An Australian Consumer Law

Fair markets — Confident consumers

17 February 2009

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FOREWORD

Consumers are key to ensuring the ongoing robustness of Australia's economy. Empowered consumers drive competition and encourage innovation and choice.

In May 2008 the Ministerial Council on Consumer Affairs welcomed the publication of the Productivity Commission's *Review of Australia's Consumer Policy Framework*, which provided a much needed analysis of Australia's existing consumer policy framework and considered recommendations for reform.

COAG's 2 October 2008 agreement to introduce a national consumer law implements recommendations by the Commission and follows on from the detailed policy proposals that we agreed at the Ministerial Council on Consumer Affairs in August 2008 to enable these recommendations to be practically implemented.

An Australian Consumer Law will significantly enhance consumer protection, reduce regulatory complexity for businesses and encourage the development of a seamless national economy. Greater enforcement cooperation will mean that consumers will benefit from these laws through consistent national approaches to consumer problems.

The reforms have three key elements:

- the development of a consumer law to be applied both nationally and in each State and Territory, which is based on the existing consumer protection provisions of the *Trade Practices Act 1974*, and which includes a new national provision regulating unfair contract terms, new enforcement powers and, where agreed, changes based on best practice in state and territory laws;

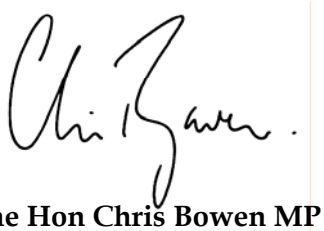
- the implementation of a new national product safety regulatory and enforcement framework, as part of the national consumer law; and

- the development of enhanced enforcement cooperation and information sharing mechanisms between national and state and territory regulatory agencies.

To assist the Ministerial Council in implementing these reforms, I am pleased to release this information and consultation paper as an important step in the reform process to develop a new national consumer law for Australia.

This paper, which has been developed by the Standing Committee of Officials of Consumer Affairs (made up of officials from all Australian governments), sets out further detail on COAG's agreed reforms, legislative proposals and suggested reforms.

I welcome the views of all those interested in, and concerned with, consumer policy in Australia.



The Hon Chris Bowen MP
Assistant Treasurer, Minister for Competition Policy and Consumer Affairs

CONTENTS

Foreword ..... **iii**
Request for comments ..... **vii**
Glossary of terms ..... **viii**
Summary **1**

PART I: CONTEXT **3**
Chapter 1 Background to the reforms **5**
The Productivity Commission's review of Australia's consumer policy framework 5
COAG's reform process 6
Chapter 2 An Australian consumer law **7**
Why does Australia need a new national consumer law? 7
An application law scheme 9
Implementing the Australian Consumer Law 11
Chapter 3 The current national consumer policy framework **13**
Generic consumer protections in Australia 13
The current consumer law enforcement framework 15
Relationship with the product safety law reforms 16
Chapter 4 The basis of the Australian Consumer Law **17**
The *Trade Practices Act 1974* as a base for the Australian Consumer Law 17
Chapter 5 Implications for national, state and territory consumer laws **23**
The TPA as a national market regulation law 23
Implications for national financial services laws 24
Implications for existing state and territory consumer laws 24

PART II: COAG'S AGREED CONSUMER LAW REFORMS **27**
Chapter 6 Unfair contract terms **29**
Unfair contract terms regulation 29
COAG's agreed model for regulating unfair contract terms 30
Banning certain types of unfair contract terms 35
Chapter 7 Agreed reforms to consumer law enforcement powers **43**
The proposed changes to consumer law enforcement powers 43
Civil pecuniary penalties and disqualification orders 43
New enforcement powers 46
New options for consumer redress 52
Chapter 8 A national regulatory regime for product safety **53**
The agreed reforms 53
Implementation of the product safety reforms 54

PART III: CONSUMER LAW REFORMS BASED ON BEST PRACTICE IN EXISTING STATE AND TERRITORY LAWS **57**
Chapter 9 Suggested reforms based on best practice in state and territory laws **59**
COAG reform processes to harmonise certain state and territory consumer laws 59
Suggested reforms 60
The basis for consideration of suggested reforms 60
Chapter 10 Suggested reforms to definitions **63**
Definitions in the Australian Consumer Law 63
The definition of 'consumer' 63
Other definitions 66

Chapter 11 Suggested reforms to provisions dealing with unfair practices 67
Suggested reforms designed to achieve national consistency 67
Suggestions for updating current TPA provisions to take account of market developments or new regulatory approaches 83

PART IV: IMPLEMENTATION AND REVIEW 95
Chapter 12 Implementing the national consumer law 97
The establishment and modification of the Australian Consumer Law 97
Enforcement arrangements 97
Chapter 13 Review of enforcement powers 99

ATTACHMENTS
Attachment A: Joint Communiqué — Ministerial Council on Consumer Affairs 101
Attachment B: Generic provisions in state and territory laws similar to TPA provisions 109
Attachment C: Definitions of 'consumer' 121
Attachment D: Mandatory disclosure provisions in the Victorian FTA 127

REQUEST FOR COMMENTS

The Standing Committee of Officials of Consumer Affairs has developed this paper: *An Australian Consumer Law: Fair Markets – Confident consumers* (February 2009), to provide information about the Council of Australian Governments' agreed consumer reforms and to seek public and stakeholder comments on further suggestions for reform.

In order to better understand the financial or other implications of the proposals, please provide information in relation to the likely compliance costs, impacts on competition and any other costs or benefits.

This information will be considered in the preparation of a Regulation Impact Statement and any other necessary regulatory documents.

Responses are requested by 5pm on Tuesday, 17 March 2009 and can be submitted to:

australianconsumerlaw@treasury.gov.au

or

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Confidentiality

It will be assumed that submissions are not confidential and may be made publicly available on the Treasury website (www.treasury.gov.au) and the Ministerial Council on Consumer Affairs' website (www.consumer.gov.au). If you would like your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked confidential to be made available will be determined in accordance with that Act.

GLOSSARY OF TERMS

ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
BRCWG	Business Regulation and Competition Working Group of the Council of Australian Governments
COAG	Council of Australian Governments
FTA	A State or Territory Fair Trading Act or similar legislation, namely: *Fair Trading Act 1987* (NSW), *Fair Trading Act 1999* (VIC), *Fair Trading Act 1989* (QLD), *Fair Trading Act 1987* and *Consumer Transactions Act 1972* (SA), *Fair Trading Act 1987* and *Consumer Affairs Act 1971* (WA), *Fair Trading Act 1990* (TAS), *Fair Trading Act 1987* and *Fair Trading (Consumer Affairs) Act 1973* (ACT) and *Consumer Affairs and Fair Trading Act 1990* (NT).
MCCA	Ministerial Council on Consumer Affairs, made up of ministers responsible for consumer affairs from the Australian, New Zealand and state and territory governments.
PC	Productivity Commission
SCOCA	Standing Committee of Officials of Consumer Affairs, composed of the senior officers of consumer policy and enforcement bodies in Australia and New Zealand.
TPA	*Trade Practices Act 1974* (Cth)

SUMMARY

In 2007-2008 the Productivity Commission reviewed Australia's consumer policy framework. The PC concluded that 'while Australia's consumer policy framework has considerable strengths, parts of it require an overhaul.'[1] On 2 October 2008, all Australian governments agreed to a new consumer policy framework, comprising a single national consumer law and streamlined enforcement arrangements.

The new national consumer policy framework will involve the following key elements:

- A new national consumer law, which will be called the ***Australian Consumer Law***, and which is implemented as part of an application law scheme with the Australian Government as the lead legislator and other jurisdictions to apply the national consumer law as part of their own laws.

- The national consumer law will be based on the existing consumer protection provisions of the TPA.

- As recommended by the PC, the national consumer law will also include:

  – a provision which regulates unfair terms in consumer contracts;

  – new enforcement powers which will enable more proportionate responses to consumer law breaches and new redress options for consumers; and

  – a new national legislative and regulatory regime for product safety.

- Where it is generally agreed that the current provisions of the TPA are inadequate, the Australian Consumer Law should include provisions which modify and augment the existing generic consumer protection provisions of the TPA, which are based on best practice in state and territory consumer laws.

- There will be an Inter-Governmental Agreement between the Australian Government and the governments of the States and Territories concerning the process for amending the national consumer law and the administrative architecture underpinning it.

- Consumer regulators will develop improved enforcement cooperation and information sharing arrangements.

The purpose of this information and consultation paper is to:

- explain how the national consumer law will be developed;

- explain the nature and scope of COAG's agreed reforms to create the national consumer law and, in some limited circumstances, seek views on specific aspects of those reforms; and

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1 PC 2008 II.2.

- seek views and explore options for augmentations and modifications to existing generic consumer protections which are based on best practice in existing state and territory laws.

Going forward, SCOCA will seek views on the draft provisions of the Australian Consumer Law, as they are made ready. To facilitate this, the paper is divided into four parts, covering:

- the context of the reforms (Part I);
- COAG's agreed consumer law reforms, including the establishment of a national consumer law (based on the TPA), unfair contract terms regulation, a national product safety regulatory regime and new enforcement powers and redress (Part II);
- suggested reforms based on best practice in existing state and territory laws (Part III); and
- implementation and review (Part IV).

Part I
Context

CHAPTER 1
BACKGROUND TO THE REFORMS

The Productivity Commission's review of Australia's consumer policy framework

On 11 December 2006 the Productivity Commission (PC) commenced an inquiry into Australia's consumer policy framework. The PC was asked to report on ways to improve the coordination of consumer policy development, the harmonisation of consumer laws and their administration across jurisdictions in Australia, and the removal of regulatory duplication and inconsistency. The PC presented its final report to the Government on 30 April 2008, and it was tabled in the Australian Parliament and published on 8 May 2008.

During the course of its work, the PC received 262 written submissions from national, state and territory government bodies, businesses, consumer representatives and the public, and conducted two rounds of public hearings in Sydney, Melbourne and Canberra. It also published a draft report in December 2007.[2] Submissions were received and public hearings conducted following the publication of the draft report, which the PC took into account when producing its final report and recommendations.[3]

In relation to a national consumer law, the PC specifically recommended that:[4]

- Australian governments should implement a new national consumer law, based on the consumer provisions in the *Trade Practices Act 1974* (TPA). The new law could be augmented in areas where the TPA does not provide adequate protection in particular generic issues and incorporate certain provisions from the state and territory Fair Trading Acts (FTAs), where it is generally agreed that the TPA is not adequate.

- The new law should apply to all consumer transactions, including financial services, with the Australian Securities and Investments Commission (ASIC) retaining its role as the primary regulator for financial services.

- Unnecessary or divergent sector-specific laws should be identified with a view to repealing or harmonising them across jurisdictions where possible.

- A provision should be incorporated into the new law that addresses unfair contract terms. The PC's preferred approach was that the provision would relate only to standard form contracts, exclude up-front prices from consideration and require all circumstances of the contract to be considered. A term would be unfair when it causes significant imbalance in the parties' rights and obligations and would, if exercised, results in material detriment to consumers.

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2 Productivity Commission 2007 *Review of Australia's Consumer policy framework* Draft Report (PC 2007).

3 Productivity Commission 2008 *Review of Australia's Consumer policy framework* Final Report (PC 2008), http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport.

4 PC 2008 Recs. 4.1, 4.2, 4.3, 4.4, 4.5, 5.1, 7.1, 9.5 and 10.1. The remainder of the PC's recommendations are set out in its Final Report.

- Responsibility for enforcing the consumer product safety provisions of the new law in all jurisdictions should be transferred to the Australian Government and undertaken by the Australian Competition and Consumer Commission (ACCC).[5]
- The remainder of the new law should be jointly enforced by the ACCC and state and territory consumer regulators. Individual States and Territories should have the option of referring their enforcement powers for all of the new law to the Australian Government with enforcement undertaken by the ACCC.
- New enforcement powers and remedies, including civil pecuniary penalties, disqualification orders, substantiation notices, infringement notices, public warning ('naming and shaming') powers and redress for non-parties.
- The new enforcement arrangements should be independently reviewed, with explicit consideration of the costs and benefits given to the case of moving towards a single national regulator model. A single national consumer regulator should be considered if the review finds evidence of differing enforcement practices or divergence of jurisdictional regulation.

COAG's reform process

On 26 March 2008 the Council of Australian Governments (COAG) agreed that the Business Regulation and Competition Working Group (BRCWG), in consultation with the Ministerial Council on Consumer Affairs (MCCA), would develop an enhanced consumer policy framework, including legislative and regulatory structures, drawing on the final report of the PC.

On 23 May 2008 MCCA agreed to develop detailed policy proposals for implementing the PC's recommendations. MCCA then developed a series of detailed reform proposals designed to respond to the PC's report, which it agreed on 15 August 2008, along with an indicative implementation plan. These are set out in MCCA's Communiqué (see **Attachment A**). MCCA then submitted these proposals to the BRCWG, prior to the BRCWG recommending these to COAG for agreement on 2 October 2008.

On 2 October 2008 COAG agreed:

> *'to a new consumer policy framework comprising a single national consumer law based on the Trade Practices Act 1974, drawing on the recommendations of the Productivity Commission and best practice in State and Territory consumer laws, including a provision regulating unfair contract terms.*
>
> *'The new national consumer law will deliver on COAG's commitment to a seamless national economy by providing a uniform and higher level of protection for Australian consumers and addressing weaknesses in existing laws. The new policy framework will improve consumer law enforcement powers, reduce compliance costs for business and increase access to information regarding dispute resolution and consumer issues.*
>
> *'The Productivity Commission has estimated the economic benefits of the framework at between $1.5 billion and $4.5 billion a year.'*

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5 For details of the COAG-agreed model for product safety, see Chapter 8 of this Paper.

CHAPTER 2
AN AUSTRALIAN CONSUMER LAW

Why does Australia need a new national consumer law?

Australia's consumer laws are adequate, but could be better

In its review of Australia's consumer policy framework, the PC concluded that '[w]hile Australia's consumer policy framework has considerable strengths, parts of it require an overhaul.'[6] The PC went on to say that '[i]n a number of respects, Australia's current consumer policy framework … is sound. In particular, without excessive prescription, the generic regulatory regime operating through the TPA and FTAs provides a broad platform for consumer protection for most products and services.'[7]

The PC's conclusion forms the basis of the approach adopted by COAG in agreeing to reform Australia's consumer laws. When formulating the detailed proposals for reform MCCA stated that '[i]n proposing these reforms, MCCA recognises that while Australia's current consumer policy framework has strengths, it is in need of significant improvements to overcome existing inconsistencies, gaps and duplication in Australia's consumer legislation and its enforcement.'[8]

With this in mind, COAG's agreed reforms and the suggested reforms set out in this paper are intended to build on and improve the current generic consumer protections set out in the TPA, which are also reflected, in large part, in state and territory FTAs. In this way, the reforms mark an evolution of Australia's consumer laws to a form which guarantees national consistency in key areas.

Developing national product and service markets need a national approach to regulation

Australia's consumer product and service markets are becoming increasingly national in character. In 2007 around 48 per cent of goods and services, measured by turnover, were supplied by firms operating nationally. Since 1998, the number of retail businesses operating nationally has increased from 47 per cent to 53 per cent and, since 2003, there has been a 70 per cent increase in the number of firms that operate in every State and Territory.[9]

Innovations in supply chain management, enabled by the greater use of information technology and better transport infrastructure, have led to an expansion in nationally-focused businesses that supply a range of goods and services to consumers across Australia. Internet technology has also seen the increase of consumers buying goods or services across jurisdictions. The NSW Office of Fair Trading estimates the percentage of

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6 PC 2008 I.2.
7 PC 2008 I.7. See Attachment B of this Paper for a table comparing similar provisions in existing national and jurisdictional consumer laws.
8 MCCA Communiqué (15 August 2008), see Attachment A of Paper.
9 PC 2008 II.51-52.

adult Australians ordering or purchasing online is above 50 per cent.[10] The increasing pace of change in many of these markets, fuelled by technological change, means that detriment for consumers from unresponsive policy making will also escalate.[11]

The trend towards national consumer markets means that consumers will, despite purchasing the same products from the same businesses, receive different levels of protection. Furthermore, the burden imposed by divergent and complex regulatory requirements will grow for businesses, and by acting now to reduce complexity and divergence, these reforms will make a significant contribution to the development of a seamless national economy.

Australian consumers deserve consistent protection, wherever they live

While there is a high degree of commonality in Australia's various generic consumer protections at the national and state levels, there remains variation in consumer protection legislation, policy approaches, enforcement intensity and practices and redress options between all Australian jurisdictions. COAG's agreed reforms are designed to overcome many of these problems.

Australian consumers have differing protections and redress options depending on where they live or where they make purchases. These differences provide inconsistent signals to consumers about their rights and responsibilities and also mean that they can be treated inconsistently in relation to the same types of consumer protection issues.

The development of e-commerce and resulting increase in cross-border transactions raises concerns in relation to application of divergent national, state and territory consumer protections to issues that have a cross-border or national dimension.

Business compliance costs are increased by the need for suppliers to comply with multiple regulatory regimes, and to operate in even slightly divergent regulatory regimes. Even where there are no actual differences in regulation, suppliers can still incur legal costs to ascertain their obligations across jurisdictions.[12] These costs are passed onto consumers in the form of higher prices.

More effective responses to consumer issues through better policy making processes

Consumers face rapidly changing markets, increased reliance on technology and a faster pace of innovation, all of which pose a significant challenge in ensuring regulation can keep pace. Any potential for complexity and duplication in policy making serves to impede the ability of regulation to keep pace with change. COAG's agreement to develop national generic consumer laws provides Australian governments with an opportunity to streamline policy making procedures, and overcome issues that may have served to delay effective responses to issues in the past.

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10 Burney MP, The Hon L (2007) *Internet shopping complaints clicking up* Government Media Statement, 5 September 2007.
11 PC 2008 II.57.
12 PC 2008 I.17.

An application law scheme

The Australian Consumer Law will be enacted both nationally and in each of the States and Territories by means of an application law scheme.

The application law model

Under an application law scheme, one jurisdiction acts as the lead legislator, passing the law that applies in its own jurisdiction, along with a schedule version for application in other jurisdictions. The other jurisdictions then apply that schedule version in their own laws. Amendments to the national law would then require agreement by jurisdictions according to an Inter-Governmental Agreement. In this way, consistency is maintained, without the need for a formal referral of powers under section 51(xxxvii) of the Australian Constitution.[13]

The use of an application law model would not preclude an individual jurisdiction referring all or part of its consumer law and/or enforcement powers to the Commonwealth at a future date.

Given the dual national/jurisdictional dimension of consumer regulation in Australia, the law will be legislated by the Australian Parliament, and each State and Territory will apply the nationally agreed law.

The PC recommended that a national consumer law should be based on the existing consumer protection provisions of the TPA, with amendments to reflect the PC's other recommendations. Where there is general agreement that an issue is not adequately dealt with by the TPA, provisions should be included based on best practice in state and territory laws.[14] Minor variations in legislation at the jurisdictional level may be required to ensure that the new law extends to non-corporate entities and reflects differing judicial arrangements among the States and Territories. There will also be a need for protocols or mechanisms to specify the basis for reviewing or making changes to the law.

An application law model would also allow New Zealand, which is a member of MCCA and party to the *Closer Economic Relations Trade Agreement* (and as such committed to greater commonality of regulation with Australia), to adopt in a fairly straightforward way aspects of the application law, should it decide to do so.[15]

The form of the legislation

The Australian Consumer Law will consist of common provisions which set out agreed generic consumer protections that will apply to all Australian consumers and across all Australian jurisdictions. The Law will also include supporting provisions that create:

- common definitions of key terms;
- common enforcement powers for use by all consumer regulators; and

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13 PC 2008 II.62, 77.
14 PC 2008 Rec. 4.1.
15 The New Zealand minister responsible for consumer affairs is a member of MCCA and the New Zealand Ministry of Consumer Affairs has been engaged in the policy development process for the reforms to Australia's consumer policy framework.

- common consumer remedies in respect of breaches of the Law.

At the national level, the Australian Consumer Law will be a schedule to Australia's main market regulation law, the TPA, which reflects the mutually reinforcing nature of consumer and competition regulation. As an application law, it will be reflected in the provisions of the TPA, and also applied by each State and Territory as part of their own laws.

Australia's governments will implement the Australian Consumer Law in the following way:

- the Australian Parliament will:
  - in accordance with the agreed text of the Australian Consumer Law, amend the consumer protection and related provisions of the TPA relating to consumer protection, and also include new provisions providing an administrative underpinning for the Australian Consumer Law;
  - enact a version of the Australian Consumer Law as a schedule to the TPA, which includes modifications to take account of the way in which state laws apply to individuals and non-incorporated entities and which takes account of specific administrative and enforcement issues;
  - enact changes to the investor protection provisions of the ASIC Act and, to the extent necessary, the *Corporations Act 2001* which reflect the Australian Consumer Law, with any necessary modifications; and
- each State and Territory Parliament will then pass an application Act which will apply the schedule version of the Australian Consumer Law in their jurisdictions and amend or repeal any state and territory legislation affected by or superseded by the new Law.

Amendments to the Australian Consumer Law will be made according to the process set out in the Inter-Governmental Agreement, which will cover proposals for changes to the Law, consultation on those proposals and decision making. Any change to the Australian Consumer Law will require the agreement of the Australian Government, plus the governments of four other jurisdictions, three of which must be States. Once a change has been agreed, then the Australian Government will introduce legislation into the Australian Parliament to amend the schedule version of the Australian Consumer Law accordingly, as well as making corresponding changes to the TPA.[16]

The objectives of the Australian Consumer Law

The PC, in its report, recommended that Australian governments adopt a new policy objective for consumer issues, which was modified in MCCA's detailed proposals to COAG. The objective, as agreed by MCCA on 15 August 2008, is as follows:

> *'To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.'*

16 This approach is similar to the model used in relation to the *Competition Code* in the TPA, under which the national law is contained in a schedule to the TPA and applied in each State and Territory.

This overarching objective is supported by six operational objectives for consumer policy:

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

In agreeing to this policy objective, MCCA did not propose that it be a statutory objective for the Australian Consumer Law but for broader policy development. However, including an overarching statutory objective in the Australian Consumer Law would assist in guiding the reader's understanding of the legislation and its intent and also aid judicial interpretation.

SCOCA suggests that the Australian Consumer Law could have the following objective:

> *'The object of this Law is to enhance the welfare of Australians through the promotion of competition and fair trading, and the empowerment and protection of consumers.'*

This proposed objective reflects the existing objective of the TPA with some modification, reflecting the concern of MCCA for both the empowerment and protection of consumers.

Implementing the Australian Consumer Law

Implementation timeline

The timeline for the implementation of these reforms is as follows:

- by 30 June 2009: finalisation of the Inter-Governmental Agreement (covering the Australian Consumer Law and including product safety);
- by 30 June 2010: finalisation and agreement of the text of the legislation for the Australian Consumer Law, including the product safety reforms; and
- by 31 December 2010:
  - the Australian Parliament is to have passed legislation for the Australian Consumer Law (including product safety) and amend the TPA;
  - the Parliaments of the States and Territories are to have passed application Acts to apply the Australian Consumer Law (including product safety) in their own jurisdictions; and

– commencement of the Australian Consumer Law in all Australian jurisdictions.

The implementation process

The Australian Consumer Law will be implemented under the auspices of MCCA, which in turn reports to COAG. SCOCA has day-to-day responsibility for the delivery of the reforms, and has established a group of senior officials, which meets regularly, to oversee the reforms.

SCOCA has divided the policy development and implementation work into five streams:

- the development of the Inter-Governmental Agreement;
- COAG's agreed reforms (the Australian Consumer Law, including unfair contract terms, civil penalties, enforcement powers and consumer remedies);
- COAG's agreed national product safety regulatory regime;
- the development of reforms, where it is generally agreed that the TPA is not adequate, based on best practice in state and territory laws; and
- operational issues, including enforcement, education and compliance.

The purpose of this paper is to provide information about the reforms and to seek input on specific issues arising from them. Further formal and informal consultation will be undertaken in relation to the draft provisions of the Australian Consumer Law as they are made ready.

CHAPTER 3
THE CURRENT NATIONAL CONSUMER POLICY FRAMEWORK

Generic consumer protections in Australia

Generic consumer protections are those laws which are designed to protect a consumer in relation to potentially harmful or exploitative conduct by a supplier which could occur in a transaction taking place in any sector of the economy. Such provisions generally either prohibit specific forms of conduct or provide a consumer with a right to take legal action in respect to harm that he or she suffers as a result of specific conduct.

Generic consumer protections for Australian consumers are currently found in 12 separate laws: the TPA and the ASIC Act, which apply nationally, and in 10 state and territory FTAs.[17] In addition, each State and Territory has industry-specific regulation in different laws. While many of the generic protections contained in these laws are broadly consistent, for a long time there have been a large number of small differences between them. In recent years, more significant differences have started to emerge which show an increasing trend towards augmenting the common generic protections (which are shared with the TPA) with additional protections, such as:

- the various additional categories of false and misleading representations prohibited in state and territory FTAs over the years;
- the ACT's provisions on the regulation of credit card limit increases;
- Victoria's provisions dealing with unfair contract terms; and
- NSW, Victoria and SA's similar but differing rules concerning telemarketing.

