Change: Building the Century Economy', (Conference Background Paper presented at e-Commerce to e-Economy Strategies for the 21st Century, Ottawa Canada, 27–28 September, 2004), page i. [www.ic.gc.ca/eic/site/ecic-ceac.n2013](http://www.ic.gc.ca/eic/site/ecic-ceac.n2013).

623 In the crowdfunding context see Arshy Mann: *Untangling Canada's proposed new crowdfunding laws* (21 March 2014) [Canadian Business](http://CanadianBusiness.com) [www.canadianbusiness.com/companies-and-industries/crowdfunding-securities-regulator-rules-faq/](http://www.canadianbusiness.com/companies-and-industries/crowdfunding-securities-regulator-rules-faq/).

624 (Working Group on Electronic Commerce and Consumers, 'Principles of Consumer Protection for Electronic Commerce: A Canadian Framework' (Principles of Consumer Protection, Office of Consumer Affairs of Industry Canada, 2009) 2.

625 *Ibid.*

schemes (section 55<sup>626</sup>). Under this regime, misleading practices are brought before the criminal courts, requiring proof of each element of the offence beyond a reasonable doubt and can result in penalties ranging from CAD\$200,000 to imprisonment of up to 14 years (section 52(5)).

- (2) **Civil regime:** The civil regime provides that a person who makes certain misleading representations to the public engages in 'reviewable conduct' (sections 74.01) relevantly including bait and switch selling (section 74.04(2)), which can result in administrative remedies including orders to cease such conduct and the payment of monetary penalties (section 74.1(1)). Such representations are deemed to be made by the person who causes the representations to be expressed, unless that person is outside Canada, in which case the person who imports (or fails to import) the goods will be held responsible (section 74.03(2)).
- (3) Proceedings under this regime may be brought before the Competition Tribunal, the Federal Court or the superior court of a province and requires that each element of conduct be proven on a balance of probabilities.<sup>627</sup> The penalties range from an order to cease the activity up to a monetary penalty of CAN1,000,000 for individuals and CAN15,000,000 for corporations (section 74.1(1)(c)).

Examples of action taken by the Competition Bureau under the Competition Act include:

- **Fake website:** In June 2013, the Competition Bureau convicted the owner of a website (www.oilcareer.com) who was running an employment scam of making false or misleading representations with respect to finding employment in the oil and gas industry.<sup>628</sup> The Bureau was subsequently able to obtain restitution for the 1500 victims located in over 60 countries of over \$185,000. The defendant was also sentenced to 30 months imprisonment and fined an additional \$164,000.<sup>629</sup>
- **Cross-border fraud:** During 2013 the Consumer Bureau assisted the US Federal Trade Commission to find a Toronto man guilty of consumer fraud arising from telephone calls made to US residents with credit problems offering them Visa or Mastercards for an advanced fee of several hundred dollars. The cards were never provided. The defendant was subsequently sentenced by the US Federal district court in Illinois to 10 years in prison for his role in an advanced credit card fee scam that defrauded thousands of US consumers of more than US\$10,000,000.<sup>630</sup>

#### 4.5.5.2 Fraud Prevention Forum

The Canadian Competition Bureau established and chairs the Fraud Prevention Forum. The Forum has over 125 members comprised of private sector firms, consumer and volunteer groups, government agencies and law enforcement organisations whose aim is to 'prevent Canadians from

626 Pyramid selling in Canada is examined at [15] of this Report.

627 Competition Bureau of Canada, *False or Misleading Representations and Deceptive Marketing Practices* (5 November 2015) Competition Bureau of Canada [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html)

628 Competition Bureau of Canada, *Alberta Man Found Guilty of Misleading Representations and Breach of Consent Agreement* (25 June 2013) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03579.html>>.

629 Competition Bureau of Canada, *Bureau Investigation Leads to Restitution for Victims of Online Jobs Scam* (4 June 2014) [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03761.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03761.html).

630 Competition Bureau of Canada, *Toronto man receives 10 years in US prison following cross-border fraud investigation* (31 January 2014) [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03654.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03654.html).

becoming victims of fraud by educating them on how to recognize it, report it and stop it'.<sup>631</sup> This model has been adopted around the world including in the US, Australia and the UK.

#### 4.5.5.3 International co-operation

The Canadian Competition Bureau has recognised that in order to fulfil its law enforcement mandate under the *Competition Act* it must collaborate closely with competition and consumer protection authorities around the world. To give effect to that approach, the Canadian Competition Bureau has entered into a number of international cooperation agreements with, amongst others, Australia,<sup>632</sup> the UK<sup>633</sup> and the US.<sup>634</sup> These agreements encourage the sharing of information between the parties in relation to, amongst other things, consumer protection and fraud.

#### 4.5.6 Singapore

Singapore relies on a combination of existing and new regulations to combat consumer fraud. As with the other jurisdictions, the majority of fraud related offences are caught by the criminal regime<sup>635</sup> as fraud is considered to fall outside the ambit of consumer protection at an ASEAN level.<sup>636</sup> While there is recognition of the same issues arising from consumer fraud on the internet the Singapore policy response is to bundle fraud into other unfair business practices and apply existing consumer provisions in the *Consumer Protection (Fair Trading) Act*. The primary aim of this legislation is to allow consumers and businesses to operate in a fair and equitable trading environment<sup>637</sup> and be provided with enough truthful and accurate information to make an informed decision.<sup>638</sup>

##### 4.5.6.1 General Protection

Section 4 of the *Consumer Protection (Fair Trading) Act* contains a general prohibition against unfair practices, including false claims, and paragraph 5 of schedule 2 expands the definition of unfair practice to include other fraud-related activities such as:

- bait advertising;
- taking advantage of a consumer by including harsh or oppressive provisions in an agreement or by exerting undue pressure or undue influence to enter into the transaction;
- representing that a particular person (such as celebrity or specialist in the area) has agreed to acquire goods or services when they have not;

631 Competition Bureau of Canada, *Fraud Prevention Forum* (19 November 2015) Competition Bureau of Canada [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03662.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03662.html).

632 See Competition Bureau of Canada, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01595.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01595.html).

633 See Competition Bureau of Canada, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#Kingdom](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#Kingdom).

634 See Competition Bureau of Canada, [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#States](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#States).

635 See for example, Computer Misuse and Cybersecurity Act, ss 4(1) and (2) (access to computer with intent to commit or facilitate commission of offence and the financial securities regime, see: Securities and Futures Act (Singapore, cap 289, 2006 rev ed) ss 6 (Monetary Authority of Singapore approval required for issue) and 46C (Licensing requirement for equity based crowdfunding and the House to House and Street Collections Act (Singapore) cap 128, 2014 rev ed (Donations based crowdfunding only).

636 In relation to the ASEAN approach see: ASEAN-Australia Development Cooperation Program Phase II, 'Consumer Protection Digests and Case Studies: A Policy Guide (Volume 1)' (Policy Guide, ASEAN and Australia Aid, November 2014) 30).

637 Consumers Association of Singapore, CPFTA & Lemon Law, (2013) Consumers Association of Singapore. [www.case.org.sg/consumer\\_guides\\_cpfta.aspx](http://www.case.org.sg/consumer_guides_cpfta.aspx).

638 (Allan Asher, 'Consumer Protection in E-Commerce: Report on OECD Guidelines for Consumer Protection in the Context of Electronic Commerce' (Paper presented at Asia-Pacific Economic Cooperation Electronic Commerce Steering Group Workshop on Consumer Protection, Singapore, 20 July 2000) 2).

- offering gifts, prizes or other free items in connection with the supply of goods or services if the supplier knows those items will not be provided; and
- generally using small print to conceal a material fact from a consumer or to mislead a consumer.

The provisions are not limited to internet fraud.

## 4.5.7 Comparison

### 4.5.7.1 Common aspects

The Federal Trade Commission, UK regulator and Canadian regulator have focussed attention on international consumer protection issues arising from the use of the Internet and various platforms contained on it. This is the same approach Australia has adopted having recognised the increasing importance of such inter-agency cooperation to achieve positive outcomes in this area.<sup>639</sup>

A majority of the reviewed jurisdictions have a similar regulatory approach to the issue of consumer fraud. The elements of this common approach are:

- (a) coordinated law enforcement against fraud and deception comprising both criminal sanctions and civil remedies;
- (b) remedies available to consumers in the case of fraud mirrors the remedies available for misleading conduct in a civil case;
- (c) existing consumer protection provisions for deceptive conduct and unfair commercial practices are reviewed to ensure clear application to fraudulent conduct occurring over the internet;
- (d) consumer education through the combined efforts of government, business and consumer groups<sup>640</sup> and by granting government agencies the authority and resources to take vigorous action to against consumer fraud and requiring that businesses are held responsible for any abuse of their services.<sup>641</sup>

The effectiveness of the regulatory frameworks instituted on a national basis is further enhanced if:

- (a) the framework is consistent with international regimes for monitoring and prosecuting fraudsters; and
- (b) the regulator is willing to cooperate on an international level with other regulators to share information and coordinate enforcement and prosecution of fraudsters operating internationally.

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639 Australian Competition & Consumer Commission, Submission No 46 to House of Representatives Standing Committee on Communications, *Inquiry into cyber crime*, July 2009, 2.

640 Federal Trade Commission Staff, 'Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace' (Report volume 1, Federal Trade Commission, May 1996), exhibit 1. **Australia** — See ACCC Scamwatch [www.scamwatch.gov.au/](http://www.scamwatch.gov.au/).

641 Consumer Federation of America, *Fraud* (2015) Consumer Federation of America <http://consumerfed.org/issues/consumer-protection/fraud/>.

#### 4.5.7.2 Emerging Issues

There are a number of emerging issues:

##### Consumer to Consumer transactions

The increase in peer to peer transactions raises for consideration whether consumer to consumer transactions should be regulated.<sup>642</sup> In the context of consumer fraud, the criminal regimes applicable to cyber/internet crime (outside of consumer protection legislation) do not distinguish between conduct in the course of a business and conduct between private individuals. Offence provisions within consumer protection legislation are generally restricted to conduct occurring in trade or commerce (or some similar phrase). Not all consumer fraud scenarios will naturally fall within a trade or commerce paradigm and consideration needs to be given to whether, at least for criminal prosecutions, application to C2C transactions should be included. This may be warranted in circumstances where there is no other applicable criminal provision upon which to prosecute the fraudster.

##### Liability of platform providers for deceptive conduct

The question of whether a platform provider, such as Facebook, eBay or Airbnb, should bear any liability for the conduct of its users arises in a number of contexts. Whether this potential liability should extend to fraudulent activity engaged in using the platform arose in a recent Court of Justice of the European Union (CJEU) decision (upon referral from the High Court of England and Wales) dealing with intellectual property breaches.<sup>643</sup> In *L’Oreal SA, Lancome parfums et beauté & Cie, Laboratoire Garnier & Cie, L’Oreal (UK) Limited v eBay International AG, eBay Europe SARL and eBay (UK) Limited*<sup>644</sup> the European Court considered whether eBay was liable for alleged infringement of L’Oreal’s intellectual property rights by its users under article 14 of the EU’s *E-Commerce Directive*.<sup>645</sup> Article 14 relevantly provides that intermediaries may avoid liability for the information they host or store if ‘upon obtaining [actual] knowledge or awareness of [illegal activities they act] expeditiously to remove or to disable access to the information’. This provides a defence to any civil or criminal liability imposed by other statutory provisions or the law for hosting the information. No liability is imposed by the *E-Commerce Directive* directly.

The decision confirmed that online market platforms are not required to police the sale of items on their website for trademark infringements or other activity. However, the defence in Article 14 was not considered to be available if the online market operator:

- has taken an active role in the relationship between buyers and sellers. This may occur where the online market operation provides assistance to optimize the presentation of offers for sale beyond purely administrative or technical assistance; or

642 Refer to [29.3] which examines the consumer to consumer issue in the context of peer to peer transactions.

643 See, European Parliament and Council Directive 2008/95/EC 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L 299/25, art 5(a) (Rights conferred by a Trade Mark) and Council Regulation (EC) No40/94 of 20 December 1993 on the Community Trade Mark [1993] OJ L 011/1, art 9(1)(a) (Rights conferred by a Community Trade Mark) (implemented as UK law in the Trade Marks Act 1994 (UK) c 26, s 9 and Part II).

644 (C-324/09) [2011] EUECJ 474.

645 Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1, art14(1) incorporated in UK law by the Electronic Commerce (EC Directive) Regulations 2002 SI 2002/2013, regulation 19.

- is aware of facts or circumstances on the basis of which ‘a diligent economic operator should have identified’ an unlawful activity and did not act to remove or disable the infringing information.<sup>646</sup> This may occur where an operator finds infringements through a monitoring process or infringements are notified by other users or consumers.

## 4.6 Peer-to-peer transactions and the sharing economy

### 4.6.1 Overview

The *sharing economy* has been defined as ‘online platforms that help people share access to assets, resources, time and skills’.<sup>647</sup> These platforms have been established due to advances in technology which allow buyers and sellers (both individual and businesses) to provide goods and services at lower costs. Many ‘suppliers’ of goods or services via peer to peer platforms are individuals who are not engaged in traditional business activities but are ‘sharing’ their existing assets for monetary gain. High profile examples like Uber and Airbnb allow individuals to share their cars or property with other individuals for consideration.<sup>648</sup> Other examples are peer to peer lending, task services and the sharing of household goods. Most commentators agree that the sharing economy will continue to grow<sup>649</sup> which in turn will drive changes to business models employed by suppliers using these platforms.

Concerns have been raised in a number of forums about the application of existing laws to the sharing economy business model. Laws developed for traditional business models have in some cases been circumvented by platform operators, particularly in relation to licensing regimes. This has caused significant concern globally in relation to the applicability of laws related to public safety, insurance, tax avoidance and employment. A number of countries have undertaken reviews of sharing economy platforms to understand the issues within the different markets.<sup>650</sup> Reference is made to these reviews where relevant to consumer issues in this report. While the issues canvassed in these reports are important for consumer welfare they are the subject of regulatory regimes outside of the *Australian Consumer Law*. The focus of this report is on the consumer protection issues that are of most relevance to the *Australian Consumer Law*.

Many countries have been grappling with the balance between encouraging and fostering innovation within a digital economy and the need to build consumer trust<sup>651</sup> in online transactions and maintain consumer protections where appropriate. In this section we explain the consumer protection issues in peer to peer transactions, compare the policy and regulatory approaches of the reviewed jurisdictions to these issues and conclude with a summary.

646 Osborne Clarke, *But was it worth it? The significance of the L’Oreal v eBay trade mark ruling for brand owners and online marketplaces* (19 July 2011) Osborne Clarke [www.osborneclarke.com/connected-insights/publications/but-was-it-worth-it-the-significance-of-the-loreal-v-ebay-trade-mark-ruling-for-brand-owners-and-online-marketplaces/#sthash.j6M4DAE9.dpufz](http://www.osborneclarke.com/connected-insights/publications/but-was-it-worth-it-the-significance-of-the-loreal-v-ebay-trade-mark-ruling-for-brand-owners-and-online-marketplaces/#sthash.j6M4DAE9.dpufz).

647 Debbie Woskrow, *Unlocking the Sharing Economy: An Independent Review*, (available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf)). Other terminology is commonly used such as ‘peer to peer economy’, ‘individual to individual services’ and ‘collaborative economy’.

648 Not all platforms operate on a commercial model some enable individuals to share assets gratuitously.

649 Deloitte Access Economics, ‘The sharing economy and the Competition and Consumer Act 2015’ Deloitte (NSW).

650 D Woskrow (2014) *Unlocking the sharing economy — an independent review*, Report for the Minister of State for Business, Enterprise and Energy; Deloitte Access Economics *The sharing economy and the Competition and Consumer Act 2015*; Deloitte (NSW).

651 Trust in a sharing platform is identified as one of the major issues for consumers by PWC in *The Sharing Economy* (2014), available at [www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf](http://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf).

## 4.6.2 Peer to peer platforms — Scope of report

Before considering the consumer issues within the sharing economy a brief explanation of the types of platforms is warranted. A common characteristic of peer to peer transactions is the existence of a platform which is used to connect the parties to the transaction. The benefit of the platform to the sellers is that transactions costs such as advertising, bargaining, decision costs and enforcement are borne by the platform reducing the costs to the seller. Platforms usually allow owners of idle assets to better utilize excess capacity of those assets to a potentially global market. To be regarded as part of the sharing economy the platform should be owned and operated separate to ownership of the assets being shared. This differentiates this type of transaction from other online transactions which may be conducted through online networks or platforms owned by the seller.

There are a broad range of peer to peer platforms.

Type of platform	Description
<b>Ridesharing platforms</b> *Uber, Lyft, Blablacar and Sidecar	Transport network companies that operate a platform which allows consumers with smart phones to submit a trip request that is then sent to drivers who use their own cars. <ul style="list-style-type: none"> <li>Prices may or may not be set by the platform operator;</li> <li>Consumers may or may not choose the driver;</li> <li>Payment is usually made via the application using the consumer's payment details contained in their profile.<sup>652</sup></li> </ul>
<b>Car sharing platforms</b> *GoGet, *GreenShareCar, *Flexicar	Allows users to rent cars for short period of time, usually by the hour from commercial operators
<b>Peer to peer car sharing</b> DriveMyCar, Car Next Door	Individuals make their vehicles available for other to rent for short periods of time. Users are matched via a platform.
<b>Accommodation platforms</b> *Airbnb, HomeAway and Flipkey, VacationRentalsm VRBO, Couchsurfing	Online platforms that connect travellers with hosts who offer their home (or a part of it) as a place to stay. <sup>653</sup> This has also extended to platforms facilitating short term letting of commercial space and car parking (*ParkHound, *Divvy, MonkeyParking, JusTPark, Open Shed).
<b>Crowdfunding</b> Gofundme, *Kickstarter, *Indiegogo, *Pozible, *OzCrowd, *VentureCrowd, *EverydayHero, *BrickX	Crowdfunding platforms allow persons seeking funding to showcase projects or companies on an Internet platform and members of the public provide funding through that platform. There are 2 main types of crowdfunding platforms: <sup>654</sup> <ul style="list-style-type: none"> <li><b>Donations or rewards model:</b> individuals provide money for benevolent reasons;<sup>655</sup></li> <li><b>Investment model:</b> individuals make investments in return for a share in the profits or revenue generated by the company/project.<sup>656</sup></li> </ul>

652 Lauren Goode 'Worth It? An App to Get a Cab', *The Wall Street Journal* (online), 17 June 2011 <http://blogs.wsj.com/digits/2011/06/17/worth-it-an-app-to-get-a-cab/>.

653 Airbnb, *About Us* (2015) Airbnb [www.airbnb.com.au/about/about-us](http://www.airbnb.com.au/about/about-us).

654 Osborne Clarke, 'The regulation of crowdfunding in the UK' (Report, Osborne Clarke, 4 December 2014) 2 [www.osborneclarke.com/connected-insights/publications/regulation-crowdfunding-uk/](http://www.osborneclarke.com/connected-insights/publications/regulation-crowdfunding-uk/).

655 The most popular example of a donation-based funding model is gofundme [www.gofundme.com](http://www.gofundme.com) or for a non-monetary reward; See, for example, Kickstarter [www.kickstarter.com/](http://www.kickstarter.com/) and Indiegogo [www.indiegogo.com](http://www.indiegogo.com).

Type of platform	Description
<b>Peer to Peer lending</b> *SocietyOne, *RateSetter Australia, *DirectMoney, *ThinCats, *Marketland	Individuals lend money to a company or project in return for repayment of the loan and interest on their investment; <sup>657</sup>
<b>Labour hire and services</b> *Airtasker, *Hipages,*TradeEzi	
<b>Peer to Peer Marketplaces</b> *Gumtree, *eBay, *Etsy <b>Peer to Peer sharing</b> *The Clothing Exchange, *Garage Sale Trail, *TuShare	Online auction and shopping websites  Online exchange of goods and services for consideration or for free.

\*Indicates those platforms currently operating in Australia

This report considers a number of regulatory issues that apply generally to peer to peer transactions across the different aspects of the sharing economy.

Crowdfunding and Peer to peer lending are not considered as part of this report. Peer to peer lending or crowdfunding may occur in a range of situations including, donations or gifts, raising of investment capital for new business, and loans on commercial terms. In the cases of lending and investment the regulatory issues will fall outside the ACL on the basis the platform or the party seeking the money will be engaged in a financial service or a managed investment. Different legislative frameworks apply in Australia to managed investments (*Corporations Act 2001* (Cth)) and financial services (*Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act)). Amendments proposed to the *Corporations Act 2001* (Corporations Amendment (Crowd-sourced funding) Bill 2016) aim to regulate crowdfunding for investment as a managed investment scheme. A similar approach is adopted in other jurisdictions<sup>658</sup> where specific legislation applying to financial services or investment are considered more applicable to the issues arising in peer to peer lending.

656 See for example, Seedrs [www.seedrs.com/](http://www.seedrs.com/) and FundedByMe [www.fundedbyme.com/](http://www.fundedbyme.com/). This is the type of crowdfunding most commonly referred to as peer-to-peer lending Leigh Schulz and Domenic Mollica, 'Ask the Expert: The regulation of crowdfunding in Australia: where are we and what's to come?' (2015) 31(7) *Australian Banking & Finance Law Bulletin* 130, 137.

657 Commonly known as peer-to-peer lending. Some popular examples include Zopa [www.zopa.com/lending/grow-your-savings?utm\\_campaign=AFFThisIsMoney&utm\\_medium=partner&utm\\_source=AFFThisIsMoney](http://www.zopa.com/lending/grow-your-savings?utm_campaign=AFFThisIsMoney&utm_medium=partner&utm_source=AFFThisIsMoney), RateSetter [www.ratesetter.com/lend?tsr=MailOnline&tc= Lend](http://www.ratesetter.com/lend?tsr=MailOnline&tc= Lend) and Funding Circle [www.fundingcircle.com/uk/investors/?utm\\_source=ThisIsMoney&utm\\_medium=Affiliate&utm\\_content=p2pWebInvestor%C2%A0&utm\\_campaign=FebTest](http://www.fundingcircle.com/uk/investors/?utm_source=ThisIsMoney&utm_medium=Affiliate&utm_content=p2pWebInvestor%C2%A0&utm_campaign=FebTest).

658 **UK:** *Financial Services and Markets Act 2000* (UK) c 8 (amended on 1 April 2014 to include peer-to-peer lending models); UK Crowdfunding, *Code of Practice* (2015) UKCFA [www.ukcfa.org.uk/code-of-practice-2](http://www.ukcfa.org.uk/code-of-practice-2); and self-regulation (in relation to donations and reward crowdfunding models that fall outside the scope of the financial services regime because they do not involve any form of financial investment return: Osborne Clarke, 'The regulation of crowdfunding in the UK' (Report, Osborne Clarke, 4 December 2014) 2 [www.osborneclarke.com/connected-insights/publications/regulation-crowdfunding-uk/](http://www.osborneclarke.com/connected-insights/publications/regulation-crowdfunding-uk/). **US:** *Jumpstart our Business Startups Act 15 USC ss 78a* (2012). **Canada:** only provincial level legislation **Ontario:** *Multilateral Instrument 45-108 Crowdfunding*; This law is substantially harmonised across Manitoba, Quebec, New Brunswick and Nova Scotia (with Saskatchewan pending) but not British Columbia **British Columbia:** *Securities Act* RSB 1996, c418 and *Start-up Crowdfunding Registration and Prospectus Exemptions (Multilateral CSA Notice 45-316)*. **Singapore:** *Securities and Futures Act* (Singapore, cap 289, 2006 rev ed); Monetary Services Authority's *Guidelines on Criteria for the Grant of a Capital Markets Services Licence*; and *House to House and Street Collections Act* (Singapore) cap 128, 2014 rev ed). (Donations-based crowdfunding only).

Platforms that facilitate donations or gifts will not fall within the definition of financial services or managed investments. As these interactions are unlikely to be in trade or commerce they will also fall outside of the ACL.

### 4.6.3 Consumer issues in peer to peer transactions

The sectors in which sharing platforms operate are diverse and can give rise to issues unique to the type of asset or service being shared.<sup>659</sup> There are a number of common consumer issues across the different types of platforms as well as some issues unique to the particular type of platform transaction. A number of these issues are similar to those already examined under product quality, misleading pricing practices, fake reviews and fraud. Consumer issues and the relevant sharing platforms to which the issue relates are summarised in the table below. Unless otherwise specified the consumer issues identified are similar to those examined in relation to e-commerce transactions earlier in the report.

Consumer issue	Platform type
<b>Product quality and safety</b>	Ride sharing, <sup>660</sup> accommodation sharing <sup>661</sup> , peer to peer marketplaces
<b>Drip pricing</b>	Ride sharing, accommodation sharing
<b>Surge (dynamic) pricing</b>	Ride sharing
<b>Fake reviews and fraudulent listings</b>	Accommodation sharing <sup>662</sup>
<b>Misleading information and deceptive practices</b>	Crowdfunding, peer to peer lending, accommodation sharing, ride sharing
<b>Standard form contracts</b>	Crowdfunding, peer to peer lending, accommodation sharing, ride sharing

As demonstrated in the table, the consumer issues arising in the case of sharing platforms are also issues in e-commerce transactions generally. The report has previously examined regulatory practices in each jurisdiction related to:

<sup>659</sup> For a more detailed list of the types of platforms emerging refer to (NSW) report.

<sup>660</sup> The main consumer protection issue, in addition to recent issues about pricing on days of high demand, has been public safety for consumers, which is an issue that falls outside the scope of this report. Refer to the relevant regulation in each of the jurisdictions: **UK:** *Private Hire Vehicles (London) Act 1998* (more particularly Transport for London's review of that legislation in regard to the sharing economy), **US:** California's *Decision adopting rules and regulations to protect public safety while allowing new entrants to the transportation industry* and **Singapore:** *Third Party Taxi Booking Service Provider Act 2015* (Singapore). For a more general discussion of the regulatory issues at a State or local level see: Mark MacMurdo, 'Hold the Phone! 'Peer-to-Peer' Ridesharing Services, Regulation, and Liability' (2015) 76 *Louisiana Law Review* 307, 323; Erin Mitchell, 'Comment: Uber's Loophole in the Regulatory System' (2015) 6 *Houston Law Review: Off The Record* 75, 94; Catherine Lee Rassman, 'Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance 'Gap' and Why Pennsylvania Should Get on Board' (2014-2015) 15 *Pittsburgh Journal of Technology & Policy* 81, 88).

<sup>661</sup> Significant issues for accommodation sharing are also compliance with planning laws, noise impact of short term letting, fire and insurance compliance.

<sup>662</sup> Fraud and fake reviews and endorsements (including whether the property meets the description on the website, whether the listing is genuine and loss of payments) and public safety have been significant issues in accommodation sharing platforms. See Joseph Shuford, 'Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina and the Constitution' (April 2015) 16 *North Carolina Journal of Law & Technology (Online Edition)* 1, 8; Brittany McNamara, 'Airbnb: A Not-so-safe Resting Place' (2015) 13 *Colorado Journal on Telecommunications and High Technology Law* 149, 152.

- (a) Application of product quality regulation to goods and services [25];
- (b) Reliance on user reviews and the regulatory protections for fake reviews [27];
- (c) Drip pricing and surge (dynamic) pricing practices [26];
- (d) Use of standard form contracts with unfair terms [4.5];
- (e) Fraud [28].

There are a number of particular consumer issues arising from the nature of peer to peer transactions:

- (a) **Platform liability:** Should the regulatory provisions of the ACL (or similar legislation in other jurisdictions) apply to both the supplier and the platform provider? What should the responsibilities of the platform provider be for the conduct of the supplier?
- (b) **Consumer to consumer:** Should the regulatory regimes traditionally focused on business to consumer transactions be broadened to clearly apply to peer to peer transactions, where the supplier may not be in the business of providing the goods or services?
- (c) **Balance of Regulation and self-regulation:** Is there a need to adopt a different regulatory model for e-commerce? Is a different balance required between government regulation and industry self-regulation to encourage innovation?
- (d) **Multi- jurisdiction compliance:** the ability or willingness of platform operators to comply with laws of the various jurisdictions in which they operator are low. This encourages platform operators to disclaim or contract out of regulatory requirements.

Most jurisdictions have adopted a cautious approach to intervention in the sharing economy and peer to peer transactions. Regulators globally have commissioned reports investigating the nature of the sharing economy and identifying potential market issues with a view to determining the nature and extent of consumer related issues within the sharing economy.<sup>663</sup>

Most commentators recommend a flexible regulatory regime which is capable of dealing with unique issues that arise from each platform type,<sup>664</sup> 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.<sup>665</sup> In Australia the existing general protections and specific protections have been successfully used to ensure compliance by e-commerce businesses and peer to peer platforms. Educational campaigns are also used to ensure consumers and small businesses are fully aware of both their rights and responsibilities under the ACL, and to encourage compliance by businesses.

663 D Woskow (2014) Unlocking the sharing economy — an independent review, Report for the Minister of State for Business, Enterprise and Energy; Deloitte Access Economics The sharing economy and the Competition and consumer Act 2015; Deloitte Access Economics, *Review of the Collaborative Economy in NSW*, 2015; Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The case for Policy Change*, Mercatus Research 2014.

664 Anna Fellander, Claire Ingram and Robin Teigland, 'Sharing Economy: Embracing Change with Caution' (Naringspolitiskt Forum Rapport 11, Entreprenorskaps Forum, 2015), 59; Vanessa Katz, 'Regulating the Sharing Economy' (2015) 30 *Berkley Technology Law Journal Annual Review* 1067, 1087.

665 (Will Coldwell, 'Airbnb's legal troubles: what are the issues?' *The guardian* (online), 8 July 2014 < [www.theguardian.com/travel/2014/jul/08/airbnb-legal-troubles-what-are-the-issues](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 [www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html?\\_r=0](http://www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html?_r=0)).

As most consumer problems are not unique and are common to other e-commerce transactions this approach has so far not created significant issues. In relation to ridesharing and accommodation platforms, the UK, Singapore and some states of the US have adopted a 'light touch' approach to regulation by acknowledging the legality of the platforms, but not imposing regulation similar to existing market participants.

The primary difficulty in the context of a peer to peer transaction is whether existing laws apply to the platform operator as well as the seller of the goods or services who may be an individual not engaged in trade or commerce.

#### **4.6.3.1 Regulation of Platform Operator**

Application of existing regulation to platform operators depends on the business model adopted for the platform. A difference arises between platforms that are active in the transaction and those that coordinate or facilitate. The issue largely depends on whether the platform operator is considered to be engaged or active in the relevant industry (engaged in trade or commerce), for example, ridesharing, accommodation or crowdfunding<sup>666</sup> or whether the platform operators are simply passive intermediaries (which is the argument raised by the ridesharing and accommodation platform operators to date).

There are no specific regulatory provisions in any of the reviewed jurisdictions that impose liability on a platform operator for the conduct of their users. Under the existing general protections of the *Australian Consumer Law* for misleading conduct, a platform operator will only incur liability if the operator:

- (i) makes misleading representations on their own behalf to the market;
- (ii) adopts a misleading representation of another person as their own
- (iii) Is knowingly involved in a misleading representation by another person.

A platform operator is unlikely to be liable for misleading statements made by a user of the platform about the product being offered for supply.<sup>667</sup> For example, Airbnb is unlikely to engage in misleading conduct if a person offers for rent a house claiming it to be 4 bedrooms and a pool when in fact it is 3 bedrooms and no pool. To date Australian courts have excluded intermediaries who broadcast advertisements from liability where the advertisement is misleading or false, and the intermediary is not adopting the advertising as their own.

The position may be different if the format of the platform website leads to a consumer being misled. A potential example is where the headline price for accommodation on Airbnb does not include all of the costs in the headline. If the website is structured by Airbnb to only allow the price to be dripped to the consumer, there is potential for Airbnb to be involved in a contravention with a user.

To date there have been very few decisions against platform operators that could inform the possible direction the courts may take on these issues.

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666 Crowdfunding operators are already largely caught within the scope of existing financial services legislation and so won't be discussed further in this section of the report (See Corporations and Markets Advisory Committee, 'Crowd sourced equity funding' (Report, Corporations and Markets Advisory Committee, May 2014) 109-110.

667 See *Google Inc v ACCC* (2013) CLR 435. High Court held that Google was not responsible for misleading representations made in advertisements displayed on its search engine pages.

Three potential types of platform types are considered and the relevant regulatory provisions in the reviewed jurisdictions which may apply.

