Law Council
OF AUSTRALIA
Business Law Section

Mr Gary Clements
Chair
Consumer Affairs Australia and New Zealand
c/o The Treasury
Langton Crescent
PARKES ACT 2600
Via email: ACLReview@treasury.gov.au

23 June 2016

Dear Mr Clements,

Australian Consumer Law Review

I have pleasure in enclosing two submissions in response to the Australian Consumer Law Review Issues Paper released on 31 March 2016. The submissions have been prepared by the Competition and Consumer Committee and the SME Business Law Committee of the Business Law Section of the Law Council of Australia, respectively.

The Committees are two of the fifteen specialist committees and one working party established within the Business Law Section to offer technical advice on different areas of law affecting business. Each of these committees approach issues of law reform and practice from a different perspective, which reflects the primary focus of their respective committees.

In this instance, whilst the two Committees agree on some issues, they do not share the same viewpoint on other issues. The difference in approach, both to substantive issues and to the approach taken to preparing the responses, reflects the different areas of law and direct legal experiences of the differently constituted Committees. This diversity of views is supported by the Business Law Section in the context of providing a range of views reflecting our members' diverse expertise and experience.

The Business Law Section is aware that the Treasury is interested in seeking the views of as many stakeholders as possible to inform the review and has indicated that it would appreciate receiving a diversity of views from within the Law Council of Australia. In this

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regard, I note that other submissions may be provided through other Sections or interest groups within the Law Council of Australia under separate cover.

Yours sincerely,

Teresa Dyson, Chair
Business Law Section

Enc.

Law Council
OF AUSTRALIA
Business Law Section

Submission of the Competition & Consumer Committee
Business Law Section
Law Council of Australia

Australian Consumer Law Review

23 June 2016

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia provides this submission in response to the Australian Consumer Law (**ACL**) Review Issues Paper (**Issues Paper**) released by the Government in March 2016.

Summary of main submissions

Australian's consumer policy framework

(a) The Committee considers Australia's consumer policy framework to be robust and well-developed, including when assessed against overseas consumer policy frameworks.

(b) The Committee believes that the current overarching Australian consumer policy objective remains relevant. The Committee notes that it may be desirable to add additional operational objectives to bring them into alignment with international norms, namely the protection of consumer data and flow of information, equalisation of e-commerce and conventional commerce protections, promoting sustainable consumption and aiding consumer education on environmental, social, and economic consequences of consumer choices.

Definition of consumer

(c) The Committee's view is that a complete re-write of the definition of 'consumer' in the ACL is not warranted. However, improvements should be made to increase consistency of the definitions of consumer across the ACL, so far as possible; make the definition of consumer more certain; ensure the protections of the ACL available to a 'consumer' are available on a principled basis; and appropriately balance competing policy objectives.

(d) The Committee's view is that the $40,000 threshold is arbitrary and it is often not clear how it applies in practice. As a matter of policy, acquisitions by business, of business goods for business use, should not receive the same protections as acquisitions by genuine consumers, regardless of their value.

(e) The Committee's suggested definition of consumer is contained in section 3.6 of this submission.

General provisions of the ACL

(f) *Misleading conduct*: The current approach to silence and omissions in the context of the prohibition in section 18 of the ACL on misleading or deceptive conduct is appropriate.

The same penalties and remedies as those that are available for contraventions of the prohibitions on specific false or misleading representations should not be available in relation to contraventions of the prohibition on misleading or deceptive conduct. If there are categories of false representation which should be, but are not currently, subject to pecuniary penalty, those categories should be identified as part of section 29 of the ACL. The possibility that there are such categories is not, however, a proper basis for imposing penalties for breach of a prohibition which was drafted in the most general terms and never intended to be subject to penalties.

(g) *Unfair commercial practices:* There is no need to extend the prohibition on misleading or deceptive conduct to include specific forms of unfair commercial practices, or to introduce a new prohibition on unfair commercial practices. The ACL currently contains both broad and flexible prohibitions designed to capture a wide range of commercial dealings and various specific protections directed at particular forms of unfair commercial practices. Further, each form of 'black listed' conduct in the EU directive on unfair commercial practices is likely to fall within one or more of the more prohibitions contained in the ACL.

Unless there is clear consumer harm that can be identified as not being addressed under the existing laws (which the Committee does not consider to be the case), then there is no reason to amend the law. Any change to the ACL will introduce uncertainty and may cut across the principles established under the current law.

(h) *Unconscionable conduct:* It is neither possible nor desirable to provide a comprehensive definition of unconscionability. The courts should be allowed to continue to develop the meaning of 'unconscionable', including the meaning of 'norms of society', without legislative intervention.

The unconscionable conduct protection under section 21 of the ACL should be extended to make it available to publicly listed companies.

Specific provisions of the ACL

(i) *Unfair terms:* The Committee considers that the ACL should not be amended to extend to contracts that are unfair as a whole. The existing law protects parties by construing terms in the context of the contract as a whole.

(j) *Consumer guarantees:* The Committee considers that an effective consumer protection regime ought to be clearly, simply and concisely stated, so as to make it easily and conveniently understood both by those on whom it imposes obligations and those to whom it grants rights. The current structure of the consumer guarantees does not meet these criteria. There are also practical issues associated with some of the definitions used in the consumer guarantees regime. In particular, the Committee recommends that the concepts of *'durability'* and *'major failures'* be made clearer. The requirements to include the mandatory text prescribed by Regulation 90 should be removed.

The Committee is not aware of any evidence that the indemnification provisions contained in section 274 of the ACL are failing to achieve the joint objectives of ensuring consumers are able to obtain remedies from suppliers, while also ensuring manufacturers bear ultimate liability for any faults of their making.

The ACL provides consumers with sufficient protection with respect to the sale of extended warranty products and there is no need for a specific provision which requires retailers to actively advise consumers of their consumer guarantee rights when selling extended warranty products. This would place an undue burden on retailers, particularly because the rights a consumer has under the consumer guarantees are subject to qualitative circumstances that often cannot be determined at point of sale.

(k) *Lemon laws:* The Committee's view is that the ACL does not need a lemon laws provision. The statutory consumer guarantees provide a regime for dealing with defective products. A lemon law would add an additional and unnecessary level of regulatory burden and complexity, without obviously providing any benefits.

(l) *Unsolicited consumer agreements:* In the Committee's view, the distinction between solicited and unsolicited is the most appropriate method to protect consumers against aggressive and high-pressure selling techniques. Extending the provisions to business

contracts is unnecessary, and concerns around vulnerability and disadvantage are less relevant in a business context. Unless there is an identified harm to businesses who choose to enter into unsolicited agreements that is not being addressed under the existing laws, then there is no reason to amend the law.

Allowing goods to be supplied during the cooling off period is appropriate and benefits consumers. $500 is a fair value by which to distinguish between significant purchases requiring further protection and less significant purchases. The Committee agrees that the exemption should extend to services.

Businesses should also be allowed to accept and require payment for supplies made during the cooling off period, pursuant to the exemption. Businesses should not be required to wait until the cooling off period has expired where the supply has already made.

Unsafe products

(m) The Committee recognises the important motivation behind the product safety regime. However, the Committee considers that current regime is not working efficiently. Whilst addressing the risks of consumer harm, the protections impose disproportionate or unnecessary costs on businesses. There are some changes that can and should be made to improve the efficiency of this regime, as set out in this submission.

(n) The Committee considers that there is no need for the introduction of a prohibition on the supply of unsafe goods. This is because the existing prohibition of non-compliance with safety standards is appropriately comprehensive. There are also a range of provisions under the ACL, including the consumer guarantees and defective goods actions, which provide rights to persons (not limited to consumers) who may have suffered injury, loss or damage in respect of consumer goods. The ACCC may also commence a representative action on behalf of persons.

Treatment of financial services

(o) The Committee considers that the current approach to splitting the consumer protection laws between the ACCC and the Australian Securities and Investment Commission (**ASIC**), through defining and exempting 'financial services' and 'financial products' from the scope of the ACL, is inefficient and creates unnecessary complexity.

(p) This unnecessary complexity could be resolved by removing the exemption to the ACL's scope which is currently provided in respect of the supply of financial services or financial products under section 131A of the CCA, and making ASIC's consumer law jurisdiction currently provided under Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) concurrent with that of the ACCC in respect of financial services or financial products.

(q) Enabling both bodies to apply their specialist expertise in their respective areas – i.e. the ACCC with its specialist competition and consumer law expertise, and ASIC with its specialist regulatory expertise – would enable a more efficient approach by ensuring a consistent application of the laws across a range of industries, avoiding duplication and unnecessary jurisdictional questions and maximising the quality of the investigations.

Administering and enforcing the ACL

(r) The Committee believes that the ACL promotes a proportionate and risk-based approach to enforcement. The enforcement tools available to ACL regulators enable them to give effect to an appropriate 'enforcement pyramid', whereby sanctions of escalating severity (and enforcement cost) are used to deal with increasingly serious breaches of the law.

(s) However, the ability of ACL regulators to give effect to such an approach will be affected by their funding. The overall level of funding and staffing at ACL regulators has been reducing, and there are concerns that the level of enforcement may be in decline. Additional and more consistent reporting by ACL regulators could assist in assessing the extent to which the ACL is being enforced.

(t) The Committee recognises civil penalties are an increasingly important enforcement tool for ACL regulators, both to deter a particular respondent and to others more generally from engaging in contravening conduct. With only five years having passed since the introduction of financial penalties for civil contraventions of the consumer protection provisions, however, the Committee considers that there has not yet been sufficient time to conclude that the current level of penalties is not providing sufficient deterrence.

Access to remedies and scope for private action

(u) Any dispute resolution mechanism must balance accessibility with reliability; ensuring that consumers and small business claimants have timely access to remedies without having to incur substantial costs, while also giving businesses confidence that complaints will be judged fairly. It is therefore important that consumers have access to dispute resolutions mechanisms that enable them to enforce their own rights.

(v) The Committee considers that there is merit in examining a broad based consumer ombudsman scheme to give consumers a low cost avenue for seeking redress. A scheme, such as the UK Retail Ombudsman and Consumer Ombudsman, is worthy of consideration in Australia.

(w) While regulators should, and currently do, have the powers necessary to seek redress for consumers where they take enforcement action, the focus of regulators should remain on their principal purpose of law enforcement, not the compensation of victims. The Committee notes that the ACCC already has the ability to bring representative proceedings in respect of a range of ACL contraventions.

(x) Consistent with the recommendation made by the Harper Review, the provisions of the ACL which are intended to facilitate private actions by enabling findings of fact in civil penalty proceedings to be prima facie evidence in private actions, could be amended to extend to admissions made in agreed statements of fact as well as findings of fact made by a court as a result of contested proceedings. Such an amendment could enable regulators by their enforcement action to facilitate subsequent private actions, including class actions, to obtain compensation.

Emerging consumer policy issues

(y) The Committee considers that existing provisions under the ACL are presently appropriate for dealing with digital products or content. In particular, the consumer guarantees and unfair contract terms provisions are working in this context – the Committee does not consider that specific tailoring of ACL provisions to address digital products (such as apps, games or music) is necessary.

(z) In each of the areas of online shopping and emerging business models, the Committee considers that the existing provisions of the ACL are already adequately capable of addressing these issues.

1 Consumer policy in Australia (section 1)

1.1 Australia's consumer policy framework objectives (section 1.3, ACL Issues Paper)

1. *Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?*

The Committee believes that the current overarching Australian consumer policy objective remains relevant, namely:

> *To improve consumer well-being through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.*

The Committee considers that Australia's reputation for maintaining a comprehensive and rigorous consumer protection regime is a significant national economic asset and advantage for Australian consumers and assists suppliers of goods and services to better compete globally including in emerging consumer markets in Asia.

Similarly, the six *operational objectives* remain relevant. The Committee notes that it may be desirable to add the following objectives to bring them into alignment with international norms:

(a) Protection of consumer data & flow of information.

(b) Equalisation of e-commerce and conventional commerce protections.

(c) Promoting sustainable consumption.

(d) Aiding consumer education on environmental, social, and economic consequences of consumer choices.

These modernisations of the consumer policy objectives are warranted to meet rapid changes in the international and domestic consumer economy.

2. *Are there any overseas consumer policy frameworks that provide a useful guide?*

The Committee considers Australia's consumer policy framework to be robust and well-developed, including when assessed against overseas consumer policy frameworks. To assist the Review, below are some observations on aspects of the key overseas frameworks.

United Nations

As recently as 22 December 2015, the United Nations General Assembly updated its United Nations Guidelines for Consumer Protection (**UNGCP**) and adopted resolution 70/186 on Consumer Protection (to which the revised UNGCP was annexed).[1] This was the second major iteration of the UNGCP since its first adoption in 1985 to "*elaborat[e] a set of general guidelines for consumer protection*".[2] The UNGCP is intended as an international baseline, "*taking into particular account the needs of the developing*

[1] General Assembly resolution 70/186 of 22 December 2015

[2] General Assembly resolution 39/248 of 16 April 1985

countries".[3] It is noteworthy that its policy objectives now include references to the following matters:

- '[P]romotion of 'sustainable consumption patterns';
- '[C]onsumer education on the environmental, social and economic consequences of consumer choice;
- '[I]nternational cooperation in the field of consumer protection';
- '[P]rotection for consumers using electronic commerce that is not less than that afforded in other forms of commerce'; and
- '[P]rotection of consumer privacy and the global free flow of information.'

United States

The consumer protection regulatory landscape in the United States is generally more 'fragmented' than is the case in Australia. The Australia regime is distributed between the ACL and the ASIC Act. The Federal Trade Commission's (**FTC**) powers are expressly precluded[4] from regulating the activities of 'common carriers',[5] and there is frequently overlapping regulatory responsibilities among US federal and state government agencies, resulting in some complexity and, sometimes, inconsistent regulation. For example, although in the U.S. a similar division between the ACCC and ASIC is seen between the FTC and Consumer Financial Protection Bureau, product safety is shared with the US Consumer Product Safety Commission, broadcasting with the Federal Communications Commission, and so forth. In addition, were the FTC to decide to commence an action for the recovery of a substantial civil pecuniary penalty it would require the involvement of the Department of Justice. In contrast, the Australian model adopts a significantly more streamlined 'single law, multiple regulator' model.

The American system also offers a number of 'self help' type options for consumer-litigants. Although consumer class actions are gaining in popularity in Australia, in the United States they are an institution. The institution of the class action makes the cost of American consumers seeking redress commercially viable. Frequently, these are done by attorneys on a contingency fee basis. Moreover, the usual costs rule in American courts (the 'American rule') is that the parties bear their own costs whether or not successful.[6] Similarly, qui tam or so-called 'whistleblower' actions in which the 'whistleblower' takes on the burden of a regulatory enforcement action for a share in any funds recovered are a not uncommon feature of federal and state legal systems. Further, consumers may sometimes take action under the federal Racketeer and Corrupt Organizations Act, otherwise known as 'RICO', which enable some consumers to obtain treble damages for activity which is also criminal. These options are responsive to questions of access to justice, and they are not without Australian analogies,[7] but do not necessarily represent a position supported by the Committee.

In the last 10 years, the FTC has become the United States' leading privacy regulator[8]. Notwithstanding that the Federal Trade Commission Act was enacted in 1914, the FTC

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[3] Economic and Social Council resolution 1981/62 of 23 July 1981.

[4] Section 5 of the *FTC Act*.

[5] In their activities *qua* common carriers.

[6] However, the *Equal Access to Justice Act* modifies the rule where a party is successful against the US Government, unless another statute provides otherwise or the government had acted unreasonably or special circumstances apply.

[7] For example, 'any person' may obtain an injunction restraining misleading or deceptive conduct under s.232 of the *Australian Consumer Law*.

[8] David C. Vladeck, *Charting the Course: The Federal Trade Commission's Second Hundred Years,* 83 Geo. Wash. L. Rev. 2101-2129 (2015), p.2102.

has adapted its general powers to prevent 'deceptive' commercial practices to an evolving digital landscape.[9] The creation of an FTC privacy jurisprudence that is viewed by some as 'functionally-equivalent to a body of common law',[10] notwithstanding a somewhat 'fragmented' and industry-specific regulatory landscape of hard law,[11] has been made possible by the consistent application of an FTC settlement policy resulting in de facto national regulation of digital collection of personal information. In contrast, the protection of consumer personal information is not an express focus of Australian consumer law regulators or a current component of the Australian consumer law policy framework.

European Union

Article 169 of the Treaty on the Functioning of the European Union states that "*in order to promote the interests of consumers and to ensure a high level of consumer protection, the union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.*"

In furtherance of this general objective, a number of key Directives are issued. There is a substantial correlation between the Australian operational policy objectives.

United Kingdom

As a Member of the European Union (for the time being at least), the UK is bound by the EU Directives mentioned above. Moreover, the introduction of the *Consumer Rights Act 2015* (UK) only commenced in October 2015: As a result, there has been insufficient time to draw any meaningful learnings from the UK regime to date.

3. *Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?*

The US FTC maintains a strong international presence, with an Office of International Affairs running both outbound and inbound engagement programs. This reflects certain realities of the size and significance of the U.S. economy, but it is an outward-looking approach that could be replicated in Australia given the receding significance of national boundaries to modern commerce, especially digital commerce.[12]

2 Australian Consumer Law – the legal framework (section 2)

2.1 Structure and clarity of the ACL (section 2.1.1, ACL Issues Paper)

4. *Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?*

[9] Which are substantially identical to the Australian jurisprudence on 'misleading or deceptive conduct'. Indeed, the former section 52 of the *Trade Practices Act 1974 (Cth)* appears to have been modelled on s.5 of the *FTC Act*. For a very recent example of the application of a general prohibition on 'deceptive' practices by failing to protect *against* digital collection of personal information by hackers, see decision of the U.S. Court of Appeals for the 3rd Circuit of 24 August 2015 in *Federal Trade Commission v Wyndham Worldwide Corporation & Others*, 799 F.3d 236 (3d Cir. 2015).

[10] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014), p.586

[11] *Ibid.*, p.588.

[12] A very recent example of this is the Federal Court of Australia finding that a US-based online game distribution platform enagaged in misleading or deceptive conduct with Australian consumers *inter alia* by maintaining warranties inconsistent with the statutory domestic consumer guarantees: *ACCC v Valve Corporation (No.3)* [2016] FCA 196 (24 March 2016)

5. *Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?*

6. *Are there overseas consumer protection laws that provide a useful model?*

The Committee considers that, with the exception of certain specific definitions and prohibitions discussed further in this submission, the language of the ACL is generally clear and simple to understand. Those aspects that the Committee considers could be improved are set out in this submission.

The Committee's observations with respect to overseas consumer protection laws are set out in section 1 above.

3 The meaning of consumer (section 2.1.2, Issues Paper)

7. *Is the ACL's treatment of "consumer" appropriate? Is $40,000 still an appropriate threshold for consumer purchases?*

3.1 Overview

By way of summary, the Committee's view is that:

(a) in the current policy setting, a complete re-write of the definition of 'consumer' in the ACL is not warranted, but

(b) improvements should be made to:

(i) increase consistency of the definitions of consumer across the ACL, so far as possible;

(ii) make the definition of consumer more certain and simpler to understand and apply for both consumers and suppliers;

(iii) ensure the protections of the ACL available to a 'consumer' are available on a principled basis; and

(iv) appropriately balance competing policy objectives – ensuring that sufficient protections are retained for individual consumers and, as appropriate, business consumers while also managing the compliance burden on Australian suppliers subject to the ACL.

3.2 The development of the definition of 'consumer' under the ACL

The first national definition of 'consumer' was found in section 4(3) of the *Trade Practices Act 1974* (Cth) (**TPA**), from the time the TPA was enacted. That definition stated:

(a) a person who acquires goods shall be taken to be a consumer of the goods if the goods are of a kind ordinarily acquired for private use or consumption and the person does not acquire the goods or hold himself out as acquiring the goods for the purposes of resupply; and

(b) a person who acquires services shall be taken to be a consumer of the services if the services are of a kind ordinarily acquired for private use or consumption and the person does not acquire the services for the purposes of, or in the course of, a profession, business, trade or occupation or for a public purpose.

There was however a concern with the way in which this definition, given its use of the word "private", would impact on small businesses. Following the Swanson Committee review in 1976, a revised definition was inserted in section 4B of the TPA. This revised definition made reference to a prescribed amount under which the purchaser of the goods would automatically be considered a 'consumer'.

The prescribed amount was initially $10,000 and a $40,000 threshold was later introduced in 1986. The threshold has not changed since that time.

Where the price of goods exceeded the prescribed amount (and then the threshold), inquiry would be made into the nature of the goods and whether they met an objective test based on the nature of the goods, not the purpose for which they were acquired. A similar test applied for services.

Section 4B of the TPA provided as follows:

> ***4B Consumers***
>
> *(1) For the purposes of this Act, unless the contrary intention appears:*
>
> *(a) a person shall be taken to have acquired particular goods as a consumer if, and only if:*
>
> *(i) the price of the goods did not exceed the prescribed amount; or*
>
> *(ii) where that price exceeded the prescribed amount – the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;*
>
> *and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and*
>
> *(b) a person shall be taken to have acquired particular services as a consumer if, and only if:*
>
> *(i) the price of the services did not exceed the prescribed amount; or*
>
> *(ii) where that price exceeded the prescribed amount – the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.*

During the introduction of the ACL in 2010, the removal of the $40,000 monetary threshold from the definition of the 'consumer' was considered.

The definition of 'consumer' in Schedule 1, section 3(1) to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) (**Bill**) made no mention of the threshold. By removing the threshold, this proposed definition had the effect of narrowing the class of persons who could be considered a 'consumer' (removing protection as a 'consumer' for goods or services acquired for less than $40,000 that were not of a kind ordinarily acquired for personal, domestic or household use or consumption), although it maintained the objective test based on the nature of the goods in the previous definition of 'consumer' in s 4B of the TPA.

It was the view of the Treasury and the Senate Economics Legislation Committee that considered the Bill, that the definition of 'consumer' should not include any monetary threshold.[13]

The above notwithstanding, as the Bill passed through the Senate it was amended before being passed and a $40,000 monetary threshold was included in the definition of 'consumer' in section 3 of the ACL, the consequence of which was that the definition of 'consumer' in section 4B of the TPA was, in effect, mirrored in the ACL.

3.3 Three different definitions of 'consumer' in the ACL

In addition to section 3, there are two other definitions of 'consumer' in the ACL. Each is drafted differently, applies in different circumstances and to different substantive provisions of the ACL. The three definitions are found in sections 2, 3 and 23.

Section 2 definition of 'consumers

The section 2 definition of 'consumer' is relevant to product safety under Part 3-3 and related offence provisions under Part 4-3 of the ACL. Section 2 defines 'consumer goods' as:

> *goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption, and includes any such goods that have become fixtures since the time they were supplied.*

This definition would apply, for example, to compulsory and voluntary recalls of consumer goods under the ACL. This definition also combines both a subjective assessment of the use of the goods and an objective assessment of the nature of the goods being acquired.

Section 3 definition of 'consumer'

The section 3 definition of 'consumer' is relevant to the broadest range of provisions in the ACL of each of the definitions. In particular, it applies to consumer guarantees, unsolicited consumer agreements and layby sales agreement (among other provisions).

In relation to goods, a person will be a 'consumer' where:

(a) the amount payable for the goods is $40,000 or less;

(b) the "*goods are of a kind ordinarily acquired for personal, domestic or household use or consumption*"; or

(c) the goods are a vehicle or trailer acquired for use principally in the transport of goods on public roads,

unless they are acquiring the goods for the purpose of resupply or the purpose of transforming them in the course of the process of production or manufacture or repair.

In relation to services, a person will be a 'consumer' where the amount payable for the services is $40,000 or less or where the "*services are of a kind usually acquired for personal, domestic or household use or consumption*".

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[13] The Senate Economics Legislation Committee, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 [Provisions]*, May 2010.

There is a rebuttable presumption under section 3(10) that where it is asserted in legal proceedings that a person acquired goods or services as a 'consumer', the person is to be considered a consumer.

As is clear from the above, a 'consumer' under the definition in section 3 may be either an individual or a corporation and the goods or services acquired may, in certain circumstances, be either goods used privately or in a business context (but not for re-supply or transformation) but the assessment of the nature of the goods or services is objective (save for the reference to a commercial vehicle or trailer).

Section 23 definition of 'consumer'

The section 23 definition of 'consumer' is relevant only to the unfair contract terms regime in Part 2-3 of the ACL. A 'consumer contract' is defined in section 23(3) as:

> *a contract for:*
>
> *(a) a supply of goods or services; or*
>
> *(b) the sale or grant of an interest in land;*
>
> *to an individual whose acquisition of the goods, services or interest in land is wholly or predominantly for personal, domestic or household use or consumption.*

Importantly, this definition of 'consumer' applies only to individuals and, unlike section 3 above, relies on a subjective assessment of the use of the goods being acquired. That subjective purpose of the acquisition need not be made known to suppliers.

The balance of this part of the Committee's submission focusses primarily on the section 3 definition of 'consumer' in the ACL, on the basis that it constitutes the principal definition of 'consumer' in the ACL, with the aim of considering whether it could be amended in a way that would enable the three definitions of 'consumer' across the ACL to be rationalised into one.

3.4 The case for amending the definitions of 'consumer'

In addition to there being three distinct definitions of 'consumer' in the ACL, the principal definition of 'consumer' under section 3 lacks clarity and certainty.

Some of the Committee's concerns with the present definition in section 3 are outlined below. In the Committee's view, these concerns warrant giving serious consideration to consolidation and amendment to the definitions of 'consumer' in the ACL.

The $40,000 threshold is arbitrary and difficult to apply

The Committee's view is that the $40,000 threshold is arbitrary and it is often not clear how it applies in practice. This has previously been recognised by The Senate Economics Legislation Committee.[14]

First, the threshold operates to protect some acquirers and not others. However, there is no principled basis why ACL rights should be extended to a person acquiring goods or services for $40,000 but not for $41,000. Nor can it be justified as an appropriate proxy for acquisitions by 'vulnerable' purchasers. Many large, sophisticated organisations acquire goods or services for less than $40,000.

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[14] The Senate Economics Legislation Committee, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 [Provisions]*, May 2010, page 29.