The once gradual but, in some respects, now substantial shift away from largely consistent generic consumer laws means that the current framework has become more costly for consumers and businesses, while providing few, if any, counterbalancing benefits.[18]

There are many differences between Australian consumer laws which have significant implications for the consistency of those laws. The major differences identified by the PC Review are set out below:

- **The definition of 'consumer':** There are significant differences between jurisdictions in how a 'consumer' is defined for the purposes of consumer protection under the TPA, ASIC Act and FTAs. The two main qualities used to define categories of consumers between jurisdictions are whether the goods or services are acquired for personal and

17 Some jurisdictions, namely WA, SA and the NT, have more than one relevant Act.
18 PC 2008 II.57.

domestic or business use, and the value of the goods or services purchased (most jurisdictions use $40,000 as the upper threshold).[19]

- **Objects of the TPA and FTAs:** There are significant differences between the objects provisions of the various Australian consumer laws. Objects provisions can be significant as an aid to judicial interpretation and therefore differences can influence judicial outcomes for consumers seeking to utilise a particular consumer provision. They can also reflect and inform very different approaches to issues of policy development and enforcement.[20]

- **Implied conditions and warranties:** Inconsistencies exist as to the application of implied warranties and conditions nationally. Only the TPA and the FTAs of NSW and NT extend implied conditions and warranties to consumers who have not had a contractual relationship with the supplier.[21]

- **Industry-specific regulation:** The PC recognised significant differences in industry-specific consumer regulation in the energy, food, credit, tobacco, electrical products and therapeutic goods industries. The PC also expressed concern that some industry-specific legislation is overly prescriptive and unnecessary, given the existence of generic consumer protections. Furthermore, changes to industry-specific regulation often occur, which creates ongoing complexity and costs to businesses as they attempt to maintain compliance across jurisdictions.[22]

  COAG has agreed a process for reviewing industry-specific regulation across all Australian jurisdictions with a view to removing differences where possible. This area of work falls outside the scope of the development of the Australian Consumer Law.

- **Occupational licensing:** The PC found that, out of approximately 100 consumer-related occupations licensed by the States and Territories, more than 30 are licensed in only one or two jurisdictions.[23] This raises questions as to the necessity of such licensing schemes and their ongoing economic impacts.

  COAG has also agreed on 3 July 2008 to develop a national trade licensing system that will remove inconsistencies across state borders and allow for a much more mobile workforce. This area of work falls outside of the scope of the development of the Australian Consumer Law.

- **Product standards:** Product safety standard provisions, modelled on those in the TPA, are included in the NSW, NT, WA, Queensland and Victorian FTAs. Victoria, Queensland and SA also have legislation that allows for mandatory standards to be applied to services.[24]

- **Enforcement and remedies:** Enforcement of consumer laws is split between the state and territory fair trading offices and the national regulators, the ACCC and ASIC. State and

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19 Corones & Christensen 2007 39-61.
20 Corones & Christensen 2007 25-26.
21 Corones & Christensen 2007 84-94.
22 PC 2008 II.65, 81-87.
23 PC 2008 II.94.
24 Corones & Christensen 2007 80.

territory regulators generally focus on issues that affect consumers within their jurisdiction, and the national regulators generally have a wider focus on issues with an inter-state or national dimension (which can include conduct that takes place within a particular jurisdiction).

There is also a high degree of cooperation between consumer regulators in relation to enforcement issues affecting their respective areas of responsibility. With the development of an increasingly national economy, and the increase of inter-state activities by many businesses, issues of enforcement responsibility are becoming more complex and require greater coordination and cooperation between regulators.

The diversity of consumer regulators is also reflected in the wide range of regulatory approaches that they adopt in enforcing consumer laws, regulating business activity and in informing and educating the public. These reflect a range of practical considerations, including the limitations on national regulators' powers to regulate the conduct of unincorporated businesses, the costs and the needs of the industry being regulated, but also the regulatory objectives and culture of the organisation concerned, informed by the legislation it is responsible for enforcing.[25] Variable outcomes for consumers across Australia occur due to the divergent requirements for businesses, differences in enforcement intensity and jurisdictional priorities.[26]

The current consumer law enforcement framework

Consumer law enforcement in Australia is shared between national, state and territory regulators. This reflects the division of responsibilities within Australia's federal system.

At the national level, the ACCC enforces the generic consumer protections of the TPA in all Australian jurisdictions. The ACCC can enforce breaches of the law against corporations and, in certain circumstances, individuals,[27] reflecting the limits imposed under the Australian Constitution.

ASIC monitors and promotes market integrity and consumer protection in relation to the Australian financial system, and enforces the investor protection provisions of the ASIC Act. The ASIC Act applies to all businesses in Australia, and is not limited to corporations, as a consequence of a referral of power by the States and Territories in 2001. The TPA's consumer protection provisions exclude the provision of financial services from their scope. The investor protection provisions of the ASIC Act are expressed in terms broadly consistent with the generic consumer protection provisions of the TPA.

25 PC 2008 II.227.
26 PC 2008 II.19.
27 The ACCC may take action against individuals on the basis of ancillary liability and under the extended liability provisions of section 6 of the TPA.

There are eight lead regulators that administer and enforce the respective consumer protection laws of the States and Territories:

- New South Wales — Office of Fair Trading;
- Victoria — Consumer Affairs Victoria;
- Queensland — Office of Fair Trading;
- Western Australia — Department of Commerce;
- South Australia — Office of Consumer and Business Affairs;
- Tasmania — Office of Consumer Affairs and Fair Trading;
- Australian Capital Territory — Consumer Affairs and Fair Trading (within the Office of Regulatory Services); and
- Northern Territory — Office of Consumer and Business Affairs.

These regulators may take action for a breach of consumer laws by any entity or person (subject to the scope of Commonwealth power). These regulators also have extensive responsibilities for regulating business conduct in their respective jurisdictions, both generally and in relation to specific business sectors.

The division of jurisdictional and functional responsibilities between the different regulators is not always straightforward and has been a long-term source of confusion for consumers and industry alike.[28] While this is so, there exist formal and informal mechanisms for regulators to cooperate in relation to enforcement issues, which are designed to overcome these challenges.

Relationship with the product safety law reforms

In July 2008, COAG agreed to reforms to Australia's product safety laws to provide for a single national law and a streamlined enforcement system. In doing so, it committed to the implementation of these reforms by the end of 2010. The Australian Consumer Law will integrate the national consumer product safety law into its provisions. A description of these reforms is set out in Chapter 8 of this Paper.

28 Corones & Christensen 2007 21-22,130-132.

CHAPTER 4
THE BASIS OF THE AUSTRALIAN CONSUMER LAW

The *Trade Practices Act 1974* as a base for the Australian Consumer Law

COAG agreed, on the basis of the PC's recommendation, that the Australian Consumer Law should be based on the existing generic consumer protection provisions of the TPA. The PC based its recommendation on the TPA's role as the foundation of current generic provisions in state and territory laws and the most practical stepping-off point for the new law (a description of the main aspects of the TPA is set out in the box below).[29]

Most of the key generic consumer protection provisions are found in Part V of the TPA, although related provisions are found in many other parts of the TPA (see **Table 4.1**). The generic provisions of the TPA are also reflected in existing state and territory consumer laws. A table, which compares the existing generic consumer protection provisions of the TPA with similar provisions in state and territory laws, is set out in **Attachment B**.

COAG agreed to three specific proposals to augment the current provisions of the TPA: the inclusion of a provision regulating unfair contract terms, the inclusion of a range of additional penalties, enforcement powers and consumer remedies, and the implementation of a new national product safety regulatory system. These are discussed in more detail in Part II of this Paper.

COAG also agreed that, based on the PC's recommendation, the generic consumer protection provisions of the TPA should be either augmented or modified where it is generally agreed that they are not adequate to deal with particular issues, and that these changes should be based on best practice in existing state and territory consumer protection laws.[30] In this respect, the process for developing the Australian Consumer Law will involve a review of the effectiveness of the existing consumer protection and related provisions of the TPA and, where generally agreed by the Australian Government, the States and the Territories, changes being made.

In this regard, SCOCA seeks the views of stakeholders on the current effectiveness of the provisions of the TPA that concern consumer protection issues or are otherwise relevant to them, and how they may be improved. State and territory governments, through SCOCA, have made a series of suggested augmentations or modifications to the TPA's provisions, which are discussed in Part III of this Paper.

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29 PC Rec. 4.1 and PC 2008 II.62.
30 PC 2008 II.62.

The consumer provisions of the *Trade Practices Act 1974*

Definition of 'consumer'

Section 4B of the TPA defines a 'consumer' for certain purposes of the Act (principally Division 2 of Part V, concerning implied conditions and warranties). A 'consumer' is defined as a buyer (who is either an individual or a corporation) of any kind of goods or services with a price of no more than $40,000 or, if the price of the goods and services is more than $40,000, they were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle.

The definition also requires that the goods should not, irrespective of their price, be acquired for the purpose of resupply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of manufacture or of repairing or treating other goods or fixtures on land. This means that, in respect of certain consumer protection provisions, goods used by businesses that fall outside of these conditions may be covered by the TPA. Similarly in those instances, any services that are acquired by a business for $40,000 or less are also covered by the TPA. Furthermore, any goods or services ordinarily of a kind acquired for personal, domestic or household use, even if acquired for a price of more than $40,000, may be covered by the TPA as long as they are not acquired for the purposes of resupply.

The definition of 'consumer' is used for specific purposes in the generic consumer protection provisions of the TPA to apply only to specific categories of person or, in some cases, business. The definition does not apply to some provisions, most notably sections 52 and 53 of the TPA, which have a general application and are not constrained by the definition of 'consumer'.

Unconscionable conduct

Section 51AA of the TPA prohibits unconscionable conduct and extends the remedies available in the Act to unconscionable conduct within the meaning of the unwritten law, from time to time, of the States and Territories. Section 51AB of the TPA prohibits unconscionable conduct in relation to the supply of goods and services to consumers. The section sets out a range of considerations that the court may take into account in determining whether there has been unconscionable conduct. Section 51AC of the TPA extends the prohibition on unconscionable conduct to business transactions, and sets out in some detail the issues that the court may take into account.

The consumer protection provisions

Misleading and deceptive conduct

Most broadly, section 52 of the TPA prohibits any conduct in trade or commerce which misleads and deceives or is likely to do so. This provision does not seek to impose liability but establishes a norm of conduct that businesses should not mislead consumers. In doing so, it does not require a court to consider whether a business intended to mislead or deceive, only that its conduct had the effect of doing so.

Section 52 creates a right of action in respect of a breach of this provision, the remedies for which are injunctions and the other civil remedies provided for in the TPA (see the discussion of civil remedies below). No other penalties available under the TPA are available.

Specific prohibitions on unfair practices

Section 52 of the TPA is complemented by a range of other provisions which prohibit more specific forms of unfair practices, including false and misleading representations (section 53), unconscionable conduct (Part IVA), referral selling (section 57) and pyramid selling (Part V, Division 1AAA). These provisions are generic in their approach, and do not relate to specific industry sectors. These provisions are subject to civil remedies or criminal sanctions (by virtue of Part VC of the TPA) and, in some circumstances, both. Only civil remedies apply in respect of breaches of section 52 of the TPA.

Section 53 of the TPA prohibits specific forms of false or misleading representations in connection with the supply or possible supply of goods or services. Section 53 applies to all types of business activities relating to the sale of goods and services and is not limited to any particular set of circumstances (such as an activity that may be specific to a particular industry). Types of proscribed false and misleading representations include those made in relation to the standard, quality, value or grade of goods or services, representations that goods are new, or those made about the price of goods or services.

Part V also includes a range of provisions which prohibit other, more specific, forms of unfair practices. For example, Part V includes prohibitions on:

- bait advertising (section 56 of the TPA), where corporations know or ought to be aware they are unlikely to be able to supply goods;
- referral selling (section 57 of the TPA), where a purchase is induced by the promise of receiving a commission for referring other customers; and
- pyramid selling (Part V, Division 1AAA), which prohibits selling and commission scheme, with no underlying economic rationale.

These are types of conduct that the Parliament has determined as being, in all cases, detrimental to consumers.

Other forms of consumer protection in the TPA

The TPA also includes some more detailed legislative regimes regulating specific forms of consumer protection. These include the regulation of product safety (Part V, Division 1A), implied warranties (Part V, Division 2) and importers' and manufacturers' liability (Part V, Division 2A).

These detailed regulatory regimes provide for very specific forms of consumer protection and also create, in some cases, additional administrative processes to facilitate them. For example, in relation to product safety, regulation is intended to remove or substantially reduce the potential for serious injury or death, and, as such, can provide for what may be considered in other regulatory contexts to be much more interventionist approaches to compliance and enforcement.

Existing enforcement powers

Investigative tools

The ACCC has a range of investigative tools available to assist in investigating possible breaches of the consumer protection provisions of the TPA under Part XII of the TPA. The ACCC can require persons or businesses to provide it with information and, in certain circumstances, can share that information with other enforcement agencies. For example, section 155 of the TPA allows the ACCC, if it believes a person is capable of furnishing information relating to a possible breach of the TPA, to require that person to provide documents or give written or oral evidence.

Specific provisions in Part XID of the TPA also allow the ACCC to enter and search premises and to seize documents, either with the consent of the affected party or a warrant issued by a magistrate.

Administrative remedies

In taking action for a breach of the consumer protection provisions of the TPA, the ACCC can, in place of taking formal legal proceedings, also accept court-enforceable undertakings under section 87B from a party that it considers has breached the TPA. Such an undertaking involves the person or business making admissions about their conduct, giving undertakings that they will not engage in the alleged conduct in the future, undertaking to do specific things (including, for example, corrective advertising, providing redress to harmed parties, instituting compliance programs or related measures or community service activities). A breach of the undertaking is then enforceable in court and, if breached, the ACCC can seek orders enforcing the terms of the undertaking and such other remedies as the court sees fit.

The ACCC issues guidance about the circumstances in which it will use section 87B undertakings.[31]

Civil remedies

A breach of the consumer protection provisions in the TPA creates a civil liability and exposes the wrongdoer to action by the ACCC or private claimants seeking civil remedies. Section 80 of the TPA provides for the court to make both interlocutory and permanent injunctions, which can either restrain a person or business in breach from engaging or continuing to engage in certain conduct or require specific actions to be undertaken. A breach of an injunction is a contempt of court, and subject to the penalties that apply to that offence.

Private litigants may also seek monetary damages under section 82 of the TPA in respect of the loss or damage derived from a breach of the Act. The ACCC may also seek damages, but only on behalf of parties named in the ACCC's action.

31 http://www.accc.gov.au/content/index.phtml/itemId/344494#h2_122.

The ACCC may also seek non-punitive orders against a business found to have breached the Act under section 86C of the TPA, including community service orders, probation orders or corrective advertising orders. These remedies are not available to private litigants.

The ACCC often also seeks orders under section 83 of the TPA that findings of fact be made in relation to the issues that are the subject of those enforcement proceedings. These findings may then be used as the basis of subsequent private proceedings initiated by individuals or businesses suffering harm as a result of the conduct.

Section 87 of the TPA allows the court to make a range of other orders, as appropriate.

Criminal sanctions

Part VC of the TPA creates a regime of specific criminal offences relating to the unfair practices prohibited in Part V, Division 1 (except for section 52) and pyramid selling, which is prohibited by Division 1AAA. Each provision in Part VC sets out the elements of the offence and the sanctions available for these. At present, sanctions are limited to fines, and the maximum monetary penalties for a breach are up to 10,000 penalty units ($1.1 million) for a corporation or 2,000 penalty units ($220,000) for an individual.

In practice, criminal prosecutions are reserved for the most egregious breaches of the TPA or examples of repeated flouting of the law. A prosecution of an offence under Part VC of the TPA may only be initiated by the Commonwealth Director of Public Prosecutions (DPP), having received a brief from, and in consultation with, the ACCC.

Table 4.1: Consumer-relevant parts of the TPA

Provision	TPA Reference
Object of this Act	Section 2
Consumers	Section 4B
Extended application of Parts IV, IVA, IVB, V, VB and VC	Section 5
Unconscionable conduct	Part IVA
Consumer protection	Part V
Unfair practices	Part V, Division 1
Misleading and deceptive conduct	Section 52
False or misleading representations	Section 53
False representations and other misleading or offensive conduct in relation to land	Section 53A
Misleading conduct in relation to employment	Section 53B
Cash price to be stated in certain circumstances	Section 53C
Offering gifts and prizes	Section 54
Misleading conduct to which Industrial Property Convention applies	Section 55
Certain misleading conduct in relation to services	Section 55A
Bait advertising	Section 56
Referral selling	Section 57
Accepting payment without intending or being able to supply as intended	Section 58
Misleading representations about certain business activities	Section 59
Harassment and coercion	Section 60
Unsolicited credit and debit cards	Section 63AA
Assertion of right to payment for unsolicited goods or services or for making entry in directory	Section 64
Liability of recipient for unsolicited goods	Section 65
Application of provisions of Division to prescribed information providers	Section 65A
Pyramid selling	Part V, Division 1AAA
Country of origin representations	Part V, Division 1AA
Product safety and product information	Part V, Division 1A
Conditions and warranties in consumer transactions	Part V, Division 2
Actions against manufacturers and importers of goods	Part V, Division 2A
Liability of importers and manufacturers for imported goods	Part VA
Price exploitation in relation to a New Tax System	Part VB
Offences	Part VC
Enforcement and remedies	Part VI
Proportionate liability for misleading and deceptive conduct	Part VIA
Claims for damages or compensation for death or personal injury	Part VIB
Search and seizure	Part XID
Miscellaneous	Part XII

CHAPTER 5
IMPLICATIONS FOR NATIONAL, STATE AND TERRITORY CONSUMER LAWS

The TPA as a national market regulation law

For the past 35 years the TPA, as Australia's principal market regulation law, has regulated competition and consumer issues. This reflects the view held by successive Australian Governments that competition and consumer policy and enforcement have mutually reinforcing roles in making markets work effectively and fairly for the benefit of consumers. Under the application law scheme, the Australian Government will enact the Australian Consumer Law as part of the TPA.

Changes to the TPA

These major reforms will have implications for the form and content of the TPA. In implementing the reforms, there will be a range of changes to the consumer protection provisions of the TPA, involving:

- the inclusion of the Australian Consumer Law as a schedule to the TPA, which will be based on the existing consumer protection provisions of the TPA;
- the amendment of the existing consumer protection provisions of the TPA to reflect the nationally agreed provisions of the Australian Consumer Law;
- the inclusion of new provisions in the TPA which provide an administrative underpinning for the application law scheme giving effect to the Australian Consumer Law; and
- other necessary changes flowing from these reforms.

A new name for the TPA

As part of these major reforms to Australia's consumer laws, the Australian Government suggests that the TPA should be renamed the *Competition and Consumer Act* (CCA) to provide greater clarity as to the functions of the TPA and reflect the complementary and mutually reinforcing nature of consumer and competition policy.[32]

In making such a change, it will be clear to consumers and businesses alike that the legislation has two functions: the promotion of competition and the protection of consumers.

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32 This change would require consequential amendments to be made to all Commonwealth and state and territory laws that refer to the TPA. This would include laws that do not, necessarily, concern consumer protection issues, for example, States and Territories would need to amend their legislation applying the Competition Code 1995.

While the term 'trade practices' is broadly descriptive, it no longer provides clarity to the general public as to the purposes underlying Australia's national market regulation law.

Renaming the TPA in this way would also bring it into line with the name of the ACCC, which was renamed in 1995 when the functions of the Trade Practices Commission and the Prices Surveillance Authority were combined.

Question

Should the TPA be renamed? If so, what name should it have, if not the *Competition and Consumer Act*?

Implications for national financial services laws

All Australian governments have agreed that generic national consumer law provisions should apply to all sectors of the economy, reflecting the PC's recommendation 4.2. However, they also recognise that constitutional issues may mean that the financial services sector will need to retain a distinct legislative framework, due to the Commonwealth's different powers to regulate these areas under the Australian Constitution.[33]

In this regard, the Australian Government has provided an ongoing commitment to maintain consistency between the Australian Consumer Law's generic provisions and the consumer (or investor) protection provisions in credit and financial services laws, to the extent that it is practicable to do so.

Australia's financial services laws are currently the subject of a reform process, and the Australian Government has consulted on proposed reforms outlined in its *Green Paper on Financial Services and Credit Reform*[34] in 2008. The States and Territories have also agreed to refer their credit regulation powers to the Commonwealth, which will necessitate a review of consumer protection provisions that apply in that sector. COAG also agreed to the establishment of uniform national laws for the regulation of consumer credit to be administered by the Australian Government. The Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry, has published a *National Consumer Credit Action Plan* outlining the reform process for credit laws.[35]

Implications for existing state and territory consumer laws

The reforms outlined in this Paper will introduce national consistency in generic consumer protections, which currently exist, in broadly similar terms, in state and territory FTAs. In accordance with COAG's agreement, the Australian Consumer Law will be applied by each

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33 There has been no referral of the States' powers to regulate consumer issues generally. Reforms to Australia's companies and securities legislation undertaken in 2001 involved a referral of power by the States to the Commonwealth in respect of the issues covered by the Corporations Law as a consequence of the High Court's decision in *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice* (1999) 163 ALR 270. These changes led to the enactment of the Corporations Act 2001 and the ASIC Act. In 2008, COAG agreed that the States would refer their powers in relation to the regulation of consumer credit to the Commonwealth. This is being progressed.

34 http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1381.

35 http://www.treasury.gov.au/documents/1381/PDF/NCC_Brochure_02102008.pdf.

State and Territory and will become part of the law of each State and Territory. This will mean that all those provisions in FTAs that are superseded by the Australian Consumer Law will be replaced by the provisions of the Law.

Each State and Territory will retain in their FTAs a range of provisions which regulate sector-specific issues, and these will remain as part of the laws of the States and Territories. COAG has also agreed to a process to review sector-specific regulation, and this is being progressed.

Part II
COAG's agreed consumer law reforms

CHAPTER 6
UNFAIR CONTRACT TERMS

On 2 October 2008, COAG agreed to the inclusion of a provision regulating unfair contract terms in the Australian Consumer Law, in the terms proposed by MCCA on 15 August 2008.[36] The details of the proposed provision are set out in more detail in this chapter.

Unfair contract terms regulation

What are unfair contract terms?

Unfair contract terms are those that cause a significant imbalance in the parties' rights and obligations arising under a contract and are not reasonably necessary to protect the legitimate business interests of the supplier.[37] Two common examples of unfair contract terms were found to exist in Victoria and the United Kingdom[38], where regulation already exists, are reserving the right to vary the contract at any time for any reason or removing liability for interruptions in supply.

Why will the new law regulate unfair terms?

Unfair contract terms appear to be widespread in contracts, particularly in standard form contracts, and the PC concluded that the consumer detriment flowing from them is likely to be non-trivial.[39] Unfair terms are more likely to be found in standard form contracts, presented to consumers as a 'take it or leave it' offer. Uniform contracts have become more widespread as they lower the cost of doing business with large numbers of consumers, and those savings are in part passed on to consumers as lower prices, Furthermore, such contracts are increasingly used in relation to online services.

A national approach to unfair contract terms regulation is a key element of COAG's agreement. The PC raised the very real risk that, in the absence of a national approach to unfair contract terms, a range of possibly divergent regulatory regimes could emerge[40], including the potential for sector-specific regimes, with consequent cost implications for businesses and, ultimately, consumers.

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36 The MCCA proposal was based on PC 2008 Rec. 7.1, with some modifications.

37 PC 2008 II.403.

38 Jurisdictions in Australia and abroad have introduced legislation addressing unfair contract terms. Victoria amended its FTA to regulate unfair contract terms in 2003, while the United Kingdom introduced an *Unfair Contract Terms Act* in 1977. Currently, unfair contracts in the UK are also regulated by the *Unfair Terms in Consumer Contracts Regulations 1999*, which implements European Council Directive 93/13/EC.

39 PC 2008 II.152-154; The PC concluded that there is only limited evidence of the extent of their use and consumer detriment arising from them. However, the PC found that improved methods of assessing consumer detriment suggest this detriment is likely to be non-trivial.

40 PC 2008 II.433.

In considering the unfair contract terms regulation, the PC identified the following costs associated with the introduction in Australia of such a law:[41]

- Standard form contracts can provide significant cost savings and, if altered in response to unfair terms regulation, some prices for consumers could rise in the short term.
- Renegotiation of certain terms where it is reasonable for a supplier to vary regularly (for example, mortgage interest rates) would be more costly than unilateral variation.
- The law may weaken the capacity of businesses to deal with a small number of consumers acting in bad faith, limiting in turn their capacity to deal fairly, cheaply and efficiently with the bulk of consumers.

These issues are addressed by the model agreed by COAG for the unfair contract terms provision, which is set out below. While there would be some administrative and compliance costs for governments and businesses, evidence from Victoria and other countries suggests these are not likely to be significant. In fact, the PC report recognised that businesses have not identified major costs associated with the introduction of the EU, UK and Victorian provisions; many businesses support unfair contract terms regulation, and many businesses already comply with similar, industry-specific regimes.[42]

COAG's agreed model for regulating unfair contract terms

The PC's recommended model addressing unfair contract terms[43] was considered by MCCA at its meeting on 15 August 2008, where it agreed to recommend the incorporation of an unfair contract terms provision to the BRCWG.

