

## 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.

<sup>766</sup> See [www.choice.com.au/](http://www.choice.com.au/).

<sup>767</sup> See [www.abc.net.au/tv/thecheckout/](http://www.abc.net.au/tv/thecheckout/).

<sup>768</sup> See [www.consumerhandbook.ca/en/about](http://www.consumerhandbook.ca/en/about).

<sup>769</sup> See [www.ic.gc.ca/eic/site/oca-bc.nsf/eng/home](http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/home).

<sup>770</sup> See [www.consumer.ca/](http://www.consumer.ca/).

<sup>771</sup> See [www.consumerprotectionbc.ca/](http://www.consumerprotectionbc.ca/).

<sup>772</sup> 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](http://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 Shackelford, ‘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 Cortés, '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.