Secondly, it is not clear whether the $40,000 threshold is intended to apply to each unit of goods acquired or more broadly to the total amount paid under a contract for a large number of those same units. Similar issues arise in contracts for services.

For example, assume:

(a) A contract for the supply of 45 laptops, at a price of $1,000 each. There is no clear statement in the ACL that the $40,000 threshold applies to each unit acquired, as opposed to the total amount paid under the contract.

(b) An ongoing service contract entered into for the maintenance and service of various telecommunications infrastructure where payments are structured to be on a monthly basis of $25,000 per month. Does the position differ if over time the payment arrangements were altered to quarterly payments of $75,000?

The subsections dealing with mixed supply provide no guidance on how to ascertain "value" for the purposes of identifying the amount paid/payable

Where a specified price is not allocated to each of the goods and services under a contract for mixed supply, and no other supplier supplies the goods or services separately, it is necessary to rely on section 3(5)(c) of the ACL to determine the "price" of the goods and services.

Section 3(5)(c) provides that in these circumstances, the amount paid or payable is taken to be the "value" of the goods or services at that time.

However, the ACL does not provide clear guidance on the way such value is to be calculated, leaving it open to many different interpretations and giving rise to ambiguity as to whether the goods and services are caught by the threshold.

For example, assume a contract for the supply and installation of solar panels, at a total price of $50,000, where the prices for supply and installation are not separately specified and where the solar panels and installation services are only supplied by other suppliers in mixed format also. How do you determine the "value" of the goods or services, to ascertain if they are within the $40,000 threshold?

The mixed supply inquiry based on another supplier's price for those goods can become farcical

Under section 3(5), if a person purchases goods by a mixed supply, and a specified price was not allocated to the goods or services under the contract (a circumstance which is common), the "amount paid" for the goods or services for the purposes of subsection (1) and (3), is taken to be:

> *(a)* *the price at which the goods or services could have been purchased separately from the supplier; or if that is not possible*
>
> *(b)* *if the goods or services could have been purchased separately (i.e, not in a mixed supply) from* ***another*** *supplier,* ***the lowest price at which the person could, at that time, reasonably have purchased goods or services of the kind acquired, from another supplier.*** (our emphasis)

Sub-section (b) creates significant problems.

First, it is necessary to determine whether another supplier separately offers goods and services which are of the same "kind". This raises difficult questions as to the comparability of those goods or services being acquired, not only as to quality and quantity but also over time.

Secondly, although in many cases such goods and services of the same kind may be offered separately by another supplier, those prices are often not publicly available. In that case, one is merely left to guess the other supplier's price, to inform whether the acquisition falls under the $40,000 threshold.

For example, assume an individual is seeking the supply and installation (mixed supply) of a ducted heating unit. The quote from Supplier A is for a mixed supply and installation totalling $80,000. No separate prices are provided in the contract and Supplier A does not sell the heating unit and installation separately.

Assuming the goods and services are "of the [same] kind", a ticketed price for the heating unit is available on Supplier B's website. Most suppliers in the industry are willing to discount their ticketed prices, by varying amounts. Is the ticketed price the "lowest price at which the person could have purchased the goods"? If not, how do you determine the lowest price in this scenario? How many enquiries are required before one could be satisfied that there is no other supplier who could make the goods available at a lower price (possibly one below the threshold)?

In relation to the services, Supplier B provides an hourly rate for installation services on its website. However, the time spent on installation is known to vary according to where the unit can be installed (e.g. on the ground or above ground). It is not possible to know what Supplier B would charge for installation as the customer's site is unique. How could the supplier calculate the price at which Supplier B could supply the services, when the services are unique to the customer's situation?

It should not be acceptable that in order to determine whether Supplier A supply is above or below the threshold, we are left to guess Supplier B's prices.[15]

The $40,000 threshold captures acquisitions it ought not capture

The Committee's view is that the $40,000 threshold (arbitrary as it is) operates to extend protection to transactions that from a policy perspective arguably should not be protected as transactions by 'consumers'. In particular, as a matter of policy, acquisitions by business, of business goods for business use, should not receive the same protections as acquisitions by genuine consumers, regardless of their value.

The Committee submits that businesses acquiring business goods or services for business purposes should not receive protection as consumers simply because those goods or services are priced at less than $40,000.

The existing definition fails to capture acquisitions which it ought to capture

The Committee also submits that the existing definition does not capture certain acquisitions which, in its view, ought to receive protection as acquisitions by 'consumers'. Specifically, acquisitions of business goods (i.e. not of a kind ordinarily acquired for personal, domestic or household use or consumption) valued at over $40,000 but which are in fact being acquired for personal use, are not presently captured.

This 'gap' arises because the current test relies only on an objective assessment of the nature of the goods and does not take into account the subjective intended use of the goods in question, instead using the $40,000 as an unreliable proxy for subjective intent (on the assumption that "consumer" purchases are valued at less than $40,000).

For example, assume an individual acquires an elevator for $50,000 for use in their home following an accident. The elevator is ordinarily acquired for commercial use. As the elevator is not of a kind ordinarily acquired for personal, domestic or household use or

[15] In this example, s 3(5)(c) does not apply, as the goods and services are available from a supplier other than by mixed supply.

consumption, the purchaser would not fall within the definition of 'consumer' in section 3 and no be afforded the protections of the ACL.

The requirement for goods or services "of a kind" raises issues of classification and degree

The requirement that goods are "of a kind" ordinarily acquired for personal, domestic or household use or consumption raises questions of classification and degree, creating material uncertainty.

For instance, many goods used in a domestic setting have more specialised and consequently more costly equivalents when used commercially. Are the commercial versions nonetheless "of a kind ordinarily acquired for personal, domestic or household use or consumption"?

The specificity with which goods or services are classified will very much affect whether a person who pays more than $40,000 is considered a 'consumer' under section 3 of the ACL yet no guidance is provided by the ACL in this regard.

For example, assume:

(a) The acquisition of a sedan motor vehicle valued at greater than $40,000. Clearly, the motor vehicle is of a kind ordinarily acquired for personal, domestic or household use or consumption. However, if a corporation purchases ten of the same motor vehicle for its commercial fleet requirements, how should it be classified?

(b) The acquisition of gas and/or electricity by a commercial enterprise, in a contract valued at more than $40,000. It is that gas or electricity a good or service in any event "of a kind ordinarily acquired for personal, domestic, or household use or consumption"?

3.5 Guiding principles for amending the definitions of 'consumer'

The Committee considers that the objective should be to create a definition of 'consumer' in the ACL which, so far as possible:

(a) is consistent across the ACL (or at least capable of being applied consistently across the ACL in time);

(b) is certain and simple to understand and apply for both consumers and suppliers;

(c) is based on sound principle;

(d) balances competing policy objectives – retaining sufficient protection for individual consumers and, as appropriate, business consumers while also managing the compliance burden on Australian suppliers subject to the ACL.

With this objective in mind, the Committee suggests the following as guiding principles for reform of the definition of 'consumer'.

The definitions of 'consumer' in the ACL should be unified

In the Committee's view, there is no principled basis to retain multiple, different definitions of 'consumer' in the ACL and, so far as possible, the definitions of 'consumer' in the ACL should be unified.

A single, consistent definition would:

(a) be easier to apply for consumers and suppliers alike;

(b) result in a clearer understanding of rights and responsibilities across the ACL; and

(c) reduce compliance costs for suppliers.

Protection should extend beyond individuals to include businesses in certain circumstances

In the Committee's view, the definition of 'consumer' should extend beyond just individuals and include businesses, in certain circumstances.

Defining 'consumers' as individuals only would result in removing many significant protections currently offered to businesses under the ACL. This would appear to be contrary to the current policy setting, which has moved significantly towards, rather than away, from protecting small businesses under Australia's consumer laws.[16]

The best way to achieve a principled outcome is to focus on the nature of goods and purpose of acquisition

If the accepted policy setting is that protection under the ACL as a 'consumer' should be available to both individuals and businesses in appropriate circumstances, the best way to achieve a principled outcome as to who receives protection and who does not, is to focus on the nature of the goods or services and the purposes for which they are acquired, not the "identity of the person".

A test based on the "identity of the person" would undoubtedly work very well in respect of individuals, but the Committee is concerned that it does not work well when seeking to differentiate between which businesses should be protected 'consumers' and which should not. For example, seeking to define an appropriately 'small business' is fraught with difficulties and, ultimately, arbitrary. The recent amendments to the unfair contract terms[17] is a clear illustration of this.

The Committee recommends a test which focuses on the nature of the goods or services and the purposes for which those goods or services are acquired in order to identify who is properly a 'consumer' and who is not.

The test should combine both objective and subjective elements

The Committee's view is that the test examining the nature of the goods or services and the purposes for which those goods or services are acquired, should combine both

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[16] This is illustrated, for example, by the extension of the unconscionable conduct provisions under the former *Trade Practices Act 1974*, from individuals under (former) s 51AB to business consumers and suppliers under (former) s 51AC in 1998 (initially with a cap on the value of the transaction of $1 million which was subsequently increased to $3 million (July, 2000) and then again to $10 million (September, 2007) and then ultimately removed altogether (November 2008)). It is also illustrated by the recent extension of the unfair contract terms provisions under Part 2-3 of the ACL to "small business" contracts under the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) (to take effect from 12 November 2016).

[17] The unfair contract terms provisions under Part 2-3 of the ACL were extended to "small business" contracts under the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) (to take effect from 12 November 2016). Under those provisions, a contract is a 'small business contract' if:

(a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and

(b) either of the following *applies:*

(i) the upfront price payable under the contract does not exceed $300,000;

(ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.

objective and subjective elements, in order to achieve the most effective, balanced and principled policy outcome.

(a) An objective limb would focus on whether the goods are likely to be acquired for personal, domestic or household use or consumption. This gives suppliers some certainty with which to proceed, as to whether acquirers of their goods or services are likely to be protected under the ACL.

(b) A subjective limb would focus on whether the particular acquirer's intended use is in fact a personal, domestic or household one, irrespective of whether the goods are likely to be or of a kind ordinarily acquired for business use. Reliance on the purchaser's subjective intention should, however, be qualified by the need for the purchaser to make that subjective intention known to the supplier.

The reason for introducing both objective and subjective elements into the definition of consumer is that a test based on either element, alone, will not derive an optimal outcome. For example, a purely objective test will give rise to gaps in protection for acquirers who are genuinely acquiring goods or services for personal use where those goods or services are ordinarily not used for personal use. On the other hand, a purely subjective test – where the intention of the particular acquirer in any given transaction will determine whether they are a 'consumer' – will not provide sufficient certainty to suppliers as they cannot be sure of the subjective uses to which their goods or services will be put.

An arbitrary monetary threshold should not be retained

In the Committee's view, an arbitrary monetary threshold of $40,000 (or otherwise) should not be retained in the definition of 'consumer' under the ACL. By removing the thresholds, the definition of 'consumer' would be simplified and many of the practical problems with the application of the definition (outlined above) would be resolved.

The Committee does not recommend, however, simply deleting the monetary threshold from the present definition of 'consumer' in section 3 but leaving the remainder of that definition intact. To do so would leave a purely objective test based only on whether the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption. This would mean that some "genuine" consumer transactions that, as a matter of policy, should receive protection, would no longer be caught by the definition – for example, where the goods or services are not of a kind ordinarily acquired for personal, domestic, household use or consumption but are in fact purchased by an individual for personal use (presently only caught if below the threshold).

An approach which incorporates both objective and subjective elements would allow the arbitrary $40,000 monetary threshold, which operates as a flawed proxy for the purchaser's subjective intention[18], to be removed from the definition.

3.6 Proposal for amended definition of 'consumer'

The Committee's proposed definition of 'consumer'

The Committee's proposal is to delete the existing definition of consumer in section 3(1) and replace it with an adapted version of the definition of "consumer goods" from section 2 of the ACL. This definition combines both objective and subjective elements and is set out below (**Proposed Definition**).

[18] That goods priced under $40,000 are only acquired by consumers and that business goods priced at more than $40,000 are never acquired by consumers.

3. Meaning of consumer

Acquiring goods as a consumer

(1) A person is taken to have acquired goods or services as a consumer if:

(a) the goods or services are intended to be used for personal, domestic or household use or consumption; or

(b) the goods or services are of a kind likely to be used for personal, domestic or household use or consumption or the supplier or manufacturer represents that the goods or services are suitable for personal, domestic or household use or consumption.

(2) The intention referred to in section 3(1)(a) must be made known to the supplier or manufacturer by the person acquiring the goods or services, either expressly or by implication, at or before the time of acquisition of the goods or services.

(3) *… [current provisions in section 3(3) of the ACL retained here re: re-supply, using up in trade or commerce, etc]*

3.7 Key differences between current protection and proposed protection of 'consumers'

There are some key differences between the protections offered under the current definition of 'consumer' in s 3 of the ACL and the Proposed Definition. These arise principally because of:

(a) the inclusion of the assessment of the purchaser's subjective intention; and

(b) the removal of the $40,000 threshold.

The table below sets out a comparison of the protections available for 'consumers' under the current definition and under the Proposed Definition.

	Current definition of 'consumer' (s3)	**Proposed Definition of 'consumer'**
"Personal" goods/services acquired for personal use	Yes, because of a kind ordinarily acquired for personal, domestic or household use or consumption (**PDHUC**).	Yes, because acquired for PDHUC (subjective) and because of a kind likely to be used for PDHUC (objective).
"Personal" goods/services acquired for business use	Yes, because of a kind ordinarily acquired for PDHUC.[19]	Yes, because of a kind likely to be used for PDHUC (objective).[6]
"Business" goods/services	Yes, if under $40,000.	Yes, because acquired for PDHUC (subjective)

[19] Subject to not being acquired for re-supply, etc.

	Current definition of 'consumer' (s3)	Proposed Definition of 'consumer'
acquired for personal use	No, if $40,000 or more.	(irrespective of price).
"Business" goods/services acquired for business use	Yes, if under $40,000.[6] No, if $40,000 or more.	No (irrespective of price).

3.8 The Proposed Definition achieves the objective for the definition of 'consumer' and is consistent with the guiding principles

The Committee submits that the Proposed Definition achieves the objective for, and is consistent with the guiding principles for amending, the definition of 'consumer' (as outlined in section 5 above).

It unifies and simplifies the definition of 'consumer' across sections 2 and 3

The Proposed Definition would unify the language of two definitions of 'consumer' in the ACL which are currently different.

In addition, by having regard to the purchaser's subjective purpose, the Proposed Definition brings the definition of 'consumer' in section 3 closer to the existing unfair contract terms definition of 'consumer' in section 23 of the ACL, which defines 'consumer contract' with regard to the purpose for which the individual is acquiring the goods or services. As it is capable of covering both individuals and small businesses, the Proposed Definition could, in due course, be used in place of the separate definitions of consumers and small businesses in the unfair contracts provisions in section 23 of the ACL.[20]

Importantly, the Proposed Definition would not introduce into the ACL concepts which are currently unknown to the ACL. Rather, it seeks to adapt language already used in the ACL.

The Proposed Definition is based on sound principle and the outcome is correct from a policy perspective

(a) As is the case now, personal goods acquired for personal use are always protected. Both consumers and suppliers can be certain of this.

(b) As is the case now, personal goods acquired for business use are always protected. Again, both consumers and suppliers can be certain of this.

(c) Business goods acquired for personal use are protected *whatever the price*, (provided that intention has been made known by the purchaser or that use represented by the supplier or

[20] In the Committee's view, complete unification of the definition of 'consumer' across the ACL is not possible in the absence of repeal of the recently enacted amendments to the unfair contract terms provisions related to small business contracts (*Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth)). This is because the 'nature of goods test' can apply to either individuals or businesses purchasing for domestic use, but the unfair contracts regime draws a distinction based on the identity of the person, i.e., a 'consumer' contract (being one with an individual) and a 'small business' contract. If the unfair contracts regime were to adopt the Proposed Definition of 'consumer' it would apply to both individuals and business. There would be duplication and potential confusion as the law presently exists because the same regime would also apply, separately, to 'small business'. The Committee assumes that given the extension of the unfair contracts regime to small business is yet to take effect, its repeal at this time to allow unification of the meaning of 'consumer' is not realistic. If, however, that repeal were to be considered at some time in the future, the Committee considers that the Proposed Definition of 'consumer' could apply equally and consistently to the unfair contracts regime.

manufacturer). This results in more protection than is currently available now for business goods, i.e. if they are priced less than $40,000.

(d) Business goods acquired for business use are not protected *whatever the price*. This removes protection where the acquirer is in fact not purchasing as a consumer, but the goods or services are priced at less than $40,000.

In addition, the arbitrary monetary threshold is removed and all of the difficulties about how to calculate 'price' including in respect of 'mixed supply' fall away.

The Proposed Definition is clear and understandable, and provides certainty for consumers and suppliers

Introducing a subjective element into the definition of 'consumer' promotes certainty for consumers – they can be assured that where they are purchasing for personal use, they will be protected. If, however, they are purchasing business goods for private use, it will be incumbent on the purchaser to make it known to the supplier or manufacturer that those business goods are in fact being acquired for personal use (unless the supplier or manufacturer represents that the business goods are suitable for private use – in that case, the purchaser is entitled to rely on that representation).

This is an appropriate compromise – otherwise, the position for suppliers selling business goods will be unacceptably uncertain, i.e. they will be subject to the 'whim' of any purchaser acquiring business goods for private use.[21]

Introducing subjective intention does not increase uncertainty because it is already used in the ACL

The inclusion of the subjective limb is essential, as it enables the arbitrary $40,000 threshold to be removed, yet avoids the gaps in protection which arise from relying on a purely objective approach.

While it has not previously formed part of the section 3(1) definition of consumer (or its predecessor 4B of the TPA), taking account of subjective intention is not foreign to the ACL. On the contrary, this approach would be consistent with subjective intention already used in the ACL:

(a) in section 2, in the definition of 'consumer goods': "intended to be used … for personal, domestic or household use or consumption" (together with an objective limb);

(b) in section 23, in the definition of 'consumer contract': where an individual acquires "wholly or predominantly" for personal, domestic or household use or consumption;

(c) in section 3 itself, in the acquisition of a vehicle "acquired for use principally in the transport of goods on public roads"; and

(d) also in section 3 itself, in the exceptions for acquisitions "for the purpose of re-supply", or "for the purpose of using up or transformation".[22]

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[21] As the onus will be placed on the acquirer, it will be important for the ACCC to educate consumers of the circumstances in which they are required to advise manufacturers / suppliers in order to obtain protection.

[22] The definitions of 'consumer' in section 2(3) of the United Kingdom's *Consumer Rights Act 2015* and in Article 2(1) of Directive 2011/83/EU in respect of consumer rights, both focus on the subjective intention of the purchaser.

Changing "ordinarily acquired" to "likely to be used" is a minor change

Under the Proposed Definition, the current objective test for goods or services "of a kind ordinarily acquired" would be replaced with "of a kind likely to be used" (together with the alternative subjective test "intended to be used").[23]

The Committee submits that "of a kind likely to be used" is intuitively easier to understand for consumers and suppliers than "of a kind ordinarily acquired". The Committee's experience is that "of a kind ordinarily acquired" is not readily understood by suppliers or consumers.

This change would also unify the language used in the definitions of 'consumer' in sections 2 and 3 of the ACL ("likely to be used" is already used in section 2).

The term "likely" is used in various places throughout the CCA and its meaning is more readily understood. In sections 45, 46 and 47 for instance, the term "likely" has been interpreted as meaning that there is a "real chance" or possibility, rather than "more likely than not".[24]

The Committee submits that the change from "ordinarily acquired" to "likely to be used" will result in slightly greater protection from the objective limb of the test, as "likely to be used" is slightly more inclusive. This is because products may be "likely to be used" by individuals with a particular need, without necessarily being ordinarily acquired for those purposes by consumers generally.[25]

3.9 Other aspects of the current section 3 definition which work well, would be retained

The definition of 'consumer' (in section 3 of the ACL) also includes some aspects that work reasonably well and, in the Committee's view, those aspects of the current definition in section 3 should be retained.

In particular, the following aspects should be retained:

(a) goods or services must be "acquired";

(b) if goods are being acquired for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce in the course of production or manufacture, they cannot be acquired by a 'consumer';

(c) a person acquiring a vehicle or trailer for use principally in the transportation of goods on public roads, is a 'consumer'; and

(d) the rebuttable presumption that a person alleged in any proceeding to be a consumer, is a 'consumer'.

In the Committee's view, it remains appropriate from a policy perspective to retain each of these aspects of the definition.

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[23] In addition to section 3, a number of other sections of the ACL refer to goods or services "of a kind ordinarily acquired". The Committee has not examined these in detail, but they include sections 48 and 166 (single price / offence re: single price), 64A (limitation of liability for failure to comply with guarantees), s140 and s 141 (liability for loss or damage if other goods/land, building or fixtures are damaged due to a safety defect), and 276A (limitation of liability of manufacturer to seller in certain circumstances). The Committee submits that the language of these sections could readily be changed to "likely to be used", for consistency with the Proposed Definition.

[24] *Monroe Topple & Assocs Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197, (Heerey J); *Seven Network Ltd v News Ltd* (2009) 182 FCR 160. "Likely" is also used in the cartel conduct provisions and is defined for those purposes in 44ZZRB as "including a possibility that is not remote".

[25] Law Council of Australia, Submission 18 to the Senate Economics Legislation Committee – *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, at page 5.

4 General protections of the ACL (section 2.2, Issues Paper)

8. *Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?*

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

The Committee's views with respect to each of these questions are set out in sections 5 to 7 below.

5 Misleading or deceptive conduct (section 2.2.1, Issues Paper)

5.1 Is the current approach to silence and omissions appropriate?

The Committee submits that the current approach to silence and omissions in the context of the prohibition in section 18 of the ACL on misleading or deceptive conduct is appropriate.

Section 18 of the ACL has broad application and encompasses conduct that occurs in relation to consumers, as well as to conduct that occurs between commercial contracting parties. The current approach to silence recognises that section 18 is not meant to impose general obligations of disclosure in dealings with consumers or to "strike at the traditional secretiveness and obliquity of the bargaining process"[26] in commercial negotiations. It also acknowledges that parties cannot rely on section 18 to shift their normal due diligence and assessment obligations onto the other contracting party. However, it also recognises that in certain circumstances there will be a 'reasonable expectation' that something is disclosed. Silence or omissions in these circumstances will be beyond the legitimate bargaining process, and will instead constitute misleading or deceptive conduct.

Whether there is a 'reasonable expectation' requires an analysis of the particular case at hand, having regard to all of the circumstances. In determining whether a reasonable expectation exists, the subjective beliefs or experiences or 'high moral expectations' of one party are irrelevant.[27] However, the existence of any common assumptions and practices established between the parties or prevailing in a particular industry can be relevant, [28] as can their experience and commercial interests.[29]

For example, in *Henjo Investments*[30] the actions of the vendor of a restaurant[31] were held to be such as to lead to an implied representation that the restaurant was licensed to seat a larger capacity than it actually was (i.e. 120 people instead of 84). It was held that, in light of the implied representation, it was misleading and deceptive to fail to disclose the true position under the licence. Similarly, in *Demagogue*[32] it was held that a land developer's agent had created the erroneous impression in the purchaser that there was nothing unusual concerning access to the land by asserting that the developer would build a driveway up the road – in these circumstances the agent or vendor was under an obligation to correct the erroneous impression by disclosing the requirement to obtain a licence to enable such access.

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[26] *Poseidon Ltd v Adelaide Petroleum NL* (1991) 105 ALR 25 at 26.

[27] *Clambake v Tipperary*

[28] e.g. *Demagogue v Ramensky* (1992) 39 FCR 31

[29] *Miller v BMW Australia Finance Limited* [2010] HCA 31

[30] *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* [1988] FCA 40

[31] I.e. describing the restaurant as seating 120 and showing the restaurant in operation with 120 seated customers

[32] *Demagogue v Ramensky* (1992) 39 FCR 31

Conversely, in circumstances where the conduct of the silent party is less than that described above, e.g. where no positive implied or express representations have been made, there is no obligation to disclose facts even where they are clearly facts which the other party would want to know. For example, in *Miller*,[33] it was held that there was no obligation on an insurer to notify a lender who was making a loan on the security of the insurance policy that the insurance policy was not cancellable and therefore not good security for the loan. The High Court held in this case that, especially having regard to the experience and commercial interests of the parties, there could be no expectation that the insurer would volunteer the details of the insurance policy and it was instead the lender's responsibility to carry out its own checks.

The Committee's view is that the requirement for a reasonable expectation of disclosure is an appropriate benchmark by which to distinguish legitimate commercial behaviour from misleading or deceptive conduct. It is a benchmark which applies a common sense approach and which parties would apply in their commercial dealings even without knowing the legal position. Using this approach, courts have created, and are continuing to develop, a body of precedent which provides clear guidance.

Removing the requirement for there to be a 'reasonable expectation' of disclosure before making silence misleading or deceptive would place an unreasonable level of risk on contracting parties and would severely stifle contractual dealings. The case law now requires 'reasonable expectations' to be shown before silence may become misleading or deceptive. In the Committee's view, this is a sensible approach, and should be preferred to statutory intervention at the present time.

5.2 Should the prohibition against misleading or deceptive be extended to prohibit specific forms of 'unfair' commercial practice? (see also section 2.4.1, Issues Paper)

There is no need to extend the prohibition on misleading or deceptive conduct to include specific forms of unfair commercial practices. The ACL contains broad and flexible prohibitions designed to capture a wide range of commercial dealings, whether those dealings are business to consumer or business to business. In addition, the ACL contains various specific protections directed at particular forms of unfair commercial practices.

Unless there is clear consumer harm that can be identified as not being addressed under the existing laws (which the Committee does not consider to be the case), then there is no reason to amend the law. Any change to the law will introduce uncertainty and may cut across the principles established under the current law.