On 2 October 2008, COAG agreed to a legislative model including the following features (which include some refinements of the PC's recommended model):

- **A 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.**

  The definition will not make reference to 'good faith', given the uncertain application of that principle in Australian law. The PC noted the potential for differing interpretations of good faith and that other definitions of an unfair term may be equally apt.[44] The inclusion of the phrase 'it is not reasonably necessary to protect the legitimate interests of the supplier' is designed to ensure that, when applying the test, the question of the business's reasons for including a provision in a contract is addressed.

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41 PC 2008 I.34-5; II.155-6, 433-8, see also II. Annex D to the Report for a fuller discussion of the issues.
42 PC 2008 II.155, 434-435.
43 PC 2008 Rec. 7.1.
44 PC 2008 II.159. The UK Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) also contain a reference to 'good faith', but the draft Bill prepared by the England and Wales and Scottish Law Commissions, which the UK Government has indicated that it will introduce in due course, has removed it. See The Law Commission and the Scottish Law Commission (2005) *Unfair Terms in Contracts – Report on a reference under section 3(1)(e) of the Law Commissions Act 1965* (Cm 6464 SE/2005/13) at 39-40.

What sort of contract terms might be covered by the unfair contract terms provisions?

Based on examples of actions taken in other jurisdictions, the following types of terms may be problematic as they are likely to cause consumer detriment:[45]

- clauses that permit the supplier to unilaterally vary the terms of the contract;
- clauses that prevent the consumer from cancelling a contract;
- clauses that require the payment of fees when the service is not provided;
- clauses that exclude liability for harm resulting from the supplier's or its agents' actions;
- clauses that let the supplier supply goods or services that are not those contracted and paid for by the consumer;
- clauses that let only the supplier decide whether to renew or not to renew the contract;
- clauses that penalise only the consumer for breaches of the terms of the contract;
- clauses that permit the supplier to change the price of the goods or services contracted for without allowing the consumer to terminate the contract;
- clauses that permit the supplier to unilaterally determine whether a breach of the contract has occurred or to interpret the contract's meaning;
- clauses that allow the supplier to assign the contract to the consumer's detriment, without the consumer's consent;
- clauses purporting to limit the consumer's right to take legal action against the supplier;
- clauses limiting the evidence that the consumer is permitted to use in legal proceedings based on the contract;
- clauses imposing the evidential burden on the consumer in legal proceedings;
- clauses that do not permit refunds to consumers when the goods or service are not provided, or which apply conditions to the way in which consumers are refunded;
- clauses that require consumers who breach a contract term or terminate early to pay penalties, in the form of specific additional payments, additional interest or indemnity legal costs, which do not reflect the suppliers' reasonable costs; and
- clauses that deem something as a fact or that something will be a fact, such as an acknowledgment that certain information has been provided to the consumer prior to the agreement being made, regardless of whether or not it was.

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45 This list is not intended to be exhaustive. See PC 2008 II.425, 427, Consumer Affairs Victoria 2007 *Preventing unfair terms in consumer contracts: Guidelines on unfair terms in consumer contracts*, Office of Fair Trading (UK) 2008 *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999*.

- **Remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class), or a substantial likelihood of detriment, not limited to financial detriment.**

  This element of the model reflects the PC's recommendation[46], although it makes it clear that action may also be undertaken on the basis of a 'substantial likelihood of detriment'. This recognises concerns about the limitations that a requirement limiting enforcement action to actual detriment would place on the effectiveness of enforcing the provision in practice. However, by requiring a proof of a 'substantial likelihood of detriment' in the particular case, the provision would require more than a theoretical case of potential detriment to be made out, but would require proof of either actual detriment or a substantial likelihood of detriment. This recognises concerns about the potential for regulatory overreach, should no such limitation be applied.[47]

  The scope of the provision will extend to standard form contracts entered into by businesses, including small businesses, and would not be confined to individual consumers. This recognises that many businesses are required to use standard form agreements in the same way as individual consumers, and their interests are essentially the same in respect of the potential for unfair contract terms.

- **The provision will relate only to standard form, non-negotiated contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not.**

  This element of the model reflects the PC's view that the inclusion of negotiated contracts would involve risks that exceeded the likely benefits.[48]

  Reversing the onus of proof in relation to whether the contract is in a standard form or not, will ensure that the potential for abuse of this provision is minimised. This would also allow a court examining a contract to consider whether the contract is, in effect, in a standard form, regardless of the use of devices like an acknowledgment by the consumer that the contract has been negotiated, or the inclusion of trivial 'negotiated' terms.

46 as per PC 2008 II.139.
47 see PC 2008 II.139.
48 PC 2008 II.161.

What types of contracts would be covered by unfair contract terms regulation?

Standard form contracts are used in many consumer and commercial contexts, including:

- utility services (electricity, gas, water and sewerage);
- communications services (telephony and internet);
- banking and financial services, including credit agreements;
- software end user licences, e-commerce and m-commerce transactions and online auctions;
- public and private transport services, including airline, bus and rail tickets;
- domestic building, renovation and maintenance services;
- professional services, including services provided by lawyers, engineers, surveyors, architects, consultants and others;
- courier and delivery services;
- subscription services, including pay television and magazine and newspaper subscriptions;
- leisure services, including health and fitness centre memberships, event tickets and holiday packages;
- motor vehicle maintenance, hire car rentals and car parking;
- residential and retail tenancies; and
- publicly and privately provided vocational training and professional development services.

- **The provision will exclude the upfront price of the good or service[49], using the approach currently adopted in regulation 6(2) of the United Kingdom's Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR).**

  Upfront price is excluded because it would be contrary to general contractual and economic principles to allow consumers to challenge easily understood upfront prices at a later time on the basis that they are unfair. Regulation 6(2) of the UTCCR provides that:

  'In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate — (a) to the definition of the main subject matter of the contract, or (b) to the adequacy of the price or remuneration, as against the goods or service supplied in exchange.'

- **The provision will require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.**[50]

  The PC noted that implicit consideration of the broader impacts of any particular term being deemed unfair should be relevant to the application of any new provision.[51]

Where these conditions are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment (or a substantial likelihood thereof), with suppliers also potentially liable to damages for that detriment, along with the other remedies that will be available under the Australian Consumer Law. This reflects the PC's recommendation that the use of the provision should be confined to situations where there is detriment (including a substantial likelihood of it).[52]

The provision will allow for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms.[53] There would also be scope to ban certain types of terms that are, in all circumstances, considered to be unfair.

Transitional arrangements should be put in place after enactment, which would give businesses time to modify their contracts.[54] There will be single national guidance on the enforcement of unfair contract terms regulation issued by the national and state and territory enforcement agencies.

The operation and effects of the new provision will be reviewed within five years of its introduction.[55]

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49 see PC 2008 II.139.
50 PC 2008 Rec. 7.1.
51 PC 2008 II.160.
52 see PC 2008 Rec. 7.1.
53 see PC 2008 II.139 & PC Rec. 7.1.
54 PC 2008 Rec. 7.1.
55 PC 2008 Rec. 7.1.

Banning certain types of unfair contract terms

The unfair contract terms provision will provide for the banning of certain contract terms on the basis that they are considered, in all circumstances, to be unfair. The use of these terms would expose a supplier to enforcement action under the Australian Consumer Law.[56]

Question

Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the Australian Consumer Law.

Terms retaining title for suppliers in goods that cannot be removed from consumers' premises without damage; terms allowing suppliers to repossess such goods

Title retention clauses (also called 'Romalpa clauses') and repossession rights seek to secure payment of the price and, in themselves, are not generally considered to be unfair in their effect on consumers. However, in the consumer context, the exercise of a term that enables suppliers to enter a consumer's home and remove fixtures (for example, carpets or other types of fixed floor coverings, swimming pools or bench-top stoves) can often leave the premises in a damaged state and seriously disrupt the lives of the consumer and their family. In many cases, the repossessed goods are not, or are not easily reusable by the supplier and the threat of the exercise of such rights is often used to intimidate consumers into paying debts owed (or allegedly owed) to the supplier.

Terms denying the existence or validity of pre- or post-contractual representations made to consumers; 'entire agreement' terms; terms deeming something a fact

Terms that:

- deny the existence or effect of oral representations;
- require the consumer to agree, for instance, that no representations have been made that are not in the written contract;
- specify that the only valid representations or waivers of the supplier's rights are those in writing signed by a senior officer of the supplier; or
- state that the written document contains the entire agreement of the parties,

can be said to have the object or effect of deterring or preventing consumers from pursuing claims based on oral or implied representations, agreements or terms.

Terms that deem something to be a fact or under which consumers agree that something is a fact (for example, that the goods or services supplied meet the terms of the contract) or terms that deem consumers to have done something (for example, that the consumer has obtained necessary consents or permits) are of a similar nature. Whether or not such matters exist or are true or have been done are questions of fact. These terms can seek to deny the facts in

56 The material set out in this section draws heavily on policy development work undertaken by Consumer Affairs Victoria in relation to reforms to the unfair contract terms provisions of Part 2B of Victorian FTA.

relevant circumstances and they act as an unfair limitation on consumers' rights to sue suppliers and the evidence that consumers can lead in proceedings on the contract.[57]

Examples

'It is agreed between the parties hereto that the terms and conditions contained herein constitute the entire agreement between the parties and that oral statements made prior to this agreement neither induced its execution nor form part of it.'

(carpet/curtain contract).

'The customer acknowledges having received the vehicle in a clean condition and in sound working order, in accordance with the vehicle condition report, and with a full fuel tank and a bottle of gas.'

(hire car contract).

'If you repudiate this Rental Agreement, we may give you notice terminating this Rental Agreement, and then you must immediately: a) pay to us the Termination Amount calculated in accordance with Clause 11, which amount you agree is a genuine pre-estimate of the loss that we will suffer by reason of your breach and repudiation of this Rental Agreement.'

(consumer lease).

'Delay does not prevent us exercising our rights under the Contract, and failure by us to enforce a right does not prevent our enforcing other rights, or the same right on a future occasion.'

(consumer lease).

Terms under which consumers acknowledge that they have read or understood the contract

Whether a person has read a contract is an objective matter of fact and it is not unfair to require consumers who have, in fact, read the contract they are about to sign, to acknowledge that fact. There is often no legal advantage to be gained by including such a requirement as the law has always regarded the question of whether a person has read the contract that they have signed as immaterial to the question whether they are bound by it.[58] However, whether consumers have understood the contract (that is, its meaning and effect) is not an objective matter and cannot be resolved simply by requiring consumers to acknowledge that they have understood the contract, even if they have also said that they do understand the contract. It is impossible to know, without searching inquiry, whether their understanding is correct. Further, where consumers have not, in fact, properly understood their contracts, then these terms seek to deny that fact.

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57 It is not considered unfair for a contract to specify that representations, waivers and amendments must be in writing and signed by a senior officer of the supplier etc, if there is no implication that these are the *only* valid representations/waivers/amendments, and if the term does not otherwise seek to deny the validity of oral or implied representations/waivers/amendments/terms.

58 *L'Estrange v Graucob* [1934] 2 KB 394; *Toll (FCGT)N Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165.

For consumers claiming that unusual terms were not brought to their attention, nor their nature and effect explained to them before they signed the contract, these terms have the object or effect of deterring or preventing them from pursuing such claims. Such terms can constitute an unfair limitation on a consumer's right to sue the supplier and on the evidence a consumer can lead in proceedings on the contract.

Example

'I have read and understand my obligations and rights in relation to this agreement and will abide by all membership conditions, rules and regulations stated overleaf. I accept that it is a condition of use of my membership rights that I must comply with them.'

(airline loyalty program contract).

Conclusive evidence terms

It is not unfair for suppliers to stipulate that certain things they generate (for example, statements of amounts owing) are prima facie evidence of their contents, particularly where such matters are primarily in the knowledge of the supplier. However, it may be considered that it can never be fair to stipulate that such things are conclusive evidence of their contents, because such terms have the object or effect of deterring or preventing consumers from pursuing claims based on conflicting evidence, and, axiomatically, have the object (if not, in practice, the effect) of limiting the evidence that consumers can lead in proceedings on the contract.

Example

'A statement or certificate given by or on behalf of the owner stating the amount owed by the client to the owner and/or the occurrence of any event shall be conclusive evidence of the amount or event.'

(consumer lease).

Terms that are void under laws that imply certain terms into contracts; terms that otherwise limit suppliers' liability for their negligence

In existing consumer laws, for example Part 2A of the Victorian FTA and Division 2 of Part V of the TPA, there are set out a range of terms that are to be implied into contracts for defined sales of goods and services (for example, implied terms requiring goods to be of merchantable quality and services to be rendered with due care and skill).[59] Such terms cannot be excluded and, in relation to sales of consumer goods and services, they cannot be limited. Exclusions and limitations, even for consequential/economic loss, are void and it is also an offence to purport to exclude or limit the terms.

59 It is also unfair under Part 2B of the Victorian FTA to purport to exclude or limit the statutory terms, as such exclusions or limitations have the object or effect of limiting consumers' rights to sue suppliers (see section 32X(k) of the Victorian FTA).

Many terms that exclude or limit suppliers' liability for loss or damage suffered by the consumer from the suppliers' acts or omissions attempt to cater for the statutory terms with words such as 'to the extent permitted by law', or other words that only indirectly refer to consumers' statutory rights. Such caveats do necessarily have the effect of altering the situation because most consumers will not know what that 'law' is. While such terms give the appearance of complying with the law, they signify nothing to consumers who are ignorant of their rights.[60]

In the same vein, it may be considered that it is invariably unfair to exclude or limit the liability that suppliers would otherwise have for their common law negligence. However, given the small amounts ordinarily at stake in a consumer contract, it is not considered unfair for the supplier to limit its liability for consequential/economic loss as a result of its negligence.

Examples

'To the extent permitted by law, under no circumstances shall [the supplier] be vicariously liable for any deliberately wrongful act, default or omission by any employee.'

(security services contract).

'The owner will not be liable to the client or any persons claiming under the client in contract or in tort in respect of any direct, indirect or consequential loss, damage, expense or injury suffered by the client or any other person arising out of or relating to the agreement, its performance, any delay in its performance or its non-performance (including, by way of illustration and not limitation, liability due to the negligence or default of the owner), or any error (whether negligent or not) in information supplied to the client before or after the date of the agreement or in connection with it.'

(consumer lease).

'Apart from terms, conditions and warranties which are implied by law and are incapable of exclusion, we give no condition, warranty or representation as to ownership, description, condition, merchantability, suitability or fitness (whether for a particular or any purpose) of the equipment, and no such term, condition or warrant will be implied.'

(consumer lease).

Flat/fixed early termination fees and those requiring the paying out of the contract

Some contracts allow consumers to terminate early and others provide for early termination on the occurrence of a stated event. In whatever way an early termination arises, the contract usually requires consumers to pay a fee, which is, or which is claimed to be, compensation for the loss suppliers will incur because of the early termination.

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60 They will also not prevent liability-exclusion clauses from constituting false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, contra section 12(k) (now section 53(g)) of the TPA: see *Trade Practices Commission v Radio World Pty Ltd* (1989) ATPR 40-973.

The general law on liquidated damages clauses regulates early termination fees that are imposed where early termination is a breach of the contract. To be valid, such damages must not be penalties, meaning that they must be a genuine pre-estimate of the loss that a supplier would suffer by the breach. That can either be a genuine pre-estimate of the supplier's lost net profit or of its wasted costs. The High Court has said that '[t]he propounded penalty must be judged "extravagant and unconscionable in amount". It is not enough that it should be lacking in proportion. It must be "out of all proportion"'. [61]

Because the question under the general law is whether the liquidated damages are a genuine pre-estimate of loss, the assessment is made prospectively, as at the date of the contract, and it is irrelevant if the amount ultimately imposed under the term proves to be more (even much more) than the actual loss suffered.

Putting aside the issue of whether an early termination fee was individually negotiated or brought to the consumer's attention, under the agreed unfair contract terms legislative model it would be unfair, and therefore void, if 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 business interests of the supplier. This applies regardless of whether it is imposed because early termination is a breach of the contract, or as a consequence of the consumer exercising a right to terminate early, or as a consequence of the contract terminating early because of the occurrence of a stated event.

Further, the question under the agreed legislative model is whether the term *causes* a *significant* imbalance in the parties' rights and obligations. This means that, contrary to the general law, judging the unfairness of an early termination fee under the agreed model would not appear to be restricted to the situation applying when the contract was signed, nor to whether the imbalance is 'extravagant and unconscionable'/'out of all proportion'. Under the agreed model, the question would appear to be whether, in its terms *or* in its application, an early termination fee causes a significant imbalance to the consumer's detriment.

Therefore, an early termination fee that could *or* does produce an amount that is significantly more than the loss that the supplier could *or* does suffer by the early termination would likely be unfair.

Fees that seek to recoup wasted costs but which are flat or fixed amounts applying regardless of when the contract is terminated cannot be genuine pre-estimates of such costs. They are otherwise unfair, because they cannot and do not take account of the extent to which those costs have been recouped or amortised, for example, by payments under the contract, the amount of which varies according to when the contract is terminated.[62]

Similarly, fees that seek to recoup lost net profit but which simply require the paying out of the remainder of the contract price (sometimes called 'accelerated payment' clauses) cannot be genuine pre-estimates of such profit. They are otherwise unfair, because they cannot and do not take account of the costs that would have been incurred in performing the remainder

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61 *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71 at [32].

62 Nor, in relevant cases, do they take account of whether the supplier would have made a loss on the contract (whereby the costs would have been wasted anyhow).

of the contract, nor of the requisite discount for the value of the early receipt of the remainder of the contract price.[63]

Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred

Terms requiring consumers to pay suppliers' enforcement costs on an indemnity basis, or that simply require consumers to pay suppliers' enforcement costs, may be considered always to be unfair because they require, or could require, consumers to pay for unreasonably or inefficiently incurred costs. Further, they provide no incentive for suppliers to be reasonable or efficient.[64]

Examples

'I agree to pay you all default costs as they are incurred.'

(personal loan contract)

'If for any reason the client fails to comply with any of its obligations under this agreement the owner may in its discretion do anything necessary to make good that failure … and do anything (including taking any legal proceedings) which the owner considers desirable to protect or enforce its rights in relation to the equipment and this agreement …The client indemnifies the owner in respect of any payments made by the owner pursuant to this clause.'

(consumer lease).

Terms requiring consumers to pay deposits or pre-payments that do not leave a substantial amount of the price to be paid on delivery/installation/performance

A distinction is drawn here between pre-payments (or part-payments) and deposits. A deposit is an amount that is intended to ensure that the consumer is serious/bona fide about proceeding with the contract[65] in the situation where the supplier will refrain from dealing with other potential purchasers, proceed to allocate resources to the contract, or proceed to expend time and effort preparing for the performance of the contract.

The law allows a genuine deposit to be forfeited if consumers do not proceed with their contracts (provided it is a reasonable amount and not a disguised penalty), regardless of the actual losses suffered by the supplier.[66]

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63 Nor, in relevant cases, do they take account of the value of suppliers' obligations to take reasonable steps to mitigate their loss, for example, the net proceeds of any resale of goods recovered or the net value of any replacement contract that did eventuate or should have eventuated.

64 A term requiring a party to pay 'all' costs would normally be subject to an implied qualification that such costs be properly incurred, that is, reasonably and in good faith: see for example, *Elders Trustees & Executor Co Ltd v Eagle Star Nominees Ltd* (1988) 4 BPR [97256] at 9208 per McLelland J, who said: 'This is in my view so obvious that it did not require expression …'

65 What the cases often refer to as an 'earnest of performance'.

66 For example, *Luu v Sovereign Developments Pty Ltd* [2006] NSWCA 40 at [24] per Bryson JA, who noted that 10% 'has long been usual' in the sale of land context; see also *Ianello v Sharpe* [2007] NSWCA 61.

On the other hand, the rationale for pre-payments is that they enable suppliers safely to commence work on a contract. In some cases, they are required to cover the cost of purchasing necessary materials, particularly if the materials are specialised for the job and so cannot be used for other contracts.

A pre-payment should be refundable if the consumer opts not to proceed with the contract, minus any actual (and reasonable) losses suffered by the supplier.

However, it may be considered to be unfair to require all or substantially all of the price to be paid at the outset, or an amount that does not leave a substantial amount of the price to be paid at either delivery, installation or performance, because such requirements unfairly derogate from the normal right or the obligation to pay at either delivery, installation or performance, and if the product complies with the contract. Similarly, it may be considered to be unfair for consumers to be required to pre-pay for installation or other labour costs because consumers should only be required to pay for those costs at delivery, installation or performance, and if the product complies with the contract.

The unfairness arises for consumers because unless a substantial amount is unpaid, their bargaining power in requiring suppliers to rectify defects etc, without recourse to litigation, can be severely reduced. Further, excessive deposits or pre-payments leave consumers unduly vulnerable to being out of pocket if the suppliers become bankrupt before delivery/installation/performance.

Example

'50% deposit to be paid before work can commence. Payment of the balance is due and payable upon notification by [the supplier] that the window coverings are available for installation. Title for these goods will not pass to the purchaser until full payment has been received.'

(curtain/carpet contract).

In the absence of this sort of term, the obligation to pay the balance of the price would not arise at common law and, in some cases, under relevant legislation[67] until the goods were installed, at which point title passes. Alternatively, there are circumstances, such as under section 35 of the *Goods Act 1958* (Vic), where installation of the goods and payment of the balance of the price are concurrent conditions, and the obligation to pay the balance of the price would not arise until installation.

Terms allowing suppliers to retain, debit or set off disputed amounts

Terms allowing suppliers to retain amounts paid by consumers to defray unpaid amounts, or to debit consumers' accounts for unpaid amounts, or otherwise to set off amounts owed by consumers against amounts owed to consumers, are common.

While such terms are unremarkable when applied to amounts that are indisputably owed, this is not the case when amounts allegedly owed by consumers are genuinely in dispute. In

67 For example, section 23 (Rule 2) of the *Goods Act 1958* (Vic).

permitting a supplier to retain, debit or set off a disputed amount, such terms effectively permit the supplier to decide that it has not breached the contract, as claimed by the consumer, allowing the supplier unilaterally to determine whether the contract has been breached or to interpret its meaning.

Such terms can have the effect of being unfair if they do not make reasonable allowance for:

- amounts genuinely in dispute (either the amount allegedly owed by the consumer or an amount alleged to be owed by the supplier); or
- genuine disputes over the adequacy of the performance of the contract. For instance, a reasonable dispute-resolution process, including the holding of disputed amounts in trust or the suspension of the right to set off or debit pending the outcome of the process could be provided.

Examples

'You must pay us without any set-off, counter-claim or deduction. ... We can pay you amounts we owe you by deducting them from amounts you owe us.'

(internet service provider contract).

'The Debtor must not deduct anything from any such payments. This means the Debtor cannot deduct anything that the Debtor claims the Credit Provider owes or could owe in the future to the Debtor.'

(personal loan contract).

Terms mandating arbitration of disputes or otherwise inhibiting access to courts or tribunals

Some existing consumer laws include provisions that prohibit the use of terms which purport to limit or prevent consumers from exercising their right to take legal action.[68] Terms requiring disputes to be privately arbitrated instead of, or before, litigation in a court or tribunal (including terms allowing suppliers to nominate arbitration) can have that object or effect, and may be particularly unfair where consumers are required to pay their portion of the arbitrator's costs as a condition of the arbitration. Such terms will, in many cases, effectively preclude consumers from any dispute resolution process.

Example

In the event of any dispute as to compensation, the dispute shall be settled by an arbitrator who shall be a person mutually agreed upon by the parties.

(on-line auction user agreement).

68 Section 32X(k) of the Victorian FTA refers to terms that have the object or effect of limiting consumers' rights to sue suppliers.

CHAPTER 7
AGREED REFORMS TO CONSUMER LAW ENFORCEMENT POWERS

The proposed changes to consumer law enforcement powers

In the detailed proposals for the Australian Consumer Law, MCCA proposed to COAG, and COAG agreed, that enforcement of the law will be shared between the ACCC and the state and territory offices of fair trading, supported by formal agreements between these regulators that cover arrangements for communication between them and the coordination of their activities. All enforcement arrangements will be reviewed by COAG within seven years after the commencement of the Australian Consumer Law.

At the national level, ASIC will have primary responsibility for the enforcement of consumer laws relating to financial services, although the States and Territories will retain enforcement powers in this area, and ASIC will assume primary responsibility for enforcing national consumer credit laws.

The Australian Consumer Law will include the full range of penalties, enforcement powers and consumer remedies currently available in the TPA, with appropriate modifications to reflect the respective powers of national and state and territory regulators and the differing law enforcement and court systems in place around the country. A description of these powers is set out in Chapter 4 above.

COAG has agreed that these powers should be extended, based on MCCA's detailed reform proposals, and that the Australian Consumer Law will include provisions covering:

- civil pecuniary penalties and disqualification orders;
- substantiation notices;
- availability of redress for non-parties to proceedings;
- public warning powers; and
- infringement notices, to the extent permitted by relevant Commonwealth and state and territory laws and policies.