### Approach 1 — Platform as an intermediary

If a platform operator is not engaged in the transaction, but instead simply acts as an intermediary or conduit for the supplier and consumer, then those operators may fall outside the scope of existing regulation (particularly in the ridesharing and short-term accommodation space). In other contexts Uber drivers and Airbnb hosts in the United Kingdom have been held personally liable for breaches of the relevant local taxi, taxation and accommodation laws.<sup>668</sup> Whether a person providing ride sharing or accommodation services is subject to existing consumer protection laws will in most jurisdictions depend on whether the consumer is acting in trade or commerce.

If this approach is adopted a platform operator would bear no responsibility or liability for product quality as liability attaches to the person supplying the goods or services to the consumer. A platform provider may however have liability for unfair pricing practices instituted by the operator, misleading statements appearing on the platform and potentially for fake reviews of which the platform operator is aware.

### Approach 2 — Platform as active participant

Where a platform operator is an active participant in the business there is greater scope for liability. An example of this type of platform arises in the context of ride sharing where Uber (or similar operator) collects the fares for the drivers and provides the digital platform used by the customer and through which information is provided. In The US and Canada various state jurisdictions are considering the issue of liability in the context of customer safety as well as misleading statements. The California Public Utilities Commission considers it has jurisdiction to regulate passenger transportation over public roadways even when that service is facilitated through a software platform.<sup>669</sup> This opens the platform operator to potential liability for deceptive advertising or unlawful or fraudulent business acts or practices of the participants.<sup>670</sup>

In Ottawa Transportation Network Companies (TNCs) are regulated to ensure the platform and drivers are subject to safety and consumer protection rules similar to those that apply to taxis including in relation to minimum insurance requirements, criminal and driving background checks on drivers, and vehicle inspections.<sup>671</sup>

### Approach 3: Platform has positive obligation for participants

Another regulatory response is analogous to liability imposed on Internet Service Providers where subscribers infringe laws (in particular copyright laws) when they have either induced the use of the platform for the infringing activity (intentional inducement liability) or have actual knowledge

668 Mark Duell, 'Uber drivers are 'breaking the law', says Boris: London Mayor claims taxis being hailed via the app is illegal because rules state only black cabs can be flagged down *Daily Mail* (online), 5 October 2015 [www.dailymail.co.uk/news/article-3260239/Uber-drivers-breaking-law-says-Boris-London-Mayor-claims-taxis-hailed-app-ILLEGAL-rules-state-black-cabs-flagged-down.html](http://www.dailymail.co.uk/news/article-3260239/Uber-drivers-breaking-law-says-Boris-London-Mayor-claims-taxis-hailed-app-ILLEGAL-rules-state-black-cabs-flagged-down.html); Hugo Gye, 'Airbnb 'landlords' face a huge tax bill: Families who let out their spare room could be hit after website hands over details to Irish taxman', *Daily Mail* (online), 11 August 2015 [www.dailymail.co.uk/news/article-3193503/Airbnb-landlords-face-huge-tax-bill-crackdown-Ireland.html](http://www.dailymail.co.uk/news/article-3193503/Airbnb-landlords-face-huge-tax-bill-crackdown-Ireland.html).

669 Decision adopting rules and regulations to protect public safety while allowing new entrants to the transportation industry (California) COM/MP1/avs Proposed Decision Agenda ID #12291 (Rev 4) Quasi-Legislative 9/19/2013 Item 39 at 13.

670 (*Unfair Competition Law*, Cal Business and Professions Code §§ 17200 et seq (1872))

671 City of Ottawa, 'Taxi and Limousine Regulations and Service Review: Case Studies' (Case Studies, City of Ottawa, 1 October 2015) 7-8.

of an infringement and have the ability to remove the infringement but fail to do so within a reasonable time.<sup>672</sup>

In the US, the Clinton Administration's Working Group on Intellectual Property released a White Paper concluding that because the platform operators were in a better position to police infringing users than copyright owners, the best policy would be to hold the platform provider liable.<sup>673</sup> This approach has been embraced by academics who have indicated that platform operators, such as Pinterest, Facebook and eBay, may be liable for users' infringement through secondary liability, that is, vicarious liability (particularly in the case of ridesharing), contributory liability and intentional inducement liability.<sup>674</sup>

The UK has adopted a similar approach, drawing a distinction between those operators that actively participate versus those that passively participate in the industry.<sup>675</sup>

In the context of ridesharing and accommodation platforms, this could mean that platform operators such as Uber could be found to be actively engaged in the ridesharing industry because they provide the platform, the payment mechanism and conducts various background checks on its drivers before accepting them into the driving pool. In contrast an operator like Airbnb may not be liable for fraudulent listings on its site unless it has been made aware of them and has failed to remove the offending listing and/or supplier from its platform. Irrespective of which analysis is accepted, platform operators may accept some level of liability for their suppliers' conduct, particularly in the case of personal injury or property damage. For example, Airbnb provides Host Protection Insurance against liability claims up to \$USD1 million<sup>676</sup> and Uber has public liability insurance that covers all Uber drivers for damage to third parties.<sup>677</sup> Risk of injury and property damage are issues being considered by local and state government in the decision whether to enact laws to regulate.<sup>678</sup>

#### 4.6.3.2 Consumer-to-consumer transactions

The second major result of an increase in peer-to-peer transactions is the increase in consumer to consumer transactions. This raises the question of the concept of a 'consumer' should be revisited.

672 Contributory liability; See *Inwood Laboratories Inc v Ives Laboratories Inc* 456 US 842, 2182; *Metro-Goldwyn-Mayer Studios Inc v V Groser Ltd* 545 US 913.

673 Bruce A Lehman, 'Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (Report, Information Infrastructure Task Force, September 1995) 117 referred to in Comment, 'Internet Copyright Infringement Liability: Is an Online Access Provider More Like a Landlord or a Dance Hall Operator?' (197) 27 *Golden Gate University Law Review* 555, 599.

674 Susanna Monseau, 'Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use' (2012) 12 *John Marshall Review of Intellectual Property Law* 70, 92

675 See, for example, *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch) (active); *Metropolitan International Schools v Designtecnica Corp* (passive).

676 Airbnb, *Host Protection Insurance* (2016) Airbnb.com <<https://www.airbnb.com.au/host-protection-insurance>>.

677 Uber, *Ridesharing with Uber: a safe, reliable and affordable transport option* (1 November 2015) Uber Newsroom <https://newsroom.uber.com/australia/ridesharing-with-uber-a-safe-reliable-and-affordable-transport-option>.

678 See foreign examples: **UK**: Private Hire Vehicles (London) Act 1998; **US**: Decision adopting rules and regulations to protect public safety while allowing new entrants to the transportation industry (California) COM/MP1/avs Proposed Decision Agenda ID #12291 (Rev 4) Quasi-Legislative 9/19/2013 Item 39; Residential Unit Conversion Ordinance, 41A San Fran Admin C ss 41A.1-41A.8 (American Legal Publishing Corporation, 2016); **Canada**: Passenger Transportation Act SBC 2004 ch 39; Sharing Economy Bill 2015 RSO; City of Vancouver Zoning & Development By Laws — By Law 10.21.6.

- (1) Often a person who supplies goods or services or shares goods or services via a peer to peer platform is a person not engaged in a business or other commercial activity. Is the supply or sharing of their existing asset (car or house) conduct in trade or commerce? This is particularly important to the application of statutory guarantees and the unfair practice provisions of the ACL.
- (2) If a consumer (under the current definition) purchases goods which are then 'shared', 'used', 'sold' to another person, does that person fall within the exception to the definition of 're-supply' in the ACL? If a consumer makes their car available for rent via a peer to peer car sharing platform, is that a 'lease or hire' of the vehicle within the definition of 're-supply'? This would exclude the statutory guarantee of acceptable quality from applying to the owners contract of purchase for the vehicle.

The issue is raised by commentators due to the increase in these types of transactions and the inability of consumers transacting on the internet to distinguish between sales by traders and other consumers. No jurisdiction has embraced any regulatory extension of existing consumer protection regimes to C2C transactions in the context of the sharing economy. Although the ACL does not extend to activities that are not 'in trade or commerce', consumer-to-consumer transactions remain caught by the *Sale of Goods Act* both in Australia and in the UK, Canada and Singapore. The rationale for excluding consumer-to-consumer transactions in these jurisdictions is that peers have equal bargaining power and do not require the level of protection afforded by the ACL (and equivalent primary consumer protection regulations in foreign jurisdictions).<sup>679</sup>

#### 4.6.4 Australia

The majority of ACL consumer protections apply only to those transactions that occur 'in trade or commerce'. This includes:

- misleading and deceptive conduct;
- statutory guarantees<sup>680</sup>;
- unfair practices (single pricing, referral selling, bait advertising,);
- unconscionable conduct;
- unfair terms.

This means that sellers conducting private sales via online auction platforms such as eBay, are not subject to the ACL regime as sales by private persons to others are not 'in trade or commerce.'<sup>681</sup> In each case this will depend upon the characteristics of the seller's activities. In the context of ride sharing and accommodation sharing platforms, if a person is regularly engaged in sharing assets for consideration it is likely that the activities will gain some commercial or business flavour. For example, a seller who earns an income from regular driving for Uber is likely to be acting in 'trade or commerce' whereas a 'one off' sale on Ebay may not be commercial in nature.

The primary difficulty for consumers is that it is difficult to distinguish between those sellers who are operating in 'trade or commerce' and those that are acting in their own capacity or as a hobby: the former being liable under the ACL and the latter escaping liability.

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679 Christine Riefa, *The Legal Classification of Online Auctions: Towards a Safer Legal Framework* (Ashgate Publishing, 2015) 23.

680 Statutory guarantees as to title (s 51), undisturbed possession (s 52) apply to all consumer sales.

681 Matthew Webster, *Internet auctions, consumer protection and the Trade Practices Act*, FindLaw Australia [www.findlaw.com.au/articles/1833/internet-auctions-consumer-protection-and-the-trad.aspx](http://www.findlaw.com.au/articles/1833/internet-auctions-consumer-protection-and-the-trad.aspx).

## Consumer

The definition of ‘consumer’ in s 3 of the *Australian Consumer Law* means that a person will acquire goods as a consumer where:

- (1) the amount paid for the goods is not more than \$40,000; or
- (2) if greater than \$40,000, the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption,

provided that the goods are not acquired for the purpose of re-supplying them; or using them up or transforming them in trade or commerce in the course of a process of production; or in the course of repairing or treating other goods or fixtures on land.

The effect of this definition is that if the goods are valued at less than \$40,000, the buyer will be a consumer, even if the equipment is for business or commercial purposes, provided the goods are not for re-supply or use in a process of production or repair.

## Trade or commerce

Generally the statutory guarantees apply to the supply of goods or services in trade or commerce. Trade or commerce is defined in s 2 of the *Australian Consumer Law* to mean trade or commerce within Australia or between Australia and places outside Australia and includes any business or professional activity. The phrase is generally given a wide meaning and applies to activity that is of a business or commercial nature.<sup>682</sup> 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.<sup>683</sup> 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 Australia<sup>684</sup> that private sales of goods, services or real property are not considered to be ‘in trade or commerce’ unless they form ‘part of a scheme or transaction engaged in for profit and the characteristics of the parties indicate the activities are commercial rather than personal in nature.

The increased use of peer to peer platforms mean that more consumer to consumer transactions are taking place that may fall outside of the statutory guarantee regime. It appears that Uber drivers generally and Airbnb hosts that rent rooms or dwellings for a number of occasions each year, are likely to be engaged in activities for profit that are commercial rather than personal in nature. If that is the case, then both the Uber drivers and the Airbnb hosts may be considered to be ‘engaged in trade or commerce’ and be caught by the relevant consumer protection provisions contained in the ACL. At what point a person’s activities move from personal to commercial in

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682 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Bond Corporation Pty Ltd v Theiss Contractors Pty Ltd* (1987) 14 FCR 215.

683 This should be contrasted with the statement in *Consumer Guarantees — A guide for business and legal practitioners* [www.consumerlaw.gov.au/content/the\\_ACL/downloads/consumer\\_guarantees\\_guide.pdf](http://www.consumerlaw.gov.au/content/the_ACL/downloads/consumer_guarantees_guide.pdf), 8 that ‘Trade or commerce means in the course of a supplier’s or manufacturer’s business or professional activity, including a non-profit business or activity’.

684 See most recently *Williams v Pisano* [2015] NSWCA 177.

nature is not a straightforward question and potentially creates uncertainty in the application of existing consumer protection provisions within peer to peer transaction. For example, if an Uber driver who drives as part of his/her main occupation picks up passengers in-transit between meetings, is this an activity which is commercial or merely sharing their empty vehicle with another person?

#### 4.6.5 Other jurisdictions

There is little guidance to be obtained from the reviewed jurisdictions as the majority exclude consumer-to-consumer transactions from their primary consumer protection legislation and instead regulate those transactions under their Sale of Goods legislation.<sup>685</sup> This provides some protection to consumers in relation to product quality, but these provisions can be excluded by the terms of the contract. The rationale for excluding consumer-to-consumer transactions from the scope of primary consumer protection legislation is that ‘businesses or consumers buying from peers are assumed to contract with equality of bargaining power’.<sup>686</sup>

Some State-based consumer protection laws in the US have been interpreted as applying to individual eBay sellers. One such case is that of *Lyle Real v Radir Wheels, Inc and Richard Conklin*<sup>687</sup> in which the defendant was found liable for misrepresentation under section 56:8-2 of the New Jersey Consumer Fraud Act<sup>688</sup> (CFA) when he sold a vintage car described as being in ‘good condition’ on eBay, but that was later discovered to have a number of significant defects that were not detailed in the relevant listing. In reaching that decision the Supreme Court of New Jersey noted the broad protective purpose of the CFA to ‘address sharp practices and dealings in the marketing of merchandise and real estate whereby the consumer could be victimized by being lured into a purchase through fraudulent, deceptive or other similar kind or selling or advertising practices.’ This approach has not yet been consistently followed in similar cases in other US States.<sup>689</sup>

One commentator has suggested the solution is to require platform operators to establish different websites for business and consumer sellers. The ‘business only’ website could then provide consumers with confidence that their transactions will be governed by the relevant consumer protection laws and the ‘consumer/individual only’ website would make it clear that only the relevant Sale of Goods Act provisions apply.<sup>690</sup>

685 See, the broad definitions of ‘buyer’ and ‘seller’ adopted in *Sale of Goods Act 1979* (UK) c 54; *Sale of Goods Act RSO 1990* c S-I; *Sale of Goods Act 1996* RSBC c 410; *Sale of Goods Act* (Singapore cap 393, 1999 rev ed).

686 Christine Riefa, *The Legal Classification of Online Auctions: Towards a Safer Legal Framework* (Ashgate Publishing, 2015) 23.

687 198 NJ 511, 969 A 2d 1069.

688 *Consumer Fraud Act* 56 NJ Stat Ann (Thomson West 2015).

689 *Smith v Marquross* 276 SW 3d 926, 927-28 (Tenn. Ct App 2008) (affirming the liability of the defendant, an individual seller, for breach of contract and failing to articulate the reason for which the plaintiff’s claim under the Tennessee Consumer Protection Act failed); *Evans v Matlock* No M2001-02631-COA-R9-CV, 2002 Tenn App LEXIS 906 at 1-2 (Tenn Ct App, 23 December 2002) (addressing only that eBay arbitration clause was inapplicable to consumers but failing to address plaintiff’s substantive claim that individual sellers were liable under the Tennessee Consumer Protection Act).

690 Fidelma White, ‘Selling on-line: Business compliance and consumer protection’ (2004-2005) 5 *Hibernian Law Journal* 223, 226.

### 4.6.6 Increased self-regulation

Online auction platforms, such as eBay have already attempted to implement a self-regulatory regime by encouraging business sellers to set up stores (<http://pages.ebay.com/help/account/how-to-register-business.html>). eBay provides guidance to sellers regarding whether they should register as a business or an individual and, in doing so, indicates that if a seller intends to sell items that they have bought to resell, sell items they have produced themselves, or sell a large amount of items on a regular basis then they should register as a business.<sup>691</sup> eBay also provides an easy process for upgrading an individual account to a business account (although it does not appear to enforce these guidelines against individuals who should be registered as businesses).<sup>692</sup>

### 4.6.7 Comparison

There is general acknowledgment by regulators in all jurisdictions that the rapid growth of the sharing economy through peer to peer platforms presents different challenges for existing regulatory models including:

- (1) Should regulation treat all suppliers of goods or services, whether a large corporation or an inexperience 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 transactions<sup>693</sup> mean there is too much complexity for a one size fits all regulatory model?
- (2) Does the increase in 'sharing' of goods and services require a reconsideration of the application of guarantees/warranties of quality and fitness for purpose to all transactions similar to the *Sale of Goods Acts*?
- (3) What liability or responsibilities should be imposed on platform operators across a spectrum of business models. Regulators are considering the (i) suitability of existing liability models and (ii) any benefits to the sharing economy (trust and confidence of consumers) of imposing responsibility for the conduct of users; (iii) the appropriate extent of the responsibility. On particular concerns is whether requirements to remove infringing material or take action in the case of fake listing or fraud should be placed on platform operators.
- (4) Whether existing regulatory models are adaptable and agile so as to apply following advances in technology which may allow businesses to operate outside of traditional business models and in many cases disrupt those models. Significant advances have been made in particular in the areas of distributed ledger technology (Blockchain), Smart Contracts and cognitive digital technology (Artificial Intelligence). Questions are already being raised about whether regulatory models that rely on legal rules to govern behaviour and impose obligations on business entities will need to be supplemented by rules that govern technical code.<sup>694</sup> A further issue is whether a combination of statutory laws and industry based codes or platform rules will be required. The speed of technical changes means that statutory regulation may not be sufficiently responsive and may need to be cast broadly and supplemented with codes, guidelines or rules promulgated by regulators, industry or individual operators.

691 eBay, *How to register as a business* eBay.com <http://pages.ebay.com/help/account/how-to-register-business.htm>.

692 eBay, *Changing your Account Type* eBay.com <http://pages.ebay.com/help/account/how-to-register-business.html>.

693 Some examples are BrandGathering (online platform that connects businesses to undertake joint marketing and branding activities helping to save money) and Nimber (sharing of logistics).

694 Refer to UK Government Office for Science report: *Distributed Ledger Technology: beyond block chain* (available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/492972/gs-16-1-distributed-ledger-technology.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492972/gs-16-1-distributed-ledger-technology.pdf)).

## Part 5: Institutional structures relating to the administration and enforcement of consumer laws

Issue 3: Professor Justin Malbon Faculty of law, Monash University and Mr Allan Asher Foundation for Effective Markets and Governance

### 5.1 Introduction

The following Part describes international institutional structures for the administration of consumer laws in:

- the US and Canada;
- the UK, a country in the EU;
- New Zealand;
- Singapore a comparable ASEAN nation.

This Part identifies compares and analyses approaches to consumer protection in those jurisdictions, and examines their approaches to access to justice, digital purchasing and other developments in e-commerce.

All jurisdictions studied are facing the challenge of protecting consumers when they purchase goods or services from an overseas seller via the Internet. The resolution of cross-jurisdictional disputes can be particularly complex, time-consuming and expensive. Many governments do not devote a great deal of attention or resources to the issue, but rather are exploring ways of encouraging informal (often industry initiated) ways of resolving consumer disputes. In some cases, it is in a business's self-interest to resolve consumer complaints so as to maintain and build a trustworthy reputation.

This Part identifies a number of themes about the ways governments establish institutional structures for consumer protection. In some jurisdictions the ministry responsible for consumer affairs is a relatively distinct and separate entity, whilst in other jurisdictions responsibility for consumer affairs sits within the ministry responsible for trade and industry development. In the latter case it may raise questions about how potential conflicts in advancing consumer and business interests are to be resolved. In New Zealand, for instance, responsibility for consumer protection is subsumed under the larger policy objective of promoting business. Consumer policy is delegated to a division within the Ministry of Business Innovation and Employment.<sup>695</sup> In some jurisdictions the agency responsible for consumer affairs holds considerable investigatory, and sometimes judicial, powers. These agencies will often be proactive in dealing with alleged illegal and exploitative market behaviour. Agencies in other jurisdictions, however, may play little more than a monitoring and reporting role, with greater reliance being placed on industries to self-regulate.

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<sup>695</sup> Note that the name of the Department has changed several times in the last few years [www.mbie.govt.nz/](http://www.mbie.govt.nz/).

In some jurisdictions a considerable degree of reorganisation and reforming of institutional structures is taking place. In the UK for instance there has been substantial reorganisation and reorientation of the institutional structures for consumer affairs. This is explored further in the discussions below.

## 5.2 Functions of consumer law enforcement and policy agencies

Institutions for protecting and advancing consumer interests typically involve the administration of consumer laws and regulations, the enforcement of those laws and regulations and the resolution of consumer disputes with sellers. In some countries, including EU countries such as France, consumer protection agencies are required to take a more interventionist role than is the case in other jurisdictions. In France, for instance, the agency responsible for consumer affairs has both rulemaking and administrative powers, and takes a proactive approach to market intervention.

In other countries, such as the EU country Germany, and to an increasing extent the UK, agencies take a less market interventionist role. These agencies perform a more advisory role and undertake consumer awareness and education programs. Under this approach, it is seen that the market itself is the better mechanism for protecting consumer interests than government intervention in the market. Similarly, the US and Canada, and increasingly the UK and New Zealand, tend to adopt a caveat emptor approach in which the burden is placed on consumers to protect their own interests.

Amongst the studied jurisdictions the powers and functions of agencies responsible for consumer affairs include:

- (1) advising the government on appropriate policies and measures for consumer protection;
- (2) representing the consumer interest on inter-governmental committees;
- (3) enforcing consumer protection and (in some instances) competition laws;
- (4) advising consumers and businesses of their rights and obligations under the relevant consumer protection laws;
- (5) conducting or commissioning market surveys and research into consumer protection issues;
- (6) conducting or commissioning product testing for safety and quality and disseminating information to consumers;
- (7) managing and monitoring the performance of consumer tribunals or other bodies for the mediation of consumer claims;
- (8) consulting with relevant stakeholders to understand consumer issues and developing policy to address problem areas;
- (9) organising public education and information programmes independently or in collaboration with consumer organisations and business entities;
- (10) registering and issuing licences for designated types of business activities;
- (11) issuing administrative rules to regulate the conduct of business entities and ensuring protection of consumer interests; and
- (12) publishing an annual report of its activities.

The agencies in most jurisdictions have some rule making powers, and in some instances, such as the US FTC can exercise a measure of judicial power.

In some jurisdictions responsibility for protecting and advancing consumer interests extend beyond the usual well-established agency for consumer protection; for example, the US FTC. Other agencies may have responsibility for aspects of consumer protection, such as responsibility for the regulation of particular market segments, including the regulation of utility services that provide water, energy and telecommunications. These agencies are typically required assist in resolving consumer complaints. This is a matter of key concern in Europe where new policies and approaches are being developed to deal with the large growth in utility related complaints.

Particular areas demanding policy attention include telecommunications and responses to the 2008 financial crisis. The telecommunications market has substantially transformed over the past few decades as a result (in some jurisdictions) of: the privatisation of the government monopoly telecommunications provider, leading to the emergence of competing providers; and rapid and highly dynamic technological change. These developments are placing considerable pressures on governments to develop appropriate policy responses. In the UK telecommunications and broadband regulation is under a single regulator. However, these relatively clear demarcation lines of regulation are being challenged by smart phone technology that enables consumers to use their phones for banking and other financial transactions. This raises difficult questions as to whether mobile technology ought to be regulated by the communication regulator or the financial institutions regulators. In Singapore Mobile money is regulated by the Central bank, whereas in Canada and the US it is largely self-regulated by industry. This concern is more pronounced in the five less developed of the ten ASEAN Member States where mobile telephony is one of the few sectors of communication that functions well.

The 2008 financial crisis, triggered by the US sub-prime mortgage crisis, has prompted significant financial services marketplace reforms. Financial services regulators have been granted increased powers to deal with market abuses and are required to place greater emphasis on consumer protection. In some cases regulatory functions are divided amongst different regulators. For instance, in the UK and the US prudential regulation is separated from marketplace conduct regulation.

Root and branch reviews of the regulatory institution structures for the consumer marketplace have been undertaken in a number of countries, most recently in New Zealand, along with the UK and European countries. The general trend of the reviews is to shift from heavy reliance on government regulatory control and oversight to shared regulatory models with business and consumer co-responsibility. Governments in some countries are placing greater obligations on corporations to comply with international guidelines such as the OECD Guidelines for Multi-National Enterprises, and ISO standards such as ISO26000 on social responsibility. The recent Re-publication of the UN Guidelines for Consumer Protection (UNGCP)<sup>696</sup> goes to some lengths to reinforce the obligations upon stakeholders to meet certain standards and marketplace standards of conduct.

### 5.3 Country institutional structures for consumer law

This section compares international institutional structures for the administration and enforcement of consumer laws in each of the five reference countries. It may be noted that obtaining a reasonable depth of information about these structures for this study has proven difficult in some instances. This section outlines:

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696 Agreed by the UN General Assembly on December 15 2015 although not yet published in a final form.

- the main institutions for the administration and enforcement of consumer laws, including semi-government and non-government agencies;
- the jurisdictional reach and key roles of the main institutions;
- regulatory agency responsibilities and linkages with other governmental and non-governmental agencies;
- the institutional settings for consumer agencies, including whether they sit within a larger governmental agency such as a Ministry for business and industry; and
- any recent changes to the jurisdictional reach or structure of the consumer protection agencies.

## 5.4 Comparison of main institutions for consumer protection

### 5.4.1 United States

US consumer protection policy is in essence based on the notion that consumers should be empowered to protect their own self interests. This leads to an emphasis being placed on requiring sellers to provide full disclosure about their products to enable consumers to make informed choices, and allowing access to justice, including by enabling class actions and collective action. Despite that, some federal and state agencies actively engage in enforcement actions in the public interest.

The best-known, biggest and most active consumer agency is the Federal Trade Commission (FTC) which administers a wide variety of consumer protection and competition laws. In keeping with the US philosophy of equipping consumers to take care of their own interests, the FTC's overall goal is to take measures to promote a deception free marketplace and enable vigorous competition.

The FTC's key source of authority derives from Section 5(a) of the *FTC Act*, which prohibits 'unfair or deceptive acts or practices in or affecting commerce'.<sup>697</sup> A recent publication notes that:

... deception occurs when there is a material representation, omission, or practice that is likely to mislead a consumer who is acting reasonably under the circumstances. Unfair practices are those which cause, or are likely to cause, reasonably unavoidable and substantial injury to consumers without any offsetting countervailing benefits to consumers or competition.<sup>698</sup>

In addition to its Section 5(a) jurisdiction, the FTC has enforcement and administrative powers under 46 other statutes, 37 of which relate to the FTC's consumer protection responsibilities. Among these laws are credit-related acts, such as the Truth in Lending Act, Fair Credit Billing Act, Fair Credit Reporting Act, and the Equal Credit Opportunity Act, as well as continuing enforcement of industry specific acts, such as the Petroleum Marketing Practices Act, and the *Comprehensive Smokeless Tobacco Health Education Act of 1986*, and additional laws relating to consumer privacy such as the Do-Not-Call Registry Act of 2003, and the *Controlling the Assault of Non Solicited Pornography and Marketing Act 2003 (CAN-SPAM)*.

The FTC uses its investigative authority to uncover deception, unfair activities, or violation of any statute under which it has authority. The Bureau of Consumer Protection may issue civil investigative demands ('CIDs') to explore possible violations. Like a subpoena, a CID can compel the

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697 See [www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf](http://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf).

698 See [www.ftc.gov/about-ftc/bureaus-office](http://www.ftc.gov/about-ftc/bureaus-office).

production of existing documents or oral testimony, while also requiring a recipient file written reports or responses to questions. Investigations can be triggered by Presidential or Congressional requests, court referrals, consumer complaints, or internal research.<sup>699</sup>

Upon completion of an investigation, the FTC may issue a complaint to a person, partnership, or corporation if it believes the person has violated the law, and enforcement is in the public interest. Hearings are held before an Administrative Law Judge (ALJ). If the actions at issue are deemed a violation, the ALJ may recommend entry of a cease and desist order. These orders are the FTC's primary tools for stopping anti-consumer practices. If a party violates the order, the FTC is authorised to use the courts to seek civil penalties and restitution for harmed consumers.

A party may appeal an order to the full FTC, then to a federal appellate court, and eventually the US Supreme Court. If neither party appeals the order, it becomes final within 60 days of being issued. Once final, a respondent's violation of the order can result in a civil penalty of up to US\$10,000 per violation. Third parties with actual knowledge of a breach who violate the Commission's orders may also be subject to fines.<sup>700</sup>

The FTC also has authority to make trade regulation rules that specifically define unfair or deceptive trade practices. For example, according to the FTC Telemarketing Sales Rule, it is deceptive if a telemarketer fails to truthfully disclose the cost of products or services, or the nature of certain return policies. Knowingly violating FTC trade regulation rules may result in a civil penalty of up to US\$10,000 per violation.

The FTC occasionally acts on behalf classes of consumers who suffer loss or damage. The Commission can require wrongdoers to surrender the proceeds of their wrongdoing. The FTC seeks these remedies when it can objectively determine a clear violation of a law and reasonably calculate the damages payment. However, if the FTC determines that private actions or criminal proceedings will result in complete relief for the consumer, it may choose not to use the restitution or disgorgement remedies. Finally, if the FTC believes a party is violating, or will violate, a law it may seek a preliminary or permanent injunction from the federal district court to prevent the violation.

As with its jurisdiction in competition law, the FTC does not have the power to bring criminal charges. The Department of Justice can prosecute federal consumer protection cases involving criminality before a federal court. It must establish the case beyond reasonable doubt.

The FTC consumer remit is implemented via seven divisions of the Bureau of Consumer Protection. Collectively they protect consumers against unfair, deceptive, or fraudulent practices. These divisions include: Advertising Practices, Financial Practices, Marketing Practices, Privacy and Identity Protection, Planning and Information, Consumer and Business Education, and Enforcement.

The Division of Advertising Practices works to prevent false advertising claims, particularly if the claims affect health and safety or cause economic injury. In addition to advertising claims regarding dietary supplements, weight loss products, alcohol, and tobacco, the Division also monitors the marketing of food, violent movies, and music and electronic games to children.

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699 See [www.ftc.gov/about-ftc/bureaus-offices](http://www.ftc.gov/about-ftc/bureaus-offices).

700 See [www.ftc.gov/about-ftc/bureaus-office](http://www.ftc.gov/about-ftc/bureaus-office).

The FTC's Division of Financial Practices was the only agency specifically charged with protecting consumers from fraud or deceptive practices in financial services until 2010. Credit card offers, mortgage practices, and debt collection practices were all covered by the Division. These functions are now carried out jointly with the Consumer Financial Protection Bureau created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009.<sup>701</sup>

The Division of Marketing Practices addresses the marketing of products and services over the Internet, the telephone, or through the mail. The Division has issued a number of trade regulation rules to address marketing practice concerns. For instance, the Telemarketing Sales Rule governs when and how marketers may use the telephone for sales pitches. Other rules, such as CAN-SPAM Rules, the Franchise and Business Opportunity Rule, the 900 Number Rule, and the Funeral Rule outline proper methods for how, when, and to whom products or services may be marketed.

The Division of Privacy and Identity Protection is the newest division and protects consumers' personal information from being used improperly, and works to ensure that companies with access to that information, such as credit card companies, keep it secure. The FTC also maintains a website wholly dedicated to preventing identity theft.

The Division of Planning and Information manages the Consumer Response Centre and the Consumer Sentinel database<sup>702</sup>. The Centre receives and addresses consumer complaints via phone or mail, while the Consumer Sentinel is a central database which contains over 3.5 million fraud and identity theft complaints. The Sentinel website analyses complaint data to better understand and prevent fraud and identity theft.

The Division of Consumer and Business Education seeks to equip consumers with the skills to protect themselves by disseminating information to consumers through a myriad of media, including print, broadcast, and electronic outlets. Recent education efforts include the creation of industry-specific websites to educate consumers about how competition in the healthcare, real estate, oil and gas, and technology marketplaces can result in better products at lower prices.

When a survey showed that Hispanics were more than twice as likely than non-Hispanic whites to be victims of consumer fraud, the Division extended its outreach by releasing its educational materials in both Spanish and English. The Division also educates young consumers to be smarter shoppers through publications such as 'The Real Deal,' a booklet that teaches through the use of games, puzzles, and cartoons.

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701 The preamble to the Act ([www.sec.gov/about/laws/wallstreetreform-cpa.pdf](http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf)) states that the purpose of the act is 'To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes'.

702 See [www.ftc.gov/enforcement/consumer-sentinel-network](http://www.ftc.gov/enforcement/consumer-sentinel-network) Consumer Sentinel is the unique investigative cyber tool that provides members of the Consumer Sentinel Network with access to millions of consumer complaints.