The current protections contained in the ACL are structured as follows:

(a) Part 2-1 (sections 18-19) on misleading or deceptive conduct, which prohibits a business from making misleading or deceptive representations regarding goods or services it offers in dealings with other businesses or its customers;

(b) Part 2-2 (sections 20-22A) on unconscionable conduct, which prohibits a business from engaging in harsh or oppressive behaviour in dealings with other businesses or its customers;

(c) Part 2-3 (sections 23-28) on unfair contract terms, which prohibits a business from enforcing an unfair contract term in a standard form contract with consumers (the regime will be extended on 12 November 2016 to apply to standard form contracts with small businesses);

(d) Part 3-1 (sections 29-50) on specific forms of unfair business practices and false or misleading conduct, all of which give rise to criminal as well as civil liability; and

[33] *Miller v BMW Australia Finance Limited* [2010] HCA 31

(e) Part 3-2 (sections 50-103) on consumer transactions, including the consumer guarantees in relation to the quality of goods and services and the right to refunds, replacements and repairs.

The key focus of the misleading or deceptive conduct provision is whether the business has acted contrary to good commercial practice, not on the particular manifestation of the unfair practice. This allows the law to apply broadly and flexibly and to adapt to evolving business models and practices. The jurisprudence has developed over decades and principles have emerged which can provide guidance to businesses as to the boundary between acceptable and unacceptable commercial conduct. These general standards are then strengthened by the specific provisions on false or misleading representations and unfair selling techniques.

In particular, sub-section 29(1) provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

(c) make a false or misleading representation that goods are new; or

(d) make a false or misleading representation that a particular person has agreed to acquire goods or services; or

(e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or

(f) make a false or misleading representation concerning:

(i) a testimonial by any person; or

(ii) a representation that purports to be such a testimonial; relating to goods or services; or

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

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

(j) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or

(k) make a false or misleading representation concerning the place of origin of goods; or

(l) make a false or misleading representation concerning the need for any goods or services; or

(m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a consumer guarantee under Division 1 of Part 3-2); or

(n) make a false or misleading representation concerning a requirement to pay for a contractual right that:

(i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a consumer guarantee under Division 1 of Part 3-2); and

(ii) a person has under a law of the Commonwealth, a state or a territory (other than an unwritten law).

In addition, the ACL prohibits contains civil and criminal prohibitions on specific forms of unfair selling techniques, including in relation to: the offering of rebates, gifts and prizes;[34] bait advertising;[35] wrongly accepting payment;[36] unsolicited credit and debit cards;[37] the assertion of rights to payment for unsolicited goods and services;[38] the assertion of rights to payment for unauthorised entries or advertisements;[39] pyramid selling;[40] multiple pricing;[41] component pricing;[42] referral selling;[43] and harassment and coercion.[44]

The Issues Paper refers to the EU directive on unfair commercial practices (**EU Directive**) as an alternative legal response to unfair commercial practices. The directive provides both broad and a prescriptive regime for regulating 'unfair' business-to-consumer commercial practices. It provides a general prohibition against unfair commercial practices, prohibitions against misleading and aggressive practices, and lists 31 specific practices that are prohibited in all circumstances (the 'black-listed' conduct).

The EU Directive must be understood in its specific context. It was introduced to harmonise divergent consumer protection regimes in the different EU Member States. Member States were required to transpose the terms of the directive into national law by 12 June 2007. The stated aim of the Directive was to facilitate EU integration and harmonise consumer protection across the EU. At Recital 4, the Directive provides:

> "*These disparities [in consumer protection laws] cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.*"[45]

The purpose of the 'black list' was to ensure that each of the (now) 28 EU Member States maintained a consistent minimum standard of consumer protection.

The risk of divergent protection does not exist in Australia. The ACL represents the national standard of consumer protection, replacing provisions in 17 pieces of state and territory

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[34] Section 32 ACL; section 154 ACL

[35] Section 35 ACL; section 157 ACL

[36] Section 36 ACL; section 158 ACL

[37] Section 39 ACL; section 161 ACL

[38] Section 40 ACL; section 162 ACL

[39] Section 43 ACL; section 163 ACL

[40] Section 44 ACL; section 164 ACL

[41] Section 47 ACL; section 165 ACL

[42] Section 48 ACL; section 166 ACL

[43] Section 49 ACL; section 167 ACL

[44] Section 50 ACL; section 168 ACL

[45] EU directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, L149/22, 11 June 2005.

legislation and the TPA. Listing specific forms of misleading or deceptive conduct would be unnecessary and duplicative.

Further, as set out in the table below, each form of 'black listed' conduct in the EU Directive is likely to fall within one or more of the more prohibitions contained in the ACL.

Blacklisted conduct	**Relevant ACL prohibition**
Misleading commercial practices	
1. Claiming to be a signatory to a code of conduct when the trader is not.	Section 18(1) Section 29(1)(h)
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.	Section 18(1) Section 29(1)(g)
3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.	Section 18(1) Section 29(1)(h)
4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.	Section 18(1) Section 29(1)(h)
5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).	Section 18(1) Section 35(1)
6. Making an invitation to purchase products at a specified price and then: (a) refusing to show the advertised item to consumers; or (b) refusing to take orders for it or deliver it within a reasonable time; or (c) demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch).	Section 18(1) Section 35(2)
7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.	Section 18(1) Section 35(2)
8. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.	Section 18(1) Sections 20 and 21

Blacklisted conduct	Relevant ACL prohibition
9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.	Section 18(1) Section 51(1)
10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.	Section 18(1) Section 29(1)(m)
11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).	Section 18(1) Section 29(1)(e)
12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.	Section 18(1) Section 29(1)(l)
13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.	Section 18(1) Section 29(1)(a)&(b)
14. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.	Section 18(1) Section 44
15. Claiming that the trader is about to cease trading or move premises when he is not.	Section 18(1)
16. Claiming that products are able to facilitate winning in games of chance.	Section 18(1) Section 29(1)(a)
17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.	Section 18(1) Section 29(1)(a)
18. Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.	Section 18(1)
19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.	Section 18(1) Section 32(1)
20. Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.	Section 18(1) Section 32(1)
21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.	Section 18(1) Section 40
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.	Section 18(1)
23. Creating the false impression that after-sales service in	Section 18(1)

Blacklisted conduct	Relevant ACL prohibition
relation to a product is available in a Member State other than the one in which the product is sold.	Section 29(1)(j)
Aggressive commercial practices	
24. Creating the impression that the consumer cannot leave the premises until a contract is formed.	Sections 20 & 21
25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.	Section 74
26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation.	Sections 20 & 21 Section 50
27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.	Sections 20 & 21
28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.	Advertising to children is dealt with in other legislation and industry codes.
29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).	Part 3-2 Div 2
30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.	Section 18(1) Section 50
31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either: — there is no prize or other equivalent benefit, or — taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.	Section 18(1) Section 32(1)

The US consumer protection regime is complex and concepts used in that jurisdiction cannot be easily imported into Australia. Consumer protection laws exist at both the state and federal level and are enforced by a variety of different agencies. At the federal level, section 5 of the Federal Trade Commission Act contains a broad prohibition on unfair or deceptive acts or practices in or affecting commerce. However, the FTC tends to bring enforcement action under section 5 in conjunction with actions under the antitrust provisions in the Sherman or Clayton Acts. In 2015, the FTC issued a 'Statement of Enforcement Principles' in respect of section 5 where it stated that it would be less likely to challenge an act or practice under section 5 if such practice can be addressed through enforcement under the Sherman or Clayton Acts. At the state level, each state has its own legislation dealing with unfair or deceptive commercial practices, although the level of protection varies from state to state.

The prohibition in section 5 therefore exists as a back-stop protection where the Sherman or Clayton Acts, or state consumer protection laws are lacking. Nevertheless, the interpretation of section 5 is similar to the interpretation of misleading or deceptive conduct under Australian law. According to the FTC Policy Statement on Deception states that the Commission analyses deceptive business practices under the following rubric:

(a) there must be a representation, omission or practice that is likely to mislead the consumer;

(b) the practice is examined from the perspective of a reasonable person in the circumstances; and

(c) the representation, omission or practice must be a material one, i.e., it is likely to affect the consumer's conduct or decision regarding the product or service.

As acknowledged by the US Supreme Court, the prohibition in section 5 is deliberately cast in broad (non-specific) terms:

> "*[i]t would not have been a difficult feat of draftsmanship to have restricted the operation of [Section 5] to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.*"[46]

Prior to the introduction of the ACL, the Australian regime more closely resembled the US approach with overlapping (and sometimes inconsistent) state and federal consumer protection laws. The regime has since been streamlined into a single national regime, which has facilitated clearer and more consistent interpretation, application and enforcement of the law. There is no need to retreat from this approach.

Further, the ACL is already a highly prescriptive regime containing general and specific prohibitions on false or misleading representations and unfair selling techniques. Changing the law to introduce further prescription is likely to increase the cost of compliance on businesses; a cost which is likely to be passed on to consumers in the form of higher prices.

5.3 Should the same financial penalties and criminal sanctions be available in relation to contraventions of the prohibition on misleading or deceptive conduct as those that are available for contraventions of the prohibitions on specific false or misleading representations?

An issue has been raised as to whether the same penalties and remedies should be available in relation to contraventions of the prohibition on misleading or deceptive conduct as those that are available for contraventions of the prohibitions on specific false or misleading representations.

The TPA, which was enacted in 1974, distinguished carefully between the prohibitions on specific misleading representations, which would expose a person to a penalty and the general prohibition on misleading or deceptive conduct, which would not. The prohibitions on specific misrepresentations are clear and individuals and corporations can readily identify the representations which are subject to penalties. On the other hand, the general prohibition on misleading conduct exposes a person to a range of remedies, including injunctions and compensatory damages, because of the need to prevent repetitions of such conduct and to compensate those harmed by it. The reason for this distinction was clear and continues to be applicable.

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[46] *Federal Trade Commission v. R.F. Keppel & Bro.*, 291 U.S. 304, 310 (1934).

When the TPA was enacted in 1974 the Explanatory Memorandum, in paragraph 60, noted in relation to section 52 that:

> *Misleading and deceptive conduct: conduct of this kind is dealt with in general terms in clause 52. The operation of this clause overlaps that of other provisions in Division 1 Part V. Breach of clause 52 gives rise to an injunction only – see the express exclusion of the clause from the offence provisions in clause 79.*

Some of the second reading speeches also shed light on the reasons for not imposing penalties in respect of the general prohibition on misleading conduct.

Senator Murphy, 14 August 1974 (page 950):

> *Clause 52 states… Although the words are general they are capable of being applied by the court and because of the generality of the words, we have provided in the Bill that there be no penalty for the breach of that clause; that is the general one. But it would be the subject of proceedings to prevent conduct which was misleading or deceptive. That would be by injunction in the courts to prevent that kind of conduct. That is a very important remedy which might assist the public, and where individuals are injured by conduct that is misleading or deceptive they would have available to them action for damages under clause 82 of the Bill.*

Bill Morrison MP, Wednesday 24 July 1974 (page 575):

> "*… the broad prohibition of misleading and deceptive conduct in clause 52 is of great importance …. The Courts will be able under that provision to take action against conduct which may not fall within the more specific terms of other provisions. This will provide the flexibility necessary if legislation of this kind is to be able to deal with evolving market practices without the constant need for legislative action to catch up, often after much damage has already been done, with new practices that are harmful to consumers. In view of its generality, there are no penalties provided in relation to clause 52, but injunctions will be available to restrain breaches of the provision and damages will be available also.*"

The distinction between specific false representations, which are subject to penalties and the general prohibition on misleading or deceptive conduct, which is not, was maintained when the ACL was enacted in 2010.

In the Explanatory Memorandum the approach to the prohibition on misleading or deceptive conduct was explained as follows:

> *3.10 The prohibition on misleading or deceptive conduct creates a broad norm of conduct in the market. The finding that the prohibition is proven according to the relevant standard of proof does not result in exposure to a criminal sanction or civil penalty under the ACL. Rather, such a finding exposes the person who has breached the provision to the wide range of remedies available under chapter 5, part 5-2 of the ACL, including redress for non-party consumers.*

This characterisation of the prohibition on misleading or deceptive conduct reflects the repeated use of that description by the Federal Court of Australia and High Court of Australia. (See for example *Brown v Jam Factory Pty Ltd (1981)* 53 FLR 330 at 348*; Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Limited* (1993) 42 FCR 470 at 506*; Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1998) 19 FCR 469 at 473-474*; Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 114.)

This "broad norm of conduct" is flexible and has been and continues to be adapted to evolving market practices, without the constraints applicable to penalty provisions. The full extent of the application of the prohibition on misleading and deceptive conduct continues to emerge through an evolutionary process.

By contrast it is still generally accepted that prohibitions which expose a person to a penalty should be expressed in specific terms. This is to enable all individuals and corporations readily to identify the specific conduct which will expose them to a penalty.

The current architecture of the ACL in this regard is appropriate. Misleading representations, which should expose a person to penalties, are identified and set out in specific terms. When the need for penalties for a particular type of misrepresentation has been identified, an appropriately specific prohibition has been enacted. For example, the prohibition, in sections 29(1)(n) and 151(1)(n) of the ACL, on misleading representations concerning a requirement to pay for a contractual right to which, in essence, a person is entitled by statutory law, was introduced in 2010 to address concerns about the increasing prevalence of misleading "additional warranty" offers.

The general prohibition on misleading and deceptive conduct was never envisaged as one to which penalties should attach. This was because a person should only be exposed to a penalty where it is clear from the language of the relevant prohibition.

If there are categories of false representation which should be, but are not currently, subject to pecuniary penalty, those categories should be identified. The possibility that there are such categories is not, however, a proper basis for imposing penalties for breach of a prohibition which was drafted in the most general terms and never intended to be subject to penalties.

6 Unconscionable Conduct (section 2.2.2, Issues Paper)

The Issues Paper makes reference to a number of potential reforms to the unconscionable conduct provisions in the ACL. The Committee agrees with the Harper Review Panel's assessment that the unconscionable conduct provisions are 'working as intended to meet their policy goals'.[47] In those circumstances, the unconscionable conduct provisions do not require any substantial change.

Importantly, the jurisprudence on the construction to be given to the unconscionable conduct provisions continues to grow with meaningful and ongoing development of the concept. The High Court may soon provide further clarity in the upcoming appeal of *Paciocco v Australia and New Zealand Banking Group* (***Paciocco***).[48]

It would be counterproductive to interrupt that judicial progress to amend the law in an effort to provide any greater clarity regarding the meaning of 'unconscionable'.

Expanding the protection under section 21 of the ACL to make it available to publicly listed companies would remove an artificial distinction between publicly listed and private companies and consistently apply a normative standard of conduct to all commercial dealings regardless of the listing status of an entity.

6.1 Should the provisions provide guidance to the courts to facilitate consistent interpretation of 'unconscionable', for example, further clarity regarding the 'norms of society' standard used in Lux?

There is already a substantial body of case law on 'unconscionable conduct'

Federal and state courts in Australia have been considering both the common law and statutory concept of unconscionability for many years.[49] The concept has its roots in equity, although its

[47] Competition Policy Review, Final Report (Harper Review), March 2015, 62.

[48] *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50. The High Court has heard arguments and has reserved its judgment.

[49] *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Stern v McArthur* (1988) 165 CLR 489.

statutory meaning in section 21 of the ACL is 'not limited by the unwritten law'.[50] The prohibition on unconscionable conduct has, at its core, the protection of the vulnerable from exploitation by the strong.[51] It has been described by the courts in earlier case law as conduct not done in good conscience,[52] that is irreconcilable with what is right or reasonable.[53] During the 1990s and early 2000s there was an expansion in the number of cases being argued under the unconscionable conduct provisions of the then *Trade Practices Act 1974* (Cth) and other Commonwealth and State legislation.[54]

In efforts to distinguish conduct that is 'unconscionable' from that which is considered to be 'merely unfair or unjust', courts have also held that unconscionability is a concept that requires a 'high level of moral obloquy'[55] or 'some degree of moral tainting'.[56]

The importation of the element of 'moral obloquy' has been the subject of much debate, with some commentators arguing that it imposes a different standard than that intended by Parliament.[57] However, recent case law has provided much needed guidance on the meaning of unconscionable conduct, with judgments of the Full Federal Court reframing the approach to determining when conduct can be said to fall within the concept of what is in all the circumstances 'unconscionable'.[58] Importantly, the Full Federal Court has also addressed the debate concerning 'moral obloquy'.[59]

Significantly, recent successful ACCC actions since this judicial development of the law demonstrate that the intention of the statutory prohibition on unconscionable conduct is being achieved.[60] These recent developments in the law have also been applied in a business-to-business context,[61] resulting in substantial penalties and compensation payments.

For the reasons that follow, the courts should be allowed to continue to develop the meaning of 'unconscionable', including the meaning of 'norms of society', without legislative intervention.

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[50] *ACCC v Simply No-Knead Franchising Pty Ltd* (2000) 104 FCR 253, [35].

[51] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461–2, 474–5; *Blomley v Ryan* (1956) 99 CLR 362, 405, 415, 428–9*; Louth v Diprose* (1992) 175 CLR 621, 626–7, 637, 650; *Bridgewater v Leahy* (1998) 194 CLR 457, 485–6; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392. Note that, as expressed by High Court in *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 [14], more is required than merely taking advantage of a superior bargaining position.

[52] *Hurley v McDonald's Australia Ltd* [1999] FCA 1728, [22]; *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380, 420; *ACCC v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17, [113]; *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, [291], [293].

[53] *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [30]; *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 316–17 [44]; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246, 262; *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, [42]; *Hurley v McDonald's Australia Ltd* [1999] FCA 1728, [22], [31] cited with approval in *Ange v First East Auction Holdings Pty Ltd* [2011] VSCA 335, [96], [104] and followed in *ACCC v Simply No-Knead Franchising Pty Ltd* (2000) 104 FCR 253, [30]; ACCC v 4WD Systems Pty Ltd [2003] FCA 850, [183]–[185]; *ACCC v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17, [113].

[54] *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246; *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Hurley v McDonald's Australia Ltd* [1999] FCA 1728; *ACCC v Simply No-Knead Franchising Pty Ltd* (2000) 104 FCR 253; ACCC v 4WD Systems Pty Ltd [2003] FCA 850.

[55] *Attorney-General (NSW) v World Best Holdings Limited* (2005) 63 NSWLR 557, [121. This was not a decision under the then *Trade Practices Act* 1974 but under the Retail Leases Act (NSW).

[56] *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389, [293]. This decision concerned the application of the unconscionable conduct prohibitions in both Commonwealth and New South Wales legislation, namely the *Australian Securities and Investments Commission Act* 2001 (Cth), s.12CB and 12CC, the *Trade Practices Act* 1974 (Cth), s.51AB and 51AC and the *Fair Trading Act* 1987 (NSW), s.43.

[57] See, for example, Robert Baxt AO, 'What Place does "Moral Obloquy" have in the Evaluation of Statutory Unconscionable Conduct?' (2014) 88 *Australian Law Journal* 396.

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

[59] *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50, [262] and [304]-[305].

[60] *ACCC v Titan Marketing Pty Ltd* [2014] FCA 913; *ACCC v South East Melbourne Cleaning* [2015] FCA 257.

[61] *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405.

The meaning of 'unconscionable' has been, and continues to be, clarified by the courts

Recent case law, particularly the Full Federal Court decisions in *ACCC v Lux Distributors Pty Ltd* (***Lux***) and *Paciocco,* has provided strong guidance on the approach to be taken when assessing whether conduct is unconscionable.

The Full Court in *Lux* stated that the task of the Court is to evaluate the facts by reference to a 'normative standard of conscience', infused with 'accepted and acceptable community values',[62] which may develop and change over time. The standard must be understood and applied in the context in which the circumstances arise, by reference to 'the norms of society'.[63] Those norms are said to generally include notions of justice and fairness, as well as the protection of the vulnerable, recognition of inequalities of bargaining power, fair dealing and good faith.

The Full Court's approach to determining unconscionable conduct has helped alleviate concerns that the courts had adopted an overly narrow construction of unconscionable conduct and imposed too high a standard (*Attorney-General (NSW) v World Best Holdings Limited (**World Best**)).*

Following *Lux*, the Chief Justice's judgment in *Paciocco* provided an important exposition of the meaning of unconscionability and tied together a number of different statements in recent judgments on the topic. Specifically, his Honour:

(a) drew upon the 'norms of society' from *Lux* to highlight the importance of assessing and characterising conduct against a normative standard of conscience that reflects certain values and norms;[64]

(b) provided a list, albeit non-exhaustive, of elements that may be relevant when assessing whether or not certain conduct is unconscionable, including the importance of honesty, fairness, good faith and fair dealing, the protection of those who are vulnerable, and the rejection of trickery or sharp practice;[65] and

(c) when considering the relevance of 'moral obloquy', cautioned against attempting to restate the word 'unconscionable' with such a substitute phrase while emphasising that the critical task is to identify and apply 'the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability: being the values and norms from the text and structure of the Act, and the context of the provision…'. [66]

While the jurisprudence can be expected to continue to develop the law in this area, these recent judgments suggest that it is developing in the direction intended by Parliament.

This process should be allowed to develop

Even with the developments in the Federal Court, it should be acknowledged that there remains some apparent divergence between the approach adopted by state Courts and the Federal Court. In particular, some judgments of state courts have continued to apply the standard of 'moral obloquy' from *World Best.* For example, the Victorian Court of Appeal in *Director of Consumer Affairs Victoria v Scully* (***Scully***) maintains that 'a significant element of moral

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[62] *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [23], applied in *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405. See also *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, [56].

[63] *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41].

[64] *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50, [306].

[65] *ibid*, [296].

[66] *ibid*, [262]

obloquy' or 'moral taint' is required for a finding of unconscionable conduct,[67] despite acknowledging the normative standard introduced in *Lux.*[68]

However, generally there is much more clarity now than there was just a few years ago, which is evidenced by the number and frequency of unconscionable conduct cases currently coming before the courts.[69]

The jurisprudence is developing appropriately. The Committee has seen cross-fertilisation of jurisprudence between state and Federal courts and this process of convergence should be allowed to continue. This is particularly so given the upcoming decision of the High Court in the *Paciocco* appeal. To intervene now would be to negate the developments from recent case law. At the very least, any legislative intervention should be delayed until the High Court hands down its decision and possibly provides further clarity on this topic.

In any case, the concept of 'unconscionability' does not lend itself to legislative prescription

It is neither possible nor desirable to provide a comprehensive definition of unconscionability.

Unconscionability is a value-laden concept better described than defined. It offers a normative standard determined by judicial decision-making rather than a prescriptive rule.[70] As noted by Allsop CJ in the Full Court decision in *Paciocco*:

> "*The place of norms, values and principles in commercial law, lacking particular precision, but stating a value or general standard, can be seen in the common law, statutes on commercial subjects, in Equity, and in other branches of commercial law. Sometimes, a rule can only be expressed at a certain level of generality, often involving a value judgment. To do otherwise, and to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion.*
>
> *The common law has many rules and principles expressed in terms of norms and values, rather than specific definitions expressed in terms of a priori logic that are sufficient by linguistic formulae to capture or recognise precise future situations of application.*"[71]

Some provisions central to the operation of commerce are best expressed in terms of generality laden with value judgments.[72] The unconscionable conduct provisions are examples of such provisions.

This sentiment was again stated in a recent speech by Allsop CJ, where the Chief Justice stated in relation to the task of providing a definition of unconscionable conduct that 'any agonised search for definition, for distilled epitome or for shorthand of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error'.[73]

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[67] *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, [20], [58].

[68] *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, [56]. Some recent State cases still apply the standard moral obloquy - *United Petroleum Franchise Pty Ltd v Gold Fuels Pty Ltd* [2016] VCC 292, [366];*Trombone Investments Pty Ltd v TBT (Victoria) Pty Ltd and anor* [2015] VSC 517, [43]; *Perpetual Trustees Victoria Ltd v Xiao & Anor* [2015] VSC 21, [149], [157], [162]; *Video Ezy International Pty Ltd v Sedema Pty Ltd* [2014] NSWSC 143, [96].

[69] *ACCC v Titan Marketing Pty Ltd* [2014] FCA 913; *ACCC v Multimedia International Services Pty Ltd* [2016] FCA 439; *ACCC v South East Melbourne Cleaning* [2015] FCA 257.

[70] *ACCC v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491, [18], [21], citing Deane J in *Commonwealth v Verwayen* (1990) 170 CLR 394 and Mahoney JA in *Antonovic v Volker* (1986) 7 NSWLR 151.

[71] *Paciocco v Australia and New Zealand Banking Group* [2015] FCAFC 50, [267]-[268].

[72] *ibid*, [269].

[73] Chief Justice Allsop, 'Conscience, Fair-dealing and Commerce — Parliaments and the Court' (Speech delivered at the Finn's Law: an Australian justice conference, Canberra, 25 September 2015) http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20150925, [94].

It is not possible to provide an exhaustive list of the types of conduct that could possibly constitute unconscionable conduct. As noted by the High Court in *Kakavas v Crown Melbourne Limited* (***Kakavas***), the adverse circumstances and elements that may constitute unconscionable dealing 'may take a wide variety of forms and are not susceptible to being comprehensively catalogued'.[74]

Further, any determination of unconscionable conduct requires an evaluative assessment on a case-by-case basis. The High Court in *Kakavas* emphasised the necessity for close consideration of the facts of each case in order to assess a claim for relief from unconscionable conduct.[75] It is clear that a determination of unconscionable conduct therefore requires a broadly-based value judgment applied to all the facts and circumstances of the specific case.[76]

This evaluative process should not be confined by further legislative prescription.

6.2 Should publicly listed companies be protected as well?

There appears to be only a limited justification for the exclusion of publicly listed companies from the protection of the unconscionable conduct provisions. In particular, the exclusion is for the purposes of discriminating between 'big business' and 'small business'.[77] The legislative intention was that the provision protect small rather than 'big' business, with publicly listed companies being considered a reasonable proxy for 'big business'.

However as discussed above, the law has evolved such that the unconscionable conduct prohibitions impose a normative standard of behaviour in commercial dealings.[78] This normative standard should apply to all business dealings, regardless of whether an entity is dealing with a consumer, a small business, or a private or public company.

In addition, recent cases illustrate the fact that the prohibition against unconscionable conduct may apply to a widely applied course of conduct affecting a large number of parties.[79]

It appears to be an arbitrary application of the normative standard sought to be applied to delimit the ability of those parties to seek recourse in relation to such conduct by the listing status of an entity.