These reforms are described in more detail below.

Civil pecuniary penalties and disqualification orders

In November 2007, MCCA endorsed a report which identified the need for additional enforcement tools in relation to consumer law breaches: civil penalties, including civil

pecuniary penalties and disqualification orders.[69] These will augment the current range of criminal sanctions and civil remedies and be implemented as part of COAG's agreement to introduce an Australian Consumer Law.[70]

Current consumer law penalties

Breaches of Part V of the TPA and the state and territory FTAs, all of which protect consumers from unfair trading practices, are currently enforced both through criminal sanctions and civil remedies. Part 2 of the ASIC Act largely mirrors the TPA's consumer protection provisions in relation to financial services. The enforcement structure is designed to deter future contraventions of the law by potential offenders; punish parties engaging in serious or habitual contraventions; provide redress for loss or damage from prohibited conduct; and stop prohibited conduct quickly to limit ongoing consumer detriment.

The criminal sanctions in the TPA, ASIC Act and FTAs punish and deter culpable conduct by imposing fines on corporate and individual offenders. In some cases, the FTAs also provide for the imprisonment of offenders in certain circumstances.[71] Convictions are recorded, but custodial sentences are not generally available under the ASIC Act and not available at all under the TPA for consumer law breaches (although imprisonment can be imposed as a sanction in relation to failure to comply with court orders and certain enforcement powers of the ACCC).

The personal, social and financial consequences of a criminal conviction can be serious for the offender. Criminal sanctions are imposed through criminal processes, which do not typically allow for outcomes such as injunctions or judgments for damages, and require the high standard of proof of beyond reasonable doubt to be met. The agreement of the relevant DPP is often required before a criminal prosecution is undertaken.[72]

Civil remedies available in the TPA, ASIC Act and FTAs include injunctions, corrective advertising, restitution and other compensation orders. FTAs also include a range of other penalties including 'cease trading' orders. They provide a rapid means of stopping continued illegal conduct and compensating consumers for losses suffered as a result, and the illegality of the conduct is determined according to the civil standard of proof on the balance of probabilities. However, there are limits on the effectiveness of the current range of civil remedies, such as limits on the availability of representative actions. Since these remedies are limited to the losses suffered or gains made through illegal conduct, they may not always provide an effective deterrent to breaches of the consumer law.

Why do we need civil penalties and disqualification orders?

The lack of civil penalties for enforcement of consumer law both nationally and in the States and Territories is a significant gap in the range of enforcement options available to consumer

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69 MCCA *Civil penalties for Australia's consumer protection provisions – A discussion paper* (September 2005) http://www.consumer.gov.au/html/civil_penalties/index.html.

70 PC 2008 Rec. 10.1; MCCA Communiqué 15 August 2008.

71 Section 62(2A) of the NSW FTA provides for a term of no more than three years' imprisonment for a person convicted of a second or subsequent offence against Part 5 of FTA (NSW), which deals with unfair practices.

72 At the Commonwealth level all criminal prosecutions are brought by the Director of Public Prosecutions after being briefed by the relevant enforcement agency. The situation may differ in respect of other jurisdictions.

regulators. While criminal sanctions provide an important deterrent against the most serious misconduct, and civil remedies can achieve timely outcomes for consumers, there is a large range of conduct which could be more proportionately penalised through civil penalties. These would also provide a greater deterrent effect through their more straightforward judicial application and they can be imposed in a more timely manner than would be the case in relation to criminal sanctions.

Moreover, at present the consumer law enforcement agencies are unable to obtain compensation for consumers when criminal action alone is brought. If a matter is serious enough to warrant a penalty, the consumer law enforcement agency must institute both civil and criminal proceedings in order to secure any type of compensation. Civil penalties would provide an alternative to this duplicative process, and provide timely and satisfactory resolutions to instances of illegal conduct which do not call for criminal sanction.

Civil penalties are a feature of other Commonwealth regulatory regimes, including the restrictive trade practices provisions in Part IV of the TPA and the ASIC Act. They are also available to state and territory agencies, and all Australian jurisdictions have indicated their willingness to make appropriate amendments to their FTAs to ensure the smooth introduction of a civil penalty regime for consumer law.

What are civil pecuniary penalties?

Civil pecuniary penalties are imposed by the courts according to civil standard of proof. As such, a matter brought to the court seeking a civil pecuniary penalty is not subject to criminal standard of proof, but the lower standard of proof of 'on the balance of probabilities' (though the court will construe the standard more strictly the higher the penalty sought).[73]

Generally speaking, civil proceedings require a lesser commitment of resources than is required in relation to criminal proceedings, where, understandably, the consequences for the defendant are much graver. They also would give the relevant enforcement agencies more flexibility in how they respond to illegal conduct, by providing an intermediate penalty which may better reflect the seriousness of the conduct engaged in than either a criminal sanction or a civil remedy.

What are disqualification orders?

Disqualification orders effectively ban or restrict individuals from participating in specific activities for specific periods of time, including managing corporations or undertaking specific business conduct. They can carry serious personal and financial consequences for the individuals concerned by preventing them from doing certain things. They therefore provide a serious deterrent for individuals from engaging in illegal conduct, but do not impose the graver consequences of a criminal conviction.

Disqualification orders would be made available for breaches of the consumer protection provisions where a civil pecuniary penalty is imposed, as well as in respect of breaches where a criminal sanction is imposed. This amendment would bring the consumer law into

73 See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 12 ALJ 100.

line with amendments made to the TPA in 2006 providing for disqualification orders in relation to breaches of the restrictive trade practices provisions.

The proposed reforms

The Australian Consumer Law will set out a series of generic consumer protections based on those currently in the TPA. For the purposes of this discussion, references to provisions in the TPA also include references to the equivalent provisions in the FTAs.

The current enforcement powers in the TPA and the ASIC Act will be augmented by the inclusion of civil pecuniary penalties which would apply to the consumer protection provisions of the Australian Consumer Law based on those provisions in Parts V and IVA of the TPA. Those consumer protection provisions of Part V of the TPA which already have criminal sanctions available will also have civil pecuniary penalties. Those provisions that do not have criminal sanctions, including the general prohibition on misleading and deceptive conduct in section 52 of the TPA, will not have civil pecuniary penalties available and civil remedies will remain as the principal means of enforcing these provisions.

Civil pecuniary penalties would not exceed the current level of monetary criminal sanctions in the TPA: 10,000 penalty units (currently $1.1 million) for corporations and 2,000 penalty units (currently $220,000) for individuals.

Disqualification orders would be limited, in the case of the Commonwealth law, to the management of corporations or the undertaking of specific activities in connection with the management of a corporation. However, in respect of the version of the Australian Consumer Law applied in the States and Territories, a more expansive approach may be adopted, permitting orders to be made to ban specific forms of conduct by named individuals and unincorporated entities.

New enforcement powers

The Australian Consumer Law will include a range of new enforcement powers for consumer regulators. These powers were considered in MCCA's September 2005 discussion paper 'Civil penalties for Australia's consumer protection provisions'[74] and its November 2007 decision to introduce national provisions in this regard.

Substantiation notices

The Australian Consumer Law will include a power for consumer regulators to issue substantiation notices.

A substantiation notice requires a supplier to provide a consumer regulator with a basis for representations that it makes regarding its supply of goods and services (or in relation to the sale or grant of interest in land). The PC observed that substantiation notices would provide

74 MCCA (September 2005) *Civil penalties for Australia's consumer protection provisions: A discussion paper* http://www.consumer.gov.au/html/civil_penalties/.

consumer regulators with an additional regulatory tool to deal with increasingly complex representations made in the course of trade and commerce.[75]

At the national level, the ACCC already has investigative powers under the TPA to obtain documents and evidence in relation to matters it suspects may constitute breaches of the Act. However, the Federal Court has held that the ACCC requires some factual basis for forming the opinion that there may be a breach of the Act.[76] The ACCC has indicated that this threshold may in some cases prevent it from obtaining information about dubious public claims by traders, in order to determine whether any breach is likely to have occurred. Some state regulators have similar powers, for example, section 106A of the Victorian FTA; section 23A of the NSW FTA; or section 88B of the Queensland FTA.

A substantiation notice would require a person or business to which it was issued to respond to a notice within a specified time and impose specific requirements about the nature of the information which is to be provided under the notice (for example, that it is not false or misleading or that the response is not frivolous or vexatious). The provision would include requirements that the notice must include certain information to enable the business to understand what is required of it.

Failure to comply with a substantiation notice either at all or in respect of the manner in which a response is provided would have consequences for the recipient. These could include enforcement action in relation to the conduct that has given rise to the notice being issued and other penalties available under the Australian Consumer Law.[77] The final form of this power is yet to be determined.

Public warning powers

The Australian Consumer Law will include a new nationally consistent 'public warning' power (often called a 'naming and shaming' power). The final form of this power is yet to be determined.

Typically, public warnings are issued to inform the public of potentially harmful conduct taking place in the very short term. Those who are the subject of such warnings are usually 'fly by night' operators, itinerant traders and financial, investment and property spruikers and advisors who often move across state and territory borders.

All but one of the States and Territories has a form of public warning power, which is generally confined to specific subject matters and is subject to a public interest test. These powers are subject to specific protocols which govern their use. At present, there is no public warning power in the TPA. However, the ACCC does publicise enforcement actions and penalties, both as a consequence of court orders being made and where a business has entered into an undertaking under section 87B of the TPA.

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75 PC 2008 II.245.

76 *Kotan Holdings Pty Limited v TPC* (1991) 30 FCR 511.

77 Currently, a number of approaches exist at the state and territory level in relation to this issue. The Australian, state and territory governments will resolve these matters and consult publicly on the agreed approach at the time the draft legislation is made available for public comment.

Table 7.1: Existing state and territory public warning powers

State/ Territory	Nature and scope of the power	Protocols applicable to the use of the power
NSW	Section 86A *Fair Trading Act 1987* The Minister or Director-General may issue a public warning in respect of unsatisfactory goods and services, unfair business practices and other matters adversely affecting persons acquiring goods and services. The power uses the public interest test. Liability is excluded generally by section 10 of NSW FTA.	The NSW OFT has internal 'Public Warning Statements Procedures and Guidelines'. The Guidelines are used to ensure that decisions about issuing warnings are made with consistency and fairness, in accordance with the public interest and the principles of natural justice.
VIC	Section 162A *Fair Trading Act 1999* Public Warning Statements If satisfied that it is in the public interest to do so, the Minister or Director of CAV may issue a public warning in respect of unsatisfactory goods and services, unfair business practices and other matters adversely affecting persons acquiring goods and services. The power grants no immunity to the Crown. A public warning statement may be issued: - by the Minister during proceedings in Parliament - by the Minister, Director or member of CAV staff in a statement made to the media in a public forum - by the Director in the annual report to the Minister in accordance with section 102 of the FTA - by the Minister or the Director pursuant to section 162A of the Victorian FTA - by the Director or member of staff in a Consumer Affairs Victoria's publication, newspaper advertisement or notice. In practice, public warnings are usually published on the CAV website and also announced to the media. Note: Seciton 162A must be distinguished from Warning Notices issued under section 58 of the Victorian FTA: Section 58 notices contain information about unsafe goods or services which are under investigation to determine whether they can cause injury and/or information about the possible risks posed by those goods or services. In practice, these notices are usually in relation to product safety issues. Section 162A public warning statements are used to provide an early warning to consumers of unfair practices and traders. For example, traders can operate under assumed names and be difficult to identify for legal proceeding, or the timing of legal proceeding may leave consumers open to further detriment. In these circumstances, a public notice is often the only timely and effective approach to attempt to reduce further detriment.	Under CAV's Compliance and Enforcement Policy, a trader may only be named in a s.162A Public Warning Statement if the following criteria are satisfied: - Publicly naming a trader is justified in the public interest. - The conduct poses actual or likely, imminent personal injury or financial or other loss to members of the public. - The conduct is deceptive, unethical, unfair or improper. - On available evidence, a prima facie breach has occurred. - The alleged offender has been the subject of previous enforcement action and has established a similar business, or one where similar losses could be expected. - The alleged offender has avoided or rejected attempts to investigate and resolve consumer complaints. The criteria are not exhaustive and are designed to guide thinking in deciding the appropriate enforcement action. Businesses are protected from the misuse of this provision: First, there is a public interest test — the power can only be used when it is in the public interest to do so. Second, there is no immunity for the Crown, and thus the business or individual in question has all the normal legal rights they would have regarding public statements made about them. High priority matters: The type of factors which may involve a risk to the public interest are also those which are classified as a high priority for enforcement action because, amongst other things: - a serious prima facie breach of administered legislation has occurred - the alleged conduct appears systemic, for example, it affects many consumers and may cause significant detriment - the alleged conduct may endanger the health and safety of a member of the public - there is a need to act quickly to stop or restrain the conduct to avoid significant consumer detriment - it is desirable to send a clear signal to the industry that the conduct engaged in is unacceptable

Table 7.1: Existing state and territory public warning powers (continued)

State/ Territory	Nature and scope of the power	Protocols applicable to the use of the power
QLD	Sections 109(1)(b) and 110 *Fair Trading Act 1989* The power exists by virtue of a limitation of liability on the Crown for making of any disclosure by the Minister or Commissioner in relation to the supply or quality of goods and services, business reputation or the contravention or enforcement of the Queensland FTA, where the Minister or Commissioner is satisfied in good faith that it is in the public interest to do so.	The OFT does not use 'public warnings' as a punishment (ie, for its direct 'reputational impact'). Public warnings are only used where there is a high likelihood of ongoing and significant consumer detriment.
WA	Sections 17 and 25 *Consumer Affairs Act 1971* The Commissioner may issue a public warning in respect of unsatisfactory goods and services, unfair business practices and other matters adversely affecting persons acquiring goods and services. The Commissioner must apply a public interest test (section 17(3) CAA (WA)). The Commissioner has immunity under section 25 CAA (WA).	WA Department of Commerce has published a policy specifically laying down an operational procedure for the agency to follow in issuing public warnings. A trader whose reputation is injured as a result of being named by the Department can bring an action for defamation to recover compensation for any loss suffered as a result of any defamatory statement. The naming of traders in media releases and other non-parliamentary circumstances will only be protected in an action for defamation if the statement can be proven to be true, or if the defence of qualified privilege applies. The circumstances in which qualified privilege applies vary and need to be assessed on a case-by-case basis. In general, however, there will be a need to show that exceptional circumstances exist. The policy puts procedures and guidelines in place that help ensure that traders are named only where the truth of allegations against them is established, and/or exceptional circumstances exist. The policy sets out a detailed checklist of questions and steps that must be undertaken prior to action being undertaken. Adherence to the policy is intended to also help balance the risks for the public from unfair and illegal practices of traders, and the need to safeguard against traders' reputations being unjustifiably damaged.

Table 7.1: Existing state and territory public warning powers (continued)

State/ Territory	Nature and scope of the power	Protocols applicable to the use of the power
SA	Sections 91A and 91B *Fair Trading Act 1987* The Commissioner may issue a public warning in respect of unsatisfactory goods and services, unfair business practices and other matters adversely affecting persons acquiring goods and services. The Commissioner must apply a public interest test. The Commissioner is given immunity under section 91B of the SA FTA.	OCBA has issued guidelines to govern the circumstances in which traders are named (Guideline 6.2 — Public Naming of Traders). The Guidelines set out a range of procedural steps required to be completed before a trader may be named, covering: - the name of the trader; - the nature of the relevant conduct; - persons affected by the conduct; - previous action taken against the trader; - other enforcement options available; - the consequences of naming or not naming the trader; - whether the trader has been notified of the conduct and the potential for naming to occur; - if the trader has not been contacted, why not and whether attempts have been made; - the manner in which the trader should be named (whether by the Minister or Commissioner, whether in Parliament, by press release, interview or in an annual report); - whether the decision has been recorded; and - whether the trader is the subject of action in other jurisdictions. SA maintains a register of named traders.
TAS	Does not have a specific power, though there is a general Crown immunity provision in respect of actions taken under the Tasmanian FTA: section 52.	CAFT does not use public warnings as a strategy.
ACT	Section 41A *Fair Trading (Consumer Affairs) Act 1973* The Minister and Commissioner may issue a public warning in respect of unsatisfactory goods and services, unfair business practices and other matters adversely affecting persons acquiring goods and services. They may issue a notice if they are satisfied that it is in the public interest to do so. The Minister and Commissioner have immunity from liability under section 42 FT(CA)A (ACT).	
NT	Section 8A *Consumer Affairs and Fair Trading Act 1990* The Minister and Commissioner may issue a public warning in respect of unsatisfactory goods and services, unfair business practices and other matters adversely affecting persons acquiring goods and services. They must apply a public interest test.	No public policy on the use of the power. It is exercised at the sole discretion of the Commissioner.

Source: Information provided by state and territory offices of Fair Trading.

In developing a common national public warning power, SCOCA will consider:

- the need for national consistency of a public warning power, which could provide business certainty that consistent powers exist across all jurisdictions, subject to similar protocols governing their exercise;
- the circumstances in which such powers are used, particularly in the absence of some related action for a breach of the law which might be the subject of publicity;
- the potential ongoing impact on businesses that are the subject of warnings, as well as the potential for regulatory error. Appropriate safeguards would need to be developed to ensure that these powers were appropriately exercised, given the issues surrounding defamation and appropriate use;
- whether, as a matter of principle, it is appropriate to provide statutory immunity from legal action in relation to potentially defamatory or inaccurate statements made in a public warning. Not all jurisdictions currently have such immunity available to the person exercising the power; and
- the need to ensure coordination of action between consumer regulators in relation to conduct that occurs in more than one jurisdiction.

Question

How can the interests of a business be safeguarded in the formal requirements for a national public warning power?

Infringement notices

The Australian Consumer Law will include a nationally consistent power for consumer regulators to issue infringement notices in relation to breaches of consumer protection provisions. This power will be sufficiently flexible to accommodate existing state and territory infringement notice powers and related administrative and court processes.[78]

A number of state and territory consumer regulators have the power to issue infringement (or penalty) notices in relation to a range of matters including both administrative breaches (concerning such issues as product safety, telemarketing, cooling-off and lay-by provisions)[79] and substantive breaches of the relevant FTA (concerning such issues as, false representations and misleading conduct). [80] At the national level, ASIC can issue infringement notices in respect of breaches of the *Corporations Act 2001*.

78 Currently, a number of approaches exist at the state and territory level in relation to the manner in which infringement notices are issued, including government-wide systems for their issuance and administration. The Australian, state and territory governments will resolve these matters and consult publicly on the agreed approach at the time the draft legislation is made available for public comment.

79 See section 64 NSW FTA, section 160A Victorian FTA (see also *Fair Trading Regulations 1999* (Vic); see Schedule 2), section 73 WA FTA.

80 *Fair Trading (Infringement Notices) Regulations 2006* (WA); see Schedule 1.

Failure to comply with an infringement notice may have consequences for the recipient including possible action by the regulator for the breach of the Law alleged.

New options for consumer redress

Non-party redress

A key objective of the consumer policy framework is to provide a range of redress options in response to large-scale consumer detriment. As part of the Australian Consumer Law, there will be a power for consumer regulators to seek orders from the court to seek redress for persons who are not parties to the particular action.

Concerns about non-party redress arose out of the Full Federal Court's 2002 decision in *Medibank Private Ltd v Cassidy* (*Medibank*) [81], where it was held that it was beyond the Court's power under section 12GD of the ASIC Act (which is equivalent to section 80 of the TPA) to order a business to provide redress to non-parties to a proceeding. Special leave to appeal this decision to the High Court was refused. Prior to *Medibank*, it was understood that section 12GD of the ASIC Act (and section 80 of the TPA) did allow for redress for non-parties.

While a small number of consumers may bring an action and obtain redress under section 87 of the TPA, when large numbers of consumers are involved this can be a difficult, time-consuming, expensive and inefficient process. The decision in *Medibank* limits the effectiveness of the TPA in providing redress to large numbers of consumers. This also limits the ACCC's ability to seek redress on behalf of foreign consumers, in accordance with the OECD's *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders*.[82]

A new non-party redress power will improve the ability of the courts to respond to situations where a large number of consumers are affected by a contravention of the consumer law. The circumstances of the case, including the number of parties involved, would determine the appropriateness of awarding redress to non-parties.

Redress for non-parties should be available when a large number of consumers suffer similar, identifiable detriment. This redress could take a number of forms, including a refund or an enforceable undertaking to honour representations that were made. The injunction should match the type of detriment suffered by the consumer. However, constitutional issues may arise at the Commonwealth level if a court of federal jurisdiction ordered compensation or damages to other non-parties. As such, a provision of this nature would need to be carefully drafted to take account of this.

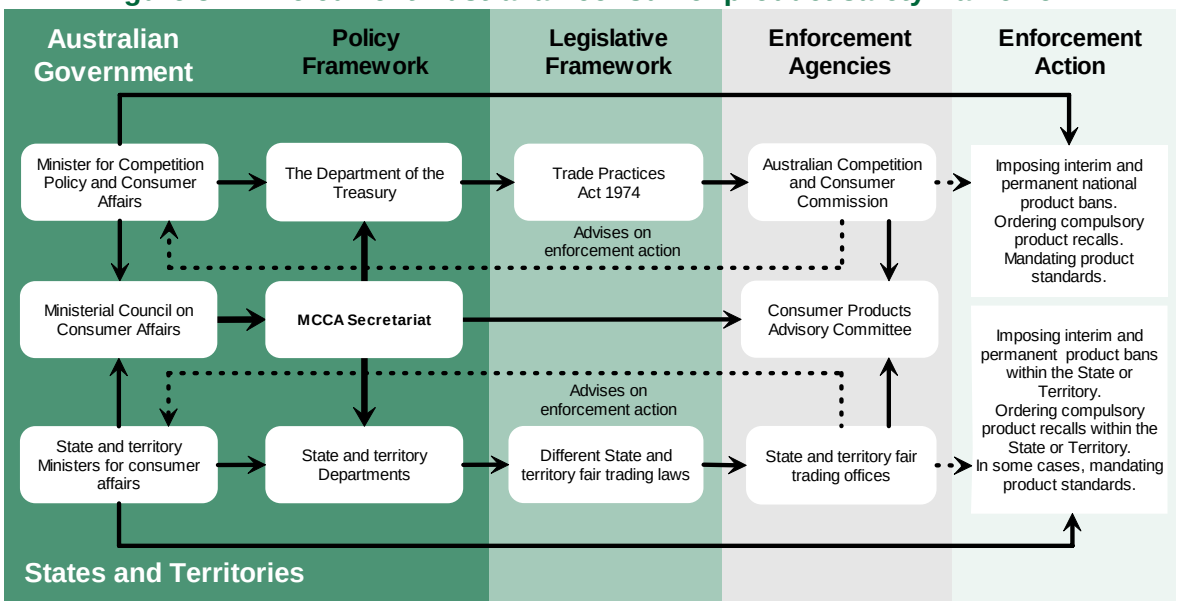
81 [2002] FCAFC 290.
82 http://www.oecd.org/document/50/0,3343,en_2649_34267_2514994_1_1_1_1,00.html.

CHAPTER 8
A NATIONAL REGULATORY REGIME FOR PRODUCT SAFETY

In May 2008, MCCA agreed to a new model for the regulation of product safety in Australia. This model was endorsed by COAG at its July 2008 meeting. The new model will be underpinned by national application legislation.

The new model will substantially simplify and streamline product safety regulation in Australia. Australia currently has a product safety regulatory system with duplicative national and state/territory responsibilities. National consumer product safety regulation is set out in the TPA and generally applies to activities undertaken by corporations, in respect of goods traded across state and territory borders, or which are traded internationally (including imported goods). Each State and Territory has its own product safety laws, which generally apply to goods traded within each State and Territory's borders and also cover activities undertaken by sole traders and unincorporated businesses. A state or territory law may cover the activities of corporations, but only to the extent that they are not inconsistent with Commonwealth laws.

Figure 8.1: The current Australian consumer product safety framework



The agreed reforms

The new product safety legislative regime will be enforced by the ACCC and the state and territory consumer regulators.