A list of the most frequent consumer complaints gives a quick sense of the agency priorities in recent times. In 2012, the top 15 categories of consumer complaints were:<sup>703</sup>

Rank	Category	No. of Complaints	Percentages
1	Identity Theft	369,132	18%
2	Third Party and Creditor Debt Collection	199,721	10%
3	Banks and Lenders	132,340	6%
4	Shop-at-Home and Catalog Sales	115,184	6%
5	Prizes, Sweepstakes and Lotteries	98,479	5%
6	Imposter Scams	82,896	4%
7	Internet Services	81,438	4%
8	Auto Related Complaints	78,062	4%
9	Telephone and Mobile Services	76,783	4%
10	Credit Cards	51,550	3%
11	Foreign Money Offers and Counterfeit Check Scams	46,112	2%
12	Advance Payments for Credit Services	42,974	2%
13	Television and Electronic Media	41,664	2%
14	Health Care	35,703	2%
15	Mortgage Foreclosure Relief and Debt Management	33,791	2%

These categories of complaints have been quite stable over the past few years.

#### 5.4.1.1 Other US consumer law institutions

Other federal agencies also play an important consumer protection role. The US Consumer Product Safety Commission (CPSC) has a mandate for reducing injury or death caused by consumer products. The CPSC develops product standards for manufacturers while also conducting recalls of any products that could, or do, cause harm.

The CPSC<sup>704</sup> does not however have jurisdiction over all consumer products. For example, food, drug, cosmetic and medical device safety is the focus of the US Food and Drug Administration (FDA). A recent initiative of the FDA has been to more deeply regulate the tobacco industry. The FDA has authority under the 2009 Tobacco Control Act to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors. The 2009 law restricts the use of 'Light,' 'Mild,' 'Low,' or similar descriptors in the labelling or advertising of tobacco products. The law also grants the FDA powers to impose civil penalties and even forbid tobacco sales by retailers who fail to comply with age limits and age identification rules regarding tobacco sales to minors.

703 A complete list of complaints can be found at: [www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf](http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf).

704 CPSC is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of types of consumer products under the agency's jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than \$1 trillion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. CPSC's work to ensure the safety of consumer products — such as toys, cribs, power tools, cigarette lighters, and household chemicals — contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 40 years.

The National Highway Traffic Safety Administration (NHTSA)<sup>705</sup> covers automobile, truck, and motorcycle safety.<sup>706</sup> Its consumer protection powers arose from a public scandal in the mid-1960s. In the 1950s and 1960s automobiles were designed for style, not safety. Even with accident prevention and driving improvement efforts, automobiles remained the leading cause of death for the population below age 44 in the 1960s, with about 50,000 vehicular deaths in 1965.

The Federal Communications Commission (FCC)<sup>707</sup> has broad jurisdiction over broadcast communications and communication common carriers. The FCC has a Consumer and Governmental Affairs Bureau that ensures that consumer interests are considered in FCC decisions. The Bureau also monitors and resolves consumer complaints about communications services. Similarly, virtually every federal executive branch and independent agency has some similar office or bureau designed to advance consumer interest in its particular field.

#### **5.4.1.2 The Bureau of Consumer Financial Protection<sup>708</sup>**

Following the excesses of credit and mortgage provision throughout the US, which was a major contributor to the global financial crisis, the Dodd Frank Wall Street Reform and Consumer Protection Act was passed by Congress. This law can be regarded as the most significant change in federal consumer protection in a generation and is a distinct break from the generally hands off approach to markets adopted by US regulators.

The main operative provision in the Act is the Consumer Financial Protection Act of 2010 which established an independent entity within the Federal Reserve System, the Bureau of Consumer Financial Protection (the Bureau). The new Bureau has a substantial budget, ramping up to \$500 million per annum. The Bureau is consolidating various consumer protection functions now being performed by the FTC and other federal agencies such as the Federal Reserve, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development.

Key elements of the Bureau's mandate include:

- Conducting financial education programs; collecting, investigating, and responding to consumer complaints; collecting, researching monitoring, and publishing information about the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets; supervising covered persons for compliance with Federal consumer financial law; and issuing rules, orders, and guidance implementing Federal consumer financial law.
- Having broad supervisory powers over 'non-depository covered persons' and over large banks, credit unions, and savings associations. A non-depository covered person is a person to who provides 'brokerage or servicing of loans secured by real estate for use by consumers', who 'offers or provides to any consumer any private education loan,' 'offers or provides to a consumer a payday loan,' and that the bureau has cause to believe 'has engaged in conduct that poses risks to consumers.' The Bureau is authorised to collaborate with the Federal Trade Commission or any other Federal or State agency that may assist it in carrying out its supervisory tasks.

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705 See [www.nhtsa.gov/About](http://www.nhtsa.gov/About).

706 NHTSA was established by the Highway Safety Act of 1970 and is dedicated to achieving the highest standards of excellence in motor vehicle and highway safety. It works daily to help prevent crashes and their attendant costs, both human and financial.

707 The Federal Communications Commission regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia and U.S. territories. An independent US government agency overseen by Congress, the commission is the United States' primary authority for communications laws, regulation and technological innovation.

708 See [www.consumerfinance.gov/the-bureau/](http://www.consumerfinance.gov/the-bureau/).

- With regard to large banks, saving associations, and credit unions, the exclusive authority to examine any insured institution with total assets of more than \$10 billion and any affiliate thereof. Institutions with less than \$10 billion in assets are subject to oversight by the Bureau, but only so far as necessary to support the implementation of Federal consumer financial laws and to determine risks to consumers and consumer financial markets.
- The regulation of ‘the offering and provision of consumer financial products or services under the Federal consumer financial laws.’ The statute explicitly defines the ‘consumer financial products’ that are regulated by the Bureau. Financial products include extending credit and servicing loans, extending or brokering leases of personal or real property, providing real estate settlement services or performing appraisals of real estate or personal property, engaging in deposit taking activities, selling, providing, or issuing stored value or payment instruments, providing check cashing, check collection, or check guaranty services, providing financial advisory services to consumers on individual financial matters, and other similar financial instruments and activities.
- The power to include other financial products or services under its scope as it sees fit. Similarly, the Act goes to great length to identify those previously enacted consumer laws, that will be enforced by the Bureau. These enumerated consumer laws include the Alternative Mortgage Transaction Parity Act of 1982, the Consumer Leasing Act of 1976, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Truth in Lending Act, the Truth in Savings Act, among others.
- If the Bureau finds an organization to be in violation of a federal consumer financial protection law, it has enforcement authority to pursue actions against that entity. Additionally, the Bureau is required to coordinate its enforcement activities with the FTC. The agencies may take joint or individual actions against an entity in violation of any of the consumer financial protection laws. The Bureau’s main enforcement power is the power to bring a civil lawsuit against the entity for any violation of any provision of federal law under its jurisdiction. Such a suit may be brought independently of or in conjunction with charges brought by the FTC.
- The power to take any action allowable under the statute to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer. The Bureau may prescribe and apply any rules or require any public disclosures it deems necessary to carry out this obligation. Additionally, the Bureau may require that a covered person make available to consumers any information concerning a financial product or service that the consumer obtained from the covered person, excepting any confidential information and information that cannot be retrieved in the ordinary course of business.
- Finally, the Secretary of the Treasury, in consultation with the Director of the Bureau is required to appoint a Private Education Loan Ombudsman to provide assistance to borrowers of private education loans. The Ombudsman is charged with collaborating with the Department of Education to oversee the distribution of loans and provide assistance to borrowers of private or Federal education loans. Additionally, the Ombudsman is required to respond to borrower complaints and to make recommendations to the Director, Secretary of the Treasury, Secretary of Education, Committee on Banking, Housing, and Urban affairs and the Committee on Health, Education, Labour and Pensions of the Senate and the Committee on Financial Services and the Committee on Education and Labour of the House of Representatives.

The Bureau's enforcement powers include using mechanisms for enforcing the federal consumer financial laws. It has general investigatory powers, and can appoint an investigator to conduct an inquiry into whether any person has violated the law. A Bureau investigator holds subpoena powers over witnesses and documents in connection with any investigation or hearing over a suspected offender.

After investigation, the Bureau may determine that further adjudication is required, at which point it can subpoena evidence in formal hearings. The hearing serves as a trial to determine whether the covered person is guilty of a violation. The Board's decisions are appealable to the Court of Appeals for the circuit where the principal office of the covered person is located. If the offending party is found guilty, the penalty is a monetary civil penalty and possibly a referral for criminal proceedings as well.

Since its creation in 2010, the Bureau has pursued several major settlements against companies engaging in deceptive and unfair credit and lending practices. In 2012, Discover Bank agreed to pay a \$14 million penalty in addition to \$200 million in restitution to 3.5 million customers for engaging for using deceptive sales practices to mislead consumers into paying for credit card add-on products.

The Bureau has also prohibited a Florida company from engaging in debt-relief sales or advertising for illegal debt-relief practices. Most recently, the Bureau obtained a \$6.5 million refund from a US bank that serviced members who participated in the Military Instalment Loans and Education Services auto loan program.

#### **5.4.1.3 Structure of the Bureau<sup>709</sup>**

The Bureau is led by a Director who is appointed for a five-year term by the President with the advice and consent of the Senate. The Director is charged with establishing the departments within the Bureau, which will assist with carrying out the Bureau's mandate.

There are three Specific Functional Units: Research, Community Affairs, and Complaint Collection and Tracking. In addition, there are four separate offices within the Bureau: The Office of Fair Lending and Equal Opportunity, the Office of Financial Education, the Office of Service Member Affairs, and the Office of Financial Protection for Older Americans.

The Office of Fair Lending and Equal Opportunity is responsible for overseeing and enforcing any Federal laws intended to ensure the fair, equitable, and non-discriminatory to access to credit for both individuals and communities. Additionally, the Office of Fair Lending and Equal Opportunity is charged with coordinating fair lending efforts between the Bureau and other Federal and State agencies, and working with private industry and consumer advocates on the promotion of fair lending compliance and education.

The Office of Financial Education develops and implements initiatives intended to educate and empower consumers to make better informed financial decisions. Additionally, it is charged with developing programs to improve the financial literacy of consumers through financial counselling, providing information to aid in understanding credit histories and credit scores, and advising consumers with regards to educational expenses, debt reduction, and improving long-term savings strategies.

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709 See [www.consumerfinance.gov/the-bureau/](http://www.consumerfinance.gov/the-bureau/).

The Office of Service Member Affairs is responsible for developing and implementing initiatives for military service members and their families to help them make informed decisions about financial products. The Office of Financial Protection for Older Americans which provides individuals over the age of 62 with protection from unfair and abusive practices and activities to assist in the financial literacy of senior citizens.

A Consumer Advisory Board and a Consumer Financial Civil Penalty Fund is established within the Bureau. The Board provides information about emerging practices in the consumer financial products or services industry. The Board is composed of six members appointed after recommendation by the Federal Reserve Bank Presidents, and meets at a minimum of twice a year. The Civil Penalty Fund provides relief for victims of activities for which charges have been brought against a financial service provider. With the critical jurisdiction of financial transactions, Internet and cross-border commerce, it is clear that the bureau's will eventually become the largest consumer protection agency in the United States.

#### **5.4.1.4 State institutional structures for consumer protection**

State governments act as both consumer law enforcement agencies and consumer advocates, much like the federal government. Responsibility for consumer protection within state governments tends to be highly decentralized, without the presence of any single overarching consumer protection department or agency.

The State Attorney Generals are charged with enforcing state consumer protection laws In most of the 50 states. An Attorney General may, in most states, file lawsuits on behalf of consumers, investigate possible violations, issue injunctions to terminate ongoing illegal activity, obtain restitution on behalf of consumers, bring criminal cases when authorised by law, and make rules to govern trade practices.

The National Association of Attorneys General (NAAG) facilitates cooperation among Attorney Generals to enhance their consumer protection effectiveness and support multi-state consumer protection activity and litigation. In larger cities and counties, there may also be a consumer protection division or bureau handling criminal and civil investigations and cases under state or local law.

One of the most successful recent consumer protection initiatives was the joint state-federal National Mortgage Settlement. In 2012, 49 state attorneys general and the federal government announced a historic settlement agreement with the five largest mortgage servicing entities in the United States. The settlement has provided over \$50 billion in relief to mortgage borrowers and state and federal agencies in connection with allegation over improper mortgage foreclosure practices by the respondents. In the settlement, borrowers received loan modifications, refinancing relief, and payments to those borrowers who lost their homes. In addition, the mortgage servicing firms agreed to nationwide standards for the servicing of both past and future mortgages and the appointment of an independent third-party monitor to oversee and report on compliance with the terms of the settlement.

#### **5.4.1.5 State Investigative Powers**

State agencies generally have the authority to issue Civil Investigative Demands, or CIDs. Under a CID, and agency may request documents or oral testimony from specific individuals or companies. Attorney Generals may issue CIDs if they believe a violation has or will occur, and need not establish probable cause. Criminal investigations are conducted through the grand jury process and must be proved beyond a reasonable doubt in the appropriate state court.

## 5.4.2 Canada

In Canada, responsibility for consumer protection legislation is divided between federal and provincial governments. The federal government is responsible for certain specific sectors as well as for national marketplace standards, whereas provincial governments are responsible for contractual and local matters. Each of the provinces and territories has consumer protection laws and regulations.

The Canadian Constitution does not specifically assign consumer affairs to either federal or provincial jurisdiction. In practice, the federal government is responsible for certain specific sectors as well as for national marketplace standards, whereas provincial governments are responsible for contractual matters and local matters.

### 5.4.2.1 Federal mechanisms

The Office of Consumer Affairs (OCA) promotes the interests and protection of Canadian consumers. Well-informed and confident consumers help stimulate competition and innovation in the Canadian marketplace.

The OCA aims to ensure consumers have a voice in developing government policies and are effective marketplace participants. It provides research and analysis on marketplace issues in support of both policy development and intergovernmental harmonization of consumer protection rules and measures. It also identifies important consumer issues and develops and disseminates consumer information and awareness tools. Finally, the OCA provides financial support to not-for-profit consumer and voluntary organizations, in the form of a Contributions Program, to encourage them to reach financial self-sufficiency and assist them in providing meaningful, evidence-based input to public policy in the consumer interest.

Under the *Department of Industry Act*, the Minister of Industry is mandated to promote and protect consumer interests throughout Canada. The Minister's powers also extend to measures to strengthen the national economy, promote sustainable development, ensure an efficient internal market governed by effective marketplace rules, and foster science and innovation.

The OCA contributes to this broad mandate by helping to build trust in the marketplace, so consumers can protect themselves and confidently and knowledgeably drive demand for innovative products and services at competitive prices.

The OCA bases its strategic directions and agenda on the following three themes:

- **vulnerable consumers** in the marketplace;
- OCA assesses the **nature of consumer vulnerability** in Canada and helps ensure that policy developments do not impact disproportionately on the most vulnerable or disadvantaged Canadian consumers;
- consumers in the **electronic marketplace**;
- OCA helps to **increase consumer confidence** in the electronic marketplace as new technologies emerge. OCA works on issues such as e-commerce and electronic payment mechanisms, and lays the groundwork for possible future policy initiatives in areas such as commercial e-services and mobile commerce;
- **consumers in the sustainable marketplace.**

The OCA works in collaboration with key stakeholders to improve consumer understanding of their role in sustainable production and consumption. The OCA undertakes research and policy development on how best to educate and equip consumers to deal with sustainable consumption issues in the marketplace.

#### **5.4.2.2 Other Canadian federal Laws for consumer protection**

Key federal consumer protection laws include the following:

- *Competition Act*, RSC 1985, c C-34 (ensures fair and competitive markets provide consumers with competitive prices and product choices).
- *Weights and Measures Act*, RSC 1985, c W-6 (establishes standards for weights and measures).
- *Food and Drug Act*, RSC 1985, c F-27 (includes requirements for food, drugs, cosmetics and therapeutic devices).
- *Telecommunications Act*, SC 1993, c 38 (ensures accessibility of telecommunication to consumers, and sets a framework for regulation of the telecommunications industry by the Canadian Radio-television and Telecommunications Commission).
- *Canadian Consumer Product Safety Act*, SC 2010, c 21 (protects consumers from potentially dangerous products).
- The *Bank Act*, SC 1991, c46 (includes consumer protection measures applying to the banking industry).
- Finally, the *Department of Industry Act*, SC 1995, c 1, gives the Minister of Industry jurisdiction over consumer affairs and standards relating to consumer goods, and the task of promoting consumer interests in Canada.

Each of Canada's thirteen provinces and territories has consumer protection laws and regulations, often found in consumer protection acts, businesses practices act or fair trading acts.

Consumer protection institutions approximate the role and structure of those in Australian States and Territories prior to the implementation of the Australian Consumer Law in 2010

- Alberta: *Fair Trading Act*, RSA 2000, c F-2.
- British Columbia: *Business Practices and Consumer Protection Act*, SBC 2004, c2.
- Manitoba: *Consumer Protection Act*, CCSM, c C200.
- New Brunswick: *Financial and Consumer Services Act*, SNB 2013, c 30.
- Newfoundland: *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1.
- North West Territories: *Consumer Protection Act*, RSNWT 1988, c C-17.
- Nova Scotia: *Consumer Protection Act*, RSNS 1989, c92.
- Nunavut: *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17.
- Ontario: *Consumer Protection Act*, SO 2002, c30.
- Prince Edward Island: *Consumer Protection Act*, RSPEI 1988, c C-19.
- Quebec: *Consumer Protection Act*, CQLR c P-40.1.
- Saskatchewan: *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.
- Yukon: *Consumer Protection Act*, RSY 2002, c40.

Several provinces also have industry specific laws and regulations. These cover specific industries such as travel agents, funeral services, debt collection, insurance, real estate and real property.

### 5.4.3 New Zealand

Institutional structures for the administration and enforcement of New Zealand consumer laws have remained largely unchanged for the past decade. However, commencing in 2010, successive governments have undertaken a root and branch review of all areas of consumer law and policy and gradually implemented major reforms to the law, policy and enforcement systems.<sup>710</sup>

#### 5.4.3.1 Commerce commission

The main agency responsible for enforcement of competition and consumer laws is the Commerce Commission (CC). The Commission is accountable to the Minister of Commerce and Consumer Affairs for its performance. Established as an independent agency, the CC operates as an impartial promoter and enforcer of the law.

A Statement of Intent is produced at least every three years setting out a work programme for the following four financial years. CC also produces a Statement of Performance Expectations annually outlining priorities, forecast financial statements, and output measures for the next financial year.

### 5.4.4 Singapore

#### 5.4.4.1 Consumer Protection Legal and Institutional Arrangements

In Singapore, the Ministry for Trade and Industry is the responsible department for consumer law and institutions. It states as its vision:

... for Singapore to be a leading global city with a dynamic economy, world-class enterprises and innovative and productive SMEs. Singapore will offer a conducive environment for entrepreneurs and enterprises to tap its diverse opportunities, and provide good jobs which are attractive to talent at all levels.

Consumer law administration and enforcement in Singapore is largely contracted out to implementation through schemes of self-regulation and co-regulation and in particular through the operations of the Consumers Association of Singapore (CASE)<sup>711</sup> which is contacted by the government to take a wide range of mediation negotiation and even enforcement action on the half of consumers. CASE is a non-profit, non-governmental organisation that is committed towards protecting consumer's interest through information and education, and promoting an environment of fair and ethical trade practices.

There are a number of laws in Singapore dealing with consumer protection, including the *Multi-Level Marketing and Pyramid Selling (Prohibition) Act*, *Sale of Goods Act* and the *Unfair Contract Terms Act*. These laws are generally applicable to transactions over the Internet. However, the Government recognises that some laws may not adequately address electronic transactions, and is thus actively looking into how existing consumer protection laws can be clarified and applied specifically to cyberspace consumer transactions.

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710 At the heart of reform of New Zealand consumer laws are changes to the Fair Trading Act which commenced operation at the end of 2013.

711 A concise outline of the history and functions of CASE can be found on the organisational member page of the Consumers International web site at:  
[www.consumersinternational.org/our-members/member-directory/CASE%20-%20Consumers%20Association%20of%20Singapore](http://www.consumersinternational.org/our-members/member-directory/CASE%20-%20Consumers%20Association%20of%20Singapore).

## 5.4.5 United Kingdom

Institutional structures for the administration and enforcement of consumer laws in the United Kingdom have undergone radical change over the past five years. Policy responsibility for consumer issues rests with the Employment Relations, and Postal Issues, Consumer, Competition, Corporate Governance and Intellectual Property Division of the Department for Business, Innovation and Skills (DBIS), which was formed after the abolition and re-formation of the Department of Trade and Industry (DTI).

The UK has transitioned away from a model in which a number of national quasi-autonomous enforcement, educational and advocacy bodies worked alongside the Trading Standards Offices and the Citizens Advice Network. Major nationally operating enforcement agencies such as the Office of Fair Trading (OFT) and the Competition Commission (CC) were abolished as were consumer complaints, policy and advocacy bodies such as Consumer Voice and Energywatch.

### 5.4.5.1 Abolition of national bodies

The work of the national bodies is now undertaken by a network of about 200 local authority Trading Standards Offices (TSO). The UK government has effectively contracted out its regulatory functions to the TSO and the charitable Citizens Advice (CA) offices. Much of the UK's previously existing consumer protection laws have been repealed and replaced. The Government was motivated by a desire to shift the burden of enforcement from government, and to place greater reliance on 'light touch' industry-based schemes.

The Government implemented new regulations in October 2015 to give effect to its obligations under the European directives on Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR). The regulations require traders who fail to resolve a dispute through their own customer service processes to advise the consumer complainant of their right to have their dispute resolved by an alternative dispute resolution body. Traders are not compelled to use the ADR body, however, it is hoped that the new regulations will encourage traders to do so.

## 5.5 Legislation and jurisdictional comparisons

### 5.5.1 United States

Most US states have statutes prohibiting unfair and deceptive conduct, modelled to varying degrees on the Federal Trade Commission Act. Under these 'Little FTC Acts,' each state Attorney-General has statutory authority to seek injunctions to remedy unfair or deceptive trade practices. A company may face contempt charges if it continues a practice after an injunction has been issued. Attorney Generals may also obtain voluntary assurances of compliance from violating companies. A breach of the voluntary assurance is akin to an injunction violation. States also may use civil and criminal penalties to penalise unfair or deceptive trade practices.

An Attorney-General may seek restitution for consumers who are victims of fraud or deception. Some states expressly grant Attorney-Generals the statutory power to obtain restitution. Other states do so implicitly because of state court decisions authorizing such actions. This remedy is especially effective if consumers have been harmed but monetary damages are not large enough to warrant litigation by private individuals. Restitution is paid directly to affected consumer if they can be readily identified. Otherwise the funds are distributed in lump sums to consumer groups and related non-profit organisations under the cy pres doctrine.

Most state consumer protection statutes allow the Attorney General, or other state regulatory or enforcement agency, to create rules that advise businesses of prohibited and acceptable business practices. Approximately 20 states have chosen to create such rules.

#### **5.5.1.1 State Regulatory Authorities**

Each state has a different system for addressing the special needs of regulated industries such as energy, transportation, health, and financial institutions. They each has a variety of mechanisms for addressing consumer concerns, resulting in little uniformity between the states or within the same state among the different regulatory structures for each industry.

States also regulate trades and professions through licensing boards and enforcement divisions. These state departments attempt to protect consumers by licensing only qualified individuals to work in specific professions, from health care providers, real estate agents, lawyers, and accountants. Consumers may search state license databases to find potential service providers or lodge a complaint against a licensed professional. Professional licenses can be suspended temporarily or permanently, or be revoked after a hearing; with the losing party having a right to appeal within the state court system.

#### **5.5.1.2 Private Rights of Actions for Consumers**

Private citizens can use the state and federal court systems to protect themselves from marketplace fraud and deceit. At the state level, consumers may use both common law and statutory causes of action such as the Little *FTC Acts*. Although the federal courts and each state court system operate independently, there are numerous commonalities to the private rights of action protecting consumers.

Common law legal action is one of the oldest means for obtaining consumer protection. Current common law actions provide consumers protection through torts for deceit, fraud, misrepresentation, and breach of warranty.

A consumer may file a lawsuit for deceit or fraud if a seller intentionally conceals a material fact or makes a false representation of a material fact, knowing the representation is false and seeks to induce the consumer to act on the representation. The plaintiff must also reasonably rely on the misrepresentation and suffer damage as a result of reliance. Deceit can arise if a seller makes a direct false statement, or when a misrepresentation arises from silence, concealment, half-truths, or ambiguity about a good or service. While misrepresentation of product facts may bring legal action, mere puffery or opinions are generally not subject to lawsuits for deceit.

If successful in court, a consumer may receive damages for out of pocket losses, rescission of the transaction at issue, damages to ensure the consumer receives the benefit of the bargain, or possibly punitive damages. Most common law consumer protection actions are brought in state court, although actions between citizens of different states can be brought in federal court under certain situations.

#### **5.5.1.3 Statutory Causes of Action**

Although common law actions have long protected consumers from fraud, it is often burdensome to successfully plead and prove such a case, particularly because a consumer must prove that the seller intended harm. If a common law claim is not possible, consumers may rely on federal or state unfair trade practice statutes to remedy misrepresentations or material omissions.

There is no private right of action under the *Federal Trade Act*, although there may be private rights under the more specific statutes enforced by the FTC and the new Consumer Financial Protection Bureau. Each state also has some form of consumer protection law, and many are modelled after the Federal Trade Commission Act and prohibit unfair and deceptive trade practices. These state laws normally allow consumers to sue for damages and injunctive relief. Consumers have a better chance of success in combating misrepresentations under these statutes because they do not typically require proof that the seller intended harm and often relax other requirements of common law fraud. In addition to protection from unfair and deception trade practices, many states also specifically prohibit certain deceptive pricing, bait and switch tactics, and pyramid sales scheme practices. In addition to preventing the broader harms of ‘unfair and deceptive’ trade practices, state ‘lemon’ laws streamline the remedy process for consumers who purchase a defective new or used car.

### 5.5.2 Canada

In common with the United States, Canadian consumer protection laws do not provide for Federal action on behalf of individual consumers. Consequently, the level of Federal intervention is relatively low. Canada, like the US, places heavy reliance on litigation as a basis for consumer redress. Despite that, there are a number of sector-specific areas where Canadian consumers have access to dispute resolution services. For example, the Commissioner for Complaints for Telecommunications Services provides a dispute resolution service for telephone and internet-related complaints. The Ombudsman for Banking and Investment Services provide services for consumers with banking and investment complaints.

### 5.5.3 New Zealand

The *Fair Trading Amendment Act 2013* modernises New Zealand consumer law, and responds to the rapid uptake of electronic and cross-border trade, and provides greater alignment of New Zealand and Australian Consumer laws than previously existed. The stated objectives of the updated legislation are to help ensure businesses can compete more effectively and that consumers are better protected.

Changes to legal and institutional arrangements for consumer law in New Zealand commenced with the publication of discussion papers in 2009 and 2010. In making the changes the government stated it reviewed the purpose and ongoing relevance of the then existing statutes, and sought to fill any gaps in the law. It also reviewed the overall effectiveness of enforcing those laws. The bulk of legislative change occurred at the end of 2013 when the consumer law reform bill received Royal assent.

#### 5.5.3.1 Objectives of the reform

The stated objectives for the reform were to revise and update consumer law so that it:

- is principles-based;
- enables consumers to transact in confidence;
- protects suppliers and consumers from inappropriate market conduct;
- is easily accessible to those who are affected by consumer law;
- better aligns New Zealand law with the Australian Consumer Law, where appropriate, in accordance with the government’s agenda for a single economic market with Australia.

The New Zealand Commerce Commission has been empowered to act in a timelier and more effective manner in dealing with breaches. Changes under the Act include providing additional rights for consumers and obligations for businesses as well as investigation and enforcement tools for the Commerce Commission. The list below provides a summary of the changes.

### **5.5.3.2 Rights and obligations**

- Auctions — new rules apply to certain types of auctions (excluding online auctions like Trade Me) Buying and selling online — traders who sell online must make it clear they are traders, meaning purchases have rights under the Consumer Guarantees Act Contracting out of the Fair Trading Act — businesses cannot contract out of their obligations to consumers.
- Door-to-door and telemarketing sales — consumers have extra protection when approached by uninvited sales people at their home or workplace, or by telephone.
- Extended warranties — traders must now disclose consumer’s rights under the Consumer Guarantees Act and a comparison of those rights with the benefits of the extended warranty being offered.
- Substantiation — it is an offence for traders to make a claim they can’t back up.
- Unsolicited goods and services — it is illegal for a business to demand payment for goods or services that haven’t been requested by the recipient Investigation and enforcement.
- Increased fines — penalties for misleading and deceptive conduct, false representations, unfair practices and issues around product safety have increased from \$60,000 to \$200,000 for individuals and from \$200,000 to \$600,000 for businesses.
- Management banning orders — in certain circumstances the Commerce Commission can ban an individual from being a director or involved in the management of a company.
- Product Safety Monitoring and Enforcement Powers — new powers when conducting inspections Laws prohibiting unfair contract terms.
- Compulsory interview powers — The Commerce Commission now has the ability to require oral evidence from people during some Fair Trading Act investigations. Previously the Commission could only request interviews and individuals could refuse to be interviewed or to answer certain questions. The interviewee must answer questions put by the Commerce Commission, but any responses cannot be used against the interviewee in criminal proceedings, other than in some limited, specified circumstances. The compulsory interview power can be used for investigations that started before the provision came into effect.
- Enforceable undertakings — are a form of out-of-court negotiated settlement. Where the Commerce Commission believes there has been a breach of the Act the Commission may accept enforceable undertakings. They may include agreements by a person or business to stop doing something, make compensation payments, publish corrective advertising or pay costs to the Commission. If the party does not keep to their agreement the Commission may apply to the Court to enforce the agreement.

Recent changes to the Act include significantly increased penalties, the introduction of infringement offences and the ability for courts to impose banning orders. The new penalties came into effect in 2015. Important changes include: Fines for misleading and deceptive conduct have been increased by at least 300%.

- Individuals now face fines of up to \$200,000 per offence. Companies face fines of up to \$600,000 per offence.
- Participants in pyramid schemes now face fines of up to \$60,000. In addition, a Court can also strip offenders of the equivalent revenue or 'commercial gain' earned from the offending. Breaches of Part 2 of the Act (relating to Consumer Information) or Part 4A (relating to consumer transactions and auctions) can result in a fine for an individual of \$10,000 and \$30,000 for a body corporate.
- The Commerce Commission can issue infringement notices with fines of up to \$2,000 for offences for: failing to comply with a suspension of supply notice issued under section 33D; involving the contravention of section 28 (consumer information standards); failing to comply with section 28B(1) or (2) (disclosure of trader status on Internet); involving the contravention of any of the following provisions of Part 4A:
  - (i) s 36C (layby disclosure requirements);
  - (ii) s 36D (further layby disclosure requirements);
  - (iii) s 36L (uninvited direct sale disclosure requirements); and
  - (iv) s 36T (extended warranty disclosure requirements).

### **5.5.3.3 Other remedies**

Other remedies under the Act remain unchanged. These include:

- Corrective advertising orders. A court may require a trader to publish corrective advertising; to disclose information to the public generally, or to an affected section of the public; and to publish corrective statements.
- Compensation or refund orders may be granted by a court. A court may also order a trader to refund or compensate a person who suffers loss from the trader's unlawful conduct.
- Altering or voiding a contract is an available remedy. A court may order that a contract be altered or voided as a result of unlawful conduct.

A Court can impose a management banning order which prohibits an individual from being involved in the management of a company. A management banning order can be taken against an individual who:

- has, on at least two separate occasions within a 10 year period, committed a criminal offence under the Act, or
- is, or was at the time of committing the offence, a director of, or concerned in the management of, an incorporated or unincorporated body that has, on at least two separate occasions within a 10-year period, committed a criminal offence under the Act, or
- has been prohibited by an overseas jurisdiction, in connection with the contravention of any law relating to unfair trading, from carrying on certain activities.

A person who breaches a management banning order commits an offence punishable by a fine of up to \$60,000.