6.3 Should unconscionable conduct be extended to specific forms of 'unfair' commercial practice? (see also section 2.4.1, Issues Paper)

The concept of 'unconscionability' does not lend itself to legislative prescription

As discussed in section 6.1 of this submission, it is neither possible nor desirable to specify the scope or provide a comprehensive definition of unconscionability. Moreover, the prohibition against unconscionability, which is to be applied both to business-to-consumer and business-to-business dealings, should be set at a level that does not unduly interfere with commercial dealings.

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[74] *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392, 425 [117]. Justice French (as his Honour then was) had previously noted that the kind of disadvantage found within unconscionable conduct 'may have many faces' and thus 'elude[s] satisfactory classification': *ACCC v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491, 499 [15].

[75] *Kakavas v Crown Melbourne Limited* (2013) 250 CLR 392, 400 [14].

[76] *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446, [115]; *Investec Bank v Naude* [2014] NSWSC 165, [59]; *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [23].

[77] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1997, 8799–8802 (Peter Reith, Minister of Workplace Relations and Small Business).

[78] The Second Reading Speech which introduced the provision noted that it would 'improve business conduct in the Australian economy and provide a more efficient and equitable basis upon which the forces of competition can operate. … [It will] encourage Australian businesses to deal with each other fairly and reasonably'- Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1997, 8802 (Peter Reith, Minister of Workplace Relations and Small Business).

[79] *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, 122–129, there are a number of listed companies listed as tier 3 suppliers in Annexure A of the judgement as entities adversely impacted by the conduct.

The standard of unconscionability is higher than that of unfairness or unreasonableness

The statutory concept of unconscionable conduct has consistently (and deliberately) been judged at a higher standard than unfairness. While Allsop CJ recast the test in *Lux*, holding that the focus should be on 'norms of society' instead of 'moral obloquy', this did not lower the standard at which unconscionability is assessed. The rationale of both Spigelman CJ and Santamaria JA, in *World Best* and *Scully* respectively, remain pertinent in demonstrating that the requisite standard of unconscionability is higher than unfairness, with Santamaria JA noting:

> "*In every case in which there has been a holding of statutory unconscionability, there has been a finding that the conduct of the defendant showed a degree of moral taint: conduct which was unethical. In none of the cases has a court moved directly from a finding that conduct has been unfair or unreasonable to a holding that, for that reason alone, that conduct has been shown to be unconscionable.*"[80]

Not every unfair practice should constitute unconscionable conduct. If unconscionability were to be applied as if it were synonymous with unfairness or unreasonableness, it would have the potential to transform commercial dealings in a manner not intended by Parliament.[81] This is evidenced by the following wording in the 1992 Explanatory Memorandum which amended the unconscionable conduct provisions:

> "*It is clear that the equitable principles of unconscionable conduct do not embrace conduct which, with nothing more,* ***is merely unfair or unreasonable****, or which* ***merely amounts to a hard bargain****.*"[82] (our emphasis)

Importantly, not only has the bar been consistently set higher than 'unfair', this is to avoid the serious detriment to commerce if the lower and more general standard of 'unfairness' were to be applied to all commercial dealings. The principle of unconscionability was, and still is, intended to be a doctrine of 'occasional application', applied only in circumstances that are highly unethical. If it were to be equated to unfair practices, it would be 'transformed into the first and easiest port of call' whenever any commercial dispute arises.[83]

7 Unfair Contract Terms (section 2.2.3, Issues Paper)

7.1 Is the current approach to determining if a term is 'unfair' and if a contact is a 'standard form contract' is sufficiently clear?

The existence of a 'standard form contract' forms the basis of the operations of the current unfair terms regime under the ACL. The existence of a standard form contract in which a particular term resides is a threshold issue that must be satisfied before any assessment of the term itself can take place. This approach is different to that of the UK and the EU, which applies to terms which have not been individually negotiated in contracts concluded between a seller or a supplier and a consumer (rather than considering whether the contract is standard form).

The ACL provides no definition of a 'standard form contract'. Rather, a contract will be presumed to be a 'standard form contract' unless proved otherwise and, in considering whether a contract is standard form, a Court must take into account (section 27(2)):

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

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[80] *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, [18].

[81] *Attorney-General (NSW) v World Best Holdings Limited* (2005) 63 NSWLR 557, [121].

[82] Explanatory Memorandum, Trade Practices Legislation Amendment Bill 1992 (Cth), [43].

[83] *ibid*.

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms … [which define the main subject matter of consumer contracts]… in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms… [which define the main subject matter of consumer contracts]…; and

(e) whether the terms of the contract (other than the terms… [which define the main subject matter of consumer contracts]… take into account the specific characteristics of another party or the particular transaction.

This approach to determining the existence of a standard form contract extends the regime beyond 'take it or leave it' contracts to arrangements that are not necessarily devoid of any negotiation between the parties. Moreover, in the Committee's experience, the factors set out in the ACL do not necessarily foreshadow unfair practices. For example, it is common for one party to a transaction to prepare a contract prior to discussions (particularly in the move to online contracting) or annex a copy of a contract to a tender request, as it is for another party to only allow the other a very limited window of time to consider their terms. These practices are a necessary corollary of achieving speed, responsiveness, convenience and cost savings in contracting methodologies and reflective of the realities of modern contracting.

The present regime is not without practical issues of interpretation and ambiguity. For example, under the present regime it is unclear whether, in order for an agreement to fall outside of the scope of a standard form contract:

(a) only some terms of the contract need to be negotiated;

(b) the majority of the terms of the contract need to be negotiated;

(c) the substantive terms of the contract need to be negotiated; or

(d) those terms that are important to the business in question need to be negotiated.

Further, it is not clear whether it is intended that standard form contracts developed by industry bodies and trade associations for use in transactions will be the subject of UCT review. The Committee considers that the current approach to the question of standard form contracts leaves such contracts open to challenge when used by businesses. In many cases, these types of 'standard form' agreement are the result of consultation between key stakeholders in an industry and are not the 'standard forms' of one party to an arrangement.

If the Government elects to retain the current ACL criteria for a standard form contract, the Committee considers it would also be helpful to provide legislative guidance on issues such as what degree and type of negotiation is sufficient for a contract to no longer be considered a standard form contract.

7.2 Should the regime extend to contracts that are unfair as a whole?

The Committee submits that the ACL should not be amended to extend to contracts that are unfair as a whole. The existing law protects parties by construing terms in the context of the contract as a whole, and not permitting "unconscientious reliance" on the literal words of a

general undertaking.[84] In *Blomley v Ryan* (1956) 99 CLR 362 at 415, Kitto J stated that a court is empowered to set aside a transaction:

> "*wherever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.*"[85]

Parties with legal rights are not permitted to exercise those rights in such a way that the exercise amounts to unconscionable conduct or misleading or deceptive conduct.[86] As discussed in section 6.3 of this submission, the courts have established that the standard of unconscionable conduct is higher than that of unfairness, although whether 'unfair tactics' were used is expressly a matter to which a Court may have regard.[87] It is the Committee's view that this is the appropriate approach to be taken to assessing a bargain as a whole. In circumstances where an element of unfairness exists in a bargain as a whole, such unfairness will not automatically render a contract unconscionable but rather will form the 'indicia of unconscionability'.[88]

The Committee submits that the unconscionable conduct and misleading and deceptive provisions of the ACL are sufficient to regulate business conduct and commercial transactions, including those in which unfairness may arise. The current approach to assess on an 'unfair' test contract terms in specified categories of standard form contracts should not be extended more broadly.

It is preferable to allow the law in this area to evolve in response to developments in commercial norms and behaviour, rather than introducing a general doctrine of unfairness into the ACL. Such a doctrine is unnecessary, and would unduly interfere with the ability of parties to regulate their commercial affairs by contract.

7.3 Should standard form contracts covered by the Insurance Contracts Act 1984 (Cth) be subject to similar protections against unfair contract terms as apply under the ACL and ASIC Act?

On 10 May 2013, an Exposure Draft of the *Insurance Contracts Amendment (Unfair Terms) Bill 2013* (Cth) (**Draft Bill**) was released for consultation.

One of the key elements of the draft legislation was that:

> *"the new unfair contract terms regime will be inserted into the Insurance Contracts Act 1984 (Cth) and apply to general insurance contracts on an equivalent basis to the regime applying to other financial products or services in the Australian Securities and Investments Commission Act 2001 (Cth). The new regime is modified appropriately for contracts of general insurance*".[89]

Five submissions were received in response to the consultation. The Committee considers that the issues flowing from extension of the unfair contracts regime to general insurance contracts were well canvassed in those submissions.

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[84] See *John Grant v John Grant & Sons* (1954) 91 CLR 112 at 127.

[85] *Blomley v Ryan* (1956) 99 CLR 362

[86] Further, the objective approach to contractual interpretation, by which courts ask what a reasonable person in the position of the parties would intend or assume rather than what one of the parties assumed, is working well.

[87] Section 22 of the Australian Consumer Law.

[88] *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, [44].

[89] http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2013/Contracts-of-general-insurance

The Draft Bill was read a second time on 26 June 2013 before the House of Representatives. The Assistant Treasurer noted that the proposed amendments were "*consistent with the Productivity Commission's 2008 report into Australia's consumer policy framework which recommended that the unfair contract terms protections apply to all sectors of the economy*."[90]

Since the Bill did not receive Royal Assent before the House of Representatives was dissolved on 5 August 2013 (prior to the federal election on 7 September 2013), the Bill lapsed at dissolution.

7.4 Are there issues with contracts in general that the ACL should address, for example, through improving contractual transparency and clarity

For the reasons set out in section 7.2 above, the Committee does not consider that there are issues with contracts "in general" that the ACL should be amended to address.

7.5 Are there are issues specific to standard form contracts for the use of digital products, for which consumers' rights may be relatively untested?

The Committee does not consider that there are issues specific to standard form contracts for the use of digital products. Further comments with respect to the application of the ACL to digital products are contained in section 9.4 and section 15 below.

The Committee considers that existing provisions under the ACL are presently appropriate for dealing with digital content. In particular, the consumer guarantees and unfair contract terms provisions are working – we do not consider that specific tailoring of ACL provisions to address digital products (like apps, games or music) is necessary.

8 Legal framework: specific protections (section 2.3, Issues Paper)

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

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

8.1 General comments

The Committee acknowledges that the range of protections against specific types of unfair or detrimental conduct contained in the ACL is appropriate. We do not consider that any addition to or removal from these types of conduct is warranted. That said, the Committee does believe that the effectiveness of a number of the existing protections can be significantly improved in a number of respects. These particular suggested improvements are set out further below.

Before addressing the detail of some of the individual provisions, however, the Committee believes that the fragmented structure of a number of the statutory protections makes them unnecessarily complex and, thus, likely to be of reduced effectiveness. While the extent to which this criticism applies varies between the different categories of protection, it is most significant in respect of the consumer guarantees.

[90] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June 2013, 7081 (David Bradbury).

9 Consumer guarantees (section 2.3.3, Issues Paper)

9.1 Complexity of the consumer guarantee provisions

The consumer guarantees are a cornerstone of Australia's consumer protection regime and purport to embody relatively straightforward legal principles. However, the experience of many members of the Committee is that the identification, construction and application of the relevant legislation to particular cases is frequently made difficult by the way they are presented in the ACL.

To illustrate, in order to understand the relevant rights and obligations in respect of a consumer good that is not working as expected, it may be necessary to determine, at a minimum:

(a) which, if any, of the consumer guarantees applies (requiring consideration of section 51 through to section 62 of the ACL);

(b) whether a claim for failure to comply with a guarantee can be made against the retailer, manufacturer, importer or either (sections 259, 271, 272 and 277);

(c) whether the failure to comply with the guarantee is major or not major (section 260);

(d) depending on the answer to (c), to what relief the consumer may be entitled, including the extent of any damages (sections 259 and/or 272);

(e) whether the consumer may or must reject goods in order to obtain the relief they seek and the consequences of that rejection (sections 259, 262 and 263);

(f) whether any remedy offered by the supplier is lawful (sections 261 and 275); and

(g) whether any contract for services connected with rejected goods may be terminated (section 265).

Thus, because of the disjointed manner in which the provisions are set out, any person seeking to understand his or her rights in respect of a single defective good must consider at least six separate issues and refer to between 6 and more than 20 separate legislative provisions, set out in different parts of the legislation.

Equally, the ability of a supplier to conveniently understand their obligations to consumers is impaired by the structural complexity of the legislation. Anecdotally at least, a number of the Committee's members are aware of instances where apparently well-meaning employees of smaller retail businesses have not understood the full extent of their obligations to consumers or the procedural requirements for remedying defects.

The Committee considers that this “user-unfriendliness” of a key piece of consumer protection legislation should be addressed so as to avoid a number of detrimental effects, including, for example:

(a) consumers being denied the ability to understand their rights easily and without legal or other advice or assistance;

(b) suppliers and manufacturers (and particularly smaller or less sophisticated businesses) requiring legal advice to understand their obligations to customers, the costs of which are likely to be borne by consumers;

(c) the additional costs of understanding and complying with their legal obligations placing more conscientious businesses at a competitive disadvantage to their rivals who do not seek to be compliant;

The Committee considers that an effective consumer protection regime ought to be clearly, simply and concisely stated, so as to make it easily and conveniently understood both by those on whom it imposes obligations and those to whom it grants rights. The current structure of the consumer guarantees does not meet these criteria.

9.2 Practical issues regarding definitions

There are practical issues associated with some of the definitions used in the consumer guarantees regime. In particular, the Committee recommends that the concepts of *'durability'* and *'major failures'* be made clearer.

Reasonable durability

The definition of acceptable quality expressly refers to goods being *'durable'*. Under the old standard of merchantable quality, there was no such express requirement, however there was probably an implied term of durability. The concept of goods needing to be durable is therefore not new – and neither is the difficult question of how long exactly after purchase goods must remain durable.

It is self-evident that the appropriate durability of goods must be product-specific, and assessed in all the relevant circumstances (including price, representations made, and so on). It is also obvious, for both suppliers and consumers, that goods are probably not reasonably durable if they fail days after purchase. However, if a problem arises weeks or years after purchase, then the obligations of the supplier and the rights of the consumer become less clear-cut.

In some of the Committee members' experience, some suppliers simply take the view that the reasonable durability of a product is equivalent to the length of time of an express manufacturer or retailer warranty on that product. This is not necessarily the correct position to adopt, however it is taken because of the lack of clear guidance on the meaning of *'durability'*. Alternatively, other suppliers are nervous of stipulating any particular time period for their products under the ACL and therefore consider each claim for a remedy on a case by case basis, which is extremely time consuming and costly. Ultimately these costs are likely to be passed on to consumers in the form of higher prices.

It is the Committee's position that it would be beneficial for greater guidance to be given to suppliers and consumers on *'durability'*. It is suggested that the ACCC could issue guidelines which state the ACCC's view on how long certain goods should generally last. The guidelines could give time periods, in ranges, for various categories of goods.

Major failures

The remedies available to a consumer for a failure to comply with a consumer guarantee turn on whether that failure is characterised as *'major'* or not. Because of this, the concept of what is, and what is not, a major failure should be clear. This is in the interests of both suppliers and consumers – both parties to the transaction should readily understand what can legitimately be expected of the other.

The Committee considers that the current definition of a *'major failure'* is not practically useful. There is a need for a better objective answer to the question of what constitutes a major failure.

Under the current law, a major failure in respect of goods or services is defined as including one where a reasonable consumer would not have acquired the goods or services had the consumer been fully acquainted with the nature and extent of the failure (sections 260 and 268). A major failure also occurs if goods are substantially unfit for the purpose for which such goods are commonly supplied, and which cannot be remedied within a reasonable time (section 260(c)).

This is an imprecise and frequently unhelpful definition. Intuitively, a reasonable consumer would rarely, if ever, acquire new goods or services if he or she were aware that there was even

a minor failure, when given the choice, without some form of compensation (e.g. discount). A merchant, however, is unlikely to consider the additional obligations associated with a major failure to be warranted for or proportionate to a superficial or trivial failure.

By way of example, a consumer may consider that a defect in a part of a new vehicle that occurs shortly after purchase is a major failure because they would not have purchased that particular vehicle had they had knowledge of the defect. However, a new car is a complex machine with many competent parts that may occasionally fail and require replacing, including early in the life of the vehicle. This should not be sufficient to mean there is a major failure in the vehicle itself, particularly if the relevant part can be easily replaced.

A key consequence of this lack of precision is that suppliers have difficulties applying the ACL provisions on an everyday basis and consumers are often frustrated. The low value of many consumer transactions means that neither consumers nor suppliers are likely to regularly obtain legal advice on whether a specific problem is major or not (and doing so should not be necessary).

In addition, it is not clear whether a consumer seeking to reject goods must establish that there has been a major failure, or whether it is up to the supplier resisting such a claim (who wants to provide a lesser remedy) to prove that the failure was not major.

It would be useful to have reform in this area to give greater guidance and clarity, from a practical perspective, on what constitutes a major failure.

Acceptable quality

In the Committee's view the concept of *'acceptable quality'* (except in respect of *'durability'*, which is discussed above) is sufficiently clear.

The change in terminology from the outdated concept of *'merchantable quality*' has assisted both suppliers and consumers to better understand their legal position, and we do not consider that further reform to the definition is presently necessary.

Should 'unsafe' products be deemed to have a major defect?

The Committee considers that there is a major failure to comply with the consumer guarantee of acceptable quality if a product is unsafe. The law in its present form, which provides that there is a major failure if goods are not of acceptable quality because they are unsafe (section 260(e)) is, in the Committee's view, sufficient in this respect.

9.3 Written notification of rights/mandatory text for warranties against defects

The Issues Paper has also asked for comment about the costs and benefits of requiring businesses to provide consumers with written notification of their rights. The Committee does not believe that it is necessary to impose any further obligation on manufacturers and suppliers about providing consumer with written notice about their rights. Consumers' rights are now substantively covered in the provisions of ACL and there is wide understanding of the existence of those rights. Businesses already have very high costs of compliance with the ACL. Any further costs of doing so are likely to ultimately be passed on in the form of higher prices for goods and services.

Section 102 of the ACL provides that the regulations may prescribe requirements relating to the form and content of warranties against defects, and prohibits giving warranties against defects that do not comply. Under section 192 of the ACL, it is an offence to give a warranty against defects that does not comply. Regulation 90 of the *Competition and Consumer Regulations 2010* (Cth) sets out the mandatory requirements for warranties against defects including mandatory text.

The mandatory text for warranties against defects imposes a significant burden on suppliers, particularly global suppliers, who provide warranties against defects for the benefit of consumers. The Committee's view is that this requirement is too onerous and is not required in order to protect consumers. The general consumer protection provisions are sufficient to ensure that consumers are not misled as to their rights under the consumer guarantees, in particular: section 18 of the ACL prohibits misleading and deceptive conduct in trade or commerce; and section 29(m) of the ACL prohibits false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy including the consumer guarantees.

Further, and as demonstrated in the paragraph below, the mandatory text is not suitable in many situations and in some situations it could even mislead consumers as to their ACL rights. The Committee's view is that, given the complexity of the remedies available to consumers for failures to comply with the consumer guarantees, it is difficult (if not impossible) to develop a simple and practical statement that summarises the position in a way that would be accurately applicable to all potential situations. It would be more appropriate to mandate reasonable notification to consumers as to the existence of their statutory rights without prescribing the specific text that must be used.

If mandatory text and other requirements in Regulation 90 are to be retained, the Committee submits the following issues need to be addressed:

(a) Although the enabling provision of the ACL (section 102) specifically contemplates the mandatory text applying to both goods and services, the mandatory text refers only to 'our *goods*'; refers to remedies that are only available against a supplier for failure to comply with the consumer guarantees in respect of *goods* (such as replacement); and refers to the 'acceptable quality' guarantee, which applies only to goods (see section 54 of the ACL). The result is that when the mandatory text is applied to any document evidencing a warranty against defects in respect of services, it potentially misrepresents the remedies available to consumers (with the consequence that compliance with the mandatory text could in some circumstances could constitute a contravention of section 29(m) of the ACL).

(b) The mandatory text does not account for the division of responsibilities between suppliers and manufacturers with the result that manufacturers who provide warranties against defects are penalised for doing so because they are effectively forced to accrue more onerous obligations than what they would otherwise have under the ACL. A consumer's rights to a remedy against a manufacturer for failure to comply with the consumer guarantees is appropriately limited to damages for the reduction of the value of the product resulting from the failure and for reasonably foreseeable loss (section 272).

However, the mandatory wording refers to the rights a consumer has against a supplier. The effect of this is that manufacturers who provide any form of warranty are forced to comply with the ACL as both manufacturer and supplier and so accrue more onerous obligations than would otherwise be required under the ACL. This creates significant issues for manufacturers who provide warranty cards with their products, particularly because there is no provision that requires suppliers to indemnify manufacturers when manufacturers provide a remedy to consumers for failures caused by the supplier.

(a) The mandatory text does not account for the fact that under the consumer guarantees, in some circumstances consumers may not be entitled to have goods repaired or replaced even if the failure is a major failure. It provides that 'You are entitled to a replacement or refund for a major failure…'. However, if the rejection period has passed or a consumer does not return the goods within a reasonable period of time after the failure becomes apparent, the consumer may not be entitled to a replacement or refund. In these situations the mandatory text could mislead consumers as it suggests they are entitled to remedies to which they are not in fact entitled.

(b) The mandatory text does not account for the fact that suppliers can limit their liability to a replacement or repair (or the cost of replacement or repair) for consumer goods which are not ordinarily acquired for personal, domestic or household use.[91] The mandatory text provides that 'You are entitled to … compensation for any other reasonably foreseeable loss or damage', even though a supplier may be legitimately allowed to exclude liability for reasonably foreseeable loss or damage. In these situations, the mandatory text could mislead consumers as it suggests they are entitled to remedies to which they are not in fact entitled.

(c) On one interpretation, the mandatory text suggests that a consumer can choose whether to have goods repaired or replaced even where the failure is not major. The mandatory text provides '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'. However, under section 261 of the ACL, if a failure is not major, the supplier can decide which of a repair, replacement or refund they wish to provide the consumer. Again, in these situations, the mandatory text is at risk of misleading consumers.

(d) Section 192 of the ACL provides that every single *document* which evidences a warranty against defects representation (such as warranty cards, product packaging and promotional material) must include the mandatory text. On a strict interpretation, even where a manufacturer supplies a product with warranty information inside the packaging which complies with Regulation 90, the manufacturer could still be in contravention if the product packaging evidences a warranty against defects representation which does not contain the mandatory text. The ACCC has indicated that in this situation it will consider that the information inside the packaging is sufficient to comply.[92] However it is clearly an undesirable state of affairs where a company which complies with the ACCC's guidance may still technically be in breach of the ACL.

(e) Regulation 90 requires that the mandatory text be provided 'at or about the time of supply'. Further, the ACCC's guidance provides that the mandatory text must be available *with* the product itself—it is not sufficient to refer consumers to information on a website or in-store.[93] Accordingly, a company will not be compliant, or benefit from the ACCC's leniency policy, by including on its packaging or warranty card a reference to a website which contains the mandatory text. The Committee submits that it is not necessarily justified to disallow a referral to a website as this would:

    (i) still provide the consumer with the full warranty details in the event they ever needed to make a claim (which was the main stated intention of the legislation).[94] Referral to a website means consumers do not have to worry about keeping hard copy warranty cards and documents;

    (ii) potentially provide consumers with a better chance to access and review the warranty terms before purchase (through using a smart-phone in store) than a warranty card inside the packaging which usually cannot be reviewed until after purchase; and

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[91] I.e. goods which are less than $40,000. See ss 64A.

[92] See 'Warranties against defects requirements' section at http://www.accc.gov.au/business/treating-customers-fairly/offering-warranties/warranties-against-defects.

[93] See 'Warranties against defects requirements' section at http://www.accc.gov.au/business/treating-customers-fairly/offering-warranties/warranties-against-defects.

[94] See the Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* and the Explanatory Statement to the *Trade Practices (Australian Consumer Law) Amendments Regulations 2010 (No 1)* both of which provide the following reason for change to the voluntary warranty laws – 'Consumers may experience difficulties seeking to have suppliers or manufacturers fulfil such promises if they lack access to basic details, such as the name and address of the supplier'.

(iii) allow manufacturers and suppliers to immediately update their warranties if changes are made to the mandatory text or the regulatory requirements, or if any details change such as the contact details of the person giving the warranty or the process for claiming the warranty.

The Committee submits that the most important role of the regulation around warranties against defects is to ensure that consumers have the correct information in a readily accessible form *in the event they need to make a claim.* Accordingly, provided that the correct information is provided in a readily accessible form after purchase, the 'at or about the time of supply' requirement in Regulation 90 is not essential to serve the primary purpose of the legislation.

9.4 Digital products

The Committee considers that existing provisions under the ACL are presently appropriate for dealing with digital products or content. In particular, the consumer guarantees and unfair contract terms provisions are working – we do not consider that specific tailoring of ACL provisions to address digital products (like apps, games or music) is necessary.

It is acknowledged that there can be challenges associated with defective products in the digital space – for example, digital content (like a computer game) might be difficult to 'return' in order for a consumer to obtain the benefits of a refund or a replacement. This issue is not, however, necessarily unique to digital content. For example, perishable goods (like food) are often not returned to a supplier on discovery of a quality problem by a consumer. In addition, suppliers are sometimes able to implement technical solutions to prevent the further use of a digital product once it has been 'returned'.

As to whether there are difficulties in determining whether digital and non-tangible content should be characterised as a good or service – it is the Committee's view that the Federal Court's decision in *ACCC v Valve Corporation (No 3)* [2016] FCA 196 provides useful guidance in this respect. In that case the games supplied by Valve to consumers were found to constitute a supply of goods. There is no reason to think that other digital content could not be subject to a similar analysis, within the existing framework of the ACL.

Further, if a consumer in Australia purchases digital content online from an overseas seller, then the protections in the ACL should apply to that purchase. The Committee does not consider that there is any basis, at the moment, to form the view that the current regime is not adequate for digital content, or that it should be reformed.