The ACCC will be responsible for recommending the making of permanent bans to the Australian Government Minister for Competition Policy and Consumer Affairs. State and territory governments will be able to impose temporary bans on products within their own jurisdiction of no more than 60 days' duration. Any decision to extend a temporary ban is a

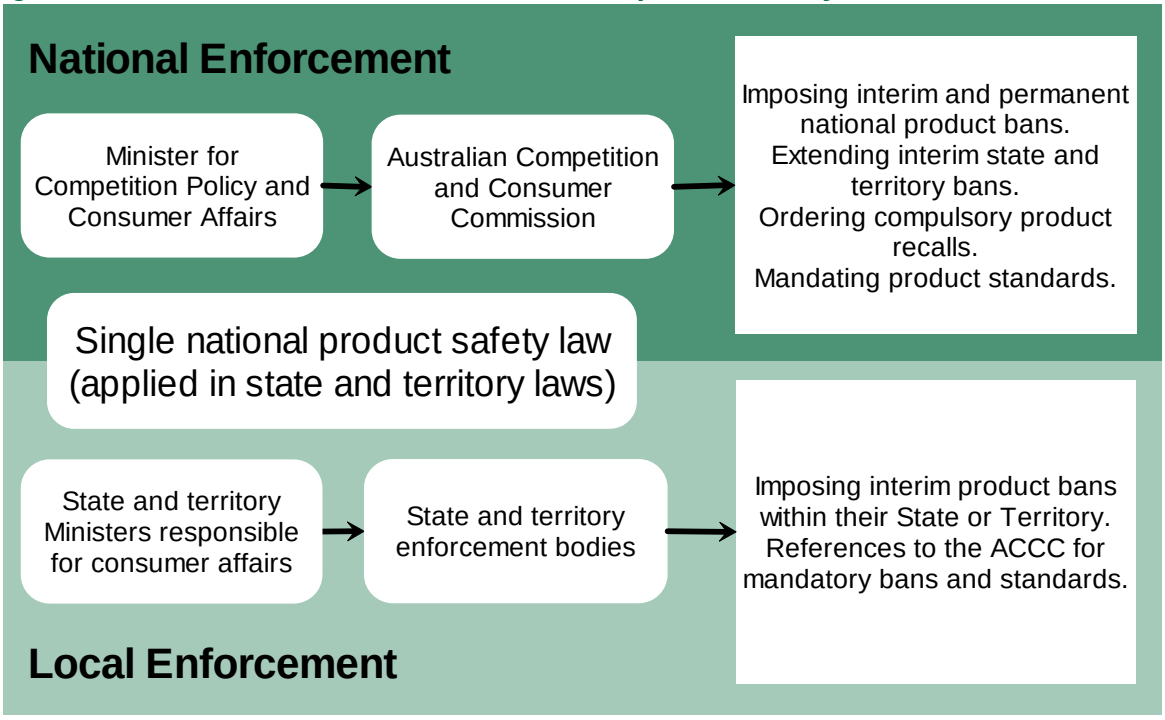
matter for the Australian Government Minister to determine at his discretion. Extensions to interim bans may be for an initial period of 30 days and an additional period of 30 days. Any State or Territory can refer the development of a proposed ban or standard to the ACCC.

The ACCC, once notified of an intention to implement an interim ban or having received a proposal for a permanent ban or standard, may make its own assessment of the need for a permanent ban or standard. The ACCC will communicate its assessment to the Australian Government Minister and to MCCA. The ACCC will report to MCCA (and the Australian Parliament, as is required of Australian Government bodies) on referrals for the development of permanent bans or standards.

The reformed product safety legislative and regulatory system will be underpinned by two fundamental elements:

- the introduction of the principal legislation to the new product safety regulatory system is subject to unanimous approval of all Australian governments; and
- the administration and ongoing maintenance of the regulatory model being underpinned by the Inter-Governmental Agreement for the Australian Consumer Law.

Figure 8.2: The reformed Australian consumer product safety enforcement framework



Implementation of the product safety reforms

Currently, Australia's national product safety provisions are set out in Division 1A of Part V of the TPA and the associated offence provisions in Division 3 of Part VC of the TPA. Each State and Territory has its own product safety laws.

The Australian Consumer Law will include new product safety provisions which will be applied in each Australian jurisdiction through application legislation. These new provisions will reflect the agreed consumer product safety reforms. With the exception of interim bans

made by the States and Territories, amendments to the application law (including regulations) would automatically be replicated in each jurisdiction.

Table 8.1: Details of the product safety reforms

Powers of the Minister for Competition Policy and Consumer Affairs (the Minister)
• The Minister may issue warning notices for a product while an investigation is underway into whether a safety or information standard is warranted. • The Minister or a State or Territory Minister may impose an interim ban on an unsafe good by a legislative instrument under the relevant jurisdiction's law (or in the Minister's case, the national law). • The Minister may impose a permanent ban on unsafe goods by regulation under the national law. Goods banned by the Minister under the national application law would be included in the *Customs (Prohibited Imports) Regulations 1956*. • The Minister may declare mandatory safety standards, with which goods must comply before they can be sold. • The Minister currently makes decisions on the advice of the ACCC. Unlike some jurisdictions, the Commonwealth has no product safety advisory committees.
Standards
• Mandatory consumer product standards for a particular class of goods may be made by regulation. There are two types of mandatory product standards: safety standards and information standards. Mandatory standards would continue to be based on existing voluntary Australia/New Zealand published standards or international standards, where appropriate. • Safety standards require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging rules; for example, construction of toys for children under three years of age.

Table 8.1: Details of the product safety reforms (continued)

Recalls

- The Minister can also order the compulsory recall of a product if the goods will or may cause injury and where it appears the supplier has not taken satisfactory action to prevent the goods causing injury to any person.
- Suppliers conducting voluntary recalls would be required to notify the Australian Government Minister only. The Commonwealth will coordinate all recalls at a national level. The ACCC would then pass details to all jurisdictions.
- Once a decision to issue a ban or compulsory recall is taken, the ACCC is currently required to give suppliers an opportunity to provide additional information through a conference process. After hearing the additional information, the ACCC may recommend to the Minister that the ban or recall remain in force or be revoked or amended.

Enforcement issues

- MCCA has agreed that the Australian Government will transfer the ACCC's ability to hold conferences in respect of bans and recalls to another independent review body.
- Currently, actions for breaches of the product safety provisions of the TPA may be taken by any party (other than the ACCC) in the Federal Court or the Federal Magistrates Court. The ACCC may instigate actions in the Federal Court.
- Currently, product safety offences are strict liability offences under Commonwealth law. Both civil remedies and criminal offence provisions exist for breaches of the product safety provisions. Consideration is being given to whether a civil penalty regime should be implemented that would apply to product safety.
- Mutual recognition arrangements will continue to apply in accordance with the national legislative *Mutual Recognition Agreement*.

Part III
Consumer law reforms based on best practice in existing state and territory laws

CHAPTER 9
SUGGESTED REFORMS BASED ON BEST PRACTICE IN STATE AND TERRITORY LAWS

The PC recommended that the consumer protection provisions of the TPA, in forming the basis of the Australian Consumer Law, be augmented or modified by reference to best practice in existing state and territory laws, where it is generally agreed that the TPA is not adequate.[83] It identified some areas of regulation, such as door-to-door sales and lay-by sales, which could benefit from this. This recommendation was included in MCCA's detailed proposals for reforms to the consumer policy framework, as accepted by COAG on 2 October 2008.

COAG reform processes to harmonise certain state and territory consumer laws

COAG has, in recent years, embarked on a number of reform processes to harmonise laws affecting consumers. These fall outside of the Australian Consumer Law development process and include:

- **trade measurement laws**, which are in the process of being referred to the Commonwealth and regulated under a single national scheme by the National Measurement Institute[84];
- **personal property securities**, where the Australian Government, in cooperation with the States and Territories, is pursuing reforms to Australia's personal property securities (PPS) law and practice which will improve Australia's business laws and to create a more competitive economy[85];
- **national business names registration**, in which the Commonwealth and the States and Territories are developing a new system to allow prospective businesses will be able to apply and pay for a national business name online through a single application covering both a business name and Australian Business Number (ABN);
- **industry-specific legislation**, in respect of which, on 3 July 2008, COAG agreed a process for reviewing industry-specific regulation across all Australian jurisdictions with a view to removing differences where possible; and
- **occupational licensing**, in respect of which, on 3 July 2008, COAG has also agreed to develop a national trade licensing system that will remove inconsistencies across state borders and allow for a much more mobile workforce.

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83 PC 2008 Rec. 4.1.

84 The *National Measurement Amendment Act 2008* passed through Parliament last year and received Royal assent on 8 December 2008. This Act provides the legislative basis for the Commonwealth, through NMI, to establish and operate a single national system of trade measurement from 1 July 2010.

85 On 13 November 2008, the draft *Personal Property Securities Bill 2008* was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report.

Suggested reforms

As part of the process for developing the policy basis for the Australian Consumer Law, States and Territories, through SCOCA, have made suggestions for provisions to augment or modify the consumer protection provisions of the TPA, based on best practice in state and territory laws. These suggestions, along with the options for their implementation, are set out in Chapters 10 and 11, along with questions about each of them.[86]

In making these suggestions, the States and Territories have identified two approaches augment or modify the existing provisions of the TPA:

- harmonising existing differences in state and territory laws to develop a uniform national legislative approach (for example, in relation to door-to-door sales or telemarketing); and
- considering whether a current TPA provision requires updating to take account of developments in the market or new regulatory approaches.

The States and Territories, in making these suggestions, have drawn on their experience in dealing with consumer protection at a local level, which has led to legislative and policy developments to deal with specific issues and concerns that may not have translated to the national level.

The status of the suggested reforms

The suggested reforms set out in Chapters 10 and 11 have not yet been agreed by the Australian Government or the governments of the States and Territories. They are set out in this document for the purposes of obtaining the preliminary views of stakeholders. The development process for the Australian Consumer Law will include opportunities for further consultation on draft legislative provisions as they are made ready.

Other potential reforms

SCOCA welcomes views on other potential reforms based on best practice in existing state and territory consumer laws, which may not be set out in this paper.

In setting out these suggestions, SCOCA notes that they will not have been the subject of detailed scrutiny through the PC's review process. Accordingly, it is important that suggestions should be considered in the light of the principles of best practice regulation (see below).

The basis for consideration of suggested reforms

In its review of Australia's consumer policy framework, the PC considered a range of specific changes to the TPA and, in doing so, considered the regulatory impact of those issues,

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86 In preparing Chapters 10 and 11, extensive reference has been made to the *Comparison of Generic Consumer Protection Legislation* commissioned by the PC from Professors Stephen Corones and Sharon Christensen, QUT (Corones & Christensen 2007) and the *Discussion Paper on implementation of the Productivity Commission's recommendations regarding a new national generic consumer law and related matters* commissioned by Victoria (on behalf the States and Territories) from Sitesh Bhojani (Bhojani 2008).

including an assessment of the consumer detriment being addressed, the impact on business and the potential benefits of reform.

The policy position of the Australian Government

In considering these proposals, the Australian Government takes the view that potential reforms should be considered subject to an appropriate regulatory impact assessment, as required by COAG.

Best practice regulation

A regulatory impact assessment has not been undertaken in relation to the proposals that are covered in Chapters 10 and 11, and they will need to satisfy the COAG's regulatory impact assessment requirements in order to be included in the Australian Consumer Law. Therefore, when considering specific proposals the following issues need to be considered:

- the nature of the problem facing consumers;
- the appropriate policy response to address these consumer issues, including non-regulatory approaches;
- what benefits may result from the change and whether these can be quantified; and
- whether the proposed change is appropriate for inclusion in a law which applies generic consumer protections on an economy-wide basis.

Questions

Are there reforms other than those covered in Chapters 10 and 11 that could be included in the Australian Consumer Law, based on existing best practice in existing state and territory laws? In making a suggestion, please address the following questions:

- What is the nature of the problem facing consumers that the suggested reform will address?
- What is the appropriate policy response to address these consumer issues, including non-regulatory approaches?
- What benefits would result from this change and can these be quantified?
- Is the suggested change appropriate for inclusion in a law which applies generic consumer protections on an economy-wide basis?

CHAPTER 10
SUGGESTED REFORMS TO DEFINITIONS

Definitions in the Australian Consumer Law

The current consumer protection provisions of the TPA and the FTAs use a range of relevant definitions, which have the effect of limiting the application of the specific Act to particular transactions and behaviour. These definitions will equally determine the application and scope of the Australian Consumer Law.

The definition of 'consumer'

The definition of 'consumer' will determine the application and scope of the consumer protection provisions of the Australian Consumer Law. It determines the application of many, but not all, of the consumer protection provisions of the TPA and the FTAs to consumer transactions.

Despite the similar objectives of consumer laws across Australia, there are significant differences between jurisdictions in how a 'consumer' is defined for the purposes of consumer protection under the TPA, ASIC Act and FTAs.

The two principal criteria used to define categories of consumers between jurisdictions are whether the goods or services are acquired for personal and domestic or business use, or the value of the goods or services purchased (most jurisdictions use $40,000 as the upper threshold).[87] The term is defined differently again under the ASIC Act in relation to investors.[88] These inconsistencies can create uncertainty for consumers and create the potential for traders, particularly in respect of distance transactions, to use the law of the jurisdiction where a 'consumer' is most restrictively defined.

Operation of the definition of 'consumer' in the TPA

Currently, the definition of 'consumer' in the TPA applies in respect of:

- the unconscionable conduct provisions (Part IVA);
- certain provisions in the unfair practices provisions (Division 1, Part V); and
- the implied conditions and warranties provisions (Division 2, Part V).

87 Corones & Christensen 2007 39-61.
88 See section 12BC of the ASIC Act.

The approaches used in the TPA and in the States and Territories

The TPA defines a 'consumer' as:

- a buyer (who is either an individual or a corporation) of any kind of goods or services with a price of no more than $40,000; or

- if the price of the goods and services is more than $40,000, they were of a kind ordinarily acquired for personal, domestic or household use or consumption, or the goods consisted of a commercial road vehicle[89].

The TPA's approach to the monetary threshold is used in the Queensland, Tasmanian and Western Australian FTAs. The New South Wales, Northern Territory and ACT FTAs do not impose a monetary threshold on the definition of 'consumer'.

Victoria applies both approaches. It does not use a monetary threshold for determining a 'consumer' for the purposes of safety and information standards, door-to-door sales, telemarketing, 'non-contact' sales, but does require that the goods or services acquired be ordinarily of a kind acquired for personal, domestic or household use or purposes.[90] No threshold applies in respect of the provisions on unconscionable conduct or unfair contracts under the Victorian FTA, but a monetary threshold of $40,000 does apply in relation to implied conditions and warranties. The Victorian FTA also uses a definition of 'consumer contract', which is used to limit the application of provisions to referral selling[91] and unfair contract terms.[92]

The definitions of 'consumer' used in the TPA and the FTAs are set out in **Attachment C**.

Resupply exclusion

The definition of 'consumer' under the TPA also requires that a person should not acquire, or hold him or herself out as acquiring, goods, irrespective of their price, for the purpose of resupply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of manufacture or of repairing or treating other goods or fixtures on land. This means that goods used by businesses that fall outside these conditions may be covered by the TPA. Similarly, any services that are acquired by a business for $40,000 or less are also covered by the TPA. Furthermore, any services ordinarily of a kind acquired for personal, domestic or household use, even if acquired for a price of more than $40,000, may be covered by the TPA.[93]

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89 The term 'commercial road vehicle' is defined by section 4B of the TPA as meaning a vehicle or trailer acquired for use principally in the transport of goods on public roads.

90 These provisions also provide that the goods should not be supplied to a purchaser who is in the business of buying or supplying those types of goods, or to a body corporate.

91 Section 18 Victorian FTA.

92 Section 32U Victorian FTA.

93 See *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493, which concerned the acquisition of mobile phone services. It may also include the acquisition of an interest in real property in the course of trade and commerce under a contract, including insurance, consultancy or royalty agreements, but not employment or lease agreements. See also *Crago v Multiquip Pty Limited* (1998) ATPR 41-620.

The FTAs contain a similar exclusion on goods or services acquired for the purpose of resupply. However, the SA FTA differs slightly in its approach in that it does not exclude goods or services for resupply, but only those purchased by a person acting in the course of a business or in the course of setting up a business.

Issues to consider

Jurisdictional differences in the definition of 'consumer' mean that there are inconsistencies as to how consumer purchases are treated. Some jurisdictions include any person or corporation which purchases goods or services for any kind of 'personal' use. This can have an expansive meaning, for example, mobile phone services, and can, in the context of business consumers, include things used for business purposes, despite their ostensibly 'personal' nature. For example, in Victoria, a corporation which purchases goods and services will be a 'consumer' for the purposes of the implied warranties provisions and unfair practices provisions but the contract itself will not be a 'consumer contract' for other purposes.

Question

Should the scope of the TPA's existing definition of 'consumer' be expanded to cover a wider range of circumstances, such as goods used in business contexts?

Moreover, in other parts of the TPA, small businesses and farming undertakings are treated either in the same way as, or in a substantially similar way to, individual consumers for the purposes of regulation, even through they may be undertaking business functions.

Question

Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings?

Similarly, certain types of goods are treated as consumer purchases for the purposes of the definition, including 'commercial vehicles' in some circumstances, and consideration could be given to retaining this approach.

Question

Should a new definition of 'consumer' cover commercial vehicles or vehicles purchased for a predominately commercial purpose?

The monetary threshold of $40,000 has been in place since 1995, without change, and consideration could be given to changing the threshold. Inflation would have increased this figure to more than $54,000 in 2007.[94] Furthermore, there is the question of whether such a threshold is needed. For example, a distinction may more usefully be drawn in relation to

94 Based on RBA inflation figures – available at www.rba.gov.au.

purchases made for business purposes and those made for personal, domestic or household purposes.

Question

Should a new definition of 'consumer' retain the monetary limit of $40,000 or should the limit be increased? If it were increased, what would be an appropriate amount?

The increasing availability of goods with multiple uses may mean that certain business consumers (for example, sole traders and small partnerships) should receive consumer protections for 'business goods', where these are used for a 'personal use'. Consideration could be given to whether the definition of 'consumer' should be widened to include:

- the purchase of business goods or services for business purposes, other than where the goods are resupplied; and/or
- business consumers or corporations purchasing consumer goods for business purposes.

Extending the definition of 'consumer' in this way may raise parallel issues about whether other key definitions that will be used in the Australian Consumer Law should be widened in a similar way. For example, in some jurisdictions 'trade and commerce' is defined, and that definition could be amended to include 'any business or professional activity'.[95]

Questions

Should a new definition of 'consumer' exclude any purchases for business purposes, regardless of the existence of monetary limits? Alternatively, should business consumers be entitled to protections available under the Australian Consumer Law, such as implied conditions and warranties?

Should a new definition retain the exclusion in relation to 'resupply'?

Are there other approaches to the way that 'consumer' can be defined?

Other definitions

The current consumer protection provisions of the TPA contain a wide range of relevant definitions, and consideration could be given to the effectiveness of these definitions as part of this reform process.

Question

Are there any other definitions currently used in the TPA in relation to consumer protection issues that require modification to improve their operation?

95 As in section 4 of the NSW FTA.

CHAPTER 11
SUGGESTED REFORMS TO PROVISIONS DEALING WITH UNFAIR PRACTICES

The Australian Consumer Law will include provisions based on Divisions 1 and 1AAA of Part V of the TPA, which address a range of unfair practices in consumer transactions. These divisions set out both general prohibitions, such as the prohibition on misleading and deceptive conduct in section 52 of the TPA, as well as more specific provisions addressing particular conduct that is considered to be wrong in all situations, such as the ban on pyramid selling in Division 1AAA.

The States and Territories, as part of SCOCA's policy development process for the Australian Consumer Law, have made a range of suggestions to augment or modify the current provisions of the TPA. These suggestions are grouped into two broad categories, which are set out below:

- suggestions to harmonise existing state and territory laws to develop a uniform national legislative approach; and

- suggestions to update a current TPA provision to take account of developments in the market or new regulatory approaches.

Suggested reforms designed to achieve national consistency

Door-to-door trading and telemarketing

All States and Territories regulate door-to-door sales and telemarketing practices and the PC suggested that these were areas in which national harmonisation could be pursued.[96]

As door-to-door and telemarketing sales calls are largely unsolicited, regulation aims to provide greater protection to consumers than they would receive when they make purchases in other retail contexts, on the basis that the consumer may be the subject of actual or perceived pressure and may not have the opportunity to compare alternative offers.

Door-to-door trading

Each State and Territory regulates door-to-door trading. Door-to-door trading generally refers to a contract for the supply of goods or services made between a purchaser and supplier at premises which are not the business premises of the supplier. What constitutes 'other than the business premises of the supplier' is specifically defined in some state and

96 These areas were also identified by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report *Harmonisation of Legal Systems within Australia and between Australia and New Zealand* (November 2006) in recommendation 16.

territory laws[97] but not in others[98], meaning that a sale made in one State or Territory may not necessarily be covered by door-to-door trading laws in another.

Existing state and territory laws have common features, namely:

- door-to-door sales calls are unsolicited;
- there are prescribed formal requirements relating to transactions arising from calls;
- calls are not to be made outside prescribed calling hours;
- contracts entered into as a result of a call are subject to a cooling-off period, additional cancellation rights and procedures for effecting cancellation;
- there are a range of exemptions and exclusions that apply; and
- they impose obligations on sellers, with which they must comply in order for a door-to-door sale to be validly completed.

Some state and territory laws have unique features:

- Victoria requires that where a consumer has cancelled a contract during the cooling-off period, a supplier is obliged not only to provide a refund, but also to return any goods traded in as part of the sale[99]; and
- Queensland allows a dealer or supplier to apply to the Fair Trading Commissioner to have their door-to-door contract, or part of that contract, exempted from the operation of the door-to-door legislation either for a limited or indefinite period of time.[100]

97 For example, see section 60 Victorian FTA.
98 For example, see section 40B NSW FTA.
99 Section 79 Victorian FTA.
100 Note that, on 2 December 2008, the Hon Kerry Shine MP, Attorney-General and Minister for Justice of the State of Queensland, introduced into the Queensland Parliament amendments to the Queensland FTA (contained in the *Criminal Proceeds Confiscation and Other Acts Amendment Bill 2008*) which will mean the Queensland Government will no longer grant exemptions under section 71A of the Queensland FTA to companies allowing them to door knock between 6 pm and 8 pm.

Table 11.1: Current state and territory door-to-door trading laws

State / Territory	Legislation	Some features of the provisions	Cooling-off period (days)	Threshold
NSW	FTA Part 4, Division 3 (Direct commerce) The provisions replaced the *Door-to-Door Sales Act 1967*	Direct commerce is the term used to apply to both door-to-door sales and telemarketing. Consumers must be given written information about the cancellation rights before the contract is made, telemarketers must give the information over the phone and follow up in writing. Consumers may cancel an agreement within the cooling-off period personally, by post, by fax or by email.	5	>$100
VIC	FTA Part 4, Division 2 (Off-business premises sales and other sales)	A sales agreement should be easy to understand and printed clearly in a minimum 10 point Times New Roman font, or minimum font of an equivalent size. The agreement must contain all terms and conditions, including fees and charges; the trader's name and business address; a notice of the cooling-off period on the front page; and a notice of the process for cancelling the sale during the cooling-off period. Traders can only visit for door-to-door sales for a maximum of one hour, written permission by the consumer can be given for a 30 minute extension. If a trader does not inform a consumer of the visiting time requirements, stays beyond the time limit without permission, does not obtain consent to visit outside prescribed times, fails to show identification or does not leave when asked, the sale may be cancelled up to three months after it is first made.	10	>$50 or unknown at the time of making the agreement
QLD	FTA Part 3, Division 4	A statement that the contract is subject to a cooling-off period must be provided in upper case writing and placed immediately above the space provided for the consumer's signature. Customers must receive a copy of the contract after they sign it, a notice explaining their right to cancel and a form which they can easily use to advise in writing that they wish to cancel, if they choose to do so within the cooling-off period.	10	>$75
WA	*Door to Door Trading Act 1987*	The terms of a contract must be printed or typed in not less than ten point type. The *Door to Door Trading Regulations 1987* prescribe that a customer must be given 'Form 1' and 'Form 2' on signing a contract. Form 1 provides details of the agreement and informs the consumer of the cooling-off period. Form 2 is a notice to rescind that can be used by the consumer to cancel the contract during the cooling-off period.	10	>$50

Table 11.1: Current state and territory door-to-door trading laws (continued)

State / Territory	Legislation	Some features of the provisions	Cooling-off period (days)	Threshold
SA	*Fair Trading Act 1987*, Part III (Door-to-Door Trading)	The agreement must be recorded as a written contract in a minimum 10 point font, and the trader must sign the contract before the consumer signs. Copies of specific forms explaining cooling-off rights and the form used to cancel the contract must be provided to the consumer. The trader must identify who the parties to the contract are and, if finance is required to purchase the goods or services, a separate contract and documents containing information about the credit arrangement must be provided. Visits to a consumer outside prescribed times are allowed by prior arrangements.	10	>$50
TAS	*Door to Door Trading Act 1986*	To cancel the agreement, the consumer must deliver the notice of cancellation to the supplier either by post or in person (not by fax or email) before the cooling-off period expires.	10	>$50
ACT	*Door-to-Door Trading Act 1991*	All agreements subject to the cooling-off period must be legible and machine-printed or typewritten.	10	>$50
NT	*Consumer Affairs and Fair Trading Act 1990* Part 7 (Door-to-door trading)	Consumers must be provided with a complete 'Right to Rescind Door to Door Contract' form at or immediately before the making of a contract.	10	>$50

Areas of divergence

Door-to-door sales provisions diverge on various points, due no doubt to the existence of eight separate regimes, each with their own jurisdiction-specific features. Key points of difference include:

- naming conventions (that is, 'distance selling' or 'non-contact sales');
- the definition of 'away from trade or business premises';
- formal requirements for constituting a door-to-door sale;
- the inclusion of a power to approve non-complying categories of sales;
- prohibited visiting hours and cooling-off periods;
- suppliers' duties whilst negotiating door-to-door sales;
- prohibitions during the cooling-off period;
- additional grounds for cancellation outside the cooling-off period;
- cancellation procedures;

- obligations of purchasers and suppliers following cancellation during the cooling-off period;
- excluded contracts;
- penalty levels;
- prohibited actions, including waiver of consumer rights; and
- approaches to dealing with harassment and coercion.