### **5.5.3.4 Enforcement mechanisms in New Zealand**

Key measures for consumer protection enforcement in New Zealand:

- **Product Safety Standards** — Mandatory safety standards for certain products are enforced by the Commerce Commission under the Act. The purpose of these regulations is to prevent or reduce the risk of injury.
- **Service Safety Standards** — These are regulations made under section 35 of the *Fair Trading Act 1986*. Their purpose is to prevent or reduce the risk of injury to any person. Currently there are no Service Safety Standards under the Act.
- **Suspension of Supply Notices** — These notices prohibit the person or persons identified in them from supplying the particular goods for a short period. It may be issued by a Product Safety Officer of the Ministry of Business, Innovation and Employment and are enforced by the Commerce Commission.
- **Unsafe Goods Notice** — The relevant Minister may declare any goods unsafe where it appears they may cause injury. It is then the Commerce Commission's role to enforce compliance with the Notice.
- **Unfair contract terms** — Unfair contract terms are prohibited in all standard form consumer contracts entered into after 17 March 2015, and also in those contracts (except insurance contracts) that are renewed or varied after that date. The provision allows the Commission to seek a declaration from a court that a term in a standard form consumer contract is unfair. While only the Commerce Commission can apply for this, any person may ask the Commission to apply to the court in relation to a contract to which they are a party.

In relation to the foregoing provisions on unfair contract terms, the court may declare a term unfair if it is satisfied that the term would cause:

- a significant imbalance in the parties' rights and obligations, and
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and
- would cause some detriment (whether financial or otherwise) to the other party if applied, enforced or relied on.

Certain terms cannot be declared unfair. These are terms that: define the main subject matter of the contract or set the upfront price payable under the contract.

## 5.5.4 Singapore

### 5.5.4.1 Consumer Protection (*Fair Trading*) Act

As with other jurisdictions reviewed in this comparative study, Singapore has a range of statutes providing consumer protection. The core law for consumer protection is the *Consumer Protection (Fair Trading) Act*. This Act provides the legislative framework to allow consumers aggrieved by unfair practices to have recourse to civil remedies before the courts. It also provides for a cooling-off period for direct sales and time share contracts, and allows specified bodies to enter voluntary compliance agreements with, or apply for injunction orders against errant traders.

### 5.5.4.2 Personal Data Protection

Singapore has both a strong common law tradition as well as appropriately structured statutory provisions to regulate use of personal data. Under the general law, confidential information may be protected under a duty of confidence. Personal information is also protected under sector-specific laws such as the *Banking Act*, *Statistics Act*, the *Official Secrets Act* and the *Statutory Bodies and*

*Government Companies (Protection of Secrecy) Act*. There is however no overarching legislation for the protection of personal data in Singapore. In February 2002, the National Internet Advisory Committee (NIAC) released a draft ‘Model Data Protection Code for the Private Sector’ which is modelled on internationally recognised standards.

In relation to e-commerce, cross border trade and consumer protection, Singapore has a highly developed policy and regulatory scheme. At the centred of the scheme is a statutory body, Info-communications Development Authority of Singapore (IDA). In the relatively laissez faire style of Singapore the IDA is something of an exception. To achieve the national goal of leadership in the region an e-commerce hub a range of policies and regulations have been promulgated and these constitute a large part of IDA’s efforts to create a conducive infocomm environment that is both pro-consumer and pro-business. To ensure sustainable growth and competition in a multi-operator, multi-network environment, IDA formulates and develops short- and medium-term infocomm-related policies, as well as standards, codes of practices and advisory guidelines — all of which are enforceable by IDA — pertaining to issues such as licensing, interconnection, resource and competition management.

IDA also monitors local and global infocomm market trends, developments and regulatory measures, while remaining technology-neutral, to ensure that the current infocomm policies and regulatory frameworks are effective and relevant.

Throughout its Policy and Regulations work, IDA claims to be committed to the principles of:

- Promoting effective and sustainable competition;
- Promoting facilities-based competition to the greatest extent possible;
- Relying on market forces;
- Adopting proportionate regulation;
- Remaining technology-neutral; and
- Providing a transparent and reasoned decision-making process.

These principles are aimed at creating an infocomm environment that allows free and fair competition, so that consumers’ interests are protected and they benefit from greater choices and the proliferation of innovative infocomm products and services.

In recognition of the dynamic nature of the infocomm industry, IDA also progressively fine-tunes and reviews its policies and regulations. We value the opinions, concerns and expertise of stakeholders and will continue to engage and consult the industry and consumers when formulating new policies or reviewing existing ones.

The IDA and the National Trust Council (NTC) conducted a public consultation on the code. Based on comments from the industry and members of the public, the Model Code has now been in operation for a number of years and has been taken up by the private sector.

The Model Code is a generic code that is available for adoption by the entire private sector. It applies to any private sector organisation that collects and installs personal data in electronic form, online or offline, using the Internet or any other electronic media. In the e-commerce area, the NTC has aligned its trust mark programme with the principles of the Model Code.

## 5.5.5 United Kingdom

### 5.5.5.1 Key UK legislation

The *Consumer Rights Act 2015* was introduced to update and transform institutional arrangements and legal provisions in the UK.

The *Consumer Rights Act* aims to rectify the complexities of UK consumer law by consolidating eight pieces of separate legislation in this area into a single piece of legislation. The Act is split into three parts. Part 1 deals with consumer contracts for goods, digital content and services; Part 2 covers unfair terms; and Part 3 contains miscellaneous and general provisions.

For the most part, the law set out in the Act is similar to existing UK laws, although there have been some changes, particularly regarding services and unfair terms. The Act introduces significant changes to private actions in competition law; including by expanding the jurisdiction of the Competition Appeals Tribunal, the introduction of opt-out collective actions and the establishment of voluntary redress schemes.

The majority of the Act's provisions came into force on 1 October 2015 and, in theory, should make compliance with consumer protection laws much easier in the long run. However, as the Act makes changes to contractual relationships and affects how products should be offered to consumers, some preparation will be required at the outset.

### 5.5.5.2 Application of the law in the United Kingdom

The *Consumer Rights Act* applies to contracts and notices between a 'trader' and a 'consumer'. A 'consumer' is defined as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. This definition is wider than definitions previously found in UK and EU law as it includes individuals who enter into contracts for a mixture of business and personal reasons.

A 'trader' is defined as 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf'. This definition includes government departments and public sector authorities.

Territorially, the Act extends to England, Wales, Scotland and Northern Ireland. However, some parts of the Act include separate rules for Scotland: for example, it makes reference to the Scots law remedy of 'specific implement', which is used to compel performance.

Certain parts of the Act do not apply to financial services firms as they implement parts of the EU's Consumer Rights Directive which do not apply to these firms. The Act does not make it clear which terms do not apply to financial services firms. However, some provisions relating to the contractual status of information and the delivery and risk in goods that originated in the EU Directive clearly do not apply to financial services firms.

### 5.5.5.3 Supply of services

The provisions regarding the supply of services consolidate various pieces of existing legislation and regulations. The new provisions apply to financial services firms. So to do the various industry-specific regulations that are imposed on businesses, mainly by the Financial Conduct Authority (FCA); which apply as a result of industry-specific EU legislation. It is intended that if stricter duties or requirements are already in place, these will take precedence over applicable provisions outlined in the Act.

## 5.6 Comparative issues in policy and practice

### 5.6.1 United States

A long running consumer protection issue in the United States is the extent to which the law and the courts permit restrictions on consumers' rights to take collective action. The debate concerns class actions and fee shifting by lawyers.<sup>712</sup> Although filing a lawsuit is an option for combating fraud, when the economic harm is small, expensive litigation is not always a viable option. Class action lawsuits allow victimised consumers who are likely to receive relatively low amounts of damages to file a lawsuit collectively.

There is a growing trend for standard form consumer contracts to include an arbitration clause in which the consumer waives their right to bring a class action. Bringing a class action lawsuit for common law fraud is difficult because US courts require a high degree of commonality among all the plaintiffs' claims. If, however, there is such commonality, class actions can be a useful tool for consumers to assert their rights.

Attorney fee shifting renders legal action a possibility for consumers who have suffered low amounts of damages. In the American legal system, each party customarily pays its own legal expenses. However, in many federal and state consumer protection causes of action, and in most class actions, a prevailing party may be entitled to reasonable attorney fees and litigation costs to be paid by the defendant, in addition to any applicable damages. In most circumstances, unsuccessful plaintiffs are not responsible for the attorney fees and costs of the prevailing defendant. Such provisions have the effect of both increasing the incentives to bring such claims and minimising the cost of a successful lawsuit.

#### 5.6.1.1 *Consumer associations and related groups*

Consumer associations and other non-profit entities play an important role in consumer protection. They play a critical role in investigating, publicising, lobbying, litigating, and researching consumer issues. US consumer groups or associations lack the statutory right to bring super-complaints or collective action suits as is the case in several European countries. They do, however, have the power to bring complaints to government agencies, and bring actions in their own name. Unlike in the EU and most European countries, an agency complaint in the US is normally informal and does not require formal agency action (or judicial review) if the government agency chooses not to pursue the matter.

Nevertheless, many of the developments described above are the result of one or more private actors bringing to the governments, or the publics, attention conduct that harms consumers either physically or economically. Much like governmental action in this area, there are numerous different private groups focused on different aspects of the consumer protection field as outlined above. A small sample of such private sector entities follows.

#### 5.6.1.2 *Consumer Federation of America, Consumers Union*

The Consumer Federation of America has four main functions. Specifically, the Federation:

- (1) advocates for consumers to state and federal legislative and regulatory bodies;
- (2) researches consumer behaviour and concerns through polling and surveys;

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712 See [www.law.duke.edu/grouplit/papers/classactionalexander.pdf](http://www.law.duke.edu/grouplit/papers/classactionalexander.pdf).

- (3) attempts to provide education about consumer concerns by disseminating press releases, reports, and other material to the media, government representatives, and consumers; and
- (4) Supports a variety of local consumer-related organisations.

The Consumers Union was founded in 1936 and is a non-profit, nonpartisan organisation that educates consumers about a wide variety of products. The Union's mission is to work for a fair, just and safe marketplace for all consumers. It the Consumers Union publishes the magazine, *Consumer Reports*, as well as two newsletters, *Consumer Reports on Health* and *Consumer Reports Money Adviser*. *Consumer Reports* provides product reviews of cars, computers, appliances, extended warranties, and even sporting equipment so that consumers may have reliable third-party information before making a purchase. The Consumers Union also supports initiatives for health care access, food safety and consumer choice in media.

### **5.6.1.3 Summary of US administration and enforcement**

Focusing on the formal rights and remedies of consumers provides only a partial picture of the state of consumer protection in the United States. Because of the emphasis on the formal nature of legal consumer rights, much depends on access to the legal system.

There is no constitutional or statutory right to legal representation in consumer protection matters, or civil litigation in general. Consumers without practical access to the courts may still benefit if one of the many government agencies discussed above take action on their behalf. Consumer associations also help fill the gap, as do legal aid bureaus and other forms of legal clinics. The availability of private rights of action which provide for different types of damages, attorney's fees, and costs to prevailing plaintiffs further help, but are still an incomplete solution.

Only certain causes of actions are covered, and only those cases with the best chances of prevailing and the best chance of recovering substantial damages will be brought, because of the needs of the private bar to obtain its fees at the end of the litigation. The US has moved from policy setting which could be described as caveat emptor, but still relies heavily on consumer self-protection

## **5.6.2 Canada**

Provincial consumer protection legislation addresses digital purchasing and digital products in a variety of ways. Some provinces have incorporated e-commerce laws and regulations into existing legislation on distance sales, other provinces have created separate sections within legislation to deal specifically with e-commerce.

In 2001 the Consumer Measures Committee (CMC) working group on e-commerce created the Internet Sales Contract Harmonization Template (ISCHT) in an effort to encourage consistent legislation across the country. All or part of the template has been incorporated in the legislation of most provinces. The template includes guidelines for information disclosure requirements, contract formation, cancelation and recovery.

Under the *Canada Consumer Product Safety Act* Health Canada federal inspectors have the authority to conduct investigations into product safety. Where products do not comply with the Act, Health Canada may issue a recall and order the manufacturer, advertiser, importer or seller of the product to take corrective measures. If a business fails to comply with an order Health Canada may issue an Administrative Monetary Penalty and seek to have criminal charges laid against the business.

### **5.6.2.1 Enforcement mechanisms**

Enforcement of more general consumer complaints is often undertaken by provincial consumer protection branches. For example, provincial inspectors in British Columbia have the authority to investigate complaints as well as to issue compliance orders, freeze bank accounts and initiate civil actions where the circumstances warrant. The Director may also initiate civil actions, issue monetary administrative penalties, and has prosecutorial powers.

Some specific laws affecting consumer interests, such as building codes, are administered and enforced by municipalities through power delegated to them by the provinces. In most cases enforcement of bylaws relating to consumer interests takes place through municipal business licensing.

### **5.6.2.2 Chargebacks**

Section 11 of the ISCHT outlines procedures relating to credit card chargebacks. The section requires a credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges where a consumer has cancelled a contract under and the supplier has not refunded all of the consideration within 15 days. This section has been adopted in part or full by six provinces.

### **5.6.2.3 Innovative measures**

- Canada's Anti-Spam Legislation (CASL) came into force in 2014. This legislation requires business to have consent, include prescribed information, and have an unsubscribe mechanism when sending commercial electronic messages.
- Under the 2010 Canada Consumer Product Safety Act the federal government created expanded powers of inspection, information monitoring and enforcement of consumer product safety standards.
- The Canadian Radio-television and Telecommunications Commission recently developed a Wireless Code. The Wireless Code is a mandatory code of conduct for providers of retail mobile wireless voice and data services.
- The Canadian Radio-television and Telecommunications Commission has also developed a Television Service Provider Code (announced today) requiring television providers to provide consumers with accessible information on billing and services. The code will come into force in September of 2017 and be enforced through licensing.

## **5.6.3 New Zealand**

### **5.6.3.1 Changes to rights and obligations**

- Auctions — new rules apply to certain types of auctions (excluding online auctions like Trade Me) Buying and selling online — traders who sell online must make it clear they are traders, meaning purchases have rights under the Consumer Guarantees Act Contracting out of the Fair Trading Act — businesses cannot contract out of their obligations to consumers
- Door-to-door and telemarketing sales — consumers have extra protection when approached by uninvited sales people at their home or workplace, or by telephone
- Extended warranties — traders must now disclose consumer's rights under the Consumer Guarantees Act and a comparison of those rights with the benefits of the extended warranty being offered

- Substantiation — it is an offence for traders to make a claim they can't back up
- Unsolicited goods and services — it is illegal for a business to demand payment for goods or services that haven't been requested by the recipient Investigation and enforcement
- Increased fines — penalties for misleading and deceptive conduct, false representations, unfair practices and issues around product safety have increased from \$60,000 to \$200,000 for individuals and from \$200,000 to \$600,000 for businesses
- Management banning orders — in certain circumstances the Commerce Commission can ban an individual from being a director or involved in the management of a company
- Product Safety Monitoring and Enforcement Powers — new powers when conducting inspections Laws prohibiting unfair contract terms
- Compulsory interview powers — The Commerce Commission now has the ability to require oral evidence from people during some Fair Trading Act investigations. Previously the Commission could only request interviews and individuals could refuse to be interviewed or to answer certain questions. The interviewee must answer questions put by the Commerce Commission, but any responses cannot be used against the interviewee in criminal proceedings, other than in some limited, specified circumstances. The compulsory interview power can be used for investigations that started before the provision came into effect
- Enforceable undertakings — are a form of out-of-court negotiated settlement. Where the Commerce Commission believes there has been a breach of the Act the Commission may accept enforceable undertakings. They may include agreements by a person or business to stop doing something, make compensation payments, publish corrective advertising or pay costs to the Commission. If the party does not keep to their agreement the Commission may apply to the Court to enforce the agreement.

Changes to the *Fair Trading Act* in 2013 include significantly increased penalties, the introduction of infringement offences and the ability for courts to impose banning orders. The new penalties came into effect in 2015.

Important changes include:

- Fines for misleading and deceptive conduct have been increased by at least 300%. Individuals now face fines of up to \$200,000 per offence. Companies face fines of up to \$600,000 per offence
- Participants in pyramid schemes now face fines of up to \$60,000. In addition, a Court can also strip offenders of the equivalent revenue or 'commercial gain' earned from the offending. Breaches of Part 2 of the Act (consumer information) or Part 4A (consumer transactions and auctions) can result in a fine for an individual of \$10,000 and \$30,000 for a body corporate
- The Commerce Commission can issue infringement notices with fines of up to \$2000 for offences for: failing to comply with a suspension of supply notice issued under section 33D; being involved in the contravention of section 28 (consumer information standards); failing to comply with section 28B(1) or (2) (disclosure of trader status on Internet); being involved in the contravention of:
  - s 36C (layby disclosure requirements);
  - s 36D (further layby disclosure requirements);
  - s 36L (uninvited direct sale disclosure requirements); and
  - s 36T (extended warranty disclosure requirements).

### 5.6.3.2 *Other remedies*

There are other remedies available under the Fair Trading Amendment Act 2013 that are the same as before the Act's amendment include corrective advertising orders. A court may require a trader to publish corrective advertising to disclose information to the public generally, or to an affected section of the public, and to publish corrective statements.

A Court can now also impose a management banning order that prohibits an individual from being involved in the management of a company. A management banning order can be taken against an individual who:

- has, on at least two separate occasions within a 10 year period, committed a criminal offence under the Act, or
- is, or was at the time of committing the offence, a director of, or concerned in the management of, an incorporated or unincorporated body that has, on at least two separate occasions within a 10-year period, committed a criminal offence under the Act, or
- has been prohibited by an overseas jurisdiction, in connection with the contravention of any law relating to unfair trading, from carrying on certain activities.

A person who breaches a management banning order made against him or her commits an offence that is punishable by fine of up to \$60,000.

## 5.6.4 Singapore

### 5.6.4.1 *Trust Marks to build confidence in the online market*

As noted in the commentary on Singapore under the heading of Institutional Structures, the government has been active in establishing an environment conducive to growth of e-commerce. A further step in that direction was taken through the government sponsored development of e-commerce trust marks which form a significant part of consumer policy in Singapore. Part of a project known as 'e-Power', the Trust Marks are intended to encourage the private sector to position Singapore as an e-commerce hub. Together with relevant government agencies, Info-communications Development Authority of Singapore (IDA) identified a four-pronged approach to build trust and confidence in e-commerce:

- Establishing a secure environment;
- Establishing confidence in e-business;
- Building user confidence;
- Raising user awareness.

To ensure the proposed approach addresses the concerns of the industry, IDA issued a consultation document on 26 September 2000 to obtain feedback from the industry and the public. Much of the feedback indicated that trust marks would instil greater user confidence in e-commerce transactions. It was also recognised that a coordinated and multi-faceted approach must be taken to achieve widespread usage of trust marks.

The National Trust Council (NTC) was formed with the vision to build public confidence in e-transactions. The NTC, formed on 28 February 2001, is an industry-led committee with government support to ensure that relevant concerns from industry are addressed.

The Council implemented the first nationwide Trustmark Programme, TrustSG, whereby appropriate organisations, such as trade associations, chambers of commerce and businesses will be accredited as Authorised Code Owners (ACO). Upon accreditation, the ACO will be granted a license to use the TrustSg seal, and they can thereafter award the TrustSg seal to merchants who adhere to their stringent codes of practice. The TrustSg seal awarded by the ACOs identifies online merchants as e-commerce enterprises which adhere to good e-business practices. Together with the TrustSg seal, the accredited merchants will also receive the consumer or industry-specific trust mark from the ACOs.

#### **5.6.4.2 Content Regulation**

Singapore has a three-pronged approach to Internet content regulation. Firstly, a light-touch class license scheme applies, which provides minimum standards to safeguard values and promote healthy growth. Secondly, it encourages industry to self-regulate. Thirdly, an active public education programme has been introduced to promote parental supervision over children's access to the Internet. The class license scheme, administered by the Media Development Authority of Singapore, which oversees an automatic licensing scheme that requires Internet Service Providers and content providers to comply with an Internet Code of Practice.

#### **5.6.4.3 Lemon Law**

Consumer protection in Singapore is distinctive because of its overt approach to consumer warranties. Under the law, a consumer is entitled to reject goods and obtain a refund if they are not of satisfactory quality of a purchased good at the time of delivery. The legislation, which took effect in September 2012, provides more options for both consumers and retailers by providing the additional remedies of repair, replacement, and reduction in price for the purchase of goods. The law also applies to hire purchase agreements. Goods include second-hand goods, discounted goods and perishable goods. It does not apply to contracts of hire (such as rental goods), the supply of services or the sale of real property (i.e. land, buildings and fixtures).

#### **The key elements of the Lemon Law**

##### **Rules for repair or replacement of goods**

The retailer may offer to repair or replace a defective good, and must do so within a reasonable period and with minimal inconvenience to the consumer. In some cases, repair and replacement are not possible or reasonable. The consumer may instead keep the defective good and ask for a reduction in price (estimated to be the difference between the value of the product in its contracted condition and the value of the product in the faulty condition). Alternatively, a consumer may request to return the product for a refund. The refund amount may be reduced to take into account the use that the consumer has had of the goods. If the item has never worked, a full refund should be made.

##### **Rules on burden of proof**

The legislation provides clearer rules on the burden of proof. If a defect is found within six months of delivery, it is assumed that the defect existed at the time of delivery, unless the retailer can prove otherwise or if such a presumption is incompatible with the nature of the goods (e.g. perishable goods would not be expected to last longer than their normal shelf life). If the defect is found after six months of delivery, it is for the consumer to prove that the defect existed at the time of delivery.

Consumers can use the remedies of repair and replacement that the law provides. However, a consumer must give the retailer a reasonable time to comply with the requested remedy (e.g. replacement or repair) before seeking an alternative remedy (such as refund or reduction of price).

The legislation does not replace the existing protection available, such as guarantees/warranties, retailers' own return policies, and existing remedies under other legislation (such as the Sale of Goods Act) or the common law.

Consumers are not entitled to a remedy if they damaged the item, misused it and caused the fault, or tried to repair it themselves or had someone else try to repair it, which damaged the item. The remedies are also not available if the consumer knew about the fault before they bought the goods, or if they simply changed their mind and no longer want the item.

## 5.6.5 United Kingdom

### 5.6.5.1 *Changes to remedies and unfair terms regulation*

Under the *Consumer Rights Act 2015*,<sup>713</sup> consumers have statutory remedies of 'repeat performance' and price reduction if a service does not conform to the contract. The remedy available is dependent on the level of non-compliance, for example:

- if a trader breaches its duty to provide services with 'reasonable skill and care', or does not comply with information that they have provided to the consumer about the service, the consumer is entitled to repeat performance or a price reduction for the services;
- if the service is not performed within a reasonable time, or the trader does not comply with the information that it has provided to the consumer which does not relate to the service, then the consumer is entitled to a price reduction for the services.

Although the consumer has a statutory right to these particular remedies in the above circumstances, this does not exclude them from seeking other remedies such as damages or specific performance provided that they do not recover twice for the same loss. The inclusion of specific statutory remedies where none previously existed improves the consumer's position and provides clarity about their rights.

### 5.6.5.2 *Changes to the contractual status of voluntary statements*

Spoken or written voluntary statements, made by the trader, about the trader or the trader's service can now be deemed to be binding contractual terms. This can be the case where the statement is taken into account by the consumer when:

- deciding to enter into the contract;
- making any decision about the service after entering into the contract.

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713 A concise summary of the legislation can be found at [www.legislation.gov.uk/ukpga/2015/15/notes/division/2](http://www.legislation.gov.uk/ukpga/2015/15/notes/division/2). The *Consumer Rights Act 2015* sets out a framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. In addition, the Act introduces easier routes for consumers and small and medium sized enterprises ('SMEs') to challenge anti-competitive behaviour through the Competition Appeal Tribunal ('CAT'). The Act clarifies the maximum penalties that the regulator of premium rate services can impose on non-compliant and rogue operators. It also consolidates enforcers' powers as listed in Schedule 5 to investigate potential breaches of consumer law and clarifies that certain enforcers (Trading Standards) can operate across local authority boundaries. It will also give the civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches or potential breaches of consumer law. Additionally, it changes the way in which judges are able to sit as chairs in the CAT; and imposes a duty on letting agents to publish their fees and other information. Further, the Act expands the list of higher education providers which are required to join the higher education complaints handling scheme, and includes certain requirements relating to resale of tickets for recreational, sporting and cultural events.

Previously, if a consumer was presented with misleading information, this information would not be deemed part of the contract. This meant that the only remedy available to the consumer would be to raise an action of misrepresentation. As any misleading statements made by the trader can now become contractual terms, a consumer will now be entitled to raise a breach of contract claim. This is significant because claims for breach of contract are generally easier to prove, and because damages will be awarded based on what the consumer's position would have been had the contract been performed.

#### **5.6.5.3 Unfair terms**

The test for 'unfair terms' in the *Consumer Rights Act 2015* is the same as under the 1977 *Unfair Contract Terms Act*. It provides that a term is 'unfair' if 'contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

The most significant change in the Act relates to 'relevant terms'; which are terms specifying the main subject matter of the contract or setting the price. These terms are not subject to the 'fairness' test provided that they are both:

- transparent: in plain and intelligible language and, if in writing, legible;
- prominent: brought to the consumer's attention in such a way that the average customer — who is well informed, observant and circumspect — would be aware of the term.

#### **5.6.5.4 Individually negotiated terms**

The Act provides that a term can be deemed to be unfair even if it has been individually negotiated with the consumer. This goes further than both the pre-existing law and the EU's Consumer Rights Directive. However, it is unlikely to have a major impact given that very few consumer contracts are actually individually negotiated, as consumers rarely have the bargaining power to negotiate their contract terms individually with traders.

#### **5.6.5.5 Additions to the 'grey list'**

The 'grey list' is an indicative and non-exhaustive list of terms in consumer contracts that may be regarded as being unfair. The list gives an indication of the types of terms which are likely to be considered unfair without any justification being provided. However, a term can be fair even if it is included on the grey list, and can be unfair even if it is not.

The *Consumer Rights Act* adds an additional three terms to the grey list. These are terms which have the object or effect of:

- allowing the trader to decide the characteristics of the subject matter after the consumer is bound;
- allowing disproportionate charges or requiring the consumer to pay for services which have not been supplied when the consumer ends the contract;
- allowing the trader discretion over the price after the consumer is bound.

#### **5.6.5.6 Inclusion of ‘notices’**

An innovative extension to the law in relation to fairness concerns the contents of notices given to consumers by traders. Consumer notices were not previously expressly covered in legislation but they are specifically covered in the Act, which brings them within the fairness regime. The Act treats consumer notices in much the same way as contract terms. Businesses will therefore have to be conscious of the content which is included in notices and ensure that this complies with the fairness test.

A consumer notice is broadly defined as a notice that relates to rights or obligations between the trader and the consumer or restricts the trader’s liability. The definition includes announcements and other communications even where these are made orally.

#### **5.6.5.7 New duty to consider fairness**

A court is now under an obligation to consider contractual terms for fairness, even if neither party to the proceedings raises fairness as an issue. This is already the position of the Court of Justice of the European Union (CJEU). This change will lead to contract terms coming under increasing scrutiny by the courts and terms may be held to be unfair even when the consumer has not complained of unfairness.

#### **5.6.5.8 Digital content**

The *Consumer Rights Act* is the first piece of legislation to regulate the supply of digital content as such. Generally, the supply of digital content is treated in much the same way as the supply of goods in that it must be of satisfactory quality, fit for purpose, and conform to the description provided by the trader.

The supply of digital content will be regulated when:

- it is supplied for a price; or
- it is supplied free with goods and services which the consumer has paid for, and would not be generally available to consumers otherwise.
- The provisions do not apply merely because the trader supplies a service by which digital content reaches the consumer.

## **5.7 Revised United Nations Guidelines for Consumer Protection**

In November 2015, the UN General Assembly passed a resolution adopting a revised set of United Nations Guidelines on Consumer Protection (UNGCP).<sup>714</sup> The resolution which recognises the rapid growth of e-commerce, privacy and digital consumption as essential measures for consumer policy comes 30 years after their initial implementation and 16 years after the addition of a chapter on sustainable consumption.

It is the first comprehensive revision of the UNGCP since 1985 and specifically recognises access to basic goods and services, and the protection of vulnerable and disadvantaged consumers as legitimate needs for consumers.

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714 2015 version not yet published this reference to previous version  
[www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf).

The revision follows a three-year process in which UN Member Countries and civil society organisations have been working on the strengthening and updating of the UNCPG.

The revision of the UN Guidelines was led by the UN Conference on Trade and Development (UNCTAD). In announcing the passage of the revised guidelines, Dr Mukhisa Kituyi, Director General of UNCTAD said:

Today's adoption by the United Nations General Assembly of the revised Guidelines for Consumer Protection is a milestone in the protection and promotion of consumer rights worldwide. I congratulate Governments and the civil society organisations that have joined these efforts. More globalised consumers require strengthened international cooperation, and UNCTAD, with this renewed mandate, stands ready to support developing countries and their consumers in seeking a more sustainable and inclusive world.

## 5.8 2030 UN Agenda for Sustainable Development

Following the successful conclusion of the negotiations on the post — 2015 development agenda, the General Assembly of the United Nations agreed on a plan of action to achieve global sustainable development, which has relevance to moving towards sustainable consumption of consumer goods.

The UN recently announced the Sustainable Development Goals and targets which sets out 17 sustainable development goals and 169 targets. They are designed to stimulate action over the next fifteen years in areas of critical importance for humanity and the planet.<sup>715</sup>

The Plan of Implementation of the World Summit on Sustainable Development can be found at [www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf).

## 5.9 Digital purchasing and digital products

The increased purchasing of goods and services online is presenting new enforcement and administrative challenges. A significant problem arises regarding cross-border enforcement. In this context, the paper reviews the newly introduced EU Regulation on Online Dispute Resolution. This section:

- (a) reviews the range of measures being undertaken by the European Commission and other nominated jurisdictions regarding e-commerce and digital purchasing;
- (b) reviews mechanisms for consumer disclosure and redress;
- (c) considers specifically implementation of the 2015 EU Regulation on Online Dispute Resolution;
- (d) surveys educational work undertaken by ECC-Net.

Perhaps the greatest distinction between the institutional structures relating to the administration and enforcement of consumer laws between United States and Canada on one hand and European member states on the other is the approach to alternative dispute resolution.

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715 See <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

### 5.9.1 Obstacles to the Digital Single Market (2015)

In September 2015, the European Commission published the results of extensive consumer surveys to identify the main cross-border obstacles to the completion of the Digital single market and map means of overcoming them.<sup>716</sup> The report entitled ‘Identifying the main cross border obstacles of the Digital Single Market and where they matter most’.<sup>717</sup>

The rationale for the studies was that in view of the rapid grow of E-commerce in the EU and the Commission’s plans to complete a connected Digital Single Market (DSM) for Europe, it was imperative to identify the existing barriers to the proper functioning of the DSM and to cross-border e-commerce in particular.

Both surveys covered three broad market categories: tangible goods and offline services ordered online (e.g. clothing, travel services), online services (e.g. social networks, communications services) and digital content (e.g. e-books, films and TV series). The Core survey was conducted online in all EU28 Members States, including Norway and Iceland, using consumer panels in all 30 countries. The Clickstream survey was conducted in Belgium and Poland with online respondents who reported their intention to make an online purchase during a 2-3-week period. Respondents allowed their online activity to be tracked by a special add-on designed to record online browsing activity (websites, time spent etc.). The raw clickstream data collected was supplemented by consumer insights obtained via weekly diary surveys which collected additional data on respondents’ actual online purchases.

Combining insights from clickstream data with online survey data provided a richer preliminary overview of the drivers and impediments to domestic and cross-border e-commerce. A dedicated chapter ‘Consumers in the Digital Single Market’ of the surveys’ results is featured at the 2015 Consumer Conditions Scoreboard.

### 5.9.2 Key findings of the surveys

- The proportion of online consumers who purchased tangible goods and offline services domestically ranged from 61-75% across 12 types of markets (54-73% accessed 8 different types of digital content), with cross border purchases within the EU accounting for 14-22% (12-17% for access to digital content) of online consumers. A significant proportion of respondents who accessed digital content (22-35%) did not know the origin of their online seller/provider
- At EU28 level, 95% of all online survey respondents purchased tangible goods and offline services at least once in the last 12 months. The most commonly purchased goods were clothing, shoes and accessories (76%).
- Online shoppers make cross-border purchases without always realising it — 40% of those making their latest online purchase from another EU country assumed the purchase to be from a domestic seller.
- Cross border online activity is more popular in some smaller EU countries with language and cultural links to larger markets. Young age and higher international exposure (knowledge of foreign languages and travelling abroad) are positively correlated with making online cross-border purchases.

716 Recent study on obstacles to the Digital Single Market (2015): [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm) Civic Consulting study on cross-border ADR (2011): [www.europarl.europa.eu/meetdocs/2009\\_2014/documents/imco/dv/adr\\_study\\_/adr\\_study\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf).