9.5 Effectiveness of the indemnification provisions

Section 274 of the ACL provides that manufacturers are liable to indemnify suppliers for faulty products in certain circumstances. The ACCC has successfully brought a number of actions against suppliers for contraventions of section 29 of the ACL (which deals with false and misleading representations), arising out of suppliers informing consumers that they must seek remedies from the manufacturer.[95] In each of these cases, however, the respondents have admitted liability and agreed orders. As such, there have been no decisions in contested matters concerning this issue.

The Issues Paper invites submissions on the 'effectiveness' of the indemnification provisions contained in section 274 of the ACL (page 22). At a general level, the Committee is not aware of any evidence that these provisions are failing to achieve the

[95] For example, the ACCC's proceedings against Hewlett Packard (*Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd* [2013] FCA 653) and Harvey Norman franchises (e.g. *Australian Consumer and Competition Commission v Camavit Pty Ltd* [2013] FCA 1397).

joint objectives of ensuring consumers are able to obtain remedies from suppliers, while also ensuring manufacturers bear ultimate liability for any faults of their making.

The Committee understands that there may have been suggestions that a supplier presented with an allegedly defective product by a consumer is not entitled to seek the manufacturer's input as to whether it is defective and tell the consumer that it is going to do so, as doing so may involve the making of a misleading representation as to the consumer's rights as against the supplier. That is, such a statement may be construed as a representation that the consumer does not have any rights to a remedy from the supplier, or does not have any such rights unless the manufacturer agrees that there is a fault.

The Committee considers that such a view is not supported in the legislation, as a statement by a supplier that it is going to consult with the manufacturer about an alleged fault does not constitute a representation that the consumer must look only to the manufacturer for remedies.

The Committee would strongly oppose any suggestion that the ACL should be amended to prohibit suppliers making such statements. This is because manufacturers are often best-placed to determine whether the returned product is faulty and, if it is, the nature of the fault, including whether it is a major or minor fault.

Permitting suppliers to consult manufacturers about alleged faults also assists in avoiding circumstances in which a supplier provides a remedy to the consumer and then seeks to be indemnified by the manufacturer, . The circumstance then arises where the manufacturer asserts that the product was not faulty that the fault was a result of the consumer's conduct, or that the product could have been repaired differently or in a less costly manner (potentially leading to a dispute about the extent of indemnification to which the supplier is entitled). Such scenarios defeat the purpose of the indemnification provisions.

Permitting such consultation is also preferable as it will alleviate the risks of disputes arising between manufacturers and suppliers seeking indemnification as to whether faults are minor or major. There is a real risk of suppliers having adverse incentives to grant remedies to consumers on the basis that a failure is a major failure, as it is arguable that the manufacturer must indemnify the supplier for whatever remedy is given, assuming the supplier was liable to provide remedies.

However, the Committee is of the view that section 274 could be drafted in a way that makes it clear on its face what the subsection is designed to achieve. The prefatory language in s 274(2) (namely, '[Extent of indemnity] Without limiting subsection (1)'), suggests that the indemnification rights under section 274(2) are in some way limited by section 274(1) and are therefore only enlivened when the two conditions in section 274(1) apply. The purpose of the prefatory language is not clear.

The Committee suggests amending section 274 by:

(a) moving subsection 2 above subsection 1;

(b) removing the following language in the current subsection 2: 'Without limiting subsection (1),'; and

(c) inserting a new subsection (c) in the existing subsection 2 that reads: 'This subsection does not limit subsection (1).'

9.6 Extended warranties

Extended warranties can provide consumers with benefits that go beyond any rights they may have under the consumer guarantees. In particular, the consumer guarantees do not necessarily provide consumers with certainty as to their rights because the legislation imports qualitative assessments (such as whether a failure is minor or major, and whether the 'rejection period' has passed because the failure did not become apparent within a reasonable time). Extended warranty products can provide certainty, as well as other benefits.

By way of example, in the recent proceedings brought by the Director of Consumer Affairs Victoria against the Good Guys, the court found that the Good Guys' extended warranty product provided benefits which were additional to the consumer guarantees and related remedies in the ACL such as in-home servicing, automatic replacement for products under $250 and automatic product replacement if the same part required more than two repairs.[96]

Sales of extended warranty products are currently governed by the following provisions of the ACL:

(a) section 18, which contains a general prohibition on misleading or deceptive conduct engaged in trade or commerce;

(b) section 29(1)(m), which deals with false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including the consumer guarantees). The ASIC Act contains an equivalent provision;

(c) section 29(1)(n) which deals with false or misleading representations concerning a requirement to pay for a contractual right that (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including the consumer guarantees); and (ii) a person has under a law of the Commonwealth, a state or a territory (other than an unwritten law). The ASIC Act contains an equivalent provision;

(d) section 59(2) which provides that there is a guarantee that the manufacturer or supplier of goods will comply with any express warranty they give or make; and

(e) section 102 which provides prescribed requirements for warranties against defects, including that any warranty document must include the following mandatory language set out in Regulation 90 of the *Competition and Consumer Regulations 2010 (Cth)*.

The effect of these provisions is that manufacturers and retailers will be in breach of the ACL or the ASIC Act if they represent that consumer rights of the kind automatically provided under the statutory consumer guarantees regime can only be obtained by payment for an extended warranty product. In addition to this, the case law suggests that an extended warranty product should provide consumers with rights that go beyond the protections provided under the consumer guarantees or there is a greater risk of contravention.[97]

The Committee's view is that the ACL provides consumers with sufficient protection with respect to the sale of extended warranty products and there is no need for a specific provision which requires retailers to actively advise consumers of their consumer guarantee rights when selling extended warranty products. This would place an undue

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[96] *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22 at [35]-[36].

[97] *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393; *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22.

burden on retailers, particularly because the rights a consumer has under the consumer guarantees are subject to qualitative circumstances that often cannot be determined at point of sale.

The Committee would support the introduction of a statutory cooling off period for extended warranty products. Subpart 3 of the *Fair Trading Act 1986* (NZ) provides for a five working day cooling off period. The Committee considers this to be reasonable. However, the Committee is of the view that any requirement for retailers to give consumers oral notice of the cooling off period (as is the case under the New Zealand legislation) could be impractical both from a compliance and enforcement perspective. The value for consumers of any additional regulatory requirement such as a statutory cooling off period should be assessed against the cost of the regulatory burden that will be placed on Australian business, which will likely be passed on to consumers.

9.7 Does the ACL need a lemon laws provision? (section 2.3.4, Issues Paper)

The Committee's view is that the ACL does not need a lemon laws provision.

The statutory consumer guarantees provide a regime for dealing with defective products. A lemon law would add an additional and unnecessary level of regulatory burden and complexity, without obviously providing any benefits.

The Commonwealth Consumer Affairs Advisory Council considered that a *'lemon'* could be defined as a product that *'simply will not function as intended, for reasons that are beyond the expertise of a reasonable repairer to remedy'*. Definitions of *'lemons'* in the US tend to focus on repeated minor faults.

The Committee's view is that if a product does not *'function as intended'*, or has repeated minor faults, then it would fall foul of the consumer guarantee of acceptable quality. A separate prohibition should not therefore be necessary. Introducing an additional law (whether only for motor vehicles or for all products) would increase complexity for businesses when implementing measures to comply with the ACL.

For example, if a lemon was defined by reference to the number of unsuccessful repairs on a product, or days out of service, then it would be necessary for a supplier or manufacturer to track these types of statistics in order to comply with the law. There would be costs associated with this tracking along with additional administrative costs. Consumers will eventually bear these costs.

Further, if a lemon law were to be introduced, significant questions arise as to:

(a) How to define the quintessential "lemon-ness" of a complex product, particularly where there are multiple components but only one of which may be problematic – is that sufficient to make the entire product a lemon?

(b) How to identify the threshold for when the lemon law would apply, across the broad range of goods or services to which the ACL applies.

The Committee considers that if greater clarity is given to the meaning of what constitutes a 'major failure' to comply with a consumer guarantee (as discussed in section 9.2 above), then a separate lemon law should be unnecessary. Furthermore, if the user-friendliness of the consumer guarantees regime were addressed (also discussed above), then the practical effectiveness of the entire regime should improve. It is the Committee's view that reform should focus on increasing the effectiveness of the current regime, rather than introducing a new (potentially complex and burdensome) prohibition on lemons.

10 Unsolicited consumer agreements (section 2.3.5, Issues Paper)

Division 2 of the ACL principally deals with door-to-door sales and telemarketing. Section 69 defines unsolicited consumer agreements. Agreements falling within this definition must comply with various disclosure and fairness requirements.

The provisions applying to unsolicited consumer agreements are concerned with protecting consumers against aggressive and high-pressure selling techniques in circumstances where there is an additional risk of vulnerability or disadvantage, in particular because the consumer was not prepared to transact. The Division uses the concept of "unsolicited" to identify when the risk of abuse arises. "Unsolicited" is defined at section 2(1) as goods or services supplied by a person without any request made by the person on his or her behalf.

10.1 Are the provisions flexible enough to deal with evolving business models, and is it appropriate to maintain the distinction between solicited and unsolicited sales (see also section 4.3, Issues Paper)?

The ACL Issues Paper notes that evolving business models may blur the distinction between solicited and unsolicited, such as where a consumer uses a comparator website and the comparator website seeks the consumer's consent to be contacted by the seller.

The ACL Issues Paper notes that recently introduced UK regulations avoid this issue by not distinguishing between “solicited” and “unsolicited” sales. Instead, they apply to any form of selling away from the trader’s business premises. The Regulations apply to the following situations:

“Off-premises contracts” meaning:

(a) contracts concluded away from the trader's business premises – e.g. in a consumer's home or place of work;

(b) contracts negotiated away from the trader's business premises but concluded at a later time – e.g. where a consumer signs an order form during a visit to his home and the trader agrees the contract later;

(c) contracts agreed on a trader's business premises or through any means of distance communication immediately after a meeting with a consumer in a place that is not the trader's business premises, e.g. a trader approaches a consumer on the street and the consumer is then taken to the trader's office to conclude the contract, or the consumer gives the trader his or her email address and then later concludes a contract with the trader via email;

(d) contracts concluded during an excursion organised by the trader with the aim of selling or promoting their goods or services to the consumer, e.g. a trader meets a consumer on holiday and invites him to travel with the trader to a different venue to be sold goods or services; and

"Distance contracts” meaning:

contracts concluded when the consumer and trader are not together and which is negotiated and agreed by one or more organised means of distance communication – e.g. by phone, post or over the internet.

In the Committee's view, the concepts of “on-premises” and “off-premises” are not as useful as "solicited" and "unsolicited" at identifying the harm which this Division seeks to address. The theory of harm is the increased risk of abuse that comes with consumers being approached in contexts other than a trader's business premises, particularly in

situations of vulnerability and disadvantage. A consumer who invites a transaction is likely to have some understanding of the good or service he or she wishes to purchase and be correspondingly less vulnerable to aggressive and high-pressure selling techniques.

Distinguishing between on-premises and off-premises sales is less suited to addressing this harm and is less able to adapt to evolving business models. Extending the regime in this way is likely to provoke satellite debates about whether a particular sales point is on or off premises. The focus would then turn on whether, for example, a temporary kiosk in a shopping mall, was a "premises", rather than whether the consumer was in a vulnerable or disadvantageous position. It would also mean that businesses making solicited online sales would need to comply with the burdensome disclosure and fairness requirements of the regime.

Further, the meaning of "unsolicited" is already nuanced so as to capture deceptive techniques to obtain an invitation to treat. For instance, consumers are not taken to have invited a seller to their homes, or to call, merely because the consumer has given his or her name for another purpose or returned a phone call, or because the consumer has given an invitation to the seller to provide a quote (see sections 69(1A) and 69(2)).

In the Committee's view, the distinction between solicited and unsolicited is the most appropriate method to protect consumers against aggressive and high-pressure selling techniques in circumstances where there is an additional risk of vulnerability or disadvantage.

10.2 Should the provisions apply to commercial companies collecting donations on behalf of charities?

Currently, donations to charities where no sales are involved are not considered to be unsolicited consumer agreements and are therefore not subject to compliance with the regime. The ACL Issues Paper asks whether the provisions should apply to companies collecting donations on behalf of charities.

In the Committee's view, extending the scope of the regime in this way is not appropriate and would be contrary to the public interest. Seeking donations from the public is a vital tool for charities to obtain sufficient funds to carry out their charitable activities. Further, requiring companies to comply with the disclosure and fairness requirements of the regime would be overly burdensome and would hinder charitable giving.

The regime already provides that, for the exemption to apply, no sales can be involved. This condition provides sufficient protection for consumers against businesses using charitable donations as an ulterior means to sell unsolicited goods or services to consumers.

10.3 Should the provisions also apply to business consumers?

Regulation 81 of the *Competition and Consumer Regulation 2010* provides that for the purposes of subsection 69(4) of the ACL, business contracts cannot be unsolicited consumer agreements. A business contract is defined as an agreement for the supply or goods or services not of a kind ordinarily acquired for personal, domestic or household use or consumption.

Extending the provisions to business contracts is unnecessary. Concerns around vulnerability and disadvantage are less relevant in a business context. Business contracts are unlikely to be concluded at the business owner's home, businesses are more sophisticated than consumers and are used to transacting with customers and other businesses on a daily basis.

Further, it is commonplace for businesses to carry out unsolicited marketing on other businesses, such as cold-calling. It would impose a significant burden on business, and significantly increase transaction costs, if any contract entered into via such marketing was required to adhere to the provisions set out in Division 2 of the ACL.

Extending the regime to unsolicited business contracts will make such transactions more costly and less efficient. Unless there is an identified harm to businesses who choose to enter into unsolicited agreements that is not being addressed under the existing laws, then there is no reason to amend the law. If the law were extended to apply to business contracts, then it is likely that the increased transactions costs and inefficiency associated with compliance will be passed on to the business obtaining the good or service. This, in turn, will ultimately lead to higher prices for consumers.

10.4 Is the exemption allowing goods up to the value of $500 to be supplied during the cooling off period appropriate? Should it extend to services and should suppliers be allowed to accept payment during the cooling-off period?

The Committee is of the view that allowing goods to be supplied during the cooling off period is appropriate and benefits consumers. Consumers often want to access to goods immediately after they are purchased. $500 is a fair value by which to distinguish between significant purchases requiring further protection and less significant purchases.

The Committee agrees that the exemption should extend to services. There does not appear to be any logical reason why a business providing goods should be able to supply those goods during the cooling off period but a business supplying services should not. The type of supply that is made has no connection to the risk of aggressive or high-pressure selling techniques, and it is not the case that consumers of services are more vulnerable or disadvantaged. Extending the exemption to services would also benefit the Australian economy, since the service sector comprises the majority of Australia's GDP.

The Committee is also of the view that businesses should be allowed to accept and require payment for supplies made during the cooling off period, pursuant to the exemption. Businesses should not be required to wait until the cooling off period has expired where the supply has already made. Delayed payment increases the risk of the transaction, and businesses simply address this increased risk by costing it into their ultimate prices to consumers.

10.5 Should a consumer be required to “opt in” without further contact from the supplier, rather than current “opt out”?

The current law already provides sufficient protection to consumers who enter into unsolicited agreements. A consumer has 10 business days to 'cool off', i.e. change his or her mind and cancel the contract for any reason. Termination can be made verbally or in writing at any time during the cooling off period. The business must promptly return or refund any money paid under the agreement or a related contract.

Even if the consumer has partially or completely used the goods supplied by the salesperson under the agreement, he or she may still cancel the contract and obtain a refund. The salesperson cannot try to convince the consumer to waive his or her rights to cool off. If the salesperson does not comply with certain requirements as to the making of an unsolicited consumer agreement, the cooling off period can be extended up to 6 months.

Requiring a consumer to contact the business again to 'opt in' to the consumer agreement will increase inefficiency and transaction costs. In particular, it will lead to hold ups in the supply chain and increased transaction costs.

At present, a business can plan to dispatch a good or service after the expiration of the cooling off period. In the Committee's view, switching to an opt-in regime would be a disproportionate response to the harm which this Division seeks to address.

11 Unsafe products (section 2.3.7, Issues Paper)

11.1 Overview

The Committee recognises the important motivation behind the product safety regime. However, the Committee considers that current regime is not working efficiently. Whilst addressing the risks of consumer harm, the protections impose disproportionate or unnecessary costs on businesses. There are some changes that can and should be made to improve the efficiency of the product safety regime.

11.2 Current approach – mandatory reporting

The ACL Review is an opportunity to address the duplication of food safety reporting requirements. State and territory laws provide for mandatory reporting of food related illnesses by health and medical practitioners to food safety regulators.[98] At the same time, section 131(1) of the ACL requires all participants in a supply chain to report consumer goods associated with death or serious injury or illness to the ACCC.

This gives rise to an overlap for consumer goods which happen to be food. Concern about this duplication was recently raised in the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* (Cth), which has now lapsed. The Bill proposed to omit food from the general product safety reporting requirement. We think this is an appropriate way of addressing the duplication. The level of protection afforded to consumers would be unchanged but the burden on businesses would be substantially reduced.

In support of the Bill, the then Small Business Minister, Bruce Bilson, stated:

> *Both the ACCC and Australian food safety regulators consider these reports to be of no added value in regulating the safety of food products. The food industry has informed the Government that this requirement places a disproportionate cost on industry.*[99]

Section 131(2)(c) of the ACL and Regulation 92 of the *Competition and Consumer Regulations 2010* (Cth) go part of the way to addressing the duplication. This is because under section 131(2)(c), section 131(1) does not apply if a supplier, or another person, is required to notify the death or serious injury or illness in accordance with a law specified in the regulations. The laws specified in Regulation 92 include various state and territory laws providing for mandatory reporting of food related illnesses. However, in practical terms it is difficult to determine whether an illness reported by a customer is notifiable under one of these other laws, particularly in a short timeframe, and we submit that the issue is better addressed by specifying in the ACL that the mandatory reporting requirement does not apply where the consumer goods are foods.

[98] See, eg *Public Health Act 2010* (NSW) s 54.

[99] http://www.smh.com.au/federal-politics/political-news/foodrelated-deaths-and-illnesses-to-no-longer-be-reported-to-the-accc-20150318-1m25kd.html.

11.3 The threshold for mandatory reporting

The mandatory reporting threshold includes an incident of 'death or serious injury or illness'. Under the ACL, 'serious injury or illness' means:

> *an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place), but does not include:*
>
> *(a) an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or*
>
> *(b) the recurrence, or aggravation, of such an ailment, disorder, defect or morbid condition.*

This definition is unclear. On the one hand it can be interpreted to capture all minor injuries where medical treatment was actually provided e.g. the application of a band aid by a doctor to a paper cut. On the other hand, if the word 'requires' has an operative meaning, it can be interpreted to mean that, for minor injuries, such medical treatment (even if it actually took place) was not 'required'. These are issues which are difficult to apply to real world scenarios. We think a carve out for minor injuries is appropriate, to make it clear that minor injuries are excluded from the mandatory reporting requirement.

The mandatory reporting threshold requires that the death or serious injury or illness was caused, or may have been caused, by the 'use or foreseeable misuse of the consumer goods'. Such a test is incredibly difficult to apply in practice. For example, it is not clear whether a person ingesting a keyboard button would meet the mandatory reporting threshold. Surely ingesting a button is not a 'use' of the keyboard as keyboards are not intended for ingestion. However, it is unclear whether this example could fall under a 'foreseeable misuse'. We do not think that legislative change is necessary, but consider that ACCC guidance, including examples, on the application of the test would be highly useful for businesses. Such guidance would reduce the compliance burden for businesses without compromising consumer safety.

11.4 Interaction with multiple regulators

The mandatory reporting regime under section 131 and the regulation of product recall action often involve duplication of resources in dealing with multiple regulators, including the ACCC and specialist regulators of the states and territories (e.g. for electrical goods). Although we acknowledge that the concept of a 'home regulator' (which is not legislated) seeks to reduce some uncertainty for goods of this nature:

(a) under the ACL, the ACCC must be notified within 2 days after voluntarily taking action to recall consumer goods in certain circumstances;

(b) in practice, both the ACCC and the home regulator (who may also wish to get the input of other state and territory regulators) will expect to be given a copy of and an opportunity to comment on the recall plan and recall notice before it is actioned; and

(c) the ACCC and any state or territory regulator may (and does) take action to investigate mandatory reports under s 131, including where such reports relate to goods already the subject of a voluntary recall.

11.5 Should Australia adopt a prohibition on the supply of unsafe goods?

The Committee considers that there is no need for the introduction of a prohibition on the supply of unsafe goods. This is because the existing prohibition of non-compliance with safety standards is appropriately comprehensive. There are also a range of provisions

under the ACL, including the consumer guarantees and defective goods actions, which provide rights to persons (not limited to consumers) who may have suffered injury, loss or damage in respect of consumer goods. The ACCC may also commence a representative action on behalf of persons (sections 149 and 277 of the ACL).

The prohibitions against false and misleading conduct may also be available in relation to withdrawal or recall of consumer goods which had been the subject of reports of product safety issues.[100]

A general prohibition is not necessary, and would simply result in unnecessary duplication and an increased compliance burden for businesses, without any increase in protection for consumers.

12 Other issues (section 2.4, Issues Paper)

12.1 Should the ACL prohibit certain commercial practices or business models that are considered unfair?

Please refer to section 5.2 of this submission.

12.2 Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?

Please refer to section 5.2 of this submission.

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

Historical context for the separate treatment of consumer protection for financial services

The Australian Financial System Inquiry 1997 (**Inquiry**) recommended that consumer protection provisions similar to those in the then TPA be inserted into the ASIC Act[101] and restricted to "financial services". The reasoning supporting this "replication" of the consumer protection provisions is contained within the Inquiry's report.

The Inquiry considered the "Philosophy of Financial Regulation" and the purposes of regulation, which were stated to be:

(a) to ensure that markets work efficiently and competitively;

(b) to prescribe particular standards or qualities of service; and

(c) to achieve social objectives.

The starting premise of the Inquiry, in terms of financial system regulation was that:

[100] *Australian Competition and Consumer Commission (ACCC) v Woolworths Ltd* [2016] FCA 44.

[101] Note that the Wallis Committee Report 1997 referred to the establishment of the "CFSC" or the Corporations and Financial Services Commission. This organisation was ultimately named the Australian Securities and Investments Commission.

"As a general principle, greater regulatory consistency and efficiency will result from economy wide regulation. Consequently, this should always be preferred unless a clear case for sector specific arrangements can be demonstrated…"[102]

Having said that, the Inquiry arrived at different views on sector-specific regulation for financial services in relation to consumer protection and competition law:

"*The complexity of financial products and markets, their intrinsic risks – including those due to limited information – and the detailed knowledge required to deliver efficient regulation in this area argue strongly for continued specialised regulatory arrangements…[and]… Specialist consumer protection in the financial system*…"[103]

"*While financial products are complex and any assessment of competition requires detailed analysis of markets, the key features relevant to competition assessment in this sector is not unique. The application of economy wide competition regulation to the financial system ensures regulatory consistency. Any anti-competitive behaviour is not unique to financial markets and it is preferable to establish both the bounds of acceptable behaviour and rules for mergers and acquisitions which are common to all industries*…."[104]

At the time, responsibility for market integrity and the regulation of financial services was shared amongst a number of organisations prior to ASIC's formation. First, the Insurance and Superannuation Commission (**ISC**) regulated life insurance, general insurance, superannuation products and insurance brokers. Secondly, the Australian Securities Commission (**ASC**) regulated securities dealers, investment advisers, futures brokers, collective investment schemes and debentures. Thirdly, the ACCC regulated economy wide business conduct laws and performed price monitoring. Finally, the Australian Payments System Council (**APSC**) monitored industry codes of practice for electronic funds transfer schemes, banks, building societies and credit unions.

The Inquiry considered whether there was sufficient advantage, considering the costs of doing so, in bringing together the functions of specific finance sector consumer protection regulators into a single Commonwealth regulator. The Inquiry identified a number of negative consequences in allowing the fragmented consumer protection arrangements outlined above to continue. They identified that there existed substantially different disclosure requirements for investment vehicles of a similar nature, giving the example of public unit trusts and investment linked life policies. There also existed inconsistent approaches to the regulation of financial sales and advice for securities brokers and life insurance agents. The Inquiry made the general observation that regulators are required to be flexible and even handed in their regulation of financial products and services, and changes in the financial system would blur distinctions between end users and financial institutions.

The Inquiry resolved that maintaining numerous specialised consumer protection regulators would not facilitate an ability to respond effectively to change. It would result in financial service providers having to engage with numerous regulators. It would result in confusion for consumers looking to understand and compare products and would interfere in their ability to seek redress. Further, it would require regulatory agencies whose focus was on prudential regulation to maintain expertise and powers in the differing field of consumer protection. The Inquiry identified the risk of consumer protection becoming subservient to other objectives in this case. The Inquiry identified

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[102] The Australian Financial System Inquiry 1997, Final Report (**Inquiry Report**) pages 186-187.

[103] Inquiry Report page 188.

[104] Inquiry Report page 189.

that "better focused, more consistent and responsive regulation would be delivered by a single regulator covering the whole financial sector".[105]

The Inquiry also considered the need to avoid overlap between specific and economy wide regulation. It identified that the ACCC maintained responsibility for ensuring economy wide compliance with the consumer protection provisions of the TPA. The coexistence of the ACCC and ASIC would create the potential for regulatory duplication and associated increases in compliance costs, uncertainty and the risk of inconsistency.

The Inquiry resolved that the substantive consumer protection provisions of the TPA should apply to the financial system and stated that the ACCC should not administer these provisions in relation to the financial system as it would detract from the specialised role of ASIC.

The Inquiry stated that the risks of regulatory capture, where a specialised regulator develops a shared interest in the regulated industry, were insubstantial. Whilst ASIC would be required to take action under the relevant provisions, the Inquiry stated that the ACCC's jurisdiction would not need to be formally withdrawn. The maintenance of its jurisdiction would remove the risk of regulatory gaps emerging.

It was therefore recommended that the ACCC and ASIC enter into an operating agreement to eliminate duplication in the enforcement effort. The Treasurer could also give the ACCC direction under the TPA to further clarify its role and avoid gaps in coverage. The ACCC and ASIC thereafter entered into a Memorandum of Understanding[106] pursuant to these recommendations.