Time for calling

A trader may not call on premises:

- in all jurisdictions, except Queensland and NSW, before 9.00 am and after 8.00 pm, on any day other than a Saturday, Sunday or public holiday, unless with prior consent. In Queensland, the prohibition applies from 6.00 pm instead of 8.00 pm. The NSW Act prohibits door-to-door sales visits on all days outside the hours of 9.00 am and 8.00 pm.
- in all jurisdictions, except the ACT and NSW, at all, on a Sunday or public holiday. In the ACT, the complete prohibition on calling only applies to Good Friday, Easter Sunday and Christmas Day.
- in all jurisdictions, except NSW, at all, on a Saturday before 9.00 am and after 5.00 pm.

Cooling-off periods

The most significant consumer protection relating to door-to-door sales contracts is the cooling-off period. A cooling-off period gives the consumer time to reconsider a decision that was made under pressure or hastily, and then allows the consumer to rescind the contract within a specified time. Cancellation of a contract can generally be done in writing, by fax or email. Typically, suppliers are required to provide consumers with specified information in the contract, and failure to do so can be an offence or lead to an extension of the cooling-off period.

While most States and Territories require a 10 day cooling-off period for door-to-door trading contracts, the NSW FTA specifies five days. The information requirements for advising consumers of their cooling-off rights also vary across jurisdictions.

International approaches

As part of the development of an overarching *Consumer Rights Directive*, the European Commission is currently proposing to revise the EU's common rules on 'distance and off-premises selling'. These changes will involve:

- extending and harmonising the withdrawal (or cooling-off) period for both distance and off-premises contracts to 14 calendar days;
- amending the information requirements (including introducing a standard withdrawal form); and
- setting out requirements for the exercise of the right of withdrawal by placing obligations on both the trader and consumer. For example, consumers who exercise their right of withdrawal will have to bear the direct costs of returning goods to the trader;
- extending the provisions to cover solicited visits; and
- removing the financial threshold at which the requirements of the Directive apply.

Questions

Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different door-to-door sales regulation? If so, please provide evidence of this.

Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?

Telemarketing

All States and Territories regulate telemarketing practices. In addition, the Australian Government regulates aspects of telemarketing through the 'Do Not Call Register'. Telemarketing covers a range of practices, but the main conduct regulated is so-called 'cold calling', which is when traders and suppliers initiate contact by telephone with consumers with a view to supplying goods and services.

The primary aim of telemarketing regulation is to protect consumers who may be pressured to make purchases and, due to transactions taking place on the telephone, are unable to see the product or compare price and quality before purchasing.

NSW and Victoria regulate telemarketing practices either as part of or adjacent to the door-to-door trading provisions of their FTAs, on the basis that the business transaction is sought out or solicited by the trader in a similar way. These laws regulate the times at which calls may be made to consumers, the documents that the seller must provide and cooling-off periods before consumer contracts entered into as a consequence of a telemarketing call can be enforced. Victorian cooling-off period is similar to the uniform door-to-door sales

provisions which still apply in most States and Territories. The NSW FTA provides for a cooling-off period of 5 days, in line with its door-to-door sales provision.

The ACT, Tasmania and Western Australia interpret 'door-to-door trading' as a trading practice by which a person goes from place to place or makes telephone calls, seeking out persons who may be prepared to enter, as consumers, into contracts for the supply of goods and services and that person then or subsequently enters into negotiations with those prospective customers with a view to the making of contracts.

Western Australia and Queensland's consumer enforcement agencies also endorse compliance with the Australian Direct Marketing Association's Code of Practice. South Australia is in the process of implementing new laws on telemarketing.

Table 11.2: State and territory telemarketing laws

State/ Territory	Telemarketing practices legislation
NSW	FTA Part 4, Division 3 (Direct commerce)
VIC	FTA Part 4, Division 2A (Telephone marketing agreements) and 3 (Non-contact sales agreements)
QLD	FTA Part 3, Division 4 (Door-to-door sales)
WA	*Door to Door Trading Act 1987*
SA	FTA Part III (Door-to-Door Trading) (the *Fair Trading (Telemarketing) Bill 2008* was introduced into the SA Parliament on 27 November 2008).
TAS	*Door to Door Trading Act 1986*
ACT	*Door-to-Door Trading Act 1991*
NT	*Consumer Affairs and Fair Trading Act 1990*, Part 7 (Door-to-door trading)

The Do Not Call Register

The Australian Government is responsible for the national Do Not Call Register (DNCR), which came into being in 2006. This provides consumers with the ability to register their telephone numbers on a central database, and businesses that contact a number on the DNCR may be the subject of financial penalties. There are exceptions for organisations operating in the public interest, such as government bodies, religious organisations, charitable institutions, political parties and independent members of parliament.

Once registered, the only circumstances in which a call may be made to a person on the DNCR is where the person has provided consent to be called by the business. The *DCNR Regulations 2006* prescribe types of calls that are not considered to be telemarketing calls, and the circumstances in which a person is deemed the nominee of an account holder for the purpose of giving consent to receiving telemarketing calls. The *DNCR Standards* outline when telemarketing and research calls cannot be made, information that must be provided during a call, when calls must be terminated and the use of calling line identification (these requirements supersede any state and territory requirements).

Spam

The Commonwealth *Spam Act 2003* regulates the sending of commercial electronic messages such as email or SMS to consumers. Under the *Spam Act* such messages can only be sent with the consent of the recipient and need to include a functional unsubscribe facility and accurate sender information. Some organisations such as government bodies, religious organisations, charitable institutions, political parties and educational institutional are exempt from the consent and unsubscribe requirements.

Questions

Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different telemarketing regulation? If so, please provide evidence of this.

Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?

False and misleading representations

Section 53 of the TPA provides that a corporation must not, in trade or commerce, and in relation to the supply or possible supply of goods or services, or to the promotion of goods or services, make:

- false representations that:
  - goods are of a particular standard, quality, value, grade, composition, make or model, or have had a particular history or particular previous use, or that they are new;
  - services are of a particular standard, quality, value or grade;

  - a particular person has agreed to acquire goods or services; or
  - goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- false or misleading representations:
  - with respect to the price of the goods or services;
  - concerning the availability of facilities for the repair of goods or of spare parts for the goods;
  - concerning the place of origin of the goods;
  - concerning the need for any goods or services; or
  - concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 53 applies to representations that relate to the supply or promotion of goods and services in all circumstances and in all sectors of the economy. Sections 53A (false representations in relation to land) and 53B (false representations in relation to employment) regulate transactions involving land and employment, due to concerns that these are not goods and services.

The FTAs contain additional prohibitions on representations made in a specific context. For example, section 12 of the Victorian FTA currently prohibits the making of a false or misleading representation:

- about the production, manufacture, preparation or supply of any goods;
- which is unnecessary for the reasonable care and maintenance of any goods; or
- that is false, misleading or deceptive in any material particular.[101]

Section 12 of the Victorian FTA also covers false or misleading representations made in a broader range of situations by applying to representations in connection with advertisements about the supply or possible supply of goods and services.

Likewise, section 44 of the NSW FTA contains additional prohibitions to those currently contained in section 53 of the TPA, namely:

- false representations related to obligations and rights under residential tenancy for a moveable dwelling;
- false representations in relation to a person's rights or obligations under a retirement village contract; and

101 See sections 12(l)-(n) of the Victorian FTA.

- false representations in relation to a person's rights or obligations under a holiday occupation agreement.

Suggested changes to the range of prohibitions in relation to false and misleading representations could include:

- false or misleading representations concerning claims of discounted goods;
- false or misleading representations concerning the availability of refunds or unqualified claims that no refunds are given;
- false or misleading representations concerning 'closing down' sales; and
- false or misleading representations concerning claims that items are on sale.

Question

Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined above?

Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?

Asserting a right to payment for unsolicited goods or services or for making entry in directory (false billing)

False billing practices usually involve individuals and businesses receiving letters or calls requesting payment for goods and services that have never been ordered. A common practice is to seek urgent payment from businesses for advertisements that are claimed to be due to appear in local business directories, on websites or as part of 'official' government publications.

The approach used in the TPA

Section 64 of the TPA prohibits a corporation from asserting a right to payment:

- from a person for unsolicited goods or services unless the corporation has reasonable cause to believe that there is a right to that payment; or
- from any person for the making in a directory[102] of an entry relating to the person or to his or her profession, business, trade or occupation unless the corporation knows or has reasonable cause to believe that the person has authorized the making of the entry.

Examples of the types of unsolicited goods or services covered by section 64 of the TPA include the following practices:

- sending consumers goods which were not ordered and then demanding payment;

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102 'Directory' includes any publication of a similar nature to a directory but does not include a newspaper published in good faith as a newspaper at regular intervals or a publication published, or to be published, by or under the authority of the Australian Telecommunications Commission.

- tradespeople and repairers doing unrequested work and then demanding payment from the occupier; and

- promoters of directories sending invoices to companies for directory entries which had never been authorised, including fake invoices.

Under section 64 of the TPA, a corporation is deemed to have asserted a right to a payment from a person for unsolicited goods or services, or to a charge for the making of an entry in a directory, if the corporation:

- makes a demand for the payment or asserts a present or prospective right to the payment;

- threatens to bring any legal proceedings with a view to obtaining the payment;

- places or causes to be placed the name of the person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment;

- invokes or causes to be invoked any other collection procedure, or threatens to do so, with a view to obtaining the payment; or

- sends any invoice or other document stating the amount of the payment or setting out the price of the goods or services or the charge for the making of the entry and not stating as prominently (or more prominently) that no claim is made to the payment, or to payment of the price or charge, as the case may be.

Section 64 of the TPA requires written authorisation signed by the person from whom payment is sought as proof that they requested the making of an entry in a directory. In the absence of such authorisation, a person who honours a request for payment for making a directory entry is entitled to recover that payment despite not having authorised that entry. The requirement for written instruction is aimed at preventing false billers from claiming payment on the basis of an alleged verbal authorisation for an advertisement, an allegation that can be hard to disprove.

State and territory approaches

The requirements in sections 64 and 65 of the TPA are reproduced to some extent in state and territory laws.[103] Section 59 of the NSW FTA and section 25 of the Victorian FTA provide that a person who receives unsolicited goods pay for those goods or for any loss or damage caused to the goods other than that resulting from a wilful and unlawful act done by the recipient if the goods remain in their possession for:

- three months from the day on which the goods were supplied to the person; or

- one month from the day on which the person notifies the supplier in writing that the goods are unsolicited and must be collected.

There is otherwise a substantial difference to the current approach in the TPA, particularly in the Victorian FTA. For example, the Victorian FTA makes particular provision for unsolicited

103 Section 65 of the TPA is similar to section 25 of the Victorian FTA and section 59 of the NSW FTA.

services.[104] Section 27 of the Victorian FTA, which addresses the right to payment for unauthorised advertisements as well as entries, imposes more detailed requirements for any written authorisation obtained from a person. For example, this authorisation must include:

- the name of the publication, the area of circulation, and total number of copies circulated;
- the name and business address of the publisher and the person on whose behalf the publication is published;
- the particulars of the entry;
- the dates on which the entry is to appear, and
- the charge for entry.

In 2006, NSW adopted new provisions in its FTA, designed to strengthen controls on false billing.[105] The amendments drew on the approaches of the Victorian and Queensland FTAs[106], notably:

- the prohibition on demanding payment for publishing an advertisement without written authority (with certain exceptions for newspapers and other large publications); and
- the provision that a person shall be taken to be demanding payment for unsolicited goods or services or a directory entry if they send a document stating the price, unless the document contains a prominent statement saying 'THIS IS NOT A BILL. YOU ARE NOT REQUIRED TO PAY ANY MONEY.'

This latter requirement clarifies whether a false biller actually intended to demand money, as the absence of the prescribed statement will be taken as proof of that intention.

Both the NSW and the Victorian FTAs provide for exemptions to this requirement for publishers that could never realistically be regarded as scammers. Section 27(5) of the Victorian FTA therefore does not apply to a publication which is published by:

- a large proprietary company;
- a subsidiary of such a company or a listed corporation or a subsidiary of such a corporation;
- the publisher of any publication which has an audited circulation of 10,000 copies or more per week, or a person which is a related body corporate to such a person;
- a servant of the Crown, a body corporate which represents the Crown or a Council; or
- any other prescribed person,

where the person has not been found guilty of an offence under section 24.

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104 See section 26 Victorian FTA. Note that this does not require written authorisation to be obtained.
105 See section 58A NSW FTA.
106 See section 52(5A) Qld FTA, which prescribes a warning statement to be included on any solicitations for payment. This warning statement was adopted within section 58A NSW FTA.

Table 11.3: Section 64 of the TPA compared with state and territory laws

State or territory law	State and territory provisions
NSW FTA	Section 58 (Assertion of right to payments for unsolicited goods or services, or for making entry in directory) NSW FTA Section 58A (Assertion of right to payments for unauthorised advertisements) NSW FTA
VIC FTA	Section 24 (Right to payment for unsolicited goods or services) Section 25 (Liability of recipient of unsolicited goods) Section 26 (Liability of recipient of unsolicited services) Section 27 (Right to payment for unauthorised entries or advertisements) Section 28 (When right to payment deemed to be asserted)
QLD FTA	Section 52
WA FTA	Section 29
SA FTA	Section 72 (Right to payment for unsolicited goods etc)
ACT FTA	Section 29
NT FTA	Section 58

Questions

Is section 64 of the TPA effective in its current form?

How could it be improved for inclusion in the Australian Consumer Law by reference to existing state and territory approaches or otherwise?

Approving or banning third-party trading schemes

A third party trading scheme is where a consumer acquires goods or services and as a result becomes entitled to goods or services from a third party. Schemes involving the accumulation and redemption of points as a consequence of the use of credit or store cards can be forms of third party trading schemes. The ability to ban such schemes is an expansion of restrictions on 'trading stamps' which have existed in state and territory laws for many years.

Part II, Division 4 of the WA FTA and Part 9 of the SA FTA allow the Minister either to prohibit or approve upon application any third-party trading scheme. The criterion for prohibition in the WA legislation is that a 'scheme is not genuine and reasonable or is contrary to the interests of consumers'. SA recently banned a third-party trading scheme due to extremely long waits for redemptions and the use of complicated conditions that had to be satisfied in order for the customer to receive the goods.[107] Part 5A of the NSW FTA retains a differently worded prohibition on certain 'trading stamp schemes and similar schemes'.

107 http://www.ocba.sa.gov.au/assets/medicomms/mrelease_cashback_aus.pdf.

Question

Should the Australian Consumer Law include a provision regulating third-party trading schemes? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Mock auctions

Mock auctions posed a significant problem for consumers throughout the 1960s and early 1970s. Mock auctioneers would entice consumers to pay more for goods than their real value, whereby non-genuine bids would be included in an auction process to drive the price up. Generally, mock auctions occur if, during the course of a sale:

- goods are sold for less than the highest bid made by the purchaser, or part of the purchase price is repaid or credited to the purchaser;
- the right to bid for any lot is restricted to persons who have bought or agreed to buy other goods; or
- any articles are given away or offered as gifts.

Sales of goods would not be considered mock auctions if a reduction in price or repayment was on account of a defect being discovered after the highest bid and the auctioneer was unaware of the defect beforehand or damage occurred after the bid.

Table 11.4: State and territory mock auction provisions

State / Territory laws	Mock auction provisions
NSW FTA	Section 51A
VIC FTA	Sections 30-31
QLD FTA	Section 56
WA *Auction Sales Act 1973*	Section 25
SA FTA	Section 28

Nowadays, mock auctions occur rarely and the provisions regulating them are generally considered by state and territory consumer agencies to be inoperative.

Question

Should mock auctions continue to be prohibited?

If so, should the Australian Consumer Law include a provision prohibiting mock auctions? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Lay-by sales

What are lay-by sales?

Lay-by sales are provided by retailers in all States and Territories. Lay-by sales involve an agreement between the consumer and the supplier to purchase goods and pay for them by instalments over an agreed period of time before taking delivery. A lay-by sale is the supply of goods on terms that provide:

- the goods will not be delivered to the consumer until the whole of the price has been paid; and
- the price is required or allowed to be paid by three or more instalments (for this purpose the deposit is considered an instalment).

Lay-by is particularly attractive to low-income consumers who may have difficulty in obtaining credit. It may also be an attractive purchasing option to general consumers who have already reached their credit limits or who want to buy an expensive good without needing to save the entire amount prior to committing to its purchase.

Existing state and territory laws

The FTAs of New South Wales and Victoria and the ACT's *Lay-by Sales Agreements Act 1963* have specific provisions for lay-by sales, which provide for:

- legislated requirements for terms and conditions, such as statement of purchase price and deposit paid, dates on which instalments are due, the balance outstanding, and cancellation charges;
- a procedure for cancellation by supplier and consumer;
- the effect of cancellation; and
- cancellation charges.

The remaining States and Territories publish guidelines for consumers and suppliers, which are based on their respective Sale of Goods Acts, the common law, or catch-all provisions in their FTAs.

Table 11.5: State and territory laws regulating lay-by sales

State/ Territory	Legislation	General details
NSW	FTA Part 5B	Consumers must be given a written statement, containing the terms or a summary of the terms of the lay-by, when the lay-by is entered into. Consumers may cancel a lay-by by notifying the supplier in writing, but only before the goods are delivered. Suppliers may accept the cancellation in forms other than writing. The supplier may cancel the lay-by if the consumer breaches a term of the lay-by. The supplier must first give the consumer notice that the lay-by will be cancelled if the consumer does not rectify the breach within a specified period. The period must not be less than seven days. When a lay-by is cancelled, either by the supplier or the consumer, the supplier must refund all money, excluding any cancellation charge specified in the lay-by statement. The cancellation charge cannot exceed a reasonable amount.
VIC	FTA Part 5	A lay-by contract must be clear and legible and, if in print or type, not less than 10 point in size. The contract must include: - a full description of the goods being purchased; - the total price of the goods; - the amount of the deposit paid and the amount of the outstanding balance; - details of when additional payments are due (for example, monthly, weekly); - cancellation fees, if any, and how they are calculated; - the trader's details, name and business address; and - any other terms or conditions. The trader must give a copy of the contract to the consumer and both must sign it. A trader is committing an offence if aware (or should be aware) that the goods placed on lay-by are unavailable. If the trader will not accept a verbal cancellation from the consumer, a form complying with the requirements set out in the Victorian FTA must be provided. If the consumer fails to meet the requirements set out in the contract, the trader may cancel the lay-by. The trader must first send a notice outlining how the requirements have not been met and allowing 14 days for the consumer to meet them. Any cancellation fee set out in the contract will apply. However, cancellation charges must not exceed a reasonable amount.
ACT	*Lay-by Sales Agreements Act 1963*[108]	A seller may not enter into a lay-by sales agreement unless the goods are in his possession. The lay-by sales agreement must be in writing. The seller must keep records of the agreement for 12 months from the date of the transaction. The agreement is to be given to the buyer. The Act also makes provision for: - appropriation of payments; - conditions and warranties; - setting aside of goods; - passing of property; - non-delivery; - determination of agreements; and - maintaining funds in a trust account.

108 The Consumer Advocacy and Financial Counselling Association of Victoria (Inc.) (CAFCA) noted in its 1994 report into lay-by sales that the ACT Consumer Affairs Bureau suggested 'that many traders have been in breach of the Act only because of their inability to understand its provisions'. Given the complexity of the legislation, this does not seem improbable. CAFCA (1994) *Why Lay-by?* Appendix p 8.

Questions

Do businesses operating across Australia use different terms and conditions for lay-by sales depending on whether there is regulation? If so, please provide examples of these terms and conditions.

Does the level of complaints about lay-by sales received by such businesses vary across jurisdictions depending on the existence of regulation?

Should the Australian Consumer Law include a provision regulating lay-by sales? If so, should this provision reflect the current regulatory approaches used in NSW, Victoria and/or the ACT?

Offering gifts and prizes

The TPA and the FTAs include provisions dealing with the issue of offering gifts and prizes. For example, section 43 of the Queensland FTA provides that:

> *'A person shall 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, offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.'*

Section 54 of the TPA is in a similar form.

Section 16 of the Victorian FTA includes an additional requirement that a person offering gifts or prizes must provide that gift or prize within a reasonable time of making the offer. This is designed to make it clearer to distinguish a breach of the provision. It also shifts the focus from proving that, at the time of the offer, the person had the intention of either not providing the gift or prize or not providing them as offered, to a requirement of proof of the fact that the gift or prize was not delivered within a reasonable time.

Question

Should the Australian Consumer Law modify the existing form of section 54 of the TPA along similar lines to section 16 of the Victorian FTA?

If an approach like that in section 16 of the Victorian FTA were adopted, should a 'reasonable time' be defined? If so, what would a reasonable time be?

Suggestions for updating current TPA provisions to take account of market developments or new regulatory approaches

An evidentiary provision regarding representations as to future matters

Section 51A of the TPA imposes certain evidentiary rules in relation to proceedings for unfair practices under Division 1 of Part V of the TPA. It provides that where, without reasonable grounds, a corporation makes a representation with respect to any future matter (including

doing, or refusing to do, any act), the representation will be presumed to be misleading. Equivalent provisions also exist in the FTAs.[109]

The practical effect of section 51A of the TPA is that a corporation will be deemed not to have had reasonable grounds for making a representation with respect to a future matter unless it produces evidence to the contrary. The circumstances surrounding these representations are often matters within the knowledge of the person or corporation making the representation and it is difficult to obtain conclusive proof of dishonesty or recklessness from the surrounding circumstances without an admission of guilt from the defendant.

The provision is intended to assist in establishing that a representation is 'misleading' for the purposes of sections 52 and 53 of the TPA. However, a similar evidentiary presumption is not available in relation to representations that are 'false' or 'deceptive'.[110]

A suggested addition to the Australian Consumer Law is that the operation of section 51A of the TPA should be extended to cover false and deceptive representations, particularly in the light of the usefulness of section 51A to consumer protection enforcement.

Question

Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law?

It is also suggested that the relationship between section 51A and the accessorial liability provisions of the TPA (such as sections 75B or 80(1)) could be clarified in the Australian Consumer Law. For example, the decisions of the Federal Court in *Quinlivan v ACCC*[111] and *ACCC v Universal Sports Challenge Pty Ltd*[112] held that the deeming provision in section 51A does not apply to a person who claimed to be an accessory under section 75B of the TPA. However, the decision in *ACCC* v *Global Prepaid Communications Pty Ltd*[113] should also be noted, as the Court found that, unlike for natural persons, there is an argument available that the liability of the corporation should be decided in accordance with section 51A for all purposes, including assessment of accessorial liability.

Question

Should the provisions of section 51A of the TPA be amended to further clarify their relationship with the accessorial liability provisions of the TPA?

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109 See sections 11 ACT FTA, 41 NSW FTA, 41 Consumer Affairs and Fair Trading Act (NT), 37 Qld FTA, 54 SA FTA, 11 Tasmanian FTA, 4 Victorian FTA and 9 WA FTA.

110 Note for example, *ACCC v Purple Harmony Plates Pty Ltd* [2001] FCA 1062 at par [21] where the ACCC's case based on section 53(c) of the TPA was not successful because it could not rely on section 51A of the TPA.

111 [2000] FCAFC 175.

112 [2002] FCA 1276.

113 (2006) ATPR 42–103 at p 44, 857 par [46] per Gyles J.

Pyramid selling

The existing approach in the TPA

Division 1AAA of Part V of the TPA defines and prohibits (in section 65AAC) practices generally known as 'pyramid selling' and section 75AZO of the TPA creates an equivalent criminal offence. Pyramid selling schemes are where a person makes a payment on joining the scheme and, in doing so, is induced to join the scheme (at least in part) on the basis that if they successfully introduce a new member to the scheme, then they will receive a payment.

A pyramid selling scheme under the TPA provisions requires a 'participation payment' by a new participant to another participant in the scheme, which is entirely or substantially induced by the prospect of a 'recruitment payment' for introducing further participants (a 'recruitment payment' being 'a payment in relation to the introduction to the scheme of further new participants').

In defining a 'pyramid selling scheme' the TPA provides that one should have two characteristics:[114]

> *'to take part in the scheme, some or all new participants must make a payment to another participant or participants in the scheme, known as a participation payment, and'*
>
> *'participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled to receive a payment, known as a recruitment payment, if they introduce further new participants to the scheme.'*

The Victorian approach to pyramid schemes

A suggested change to the approach in the TPA could be to use the approach in the Victorian FTA, which could address concerns about specific schemes characterised as 'multi-level marketing schemes', but which may also bear many of the hallmarks of pyramid selling schemes.

A key issue with legislation prohibiting pyramid selling schemes is how it distinguishes legitimate multi-level marketing schemes (LMLMS) from illegitimate pyramid selling schemes. The purpose of a LMLMS is the sale of a good or service, with recruitment payments simply being the incentive to attract more sellers into the scheme to sell more products. The purpose of a pyramid selling scheme is to get more people into the scheme to maximise recruitment payments.