717 See [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstACLes\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstACLes_dsm/index_en.htm).

### 5.9.3 Types of purchases and online spending<sup>718</sup>

- The total market value of the B2C segment of the DSM Market is estimated at ~ €231 billion. Tangible goods and offline services are estimated to represent 92% of this total value, with digital content and paid online services accounting for only 6% and 2% respectively. The intra-EU cross-border component represents around 14% of the total value (and cross-border purchases from outside the EU around 6%).
- The average online consumer who purchased tangible goods and offline services in the last year reported spending €760. Much lower figures for online services (€94/year) and digital content (€107/year) were reported amongst those who made such purchases (different base sizes). The difference between domestic and cross-border spending was less pronounced for digital content products than with tangible goods/offline services.
- EU13 consumers spend relatively more (than EU15) on online purchases from other EU countries.
- Online consumers spent on average €100 on their latest online purchase which tended to be a tangible good/offline service (93%). The most commonly purchased product was clothing, shoes and accessories (21%), followed by electronics and computer hardware (13%).

### 5.9.4 Consumer attitudes and behaviour regarding online purchases

- The average time online shoppers spent in total on their most recent online purchase was 3.1 hours.
- Visiting online market places, e.g. Amazon, eBay (42%), visiting seller or service provider websites (41%) and searching via a general search engine (38%) were the three most preferred means of researching an online purchase.
- The choice for a specific seller is mostly determined by price (45%) and previous experience (44%). 84% of online shoppers used a website for their latest online purchase, with 13% purchasing via an app and 3% via an Appstore.
- Respondents from EU13 countries (47% vs 12% for EU15) are much more likely to pay cash on delivery. The most commonly used devices for making online purchases were a laptop (80%), followed by a desktop PC (73%) and a smartphone (59%).
- Concerning knowledge of consumer rights when buying online, only 9% of EU28 online consumers identified correctly the latest stage when they have the right to withdraw from a purchase of a digital content and get their money back.

### 5.9.5 Perceived and actual barriers with online (cross-border) purchases

- Data protection and payment security (30% of online consumers were concerned that personal data may be misused and 25% that payment card details may be stolen) and consumer rights (fear of receiving wrong or damaged products — 26%, difficulty in replacing or repairing a faulty product — 22% and difficulty in returning a product they did not like and get reimbursement — 22%) are key concerns in domestic e-commerce.

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718 Recent study on obstacles to the Digital Single Market (2015): [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/obstacles\\_dsm/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/obstacles_dsm/index_en.htm). Civic Consulting study on cross-border ADR (2011): [www.europarl.europa.eu/meetdocs/2009\\_2014/documents/imco/dv/adr\\_study\\_/adr\\_study\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf).

- Concerns about cross-border e-commerce are linked primarily to delivery (delivery costs — 27%, high return shipping costs — 24% and long delivery times — 23%), followed by redress (the difficulty of solving problems if something goes wrong — 23%) and consumer rights (getting a faulty product replaced or repaired — 20%, returning a product consumers did not like and getting reimbursed — 20%)
- 31% of all EU28 online shoppers experienced at least one problem when making or trying to make an online purchase in the past year; problems were more prevalent in the EU13. Cross-border purchases, both within the EU and from outside the EU, accounted for a disproportionately high amount of problems.
- Consumers continue to face problems with cross-border online transactions linked to their country of residence (e.g. refusal to sell, redirection to the foreign seller's website in the country of the consumer, being charged more by foreign seller, not being able to access the service etc.).
- When crossing an EU border, consumers are frequently prevented from accessing streaming content which they accessed for free or via a payment in their home country. Out of those respondents who streamed films and TV series or live events (e.g. sports matches) in the last 12 months and tried to access these streaming services of their own country while being abroad, 43% and 51% respectively reported not being able to access the content when abroad.
- 16% of respondents did not take any action to resolve their most recently experienced problem. Approximately two thirds of respondents who took action were satisfied with the way their complaint was handled. The highest satisfaction was with out-of-court dispute resolution entities (68%), whilst the lowest with court (54%).

## 5.10 Other interesting developments

The terms of reference for this project called for identification and a description of 'other interesting developments'. This section contains a number of recent consumer protection innovations and proposals.<sup>719</sup>

The first provides a review of the first 10 years of operation of the EEC-Net.

- Included in this section is a summary of the recent ECC-Net Europe wide study on Chargeback and maps the growing use of chargeback as a means for resolution of consumer.
- The section also includes a brief history of the development of chargeback and limitations in this remedy in circumstances where traders refused to make a refund where it is warranted.
- Also discussed is a proposal for the development of a Pan-European Trust Mark.
- The paper includes a review the project on Best Practices of Consumer Redress being undertaken by Dr Ying Yu from the University of Oxford for UNCTAD.
- Recent information on the launch of the European Union Online Disputes Resolution platform is provided.
- An outline of the innovative European e-Justice Portal.

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719 This recent study on legal and commercial guarantees may also be of relevance:[http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/guarantees/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/guarantees/index_en.htm).

- Consumer Conditions Scoreboard which tracks the situation and behaviour of consumers across member states of the EU and over time. Such a tool enables policymakers to plan interventions where necessary or discontinue interventions which are no longer necessary.
- To understand the progress and achievements of consumer and market integration policies, the EU commissions from time to time impact studies. This report presents the results of a study commissioned by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) and carried out by Civic Consulting between July and September 2014. The study concerns achievements in the area of the single market and consumer protection.

## 5.11 The European Consumer Centres Network (ECC-Net)

ECC-Net was established in 2005 to respond to the multiple challenges to consumer welfare caused by burgeoning cross border commerce. It was created by the European Commission together with national governments to provide an accessible network of European Consumer Centres (ECCs) for consumers across the Commission Member Countries. According to an ECC-Net report published on the 10th anniversary of the network, between 2005 and 2014, 650,000 consumers have used the services of the network. In recent years the activities of ECC-Net have extended beyond the boundaries of the EU and now include Norway and Iceland.<sup>720</sup>

A key aim for the Network (which has no formal consumer law enforcement role) is to undertake comparative research, engage in information and education projects and help consumers understand and use their consumer rights.

### 5.11.1 Operational information

The ECC-Net is a network of 30 offices in the EU Member States, Norway and Iceland, providing free-of-charge help and advice to consumers on their cross-border purchases, whether online or on the spot within these 30 countries.

The ECC-Net report states that it is in direct contact with some 100,000 consumers every year and handles about 40,000 consumer complaints. Well over 3 million more access information on member websites, and many others through their apps, from ECC staff on stands at events, or from media reports highlighting warnings or cases published by the Centres.

The ECC-Net is staffed by legal experts who provide personalised advice and assistance. They help consumers make complaints against traders who sell faulty goods and services, or otherwise fail to live up to the standards required by EU legislation, e.g. on travellers' rights.

The ECC-Net advises on handling disputes between a consumer and a trader located in two different countries with the aim of achieving amicable outcomes. More than two third of the cases are solved in this way.

ECC-Net staff do not have legal powers to settle disputes or offer court representation, but can advise on how to go down these routes if it proves necessary. The ECC-Net Centres strive to deliver services to a common high standard, based on uniform guidance on customer service, good practice, data protection, quality, branding, case-handling and more.

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720 CPEC evaluation of the ECC-Net (2011): [http://ec.europa.eu/consumers/ecc/docs/final\\_report\\_cpec\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/final_report_cpec_en.pdf). CPEC evaluation of the CPC Regulation (2012): [http://ec.europa.eu/consumers/enforcement/docs/cpc\\_regulation\\_inception\\_report\\_revised290212\\_en.pdf](http://ec.europa.eu/consumers/enforcement/docs/cpc_regulation_inception_report_revised290212_en.pdf).

The ECC-Net Centres work closely with each other and with enforcement bodies to resolve complaints, and to uphold the uniform consumer rights that EU residents enjoy wherever they are in the EU.

The ECC-Net Centres pool their expertise to research consumer rights topics and consumers' day-to-day experiences with EU legislation in action, and in this way to identify gaps and emerging issues.

### 5.11.2 Role and activities

European consumer policy and measures to implement it are an amalgam of Member State measures plus EU Directives which are transposed into local law and enforced and implemented by member state institutions. This makes ECC-Net an unusual body as an EU body operating in Member States alongside existing government and non-government agencies. In recent years, consumer policy has received high priority on the Commission's agenda and this is true of the current Juncker Commission's priority list. A key role adopted by ECC-Net is to assist in achieving a strong and coherent consumer policy to reap the full benefits of the Digital Single Market — for both consumers and businesses.

With rapid growth in online shopping, the ECC-Nets' role in resolving cross-border disputes has grown and is expected to continue at an accelerating rate. Their role in advising consumers, and ensuring that their rights are upheld are seen as important to building trust in the digital economy.

### 5.11.3 Future challenges

According to the 10th Anniversary Report of ECC-Net:

The numerous achievements of the last 10 years and the proposals for improvements already in the pipeline and described in this report are not the end of the story. There are still obstacles to consumers making the most of the opportunities of the EU's Single Market, and above all of the Digital Single Market. Consumers could save EUR 11.7 billion per year if they could choose from the fullest possible range of goods and services from across the EU's 28 countries when they shop online.<sup>721</sup>

Nearly three-quarters of all European Internet users feel they are being asked for too much personal data online, and of all attempts to place a cross-border order, in just over half the seller does not serve the country of the consumer.

In addition, copyright rules are preventing Europeans from watching content from their own country when they travel, or from watching content from other countries from their own homes. Yet, images, films, music and games are the most popular online activities and digital spending on entertainment and media has double digit growth rates.

The Commission's Digital Single Market Strategy is about overcoming the obstacles. Future legislation will improve data protection and give individuals control over their personal data, and further harmonise online rights while tackling unfair practices and discrimination. Other obstacles will be addressed by improving technical standards and telecoms infrastructure, and citizens' digital skills.

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721 See [www.google.co.id/search?q=ecc-net+10th+anniversary&oq=ecc-net+10th+anniversary&aqs=chrome.69i57.11395j0j9&sourceid=chrome&ie=UTF-8](http://www.google.co.id/search?q=ecc-net+10th+anniversary&oq=ecc-net+10th+anniversary&aqs=chrome.69i57.11395j0j9&sourceid=chrome&ie=UTF-8).

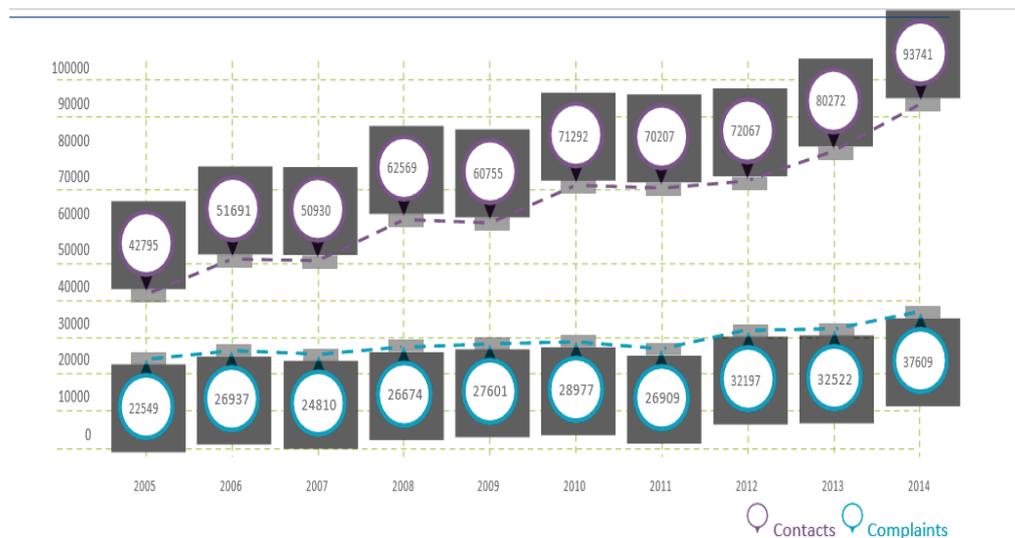
Over the 10 years from 2005-2014, the ECCs had over 650,000 direct contacts with consumers, and the number has grown steadily. In 2014 alone, the figure was well over 90,000, twice as many as in 2005. These are consumers who have made direct contact with an ECC. More often than not, all they need is an explanation about their rights.

If a consumer has a specific complaint about a trader, the Centres' legal experts provide specific advice. Where complaints remain unresolved, the ECC may get more directly involved, either by contacting the trader or asking the ECC in the country where the trader is established to do so. ECCs have helped out in this way nearly 300,000 times in the last 10 years. In 2014, they dealt with more than 37,000 complaints.

#### 5.11.4 Contacts and complaints

In addition to direct contacts, ECCs often reach out to consumers at events with publications and information, and increasingly consumers find what they need on the ECCs' detailed websites. In 2014, they received more than three million visits altogether. This number is expected to grow considerably as a consequence of active online marketing efforts being undertaken by the ECCs.

The move to online is also increasingly reflected in the way complaints are lodged, that is, via online forms (20% of all complaints in 2014).



#### 5.11.5 Research activity

Recent consumer research commissioned by ECC-Net undertaken through cross-border mystery shopping entitled 'State of the e-Union' uncovered a series of obstacles to cross-border shopping, starting with it being surprisingly difficult to find a website willing to sell to someone in another country. Many websites were not providing basic information about how to contact them, on where they were based, but for the websites agreeing to deliver cross border, there were as few issues as for a purely domestic transaction.

So while the ECCs concluded that consumers can shop on line with confidence, they stressed the need to check some basics before embarking on a purchase.

The ECC-Net has supported the development of online consumer fairness with tips for consumers on how to know which traders to trust and how to avoid scams. In the European Consumer Centres E-commerce report 2014, for example, consumers can test their knowledge of their rights using a checklist, and there is also a checklist where traders can make sure they are on the right side of the law.

#### **5.11.5.1 Case studies of ECC-Net activities**

Car rental to find a fair deal

- ECCs have dealt with more than 8,000 cases involving car rental over the last 10 years. Moreover, the number of complaints has more than doubled between 2010 and 2014, while the total number of complaints received by ECCs only increased by half.
- This has led ECCs to engage vigorously with the car rental industry, requiring it to become much more transparent about total rental costs and various exceptions to the damage coverage solutions proposed, and to be so right from the booking stage.
- ECCs have issued leaflets and detailed advice warning consumers about most common unfair commercial practices, such as overcharging for damage or fuel, or high administrative costs for dealing with road traffic fines on behalf of consumers.
- The evidence of malpractices accumulated by ECCs led the European Commission to propose to national enforcement authorities that they act jointly at EU level to require the car rental industry to comply with EU consumer legislation

ECCs provide guidance

- ECCs proactively issue guidance on passenger rights, regularly issuing information when airlines go out of business or passenger travel companies are on strike; they frequently take stands at travel fairs and have issued a number of special reports to support consumers and/or policy makers:
- 2010: Classification of Hotel Establishments within the EU provided practical guidance on understanding Europe's complex hotel classification systems. It described each ECC country's system in detail.
- ECC-Net Air Passenger Rights Report 2011 — in the aftermath of the 'Volcanic Ash Crisis': the problems passengers experienced in asserting their air passenger rights when many flights were re-routed, delayed or cancelled. These included a lack of information on their rights, a lack of assistance and not getting their money back when they arranged their own alternative transport.
- 2012: Alternative Dispute Resolution in the Air Passenger Rights Sector, highlighting how diverse the ADR landscape is for air travellers and underlining that it had not reached its full potential.
- 2013: Ski Resorts in Europe 2012/2013: the price range and infrastructure of ski, cross-country and indoor resorts all over Europe.

#### **ADR research**

- There has been a steady increase over the last decade in the number of EU-wide rapid and inexpensive cross-border dispute resolution options designed for cases which often involve small amounts of money. Consumers hesitate to engage in court litigation in such cases. Surveys have shown that one third of the EU's consumers have not gone to court after a

problem they encountered because the sums involved were too small or the procedure for going to court would be too expensive or too complicated. The same number felt similarly about alternative dispute resolution, or simply did not know this possibility exists.

- Pointing consumers in the direction of the right alternative dispute resolution mechanism which offers a fast and cheap solution is therefore an important part of the work of ECCs, once their best efforts to broker an amicable solution have not been successful.

### 5.11.6 Chargeback as a consumer protection tool

Recent developments in the protection of consumers in E-commerce include the right of payment card holders to ‘chargeback’ for payment for unsatisfactory goods or services. This US development is being taken up in the EU.

This section contains a summary of the recent ECC-Net Europe wide study on Chargeback and maps the growing use of chargeback as a means for resolution of consumer disputes in circumstances where traders refused to make a refund where it is warranted.

The section also includes a brief history of the development of chargeback and limitations in this remedy. This paper summarises a 2014 ECC-Net research report entitled “Chargeback in the EU/EEA:

#### **A solution to get your money back when a trader does not respect your consumer rights’**

The report considers that consumers in Europe have benefited greatly from recent improvements to national and European Union consumer legislation the reliability of e-commerce (and distance selling in general) has greatly improved in Europe in the last ten years. According to the last Consumer Scoreboard published by the European Commission<sup>1</sup>, the proportion of consumers engaging in e-commerce has grown significantly in recent years (from 20 % in 2004 to 45 % in 2012).

Despite the improvements in consumer protection, there remain a number of challenges to protect consumer rights when a trader refuses to provide a refund when warranted or has gone bankrupt, or when a card transaction was not authorised.

The 2012 ECC-Net European Small Claims Procedure Report highlighted a lack of awareness of the procedure among judges. It pointed out that translation costs can undermine the principle of obtaining redress. Serving the judgement, and above all, getting it enforced, are other obstacles to this procedure working as well as it might. This work was taken into account by the Commission in its 2014 proposal on a revised Procedure.

In many EU Member States, consumers having used a payment card may be entitled to be reimbursed by a chargeback procedure through the card issuing bank. The ECC-Net report was commissioned to inform European consumers about this procedure and how it is implemented in the various EU countries, Norway and Iceland.

#### **5.11.6.1 Definition of chargeback**

According to the ECC-Net originally chargeback was a system developed by payment card issuers to protect consumers in case of fraudulent authorisation of their card (e.g. following a theft or card cloning). However, chargeback may also apply to reverse authorised payments made by a consumer by card in duly justified cases of breaches of consumer rights or in case of the report bankruptcy of the recipient.

In a report from the year 2000 from the EU- Commission, chargeback is defined as the following:

Chargeback is the technical term used by international card schemes to name the refunding process for a transaction carried out by card following the violation of a rule. This process takes place between 2 members of the card scheme, the issuer of the card and the acquirer (the merchant's bank). The final customers of these 2 schemes members, the cardholder for the issuer and the merchant for the acquirer, do not have any direct relationship in the chargeback process.

#### **5.11.6.2 Objective and methodology of the report**

The objective of the report is to clarify the legal bases for chargeback procedures that can be used by consumers in the EU, Norway and Iceland (namely Directive 2007/64/EC on payment services in the internal market (PSD) and Directive 2008/48/EC on credit agreements for consumers (CCD), how they are implemented on the ground, the existence of out-of-court dispute resolution procedures and the additional possibilities that card issuers may give to their clients. The report has been completed by the European Consumer Centres Network. The ECC-Net main objective is to inform and assist European citizens in all their practical cross-border consumer issues. There is established a European Consumer Centre in the 28 EU countries.

#### **5.11.6.3 Legal rights to chargeback**

EC rules for payment services and credit<sup>722</sup> form the main legal bases to request a charge back in the following cases:

- the transaction is not authorised by the consumer/cardholder;
- the trader does not respect the consumers' rights;
- in the case of bankruptcy.

According to the ECCs participating in the project, these Directives have been transposed into the domestic legislation in all the EU member States, Norway and Iceland.

#### **5.11.6.4 Non-authorised use of cards**

In the EU, Norway and Iceland, when the consumer's card has been charged without authorisation from the consumer, e.g. if the card has been stolen, the payment service provider (e.g. a credit institution) shall refund the amount to the cardholder (Article 60 of the PSD).

However, Article 61 states that the cardholder/consumer shall bear the losses relating to any unauthorised payment transactions, up to a maximum of EUR 150, resulting from the use of a lost or stolen payment instrument, or if the cardholder has failed to keep the personalised security features safe, from the misappropriation of a payment instrument. In this respect, Article 56 of the PSD requires the cardholder to take all reasonable steps to keep personalised security features safe, incl. the PIN number.

#### **5.11.6.5 Cases relating to use of the PIN code**

If the PIN number has been used, the consumer may therefore be obliged to cover the losses him/herself in case of proven gross negligence or fraudulent behaviour (in the latter case, there could also be a criminal prosecution).

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722 EU Payment Agreements Directive 2007/64/EC on payment services in the internal market (PSD) and Directive 2008/48/EC on credit agreements for consumers (CCD).

The consumer has to notify the loss, theft or inappropriate use of the card to the card issuer as soon as he/she becomes aware. The payment service provider shall ensure that appropriate means are available at all times to enable the consumer to make a notification.<sup>723</sup>

#### **5.11.6.6 Pre-authorised payment transactions**

When it comes to pre-authorised payment transactions, sometimes the consumers complain about unexpected supplementary charges in the final payment, e.g. in relation to car rental. However, the consumers might have signed an agreement where the supplementary charges are included, for example that they have accepted to be charged for any damages to the car. According to PSD, Article 62, the cardholder may still be entitled to a refund of a payment transaction initiated by or through a payee and which has already been executed. The conditions are that the authorisation did not specify the exact amount, and this amount exceeded the amount the cardholder could reasonably have expected, taking into account his previous spending pattern, the conditions in his framework contract and relevant circumstances of the case.

#### **5.11.6.7 Goods or services not delivered or not in conformity with the contract**

If the consumer has purchased goods on the internet and does not receive the goods, he or she should first complain to the trader. If the trader does not deliver the goods or does not reimburse the payment made, the consumer can turn to the payment service provider.

In terms of chargeback, EU-law only covers credit card chargeback. Purchases where debit cards are used are not covered by EU-law but can be covered by national law such as in Denmark and Portugal. Debit card holders may nevertheless under certain circumstances enjoy protection of the card companies operating rules.<sup>724</sup>

The CCD leaves ample space for consideration to member states. The legal situation therefore varies among participating countries. Some countries allow consumers to exercise the same rights against the creditor (credit card issuer) as well as against the seller of goods or service provider. Certain conditions may have to be met in order for the consumer to be allowed to make a claim against credit card issuer. Such conditions may for instance include that the consumer makes an unsuccessful claim with the seller or service provider first.

#### **5.11.6.8 Bankruptcy**

When the trader goes bankrupt the trader will often not have the economic recourses to reimburse the consumer, and chargeback could be the only way for the consumer to obtain a refund.

### **5.11.7 Other chargeback possibilities**

Many of the respondents have stated that banks do provide chargeback based on the card companies operating rules, however, many of them also state that the bank doesn't inform consumers about this possibility and that consumers must insist to get the bank handling their requests.

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723 The consumer could be liable for all losses where there has been a failure to fulfil one or more of his obligations under Article 56 with intent or gross negligence, cf. Article 61 number 2.

724 Under Article 15 of *Directive 2008/48/EC* on credit agreements for consumers (CCD) where the goods or services covered by a linked credit agreement are not supplied, or are supplied only partially, or are not in conformity with the contract for the supply thereof, the consumer has the right to pursue remedies against the creditor. Member States shall determine to what extent and under what conditions those remedies shall be exercisable.

#### **5.11.7.1 Out-of-court dispute resolution procedures**

According to CCD (Article 24) and PSD (Article 83), the Member States shall ensure that out-of-court dispute resolution procedures/ Out-of-court redress procedures for the settlement of disputes are in place. If the consumer does not obtain a chargeback/refund, he should therefore be able to make use of out- of-court procedures.

There are out-of-court dispute resolution entities which can handle chargeback in all of the countries which participated to the survey. Not all of the countries have a specific ADR body for these cases. Romania has authorised mediators who have the competence to deal with payment service problems. In most countries, however, there is a specialised ADR, a general ADR covering all types of consumer disputes or different ADRs depending on the dispute category.

However, there might be certain conditions which must be fulfilled before the consumer can make use of the out-of-court dispute resolution procedures. In Romania mediation can only take place if both parties agree and conclude a contract. According to the Italian Law on Banking, it is mandatory for banks and financial intermediaries to participate in systems for the out-of-court resolution of disputes with customers. In Spain it is not mandatory to be a member of the ADR system. If the bank is not a member of the ADR system, the ADR is not able to handle the case. This is also the current situation in Norway, but very few companies do not participate in the ADR system, and participation will soon become mandatory.

The Financial Services Ombudsman of Ireland has handled 26 chargeback complaints from 2011 to 2013. Although these cases are confidential, they informed the ECC that the consumer complaint was upheld on 3 occasions, partially upheld on 1 occasion and not upheld in 22 instances.

#### **5.11.7.2 Cross-border disputes**

According to CCD (Article 24) Member States shall encourage the out-of-court entities to cooperate in order to also resolve cross- border disputes concerning credit agreements made between two parties residing in two different countries. According to PSD (Article 83), Member States shall also make sure that those concerned bodies cooperate actively in resolving cross-border disputes.

### **5.12 Proposal for a Pan-European Trust Mark**

This study presents the results of research conducted by Civic Consulting between March and June 2012. Its purpose is to examine the possibilities and opportunities of creating a pan-European Trustmark for e-commerce.

#### **5.12.1 Consumer trust in e-commerce**

Trust has been identified as an important factor in consumers' purchasing decisions and lack of trust has been repeatedly highlighted as one of the key impediments to e-commerce.

In a 2011 consumer market study consumers were concerned, among other things, about returning products, wrong or damaged products being delivered, problems with replacement or repair of a faulty product, products not being delivered at all, personal data being misused and payment card details being stolen. When considering shopping online in another EU country, only 12% of consumers stated that they did not have any concerns.

There are different possibilities for trust-building related to online shopping. Differences between smaller traders and those that have built their own widely known brands have to be noted. Big brands capitalise on their recognition and reputation and have less or no need to support their trustworthiness with additional cues such as Trustmarks.

### 5.12.2 Trustmarks for e-commerce

Trustmarks for e-commerce are intended to be displayed on a website as electronic labels, and the purpose is to signal adherence to a set of rules (a code of conduct) to increase consumers' confidence in the online trader.

One of the defining characteristics of a Trustmark is the involvement of a third party which provides an assurance to consumers regarding the online trader. Third-party certification is at the heart of a credible Trustmark. It entails a set of requirements and the assessment of an online trader's compliance with these requirements.

There is significant diversity among existing Trustmarks in the EU. Some points of distinction are: a formal accreditation of a Trustmark, the nature of organisations which administer Trustmarks, their sources of funding, involvement of stakeholders, geographical and substantive scope of coverage, monitoring traders' compliance and sanctioning non-compliance.

Research findings concerning the actual effects of Trustmarks are scarce and not consistent. Several studies have found that effects of Trustmarks are mostly identifiable with people who generally consider online shopping as risky. A previous study has indicated awareness among consumers and businesses as one of critical success factors, thus a particular challenge is the low consumer awareness of Trustmarks.

There has been some progress in recent years with the consolidation and expansion of some of the existing Trustmarks, as can be inferred from the increasing numbers of certified traders using Trustmarks included in this study.

### 5.12.3 Advantages and disadvantages of an EU Trustmark for e-commerce

Potential advantages and disadvantages of an EU Trustmark are conditional upon its design.

The main possible advantages identified through research for this report are: support for SMEs; enhanced cross-border coordination of Trustmarks and exchange of best practices; overcoming language barriers; increased legal certainty; increased credibility of accredited Trustmarks; broad recognition among consumers in different MS; increased trust in online shopping; enhanced cross-border trade.

Possible disadvantages could be in the administrative burden for businesses; potential confusion among consumers; interference with existing Trustmarks; difficulties with ensuring consistency across the EU; the cost of administering the Trustmark; gaps in coverage in case of an accreditation scheme for existing Trustmarks; and discrediting compliant traders and other Trustmarks in case of lacking enforcement.

#### 5.12.4 26.4 Legal framework for e-commerce Trustmarks<sup>725</sup>

There is no particular piece of EU legislation addressing only Trustmarks, but some legislation touches upon several relevant aspects: The primary legislation regulating the use of Trustmarks is that concerning commercial communication directed at consumers, including in particular the 2005 Unfair Commercial Practices Directive (UCPD). In addition, a number of other consumer protection directives are relevant in the context of drafting the requirements for the use of a Trustmark.

Generally, there is a comprehensive set of rules in EU legislation protecting consumers in e-commerce and any code of conduct underlying a possible EU Trustmark for consumer protection in e-commerce must be understood in the context of already existing EU legislation.

A Trustmark is likely to be perceived as a guarantee by a consumer. This entails that Trustmark must guarantee something that is not already prescribed by law. This principle is introduced into EU law in the UCPD Annex I, item 10, which states that it is a misleading commercial practice to present rights given to consumers in law as a distinctive feature of the trader's offer. However, it should be considered that for example certification, monitoring, enforcement, etc. by a third party intrinsically entails benefits for the consumer and is beyond what is merely prescribed by law.

The Trustmark may establish expectations, such as guarantees with consumers that the issuer may be liable for, to the extent consumers are disappointed with regard to their reasonable expectations. The Trustmark operator is not likely to be liable for all breaches by a trader — unless the Trustmark includes a guarantee that specifically covers this. Whether the Trustmark operator may be liable will depend on the interpretation of national law, including whether the Trustmark operator has failed to carry out controls of the trader in accordance with the reasonable expectations that consumers may form from the Trustmark and its marketing.

#### 5.12.5 An EU Trustmark for e-commerce<sup>726</sup>

There exists a broad spectrum of policy options on how to tackle and foster a pan European Trustmark for e-commerce. Five main strands of policy scenarios are: no intervention; encouraging self-regulation; co-regulation; establishing EU accreditation of Trustmark providers; establishing a pan-EU Trustmark for ecommerce.

If EU policy makers decide to introduce a Trustmark at EU level, this would basically be akin to establishing a privately operated Trustmark in the sense that the desired scope can be freely chosen. It is advisable for an EU Trustmark to provide for procedures for both initial and recurrent assessment as well as sanctions in case a violation of the code of conduct is identified.

A consumer may reasonably infer that a Trustmark is something earned (i.e. voluntary) rather than something required, as well as that the bearer of a Trustmark performs above the requirements of legislation. The existence of certification requirements and procedures could be taken to exceed compliance with legislation and offer consumers an extra aspect of protection.

If policy makers decided to introduce a mandatory EU Trustmark for e-commerce, it would be necessary to introduce EU legislation imposing the requirement on traders and to examine potential conflicts with existing EU legal framework. From a political and economic perspective, a mandatory EU Trustmark might come with a number of additional challenges.

725 See [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/e\\_commerce/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/e_commerce/index_en.htm). Civic Consulting study on a Pan-European trust market for e-commerce (2012): <http://bookshop.europa.eu/en/a-pan-european-trustmark-for-e-commerce-pbBA3212266/>.

726 See [www.ecommerce-europe.eu/about](http://www.ecommerce-europe.eu/about).

In general terms, the choice of legal instrument follows the scale of the extent to which Member States are to carry out the intentions of the Trustmark scheme. If an EU institution should award the Trustmark, a regulation would be appropriate. If the approach was for Member States to set up national institutions and ensure accreditation at national level, a directive would be appropriate.

When laying out the principles for certification of the EU Trustmark, it would be important to note that compliance with some requirements is much easier to control than with others. In contrast to compliance with information requirements that are generally easy to assess, the adherence to requirements concerning commercial practices and the processing of personal data seems rather difficult.

Challenges inherent in the setting-up of an EU accreditation scheme or an EU Trustmark would include legal implications, proper enforcement and sustainable funding, among others. Awareness among consumers is considered a key factor for success. Analysis for this study has revealed that it typically takes a minimum of five years from the inception of a Trustmark until considerable dissemination.

Differences in substantive law that continue to exist must be considered. They can be overcome by adopting a code of conduct that satisfies requirements in all Member States (highest common denominator). Another approach to deal with differences in national consumer protection law is to fully harmonise the areas in question.

### **5.13 Best practices for all consumer redress**

Review the project on Best Practices of Consumer Redress being undertaken by Dr Ying Yu from the University of Oxford for UNCTAD.

During 2015, The United Nations Conference on Trade and Development (UNCTAD) commissioned Dr Ying Yu, a Research Fellow at Wolfson College, University of Oxford to undertake a study on the best measures currently available for obtaining consumer redress.

In February 2016, Dr Yu, noted that research work was well underway and that the project has made considerable progress. Dr Yu observed however that no preliminary material resulting from the study is yet available and that this will be released at a seminar to be held in September 2016 in the UK.