Ultimately, for the reasons above, the Inquiry recommended that ASIC should maintain sole responsibility for administering consumer protection regulation within the financial sector. Consumer protection provisions as found in the TPA would be included in ASIC's legislation.

Current approach is inefficient and creates unnecessary complexity

In 2007/2008, the Productivity Commission's undertook the *Review of Australia's Consumer Policy Framework (***PC Review***).* Recommendation 4.2 in the PC Review Final Report stated as follows:

> *"The new national generic consumer law should apply to all consumer transactions, including financial services. However:*
>
> - *the Australian Securities and Investments Commission (ASIC) should remain the primary regulator for financial services, with any involvement by the Australian Competition and Consumer Commission or State and Territory consumer regulators in this area only occurring after prior consultation with ASIC; and*
>
> - *financial disclosures currently only subject to 'due diligence' requirements should be exempted from the misleading or deceptive conduct provisions of the new law…."*[107]
>
> *Current arrangements are inefficient and unnecessarily complex."*

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[105] Financial System Inquiry Report, Parliament of Australia (1997) 243.

[106] the most recent version of which was entered into on 15 December 2004

[107] Productivity Commission "*Review of Australia's Consumer Policy Framework" Final Report 2008 Volume 1 at page 64*

The Committee agrees with this view. We consider that the current approach to splitting the consumer protection laws between the ACCC and ASIC, through defining and exempting 'financial services' and 'financial products' from the scope of the ACL, is inefficient and creates unnecessary complexity.

The definition itself is overly convoluted and requires cross-referencing between a number of sections of not only the ASIC Act but also the CCA. In addition, depending on which consumer protection law is relied on,[108] parties may need to consider whether the conduct is in relation to not only a 'financial product' as defined in the ASIC Act, but also in relation to a 'financial service' as defined in a separate, and similarly convoluted section, of the ASIC Act.

The substantial sections dedicated to addressing this question in the case law reflect the time and effort that parties and courts expend in determining who has jurisdiction over a consumer protection matter. For example in the recent *Europcar* decision,[109] three pages of the approximately 28 page judgment are dedicated to determining whether the relevant conduct was in relation to a 'financial product' and 'financial service'. The analysis involved assessing what is positively included in the definition (which is itself a long detailed list) and cross-referencing against the exceptions, which in turn necessitated a cross-referencing with the definition of 'goods' within the CCA. Similarly long discursions are found in other cases in which the question is relevant.[110]

The complexity is unnecessary because there is no different skill set or expertise that is required for dealing with consumer law issues when they involve 'financial services' so as to necessitate that only ASIC can carry out the investigation. On a number of occasions where it has been determined that the relevant conduct relates to a 'financial service' (or 'financial product'), the ACCC has simply obtained a delegation of authority from ASIC under section 102 of the ASIC Act and has carried out the investigation (and any proceedings) itself, as it would have were the 'financial service' definition not met.[111]

Further, in the event that assistance is required of ASIC by the ACCC, for example in relation to understanding a particular 'financial product' or 'financial service', this assistance can be provided without introducing the unnecessary and complex jurisdictional question currently presented by the 'financial services' exemption.

Additionally, having the same consumer regime duplicated over two statutory instruments means there is a higher chance of unintended inconsistencies between the two, depending on which statute covers the relevant conduct. For example, the ASIC Act pecuniary penalty regime refers to 'penalty units' (i.e. 10,000 penalty units) while the ACL refers to a dollar amount (i.e. $1.1 million). This has now led to inconsistencies in the maximum penalties available as the definition of penalty unit under the *Crimes Act 1914* (Cth) has increased from $110 to $180 per unit, making the maximum penalty available under the ASIC Act $1.8 million, whereas the dollar amount prescribed in the ACL has not increased and remains at $1.1 million.

Another key (and apparently unintended) inconsistency between the ASIC Act regime and the ACL is the lack of an equivalent consumer guarantee regime in the ASIC Act. The consumer guarantee regime is a key part of the ACL and was introduced to replace the old implied undertakings regime, due to the government's concern that the former

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[108] E.g. the misleading and deceptive conduct provisions apply only in relation to 'financial services' and not 'financial products'

[109] *ACCC v CLA Trading Pty Ltd* [2016] FCA 377

[110] See also *ASIC v Accounts Control Management Services Pty Ltd* [2012] FCA 1164, (4 pages), *ACCC v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 (2 pages), *Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Limited (in liq)* [2013] FCAFC 5 (3 pages, rejecting trial judge's conclusion that conduct was not in relation to 'financial services')

[111] E.g. as it did in relation to the *Europcar* decision, *Lumley Retail Warranty* investigation and the *Fisher & Paykel* proceedings.

regime was too unclear to be of practical use. However the new regime has not been duplicated in the ASIC Act, and instead the only 'equivalent' protection available is in relation to 'financial services' under s12ED ASIC Act,[112] which is based on the old implied undertakings regime.

Finally, information gathering powers under the two regimes (the CCA/ACL and the ASIC Act) also differ, giving rise to further unnecessary complexity.

The decision in *ACCC v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 is illustrative of the complexity involved with the current carve out of financial services from the ACL. In that matter, Fisher & Paykel Customer Services (**FPCS**) was found to have made false or misleading representations in relation to extended warranties that they offered customers on Fisher & Paykel white goods they had purchased. The representations were false or misleading by reason of the existence of the consumer guarantee regime under the ACL – the letters represented that the consumer would not be protected against repair costs for the appliance after 2 years unless the customer purchased the extended warranty when they may have been already protected under the ACL's consumer guarantee regime. However, the Court found that the extended warranty itself was a financial product under the ASIC Act and that issuing a financial product constitutes dealing in a financial product and therefore amounts to the provision of a financial service. FPCS's misleading or deceptive conduct therefore amounted to a contravention of the ASIC Act, not the ACL. In another matter concerning extended warranties, the ACCC's s 87B undertaking refers to the conduct contravening either the ACL or the ASIC Act.[113]

Suggested approach to addressing these issues

The Committee is of the view that this unnecessary complexity could be resolved by removing the exemption to the ACL's scope which is currently provided in respect of the supply of financial services or financial products under section 131A of the CCA, and making ASIC's consumer law jurisdiction currently provided under Part 2, Division 2 of the ASIC Act concurrent with that of the ACCC in respect of financial services or financial products. The ACCC should have consumer law jurisdiction over all types of goods and services regardless of the industry, including 'financial services' and 'financial products'. There is no persuasive rationale for splitting jurisdiction in relation to financial services but not any other type of products or services, e.g. energy products, telecommunications etc.

Additionally, as noted above, if, and to the extent, that the ACCC may at any time require ASIC's assistance in relation to understanding the nature or mechanisms of a particular financial product or service, there would be nothing preventing this flow of assistance pursuant to the Memorandum of Understanding that is currently in place between ASIC and the ACCC.

Enabling both bodies to apply their specialist expertise in their respective areas – i.e. the ACCC with its specialist competition and consumer law expertise, and ASIC with its specialist regulatory expertise – would enable a more efficient approach by ensuring a consistent application of the laws across a range of industries, avoiding duplication and unnecessary jurisdictional questions and maximising the quality of the investigations.

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[112] s12ED *ASIC Act* provides that in every contract for the supply of financial services by a person to a consumer in the course of a business, there is an implied warranty that: (a) the services will be rendered with due care and skill; and (b) any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.

[113] See the s 87B undertaking dated 7 December 2015 offered by WFI Insurance Limited trading as Lumley Retail Warranty.

13 Administering and enforcing the Australian Consumer Law (section 3, Issues Paper)

13.1 Does the ACL promote a proportionate, risk-based approach to enforcement? (section 3.1, Issues Paper)

The Committee believes that the ACL continues to promote a proportionate and risk-based approach to enforcement.

The availability of criminal and (since 2010) civil penalties, the ability of ACL regulators to seek the broad range of remedies available under section 243 (which include the recovery of profits from contravening conduct and the recompense or redress of affected parties), the introduction in 2010 of the ability of ACL regulators to seek banning orders, and the range of other intermediate powers available to ACL regulators (such as public warnings, substantiation and infringement notices) enable ACL regulators to give effect to an appropriate 'enforcement pyramid', whereby sanctions of escalating severity (and enforcement cost) are used to deal with increasingly serious breaches of the law.[114]

The broader range of enforcement tools available to ACL regulators since 2010 means that they are now capable of adopting a layered approach to enforcement that involves tailoring regulatory action to the severity of specific compliance breaches.

Necessarily, however, the ability of ACL regulators to give effect to such an approach will be affected by their funding. As noted in a recent report, the overall level of funding and staffing at ACL regulators has been reducing,[115] and there are concerns that the level of enforcement may be in decline.[116] As noted in section 13.6 below, additional and more consistent reporting by ACL regulators could assist in assessing the extent to which the ACL is being enforced.

13.2 Are the remedy and offence provisions effective (section 3.2, Issues Paper)?

The Committee considers that the current balance of contraventions and offences, and the remedies available to ACL regulators, remain effective and therefore sufficient.

In the view of the Committee, it remains appropriate to maintain both civil and criminal penalties, given the different functions they perform. ACL regulators will remain constrained in their ability to pursue criminal actions in all but the most egregious of cases that require more general deterrence, given the cost and time involved in establishing the higher burden of proof. Civil penalties therefore provide a more cost-effective, timely and proportionate enforcement approach.

At this point in time, the Committee does not believe that the need for imprisonment as a remedy is warranted for breaches of the ACL.

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[114] See Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, page 54.

[115] See The Australia Institute, *Corporate malfeasance in Australia*, April 2013, page 3.

[116] *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, a report by Gordon Renouf, Teena Balgi and the Consumer Action Law Centre, March 2013.

13.3 Are the current maximum financial penalties available under the ACL adequate to deter future breaches? (section 3.2.3, Issues Paper)

Current maximums are sufficient and should be given time to work

The Committee recognises civil penalties are an increasingly important enforcement tool for ACL regulators, both to deter a particular respondent and to others more generally from engaging in contravening conduct.

With only five years having passed since the introduction of financial penalties for civil contraventions of the consumer protection provisions, however, the Committee considers that there has not yet been sufficient time to conclude that the current level of penalties is not providing sufficient deterrence.

The ACCC as the national regulator has secured significant penalties in a number of recent cases, including in relation to unconscionable conduct (as has ASIC[117]). Importantly, where cases are not resolved by way of settlement, ACL regulators have avenues to seek review of penalty decisions if it thinks they are not sufficient, as shown by the ACCC's present appeal of the penalty awarded by the Court in the *Nurofen* case. Regard should also be had to the fact that in many, if not most, cases, proceedings are taken in relation to conduct that is capable of being characterised as more than one contravention, such that more than one penalty may be appropriate.

Penalties are also only one aspect of the consequences of a breach of the consumer protection laws. ACL regulators are also able to seek remedies that require contravening corporations to make redress to affected parties, such as the requirement that they set up a scheme for the repayment of monies obtained by unconscionable conduct or other prohibited conduct. When these amounts are taken into account, the monies paid can increase by factors of two or more.[118]

Companies who are taken to Court and lose also are exposed to other orders, including injunctions, corrective advertising and compliance programs, all of which have costs associated, as well as significant reputational effects, and act as significant deterrents.

This said, the Committee recognises that there is some work to be done in achieving consistency between the ASIC Act and the ACL provisions on penalties for consumer law breaches: For example:

- The maximums under the ACL are set by reference to dollar figures – generally $1.1 million for a corporation and $200,000 for an individual.
- The ASIC Act applies maximums by reference to penalty units, as set by section 4AA of the *Crimes Act 1914* (Cth) – generally $1.8 million for a corporation and $360,000.

This discrepancy results in a corporation or person engaging in contravening conduct in relation to financial services receiving a penalty that is 80% higher than conduct in relation to other goods or services under the ACL.

For this reason, the Committee supports reforms that would link the maximum financial penalty for contraventions of the ACL to penalty units, which would also removing the need to legislate change to the penalty to take account of inflation.

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[117] See for example *ASIC v The Cash Store Pty Ltd (in liquidation) (No 2)* [2015] FCA 93, in which the maximum penalty was imposed.

[118] See for example reports that Coles aid its suppliers more than $12 million to suppliers, in addition to the $10 million penalty imposed by the Court: https://www.accc.gov.au/media-release/coles-refunds-over-12-million-to-suppliers-following-accc-action (30 June 2015).

Approach to assessing multiple contraventions

If the basis of concern as to the levels of penalty that are being imposed by the Court is not on the maximum applicable to each contravention but rather to the approach being taken in assessing multiple contraventions, consideration could be given to amending sections 214 and 224 of the ACL.

- Section 214 of the ACL provides that, where a person is convicted of two or more consumer offences of the same or substantially the same nature, and they occurred at or about the same time, the court is not entitled to impose fines that in aggregate exceed the maximum fine that would be applicable in respect of one offence by that person; and

- Section 224(4) provides that, although proceedings may be instituted against a person for breaches of more than one provision of the ACL, the court cannot impose more than one penalty in respect of the same conduct.

In considering any changes, however, the Committee considers that the guiding principle should be that all ACL regulators have access to the same remedies, including penalties. As discussed in section 13.6 below, state and territory ACL regulators are not currently able to avail themselves of the current maximum penalties in many cases. Remedying this position should be a priority.

Phoenix activity

A 2013 report prepared for the Fair Work Ombudsman put the annual cost of phoenix activity to the Australian economy at potentially more than $3 billion, including $1.93 billion in costs for goods and services that have been paid for but not provided, as well as unpaid suppliers.[119] The size and economy-side impact of phoenix activity led to the establishment of an inter-agency "phoenix taskforce", led by the ATO, in November 2014 to enhance information sharing arrangements and identify, design and implement cross-agency strategies to reduce and deter fraudulent phoenix activity.[120]

The Committee considers it appropriate that the ACL does not itself prohibit "phoenixing" per se. It is presently possible for individuals involved in phoenix activity to be appropriately penalised where their conduct results in contravention, for example because it constitutes bait advertising or wrongly accepting payment. Further, one of the factors that the Court takes into account in assessing penalty is whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct (see section 224(2)).

It is important however that, where phoenixing results in consumer harm, redress can be achieved. In this regard, as with all provisions of the ACL, the Committee recognises the importance of consumers having access to timely and cost-effective redress mechanisms by which they can rely on the output of regulatory investigations. See further section 14 below.

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[119] PwC, *Phoenix activity: sizing the problem and matching solutions*, June 2012

[120] See https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Inter-Agency-Phoenix-Forum/Inter-Agency-Phoenix-Forum/. This forum does not seem to involve the ACCC. Significant work has been undertaken by ASIC to publicise the risks of phoenix activity, and the ACCC should be encourage to work with ASIC to make consumers and suppliers more aware of how to protect themselves, including by means of the ASIC Business Checks app. See for example: http://asic.gov.au/about-asic/contact-us/how-to-complain/illegal-phoenix-activity/.

13.4 Is the current method for determining financial penalties appropriate? (section 3.2.4, Issues Paper)

For the reasons set out above, the Committee does not think it is the right time to revisit the basis on which penalties are calculated. The ACL regime should be given further time to operate, and ACL regulators further time to educate the community, before any change is made.

13.5 Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach? (section 3.2.5, Issues Paper)

Non-punitive orders play an important role in rectifying harm caused by a breach of the ACL, or to prevent harm or further harm from occurring.

Given this purpose, the Committee supports the suggestion that businesses be permitted to hire third parties to give effect to community service orders under section 246 to ensure that the intended benefit is received by the community in question. In some circumstances in may in fact be more appropriate for a third party to provide the services in question, so that affected persons do not have to deal with the contravener again. To the extent that any clarification of the existing provision is necessary, this should be considered further.

As to whether any additional remedy is required to facilitate the dispersal of ill-gotten funds to charities or for other public purposes, the Committee notes that:

(a) to the extent that consumer issues are resolved by consent, the ACCC has the ability under section 87B to accept a court-enforceable undertaking that could be crafted to this effect; and

(b) subject to any necessary amendments, community service orders could be used to this effect.

13.6 What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions? (section 3.2.6, Issues Paper)

A fundamental guiding principle for any reform should be that each of the ACL regulators (the ACCC, ASIC and state/territory fair trading authorities) should be able to seek the same remedies and use the same enforcement tools.

Penalties

At present, some state and territory regulators are unable to obtain the maximum penalties established under the ACL by reason of limitations as to the forum in which they can commence proceedings, as imposed by the implementing legislation. In various county, magistrates or district courts, maximum civil penalties are set at significantly lower levels and thereby restrict the penalty that judicial officers may impose.

It is not appropriate that, simply by virtue of the identity of the regulator, a contravener should be subject to a lower penalty. The Committee is of the view that each state and territory regulator ought have the power to commence proceedings for recovery of a penalty in a forum that has the jurisdiction to impose the statutory maximum.

At present, some ACL regulators are seeking to circumvent limitations of this nature by commencing proceedings in the Federal Court for an injunction pursuant to section 232 of the ACL as an “other person”. While in some cases the Federal Court has then accepted

that it is also seized of the matter under the state or territory ACL and as such can impose penalties on application by the state or territory regulator[121], this approach is not without some uncertainty. A simple remedy to this situation would be to amend section 228 of the ACL to permit an "associate regulator" (defined to include state and territory ACL regulators) to commence proceedings for the recovery of a penalty.

Other enforcement tools

The introduction of the increased consistency of tools available to consumer protection regulators, and provided the ACCC with a number of tools that had long been available to its state and territory counterparts. One enforcement tool that is inconsistently available to all ACL regulators is the ability to issue an infringement notice (and its associated consequences).

The infringement notice provisions are not contained in the ACL itself, but in Part XI of the CCA, and as such expressly only applying to the ACL as a law of the Commonwealth. This approach was taken because the existing laws of some states and territories, which already included infringement notice powers. As such, it was left to the states and territories to decide whether to extend their existing infringement notice provisions for the purposes of the ACL, apply a new regime similar to that in Part XI of the CCA for their own purposes, or not to take action.

At present, the ACL regulators in the ACT, NSW and South Australia have no power to issue an infringement notice, and ACL regulators in Western Australia and Tasmania are only able to issue infringement notices in respect of a subset of offences (excluding, notably, unconscionable conduct).

In addition, the penalties that may be stated in an infringement notice differ both:

(a) as between jurisdictions, with significantly higher penalties payable in respect of notices issued by the ACCC and the Queensland ACL regulator than in other jurisdictions;[122] and

(b) under the Commonwealth and Queensland ACLs, depending on whether an entity is a listed or unlisted corporation.

In relation to differences between jurisdictions, efforts should be made for further harmonisation both as to the powers to issue notices and the level of penalty that may be issued pursuant to those notices.

As to the differing treatment of listed and non-listed entities, the Committee's view is that such a distinction should not be maintained. In the Australian economy, there are any number of sectors in which listed and unlisted entities are of equal strength and contravening conduct will have similar impacts on consumers, suppliers or buyers as may be relevant. A decision about corporate structure should not result in a different penalty result where conduct is equally egregious.

Consistency of enforcement

The issues listed in section 3.2.6 of the Issues Paper also raise issues of consistency in the levels of enforcement and access to remedies by ACL regulators.

State and territory ACL regulators play a critical role both in promoting an environment for well-informed consumers and in enforcing the ACL by use of the numerous and varied

[121] Only the ACCC having the power to seek imposition of a penalty under the ACL as a law of the Commonwealth.

[122] A detailed analysis of the penalties payable under the different state and territory regimes can be made available to CAANZ on request.

devices in their enforcement toolkits. These regulators are conscious of local conditions and practices, embedded and involved in local and regional communities and the types of conduct prevalent in those areas and are often involved in the early identification of trends in consumer issues.

It is generally assumed that state and territory ACL regulators take on the vast majority of ACL enforcement activity, despite the higher profile that the ACCC and ASIC may have in the general community. However, at present, information on enforcement by state and territory ACL regulators is not regularised, with both different levels of detail and differing regularity of what reporting there is. The lack of consistent data makes it difficult to assess the extent to which ACL regulators are enforcing the ACL – whether at an overall level, or in a consistent manner or with consistent vigour.

Some data is made available by each ACL regulator, at differing intervals. As recommended by the Consumer Action Law Centre (**CALC**), the Committee would support initiatives that standardise the reporting by ACL regulators so as to provide transparency about the work undertaken by ACL regulators and boost public confidence that regulators are doing an adequate job.[123] The Committee would encourage ACL regulators to agree a consistent approach to reporting that enables consumers to have an overview of all enforcement activity in the relevant period, such as:

(a) the number of actions taken in respect of each enforcement power (e.g. litigation commenced, continuing and resolved (including remedies), enforceable undertakings, infringement and substantiation notices, public warnings etc);

(b) actions by industry or sector (e.g. education, financial advice, construction); and

(c) actions by type of contravening conduct (e.g. misleading conduct, bait advertising, product safety etc).

Ideally, such reporting would be on a quarterly basis or at least biannually.[124]

13.7 How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders? (3.3.3)

As previously submitted by the Committee in relation to the Harper Review,[125] the Law Council supports removal of section 5 of the CCA to the extent that it requires Ministerial consent to be given:

(a) before an action seeking orders under subsection 237(1) or 238(1) of the ACL can be commenced if it relies on extraterritorial conduct; or

(b) before such evidence can be relied upon in an action for damages under section 236 of the ACL.

This position was ultimately accepted in Recommendation 26 of the Competition Policy Review.

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[123] *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, a report by Gordon Renouf, Teena Balgi and the Consumer Action Law Centre, March 2013, page 55.

[124] See also the recommendation by the Productivity Commission that more consistent reporting would help to deliver more consistent enforcement outcomes under a multi-jurisdictional model: Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, page 48.

[125] See submissions of both the Competition and Consumer Committee and the Small and Medium Enterprise Business Law Committee of the Business Law Section dated 24 November 2014.

Recommendation 26 also proposed that section 5 of the CCA also be amended to remove the requirement that a firm that engages in contravening conduct must have a connection with Australia in the nature of residence, incorporation or business presence.

The Committee considers that it remains appropriate that section 5 section stipulate *some* connection between the conduct and Australia as a requirement when the ACL is applied to overseas conduct, but agrees that not all overseas conduct ought be subject to the ACL: only that conduct that harms Australian consumers. The Competition Policy Review recommended that all conduct relating to 'trade or commerce' as defined in the CCA should be the test adopted: that is, trade or commerce within Australia or between Australia and places outside Australia.[126] The Committee has previously expressed its view that this proposal creates too low a bar and would generate too much uncertainty,[127] but recognises the value in consistency of approach in this regard between the competition provisions and the ACL. The nature of this requirement should be discussed further upon release of the exposure draft legislation by the Treasury.

14 Access to remedies and scope for private action (section 3.3, Issues Paper)

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

The Committee agrees with the observation in the Issues Paper that education in relation to rights and obligations (for both consumers and business) is essential in improving levels of compliance. It is clear that regulators, at both the state and Commonwealth level, are devoting considerable effort to this task.

However, there obviously remains scope for disputes in consumer matters, not where parties are unaware of their rights or obligations, but where they simply do not agree on whether those rights or obligations have been triggered or what consequences should follow. Whether this is the result of a bona fide dispute or indifference by one of the parties, the issue for the aggrieved party is the same – how do they enforce the rights given to them under the ACL?

Access to remedies in this situation remains a shortcoming of the ACL and the dispute resolution mechanisms that surround it.

From a consumer standpoint, the critical barrier remains cost. The Productivity Commission has acknowledged widely held views that accessing justice through the civil legal system is beyond the financial reach of 'ordinary' Australians.[128]

Tribunals play an important role in providing redress, but these too can be attended by a degree of formality, and in consumer matters are subject to monetary limits which differ between jurisdictions and which may not permit valid complaints to be heard. For example, the limit for a consumer claim under the ACL in the relevant Tribunal is $10,000 in the ACT, $25,000 in Queensland, $40,000 in NSW, and unlimited in Victoria.[129]

Cost is also a critical consideration from the business standpoint; not only the costs of defending a complaint which is unjustified, but the cost of providing a remedy where none is warranted.

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[126] See Final Report, page 414.

[127] See LCA submission on Final Report dated 24 May 2015, page 7.

[128] Productivity Commission, *Access to Justice Arrangements* (2014), page 114.

[129] Small claims in other jurisdictions must proceed directly to the Magistrates Court.

14.2 What low cost actions could consumers and businesses more readily use to enforce their rights? Are there any overseas initiatives that could be adopted in Australia?

Any dispute resolution mechanism must balance accessibility with reliability; ensuring that consumers and small business claimants have timely access to remedies without having to incur substantial costs, while also giving businesses confidence that complaints will be judged fairly.

It is therefore important that consumers have access to dispute resolutions mechanisms that enable them to enforce their own rights. The Committee notes with interest the ombudsman schemes that exist in relation to banking, financial services and utilities such as communications. The Committee considers that there is merit in examining a broad based consumer ombudsman scheme to give consumers a low cost avenue for seeking redress. A scheme such as the UK Retail Ombudsman and Consumer Ombudsman, is worthy of consideration in Australia.

While the Committee considers it premature to comment on the detail of such a scheme, there are several principles that ought to be front of mind in assessing such an option:

(a) such a service needs to be sufficiently well resourced to be able to provide timely access to remedies;

(b) it needs to be operate with minimal formality, so as to avoid the need (or the perception of a need) to incur legal costs; and

(c) staff need to be sufficiently well trained and equipped to assist parties where necessary, and to deliver credible decisions that are consistent with the provisions of the ACL.[130]

Care should be taken before making the decisions of such a body legally binding, since this may encourage formality and expense. It is to be hoped that, if such a body is seen as producing fair and credible outcomes, parties would be more inclined to respect its decisions rather than risk a similar outcome through a more costly and protracted legal process.

14.3 What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?

It is important to recognise that the ACL regulators are chiefly law enforcement bodies, not consumer or small business advocates. While regulators should certainly be equipped to seek redress for consumers where they take enforcement action, the regulators will never be sufficiently resourced to provide effective assistance more generally in the resolution of genuine disputes, and the focus of regulators should remain on their principal purpose of law enforcement, not the compensation of victims. It is important that consumer and small business expectations of regulators do not exceed what the regulators are able to deliver in this respect. If remedies are to be made more accessible, there needs to be a focus on avenues for redress that an aggrieved party can pursue independently.