Section 22 of the Victorian FTA provides that a person must not establish, promote or take any part in a pyramid selling scheme or induce another person to do so. In doing so, the Victorian FTA adopts a different definition of a 'pyramid selling scheme'. A pyramid selling scheme under the Victorian provisions requires:

- a person to make a payment to participate in a scheme;
- that person to receive a payment for:
  - inducing or enabling another person to participate in the scheme; or

114 Section 65AAD(1) of the TPA.

  - assisting or enabling participants to be promoted within the scheme; or

  - providing participants with or enabling them to be provided with training, facilities or other services; and

- goods or services supplied under the scheme bear no reasonable relationship to their value.

Section 22 of the Victorian FTA also provides that specific schemes may be exempted from the provision by the Governor-in-Council.

Issues with the current approach in the TPA

In raising this issue, some States and Territories have noted a number of concerns about the current approach in the TPA:

- by defining a recruitment payment as a payment *in relation to* the introduction to the scheme of further new participants, the TPA may be said to cast the net too widely and capture LMLMS, which are legitimate schemes under case law. A proposed alternative would be that '*in relation to*' should be replaced with '*for*'. However, the corollary of this may be to enable pyramid scheme operators to convince courts that they come within the LMLMS exemption.

- the TPA provisions centre on the requirement that the participation payment be *entirely or substantially* induced by the prospect that the payer will receive recruitment payments. The burden of proving beyond reasonable doubt (that is, to the criminal standard of proof) that participation payments fall within this definition has, in practice, proved very onerous for those prosecuting pyramid scheme operators. That is, many pyramid schemes involve a recruitment payment plus some other inducement (for example, cheaper telephone charges, investment advice, website construction kits or some other incidental product intended to give the impression that they are LMLMS). Hence, if the defendant leads evidence that participants made their participation payments largely because of the prospect of receiving these inducements, with the prospect of recruitment payments being an insubstantial or incidental matter, it is very hard to disprove this, particularly to the criminal standard of proof.

The Victorian provisions approach the issue of these other inducements differently:

- they require the existence of a participation payment and a recruitment payment to constitute a pyramid selling scheme, without any nexus such as that the participation payment be entirely or substantially induced by the prospect of a recruitment payment; and

- they exclude a scheme involving a payment for goods or services if the payment bears a reasonable relationship to the value of the product (which is the definition of an LMLMS in Victoria).

In addition, the Victorian *Magistrates Court Act 1989* places the onus of proof on defendants who wish to rely on an exception, such as the LMLMS exception, to adduce evidence that 'suggests a reasonable possibility of the existence of facts that, if they existed, would establish the exception.' This is not a very high evidentiary burden to overcome, but relieves

the prosecution from having to bear the entire burden of proof and ensures that a defendant must be required to produce some evidence that they are a legitimate LMLMS.

The TPA provisions attempt to provide for the concept of 'reasonable relationship' by allowing the court, in deciding whether a participation payment is entirely or substantially induced by the prospect of a recruitment payment, to have regard to the extent to which the participation payment bears a reasonable relationship to the value of the product that participants are entitled to under the scheme. However, this is currently a discretionary consideration.

Example: *Australian Communications Network Pty Ltd v ACCC (2006)*

The ACCC was ultimately unsuccessful in showing that the marketing scheme in *Australian Communications Network Pty Ltd v Australian Competition and Consumer Commission*[115], was a pyramid selling scheme for the sale of retail telecommunications services.

The Full Federal Court found that multi-level marketing was a key element of ACN's business. Participants, called 'Independent Representatives', were paid commissions on the billings paid by customers that they had signed up. The Independent Representatives also received a commission on the billings of customers signed up by other Representatives, who had been recruited by the Independent Representatives (known as 'Downstream Independent Representatives').

The payments received by Independent Representatives were not solely based on the recruitment of Downstream Independent Representatives, and there had to be a billing to a customer for the acquisition and use of the telecommunications services. Accordingly, ACN's scheme was found not to be a pyramid selling scheme as there was a genuine underlying economic activity, in the form of the sale of the telecommunications services.

Question

Are the current pyramid selling provisions in the TPA effective? How could they be improved?

Accepting payment without intending to supply

Section 58 of the TPA provides that it is an offence for a corporation, in trade and commerce, to:

- accept payment for goods or services it does not intend to supply;
- accept payment for one kind of good or service when the corporation intends to supply something different; and

115 (2006) ATPR 42-090; (2005) ATPR 42-0674.

- accept payment for goods or services when there are reasonable grounds, of which the corporation ought to be aware, that it will not be able to supply the goods or services paid for either within the period specified, or if no period was specified, within a reasonable time.

Section 19 of the Victorian FTA takes a strict liability approach to this issue. Rather than applying to intended failures to supply, which focus on what a corporation was thinking or knew at the time it accepted payment for goods or services, the Victorian FTA focuses on actual failures to supply or on the actual supply of materially different goods or services within the period of time specified by the supplier or within a 'reasonable' time. [116]

Question

Should the claimant in an action relating to accepting payment without intending to supply be required only to prove that the supplier failed to supply the goods after accepting payment?

Should a maximum limit be imposed on the amount or percentage of the purchase price that may be taken as a deposit for goods that have been ordered, but not yet delivered?

Dual pricing

State and territory approaches

Section 40 of the NSW FTA[117] provides that a supplier should not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices. A price for these purposes is 'attached' when it:

- is a price annexed or affixed to, or printed, stamped or otherwise located on the goods;
- appears on a display or stand for the goods;
- is encoded on the goods;
- is published in any catalogue available to the public (unless the catalogue can reasonably be regarded as out of date); or
- in any other way represented as a price applicable to the goods.

Under section 40 of the NSW FTA, where a consumer has picked an item bearing two prices, it is an offence for the trader to sell it at the higher price. The aim is to deter traders from misleading consumers into purchasing goods at a price higher than the lowest marked price. Conversely, if the trader does not want to sell it at the lower price, they have the right to withdraw it from sale altogether. This protects traders from loss due to error (where an incorrect price has inadvertently been displayed) or attempted fraud, for example, where a

116 The SA Government's recent review of the SA FTA has proposed a similar approach be adopted for section 67 of the SA FTA: see http://www.ocba.sa.gov.au/assets/files/fair_tradingdis.pdf.

117 The ACT has a substantially similar provision which also includes a defence of accident where all reasonable precautions are taken.

price label from a cheaper product has been placed onto a higher value product by a consumer.

Section 40 of the NSW FTA is mainly enforced in relation to supermarket barcode scanning. The *Voluntary Code of Practice for Computerised Checkout Systems*[118], administered by the Australian Retailers Association, reinforces the dual pricing provision. It clearly spells out retailers' obligations in this area and applies to a significant range of supermarkets and food stores.

Dual-priced goods may not necessarily have more than one price marked directly on them. The provision covers a broad range of pricing methods, including labels, shelves, displays, catalogues and encoding, for example, in a barcode, computer or cash register.

A recent review[119] noted that the NSW dual pricing provisions appear to function effectively and that, in any case, the NSW Office of Fair Trading receives few complaints on this subject. Submissions made to the review did not raise any concerns about the effectiveness of the provision. It was also noted that the provision does not appear to have had any impact on competition, since it applies to all NSW retailers. Nor does the provision appear to impose any unwarranted costs on traders, given that it is a matter of good business practice to ensure that products and coding systems are accurate. By contrast, incorrect pricing would increase the level of customer complaints a trader receives, thereby increasing complaint handling costs.

The current position under the TPA

The TPA does not contain a provision equivalent to section 40 of the NSW FTA and dual pricing is not, of itself, a contravention of the TPA. However, court decisions have found that the representation of a previous price needs to be accurate and it needs to have been a true price for a reasonable amount of time.[120]

Question

Is there a need to introduce a specific provision into the Australian Consumer Law to provide that a supplier must not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices?

Provisions relating to mandatory disclosure

Effective information disclosure plays an essential role in enabling consumers to make informed decisions about goods or services. Mandatory information disclosure is intended to mitigate information asymmetries facing consumers when purchasing goods and services, In doing this, it also serves to improve consumer confidence and fair competition.

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118 See www.retail.org.au.

119 NSW Office of Fair Trading (2002) *National Competition Policy Review, Fair Trading Act 1987 & Door to Door Sales Act 1967 Final Report*; 2002; http://www.fairtrading.nsw.gov.au/pdfs/About_us/ftadtdreport.pdf.

120 See for example *Australian Competition and Consumer Commission v Prouds Jewellers Pty Ltd* [2008] FCA 75 (15 February 2008) and *Australian Competition and Consumer Commission v Ascot Four Pty Ltd* [2008] FCA 1295 (21 August 2008).

The FTAs already make provision for disclosure of certain information in specific types of transactions (such as door-to-door sales and telephone sales) and, in the case of the Victorian FTA, the need for such information to be set out clearly and comprehensibly. In addition to mandatory information standards, there are also voluntary standards that apply in specific sectors.

The Victorian FTA includes a range of provisions which could be considered as the basis for a nationally consistent approach to mandatory information disclosure. These are:

- the requirement for consumer documents to be clear[121];
- the requirement for a business to include its address in a consumer document[122]; and
- the requirement to provide receipts for itemised bills.[123]

These provisions are set out in **Attachment D**.

An additional factor to be taken into account is the potential for information 'layering', which is providing key information at specific times in the life of a transaction. For example, in an online transaction the vendor may show the cumulative price of a basket of goods and then disclose any taxes payable close to the end of the transaction. National consistency in this area could simplify compliance for businesses and ensure consumers are adequately and appropriately informed about key aspects of the transaction at the most appropriate time.

Clarity in consumer documents

Section 163 of the Victorian FTA provides that certain consumer documents (principally contracts) are required to adhere to certain standards. These include:

- being easily legible;
- if printed or typed, being in a minimum of a 10 point font; and
- being clearly expressed.

Similarly, the *Corporations Act 2001* (Cth) also contains clarity requirements in relation to specific types of documents, including offer documents (section 1019I), disclosure documents (section 715A), Financial Services Guides (section 942C) and Product Disclosure Statements (section 1013C). In those and certain other sections, identical wording is used to require that specified documents 'must be worded and presented in a clear, concise and effective manner', although they do not require the use of specific font sizes.

In *Matrix Pilates*[124], a decision in relation to section 163 of the Victorian FTA, the Victorian Civil and Administrative Tribunal (VCAT) held that while particular terms were not 'particularly difficult to read', they were nonetheless 'ambiguously expressed, or expressed in a way which disguises their true effect' and, therefore, in breach of the section. VCAT also

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121 Section 163 Victorian FTA.
122 Section 29 Victorian FTA.
123 Section 161A Victorian FTA.
124 *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482 (17 March 2008); declarations at [2008] VCAT 1332 (14 July 2008).

noted that while the font size used was impermissibly small, 'the use of this small type renders the document '*not easily legible*' within the terms of [the] section', suggesting that if the size requirement were breached, so too was the legibility requirement. VCAT did not make a declaration in respect of both provisions, suggesting that in the absence of penalties only one or the other is necessary.

Matrix Pilates also concerned claims under Victoria's unfair contract terms law, and Consumer Affairs Victoria's *Guidelines on unfair terms in consumer contracts*[125] note that section 163 serves to complement Victoria's unfair contract terms provisions, because many unfair terms are also often presented in a way which means consumers cannot properly understand them.

Sections 52 and 53 of the TPA and corresponding provisions in the FTAs already prohibit conduct which is misleading and deceptive and the making of false and misleading representations. Section 52 of the TPA is a provision of wide application and courts have interpreted this section as broadly prohibiting conduct which induces, or is capable of inducing, error.[126] This could include conduct which presents information to consumers in a way which has the effect of misleading or deceiving them or misrepresenting the true position.

While section 52 of the TPA applies to all types of conduct, there is no national provision that generally addresses the issue of illegible or ambiguously worded or presented documents.

Question

Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

Address to be included in documents

Consumer detriment can be difficult to deal with in circumstances where suppliers deliberately withhold or conceal information about their address. This can take the form of simply not providing information at all or only providing limited information, such as a post office box number.

Section 29 of the Victorian FTA requires that a supplier must provide the name and physical address of the person publishing a document, statement or advertisement in respect of the actual or potential supply of goods or services. In addition, if the business is licensed or registered, then the relevant registration number should be provided.[127]

Section 23 of the Tasmanian FTA requires statements intended or likely to promote the supply of goods or services, which include a reference to a private box number, to include the name and address of the place of business or residence of the person by whom the private box number is rented or was obtained. In the other States and Territories, the

125 (2007) 2nd Edition, p 6.
126 See for example, *Parkdale Custom Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.
127 Section 29 of the Victorian FTA does not apply in relation to the supply of prostitution services, as defined under the *Prostitution Control Act 1994 (Vic)*.

requirement tends to arise in the context of the regulation of specific practices, such as door-to-door sales.[128]

Question

Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

Providing receipts for itemised bills

Section 161A of the Victorian FTA allows a purchaser to whom services have been supplied to request an itemised bill within 30 days after receipt of a bill or account from the supplier. If the account relates to a contract for goods or services up to $50 in value, a purchaser to whom the goods or services were supplied may also request proof of transaction.[129]

Question

Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

Requirement to return replaced parts

The TPA does not require a supplier to return removed parts where they are being repaired or maintained.

A suggested addition to the Australian Consumer Law is the inclusion of a new provision based on section 162 of the Victorian FTA. Section 162 provides that a person who permanently removes a part from goods which he or she is repairing or maintaining in trade or commerce (whether or not he or she also replaces the part):

- must offer to return the removed part at or before the return of the goods; and
- must return the removed part, if the owner asks for the part to be returned, within a reasonable time of the return of the goods to the owner.

This requirement does not apply if no charge is imposed for removing the part or for replacing and fitting the part.

Question

Should the Australian Consumer Law include a provision requiring a supplier to return replaced parts along the lines of section 162 of the Victorian FTA?

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128 For example, section 40J NSW FTA, which requires a door-to-door dealer to identify themselves, including their address (not being a postal box).

129 In contrast, accounts exceeding $50 in value must be accompanied by proof of the transaction. See section 161A(4) Victorian FTA.

Liability of recipient of unsolicited services

At present, section 65 of the TPA provides for liability of a recipient of unsolicited goods, but not services. Section 26 of the Victorian FTA extends this provision to services:[130]

> *'A person to whom unsolicited services are supplied by another person, in trade or commerce, is not liable to make any payment for the services and is not liable for loss or damage as a result of the supply of the services.'*

Question

Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

130 Section 26 Victorian FTA.

Part IV
Implementation and review

CHAPTER 12
IMPLEMENTING THE NATIONAL CONSUMER LAW

The establishment and modification of the Australian Consumer Law

The Australian Consumer Law is to be supported by an Inter-Governmental Agreement between the Australian Government and the governments of the States and Territories. This will set out the various administrative mechanisms for the implementation and ongoing maintenance of the Australian Consumer Law.

In the first instance, the initial text of the Australian Consumer Law will be agreed by the Australian Government and the governments of the States and Territories and approved by COAG. It has been agreed that this process will be completed by 30 June 2010.

Subsequently, the generic consumer protections covered in the Australian Consumer Law may require modification or augmentation. The process for the agreement of such changes was proposed by MCCA at its 15 August 2008 meeting and ratified by COAG on 2 October 2008. MCCA agreed that this process would be set out in the Inter-Governmental Agreement and would require amendments to the Australian Consumer Law to be agreed by the Australian Government plus four governments of the States and Territories, of which three must be States.

Enforcement arrangements

The implementation of the Australian Consumer Law will require changes to the interactions between consumer law enforcement agencies in each Australian jurisdiction. While each jurisdiction will retain a role in the enforcement of generic consumer protections, the introduction of national consistency in laws will increase the need to ensure that investigation and enforcement actions are coordinated by national, state and territory enforcement agencies. To this end, enforcement agencies will develop formal agreements that cover arrangements for communication between them and the coordination of their activities. These arrangements will harmonise and improve upon the cooperation mechanisms already in place between enforcement agencies.

In some cases, enforcement agencies will be also required to develop consistent national guidance for businesses and consumers on specific issues. In its detailed proposals, MCCA agreed that enforcement agencies would develop national guidance on the enforcement of the new unfair contract terms provisions, in accordance with a process set out in the Inter-Governmental Agreement.

CHAPTER 13
REVIEW OF ENFORCEMENT POWERS

In its review of Australia's consumer policy framework, the PC recommended that the new enforcement powers be reviewed, with explicit consideration of the benefits and costs of moving to a single national regulator model for all of the law, having regard to:

- any evidence that differing enforcement practices or regulatory 'break-out' are leading to divergent outcomes for consumers and businesses across Australia;
- experiences and outcomes in any jurisdictions that have referred their powers of enforcement for the new national generic consumer law to the Australian Government; and
- the implications of any shifts in enforcement responsibility for industry specific consumer policy to the national level.[131]

In its detailed proposals, MCCA agreed that such a review should take place after seven years.

131 PC 2008 Rec. 4.5.

ATTACHMENT A
JOINT COMMUNIQUÉ — MINISTERIAL COUNCIL ON CONSUMER AFFAIRS

Friday 15 August 2008

The Ministerial Council on Consumer Affairs (MCCA) held its twentieth meeting in Hobart today. MCCA comprises Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading, consumer protection laws, trade measurement and credit laws.

Members of the Council are:

Hon David Llewellyn MHA (Chair, Tasmania)
Hon Chris Bowen MP (Commonwealth)
Hon Tony Robinson MP (Victoria)
Hon Linda Burney MP (New South Wales)
Hon Kerry Shine MP (Queensland)
Western Australia (in caretaker mode)
Hon Gail Gago MLC (South Australia)
Mr Simon Corbell MLA (Australian Capital Territory)
Dr Chris Burns MLA (Northern Territory)
Hon Judith Tizard MP (New Zealand)

Apologies were received from Dr Chris Burns MLA, Mr Simon Corbell MLA, the Hon Sheila McHale MLA and the Hon Judith Tizard MP.

MCCA's objective

MCCA's objective is to provide the best and most consistent protection for Australian consumers through its consideration of consumer affairs and fair trading issues of national significance and, where possible, development of consistent approaches to those issues.

MCCA's principal strategies

To achieve this objective, MCCA's principal strategies are to facilitate and encourage:

1. nationally coordinated and consistent policy development and implementation by all jurisdictions, including legislative consistency of major elements of consumer protection law and emerging policy issues (*Policy and Legislative Harmonisation*);

2. consistency of policy and enforcement decisions for the suppliers of goods and services within a national marketplace (*Consistent Enforcement*);

3. access to education and information for consumers and suppliers (*Education*);

4. co-operation and consultation on consumer policy between Australia and New Zealand (*Australia/NZ Co-operation)*; and

5. research into consumer concerns and trade practices *(Research)*.

MCCA is supported by a Standing Committee of Officials of Consumer Affairs (SCOCA).

MCCA considered a range of consumer issues in the context of these strategies. Outcomes of the meeting included:

Enhancing Australia's Consumer policy Framework: Reform Proposals

Today the Ministerial Council on Consumer Affairs (MCCA) agreed a series of proposals for far-reaching consumer policy reform. In doing so, the Ministerial Council responded to the Council of Australian Government's (COAG) request that the Business Regulation and Competition Working Group (BRCWG), in cooperation with MCCA, develop enhanced national approaches for Australia's consumer policy framework, drawing on the final report of the Productivity Commission (PC).

MCCA has taken this opportunity to build on its high-level commitments made in May 2008 and reach in-principle agreement on a range of policy initiatives designed to provide greater national consistency in Australia's consumer laws, their enforcement and the way in which those laws are developed. This represents a cooperative approach by the States and Territories to work with the Commonwealth to develop national reforms. The PC estimated that taking these steps could result in benefits to Australian consumers of between $1.5 billion and $4.5 billion a year.

In proposing these reforms, MCCA recognises that while Australia's current consumer policy framework has strengths, it is in need of significant improvements to overcome existing inconsistencies, gaps and duplication in Australia's consumer legislation and its enforcement. Australian consumers can benefit from consistent national coverage by a uniform national consumer law, and by coordinated enforcement action, providing them greater confidence in Australia's product and service markets. In this way, Australian governments can build on the structural market reforms of the past 15 years, to better enable consumers to drive competitive, efficient and well-functioning markets in future.

In agreeing to these proposals, MCCA seeks to build on its earlier agreement to introduce a new national product safety regulation and enforcement system, which was confirmed by COAG at its 3 July 2008 meeting, and also the agreement of the State and Territories to transfer their responsibilities for the regulation of consumer credit to the Commonwealth. The development of increasingly national consumer product and service markets means that Australian consumers will benefit from uniform national consumer policy, legislative and enforcement frameworks.

The Ministerial Council proposes that COAG consider the following reform proposals, which would form the basis of an enhanced consumer policy framework for Australia to be agreed by COAG at its 2 October 2008 meeting. These policy proposals have been developed through a process led by the Commonwealth, in which the States and Territories have been actively involved.

A national consumer policy objective

Effective national consumer policy requires common adherence by the Commonwealth, the States and the Territories to a single national objective. With this in mind, the Ministerial Council proposes that all Australian governments should agree to a common, overarching objective for consumer policy based on the Productivity Commission's proposed objective:

> *'To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.'*

Ministers further propose that this overarching objective should be supported by six operational objectives for consumer policy:

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

A national consumer law

The keystone of the proposed enhanced national consumer policy framework is a single national consumer law, which represents best practice regulation. A single national consumer law will enhance individual consumer well-being, further assist in the development of a single national economy, reduce burdens on business and facilitate well-functioning markets, to the benefit of all Australian consumers and businesses.

The Ministerial Council proposes that all Australian governments should agree to adopt a new national consumer law, which operates in all Australian jurisdictions and which remains consistent. This law should be based on the current consumer protection provisions of the *Trade Practices Act 1974* (TPA) and also incorporate appropriate amendments reflecting best practice in state and territory legislation.

The Ministerial Council further proposes that:

- the new national consumer law should be developed by the agreement of all Australian governments and made law through an application legislation scheme, with the Commonwealth as the lead legislator and the States and Territories applying the new national consumer law (as amended from time to time) as part of their own laws;
- national consumer law provisions should apply to all sectors of the economy. However, Ministers also recognise that existing constitutional issues may mean that the financial services sector will need to retain a distinct legislative framework. In this regard,

Ministers note the Commonwealth's position that there should be an ongoing commitment by the Australian Government to consistency between the national consumer law's provisions and consumer provisions in credit and financial services laws, to the extent that it is practicable to do so; and

- amendments to the national consumer law must be agreed by governments according to an Inter-Governmental Agreement, which will provide, among other things, for the amendments to be agreed by the Commonwealth plus four state and territory governments, of which three must be states, noting that these arrangements will require endorsement by COAG on 2 October 2008.

Unfair contract terms

As part of the proposed national consumer law, the Ministerial Council proposes that it should include a provision that addresses unfair contract terms. The provision should have the following features:

- 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;

- 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). Detriment is not limited to financial detriment;

- it would relate only to standard form (ie non-negotiated) contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not;

- it would exclude the upfront price of the good or service, using the approach currently adopted in regulation 6(2) of the United Kingdom's *Unfair Terms in Consumer Contracts Regulations 1999*; and

- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment (or the substantial likelihood thereof), with suppliers also potentially liable to damages for that detriment, along with other remedies available under the *Trade Practices Act 1974*.

The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms, in keeping with the PC's recommendation that representative actions be improved.

The provision should also permit the prescription of certain terms that are, in all circumstances, considered to be unfair. This regulation making power would rest with the Australian Government Minister, who would prescribe terms in accordance with the national consumer law amendment process set out in the Inter-Governmental Agreement and the requirements of regulatory impact assessment.

The provision should be supported by national guidance on its enforcement, developed by the national and state and territory regulators, in accordance with a process set out in the Inter-Government Agreement.

Transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts.[132]

The operation and effects of the new provision should be reviewed within seven years of its introduction.

Enforcement of the national consumer law

In implementing a new national consumer law, the Ministerial Council recognises the importance of ensuring that enforcement arrangements can address the needs of all Australian consumers effectively, including the most vulnerable and disadvantaged. In this respect, Ministers are mindful of the findings of the PC, which concluded that current enforcement arrangements could be greatly enhanced.

To this end, Ministers propose that:

- enforcement of the national consumer law will be shared between the ACCC and the state and territory offices of fair trading, supported by formal agreements between these enforcement bodies that cover arrangements for communication between them and the coordination of their activities;

- at the Commonwealth level, ASIC will have primary responsibility for the enforcement of consumer laws relating to financial services, and the States and Territories will retain their enforcement powers in this area, and ASIC will assume primary responsibility for enforcing national consumer credit laws; and

- all enforcement arrangements should be reviewed by COAG within seven years after the commencement of the new national consumer law.

The Ministerial Council also proposes that enforcement and redress powers for regulators should be enhanced under the national consumer law, as recommended by the PC and as previously agreed by the Ministerial Council, through the inclusion of civil pecuniary penalties, disqualification orders, substantiation notices and public warning powers and infringement notices (to the extent permitted by relevant Commonwealth and state and territory laws and policies). Consumer regulators should also be able to take representative actions on behalf of consumers not party to court proceedings and have the power to gather evidence until substantive proceedings have commenced.