This section of the report provides an overview of the underlying purpose for the study and describes objectives and project plan.

The functions of Consumer Protection Law include regulating business misconduct and providing redress for consumers when something goes wrong. However, providing redress for consumers is somewhat overlooked by both international and national consumer policy and law. The context to this research project is that consumers are not protected by the existence of a law, but resolution of problems in the simplest way.

A case study comes from the Consumers International member survey carried out in 2012/13. CI members were asked: 'Have any of the following enforcement actions been used in your country by the authorities in response to consumer protection violations?' Among the measures listed, out of 62 countries responding, fines were imposed in 92% of cases, but compensation orders were granted in only 53%. The European Commission has estimated aggregate losses to consumers and to the economy: 'In 2010 one in five European consumers experienced problems when buying

goods and services in the single market’<sup>2</sup> and ‘The cost of unresolved consumer disputes is estimated at 0.4% of the EU’s GDP. This includes the money lost by European consumers due to problems when shopping from other EU countries, which is estimated between €500 million and €1 billion.’

In the USA, it seems that Class Action is a very powerful tool to obtain redress for consumers by very punitive compensation. In contrast, US-style Class Action has been described as a ‘toxic cocktail’ by the EC which has placed emphasis rather on Consumer ADR (Alternative Dispute Resolution). Two new pieces of legislation, on Consumer ADR and Consumer ODR (Online Dispute resolution) have recently been adopted by EU on 21 May. Meanwhile, China is undertaking a reform of Consumer Protection Law with consumer redress as one of the most significant topics. Chinese legislators and consumer specialists anchor their hopes on introducing Class Action into Chinese consumer law to move away from the dilemmas caused by the present deficient consumer redress mechanisms. But whether Class Action will function well in every legal system is not known. The EU has already indicated its view that Class Action does not provide an effective way to redress consumer grievances in most cases, and that ADR does provide a more promising approach.

In the area of financial services, the Financial Ombudsman Service in UK turns out to have been a very successful Consumer ADR mechanism, judging from the volume of adjudications. In E-commerce area, payment medium seems very effective to ensure the consumer redress. ‘Chargeback’ for payment card holders originated from the USA as a legal right for consumers and was applied in the EU as a contractual right for consumers, and now functions as a very effective tool for consumer redress both in USA and EU. In China, Escrow is widely accepted by E-commerce consumers to guarantee their transactions, but is only a *lex mercatoria* not backed by legislation. It functions much better than statutory routes for consumer redress in China, but has been well developed in jurisdictions with a common law system for more than 500 years.

One area of increasing importance is cross-border redress as the volume of cross-border transactions rises following the development of e-commerce, migration and tourism. Difficulties in resolving potential cross-border problems have been found to inhibit cross-border transactions for some years now. Networks such as the ECC-Net have been set up to coordinate responses by consumer protection agencies in different countries and to advise consumers affected. Such networks have limited judicial powers but merit investigation nonetheless.

### 5.13.1 Objectives

The objective of this research is to compare and analyse some of the best practices of effective consumer redress in different jurisdictions, and draw a clear picture of the circumstances under which the individual practices function well. This will help developing countries to reach an objective approach to the orientation of their consumer redress policy. Moreover, the research will come up with suggestions regarding the possibility and the practical approach to building up an ADR (ODR) Platform of Cross-Border Consumer Redress globally.

#### 5.13.1.1 Project plan

- Phase 1: Investigate and select a few relevant and effective consumer redress tools as best practice models. Examples to be drawn from US, EC and China
- Phase 2: Survey and analyse how and why the models function well.
- Phase 3: Compare the results and try to synthesise an approach for a cross-border consumer redress platform.
- Phase 4: Draft a report containing the conclusions and recommendations.

### 5.13.2 The European e-Justice Portal<sup>727</sup>

The European e-Justice Portal benefits citizens, businesses, lawyers and judges with cross-border legal questions and boosts mutual understanding of different legal systems by contributing to the creation of a single European area of justice.

An Italian consumer travelling in Germany needs a lawyer. A French entrepreneur wants to search the Hungarian land register. An Estonian judge has a question about the Spanish court system. Answers to all these questions — in 23 official EU languages — can be found on the European e-Justice Portal.

With more than 12,000 pages of content, the portal provides a wealth of information and links on laws and practices in all EU countries. The resources range from information on legal aid, judicial training, European small claims and videoconferencing to links to legal databases, online insolvency and land registers. It also includes user-friendly forms for various judicial proceedings, such as the European order for payment.

The portal is implemented by the Commission in very close cooperation with the EU countries.

#### 5.13.2.1 The portal

Though not specifically designed as a means of access to justice for consumers, nonetheless, consumers will be able to get answers on how the 28 EU countries' legal systems function. More than 10 million citizens face judicial procedures involving different EU countries every year. The Portal helps them find relevant information when dealing with events such as divorce, death, litigation, succession or even moving house. They can find a legal practitioner in another country and learn how to avoid costly court cases through mediation, where to bring a lawsuit, which country's law applies to their case and whether they are eligible for legal aid.

Consumers, traders, government official's lawyers, notaries and judges can get access to legal databases, contact colleagues through judicial networks and find information on European judicial training. They can also find practical information on arranging multi-country videoconferences.

Businesses can search in interconnected insolvency registers, find links to land registers, find information on cross-border proceedings and the laws that apply.

#### 5.13.2.2 Next steps

The first release of the Portal in 2010 was just the first step in developing a multilingual online access point that makes life easier for citizens, businesses and practitioners in Europe. New information, tools and functions are being continuously added. For instance, the Portal will soon contain the following tools:

- ECLI Search Engine which will allow legal practitioners to easily find case law as the adoption of the ECLI standard gradually gains ground;
- businesses will also benefit from lower costs thanks to streamlined online legal procedures once business registers and land registers are accessible via the Portal;
- soon citizens will have the possibility to apply for cross-border European orders for payment and Small claims electronically and receive communication from the courts online.

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727 See [http://ec.europa.eu/justice/criminal/european-e-justice/portal/index\\_en.htm](http://ec.europa.eu/justice/criminal/european-e-justice/portal/index_en.htm).

### 5.13.3 Consumer Conditions Scoreboard

#### **Consumer Conditions Scoreboard: Consumer at home in the Single Market — 2015 edition**<sup>728</sup>

The Consumer Conditions Scoreboard tracks the situation and behaviour of consumers across Member States and over time. The 2015 edition brings together the latest consumer data based on an improved methodology with a fully revised conceptual framework for measuring consumer conditions. This edition has also a special focus on consumer conditions in the Digital Single Market.

#### **5.13.3.1 Highlights**

The Digital Single Market is emerging, but still faces constraints. The frequency of e-commerce transactions has been increasing. Half of Europeans bought goods or services over the internet in 2014. Yet, consumers continue to feel considerably more confident buying online from their own country (61%) than from other EU countries (38%).

While domestic online purchases are conducted considerably more frequently, accounting for 70% of most recent online purchases, the Scoreboard results suggests that the incidence of cross-border online purchases within the EU is considerably under-reported, since consumers are not always aware that they are buying from another EU country.

Cross-border purchases cause a disproportionately high amount of problems. In particular, concerns about delivery and product conformity seem to be confirmed by actual consumer experience. Moreover, consumers continue to face discrimination linked to the country of residence in cross-border transactions. These issues also account for the majority of complaints about cross-border e-commerce received by European Consumer Centres.

Further awareness raising on consumer rights is needed. Consumers' and retailers' awareness of some key consumer rights guaranteed by EU legislation remains limited. In the EU as a whole, only 9% of consumers were able to answer all three knowledge questions correctly, with the lowest levels of knowledge among young people.

Investing in enforcement does pay off. There is a high correlation between retailers' perceptions of enforcement efforts on the one hand and their assessment of compliance and of the prevalence of unfair commercial practices on the other hand, which suggests that monitoring efforts do translate into better outcomes for consumers.

Further development of Alternative Dispute Resolution (ADR) promises more effective consumer redress. Still a quarter of all consumers encountering problems do not complain in case of a problem. The majority of consumers who did not take any action in case of a problem were discouraged by the perceived difficulties (e.g. low likelihood of success, lack of information, length of procedure). Satisfaction with complaint handling is highest amongst those consumers who complained to Alternative Dispute Resolution (ADR) bodies, even though the use and knowledge of these bodies are still relatively low.

### 5.13.4 Contribution of the Internal Market and consumer protection to growth

The Contribution of the Internal Market and Consumer Protection to Growth Report<sup>729</sup> presents the results of a study commissioned by the European Parliament's Committee on Internal Market

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<sup>728</sup> See [http://ec.europa.eu/consumers/consumer\\_evidence/consumer\\_scoreboards/11\\_edition/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/index_en.htm).

and Consumer Protection (IMCO) and carried out by Civic Consulting between July and September 2014. The study concerns achievements in the area of the single market and consumer protection and related contributions to economic growth in the European Union, with a specific focus on the flagship initiatives of the Europe 2020 strategy.

The benefits of a single market for growth can be broadly subsumed into four separate categories: economies of scale; stronger competition; lower transaction costs; and better allocation of resources. In addition to benefits for growth, single market integration also induces other benefits, such as increased consumer choice and better quality, and innovative goods and services. Nonetheless, the single market may induce additional costs, including administrative costs, adjustment or transition costs, a widening in regional and distributional disparities, and an increase in environmental degradation.

Many studies have tried to quantify the overall impact of single market integration on economic growth. One of the most-often quoted ex-ante studies is the Cecchini report, commissioned in 1988 by the European Commission<sup>730</sup>. It estimated an impact of 4.25-6.5% increase in EU GDP for the EU-12. More recent studies assessing the effects of the elimination of intra-EU goods and services barriers have subsequently made even higher estimates, indicating that EU GDP could increase by 14% as early as 2020, depending on the assumptions made.

However, ex-post analyses have since measured the observed impact of the single market on growth and have generally estimated the real gains to be smaller. Several factors may explain the differences noted between ex-ante and ex-post estimates identified, including the absence of a clear control group or counterfactual; difficulty in predicting the dramatic transformative effects of market liberalisation; difficulty in accounting for dynamic effects of integration related to gradual changes in productivity and efficiency; and other potential biases leading to an overestimation of the predicted gains of single market integration.

Improving consumer protection and empowerment can also have positive effects on growth, through several channels including: consumers' increased confidence and trust; consumers' better decision-making and assertion of rights; lower consumer financial detriment from problems; and as a signal of high standards for third countries trading with the EU. However, while there is a significant body of literature confirming these benefits, little empirical evidence has been identified to support them. Nonetheless, a major EU-wide survey in 2010 concluded that total ex-post-consumer detriment — based on financial losses reported from problems experienced — was equivalent to 0.4% of EU GDP.

A larger number of achievements have been made relevant to the single market and consumer protection within the scope of 'A Digital Agenda for Europe', relating to electronic communications, e-commerce/online services and data protection. Major legislation proposed includes the Connected Continent Regulation and Data Protection Reform Package. Evidence suggests that completing the digital single market has significant potential to contribute to growth, with one estimate indicating a possible 2-4% increase in EU GDP by 2020.

Relevant aspects of 'Innovation Union' relate to breaking down barriers to innovation, improving cross-border access to finance for SMEs and encouraging cross-border mobility of researchers, which may each have beneficial effects on growth. Key achievements include the establishment of a unitary patent system, expected to reduce costs of applying for a patent valid EU-wide by 80%.

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729 Available at: [https://polcms.secure.europarl.europa.eu/cmsdata/upload/d6de1e78-a18e-4c7a-a643-b5c61a15113e/att\\_20141027ATT91951-5076263125688467492.pdf](https://polcms.secure.europarl.europa.eu/cmsdata/upload/d6de1e78-a18e-4c7a-a643-b5c61a15113e/att_20141027ATT91951-5076263125688467492.pdf).

730 See [www.europarl.europa.eu/RegData/etudes/STUD/2014/510981/EPRS\\_STU\(2014\)510981\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/510981/EPRS_STU(2014)510981_REV1_EN.pdf).

Learning and employment mobility of young people constitute the key areas of relevance for the single market under 'Youth on the Move', for which available evidence indicates a potential positive impact on the EU economy. A major achievement is the regulation establishing Erasmus+, which combines the EU's education, training, youth and sport schemes into one integrated programme.

Significant achievements have been made within the scope of 'Resource-efficient Europe' relevant for the single market and consumer protection and empowerment in the energy and transport sectors. Major legislation adopted in the energy sector includes the Third Energy Package, while for several transport modes fresh single-market initiatives have been proposed, accompanied by a well-developed framework for passenger rights.<sup>731</sup>

Relevant achievements as part of 'An industrial policy for the globalisation era' relate mainly to industrial products, as well as specific areas such as combating late payments, business services, and entrepreneurship. Major legislation proposed includes the Product Safety and Market Surveillance Package. Addressing the remaining barriers to intra-EU trade in goods could be highly beneficial; one estimate shows that full integration of goods markets could result in a 2.2-8.8% increase in EU GDP in the long run.

Labour mobility is the main aspect relevant to the single market in 'An agenda for new skills and jobs'. Major legislation adopted includes the revised Professional Qualifications Directive. Research suggests labour mobility stimulates growth: one study finds the immigration of four million people from eight of the countries acceding to the EU in 2004 could lead to a long-run increase of 0.6% in EU GDP.

Finally, actions under 'European Platform against Poverty and Social Exclusion'<sup>732</sup> relevant to the single market relate primarily to social enterprise, which may also induce growth. A key achievement was the launch of the Social Business Initiative.

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731 Significant growth potential is evident: according to estimates, liberalisation of gas and electricity markets could raise EU GDP by 0.6-0.8% over 2011-2020, while supply- and demand-side effects of air transport liberalisation could, respectively, raise EU GDP by 1.8% and 1.3% over 2005-2025.

732 The European platform against poverty and social exclusion is one of seven flagship initiatives of the Europe 2020 strategy for smart, sustainable and inclusive growth. It is designed to help EU countries reach the headline target of lifting 20 million people out of exclusion. The platform was launched in 2010 and will remain active until 2020.

## Part 6: MEASURES TO FACILITATE ACCESS TO JUSTICE

### Issue 4: Measures to facilitate access to justice (Associate Professor Jeannie Marie Paterson, Melbourne Law School, University of Melbourne)

The fourth issue for analysis is:

- Measures to facilitate access to justice, including:
  - early intervention and consumer empowerment;
  - support for consumers in accessing dispute resolution; and
  - institutional support (e.g. from regulators or other third party advocates).

### 6.1 Introduction

Governments should establish or maintain legal and/or administrative measures to enable consumers to or, as appropriate, relevant organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive, and accessible. Such procedures should take particular account of the needs of low-income consumers.<sup>733</sup>

If consumers cannot exercise and enforce their rights under the ACL, then those consumers may be left bearing the costs imposed by substandard and defective goods and services and the incentives for traders to comply with the law will be reduced.<sup>734</sup>

Many consumers, particularly vulnerable or disadvantaged consumers, will not have the funds or expertise to hire lawyers and pursue a claim in court.<sup>735</sup> However, access to justice in a consumer context does not merely mean addressing this issue of the cost of lawyers and litigation.<sup>736</sup> Traditional litigation will not be appropriate in many consumer contexts. Most disputes between traders and consumers involve relatively small amounts of money, and the value of the claim will not justify the expense of seeking legal advice or going to court.<sup>737</sup> Moreover, in many cases consumers and traders may prefer a quick resolution to their dispute over the long drawn-out process of litigation. They may also seek to maintain their relationship after the resolution of the

733 *United Nations Guidelines for Consumer Protection* GA Res 248, 39 UN GAOR (106<sup>th</sup> plen. Mtg), UN Doc A/Res/39/248 (1985).

734 J Malbon, 'Access to Justice for Small Amount Claims in the Consumer Marketplace: Lessons from Australia' in M Trebilcock, A Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) page 328.

735 M A Noone, 'Public Interest Law and Access to Justice: the Need for Vigilance' (2011) 37 *Monash UL Rev* 57.

736 Ronald Sackville, 'Law and Poverty in Australia' (Parliamentary Paper No 294, Parliamentary Library, Parliament of Australia, 1975); Senate Standing Committee on Legal and Constitutional Affairs, 'Cost of Legal Services and Litigation' (Discussion Papers No 1-7 Final Reports I and 2 (1991-1994); Australian Law Reform Commission, *Equality before the Law*, Report No 69 (1994); Access to Justice Advisory Committee, *Access to Justice — An Action Plan* (1994); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000); Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004).

737 See A Duggan, 'Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics Perspective' in C Rickett and T Telfer (ed) *International Perspectives of Consumers' Access to Justice* (Cambridge University Press, 2003).

dispute or, at least in the case of traders, to maintain a good reputation for future consumer dealings.

As the issue of access to justice is a multi-dimensional problem, promoting access to justice in consumer disputes will require a multi-faceted and tiered response.<sup>738</sup> Ideally access to justice is promoted by a combination of strategies that respond to the different degrees of wrongdoing by traders that may have occurred and are sensitive to the different needs of the consumers affected by breaches of consumer law. This Part considers and compares five different categories of measures for promoting access to justice in six different countries, including Australia. These measures are not the only ways of facilitating to justice but are prominent elements of most responses.

**(1) The form of and content of legislation:**

First, the form and content of consumer protection legislation may have a role in promoting access to justice. This may be done through legislation being expressed in a simple and accessible form and also in affirming the value of consumer rights.

**(2) Information and education:**

Secondly, access to justice may be promoted through information and education initiatives that assist consumers in better understanding their rights and obligations under the law so as to avoid disputes arising in the first place.

**(3) Legal assistance and advice:**

Thirdly, access to justice may be facilitated by opportunities for consumers to obtain ‘self-help’ advice that assists them in resolving their own disputes, and also in providing legal representation to those consumers unable to pursue their own claim.<sup>739</sup>

**(4) Alternative dispute resolution:**

Fourthly, access to justice may be promoted by support for consumers in accessing low cost and informal forums for dispute resolution, such as through mediation, arbitration, specialist tribunals and ombudsman services, and also possibly by utilising new digital technologies in online dispute resolution.

**(5) Compliance and enforcement action by regulators:**

Fifthly, access to justice will require targeted compliance and enforcement action by regulators against rogue traders who show a systemic failure to comply with the law or deliberately set out to exploit vulnerable consumers or resist justified consumer claims. Regulatory action may also be needed to develop uncertain or controversial areas of the law.

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738 See further M Trebilcock, A Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) p 1 quoting Lorne Sossin, *Research Priorities Report Submitted to the Board of Governors of the Law Commission of Ontario* (2007).

739 Class actions may also be used to litigate consumer claims. Class actions have the attraction of aggregating a bundle of claims in order to make litigation viable from a financial perspective. However, they do not always work effectively in a consumer context where the size of the initial claim may be so small that even a combined group of claims is unlikely to produce a sufficiently large damages award to justify the expense of litigation. See A Duggan and Iain Ramsay, *Front End Strategies for Improving Consumer Access to Justice* in M Trebilcock, A Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) 96; Justin Malbon, ‘Access to Justice for Small Amount Claims in the Consumer Marketplace: Lessons from Australia’ in M Trebilcock, A Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) 346-348.

The countries in which access to justice measures are considered are:

- Australia,
- Canada (British Columbia and Ontario),
- Singapore,
- South Africa,
- United Kingdom, and
- United States (California and New York).

The emphasis in the comparison will not be on legislative frameworks and provisions but on the ways in which these countries use the identified measures to facilitate the ability of consumers to exercise their rights under consumer protection legislation. Not every measure for promoting access to justice is found in a meaningful form in all of these countries. Accordingly, the discussion below selects those features of the comparison regimes that illustrate particular access to justice strategies and highlights the similarities or differences to those used in Australia. The aim of the comparison is to identify approaches that may be useful in thinking about how best to promote fair and accessible protection for consumers under the ACL.

## 6.2 The form of and content of legislation

The form and content of consumer protection legislation may have a role in promoting access to justice. Clearly expressed and logically structured legislation assists consumers in finding, understanding and asserting their rights under that legislation. Strong statements of support for consumer rights in legislation may perform an important rhetorical role in affirming the centrality and significance of those rights. Such statements may also act as a directive to courts and decision makers to interpret the legislation in a broad and generous manner conducive to the legislative objective of protecting the interests of consumers.

### 6.2.1 Australia

The importance of clear and accessible legislation informed some aspects of the changes to consumer protection in Australia introduced by the ACL. In particular, one of the reasons for introducing the regime of consumer guarantees in Part 3-2 was to clarify and simplify what was perceived to be an overly technical and difficult regime of contractual implied terms in the *Trade Practices Act 1974*.<sup>740</sup>

More generally, in interpreting the ACL, Australian courts have acknowledged that the legislation gives effect to ‘matters of high public policy’<sup>741</sup> and is to be ‘construed so as “to give the fullest relief which the fair meaning of its language will allow”’.<sup>742</sup> This imperative is also made explicit in South Africa.

<sup>740</sup> Consumer Affairs Victoria, ‘Warranties and Refunds in the Electronic Goods, White Goods and Mobile Telephone Industries’ (2009), *Research Paper No 17*, 2-3; Commonwealth Consumer Affairs Advisory Council, Department of Treasury, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties — Final Report* (2009), 127-8.

<sup>741</sup> *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 [99] (Gummow J), citing *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 256 (Lockhart J).

<sup>742</sup> *Marks v GIO Australia Holdings Ltd* 1998) 196 CLR 494, 528 [99] (Gummow J), citing *Bull v Attorney-General (NSW)* (1913) 17 CLR 370, 384 (Isaacs J); *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32, 44 (Mason CJ); *Webb Distributors (Australia) Pty Ltd v Victoria* (1993) 179 CLR 15, 41 (McHugh J).

## 6.2.2 South Africa

Access to justice is a particularly important aspect of consumer protection law in South Africa, in part due to that country's pre-republican history of division and disenfranchisement. The South African Constitution enshrines a right of access to dispute resolution:

Access to courts — Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.<sup>743</sup>

These sentiments are reinforced in the *Consumer Protection Act 2008*, the principal act for consumer protection in South Africa. The preamble to the Act emphasises the role of consumer protection law in protecting 'historically disadvantaged persons' and promoting their 'full participation as consumers'.<sup>744</sup> The *Consumer Protection Act 2008* also instructs courts, in event of ambiguity, to favour consumer rights and interests.<sup>745</sup> Section 4(3) provides that:

if any provision of this Act, read in its context, can reasonably be construed to have more than one meaning, the Tribunal or court must prefer the meaning that best promotes the spirit and purposes of this Act, and will best improve the realisation and enjoyment of consumer rights generally, and in particular by [disadvantaged and vulnerable] persons.

Consistently, in *Standard Bank of South Africa Limited v Dlamini* the court noted that that 'the [National Credit Act 34 of 2005] and the [Consumer Protection Act 68 of 2008] are but two statutes on a raft of national legislation aimed specifically at consumers to reverse the historical socio-economic inequalities and adjust the imbalances'.<sup>746</sup>

## 6.3 Information and education

An apparently simple and straightforward method of facilitating consumer access to justice is through information and education initiatives. These types of initiatives provide a 'front end'<sup>747</sup> response to consumer protection, rather than an approach focused on merely picking up the pieces should something go wrong. Information and education initiatives aim to assist consumers in making better, more informed choices about the goods and services that they purchase. More informed choices mean that consumers are less likely to be disappointed with their purchases. In the event that something does go wrong, information and education initiatives seek to prevent disputes arising over how that problem should be resolved. If both parties understand their rights under the law, then they may be more likely to be able to negotiate a fair and equitable resolution to the problem.

To be effective, information and education initiatives need to be carefully thought through and strategically targeted. The information should be presented in a range of different formats: online, in print and using both verbal and visual techniques so as to cater for different learning preferences and abilities.<sup>748</sup> The information should be presented in clear and simple language, and provided in a number of different languages to be accessible to all members of the relevant community of

<sup>743</sup> Constitution of the Republic of South Africa s 34.

<sup>744</sup> See also Consumer Protection Act 2008 s 3.

<sup>745</sup> Ibid s 4.

<sup>746</sup> (2013) (1) SA 219 (KZD), [32].

<sup>747</sup> See A Duggan and Iain Ramsay, 'Front End Strategies for Improving Consumer Access to Justice' in M Trebilcock, A Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) 96-7.

<sup>748</sup> See also A Duggan, A Remani and D Kao 'Policy Options with Respect to Consumer and Debtor/Creditor Law' in M Trebilcock, A Duggan and L Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) 490.

consumers. Information and education initiatives need to be proactively promoted. Merely placing information about consumer rights on a web site will not assist consumers who do not know they have such rights or where to look for information about them.<sup>749</sup>

It is also important to recognise that, while information and education initiatives are an undoubtedly useful tool in facilitating access to justice, their efficacy should not be over-estimated. Providing information to consumers about consumer protection issues will not overcome all information asymmetries in the market for goods and services. The characteristics of many goods and services are too complex and the preferences of consumers are too diverse for them to be met through general, publically provided information. Information and education initiatives may also not offset the behavioural biases shown by consumers in their purchasing decisions. Behavioural economics draws on psychology and economics to suggest that there are cognitive limitations on the ability of consumers to use information,<sup>750</sup> and that consumers ‘will often process imperfectly even the information they do acquire.’<sup>751</sup>

Moreover, access to information is not the only factor that determines the ability of consumers to assert their rights under law. Effective consumer ‘self help’ relies on consumers holding a requisite level of assertiveness and confidence, and may therefore be impacted by social and cultural factors. Studies suggest that in consumer disputes there may be a correlation between willingness to complain and socio-economic status and gender.<sup>752</sup> Education will not therefore overcome all manifestations of the inevitable and often considerable power imbalance between traders and consumers. Information and education initiatives may also need to be buttressed by more interventionist strategies to ensure that consumers can enforce their rights under consumer protection law.

## 6.4 Information provided by regulators and consumer advocates

All of the countries under consideration have extensive programs for informing and educating consumers about their rights under consumer protection legislation. An issue facing all of these countries, particularly those with multiple enforcement agencies and consumer advocacy groups, is how to coordinate the various information and education initiatives so as to ensure that the information provided is coherent and consistent as between different providers. It is also important that the experiences of consumer advocates and regulatory agencies that have close connections with marginalised consumer groups are included, and even prioritised, in any conversation about coordinated education and information strategies.

### 6.4.1 Australia

In Australia, information and education about consumer purchases and consumer rights is provided through:

- regulators charged with enforcing the ACL;
- specialist community legal centres;

749 See generally Iain Ramsay, ‘Consumer Redress and Access to Justice’ in C Rickett and T Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) 17.

750 See generally, Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211; Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203; Robert A Hillman and Jeffrey J Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ (2002) 77 *New York University Law Review* 429.

751 Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211, 214.

752 Iain Ramsay, ‘Consumer Redress and Access to Justice’ in C Rickett and T Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) 28.

- the peak body representing consumers, the Consumers Federation of Australia;
- long standing consumer advocacy organisation, CHOICE;
- various radio and television media and, in particular, the television show ‘The Check Out’.

The regulatory agencies charged with enforcing the ACL provide extensive information on consumer protection directed to both consumers and traders. The Commonwealth regulatory agency, the Australian Competition and Consumer Commission (ACCC), takes the lead in this regard. It provides information on a range of consumer topics, including consumer rights and guarantees, complaints and problems, misleading claims and advertising, prices and receipts, contracts and agreements, groceries, health, home and car, online shopping and internet and phone usage.<sup>753</sup> Some of this information is aimed at informing consumers about relevant considerations in making purchasing decisions and other information is aimed at informing consumers about their rights and responsibilities should a problem arise after purchase.

The information provided by the ACCC is most easily accessed online but is also available in various hard copy publications and brochures. The information is presented in traditional print format and also through various video presentations. Facebook and other social media are utilised. The ACCC also hosts sites aimed at particular issues, such as Scamwatch<sup>754</sup> and Energy Made Easy.<sup>755</sup> The ACCC provides information directed at certain typically vulnerable and disadvantaged groups: the indigenous community,<sup>756</sup> people with a disability,<sup>757</sup> people from non-English speaking backgrounds<sup>758</sup> and seniors.<sup>759</sup> The state and territory regulators provide similar information and also information on issues specific to their jurisdiction.

Some state regulators provide information for primary and secondary teachers to use in lessons on consumer protection.<sup>760</sup> No data was available on how widely these resources are used.

Consumer protection information and education materials are also provided by the various consumer advocacy organisations in Australia, including the Consumers’ Federation of Australia,<sup>761</sup> Consumer Action Law Centre,<sup>762</sup> Australian Communications Consumers Action Network<sup>763</sup> and Caxton Legal Centre.<sup>764</sup> A leading provider of specialist consumer law information, advice and assistance for consumers is the Consumer Action Law Centre (CALC). CALC provides:

... free legal advice and pursues litigation on behalf of vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. As well as working with consumers directly, Consumer Action provides legal assistance and professional training to community workers who advocate on behalf of consumers ... As a nationally recognised and influential policy and research body, Consumer Action pursues a law reform agenda across a range of important consumer issues at a governmental level, in the media, and throughout the community directly.<sup>765</sup>

753 See [www.accc.gov.au/consumers](http://www.accc.gov.au/consumers).

754 See [www.scamwatch.gov.au/](http://www.scamwatch.gov.au/).

755 See [www.energymadeeasy.gov.au/](http://www.energymadeeasy.gov.au/).

756 See [www.accc.gov.au/about-us/information-for/indigenous-consumers](http://www.accc.gov.au/about-us/information-for/indigenous-consumers).

757 See [www.accc.gov.au/about-us/information-for/people-with-a-disability](http://www.accc.gov.au/about-us/information-for/people-with-a-disability).

758 See [www.accc.gov.au/about-us/information-for/non-english-speaking-background](http://www.accc.gov.au/about-us/information-for/non-english-speaking-background).

759 See [www.accc.gov.au/about-us/information-for/seniors](http://www.accc.gov.au/about-us/information-for/seniors).

760 See e.g. [www.consumer.vic.gov.au/resources-and-education/teacher-resources](http://www.consumer.vic.gov.au/resources-and-education/teacher-resources).

761 See <http://consumersfederation.org.au/topics/story-type/tips-and-advice/>.

762 See <http://consumeraction.org.au/>.

763 See <http://accan.org.au/>.

764 See <https://caxton.org.au/>.

765 See <http://consumeraction.org.au/about/>.

Another long-standing and important source of information and advice for Australian consumers is CHOICE.<sup>766</sup> Established in 1959, CHOICE is a consumer advocacy organisation that tests and reviews common consumer respects, investigates consumer issues and runs advocacy campaigns. CHOICE's information and review material is restricted to members, although its advocacy work is conducted on behalf of all consumers.

Information about products, purchasing decisions and consumer rights has been prominently promoted in Australia through the comedy consumer affairs television show 'The Checkout'.<sup>767</sup> Clips and segments from this show are available online and cover a wide range of consumer topics in a light-hearted and humorous format.

There is a degree of overlap in the information provided by the ACCC, State and Territory regulators and consumer advocates. While this may increase the opportunities for consumers to obtain useful and relevant information, it may also increase the work required by consumers to research their rights. Consumers may be faced with the task of sorting through and assessing the ultimately very similar pieces of information provided by these different sources in order to find a solution to a particular problem.

## 6.4.2 Canada

There are a number of information and education initiatives in Canada, largely aimed at assisting Canadian consumers in making more optimal purchasing decisions and having a better understanding of their rights as consumers. Operating on a national scale, the Consumer Measures Committee produces the *Canadian Consumer Handbook*, which provides advice on a wide range of issues relevant to consumer transactions. The Consumer Measures Committee is:

... a joint federal/provincial/territorial committee which provides a forum for national cooperation to improve the marketplace for Canadian consumers, through the harmonisation of laws, regulations and practices and through actions to raise public awareness.<sup>768</sup>

The Handbook provides consumers with information on their rights as consumers, and related legal issues, and also directed by the Handbook to various organisations they may seek help from if they encounter problems. This resource provides a useful 'one stop shop' for consumers seeking information and avoids the repetition and confusion that may eventuate from having multiple sources of information.

In addition to this handbook, the Office of Consumer Affairs<sup>769</sup> and the Consumers' Association of Canada<sup>770</sup> provides links to information on consumer products, consumer rights and how to progress consumer complaints. Consumer education initiatives and useful consumer information are also available through the provincial regulators such as Consumer Protection British Columbia<sup>771</sup> and Consumer Protection Ontario.<sup>772</sup>

These organisations all make extensive use of social media in performing their activities. It is unclear from these sources what strategies are in place for providing information to disadvantaged and vulnerable consumers.