As a consequence, the Committee sees only a limited role for regulators in ensuring that consumers have access to remedies in cases of genuine dispute. To that end, the Committee:

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[130] See section 9.4 of the Productivity Commission's 2008 report, *Review of Australia's Consumer Policy Framework* for an assessment of the key features of effective consumer ADR regimes.

(a) notes that the ACCC already has the ability to bring representative proceedings in respect of a range of ACL contraventions, including unfair terms, unconscionable conduct, consumer guarantees, and defective goods actions.[131] We note however that the remedies available differ in some respects and individual consent is required for some kinds of actions and not others, and so there may be some room to revisit consistency of approach; and

(b) considers that, consistent with the recommendation made by the Harper Review,[132] section 137H of the ACL, which is intended to facilitate private actions by enabling findings of fact in civil penalty proceedings to be prima facie evidence in private actions, could be amended to extend to admissions made in agreed statements of fact as well as findings of fact made by a Court as a result of contested proceedings. Such an amendment could enable regulators by their enforcement action to facilitate subsequent private actions, including class actions, to obtain compensation.

There may also be additional steps that a regulator could take, in preparing a matter for hearing (e.g. consideration of section 191 of the *Evidence Act* 1995 (Cth)) that could facilitate subsequent private hearings.

If there is a perception that these provisions are not being used sufficiently, there may be merit in having the ACCC include, in its Annual Report, a section in which it reports on:

(a) whether it sought compensation for consumers;

(b) if not why not and, if so, what orders were made; and

(c) cases in which the court admitted into evidence findings from proceedings brought by the ACCC, and the outcome of those cases.

15 Emerging consumer policy issues (section 4, Issues Paper)

15.1 General observations

The third of the three Terms of Reference for the current review addresses "emerging issues" in the ACL, as follows:

> *"The review will assess the flexibility of the ACL to respond to new and emerging issues to ensure that it remains relevant into the future as the overarching consumer policy framework in Australia."*

The most important of the emerging issues facing the ACL is the rise of the digital economy and the increasing delivery of goods and services via software-based digital platforms.

While the digital revolution continues to deliver substantial benefits to consumers, it is also having a profound impact on historic business models and the traditional supply chain of various industries, which we colloquially refer to today as 'disruption'.

(a) The glowing glass screen of a 21st century internet-enabled mobile supercomputer (the so-called 'smartphone') enables us each to access the library of all human knowledge. Software-based digital platforms (the so-called 'apps") harness this power to allow us to order any imaginable good or service, literally at our fingertips, from anywhere on the planet.

[131] See sections 149, 237(i)(b), 239(i) and 277.

[132] Recommendation 41.

(b) The ability of suppliers to capture ever higher levels of consumer information (i.e., so-called 'big data') is enabling consumers to be targeted for products and services with increasing levels of precision, resulting in a revolution in marketing processes and techniques. In turn, this is driving a process of software-driven disintermediation in some industries, but also interposing new Internet-based intermediaries in others as distribution systems become more Internet-oriented.

(c) The divide between consumers and businesses is also blurring as evolving business models allow consumers to also participate as suppliers. The so-called "sharing economy" creates idiosyncrasies that may lead to confusion regarding the ACL's application to the different participants in these new business models.

(d) With the rise of internet-based commerce and the higher level of anonymity that it can provide for suppliers, consumers are more exposed than ever before to the risks of fraudulent and morally questionable conduct. The owners of scam websites, for example, act with blatant disregard to Australian consumer protection legislation – often operating out of jurisdictions that sit outside Australia's practical extra-territorial reach.

The central question raised by the review is whether the ACL is sufficiently flexible to respond to such issues, or whether amendments to the ACL are now required. At the highest level, this raises an important philosophical question, namely the appropriate level of granularity of consumer regulation.

Are the existing prohibitions in the ACL framed sufficiently broadly to apply to some of the more problematic forms of conduct rising in the digital economy? Or

Are specific new prohibitions required in the ACL to address certain novel issues?

The Committee prefers the first approach, namely to ensure that existing prohibitions are sufficiently broad. One of the central tenets of competition policy is to prefer a deregulatory approach and generic regulation. The risk with introducing specific new prohibitions is that this may lead to ever more invasive and inflexible 'micro-regulation' in one of the most dynamic sectors of the Australian economy, potentially introducing unintended costs and distortions, including impediments to innovation.

As a general proposition, the Committee is not supportive of introducing new regulatory provisions into the ACL to respond to unique 'emerging issues' in circumstances where such issues can be appropriately addressed under existing provisions. However, the Committee is supportive of efforts to 'modernise' regulatory provisions so that they are cast sufficiently broadly to apply to 21st century business practices.

Each of the emerging issues raised in the Issues paper are considered in turn below.[133]

15.2 Selling away from premises (section 4.1, Issues Paper))

Please refer to section 10.1 above.

15.3 Online shopping (section 4.2, Issues Paper)

Section 4.2 of the Issues Paper raises a series of questions in relation to online shopping. The general theme of the Issues Paper is to propose greater transparency to address specific practices of concern. In each case the Committee considers that the existing provisions of the ACL are already adequately capable of addressing these issues.

[133] Unsolicited goods and services are addressed \earlier in this submission.

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

Advertised "prices" for goods and services are subject to a number of ACL prohibitions:

(a) Traders cannot represent or refer to a "price" (which is only part of the total price) without also setting out, in a prominent way, the minimum total price (section 48(1)).

(b) Traders cannot make false or misleading representations about the "total price" (sections 18 and 29(1)(i)).

(c) Traders cannot seek to impose undisclosed optional fees via a consumer contract, when the price term is not transparent or was not disclosed at or before the time the contract is entered into (sections 24(2) and 26(2)).

The ACCC has taken successful drip pricing enforcement action under the existing consumer law framework, suggesting that these existing laws are working well.[134]

While introducing regulation that requires traders to disclose optional fees would promote greater transparency, this would also introduce greater compliance costs for businesses. The existing provisions sufficiently address this issue. The Committee is therefore opposed to more granular provisions at this time.

However, the ACCC could revise and more regularly update its online pricing guideline to promote greater trader awareness of the existing disclosure obligations under the ACL. The ACCC could also engage in an enhanced educative program to inform consumers about their online rights.

(b) Are there any changes that could be made to the ACL to improve pricing transparency?

The existing requirements of section 48 of the ACL are flexible and can be applied to many different situations, so are already adaptable to different technological circumstances. A more prescriptive regime would be difficult to formulate given the multiplicity of ways an online price can be displayed (e.g. on a phone, laptop, tablet, computer) and would introduced unwarranted inflexibility.

Revised online pricing guidelines by the ACCC in conjunction with enforcement action against online traders who mislead consumers about prices would better promote price transparency. An alternative prescriptive regime would increase compliance costs and unlikely deliver proportionate benefits.

(c) Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

The global trend in consumer law is towards increased transparency and ensuring consumers are fully informed before making purchasing decisions. The OECD's recent report "*Consumer Protection in E-commerce*" (2016), recommended online businesses provide information describing the goods or services offered in sufficient detail to enable consumers to make informed decisions, including product safety and health care information.

In Australia, it is already an offence to supply goods that do not comply with or "safety standards" (section 106) or "information standards" (section 136). These prohibitions apply to a local retailer selling products online (which may have been supplied by, for

[134] *ACCC v Jetstar Airways Pty Ltd* [2015] FCA 1263, and court enforceable undertakings given to the ACCC by Airbnb Ireland and Vacaciones eDreams, SL.

example, a UK retailer) and otherwise apply to online retailers engaging in trade in Australia. Accordingly, requirements specifying "how" product safety information should be displayed are enforceable.

The existing consumer law framework is already sufficiently capable of addressing the form and content of online point of sale information. Section 104(3)(e) of the ACL enables the Minister when prescribing standards to specify the content of the standard, which includes "*the form and content of warnings, instructions or other information about such services*". Similarly, under section 134(2)(b)-(c), the Minister may make an information standard for goods or services, the contents of which may "*require the provision of specified information*" or "*provide for the manner or form in which such information is to be provided*".[135]

No amendments to the ACL are therefore required, rather any issues can be addressed by making refinements to the Ministerial standards. The Minister already has the ability to specify that products subject to a standard, which are sold online, must be displayed with all the information that would otherwise be available to a customer at the point of sale

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

Comparator websites can enhance competition by enabling consumers to easily compare similar products and services across providers better enabling informed choices. For these benefits to be realised, the Committee agrees that consumers will require confidence in the comparator sites.

The ACCC released a guide for comparator website operators in 2015.[136] This followed a 2014 ACCC review and report on comparator website operators, which identified a number of challenges, including:

(a) the intrinsic challenge of comparative advertising, eg being clear about whether the website compares all the products or services available;

(b) being accurate about the benefits asserted to arise from using the comparator website, eg that the savings advertised are accurate;

(c) whether for each product or service being compared, the comparison is like-for-like or something else; and

(d) not misleading users about the commercial relationships between the platform and firms reviewed, eg the implication is that the comparator is providing impartial and unbiased recommendations, while being silent about an existing relationship.

At the same time, the ACCC has taken enforcement action under the ACL against comparator websites:

(a) Compare The Market Pty Ltd paid a $10,200 infringement notice for advertising that it compares more health funds than any other website in Australia (August 2014).

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[135] The ACL recognises the following mandatory information standards: fibre content labelling of textile products - labels must state the various percentages of different fibres, such wool or cotton, in the textile; care labelling for clothing and textile products - labels should include appropriate instructions to help consumers care for the item ingredient labelling of cosmetics and toiletries - labels must state the ingredients to help consumers compare products, identify ingredients and avoid adverse reactions.

[136] Comparator websites: A guide for comparator website operators and suppliers (August 2015)

(b) Energy Watch Pty Ltd paid $1.95 million for misleading advertising about the nature of the service and the savings consumers would make by switching energy retailers (2012).

(c) iSelect gave an undertaking regarding representations about the range of health insurance policies it compared when recommending a policy (2007).

Lastly, the ACCC has the ability to issue substantiation notices to a comparator website operator if the ACCC believes that the operator has made false or misleading claims about the operation of the comparator website.

Accordingly, with specific guidelines in place and successful ACCC enforcement action, it is not apparent that legislative reform is required.

In respect of the specific issue of comparator transparency the existing consumer law framework which can deal with misleading statement could be enhanced through mechanisms other than legislative reform. Options for enhanced transparency that could be considered are: (a) an ACCC approved code of practice; (b) formal accreditation of comparison websites by the ACCC; or (b) self-assessment against an ACCC proscribed standard the results of which must be published on the comparator's website. There appear to be options for complementing and enhancing the existing legal framework without adding new laws.

15.4 Emerging business models and the ACL (section 4.3, Issues Paper)

Section 4.3 of the Issues Paper raises a series of questions in relation to emerging business models. The general theme of the Issues Paper is to propose more granular levels of regulation to address specific issues of concern. In each case the Committee considers that while there is some ambiguity in respect of certain activities, this is not sufficient to recommend more granular amendments to the ACL at this time.

(a) Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?

The sharing economy refers to platforms such as Uber and Lyft for ride-sharing, Airbnb for accommodation, or DriveMyCar for car rentals, which are generally peer-to-peer platforms (described by one commentator as a modern more functional version of the yellow pages.)[137]

Regulation of the sharing economy is in flux as various agencies Australian State and Federal Government bodies are currently reviewing existing laws and regulations to manage the impact of the sharing economy. For example, in January 2015, the ACT announced an Innovation Review of the ACT taxi industry to examine the laws and regulations in that industry.

Consumer law issue and the sharing economy have been considered in various reports both in Australia and overseas.[138]

The Issues Paper identifies 'the sharing economy' (ie online platforms that connect buyers and sellers, such as eBay and Airbnb) as potentially requiring additional consumer law regulation. The key issues are:

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[137] King S, Regulating Uber, Airbnb and the sharing economy, Business Spectator, (27 March 2015)

[138] See: Deloitte Access Economics, "The sharing economy and the Competition and Consumer Act Australian Competition and Consumer Commission" (2015), p. v; King, S, "The three regulatory challenges for the sharing economy", The Conversation (2015); Grattan Institute, "Policy Pitch - Regulating the peer-to-peer economy", Panel discussion Melbourne (9 February 2015), NSW Business Chamber, "The sharing economy issues, impacts, and regulatory responses in the context of the NSW visitor economy" (November 2015)(Link)

(a) whether sellers and platform operator in peer-to-peer platforms (ie, sellers that are not a corporation) engage in "*trade or commerce*" for the purposes of the ACL; and

(b) whether suppliers and buyers are aware of their respective rights and obligations when using these platforms.

Overall, the ACL protects consumers and applies to sellers and the platforms engaged in the sharing economy.

The misleading and deceptive conduct prohibitions require the relevant conduct to be *"in trade or commerce*." Section 2 of the ACL defines this as "*trade or commerce within Australia or trade or commerce between Australia and places outside Australia*". The phrase has been considered the Court in a broad range of circumstances and is treated expansively. Effectively, the relevant conduct must be conduct which has "*a trading or commercial character"*. The representation complained of, must occur in the context of some "trade or commerce".[139]

(a) The "commercial character" test is a simple, flexible and robust way to determine whether a seller on a peer-to-peer platforms is caught by the ACL. This test also has a broad body of precedent to draw on, which can be applied to sellers' activities in the sharing economy.[140]

(b) The Issues Paper notes that some sellers' may lack a *clear* 'commercial character' leading to consumers not being protected by the ACL. In a nascent industry, absent evidence that this sub-set of sellers comprise a significant proportion of peer-to-peer transactions and that consumers are suffering when transacting with these sellers, it is not sufficiently certain that reforms are required.

(c) The paper also notes that some ambiguity arises in relation to application of the ACL to sellers who: sell products that fail to comply with Australian mandatory standards; do not provide the consumer guarantees required by the ACL; or supply goods via an auction site but allow the item to be purchased immediately without conducting an auction.[141] The first two issues are dealt with in the sections specific to consumer guarantees and product safety. The third issue is easily remedied by including a definition for auction in the ACL, ie that auction excludes goods purchased using a "buy it now" function.

The ACL applies to persons engaging in trade or commerce in connection with the supply of good or services. The ACL extends to any business or professional activity (whether or not carried on for profit) and defines 'supply' to include, "sale, exchange, lease, hire or hire-purchase" and extends to "services, providing, granting or conferring" (see section 2 of the ACL). Accordingly, the ACL generally applies to peer-to-peer platform activities.

In addition, the ACCC's 2015 enforcement action against Airbnb and eDreams, where it secured a court enforceable undertaking, indicates the ACCC can enforce the platforms' compliance with the ACL.

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[139] *Norcast Sárl v Bradken Limited* (No 2) (2013) ATPR ¶42-433 at [341]–[342]

[140] For example, representations by a seller about the size of individual units in a leased block of units being sold, were held to be in 'trade or commerce': *Webster v Havyn Pty Ltd* [2004] NSWSC 227. Letting out the six flats in the building through managing agents in a businesslike way meant the representations were 'in trade or commerce' and misleading: *Hosmer Holdings Pty Limited v CAJ Investments Pty Limited* (1995) ATPR ¶41-407 By analogy, a person who constantly leases their room is conducting themselves in a businesslike way. In *Seafolly Pty Ltd v Madden* Justice Tracey in discussing whether statement on a person's Facebook page were in 'trade or commerce' noted that "*the making of statements which are intended to have an impact on trading or commercial activities, even if made by a person not engaged in the relevant industry, may bear the necessary trading or commercial character."*: *Seafolly Pty Ltd v Madden* [2012] FCA 1346. Again, by analogy, a Seller's profile on Airbnb is intended to have an impact on their trading activities (ie the rental of their home), even though they are not themselves in the holiday rental accommodation industry.

[141] Eg, section 54 provides a guarantee that goods are of acceptable quality but excludes "supply … by way of sale by auction".

One area of ambiguity in the application of the ACL is whether some platforms merely provide information supplied by others and therefore can rely on the so called "publishers exemption." In the *Google* proceedings the High Court found that in publishing a misleading link provided by the seller, Google did not engage in misleading and deceptive conduct. However, this exemption is not clear-cut and whether peer-to-peer platforms will be able to invoke this defence will depend on facts. Some platforms do no more than publish information while other platforms go further adopting the seller's information as their own. As Justice French observed:[142]

> "*When however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation.*"

The law has considered sufficiently similar issues to those raised by peer-to-peer platform advertising sellers' products to be able to respond to issues raised by the sharing economy, without the need for amendments to the ACL.

The sharing economy is its infancy and how compliance and consumer protection issues are best dealt with is an open question. The Committee considers that, absent literature or evidence demonstrating that serious consumer issues arise, it is too early to recommend legislative reform. Further, as identified by a report the ACCC commissioned (Deloitte Access Economics in its paper on the Sharing Economy), if there are issues with the application of the ACL, there are a range of other regulatory tools with different costs and outcomes which could be considered. These include:[143]

(a) light touch regulation: this relies on broad principles is flexible and covers a wide range of circumstances;

(b) self-regulation: this relies on industry enforced rules, eg the Code of Banking Practice; and

(c) quasi-regulation: this relies on prescribed codes, eg the Franchising Code;

If the concern remains that that ACL will prove unable to adequately protect consumers involved in the sharing economy, these alternatives should be considered before resorting to legislative reform.

(b) Does the ACL provide adequate clarity and certainty for consumers when engaging in the 'sharing' economy? What areas need to be addressed, and what types of personal transactions should be excluded?

The ACL applies to consumers, sellers and platforms engaged in the sharing economy and subject to certain specific refinements, such as the definition of auctions, do not require significant amendment.

However, whether sharing economy consumers, sellers and platforms have clarity about their respective rights and obligations is less certain. In this regard, the European Parliament in 2015-2016 undertook public consultation on the sharing economy and concluded that there was uncertainty over the rights and obligations of users.[144] Notwithstanding the consultation results, the European Parliament ruled out enacting

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[142] *Gardam v George Wills & Co Ltd* (1982) ALR 415

[143] Deloitte Access Economics, "The sharing economy and the Competition and Consumer Act Australian Competition and Consumer Commission" (2015), p. v

[144] First brief results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy (27 January 2016). See also European Parliament, "The Cost of Non-Europe in the Sharing Economy Economic, Social and Legal Challenges and Opportunities" (January 2016) (Link)

specific legislation to regulate the sharing economy. Instead, new guidelines on how to apply existing laws across the EU in a more homogeneous way were proposed, with a preference for clear guidelines related to existing regulations.

In August 2015 the ACCC published its "comparator website guidance". The ACCC has also published various guides regarding the application of the ACL, such as its "advertising and selling guide". Consistent with its past practice of publishing guides to address issues of concern, it would be beneficial and increase clarity and certainty for consumers, sellers and platforms, if targeted guides were published by the ACCC on the rights and obligations of those involved in the sharing economy.

In relation to the question of what areas need to be addressed, and what types of personal transactions should be excluded, the European Parliament's 2016 report on the sharing economy recommended clarifying what constitutes a business activity on a sharing economy platform and what does not. For the purposes of the ACL, specifying when an activity will have a trading or commercial character would assist to clarify:

(a) when sellers needed to ensure they complied with the ACL requirements, i.e. to ensure they did not mislead consumers about the product or service offered; and

(b) when buyer would be able to rely on their rights under the ACL, i.e. in relation to consumer guarantees.

The Committee considers that defining types of personal transactions which would be excluded from the ACL is likely too prescriptive and would introduce an unwarranted level of inflexibility. Instead, the Committee favours the continued use of a broad rule of general application, supported by the publication of interpretative guidelines by the ACCC.

15.5 Promoting competition through empowering consumers (section 4.4, Issues Paper)

Section 4.4 of the Issues Paper raises a series of questions in relation to facilitating consumer access to data. The general theme of the Issues Paper is to propose specific provisions to ensure consumer access to date. In each case the Committee considers that such issues can be more appropriately addressed in the context of privacy legislation and are beyond the appropriate scope of the ACL at this time.

(a) Do consumers want greater access to their consumption and transactional data held by businesses? What is the role of the ACL and the regulators in supporting consumers' access to data? Is there anything in the ACL that would constrain efforts to facilitate access?

The Committee agrees that empowering consumers with their consumption and transactional data has potential to improve competition and consumer outcomes. The on-going Productivity Commission review into "*Data Availability and Use*", will likely provide a clearer understanding of consumer preferences for access to personal data. The Productivity Commission's final report is due out in March 2017.

The current role of the ACL and ACL regulators is limited in supporting consumers' access to data. The ACL prohibits businesses from misleading consumers about its data policies but does not contemplate a framework under which businesses are required to provide consumers access to their transaction data.

However, the Committee emphasises that a framework for access to data already exists. A 2012 amendment to the *Privacy Act 1988* (Cth) created Australian Privacy Principles that apply to both public agencies and private businesses. Principle 12 requires an entity that holds personal information about an individual to give the individual

access to that information on request.[145] The Committee considers that the *Privacy Act 1988* (Cth) is a more appropriate policy basis to facilitate consumer access to personal data than the ACL.

A disadvantage of using the current ACL framework to regulation access to personal data is that the ACL does not have capacity to regulation organisations that do not engage in trade or commerce, such as government departments, which may also hold personal data. In addition, other policy objectives such as privacy and data protection must be considered in the context of access to data. The OECD has recognised that privacy and data protection as key challenges for strengthening consumer protecting in the Internet economy.[146] The current ACL is not equipped to appropriately take those objectives into consideration.

(b) *Does the provision of data, or the emergence of an 'infomediary' market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?*

The ACL is industry agnostic and will remain relevant and applicable as new markets emerge, therefore the emergence of the "infomediary" market is unlikely to create, or increase, any risks that the ACL fails to regulate consumer harm in the market-place.

However, the ACL would not capture a party's conduct if that party does not engage in trade or commerce. With the emergence of the sharing economy, the line between personal-to-personal and personal-to-business interactions are blurring. However, it is unclear how "infomediary" markets have to date caused consumer harm. Where those harms are identified, the existing ACL provisions should be allowed to be tested before legislative reform is considered.

In recent years, the UK and US governments have undertaken initiatives in partnership with the private sector to allow consumers access and use of their personal data held by businesses. These initiatives, (Midata in the UK, and Smart Disclosure in the US) promote consumer outcomes in "infomediary" markets. The Australian Federal Government has already published the Australian Government Public Data Policy Statement, which outlines the Government's commitment to data transparency. The Government could consider undertaking initiatives similar to those in the UK and US.

(c) *Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?*

The ACL already imposes certain disclosure obligations. For example, regulation 90 made under the *Competition and Consumer Act 2010* (Cth) requires businesses to disclose information on warranties against defects in a transparent document with specific prescribed information. The ACL also requires a business to disclose the minimum total price when advertising goods or services with recurring payments (section 48(1)). Broad prohibitions on businesses to not mislead consumers also apply (sections 18 and 29).

These disclosure requirements already create a framework for dealing with consumer information, and the ACCC is a very active regulator that enforces those laws. The ACL also has general prohibitions against traders from making false or misleading representations. Broader disclosure requirements of the kind envisaged by this review would not be suitable to be included in the ACL. Access to data is a multi-faceted issue that involves border policy considerations such as privacy and data security and is better addressed in that context.

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[145] The Productivity Commission distinguishes between "information" and "data", where information is derived from data. See Productivity Commission Issues Paper, Data Availability and Use, April 2016.

[146] OECD, *Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy*, Background Report, 2009, and *Consumer Protection in E-Commerce OECD Recommendation, 2016.*

Law Council
OF AUSTRALIA
Business Law Section

Submission of the SME Business Law Committee

Business Law Section

Law Council of Australia

Australian Consumer Law Review

23 June 2016

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Business Law Committee of the Business Law Section of the Law Council of Australia (***SME Committee***) makes this submission in response to Discussion Paper, dated December 2015, released by Treasury.

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (***SMEs***) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SME's.

Please note that the SME Committee's submission may differ from those made by other Committees of the Law Council because of our Committee members' perspectives and experiences as advisers to SMEs.

Submission

Thank you for the opportunity to comment on the Australian Consumer Law Issues Paper (Issues Paper). We have sought to respond to each of the questions listed in the Issues Paper.

Consumer policy in Australia

1. ***Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?***

The SME Committee believes that the national consumer policy framework's overarching objectives remain relevant, as follows:

> *To improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.*

The SME Committee believes each of the ACL Regulators are undertaking considerable activity to achieve the objective of improving consumer wellbeing through consumer protection. However, the Committee also believes that more work has to be done in terms of consumer empowerment. In our view, much more can be done to provide consumers, including small business consumers, with greater access to justice. We will return to this issue in more detail below.

We also agree that the national consumer policy framework's operational objectives remain relevant. However, we query how the ACL can achieve the operational objective of preventing practices that are unfair in the absence of a broad prohibition in the legislation prohibiting unfair practices.

2. ***Are there any overseas consumer policy frameworks that provide a useful guide?***

While the Committee is of the view that the ACL represents world best practice in terms of consumer protection, we believe that some further investigation of the unfair conduct legislation which has been enacted in overseas jurisdictions should be undertaken.

3. ***Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?***

The Committee notes that the Australian Competition and Consumer Commission (ACCC) has adopted an approach of announcing its annual Compliance and Enforcement Priorities. In this way, the ACCC has been able to provide consumers and businesses with greater transparency about the particular areas the ACCC will be focusing its attention on in the coming year.

The Committee believes the each of the other ACL Regulators and ASIC should consider adopting a similar practice to the ACCC and identify their Compliance and Enforcement Priorities for the coming year.

Australian Consumer Law — the legal framework

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

The Committee believes that the language of the ACL is relatively clear and simple to understand. The Committee believes that the use of the term "acceptable quality" has been a significant improvement over the concept of "merchantable quality".

Having said that, the definition of "acceptable quality" as it applies to goods and services could be clearer and more relevant to today's goods and services (considering current technology and digital climate). Consideration should also be given to providing more education to SMEs around this standard to ensure it is better understood.

One concern relates to what appears to be a drafting error in the legislation in relation to the country of origin provisions. This issue will be expanded upon later in this submission.

5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?

The structure of the ACL is not prima facie easy to navigate, particularly the duplication of the civil and criminal prohibitions. Having said that, the Committee believes that any changes to the current structure of the ACL are likely to create further confusion. Accordingly, the Committee does not support making any proposals to change the structure of the ACL.