Ministers recognise the need for consistent and timely national information as a basis for improving the general understanding of existing and developing consumer policy issues. To this end, the Ministerial Council proposes that the consumer regulators should be required to report annually to it, in a nationally consistent manner, on common enforcement issues, or consumer issues arising from their enforcement activities.

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132 Consideration of the interaction of an unfair contract terms provision and industry-specific measures, such as the *Telecommunications (Standard Form of Agreement Information) Determination 1999*, will need to be taken into account during the consultation and development stages of this reform.

The Ministerial Council recognises that consumer law enforcement bodies need to share information in order to provide comprehensive enforcement coverage. To this end, it proposes that all Australian consumer regulators consistently participate in the AUZSHARE complaints database.

Consumer information

The Ministerial Council also recognises that consumers must access a range of consumer law enforcement bodies and other bodies providing consumer assistance and advice. In keeping with the PC's recommendation, the Ministerial Council also proposes that the Commonwealth would work in consultation with state and territory governments to develop an enhanced national web-based information tool for guiding consumers to the appropriate dispute resolution body, as well as providing other consumer information. It should be subject to consumer testing to ensure that it is easy to use and has the appropriate content.

Consumer research and advocacy

Ministers recognise the importance of evidence-based policy, supported by robust research and effective stakeholder advocacy. To this end, Ministers propose that the Commonwealth will work with the States and Territories to further develop the effectiveness of consumer representation and consumer policy research nationally.

Review of sector specific laws

The Ministerial Council notes the Productivity Commission's recommendation that the BRCWG, in consultation with MCCA, should oversee a process to identify unnecessary or divergent industry-specific consumer regulation with a view to repealing or harmonising it across jurisdictions where beneficial, and that the BRCWG has commenced a process to do this.

Other issues for noting

In making these proposals, the Ministerial Council also notes that a number of other areas of consumer policy are being considered and developed as part of other processes:

- Ministers note that implied warranty and condition laws, including a consideration of 'lemon' laws, require review (as agreed by the Council on 23 May 2008), and further note that, as a part of the incorporation of these provisions into the national consumer law, further steps should be taken to educate consumers and business as to their rights and responsibilities by Australian governments.

- Ministers note that the Commonwealth Attorney-General is considering initiatives to improve access to justice for all claimants in Commonwealth courts, including consumers, and agrees that the Commonwealth will work with the States and the Territories to consider enhancements to the procedures of small claims courts and tribunals so as to create greater national consistency for consumer law actions, as well as considering the need for changes to arrangements for class actions in the Federal Court of Australia.

- Ministers note that SCAG is currently considering legal aid policy and funding in the context of COAG's new framework for Commonwealth-State relations.

- Ministers propose that Australian governments should review the effectiveness and consistency of alternative dispute resolution (ADR) schemes both within and across industry sectors throughout Australia.

Progress on other recommendations

Ministers also propose that COAG should note that:

- the Australian Government is working with the States and Territories to implement a new product safety system in line with COAG's decision in July 2008 and that this process will be completed by mid-2010; and

- the Ministerial Council's National Education and Information Advisory Taskforce is currently pursuing an evaluation of the effectiveness of publicly available consumer information.

Implementation

Ministers have given preliminary consideration to the issue of implementing these reforms, and have agreed an indicative implementation plan to propose to the BRCWG, with a proposed date for completing the policy development and implementation process by the end of 2011. Ministers recognise that there is a need for much of the detail of these proposals to be further developed as part of the policy development and implementation process and further note that individual jurisdictions are already engaged in discussions to identify the scope of this work.

Update on Consumer Product Safety Reform

MCCA noted that at its meeting on 3 July 2008, the Council of Australian Governments endorsed the model for reform of product safety regulatory arrangements that was recommended by MCCA at its May 2008 meeting. The revised regulatory arrangements will be implemented by mid-2010.

MCCA recognised the significant work undertaken to harmonise existing bans and standards.

National Trade Licensing

Ministers expressed support for a national system of occupational licensing underpinned by cooperative state and territory legislation.

A national licensing system will introduce uniform requirements across Australia and will allow businesses and individuals to move seamlessly between jurisdictions without the need for multiple licences. Some of the first occupations to move to the proposed national system will be electricians, property agents, plumbers and builders.

Ministers noted that the Chair of MCCA would write to the COAG Skills Recognition Steering Committee requesting that it consult with state and territory Consumer Affairs Ministers on the proposed model for national licensing and the Intergovernmental Agreement.

MCCA Governance

Ministers have agreed that they will review the role, function and governance arrangements of the Ministerial Council to ensure the successful delivery of an enhanced national consumer policy framework.

ATTACHMENT B
GENERIC PROVISIONS IN STATE AND TERRITORY LAWS SIMILAR TO TPA PROVISIONS

Note: This table is intended to compare provisions which cover the same or similar issues. It is not intended to suggest that provisions are necessarily drafted in the same terms.

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Act binds the Crown	2A(1) 2B	12AD(1)	3(1)	7	5	4	3	12	-	3
Liability of the Crown	2A(3)	12AD(3)	3(2)	7(a)						3(1)
Definition of 'consumer'	4B, 60	12BC	5	6		48	6	5	6	5
Unconscionable conduct within the meaning of the unwritten law	51AA	12CA(1)								
Unconscionable conduct	51AB	12CB(1)	43	39	8	57	11	15	13	43
Unconscionable conduct in business transactions	51AC	12CC			8A			15A		
Exceptions	51								87A	
Interpretation (unfair practices)	51A	12BB	41	37	4	54	9	3(7)-(9)	11	41
Misleading and Deceptive conduct	52	12DA	42	38	9	56	10	14	12	42
False or misleading representations	53	12DB	44	40	10-12	58	12, 13	16	14	44
False representations etc in relation to land	53A	12DC	45	40A		59	12, 13	17	15	45
Misleading conduct in relation to employment	53B		46	41	13	60	14	18	16	46
Cash price to be stated in certain circumstances	53C	12DD	47	42	15	61	15	21A	17	50
Offering gifts and prizes	54	12DE	48	43	16	62	16	19	18	51

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Misleading conduct to which Industrial Property Convention applies	55		49	44	10	63	17	20	19	47
Certain misleading conduct in relation to services	55A	12DF	50	45	11	64	18	21	20	48
Bait Advertising	56	12DG	51	46	17	65	19	22	21	52
Referral selling	57	12DH	52	47	18	66	20	26A	23	53
Accepting payment without intention or ability to supply as ordered	58	12DI	53	48	19	67	21	24	24	54
Misleading representations as to certain business activities	59		54	49	20	68	22	25	25	49
Harassment and coercion	60	12DJ	55	50	21	69	23	26	26	55
Unsolicited credit and debit cards	63A	12DL	57	-	23	71	28	27	28	57
Assertion of right to payment for unsolicited goods or services or for making entry in directory	64	12DM	58	52	24, 27, 28	72	29	-	29	58
Liability of recipient of unsolicited goods	65	-	59	53	25	73	31	-	30	59

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Application to information providers	65A	12DN	60	51	32	74	63	28	31	60
Pyramid selling	65AAA-65AAE	12DK	60S, 60T, 60U	55D	22	70	24	26B	25A, 25B, 25C, 25D	60A, 60B, 60C, 60D
Product safety — Warning notice to the public	65B		86A(1)(a)		58, 162A		49			8A
	65C(5)									
	65C(7)		cf 31	85	35, 36, 39, 40, 43		51 23Q & 23R of the *Consumer Affairs Act 1971* (WA)			30
Product information standards	65D		39	82	46		58, 59, 60, 62 23U *Consumer Affairs Act 1971* (WA)			39
Power of Minister to declare product safety and information standards	65E		26 (safety) 38 (info)	81 (info) 83 (safety)	34 (safety) 47 (info)		50 (safety) 59 (info) 23U CAA (safety)			25 (safety) 38 (info)

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Compulsory product recall	65F		35 and 36		50		54			33, 34
Compulsory product recall (circumstances for reduction of refund)	65F(2)		36A		52		54(3)			34(4)
Compulsory product recall (repair of recalled goods)	65F(4)		36B(1)		51(1)		54(5)			34(1)
Compulsory product recall (replacement of recalled goods)	65F(5)		36B(2)		51(2)		54(6)			34(2)
Compulsory product recall (compliance with product recall order)	65G		36C		53					35
Loss or damage caused by contravention of product recall order	65H		36F(3)		54		56(3)			31

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Opportunity for conference before certain powers exercised	65J		36(1)-(4)		57		55(2) 23E (*Consumer Affairs Act 1971*)			
Recommendation after conclusion of conference	65K		36 (5)		58		55			
Exception in case of a danger to the public	65L						55			
Conference after goods banned	65M									
Recommendation after conclusion of conference	65N		36							
Minister to have regard to recommendation	65P						55			
Power to obtain information, documents and evidence	65Q		20	35 (general power to inspect)	Section 118	77	19 (*Consumer Affairs Act 1971*)			8
Notification of voluntary recall	65R		36D		49		54(10)			36(3)

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Notices	65S		36E		50(4), 58(3), 35(3), 37, 41, 42		49			36
Certain action not to affect insurance contracts	65T		37	109A	56		57			40
Conditions and warranties — conflict of laws	67	12EA								
Application of provisions not to be excluded or modified	68	12EB	40M	79	32L	8 (*Consumer Transactions Act 1972*)	34			68
Limitation of liability for breach of certain conditions and warranties	68A	12EC			32MA		35			69
Limitation of liability in relation to supply to recreational services	68B		40M(3)		32N					68A
Implied undertakings as to title, encumbrances and quiet possession	69		40O	15 (*Sale of Goods Act 1896*)	32G, 32GA	6 (*Consumer Transactions Act 1972*)	36	17 (*Sale of Goods Act 1896*)	12 (*Sale of Goods Act 1952*)	62

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Supply by description	70		40P	16 (*Sale of Goods Act 1896*)	32H	6(3) (*Consumer Transactions Act 1972*)	37	18 (*Sale of Goods Act 1896*)	18 (*Sale of Goods Act 1954*)	63
Implied undertakings as to quality or fitness	71		40Q	17 (*Sale of Goods Act 1896*)	32I	6(4) (*Consumer Transactions Act 1972*)	38	19 (*Sale of Goods Act 1896*)	19 (*Sale of Goods Act 1954*)	64
Supply by sample	72		40R	18 (*Sale of Goods Act 1896*)	32HA	6(4)(b) (*Consumer Transactions Act 1972*)	39	20 (*Sale of Goods Act 1896*)	20 (*Sale of Goods Act 1954*)	65
Warranties in relation to supply of services	74	12ED	40S		32J	7 (*Consumer Transactions Act 1972*)	40			66
Actions against importers and manufacturers — interpretation	74A(2)		40T(2)							72(2)
	74A(3)		40T(3)							72(4)
	74A(4)		40T(7)							72(7)
Unsuited goods	74B		40U							73
False descriptions	74C		40V							74
Unmerchantable quality	74D		40W		31I					75

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Non-correspondence with samples	74E		40X							76
Failure to provide facilities for repair and parts	74F		40Y							77
Non-compliance with express warranty	74G		40Z							78
Right to seller to recover from importer or manufacturer	74H		40ZA							79
Time for commencing actions	74J		40ZB		142					80
Application not to be excluded or modified	74K		40ZC							81
Limitation in certain circumstances of liability of manufacturer to seller	74L									82
Offences	79	12GB	62	92, 92A, 92B, 93	142	75	69-70	33	41	88
Enforcement and recovery of certain fines	79A								42	
Preference for compensation for certain victims	79B	12GCA								

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Injunctions	80	12GD	65	98	149-151C	83	74, 75, 76	34	44	89
Stay of injunctions	80AB									
Actions for damages	82	12GF	68	99	159	84	79	37	46	91
Findings in proceedings to be evidence	83	12GG	69		157	91(8)-(9)	80	38	47	92
Conduct by directors, servants or agents	84	12GH	70	95	143, 144	90	82	39	48	93
Defences	85	12GI	71	97	155	88	83	40	49	94
Jurisdiction of courts	86	12GJ		103 (Supreme court)						
Limit on jurisdiction of the Federal Magistrates Court	86AA			103(3)						
Transfer of matters	86A	12GK								
Transfer of matters to the Family Court	86B	12GL								
Non-punitive orders	86C	12GLA								
Punitive orders — adverse publicity	86D	12GLB			153					
Other orders	87	12GM	72	100	158	85	77	41	50	95

	TPA	ASIC Act	NSW	QLD	VIC	SA	WA	TAS	ACT	NT
Power of the court to prohibit payment or transfer of moneys or other property	87A	12GN	73	102	154		78	42	51	96
Enforcement of undertakings	87B	93AA	73A	91K	146				51A	
Proportionate liability for misleading and deceptive conduct — Application	87CB	12GP								
Certain concurrent wrongdoers not to have benefit of apportionment	87CC	12GQ								

ATTACHMENT C
DEFINITIONS OF 'CONSUMER'

TPA	Section 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; (iii) 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. (2) For the purposes of subsection (1): (a) the prescribed amount is $40,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount; (b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services; (c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been: (i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services; (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or (iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the goods or services at that time; (d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been: (i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier; (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

TPA (continued)	(iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and (e) without limiting by implication the meaning of the expression ***services*** in subsection 4(1), the obtaining of credit by a person in connection with the acquisition of goods or services by him or her shall be deemed to be the acquisition by him or her of a service and any amount by which the amount paid or payable by him or her for the goods or services is increased by reason of his or her so obtaining credit shall be deemed to be paid or payable by him or her for that service. (3) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services. (4) In this section, ***commercial road vehicle*** means a vehicle or trailer acquired for use principally in the transport of goods on public roads.
NSW FTA	**Section 5 Meaning of 'consumer'** (1) In this Act, a reference to a consumer is a reference to a person who: (a) acquires goods or services from a supplier, or (b) acquires an interest in land, other than land used, or intended to be used, or apparently intended for use, for industrial or commercial purposes. (2) Goods or services referred to in subsection (1) do not (except for the purposes of section 43) include goods or services acquired, or held out as being acquired, for re-supply or, in the case of goods, in the course of a business other than a farming undertaking for the purpose of: (a) consuming or transforming them by a process of manufacture or production, or (b) using them for the repair or treatment of other goods or of fixtures on land. (3) In this section:**'farming undertaking'** includes: (a) the raising of stock to provide meat or other food for human consumption, and (b) any agricultural, pastoral, horticultural, orcharding or viticultural undertaking.
VIC FTA	**Section 3 Definitions** **consumer contract** means an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services; **Section 8A — Unconscionable conduct in business transactions** (1) A person must not, in trade or commerce, in connection with— (a) the supply or possible supply of goods or services to another person (other than a listed public company); or (b) the acquisition or possible acquisition of goods or services from another person (other than a listed public company)— engage in conduct that is, in all the circumstances, unconscionable. (2) This section only applies to— (a) the supply or possible supply of goods or services to a person; or (b) the acquisition or possible acquisition of goods or services by a person — whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce. (3) — (8) … **Section 32U relating to Unfair Contract Terms** *consumer*, in relation to a consumer contract, means a person to whom goods or services have been or are to be supplied under the contract. **Section 32D Part 2A (Implied Conditions & Warranties) applies to certain kinds of contracts** (1) In this Part a reference to a contract of supply of goods or services is a reference to a contract of supply of goods or services where the cash price of the goods or services— (a) is not more than $40 000; or

VIC FTA (continued)	(b) is more than $40 000 and the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption. Note The definition of *supply* in section 3 includes supply by way of lease. **Section 32DA Part 2A (Implied Conditions & Warranties) does not apply to certain kinds of contracts** (1) In this Part a reference to a contract of supply of goods or services does not include a reference to— (a) a contract of supply of goods where a purchaser purchases, or holds out as purchasing, the goods for the purpose of re-supply; or (b) a contract of supply of raw materials or goods that are ordinarily acquired for the purposes of repairing or treating other goods or fixtures on land or being incorporated in other goods, where a purchaser purchases, or holds out as purchasing, the goods for the purpose of transforming them or incorporating them in other goods, in trade or commerce, in the course of— (i) a process of production or manufacture; or (ii) repairing or treating other goods or fixtures on land; or (c) a contract of supply of services where the purchaser of those services has contracted to provide those services, or goods or services including those services, to a third person; or (d) a contract of supply of goods or services entered into before the commencement of section 11 of the *Fair Trading (Amendment) Act 2003*. (2) Sections 32NA, 32O, 32P and 32PA do not apply to a contract of supply by way of lease of goods. (3) In subsection (1) a reference to the re-supply of goods purchased from a person includes a reference to— (a) a supply of the goods to another person in an altered form or condition; and (b) a supply to another person of goods in which the first-mentioned goods have been incorporated.
QLD FTA	**Section 6 Meaning of consumer** (1) In this Act-- consumer means a person who, in a particular transaction, whether a separate contract or separate transaction within a contract, acquires goods or services or an interest in land as a consumer. (2) A person acquires goods or services or an interest in land as a consumer under subsection (1) if-- (a) the person-- (i) is an individual; and (ii) acquires the goods, services or interest otherwise than for a business carried on by the person, whether as an individual or a member of a business partnership; or (b) the price of the goods, services or interest is not more than $40000, after discounting for any GST payable on the supply of the goods, services or interest. (3) If a person acquires goods for resupply by way of sale, exchange, lease, hire or hire-purchase, the person does not acquire the goods as a consumer. (4) For the purposes of subsection (2)(b), if the price of goods or services or an interest in land cannot be decided by reference to a cash price specified in the contract concerned, the price is taken to be the reasonable cash price having regard to the circumstances of the case. (5) If it is claimed in a proceeding or about an issue under this Act that a person is a consumer of particular goods or services or an interest in land, it must be presumed unless the contrary is proved that the person is a consumer of the goods, services or interest.

WA FTA	**Section 6 Consumers** (1) In this Act, a reference to a consumer is a reference to a person — (a) who for the purposes of the *Consumer Affairs Act 1971* would be a consumer within the meaning of that term as defined in section 4 of that Act; and (b) who acquires, or proposes to acquire — (i) goods or services; or (ii) an interest in land, not being land used, or intended to be used, or apparently intended for use, for industrial or commercial purposes. (2) 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 vehicle, and the person did not acquire the goods, or hold himself 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. (3) For the purposes of subsection (2) — (a) the prescribed amount is $40 000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount; (b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services; (c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been — (i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services; (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services — the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or (iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services — the value of the goods or services at that time; (d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been — (i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier; (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier — the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or (iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services — the value of the goods or services at that time.

WA FTA (continued)	(4) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods, services or land, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to the goods, services or land. (5) In this section, ***commercial vehicle*** has the meaning given by section 5(1) of the *Credit Act 1984*.
SA FTA	'consumer' means a person who— (a) acquires, or proposes to acquire, goods or services; or (b) purchases or leases, or proposes to purchase or lease, premises, not being a person acting in the course of a business or in the course of setting up a business;
TAS FTA	**Section 5 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. (2) For the purposes of subsection (1) — (a) the prescribed amount is $40 000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount; and (b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services; and (c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been — (i) the price at which, at the time of acquisition, the person could have purchased from the supplier the goods or services without the other property or services; or (ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services, the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or (iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services, the value of the goods or services at that time; and (d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been — (i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier; or

TAS FTA (continued)	(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier, the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or (iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services, the value of the goods or services at that time; and (e) without limiting the meaning of the expression 'services' in section 3, the obtaining of credit by a person in connection with the acquisition of goods or services by the person shall be deemed to be the acquisition by the person of a service and any amount by which the amount paid or payable by the person for the goods or services is increased by reason of the person so obtaining credit shall be deemed to be paid or payable by the person for that service. (3) In this section, 'commercial road vehicle' means a vehicle or trailer acquired for use principally in the transport of goods on public roads.
ACT FTA	**Section 6 Consumers** (1) For this Act, a ***consumer*** is a person who acquires goods or services from a supplier. (2) A person is not a ***consumer*** for this Act if, in the course of a business, he or she acquires, or holds himself or herself out as acquiring, goods or services from a supplier for the purpose of— (a) resupplying them; or (b) using them up or transforming them in or in connection with a process of manufacture or production; or (c) repairing or treating other goods or fixtures on land. (3) If it is alleged in any proceedings under this Act or in any other proceedings in relation to a matter arising under this Act that a person was a consumer in relation to particular goods or services, it must be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.
NT FTA	**Section 5 Meaning of *consumer*** (1) In this Act, a reference to a consumer is, subject to subsection (2), a reference to a person who acquires goods or services from a supplier. (2) In subsection (1), ***goods*** does not include goods which are acquired, or are held out as being acquired — (a) for the purpose of re-supply; or (b) for the purpose of using them up or transforming them, in the course of a business, in or in connection with a process of manufacture or production, and in that subsection as it has effect for the purposes of Parts 5 and 6, the term also does not include goods which are acquired, or held out as being acquired, for the purpose of using them up or transforming them, in the course of a business, in or in connection with the repair or treatment of other goods or of fixtures on land.

ATTACHMENT D
MANDATORY DISCLOSURE PROVISIONS IN THE VICTORIAN FTA

Section 163 — Consumer documents to be clear

(1) In this section consumer document means—

(a) a consumer contract; or

(b) a statement, notice or other document required by this Act to comply with this section.

(2) A consumer document does not include a contract to which the Consumer Credit (Victoria) Act 1995 applies.

(3) A consumer document—

(a) must be easily legible; and

(b) to the extent that it is printed or typed, must use a minimum 10 point font; and

(c) must be clearly expressed.

(4) If a court or the Tribunal is satisfied, on application by the Director, that any provision of a consumer contract does not comply with the requirements of this section, the court or the Tribunal may by order prohibit a supplier from using the provision in the same or similar terms in consumer contracts.

(5) A supplier must comply with an order under this section.

Section 29 — Address to be included in documents

(1) A person who-

(a) publishes a document, statement or advertisement or causes a document, statement or advertisement to be published; or

(b) gives a document, statement or advertisement to any person or causes a document, statement or advertisement to be given to any person to whom goods or services are or may be supplied-

that-

(c) is intended or likely to promote the supply of goods or services in trade or commerce; and

(d) contains a reference to a means of contacting the person that does not include the name and the address of the place of business or residence of the person-

must include in the document, statement or advertisement-

(e) the name of the person or the business; and

(f) one of the following-

(i) the full address (not being a post box) of the place of business or residence of the person;

(ii) if the person is carrying on a business that is required to be licensed or registered under an Act, the relevant licence or registration number of the business or person; Example This may include an LMCT number if the person is a car dealer or the person's registration or licence number if the person is a plumber.

(iii) if the person is carrying on a business under a business name registered under the Business Names Act 1962, the registered number of the business under that Act.

(2) This section does not apply to a person who publishes or causes to be published, a document, statement or advertisement for prostitution services within the meaning of the Prostitution Control Act 1994.

(3) A person, other than a person who publishes a document, statement or advertisement on the person's own behalf or a person referred to in subsection (1)(f)(ii) or (1)(f)(iii), is not required to comply with subsection (1)(f) if the person has provided to the publisher of the publication in which the document, statement or advertisement is to appear-

(a) the name of the person or the business; and

(b) the full address (not being a post box) of the place of business or residence of the person.

(4) A publisher must record and keep all information provided to the publisher under subsection (3) for at least 12 months from the date it is received.

(5) In this section, publish in relation to a document, statement or advertisement means to make the document, statement or advertisement generally known in any manner (including in an electronic form).

Section 161A — Bills and receipts

(1) Within 30 days after receipt of a bill or account from a supplier for services supplied, a purchaser to whom the services were supplied may request an itemised bill.

(2) A supplier must provide an itemised bill within 7 days of receiving a request under subsection (1).

60 penalty units, in the case of a natural person.

120 penalty units, in the case of a body corporate.

(3) A supplier must not charge a person for the preparation of an itemised bill for services.

60 penalty units, in the case of a natural person.

120 penalty units, in the case of a body corporate.

(4) A supplier must, at the completion of a contract for goods or services the value of which exceeds $50 (exclusive of GST), provide the purchaser with a proof of transaction.

60 penalty units, in the case of a natural person.

120 penalty units, in the case of a body corporate.

(5) After completion of a contract for goods or services the value of which does not exceed $50, a purchaser to whom the goods or services were supplied may request a proof of transaction.

(6) A supplier must provide a proof of transaction within 7 days of receiving a request under subsection (5).

60 penalty units, in the case of a natural person.

120 penalty units, in the case of a body corporate.

(7) This section does not apply to a contract for the provision of legal services to which the Legal Profession Act 2004 applies.

(8) In this section—

GST has the same meaning as in the A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth;

itemised bill means a bill or account of costs that specifies how the costs are calculated and includes, where applicable, the hourly rate and number of hours comprising the labour component and a list of the various materials used and the amount charged for each item;

proof of transaction means evidence that identifies the supplier, the date of the supply and the goods or services supplied to a purchaser.

Note

Proof of transaction includes the following—a tax invoice under the A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth, a cash-register receipt, a credit or debit card statement, a hand-written receipt, a lay-by agreement and a confirmation or receipt number provided in a telephone or internet transaction