766 See [www.choice.com.au/](http://www.choice.com.au/).

767 See [www.abc.net.au/tv/thecheckout/](http://www.abc.net.au/tv/thecheckout/).

768 See [www.consumerhandbook.ca/en/about](http://www.consumerhandbook.ca/en/about).

769 See [www.ic.gc.ca/eic/site/oca-bc.nsf/eng/home](http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/home).

770 See [www.consumer.ca/](http://www.consumer.ca/).

771 See [www.consumerprotectionbc.ca/](http://www.consumerprotectionbc.ca/).

772 See [www.ontario.ca/page/consumer-protection-ontario](http://www.ontario.ca/page/consumer-protection-ontario).

### 6.4.3 Singapore

The Consumers Association of Singapore (CASE) is a non-profit, non-governmental organisation formed to protect consumers' interests 'through information and education, and promoting an environment of fair and ethical trade practices'.<sup>773</sup> CASE has taken a strongly proactive role in educating consumers and traders about their rights and responsibilities through a variety of media, including an online presence, education programs, pamphlets and cartoons.<sup>774</sup> CASE also has a strong Facebook presence.<sup>775</sup>

In addition, the Singapore Law Association produces the 'Know the Law Now' booklet, which is specifically targeted to laypeople and an easy to follow guide on consumer law.<sup>776</sup>

Both the Singapore Law Association and CASE run a range of outreach education programs on consumer protection law.<sup>777</sup> The Law Society of Singapore has launched education programs aimed at school students and the elderly.<sup>778</sup> It is looking at providing the 'Know the Law Now' publication in different languages in the future: Mandarin, Malay and Tamil.<sup>779</sup>

### 6.4.4 South Africa

In South Africa, the Provincial Consumer Offices provide information and education activities in a variety of formats.<sup>780</sup> The Consumer Goods and Services Ombudsman also provides information about consumer rights and obligations and about the complaint process.<sup>781</sup> The Ombudsman is also working to develop and extend its education initiatives. This is on the basis that accessibility is increased through public awareness of the existence of the system. The Ombudsman promotes its activities through social media, traditional print media and through its website. It also takes the view that an effective way of increasing consumer awareness is through suppliers informing consumers of its existence.<sup>782</sup>

### 6.4.5 United Kingdom

In the United Kingdom, Citizens Advice is a charity that provides training information and advice on a range of legal issues including consumer law.<sup>783</sup> It has government funding to provide consumer education and works with the consumer regulator to promote consumer education and empowerment.<sup>784</sup> It provides training resources on a variety of consumer topics such as energy, digital products and understanding contracts.<sup>785</sup>

There was no prominent indication on the webpage of this organisation about outreach to vulnerable and disadvantaged consumer groups. Citizens Advice has a strong social media presence.

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773 See [www.case.org.sg/](http://www.case.org.sg/).

774 See eg [www.case.org.sg/publications.aspx](http://www.case.org.sg/publications.aspx).

775 See [www.facebook.com/casesg](https://www.facebook.com/casesg).

776 See <http://probono.lawsociety.org.sg/Pages/Community-Legal-Clinic.aspx>.

777 See [www.case.org.sg/events.aspx](http://www.case.org.sg/events.aspx).

778 Law Society of Singapore *Annual Report 2015*, 80.

779 Law Society of Singapore *Annual Report 2015*, 80.

780 See [www.southafrica.info/services/consumer/consumer.htm#.Vt62N5N95-X](http://www.southafrica.info/services/consumer/consumer.htm#.Vt62N5N95-X).

781 See [www.cgso.org.za/your-rights-explained/](http://www.cgso.org.za/your-rights-explained/).

782 Consumer Goods and Services Ombudsman, *Annual Report 2014/15* pp 26-27.

783 See <https://www.citizensadvice.org.uk/consumer/>.

784 See [www.citizensadvice.org.uk/about-us/how-we-provide-advice/our-prevention-work/citizens-advice-consumer-education/](http://www.citizensadvice.org.uk/about-us/how-we-provide-advice/our-prevention-work/citizens-advice-consumer-education/).

785 See [www.citizensadvice.org.uk/about-us/how-we-provide-advice/our-prevention-work/education/education-resources/education-resources/](http://www.citizensadvice.org.uk/about-us/how-we-provide-advice/our-prevention-work/education/education-resources/education-resources/).

Which? is a consumers' association that advocates for consumer rights<sup>786</sup> and also a company that, like Choice in Australia, provides members with reviews and comparisons of consumer products so as to improve purchasing decisions by consumers.<sup>787</sup>

## 6.5 Information via traders

Another potentially effective resource in educating and informing consumers about their rights under law is through traders. This approach requires traders to internalise some of the costs of providing relevant information to consumers and also may have advantages in providing information at the point of purchase when consumers may be specially focused on their rights and obligations associated with the sale. It should also be recognised that the emotional factors associated with the act of making a purchase may undermine the likelihood of consumers making efficient use of information provided at this time.<sup>788</sup>

### 6.5.1 Australia

The ACL imposes some obligations on traders to disclose information about consumers' rights and remedial options. For example, for unsolicited sales, the ACL ss 78–79 require traders to provide consumers with specified information including the name and business address of the trader and information on termination rights.

Where a trader provides a 'warranty against defects',<sup>789</sup> consumers must be provided with specified information about the warranty, including details of who is giving the warranty, the period for which the warranty applies and how to claim under the warranty.<sup>790</sup> In addition, the written document providing a warranty against defects must expressly advise consumers of the existence of the consumer guarantees under the ACL, as follows:

Our goods come with guarantees that cannot be excluded under the *Australian Consumer Law*. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.<sup>791</sup>

### 6.5.2 Singapore

As a response to issues with unsolicited sales, Singapore legislation requires traders to disclose to specified information to consumers, and in particular their rights to terminate any contract made with the trader.<sup>792</sup>

### 6.5.3 United Kingdom

United Kingdom consumer protection legislation makes extensive use of disclosure requirements for traders to promote consumer awareness of their rights. For example the *Consumer Contracts (Information and Additional Charges) Regulations 2013* require traders to provide consumers with

786 See [www.which.co.uk/about-which/who-we-are/overview/](http://www.which.co.uk/about-which/who-we-are/overview/).

787 See [www.which.co.uk/about-which/what-we-offer/](http://www.which.co.uk/about-which/what-we-offer/).

788 See also Jeannie Marie Paterson, 'Consumer Contracting in the Age of the Digital Natives' (2011) 27 *Journal of Contract Law* 152.

789 ACL s 102(3).

790 Competition and Consumer Regulations 2010 (Cth) reg 90.

791 Competition and Consumer Regulations 2010 (Cth) reg 90(2).

792 Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations regulation 4(6).

a range of information relevant to ensuring consumers are fully informed about who they are contracting with and their rights of redress, including information about cancellation rights, information about the seller, including their location and address and also ‘in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract’.<sup>793</sup>

## 6.6 Advice and assistance

... if the rule of law is considered to be based on laws that are knowable and consistently enforced such that individuals are able to avail themselves of the law, then individuals must have the tools to access the systems that administer those laws.<sup>794</sup>

In the event that a dispute between consumers and traders does eventuate, general information provided to consumers about their rights under consumer protection law may be insufficiently tailored to the particular issues raised the dispute or the steps needed for enforcement to assist the consumer. Genuine access to justice requires opportunities for consumers to obtain advice and assistance in enforcing their rights and resolving trader disputes.

Typically, consumer disputes will involve relatively small amounts of money and so consumers may not feel justified in paying for legal representation, and may not have the funds to do so in any event. Legal aid is generally not available for consumer claims, being viewed as presenting a less compelling case for public subsidy than, for example, crimes of violence.<sup>795</sup> Instead consumers are likely to seek some alternative form of free or subsidised assistance.

Advice and assistance for consumers in resolving disputes with traders may be provided by regulators, specialist community legal centres and clinics or pro bono schemes. It may be provided in a variety of formats: online, by telephone or in person. It may range from general advice on how consumers can themselves enforce their consumer rights (which may overlap with the education initiatives above) to more specific legal advice on enforcement by a lawyer (and in some jurisdictions only a lawyer is qualified to give such advice).

### 6.6.1 Australia

In Australia regulators and specialist community legal services such as the Consumer Action Law Centre provide general advice on how to resolve a dispute and materials to assist consumers in that process.<sup>796</sup> Consumers may also seek specific advice about what their rights are and how to resolve a dispute by telephone, in person or online from regulators, legal aid providers and community legal centres, as well as from the Consumer Action Law Centre.<sup>797</sup> In most cases, general advice and assistance is available to all consumers. More specific advice and legal assistance through community legal centres and pro bono schemes is generally restricted to consumers who cannot pay for legal representation and/or meet the other access criteria of the relevant organisation.

<sup>793</sup> *Consumer Contracts (Information and Additional Charges) Regulations* 2013 schedule 1 for on premise contracts and schedule 2 for off premises contracts.

<sup>794</sup> M Trebilcock, *Report of the Legal Aid Review 2008* [www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar).

<sup>795</sup> See eg R Smith, ‘Middle Income Access to Civil Justice: Implication of *Proposals for the Reform of Legal Aid in England and Wales* in M Trebilcock, A Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) pages 187-188.

<sup>796</sup> See eg [www.consumer.vic.gov.au/contact-us/resolve-a-dispute](http://www.consumer.vic.gov.au/contact-us/resolve-a-dispute) and <http://consumeraction.org.au/help-for-consumers/ask-a-legal-expert/>.

<sup>797</sup> See the resources listed for consumers seeking advice at <http://consumeraction.org.au/help-for-consumers/who-else-can-help/>.

## 6.6.2 Canada

Provincial agencies such as Consumer Protection British Columbia and Consumer Protection Ontario provide a variety of resources to assist consumers resolve disputes. If these approaches do not work consumers can file complaints on areas within the jurisdiction of the agencies, or will be directed to the appropriate body to assist with matters outside that jurisdiction.<sup>798</sup>

## 6.6.3 Singapore

The Singapore Government has sought to encourage ‘greater consumer responsibility and pro-activity’ by empowering consumers to ‘seek civil remedies against errant traders without having to rely on or wait for the government to take action’.<sup>799</sup> Consistently, Consumers Association of Singapore (CASE) provides legal advice and assistance to consumers seeking to resolve a claim with a trader, which may be provided over the phone, in person or online.<sup>800</sup> CASE reports that most consumer complaints received by it are settled directly by consumers after receiving advice, letter writing assistance, and in some cases, mediation.<sup>801</sup>

The Law Society of Singapore has established the Pro Bono Services Office, a charity that oversees the pro bono initiatives of the Law Society. The Pro Bono Services Office will provide legal advice to needy individuals unable otherwise to obtain legal advice and assistance.<sup>802</sup> The Pro Bono Services Office reports that consumer related issues are around the fourth most common type of case taken on by participants in the scheme.<sup>803</sup>

In addition the organisation Legal Help, a network on volunteer local lawyers, assists members of the public with ‘everyday’ legal questions.<sup>804</sup>

## 6.6.4 South Africa

In South Africa, the regulator charged with oversight and enforcement of the *Consumer Protection Act 2008*, the national Consumer Commission, will also provide assistance and advice to consumers in resolving disputes.<sup>805</sup> Consumer advice and assistance services are also provided by Consumer Affairs Offices in each province.<sup>806</sup> These offices may work in conjunction with community legal services and some have consumer helplines.<sup>807</sup>

## 6.6.5 United Kingdom

In the United Kingdom, Citizens Advice provides advice on common legal problems through paid staff and volunteers in consultations that may occur face to face, by telephone, by email, on line and in print form.<sup>808</sup> The assistance provided by Citizens Advice is extremely wide-ranging and its

798 See eg [www.consumerprotectionbc.ca/consumers-other-businesses-home/how-to-make-a-complaint](http://www.consumerprotectionbc.ca/consumers-other-businesses-home/how-to-make-a-complaint) and [www.ontario.ca/page/filing-consumer-complaint](http://www.ontario.ca/page/filing-consumer-complaint).

799 See eg *Singapore Parliamentary Debates, Official Report* (10 November 2003) vol 76 at col 3352 (Mr Raymond Lim Siang Keat); *Singapore Parliamentary Debates, Official Report* (11 November 2003) vol 76 at col 3444 (Mr Raymond Lim Siang Keat).

800 See [www.case.org.sg/complaint.aspx](http://www.case.org.sg/complaint.aspx).

801 Rachel Au-Yeong, ‘Sick of Scams: But What is the Cure?’ *The Straits Times* (15 November 2014) online: The Straits Times [www.straitstimes.com](http://www.straitstimes.com).

802 See <http://probono.lawsociety.org.sg/Pages/default.aspx>.

803 Law Society of Singapore *Annual Report 2015* page 69.

804 See [www.legalhelp.com.sg/](http://www.legalhelp.com.sg/).

805 See [www.thecc.gov.za/](http://www.thecc.gov.za/).

806 See eg Western Cape Office of the Consumer Protector *Annual Report 2014-15*.

807 See [www.legalhelp.com.sg/](http://www.legalhelp.com.sg/).

808 See [www.citizensadvice.org.uk/consumer/](http://www.citizensadvice.org.uk/consumer/).

coverage is no doubt assisted by the fact that the United Kingdom, unlike Australia, there is no restriction on non-lawyers from providing legal advice. In 2014–15, consumer issues were the third most advised on area (0.9 million issues).<sup>809</sup>

The consumer association ‘Which?’ also provides an advice line, although this is limited to paying members.<sup>810</sup>

### 6.6.6 United States

The United States has a long tradition of initiatives designed to provide legal representation to consumers in pursuing claims against traders who have contravened the law in some regard. This may be achieved through pro bono and volunteer programs and through contingency fee arrangements. Thus, for example, the New York State Courts Access to Justice Program seeks to ensure ‘access to justice in civil and criminal matters for New Yorkers of all incomes, backgrounds and special needs, by using every resource, including self-help services, pro bono programs, and technological tools, and by securing stable and adequate non-profit and government funding for civil and criminal legal services programs.’<sup>811</sup> Utilising a different model, Consumer Attorneys of California is a professional organisation of lawyers who represent ‘plaintiffs seeking accountability from those who do wrong’.<sup>812</sup> In this type of endeavour significant use is made of the contingency fee system under which the lawyer is paid ‘only if their clients achieve a successful result’.<sup>813</sup>

## 6.7 Alternative dispute resolution

Private enforcement through litigation has been superseded by redress delivered by new techniques involving public regulation and new(ish) [consumer dispute resolution] entities, incentivising voluntary compliance and negotiated solutions. The new techniques are preferred because they are quicker, more effective, and cheaper than litigation.<sup>814</sup>

Alternative dispute resolution is usually understood as a dispute resolution procedure that takes place outside a court with the aid of a third party. The alternative dispute resolution mechanisms available to consumers will be central to any bundle of initiatives aimed at facilitating access to justice.<sup>815</sup> Traditional, formal litigation in a court is generally not well suited to the resolution of consumer disputes. In most cases dispute resolution in a consumer protection context will be better provided by mediation, specialist tribunals and ombudsman services, and also possibly by utilising digital technologies to provide online dispute resolution.

## 6.8 Tribunals and small claims courts

Specialist consumer tribunals and small claims courts promote access to justice by providing relatively low cost and informal dispute resolution accessible to traders and consumers alike.<sup>816</sup> Typically the opportunity of a tribunal hearing is preceded by a mediation process, which aims to

809 Citizens Advice, *Annual Report*, page 10.

810 See [www.which.co.uk/consumer-rights](http://www.which.co.uk/consumer-rights).

811 See <http://courts.state.ny.us/ip/nya2j/index.shtml>.

812 See [www.caoc.org/](http://www.caoc.org/).

813 See eg [www.caoc.org/](http://www.caoc.org/).

814 Christopher Hodges, ‘Mass Collective Redress: Consumer ADR and Regulatory Techniques’ (2015) 5 *European Review of Private Law* 829, 871-872.

815 See D Rhode, *Access to Justice* (OUP 2004) 81.

816 Tribunals are required to act with as little formality as the case permits. See eg *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98; *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4).

increase the likelihood of a low cost and relatively straightforward resolution of the dispute, which fully engages with the perspectives and preferred outcomes of the parties involved.

Perhaps the major challenge to consumer tribunals and small claims courts lies in balancing the goal of access to justice, through providing a cost effective and informal forum for dispute resolution, against the objective of substantive justice: that is, fair, impartial and consistent decision-making according to law. It is the informality of the tribunal system that makes it accessible to consumers and an overly legalistic approach erodes this element of accessibility. Individuals making use of the tribunal system arguably expect not only a resolution of their dispute according to the law but an opportunity to be heard and a respectful hearing of their claims.<sup>817</sup> Yet at the same time the consumers seeking to assert their rights under consumer protection legislation have a legitimate expectation of decision-making that applies that body of law in a rigorous, coherent and consistent manner.<sup>818</sup> There is a public interest in this type of decision-making as well, in ensuring that consumer protection law is publically and properly adjudicated.<sup>819</sup>

Another real challenge faced by consumer tribunals and small claims courts is overcoming the hurdles to accessibility faced by marginalised consumers. Even a relatively informal and low cost dispute resolution forum such as offered by tribunals may still prove difficult to navigate by disadvantaged or vulnerable consumers who lack the experience, language skills or confidence to pursue a claim according to the rules of the tribunal.<sup>820</sup> A genuine commitment to access to justice for all consumers will require some level of support through the throughout the entire hearing process provided to those consumers. Tribunals are sometimes criticised as a form of inexpensive decision-making that is used by traders against consumers, in particular to collect debts.<sup>821</sup>

All of the jurisdictions being compared offer some form of tribunal or small claims court system. The Australian system of consumer tribunals is reasonably well developed and responsive to consumer needs. Singapore operates a similar tribunal system. The other jurisdictions being studied differ in placing a greater emphasis on other forms of alternative dispute resolution, such as online options or ombudsman services.

### 6.8.1 Australia

Most Australian states and territories have introduced tribunals to deal with small amount claims and most have a specific tribunal or division within a tribunal dealing with consumer claims.<sup>822</sup> Many if not most small to medium consumer/trader disputes that cannot be resolved by the parties and progress to a hearing are heard in a tribunal.<sup>823</sup>

817 K Bell, *One VCAT: President's Review of VCAT* (Victorian Civil and Administrative Tribunal, 2009) 46; I Ramsay, 'Consumer Redress and Access to Justice' in C Rickett and T Telfer (ed) *International Perspectives of Consumers' Access to Justice* (Cambridge University Press, 2003) 37.

818 K Bell, *One VCAT: President's Review of VCAT* (Victorian Civil and Administrative Tribunal, 2009) p 39.

819 Federation of Community Legal Centres (Vic), Submission to Parliament of Victoria Law Reform Committee, *Inquiry into Alternative Dispute Resolution*, 31 March 2008, 2.

820 A Duggan, A Remani and D Kao 'Policy Options with Respect to Consumer and Debtor/Creditor Law' in M Trebilcock, A Duggan and L Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) page 512.

821 See eg Tania Sourdin, *Dispute Resolution Processes for Credit Consumers* (La Trobe University 2007).

822 (ACT) ACT Civil and Administrative Tribunal; (NSW) Consumer, Trader and Tenancy Tribunal and, from 2014, the Civil and Administrative Tribunal — Consumer and Commercial Division; (Vic) Victorian Civil and Administrative Tribunal; (SA) Magistrates Court of South Australia; (Tas) Magistrates Court of Tasmania; (Qld) Queensland Civil and Administrative Tribunal; (WA) Magistrates Court of Western Australia, Civil Division.

823 K Bell, *One VCAT: President's Review of VCAT* (Victorian Civil and Administrative Tribunal, 2009) page 10.

A good illustrative example of the role of the tribunal in consumer/trader dispute resolution is Victorian Civil and Administrative Tribunal (VCAT). VCAT was established in 1998, to provide a 'one-stop shop for the handling of a range of disputes.'<sup>824</sup> VCAT has jurisdiction to hear and determine a cause of action arising under any provision of the ACL (in its application to Victoria).<sup>825</sup> Fees range from \$59.80 for claims of less than \$500 to \$174.10 for claims between \$500 and \$10,000.<sup>826</sup> There is a possibility of fee waiver or reduction in some cases.

VCAT aims to provide dispute resolution that is 'cost effective, accessible, informal, timely, fair, impartial and consistent'.<sup>827</sup> In order to be accessible to parties, VCAT is required to act with as little formality as possible.<sup>828</sup> There is only a limited system of precedent and parties are usually taken through a mediation process,<sup>829</sup> only going to a hearing if this is not successful.<sup>830</sup> In most cases a lawyer will not represent the parties.<sup>831</sup>

A review of VCAT in 2008 found that it had 'generally improved access to justice and equitable outcomes for the community.'<sup>832</sup> There had been some criticism of the quality of decision making within the tribunal.<sup>833</sup> The review also identified concerns that VCAT was underutilized by 'culturally and linguistically diverse' members of the community and by the indigenous community, who might together be described as vulnerable and disadvantaged consumers.<sup>834</sup> VCAT has subsequently been working to broaden the scope of community involvement and engagement, including through opening regional centres and implementing a Koori engagement policy.<sup>835</sup>

## 6.8.2 Singapore

In Singapore, consumer disputes are heard before the Small Claims Tribunal. The fees payable for claimants are quite low. For consumer claims under \$5000 the fee payable for a consumer is \$10.<sup>836</sup> The Tribunal has jurisdiction to hear claims up to \$10,000 (or \$20,000 with the consent of the parties).<sup>837</sup>

The primary function of the Small Claims Tribunals is to bring the parties to an agreeable settlement through an informal process.<sup>838</sup> Parties are not bound by the rules of evidence and may seek out evidence as they see fit.<sup>839</sup> Parties conduct their own case,<sup>840</sup> unless they are unable to do so by reasons of 'old age, infirmity of mind or body' in which case an authorised or approved person may conduct the case on the consumer's behalf.<sup>841</sup> Mediation is a compulsory step in the

824 VCAT, 2014-15 Annual Report page 2.

825 Australian Consumer Law and Fair Trading Act 2012 (Vic) s 224.

826 See [www.vcat.vic.gov.au/system/files/vcat\\_fees\\_effective\\_1\\_july\\_2015\\_2.pdf](http://www.vcat.vic.gov.au/system/files/vcat_fees_effective_1_july_2015_2.pdf).

827 See [www.vcat.vic.gov.au/about-vcat/service-charter-0](http://www.vcat.vic.gov.au/about-vcat/service-charter-0).

828 Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 98.

829 Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 88.

830 See eg [www.vcat.vic.gov.au/about-vcat/how-vcat-resolves-cases](http://www.vcat.vic.gov.au/about-vcat/how-vcat-resolves-cases).

831 Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 62(1) and (2).

832 K Bell, *One VCAT: President's Review of VCAT* (Victorian Civil and Administrative Tribunal, 2009) pages 1-2.

833 K Bell, *One VCAT: President's Review of VCAT* (Victorian Civil and Administrative Tribunal, 2009) page 37.

834 K Bell, *One VCAT: President's Review of VCAT* (Victorian Civil and Administrative Tribunal, 2009) pages 2-3.

835 VCAT, 2014-15 Annual Report page 2.

836 See [www.statecourts.gov.sg/SmallClaims/Pages/GeneralInformation.aspx](http://www.statecourts.gov.sg/SmallClaims/Pages/GeneralInformation.aspx).

837 See [www.statecourts.gov.sg/SmallClaims/Pages/GeneralInformation.aspx](http://www.statecourts.gov.sg/SmallClaims/Pages/GeneralInformation.aspx).

838 Small Claims Tribunals Act s 12(1).

839 Small Claims Tribunals Act s 22 (2) and (3).

840 Small Claims Tribunals Act s 23 (1).

841 Small Claims Tribunals Act s 23 (2).

process.<sup>842</sup> The Consumers Association of Singapore also operates a low cost mediation service to assist in resolving consumer/trader disputes.<sup>843</sup>

### 6.8.3 South Africa

In South Africa, disputes arising under the *Consumer Protection Act 2008* are heard in the National Consumer Tribunal,<sup>844</sup> as referred to it by parties or by the National Consumer Commission.<sup>845</sup> The National Consumer Tribunal is required to conduct its hearings in a manner that is inquisitorial, expeditious, informal and in accordance with the principles of natural justice.<sup>846</sup> It is seen as the last stage in consumer dispute resolution, with emphasis placed on the role of the Ombudsman (discussed below) in guiding parties through dispute relation process.

### 6.8.4 United Kingdom

Consumers pursuing litigation to vindicate consumer rights may have access to a small claims track in the Court system.<sup>847</sup> As in Australia concern has been expressed that plaintiffs in small claims courts are predominantly middle class professionals or businesses, and poorer consumers appear predominately as defendants in actions to recover a debt.<sup>848</sup>

As with South Africa, the emphasis for consumer dispute resolution is not with the court system but through mediation and ombudsman services (discussed below). The parties must first have attempted to resolve their dispute before taking the claim to court. Parties will usually first be expected to attempt to resolve the claim through mediation, using an alternative dispute resolution scheme of their choice or a court appointed mediator.<sup>849</sup> Many industries operating in the UK have their own recognised alternative dispute resolution schemes that are run through the Institute of Dispute Resolution Schemes, which is overseen by the Chartered Institute of Arbitrators.<sup>850</sup>

### 6.8.5 Canada

Consumers in Canada may seek to enforce their rights under consumer protection law through small claims courts. The processes and opportunities available to consumers vary between jurisdictions. In British Columbia, for example, consumers may pursue claims through the small claims courts<sup>851</sup> but parties are encouraged to use Online Dispute Resolution to settle before going to court.<sup>852</sup>

### 6.8.6 United States

Small claims court options are found in many jurisdictions in the United States. Thus, for example, the California Small claims court provides a dispute resolution service for low value disputes (under \$5,000 to \$7,500) with low fees (\$30–\$75) and opportunities for legal advice and pre-trial

842 Small Claims Tribunals Act s 22(1).

843 See [www.case.org.sg/complaint\\_mediation.aspx](http://www.case.org.sg/complaint_mediation.aspx).

844 See [www.thenct.org.za/mandate](http://www.thenct.org.za/mandate)

845 Consumer Protection Act 2008 ss 69 and 75.

846 National Consumer Tribunal, *Annual Report 2015* p 16.

847 See [www.justice.gov.uk/courts/procedure-rules/civil/rules/part27](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27).

848 J Baldwin, *Small Claims in the County Courts in England and Wales: the Bargain Basement of Civil Justice?* (Oxford Clarendon Press, 1997).

849 See [www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/small-claims/](http://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/small-claims/).

850 See [www.cedr.com/idrs/](http://www.cedr.com/idrs/).

851 See eg [www.smallclaimsbcc.ca/](http://www.smallclaimsbcc.ca/) and <http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/>.

852 See [www.smallclaimsbcc.ca/user](http://www.smallclaimsbcc.ca/user).

mediation.<sup>853</sup> However, as noted below, the accessibility of these forums to consumers may be impeded by the extensive use of compulsory and exclusive arbitration clauses in consumer contracts.

## 6.9 Mediation

Mediation is a negotiation process, led by an independent mediator, which aims to assist the parties to negotiate an agreement to resolve their dispute. Mediation is an alternative to a decision imposed on the parties by a court, tribunal or ombudsman. Mediation is commonly used as a precursor to a court or tribunal hearing, including in the consumer tribunals discussed in the section above.

Mediation has the attraction of being private, informal and, ideally, driven by the parties themselves. Criticisms of mediation in a consumer context are that it ignores the power imbalance between consumers and traders and may proceed to a settlement without the parties fully understanding or vindicating their rights under law.<sup>854</sup> Without proper support mediation can be a stressful and unsupported environment for consumers.<sup>855</sup>

Consumer advocates have also expressed concern that mediation does not develop a body of precedent that can be used to develop the law and respond to systematic abuses.<sup>856</sup>

## 6.10 Compulsory arbitration

Arbitration is a well-accepted means of resolving commercial disputes. In a consumer context it may have advantages in offering consumers quick and efficient dispute resolution. Consumer advocates have commonly expressed concern about contract terms that require consumers to submit to compulsory arbitration or make arbitration the exclusive form of dispute resolution. These provisions reduce consumer choice and may restrict consumers from pursuing other, more amenable dispute resolution options, such as for example where the arbitration precludes class actions.

### 6.10.1 Australia

In Australia, compulsory adjudication and arbitration clauses may be void as unfair terms under Part 2-3 of the ACL. Certainly, they would appear to fall within the example of the kinds of terms that may be unfair of 'a term that limits, or has the effect of limiting, one party's right to sue another party'.<sup>857</sup>

In some circumstances, compulsory arbitration clauses might also be void as attempts to limit the liability of a trader for a failure of goods or services to comply with the consumer guarantees in Part 3-2 of the ACL.<sup>858</sup>

853 See [www.courts.ca.gov/selfhelp-smallclaims.htm](http://www.courts.ca.gov/selfhelp-smallclaims.htm).

854 Richard Abel, *The Politics of Informal Justice* (Academic Press, 1982) vol 1, p 298; M A Noone, 'Public Interest Law and Access to Justice: the Need for Vigilance', (2011) 37 *Monash UL Rev* 57; T Sourdin, 'Civil Dispute Resolution Obligations' (2012) 5 *UNSWLJ* 889, 890.

855 M A Noone, 'Public Interest Law and Access to Justice: the Need for Vigilance', (2011) 37 *Monash UL Rev* 57, 75.

856 M A Noone, 'Public Interest Law and Access to Justice: the Need for Vigilance', (2011) 37 *Monash UL Rev* 57, 76.

857 ACL s 25(1)(k).

858 See ACL s 64.

### 6.10.2 United Kingdom

In the United Kingdom compulsory arbitration clauses may be void as unfair terms under the *Consumer Rights Act 2015* (previously *Unfair Terms in Consumer Contracts Regulations 1999*). The ‘grey list’ of potentially unfair terms includes terms that have the effect of ‘excluding or hindering a consumer’s right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions ...’.<sup>859</sup> This type of clause was also held to be unfair in *Mylcrist Builders Ltd v Mrs G Buck*.<sup>860</sup> Moreover, under the *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015* an agreement between a consumer and a trader to submit ‘a cross-border dispute or domestic dispute to alternative dispute resolution is void to the extent that it was made before the dispute arose and would deprive the consumer of the opportunity to bring judicial proceedings.’<sup>861</sup>

### 6.10.3 United States

In contrast to the European Union, the United States has long recognized parties’ ability to contract as they see fit, with few exceptions or limitations, even in the field of dispute resolution clauses. The wide support for parties’ ability to contract for dispute resolution has led to the growth of the dispute resolution industry. These entities provide dispute resolution services within the context of a business endeavour with no regulation, or oversight and few restrictions. In the United States, dispute resolution is a creature of contract, which allows for wide deference to be given to the parties’ agreement to resolve the dispute as the parties see fit.<sup>862</sup>

Many traders in the United States include terms in their standard form contracts requiring compulsory and often exclusive arbitration to resolve consumer disputes.<sup>863</sup> The approach has been widely criticised by consumer advocates.<sup>864</sup> Nonetheless, this type of provision, excluding use of class actions in favour of arbitration was recently upheld by the Supreme Court.<sup>865</sup>

## 6.11 Ombudsman services

It is the design of the ADR system that is critical. ... [U]nlike many arbitration-based or ‘complaint to regulator’ facilities, an independent Ombudsman scheme can act not just as a dispute resolution function but also — critically — in a regulatory support function.<sup>866</sup>

859 *Consumer Rights Act 2015*, Schedule 2 Part 2(20).

860 [2008] EWHC 2172. Arbitration clauses have been found not to be unfair where introduced by the consumer’s own agent: *Lovell Projects v Legg & Carver* [2003] BLR 452; *Westminster Building Co Ltd v Beckingham* [2004] 1 BLR 265; *Allen Wilson Shopfitters v Buckingham* [2005] EWHC 1165; *Bryen & Langley Ltd v Boston* [2005] EWCA 973; *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC).

861 *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015* 14B.

862 Anjanette H. Raymond and Scott J Shackleford, ‘Technology, Ethics and Access to Justice: Should an algorithm be deciding your case?’ (2013-14) 35 *Michigan Journal of International Law* 485, 512.

863 See [www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts](http://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts).

864 See eg <http://kluwerarbitrationblog.com/2016/02/25/consumer-arbitration-will-the-two-different-worlds-across-the-ocean-converge/>. See Oren Bar-Gill, *Seduction by Contract* (Oxford: Oxford University Press, 2012); Margaret Jane Radin, *Boilerplate: the Fine Print, Vanishing Rights and the Rule of Law* (Princeton: Princeton University Press, 2013).

865 *DIRECTV, Inc. v. Imburgia*, 577 U.S.