6. Are there overseas consumer protection laws that provide a useful model?

Again, the Committee does not support changing the structure of the ACL as it believes that this would create a great degree of confusion.

7. Is the ACL's treatment of 'consumer' appropriate? Is $40,000 still an appropriate threshold for consumer purchases?

The Committee would be very concerned if any attempt was made to change the definition of consumer in the ACL to remove the $40,000 threshold. The inclusion of this particular threshold has made the ACL of great utility to small business consumers for products which do not satisfy the test of having been "ordinarily acquired for personal, domestic or household use or consumption".

The Committee agrees that there are arguments for increasing this threshold from $40,000 to a higher threshold, given that the current threshold was set in 1986. If the amount were adjusted for inflation it would be around $100,000 in today's terms. A higher threshold would provide significant benefits to small businesses which are purchasing high value specialised equipment.

8. Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

The Committee believes that the ACL's general protections are working effectively. Our experience is that the general protections are well understood by both large and SME businesses. We do not believe that these general protections impose disproportionate or unnecessary costs on business. Business customers understand that these general protections reflect a common sense approach to conducting business.

Having said this, we believe that consumer guarantees should be extended to financial services (ASIC Act) and goods and services bought at auction. Further protection of SMEs in these areas is warranted as SMEs are particularly vulnerable given the nature of the goods and services. Committee members have seen many small businesses and consumers struggle with redress in these areas.

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

The Committee has noted the various issues listed in section 2.2 and responds as follows:

- it is appropriate to maintain the current approach to silence or omissions, that is where it is not misleading unless there is a 'reasonable expectation' that a consumer would be informed of the omitted fact. Until recently it was relatively uncommon to see misrepresentation by silence cases. However, we think that the ACCC's recent cases in relation to drip pricing in various industries, particularly in the airline industry, have demonstrated that the existing test of determining the consumer's 'reasonable expectation' is appropriate.

- the idea of extending the ACL to introduce provisions to prohibit specific forms of 'unfair' commercial practice should be explored further.

- there are strong arguments for applying pecuniary penalties of section 18 of the ACL. Indeed, there does not appear to be any reason as a matter of principle why pecuniary penalties should not apply to section 18.

- we do not see a need to provide legislative guidance to the courts to facilitate a more consistent interpretation of 'unconscionable'. Prior to the Full Federal Court decision in Lux, such guidance may have been appropriate. However, the Lux case has provided valuable guidance on the how the unconscionable conduct provisions are to interpreted and applied.

- there is no strong basis in principle for excluding publicly listed companies from the unconscionable conduct provisions. Publicly listed companies can also be the victims of unconscionable conduct, particularly in their dealings with much larger firms.

- the current approach to determining if a term is 'unfair' and if a contract is a 'standard form contract' is sufficiently clear. We also believe that making changes to these issues at this time is likely to create a great deal of confusion. However, please see the additional comments at the end of this submission about the proposed UCT extension laws for small business to be introduced in November 2016.

- we do not believe that the unfair contract terms protections should be extended to a contract that is unfair as a whole. In practice, the unfairness of a contract can only be determined by reference to the specific terms in the contract. Further, we believe that some level of business

and commercial acumen should be expected in SMEs to negotiate the overall fairness of the contract.

- we believe that standard form contracts covered by the *Insurance Contracts Act 1984* (Cth) should be subject to similar protections against unfair contract terms as apply under the ACL and ASIC Act.

- given that the unfair contract term legislation in relation to consumer contracts has been in force for a number of years now, it is now appropriate to introduce monetary penalties for businesses that breach these provisions. We believe that businesses have had sufficient time to understand what an unfair contract term is and to make appropriate changes to their standard form contracts

- we believe that regulators should be more active in taking representative actions on behalf of consumers in relation to issues under the ACL, including in relation to systemic unfair contract terms

- it may be appropriate to consider some further regulation around the conduct of real estate agents, particularly in the misleading and deceptive conduct and false and misleading representation provisions. This is another area where SMEs and consumers have great difficulty in obtaining any remedy through private actions.

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

The Committee believes that most of the ACL's specific provisions are working effectively. Generally, these provisions adequately balance the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses.

However, we believe some provisions could operate more effectively:

<u>Country of Origin laws</u>

There appear to have been a number of legislative oversights when the country of origin amendments was first enacted in 1998 and then re-enacted in 2011.

The first oversight is that the defences in Part 5-3 of the ACL only apply to sections 18, 29(1)(a) and (k) and sections 151(1)(a) and (i), but not to sections 33 and 155 of the ACL. Section 33 of the ACL provides:

> *A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.*

As is apparent, section 33 can quite easily be used by either the ACCC or a private litigant to take action against a business which is making a country of origin claim by arguing that the country of origin representation is a representation about the nature, manufacturing process and characteristics of a good. If this approach were taken, the defences contained in Part 5-3 would not be available to

the business because section 33 has not been included as one of the sections to which the defences apply.

If a business was subject to ACCC enforcement action or private action in relation to its country of origin claims under section 33 of the ACL, it would have to defend itself by using the various common law tests which applied prior to the enactment of the country of origin laws in 1998. As is well known, prior to 1998 these laws provided business with no legal certainty.

Furthermore, the defences contained in Part 5-3 do not extend to section 155 of the ACL which is the mirror criminal provision to section 33.

The failure to extend the defences contained in Part 5-3 to an action under section 33 of the ACL is a significant legislative oversight. This oversight threatens to undermine the entire purpose of Part 5-3, which is to give business some certainty about the circumstances in which they can make a country of origin claim about their goods.

The second oversight relates to the drafting of section 5 of the CCA which has the effect of excluding the defences in Part 5-3 of the ACL entirely in relation to exported products.

Section 5 of the CCA reads as follows:

> *(1) Each of the following provisions:*
> *(a) Part IV;*
> *(b) Part XI;*
> *(c) the Australian Consumer Law* ***(other than Part 5-3);***
> *(f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b) or (c));*
>
> *extends to the engaging in conduct outside Australia by:*
>
> *(g) bodies corporate incorporated or carrying on business within Australia; or*
> *(h) Australian citizens; or*
> *(i) persons ordinarily resident within Australia.*

The effect of section 5 of the CCA is to extend the operation of the CCA and ACL to conduct engaged in outside Australia. Particular overseas conduct will be subject to the CCA and ACL if it is engaged in by bodies corporate incorporated or carrying on business within Australia, Australian citizens, or persons ordinarily resident within Australia.

The anomaly in the operation of section 5 occurs in subsection 5(1)(c) which specifically excludes Part 5-3 of the ACL.

The drafting of section 5 of the CCA has had the practical effect of excluding the defences contained in Part 5-3 of the ACL to country of origin claims made in places outside Australia by bodies corporate incorporated or carrying on business within Australia, or Australian citizens, or persons ordinarily resident within Australia. In other words, Australian exporters will be unable to take advantage of the statutory defences contained in Part 5-3 in relation to country of origin claims which they make in relation to export goods.

A review of the relevant Explanatory Memorandum shows that the drafting error in section 5 initially occurred in 1998 with the enactment of the *Trade Practices Amendment (Country of Origin*

Representations) Bill 1998. Item 2 of this Bill introduced the relevant amendment to section 5 of the TPA.

The relevant Explanatory Memorandum explained the purpose of the amendment to section 5 of the TPA in the following way:

> *Item 2 ensures that this extra-territorial element of the Act is not applied to the new Division, as to do so may subject Australian manufacturers to both the Trade Practices Act 1974 requirements and the labelling requirements of the country in which they are selling their goods. By explicitly excluding any extra-territorial reach, the new provision is limited to goods sold or made available for retail sale in Australia (at 17).*

Therefore, Parliament's intention in 1998 was to exempt Australian manufacturers from having to comply with Australian country of origin laws in relation to their exports. Parliament intended that such Australian exporters would be subject only to the country of origin laws which applied in the country where they were selling their Australian made goods.

Obviously, the amendment to section 5(1)(c) of the TPA / CCA has not had the legal effect of making Australian exporters exempt from compliance with Australian country of origin labelling laws. Rather, Australian exporters now have no statutory defences to an action against them alleging that their country of origin claims constitute a breach of sections 18, 29(1)(a), 29(1)(k), 151(1)(a) or 151(1)(k) of the ACL.

The simplest solution to this problem would seem to be to amend section 5(1)(c) of the CCA to omit the words "(other than Part 5-3)".

Regulation 90

In the Committee's view, the provision of the ACL which has created the most consternation amongst business, both large and small, are the laws governing warranties against defects. These laws are contained in Regulation 90 of the *Competition and Consumer Regulations* 2010 (CCR).

The Regulation, which commenced on 1 January 2012, introduced prescriptive requirements and obligations in relation to the provision of voluntary warranties against defects to consumers.

The main concern with this provision was that it created an obligation on businesses to prepare a separate warranty document for use in the Australia market place. This was because Regulation 90 created a requirement to include the following mandatory wording in all warranty against defect documents:

> *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.*

In other words, businesses were now required to produce two separate warranty documents – one for use in Australia and one for use in the rest of the world.

Another consequence of this mandatory wording is that some businesses have been prevented or impeded from making opportunistic parallel importation of products because they faced the problem of their warranty documents not complying with Australian laws.

The final problem with the mandatory wording is that it has generated a great deal of confusion amongst consumers because the wording is incorrect. As is apparent, the above wording correctly states that the consumer is entitled to a replacement or refund for a major failure.

The mandatory wording then states that the consumer is 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. However, this is not correct. The consumer does not have any entitlement to choose a replacement or a repair; rather it is the supplier of the goods which has the right to elect the remedy for a minor failure. The Committee understands that this particular wording has led to a great deal of consumer confusion. Indeed, it has often resulted in consumers contacting resellers and demanding a replacement product in circumstances where the supplier had the legal right to elect to repair the product.

This problem could be rectified with the following amendment:

> *We will either repair or replace your goods if the goods fail to be of acceptable quality and the failure does not amount to a major failure.*

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

An issue which businesses have considerable difficulty with is determining the reasonable life of a product for the purposes of the consumer law guarantees. Often the business person's view of a reasonable useful life of a product is much shorter than the consumer's view. Accordingly, there may be some benefit in the ACL being amended to establish some benchmarks for the reasonable life of a number of common consumer products. Such an approach would remove a great deal of the confusion which currently exists in relation to this issue as well as reducing the number of disputes between businesses and consumers about this issue.

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

'Lemon laws' set out when manufacturers or suppliers must repair, replace or, if these remedies fail, refund the purchase price for products that repeatedly fail to meet standards of quality and performance. In order to achieve the ACL's objective of improving consumer wellbeing through consumer protection the Committee considers that the specific introduction of 'lemon laws' for new products would assist in improving consumer and small business confidence that their rights are protected in a more practical manner than having to take legal action themselves.

13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?

The Committee is of the view that products safety laws and the enforcement of those laws are working very effectively at the moment. It is apparent that over the last few years, the ACCC has dedicated a great deal of resource and attention to the product safety area. For example, it has recognised that the traditional ways of conducting product recalls, through the publication of newspaper announcements, was quite ineffective in the digital age.

14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be made more effective, and how? Should protocols or other arrangements be established between ACL and specialist regulators?

As stated above, the Committee is of the view that product safety laws and enforcement are working very effectively at the moment. Accordingly, we do not support any changes in this area. However, we agree that there needs to be better coordination between ACL regulators in relation to some product safety issues. In particular, members of the Committee are aware of significant difference of opinion between ACL Regulators in relation to electrical safety standards, including the way in which a recall should be undertaken.

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?

The main problem with the introduction of a prohibition on certain commercial practices or business models is how to define such practices and models. The ACL already prohibits a particular type of business model, namely pyramid selling schemes, but it is difficult to identify other business models which should be subject to a blanket prohibition.

16. Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?

It is apparent that the EU's Unfair Commercial Practices Directive 2005 (EU Directive) includes many provisions which are already contained in the ACL. Accordingly, rather than adopting the EU Directive in its entirety, the Committee considers it would be valuable to identify those provisions which are not already provided for under the ACL and assess the utility of adding these provisions to the ACL.

The Committee should add that does not have a good understanding of whether the EU's Unfair Commercial Practices Directive 2005 has been effective in reducing unfair commercial practices. In this regard it may be appropriate for CAANZ to contact its counterparts in Europe to ascertain the effectiveness of the EU Directive.

The Committee also notes section 5 of the Federal Trade Commission Act. Committee members have greater familiarity with this particular provision than with the EU Directive. In the Committee's view, section 5 has not been highly effective in prohibiting unfair practices in the US. Indeed, the provision has been extensively criticised because of its "unpredictable breadth". The provision has also been used primarily to deal with anti-trust or competition law matters rather than consumer protection law matters.

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

The Committee believes that the division between financial services and other goods and services to be unnecessary. The division creates a great deal of uncertainty, particularly where the ACCC seeks a delegation from ASIC to pursue a matter involving a financial service. Accordingly, we would support jurisdiction for financial services being returned the ACCC rather than being under the jurisdiction of ASIC.

Administering and enforcing the Australian Consumer Law

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

We believe that the ACL promotes a proportionate, risk based approach to enforcement. In particular, the ACCC's practice of explaining its Compliance and Enforcement priorities for the coming year has made it much easier for businesses to understand the major risk areas. As stated above, the Committee believes it would be helpful if all other ACL Regulators adopted a similar approach to the ACCC in terms of releasing an annual statement of priorities.

19. Are the remedy and offence provisions effective?

The Committee believes that the criminal sanction provisions in the ACL are underutilised. We believe that the ACCC should seek to use these provisions more often, particularly when taking action again repeat offenders. One approach which may encourage the ACCC to pursue a greater number of criminal prosecutions may be to increase the financial penalties which apply under the criminal offence provisions, whilst leaving the civil penalty provisions at current levels.

20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches?

While the maximum financial penalties available under the ACL are adequate to deter future breaches by SMEs, it is arguable that maximum penalties of $1.1 million are inadequate to deter larger businesses. It is important for ACL penalties to achieve both general and specific deterrence. However, the current penalties are unlikely to achieve specific deterrence in relation to large multinational corporations.

21. Is the current method for determining financial penalties appropriate?

The Committee supports the idea of amending the maximum financial penalties which apply for breaches of the ACL depending on whether the relevant business is a publicly listed corporation. We believe that maximum penalties of $10 million should be available for breaches of the ACL by publicly listed corporations.

We also believe that a three times the benefit rule, as applies under the *Competition and Consumer Act* 2010 (CCA), should be introduced to the ACL in relation to publicly listed corporations. In other words, the court should have the option of imposing a financial penalty of up to $10 million per contravention or three times the benefit from the offending conduct in relation to publicly listed corporations.

22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?

Members of the Committee consider that the ACCC could more fully utilise the scope of the non-punitive orders made available under the ACL. For example, it seems that in many cases the ACCC looks to have compromised on the scope of the Compliance Program implemented by a company following a contravention of the ACL.

Furthermore, if a company with an existing Compliance Program breaches the ACL it seems sensible for the ACCC to require that they retain an independent person to review their Compliance Program to ensure that it is effective. However, often settlements between the ACCC and repeat offender businesses do not mandate an independent review of their Compliance Program, but rather take on an obligation to 'update' their Compliance Program.

The Committee considers it may also benefit the ACCC to look to better understand the cost of the corrective orders which it seeks as part of a settlement. Often the cost of corrective orders,

particularly television, radio and newspaper corrective communication can amount to many thousands of dollars. Even the replacement of billboard and other outdoor advertising can cost significant amounts of money.

As to whether a business given a community service order should be allowed to hire a third party to give effect to that order, the Committee believes that leave of the Court should be required in these circumstances and there should be relevant factors for the Court to consider in making such an order (that is,. harm likely including costs and resources in the business giving effect to the order itself).

23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?

From the Committee's experience, the main factor which tends to undermine the consistency of ACL penalties is the levying of very large fines against companies in liquidation. As there is no party present in such types of proceedings to contradict or argue against the imposition of a very large fine, Courts have shown a willingness to simply accept ACCC submissions to impose very large fines which are consistently higher than the fines imposed in similar cases where the offending company is not in liquidation. One Committee member has described these fines as "phoenix fines" as there is no expectation that any of this money will ever be paid into Consolidated Revenue.

24. Do you have views on any of the issues raised in section 3.2?

An issue raised in section 3.2 is the appropriateness of the current civil penalties and remedies in the context of 'phoenix' companies. The Committee is of the view that it is very difficult to take effective enforcement action against 'phoenix' companies and their directors. One option which may be considered is whether to introduce imprisonment as a punishment for directors who are involved in 'phoenix' companies. While the ACCC is unable to imprison persons for contraventions of the ACL, this option is available to some ACL Regulators.

For example, section 64 of the NSW *Fair Trading Act* 1987 states:

1. A person who is convicted of a second or subsequent offence against Division 1, 2 or 5 of Part 4-1 of the ACL is, in addition to, or as an alternative to, any monetary penalty, that may be imposed in relation to the offence, liable to imprisonment for a term not exceeding 3 years.

2. However, the maximum term of imprisonment that the Local court may impose for any such second or subsequent offence is 2 years.

In other words, a Court may imprison an individual for a second or subsequent conviction for a contravention of Divisions 1, 2 or 5 of the Part 4-1 of the ACL.

It may be appropriate to include a similar type of provision into the ACL in relation to illegal phoenix activity to give ACL Regulators the ability to imprison serial offenders.

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

Currently, and without 'lemon laws', the most effective way for consumers and small businesses to enforce their rights is to commence an action under a state based tribunal. Historically, these tribunals, such as the NSW Civil and Administrative Tribunal, have provided effective and low cost avenues for enforcing rights. However, over the last few years many of these state based tribunal have become much more formal in how matters need to be presented and in their processes and

procedures. The Committee firmly believes that an effort must be made to ensure that these Tribunals remain an informal and low cost option, and do not become quasi-courts.

One issue of concern may be the recruitment policies adopted by governments when appointing persons as Tribunal members. The Committee notes that over the last few years, there appears to be a trend to appointing former judicial officers as Tribunal members, which may have the effect of making the Tribunal's more "court like" in their approach to resolving disputes. Indeed, the Committee considers it would be beneficial for thought may be given to appointing persons with small business experience as Tribunal members.

In the Committee's view, there is a real lack of basic knowledge amongst consumers and SMEs about what remedies are available under the ACL and how to access them. Education campaigns and perhaps guidance notes could be considered to improve this.

Access to remedies through private legal action presents huge barriers for SMEs in terms of time away from their business, costs and difficulties in proving these types of claims in litigation (that is, the substance of the misleading and deceptive representations; causation; loss – proof, quantification, experts required). These difficulties further drive up costs in private action. Further, there is limited ability to obtain remedies in a timely manner.

The Committee believes that there are inadequacies in terms of using the Financial Ombudsman Service ("FOS") as a dispute resolution mechanism for consumers / SMEs in the area of financial services (ASIC Act). Committee members have seen very inconsistent and heavily favoured financial services provider decisions from FOS over the years. The FOS is not seen by consumers and SMEs as an independent body, particularly as its members are the financial services providers. Also, it takes around 2 years for a dispute to move through the FOS system and during this time, the parties are not able to file Court proceedings (unless statute of limitations period is about to expire).

26. What low-cost actions could consumers and businesses more readily use to enforce their rights?

Many consumers and small businesses are not aware that they are able to pursue their legal rights under the ACL in state based tribunals. While there are numerous organisations referring consumers to these tribunals, such as the ACL Regulators and the state and federal small business commissioners and ombudsman, more education needs to be undertaken particularly amongst SMEs. Unfortunately, there is a poor culture of compliance with the ACL amongst many small businesses. In the Committee's view, the only solution to this problem is increased education.

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

The main overseas initiatives which have been successfully introduced to encourage greater private enforcement are treble damages and changes to cost rules. In the US, treble damages are available in antitrust matters as well as in some trademark dispute matters. The availability of treble damages has clearly resulted in a greater level of private enforcement.

Also changes to the costs rules to displace the usual rule that costs follow the successful party to the US rule of each party bearing their own costs in ACL matters, would provide a significant impetus to private actions in Australia.

The Committee considers that, having said that, these changes would have such a major impact in the Australian legal landscape, that they could only be introduced after extensive consultation had been undertaken to examine the advantages and disadvantages of such changes.

28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?

The Committee can report that most of their clients' interactions with the ACL Regulators have been positive. Most clients value the guidance provided by the ACCC about its Compliance and Enforcement Priorities for the coming year. This provides SMEs with a great deal more certainty about where they should be focusing their attention in terms of ensuring that they comply with the ACL. As stated above, it would be helpful for the other ACL Regulators to adopt a similar approach to the ACCC in this regard.

Committee members have, however, had some experiences where ACL Regulators have taken quite radically different approaches to the same matter, particularly in the product safety area. In one case, the ACCC and an ACL Regulator requested completely different steps to be taken in relation to the recall of a particular product.

The Committee notes that ACL Regulators are now able to seek compensation for victims of breaches of the ACL. Indeed, section 213 of the ACL states that a Court, when weighing up whether to grant an order for compensation for victims or other orders, such as the payment of a pecuniary penalty, is required to give preference to the payment of compensation. The Committee believes that ACL Regulators should also be guided by section 213 and seek to preference compensation for victims I their enforcement actions, over orders for pecuniary penalties.

However, it seems to the Committee that ACL Regulators often focus almost exclusively on orders for pecuniary penalties at the expense of orders for compensation for the victims of breaches of the ACL.

29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

The Committee is of the view that consideration could be given to including in the Free Trade Agreements that Australia enters into with overseas jurisdictions provisions to apply the ACL to cross border manufacturers and suppliers when the transaction is with an Australian consumer or SME.

30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?

In the Committee's view, whilst the law in relation to unsolicited sales has proved to be quite complex, it has also proven to be very effective in regulating this particular area. Given that the law is operating effectively, the Committee would not support a change to these laws.

31. Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving 'pressure selling'?

The Committee supports the current law which is limited to "unsolicited" sales. It does not seem appropriate to apply cooling off rights to solicited sales.

32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?

The Committee does not believe that the unsolicited selling provisions need to be amended to extend their operation to "pop-up" stores. We believe that introducing laws to cover situations where a salesperson from a "pop-up" store approaches a consumer in a shopping centre would introduce an unnecessary level of complexity to the law.

33. How could these issues be addressed?

We do not believe that the traditional sales activities of salespersons approaching consumers in commercial areas, such as shopping centres, should be curtailed simply because the salesperson is operating from a "pop-up" store.

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

The Committee believes that it is appropriate for businesses to only disclose the minimum price and not optional fees and charges. In many businesses, there can be a wide range of optional fees and charges. Accordingly, any obligation to disclose all of these optional fees and charges is likely to significantly increase compliance costs for small business. In the Committee's experience, it is when a consumer or SME is offered or seeks an additional service or product covered by optional fees and charges, that those optional fees and charges will then be disclosed.

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

The Committee is of the view that the laws contained in the ACL in relation to price transparency are operating effectively. This is amply demonstrated by the ACCC's recent success in a number of drip pricing cases.

36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

The Committee is not aware of any obligation on either traditional resellers or online sellers to provide product safety information about their products or services at point of sale. Obviously many resellers see the provision of such information at point of sale as a valuable marketing tool, but it is not a mandatory requirement. The Committee sees no reason for making such an obligation mandatory for online sellers, unless it is also mandatory for traditional bricks and mortar resellers.

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

The Committee believes that the ACCC's successful actions against a number of comparator websites demonstrates that the ACL is working effectively in terms of regulating this growing area of commerce. The ACCC has also run a number of successful cases against businesses which had made false or misleading online reviews. The ACCC has also provided useful guides for business on both comparator websites and online reviews.

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

Again the Committee notes that the ACCC has taken successful actions against a number of players in the "sharing economy", namely Airbnb and eDreams. We believe that it would be appropriate for further work to be done by the ACL Regulators in this area to identify emerging issues which may

cause potential consumer harm in the future. Having said that, the Committee does not believe that there is any basis for exploring amendments to the ACL to specifically regulate the sharing economy.

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

See the Committee's earlier response.

40. Do consumers want greater access to their consumption and transactional data held by businesses?

The Committee does not believe it is qualified to comment on this issue.

41. What is the role of the ACL and the regulators in supporting consumers' access to data? Is there anything in the ACL that would constrain efforts to facilitate access?

We do not believe that access to data issues should be an area of focus for ACL Regulators. These issues made by more appropriately dealt with by other agencies, such as the Office of the Australian Information Commissioner.

42. Does the provision of data, or the emergence of an 'infomediary' market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?

See the Committee's earlier response.

43. Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?

The Committee believes that the disclosure requirements in the ACL are adequate. The only area which may require further thought is whether new disclosure requirements be introduced in relation to whether a product or service complies with a mandatory product information or product safety standard. The Committee is of the view there may be some merit in considering such a change.

Additional comments

The Committee would also like to make some additional comments in relation to the unfair contract terms legislation which is to be introduced in November 2016.

The Committee notes that the proposed legislation will operate where there is a significant imbalance in the party's rights and obligations:

> *The term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier*

In the Committee's view, this element of the new provision is potentially quite onerous for small businesses as in many cases there may not be a "significant" imbalance. The Committee does not believe there is a need for this imbalance test, as a contract term is either fair or unfair in the circumstances.

Further the “legitimate interests” defence may be a difficult test to meet by a plaintiff in a business context.

We are also concerned at the use of the word “substantial” in the following

> *A remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class).*

It may be difficult for a small business to prove a substantial likelihood of detriment.

In the Committee’s view, it is not at all clear what “non-negotiated” means in the proposed legislation. For example, what level of negotiation would take the contract out of the concept of standard form contract. Also what would be the situation if there was negotiation in relation to some parts of a contract but not the allegedly unfair contract term.

The Committee is concerned that if the legislation were interpreted to mean that any level of negotiation takes the contract outside the UCT laws, then it will be quite easy for businesses to avoid the new legislation.

The Committee is also concerned at the exclusion of the upfront price, as this will see some businesses increasing the upfront price to include a number of options costs such as insurance. Upfront price exclusion should not apply to renewal of contracts in commercial situations.

Further discussion
The SME Committee would be happy to discuss any aspect of this submission.

Please contact Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.