866 Christopher Hodges, ‘Mass Collective Redress: Consumer ADR and Regulatory Techniques’ (2015) 5 *European Review of Private Law* 829, 871-872, 836.

The use of an ombudsman in dispute resolution has its roots in the Scandinavian concept of a ‘citizens defender’ and has now spread beyond a system merely responding to complaints against government departments to systems that cover a wide range of disputes.<sup>867</sup> In the consumer context, Ombudsman services are industry funded but independently operated dispute resolution services, often introduced by industry in compliance with regulatory or licensing requirements laid down by legislation.<sup>868</sup> The benefit to consumers is in the form of a free, informal, flexible and supportive dispute resolution scheme, and also through higher level of compliance with consumer law by industry participants. Dispute resolution through ombudsman services should have a higher level of transparency than mediation. Mediation is essentially a private method of dispute resolution. By contrast, ombudsman services generally have a variety of reporting requirements to stakeholders, a mandate to promote compliance with consumer protection law and obligations to report systematic transgressions to that law to the relevant regulator.

The main challenges for such schemes are in maintaining a flexible but fair approach to dispute resolution and in avoiding any perception that the industry members in anyway influence the decision-making processes.<sup>869</sup> Some form of external review is desirable to monitor the quality and consistency of decisions<sup>870</sup> and to ensure accountability.<sup>871</sup>

Australia has a range of ombudsman services in the consumer sector. Ombudsman services also play a prominent role in promoting access to justice in South Africa and the United Kingdom, both of which, unlike Australia, rely on a general consumer ombudsman.

### 6.11.1 Australia

Australia makes extensive use of ombudsman services in regard to certain essential or socially significant services, including through the:

- Telecommunications Ombudsman;
- Financial Ombudsman Service;
- Credit and Investments Ombudsman;
- Energy and Water Ombudsman NSW;
- Utilities Commission of the Northern Territory;
- Energy and Water Ombudsman Queensland;
- Energy Industry Ombudsman SA;
- Energy Ombudsman Tasmania;
- Energy and Water Ombudsman (Victoria);
- Energy Ombudsman Western Australia.

867 See C Harlow, ‘Ombudsmen in Search of a Role’ (1978) 41 *Modern Law Review* 446.

868 J Malbon, ‘Access to Justice for Small Amount Claims in the Consumer Marketplace: Lessons from Australia’ in M Trebilcock, A Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012) page 345.

869 M Donnelly, ‘Financial Services Ombudsman: Asking the ‘Existential Question’ (2012) 35 *Dublin U LJ* 229, 230; A Duggan, ‘Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics Perspective’ in C Rickett and T Telfer (ed) *International Perspectives of Consumers’ Access to Justice* (Cambridge University Press, 2003) p 62.

870 M Donnelly, ‘Financial Services Ombudsman: Asking the ‘Existential Question’ (2012) 35 *Dublin U LJ* 229, 245.

871 M Donnelly, ‘Financial Services Ombudsman: Asking the ‘Existential Question’ (2012) 35 *Dublin U LJ* 229, 260.

The Financial Ombudsman Service provides a good model of the operation of an Ombudsman in Australia, albeit one dealing with financial services rather than goods and services regulated under the ACL. The Financial Ombudsman Service aims to resolve disputes in a timely manner with ‘minimum formality and technicality’ and ‘as transparently as possible, taking into account our obligations for confidentiality and privacy’.<sup>872</sup> Disputes are usually resolved through negotiation and conciliation and, where necessary a decision is made.<sup>873</sup> If necessary The Financial Ombudsman Service can award compensation or other redress to bank customers.<sup>874</sup>

The process requires the financial service provider first to be offered an opportunity to resolve the dispute within a specified time. If this is not successful the service provider must explain its position to the Financial Ombudsman. The dispute then progresses to a case management stage during which issues will be clarified and negotiation or conciliation process attempted. If this stage does not resolve the dispute it will progress to a decision. Decisions are based on the circumstances of the case, the relevant law and industry code and a standard of good industry practice.<sup>875</sup> The applicant consumer can choose to either accept or reject the decision. Significantly, this choice is not available to the financial services provider. If acted on by the consumer the determination becomes binding. If it is not accepted then the consumer may take other available action, including through the courts.<sup>876</sup>

### 6.11.2 South Africa

In South Africa, the Consumer Goods and Services Ombudsman plays a central role in the protection of consumers and resolution of consumer disputes. The Consumer Goods and Services Ombudsman is regulated by the *Consumer Goods and Services Code of Conduct*, made pursuant to s 82 of the *Consumer Protection Act 2008*.<sup>877</sup> It provides an alternative dispute resolution mechanism and also aims to offer guidance to participants and consumers as to their rights and responsibilities under the *Consumer Protection Act 2008*.<sup>878</sup> The central role of the Ombudsman arises from the requirement in the *Consumer Goods and Services Code of Conduct* for suppliers of consumer goods to register as participants (with some exceptions, for example for electronic communication service providers and the automotive industry).<sup>879</sup>

All complaints that are received by the Consumer Goods and Services Ombudsman and determined to fall within its jurisdiction are referred to the supplier involved. The aim of this process is to give the supplier a last opportunity to resolve the complaint directly with the consumer concerned. Consumer complaints that are not resolved by the parties are considered by the Consumer Goods and Services Ombudsman. Some of them are referred for formal mediation while in others, more informal third party facilitation takes place.<sup>880</sup> The vast majority of complaints are finalised through these processes.<sup>881</sup>

Where a case is not resolved through mediation, the Consumer Goods and Services Ombudsman further investigates the matter using correspondence with the parties or with the assistance of independent experts. After considering all the information provided by the parties, a written

872 See [www.fos.org.au/about-us/what-we-do/](http://www.fos.org.au/about-us/what-we-do/).

873 See [www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/#id=undefined](http://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/#id=undefined).

874 Financial Ombudsman Service, *Terms of Reference* cl 9.1.

875 See [www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/#id=undefined](http://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/#id=undefined).

876 See [www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/#id=undefined](http://www.fos.org.au/resolving-disputes/dispute-resolution-process-in-detail/#id=undefined).

877 See [www.cgso.org.za/about-us/](http://www.cgso.org.za/about-us/). See also the recognition of consumers’ right to alternative dispute resolution in the *Consumer Protection Act* s 70.

878 See [www.cgso.org.za/your-rights-explained/](http://www.cgso.org.za/your-rights-explained/).

879 Consumer Goods and Service Industry, *Code of Conduct*, 4.4.

880 Consumer Goods and Service Industry, *Code of Conduct*, 9.1.2

881 Consumer Goods and Services Ombudsman, *Compendium of cases*, 30 October 2015.

assessment is compiled by the Consumer Goods and Services Ombudsman, setting out its findings and recommendations for the settlement of the dispute.<sup>882</sup> This assessment is based both on the relevant law and fairness considerations. The parties then have the opportunity to accept the recommendation or respond to the findings and recommendation. If settlement is reached through any of the above means, this may at the request of one of the parties be recorded in the form of an order and made an order of a court or the Tribunal.<sup>883</sup> A party who is not satisfied with the outcome under this process can approach the Consumer Tribunal to reconsider the matter.<sup>884</sup> The Consumer Goods and Services Ombudsman cannot make binding declarations but may refer matters to the National Consumer Commission, which has investigation and enforcement powers.<sup>885</sup>

### 6.11.3 United Kingdom

In the United Kingdom ‘Ombudsman Services’ acts as ombudsman for a range of industries, including, including energy, communications, property, veterinary surgeons, glazing, copyright, green deals, removalists and Which? Trusted Traders.<sup>886</sup> Ombudsman Services now operates a general Consumer Ombudsman.<sup>887</sup> The Consumer Ombudsman is an authorised alternative dispute resolution scheme, pursuant to the *Alternative Dispute Resolution for Consumer Disputes (Competent Authority and Information) Regulations 2015* and certified by the Chartered Institute of Trading Standards. It is designed to reach a resolution of unresolved disputes between consumer and traders who are members of the scheme (or agree to the dispute resolution service). It covers goods and services purchased after 1 January 2015, including online purchases.<sup>888</sup>

The role of ombudsman services in the United Kingdom is supported by the *Alternative Dispute Resolution for Consumer Disputes (Competent Authority and Information) Regulations 2015*. These regulations provide for the approval and oversight of alternative dispute resolution schemes. They also impose obligations on traders, where it is unable to settle a dispute with a consumer, to inform the consumer in a durable medium:

- (a) that the trader cannot settle the complaint with the consumer;
- (b) of the name and website address of an ADR entity which would be competent to deal with the complaint, should the consumer wish to use alternative dispute resolution; and
- (c) whether the trader is obliged, or prepared, to submit to an alternative dispute resolution procedure operated by that ADR entity.<sup>889</sup>

Ombudsman Services has accreditation to provide alternative dispute resolution procedures in relation to all types of consumer disputes. Some industries and trade organisations require trader members to offer alternative dispute resolution, while other traders are voluntary members of the scheme. If a trader refuses to work with the Ombudsman, it has no jurisdiction but will give advice to the consumer.<sup>890</sup>

882 Consumer Goods and Service Industry, *Code of Conduct*, 2015 9.1.3.

883 Consumer Protection Act s 70(3) (SA).

884 See [www.cgso.org.za/where-we-fit-in/](http://www.cgso.org.za/where-we-fit-in/).

885 See [www.cgso.org.za/your-rights-explained/](http://www.cgso.org.za/your-rights-explained/).

886 See [www.ombudsman-services.org/](http://www.ombudsman-services.org/).

887 See [www.consumer-ombudsman.org/](http://www.consumer-ombudsman.org/).

888 See [www.ombudsman-services.org/consumer-ombudsman.html](http://www.ombudsman-services.org/consumer-ombudsman.html). See also the similar Retail Ombudsman: [www.theretailombudsman.org.uk/](http://www.theretailombudsman.org.uk/).

889 *Alternative Dispute Resolution for Consumer Disputes (Competent Authority and Information) Regulations 2015* 19(2).

890 Ombudsman Services, *Terms of Service*.

The decisions of the Consumer Ombudsman are to be made ‘in accordance with what is fair and reasonable in all the circumstances having regard to principles of law, good practice, equitable conduct and good administration’.<sup>891</sup> The Ombudsman is not bound by the rules of evidence.<sup>892</sup> The Ombudsman has a power to give remedies and redress where it makes a determination on an unresolved dispute.<sup>893</sup> The total remedies that can be ordered cannot exceed £25,000.<sup>894</sup>

In terms of process, the Consumer Ombudsman will only consider a complaint by a consumer after the trader has had a reasonable opportunity to resolve the issue. It then seeks to resolve the complaint within 90 days.<sup>895</sup> On accepting a complaint, the Consumer Ombudsman will allow both parties to provide information about the complaint and may if necessary request further information.<sup>896</sup> After considering the information provided by the parties, if the Ombudsman considers that the trader is offering a fair settlement or that no settlement is required, it may terminate the dispute.<sup>897</sup> Otherwise the Consumer Ombudsman proposes a conclusion to the dispute and invite comments from the parties.<sup>898</sup> This suggested conclusion may be accepted or rejected by the parties. If rejected, the Ombudsman will make a Final Decision<sup>899</sup> and may impose remedies.<sup>900</sup>

The Ombudsman may also make recommendations to the trader about changing its policies or procedures.<sup>901</sup> If accepted by the consumer, the Final Decision is binding on both parties.<sup>902</sup> If it is rejected by the consumer, the consumer may pursue other redress such as through a court.<sup>903</sup> If the trader does not provide the required remedy, the Ombudsman may notify the Regulator or Trade body, and advise the consumer of any rights to pursue the remedy independently.<sup>904</sup> The Consumer Ombudsman has duties of liaison with consumers, traders and other relevant bodies<sup>905</sup> and to make recommendations of changes within particular service sectors.<sup>906</sup>

As the Consumer Ombudsman was only recently established, it is not possible to measure its success. However, its existence reflects the increased emphasis throughout the EU on providing independent alternative dispute resolution services for consumer/trader disputes and also success of industry specific ombudsman services that have been operating for some time in the United Kingdom.<sup>907</sup> In 2014–15, Ombudsman Services reported 215,969 initial enquiries from complainants, of which a significant 63% were outside its terms of reference.<sup>908</sup> It is unclear what percentage of these cases will be caught by the new general Consumer Ombudsman. Of the cases accepted, a fairly high number were resolved: 62,806.<sup>909</sup> While complainants were generally satisfied with procedures and processes offered by Ombudsman Services, only 57% of complainants were satisfied with the outcome achieved and almost half of complainants (48%)

891 Consumer Ombudsman, *Terms of Reference* [8.7].

892 Consumer Ombudsman, *Terms of Reference* [8.8].

893 Consumer Ombudsman, *Terms of Reference*, [1].

894 Consumer Ombudsman, *Terms of Reference* [4.5].

895 Ombudsman Services, *Terms of Service*.

896 Consumer Ombudsman, *Terms of Reference* [7].

897 Consumer Ombudsman, *Terms of Reference* [8.6].

898 Consumer Ombudsman, *Terms of Reference* [8.4].

899 Consumer Ombudsman, *Terms of Reference* [10.1].

900 Consumer Ombudsman, *Terms of Reference* [10.3].

901 Consumer Ombudsman, *Terms of Reference* [10.4].

902 Consumer Ombudsman, *Terms of Reference* [10.9].

903 Consumer Ombudsman, *Terms of Reference* [10.10].

904 Consumer Ombudsman, *Terms of Reference* [10.13].

905 Consumer Ombudsman, *Terms of Reference* [11.1].

906 Consumer Ombudsman, *Terms of Reference* [11.1].

907 See eg the Ombudsman Services, *Annual Report 2015*, [www.ombudsman-services.org/annual-reports-os.html](http://www.ombudsman-services.org/annual-reports-os.html).

908 Ombudsman Services, *Annual Report 2015*, 8.

909 Ombudsman Services, *Annual Report 2015*, 8.

expressed dissatisfaction with the participating trader's response to the recommended remedy.<sup>910</sup> It may be that the scheme would usefully be strengthened by a legislative requirement for traders to belong to an alternative dispute resolution scheme.<sup>911</sup>

## 6.12 Online dispute resolution

[The expansion of Online Dispute Resolution in a consumer context] is 'mostly about finding innovative ways to settle niche disputes which otherwise would remain unresolved due to the high costs of litigation'.<sup>912</sup>

Online dispute resolution is increasingly seen as a way of promoting access to justice goals by combining ideals of alternative dispute resolution in terms of a collaborative flexible and informal process for resolving disputes with the innovations for processing and using information options offered by online digital technology.<sup>913</sup> As with other alternative dispute resolution processes, any online system must have a robust strategy for ensuring access by disadvantaged groups. Additionally an access to justice strategy that relies on online dispute resolution must avoid entrenching a 'digital divide' between those with the skills and resources to access the technology and those without.

The use of online digital technology in resolving consumer disputes is also discussed at 40.16. This section notes the progress made in this area in Canada and the United Kingdom.

### 6.12.1 Canada (British Columbia)

Consumer Protection British Columbia has been trialling an Online Dispute Resolution platform to resolve consumer debt disputes.<sup>914</sup> Consumer Protection British Columbia has also been developing a new Civil Resolution Tribunal,<sup>915</sup> a fully online tribunal, open 24 hours a day and 7 days a week.<sup>916</sup> The Civil Resolution Tribunal (CRT) will come into use in 2016 and will likely move from a voluntary to a mandatory system in 2017. The CRT is promoted as dispute resolution that is a 'more straightforward, convenient, timely and affordable option' than traditional methods.<sup>917</sup>

The CRT aims to be collaborative and to promote resolution by agreement but also factors in an adjudication stage where needed. Under the CRT, parties will navigate the initial stages of a consumer dispute using an online interface. An expert system will help users diagnose problems and disputes, provide specific information, offer self help tools, then triage and stream disputes into a subsequent phase if necessary. The next stage will involve party-to-party negotiation. If after this stage, no resolution of the dispute is reached then a Tribunal member/case manager will

910 Ombudsman Services, *Annual Report 2015*, 27.

911 See also Pablo Cortés, 'A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward' (2015) 35 *Legal Studies* 114

912 See further Pablo Cortes, 'Online Dispute Resolution for Consumers: Online Dispute Resolution Methods for Settling Business to Consumer Conflicts' in Mohamed S. Abdel Wahab et al (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International, 2011) page 152; Anjanette H Raymond and Scott J Shackelford, 'Technology, Ethics and Access to Justice: Should an Algorithm be Deciding your Case' (2014) 35 *Michigan Journal of International Law* 485

913 See also Julia Hörnle, 'Encouraging Online Alternative Dispute Resolution in the EU and Beyond' (2013) 38 *European Law Review* 187; Anjanette H Raymond and Scott J Shackelford, 'Technology, Ethics and Access to Justice: Should an Algorithm be Deciding your Case' (2014) 35 *Michigan Journal of International Law* 485; Anjanette H Raymond, 'Yeah, But Did You See the Gorilla? Creating and Protecting an Informed Consumer in Cross-Border Online Dispute Resolution' (2014) 19 *Harvard Negotiation Law Review* 129.

914 See [www.consumerprotectionbc.ca/odr](http://www.consumerprotectionbc.ca/odr).

915 Established under the Civil Resolution Tribunal Act 2012.

916 See further [www.civilresolutionbc.ca/](http://www.civilresolutionbc.ca/).

917 See [www.civilresolutionbc.ca/what-is-the-crt/how-will-the-crt-work/](http://www.civilresolutionbc.ca/what-is-the-crt/how-will-the-crt-work/).

conduct a facilitative dispute resolution process, along the lines of mediation, though teleconferences and/or in person. Failing a resolution of the dispute at this stage the Tribunal can reach a decision binding on the parties.<sup>918</sup>

The CRT program is still being developed but is alive to the issue of ensuring that it is accessible to a wide-ranging group of consumers, and relies on the already existing high level of Internet use among British Columbia's residents.<sup>919</sup>

### 6.12.2 United Kingdom

Consumers in the United Kingdom may currently use Money Claim Online to resolve a dispute concerning money. Money Claim Online is a court run Internet service for making claims corresponding to a monetary remedy.<sup>920</sup> Claims may be lodged for compensation for a fixed amount of money under £100,000 against no more than two defendants with an address in England or Wales.<sup>921</sup> The cost is scaled according to the size of the claim, for example £25 for a claim of up to £300 and £105 for a claim of between £1500 and £3000.<sup>922</sup>

Pursuant to the European Union's Alternative Dispute Resolution Directive (Directive 2013/11/EU) and the Online Dispute Resolution Regulation (Regulation (EU) No 524/2013),<sup>923</sup> the United Kingdom is also proceeding with online dispute resolution.<sup>924</sup> The EU Online Dispute Resolution (ODR) became available for consumer disputes about goods and services bought online, including cross border disputes, in early 2016.<sup>925</sup> Essentially the ODR Platform provides a portal for consumers to submit a complaint to a registered alternative dispute resolution provider with the aim of resolving the dispute<sup>926</sup> through a process conducted entirely online.<sup>927</sup> Notably, the Regulation requires the ODR platform to be accessible to all consumers, including vulnerable consumers.

In the United Kingdom, the regulatory framework supporting the new ODR platform, the *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015*, requires online traders to provide a link to the ODR platform on its website and in any terms and conditions of business.<sup>928</sup>

## 6.13 Compliance and enforcement action by regulators

Even where other measures adopted to facilitate access to justice are effective, the goal of improved access to justice will still require targeted compliance and enforcement action by regulators. Robust and vigilant regulatory action will be needed to deal with rogue traders who

918 See [www.civilresolutionbc.ca/what-is-the-crt/how-will-the-crt-work/](http://www.civilresolutionbc.ca/what-is-the-crt/how-will-the-crt-work/).

919 See [www.civilresolutionbc.ca/new-survey-results-british-columbia-is-online/](http://www.civilresolutionbc.ca/new-survey-results-british-columbia-is-online/).

920 See [www.moneyclaim.gov.uk/web/mcol/welcome](http://www.moneyclaim.gov.uk/web/mcol/welcome).

921 See [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/503066/money-claim-online-user-guide.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503066/money-claim-online-user-guide.pdf)

922 See [www.gov.uk/make-court-claim-for-money/court-fees](http://www.gov.uk/make-court-claim-for-money/court-fees).

923 On the European approach to ODR for consumer disputes see further Pablo Cortes, 'A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward' (2015) 35 *Legal Studies* 114.

924 See generally Pablo Cortés, 'A new regulatory framework for extra-judicial consumer redress: where we are and how to move forward' (2015) 35 *Legal Studies* 114. See also the Civil Justice Council, *Online Dispute Regulation for Low Value Civil Claims* (2015).

925 See <http://ec.europa.eu/consumers/odr/>.

926 See <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>.

927 See [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/docs/adr-odr.factsheet\\_web.pdf](http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf).

928 *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015* reg 19A (as amended by the *Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015*). Also [http://ec.europa.eu/consumers/solving\\_consumer\\_disputes/docs/adr-odr.factsheet\\_web.pdf](http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf).

deliberately set out to exploit vulnerable consumers, with traders who show a pattern of resisting consumer claims and also, in some cases, to clarify uncertain or controversial areas of the law. In comparing the regulatory approaches in the different countries considered, a major difference is in how responsibilities are divided between regulators.

Australia has a federal system but has resolved some of the coordination problems inherent in such a system through agreement on uniform legislation, the ACL, and a division of responsibilities between Commonwealth and State and Territory regulators. Also a federal system, Canada has a division of regulators based on the scope of the relevant Federal and Province legislation. By contrast, in the United Kingdom, the main division is between the peak regulator and those responsible for specific industry sectors, which some regulatory oversight also provided by the Consumers Association. Singapore is unique in not having a regulator responsible for monitoring and enforcing its consumer protection legislation.

### 6.13.1 Australia

In Australia, both Commonwealth and State/Territory consumer protection agencies, together defined as the ‘regulator’, are responsible for monitoring and enforcing compliance with the ACL. The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the ACL at the Commonwealth level (except in relation to financial services and products). The various State and Territory consumer agencies also have responsibility for enforcement of the ACL as enacted within their respective jurisdictions:

- ACT — Office of Regulatory Services;
- New South Wales — NSW Fair Trading;
- Northern Territory — Consumer Affairs;
- Queensland — Office of Fair Trading;
- South Australia — Consumer and Business Services;
- Tasmania — Consumer Affairs and Fair Trading;
- Victoria — Consumer Affairs Victoria;
- Western Australia — Department of Commerce.

The ACCC has engaged in processes of review and consultation with relevant stakeholders in various industries and, where it considers necessary,<sup>929</sup> taken enforcement action against transgressing companies.<sup>930</sup> In this task the ACCC has set out the principles guiding its approach to enforcement.<sup>931</sup> These involve giving priority to matters involving the following factors:

- conduct of significant public interest or concern;
- conduct resulting in a substantial consumer (including small business) detriment;

929 ACCC, Unfair Contract Terms — Industry Review Outcomes (2013).

930 See eg Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd [2013] FCA 653; Australian Competition and Consumer Commission v Launceston Superstore Pty Ltd [2013] FCA 1315; Australian Competition and Consumer Commission v HP Superstore Pty Ltd [2013] FCA 1317; Australian Competition and Consumer Commission v Camavit Pty Ltd [2013] FCA 1397; Australian Competition and Consumer Commission v Avitalb Pty Ltd [2014] FCA 222; Australian Competition and Consumer Commission v Gordon Superstore Pty Ltd [2014] FCA 452; Australian Competition and Consumer Commission v Mandurvit Pty Ltd [2014] FCA 464.

931 See further ACCC, Enforcement and Compliance Policy 2015.

- unconscionable conduct, particularly involving large national companies or traders, which impacts on consumers and small businesses;
- conduct demonstrating a blatant disregard for the law;
- conduct involving issues of national or international significance;
- conduct involving essential goods and services;
- conduct detrimentally affecting disadvantaged or vulnerable consumer groups;
- conduct in concentrated markets which impacts on small businesses or suppliers;
- conduct involving a significant new or emerging market issue;
- conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene;
- where ACCC action is likely to have a worthwhile educative or deterrent effect, and/or;
- where the person, business or industry has a history of previous contraventions of competition, consumer protection or fair trading laws.<sup>932</sup>

These priorities clearly have important access to justice dimensions. They focus on cases of considerable widespread significance to consumers and small businesses and also recognise the needs of vulnerable and disadvantaged consumer groups.

### 6.13.2 Canada

Responsibility for consumer issues in Canada is divided between federal and provincial regulators differently than in Australia. The federal agency, the Canadian Competition Bureau is responsible for enforcing and ensuring compliance with the *Competition Act*, which contains criminal and civil provisions to address false or misleading representations and deceptive marketing practices in promoting the supply or use of a product.<sup>933</sup> In this task the Bureau adopts a variety of strategies that aim to balance voluntary compliance and necessary enforcement.<sup>934</sup>

Provincial regulators are responsible for the various provincial acts and regulations that govern other aspects of consumer protection in Canada. Thus, for example, Consumer Protection British Columbia is responsible for administering British Columbia's consumer protection laws (*Consumer Protection Act*, the *Cremation, Interment and Funeral Services Act* and the *Motion Picture Act* along with a range of regulations).<sup>935</sup> Consumer Protection British Columbia responds to inquiries and complaints, educates consumers and businesses, licenses specific businesses and occupations, inspects licensed businesses, investigates alleged violations of consumer protection laws and follows up with enforcement actions, and provides recommendations to government regarding enhancements to British Columbia's consumer protection laws.<sup>936</sup> Its strategies include random selection of businesses to review compliance with consumer protection laws.

932 See [www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy](http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy).

933 See [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00529.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00529.html).

934 See [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00149.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00149.html).

935 See also the similar role performed by Consumer Protection Ontario: [www.ontario.ca/page/consumer-protection-ontario](http://www.ontario.ca/page/consumer-protection-ontario).

936 Consumer Protection British Columbia, *Annual Report (2014)* page 6 [www.consumerprotectionbc.ca/corporate-news/1246-2014-annual-report](http://www.consumerprotectionbc.ca/corporate-news/1246-2014-annual-report).

### 6.13.3 United Kingdom

The main consumer protection regulator in the United Kingdom is the Competition and Markets Authority.<sup>937</sup> The Competition and Markets Authority has powers to enforce a range of consumer protection law such as the *Unfair Terms in Consumer Contract Regulations* 1999, the *Consumer Protection (Distance Selling) Regulations* 2000 and under the *Consumer Protection from Unfair Trading Regulations* 2008 can take civil proceedings or criminal prosecutions against appropriate breaches. In contrast to Australia, the Competition and Markets Authority, a variety of sectoral regulators and also consumer advocate ‘Which?’ are also able to take enforcement action under the *Unfair Terms in Consumer Contract Regulations* 1999, now the *Consumer Rights Act 2015* part 2.<sup>938</sup> As with the Australian regulators the United Kingdom regulators have identified strategic priorities about the types of cases they will pursue and the enforcement action taken, which include regard to the national impact of the alleged wrongdoing and the effect on consumer welfare. These strategies are integrated with a wider policy directed at consumer education and empowerment.<sup>939</sup>

### 6.13.4 Singapore

The stated preference of the Singapore government in enacting a comprehensive consumer protection regime was to balance regulatory action and consumer responsibility.<sup>940</sup> Consistently, there are only limited opportunities for representative action to enforce consumers’ rights under consumer protection legislation. There is no independent entity administering the *Consumer Protection (Fair Trading) Act 2003*. The Act provides for ‘specified bodies’ which are empowered to invite errant traders to enter into a voluntary compliance agreement.<sup>941</sup> Only specified bodies may apply to the court for a declaration that a supplier has engaged in, or is about to be engaged in, unfair practice or for an injunction to restrain an errant supplier.<sup>942</sup> Currently, the Consumers Association of Singapore and the Singapore Tourism Board have been appointed as ‘specified bodies’.<sup>943</sup> However, prior to applying to the court, they are required to first seek endorsement of the Injunction Proposals Review Panel,<sup>944</sup> which has to be satisfied that there is a public interest to be safeguarded through the declaration or injunction.<sup>945</sup>

## 6.14 Comparison and analysis

An overarching theme in considering access to justice is that the commitment requires a diverse range of measures in order to address the different types of trader disputes and different consumer experiences. A focus on traders recognises that some need to be addressed by regulatory action while other trader-related problems may be resolved through informal conversations and negotiations. A focus on consumers recognises the need to address the hurdles to access to justice faced by all consumers and especially the most disadvantaged and vulnerable consumers.

937 See [www.gov.uk/government/organisations/competition-and-markets-authority](http://www.gov.uk/government/organisations/competition-and-markets-authority).

938 Consumer Rights Act 2015, schedule 3.

939 See eg [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/288624/CMA7\\_Consumer\\_Protection\\_guidance.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288624/CMA7_Consumer_Protection_guidance.pdf)

940 Singapore, Ministry of Trade and Industry, ‘Singapore: Public Consultation on the Consumer Protection (Fair Trading) Act’ (2008) 34(1) Common LB 149, 149. See also Singapore, Ministry of Trade and Industry, *Consumer Protection (Fair Trading) Bill 2<sup>nd</sup> Consultation Paper* (July 2003) at 1.

941 Consumer Protection (Fair Trading) Act s 8.

942 Consumer Protection (Fair Trading) Act s 9.

943 Consumer Protection (Fair Trading) Act s 8(10).

944 Consumer Protection (Fair Trading) Act ss 9(4), 10.

945 Consumer Protection (Fair Trading) Act s 10(5). See also *Consumers Association of Singapore v Garraway Enterprises Limited Singapore Branch* [2009] SGDC 193.

In taking measures to facilitate access to justice under the ACL, Australia performs relatively well in comparison to other countries surveyed within the confines of the available resources available to the relevant stakeholders involved. Australia has a broad range of strategies for promoting access to justice and stakeholders are generally aware of the need to tailor these strategies to consumer groups with different experiences and expertise. There are nonetheless lessons that can be learned from comparison with other countries.

**(1) The form of and content of legislation**

The form and content of legislation are often forgotten but important tools in facilitating consumers' access to justice. Clearly expressed and logically structured legislation provides the best opportunity for both consumers and traders to understand and apply their statutory rights and obligations. Legislation can also play an important role in proclaiming and reinforcing the importance of consumer rights to society. These considerations should be at the forefront of any reform process affecting the provisions of the ACL.

**(2) Information and education**

A relatively straightforward measure for promoting access to justice is through the provision of information and education about consumer rights, which can be presented in a variety of formats and topics and then made available to any consumer with access to a search engine. Australia and the other jurisdictions considered provide good quality information to consumers in range of formats. Australia might look at harmonisation measures between sources of information and education strategies to reduce duplication. It might also consider developing a single (online) directory of available resources, similar to the Canadian Consumer Handbook, to assist consumers and to reduce the risks of consumers being confused by the volume of material available.

It is also important to remember that information has limitations in empowering consumers to assert and defend their consumer rights. This is because the imbalance in bargaining power between traders and consumers that influences the extent to which consumers can insist on their rights under law is influenced by factors other than merely the information available to consumers. Consumers' ability to assert their rights is also influenced by a variety of socio-economic and cognitive factors that need to be taken into account in designed measures to facilitate access to justice.

**(3) Legal assistance and advice**

Legal advice and assistance are essential in facilitating access to justice. Such measures need to be properly funded to be effective; they also must be tailored to the needs of all affected consumer groups, and in particular to the circumstances of vulnerable and disadvantaged consumers.

**(4) Alternative dispute resolution**

Cost effective, time efficient and fair forums for dispute resolution that provide an alternative to court based litigation are essential to ensuring access to justice. Consumer disputes typically do not involve sufficiently large sums of money to justify traditional litigation relying on lawyers and taking place in court, and this is not a process amenable to many consumers in any event. In this regard, Australia might consider the introduction of a general consumer ombudsman as found in South Africa and in the United Kingdom and an industry funded, proactive and consumer friendly model for alternative dispute resolution.

In addition, Australia might look to the experience of British Columbia and the United Kingdom, or more broadly the European Union, where advances in online dispute resolution have taken place. Online dispute resolution using both intelligent systems and human expertise has the potential to provide quick, neutral and consistent dispute resolution in the consumer context. Any foray into online dispute resolution for consumer matters must include a strategy for ensuring that the use of this technology does not exclude vulnerable and disadvantaged consumers, so widening the digital divide.

(5) **Compliance and enforcement action by regulators**

Finally regulatory oversight and enforcement is vital to ensuring that consumer law is effective across the field and not merely in the high profile areas promoted by the media or among particularly affluent or vocal consumer groups.

Overall, successful progress in facilitating access to justice in the Australian context will accordingly require carefully conceived and targeted strategies and good communication between all stakeholders, along with a process of research and review to assess the success of those strategies that are implemented.