

Comparison of Generic Consumer Protection Legislation

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Table of Contents

Part I: Introduction	4
Part II: Commonwealth Consumer Protection Regime	5
2.1 Introduction.....	5
2.2 TPA and the Corporations Act.....	5
2.3 TPA and the ASIC Act.....	6
2.4 Consumer Protection for Financial Services.....	10
2.5 Review Recommendation.....	21
Part III: Comparison of Commonwealth TPA with State and Territory Fair Trading Regimes	24
3.1 Introduction.....	24
3.2 Comparative Table.....	25
3.3 Material differences between TPA and FTAs.....	26
S2A/2B: Application of the TPA	28
3.4 Introduction.....	28
3.5 Application to the Crown.....	29
3.6 Crown not liable for penalty or prosecution.....	29
3.7 Extra-territoriality and Conflict of Laws.....	30
S4: Definition of consumer	39
3.8 Introduction.....	39
3.9 Comparison of definitions of consumer.....	40
3.10 What are the material differences between the FTA's and TPA?.....	46
3.11 Summary of Review Issues.....	62
3.12 Introduction.....	64
3.13 Unconscionable conduct within the meaning of the unwritten law of the States and Territories.....	66
3.14 Unconscionable conduct in trade or commerce.....	66
3.15 Unconscionable conduct in trade or commerce in relation to business transactions.....	67
Pt IVB: Industry codes	69
3.16 Introduction.....	69
3.17 TPA Provisions.....	69
3.18 State Regimes.....	70
3.19 Comparison of additional provisions in FTAs.....	72
Pt V: Consumer protection (except div 1AA)	74
3.20 Introduction.....	74
Pt V Div 1	74
3.21 Misleading or Deceptive Conduct.....	74
3.22 Representations in relation to a future matter.....	75
3.23 Specific Misleading Conduct Provisions.....	75
3.24 Statement re Price of goods.....	77
3.25 Advertising in relation to Goods.....	77
3.26 Unsolicited Goods.....	78
3.27 Summary of Additional Provisions in State FTAs not present in TPA.....	79
Pt V Div 1A	80
3.28 Consumer information and product safety.....	80
Pt V Div 2	84
3.29 Comparison of Non-excludable Implied Warranties and Conditions in the Trade Practices Act and State Regimes.....	84
Pt V Div 2A	95
3.30 Actions against Manufacturers and Importers.....	95

Pt VC: Offences	98
3.31 Introduction	98
3.32 Comparison of penalties by state	98
3.33 Comparison of Maximum Penalties for Offences by Bodies Corporate	99
3.34 Comparison of maximum penalties for individuals	100
3.35 Material Differences	101
3.36 Comparison of PART VC, TPA and FTAs: Offences	102
Pt VI: Enforcement and Remedies	105
3.37 Introduction	105
3.38 Injunctions	105
3.39 Non-punitive Orders	106
3.40 Undertakings	108
3.41 Recommendations for Additional Enforcement Powers	109
3.42 State and Territory Enforcement (Unfair conduct)	110
3.43 Remedies under the Commonwealth Regime	112
3.44 Remedies for breach of Implied Terms	112
3.45 Remedies under the State and Territory regime	113
3.46 Remedies for breach of implied terms State and Territory legislation	114
3.47 Enforcement Powers	114
3.48 Remedies	115
3.49 Material differences	116
PtVIA: Proportionate liability for misleading or deceptive conduct	117
4.1 Introduction	117
4.2 TPA Framework.....	117
4.3 Material differences	118
4.4 Apportionable Claim – TPA and CLAs	118
4.5 Excluded Wrongdoers	119
Pt VIB: Claims for damages or compensation for death or personal injuries (compared to negligence/ other avenues for redress under State and Territory laws)	121
5.1 Introduction	121
5.2 TPA Framework.....	121
5.3 Availability of damages for death or personal injury in TPA & FTAs.....	122
5.4 Compensation for loss or damage	123
5.5 Limitation of liability for provision of recreational services	124
5.6 Maximum damages available	124
5.7 Cap on damages for loss of earnings.....	124
5.8 Threshold for damages.....	125
5.9 Court may refer to past decision in determining non-economic loss	125
5.10 Abolition of aggravated and exemplary damages	125
5.11 Gratuitous care	125
5.12 Availability of Structured Settlements.....	126
State and Territory legislation which deals with unfair and unjust terms	127
6.1 Contracts Review Act 1980 (NSW)	127
6.2 Part 2B of the Fair Trading Act 1999 (Vic)	128
6.3 Material Differences.....	129
Summary of Material Differences and Recommendations for Review	130

Part I: Introduction

This report has been prepared by Professor Stephen Corones and Professor Sharon Christensen, both of the Faculty of Law, Queensland University of Technology, and Ms Bridget Lewis, a Senior Research Assistant within the Faculty of Law.

The purpose of the Report is to assist the Productivity Commission to undertake an inquiry into Australia's consumer policy framework, including its administration, in accordance with the Terms of Reference provided by the Treasurer.

It provides an overview of the *material* differences between the objectives, substantive prohibitions, interpretation, enforcement, sanctions and remedies in Commonwealth, State and Territory generic consumer protection legislation.

For the purposes of this report the term "material" is taken to mean differences which are judged to have non-trivial impacts on factors such as:

- Business compliance costs;
- The level of protection afforded to consumers or their ability to seek redress; and
- The ability of firms to innovate or supply products at least cost.

The structure of this report is to consider first in Part II the Commonwealth consumer protection regime contained in the *Trade Practices Act 1974* (Cth) (TPA), and other Commonwealth legislation, namely the *Australian Investment and Securities Commission Act 2001* (Cth) (ASIC Act), and the *Corporations Act 2001* (Cth).

Having considered the material differences between Commonwealth legislation, in Part III we compare the TPA (the template legislation) with the equivalent provisions of the State and Territory Fair Trading legislation including the enforcement powers of the State and Territory regulators, noting the material differences.

Part II: Commonwealth Consumer Protection Regime

2.1 Introduction

The fundamental policy issue is how to deal with the problem of information asymmetry. There are three pieces of legislation that deal with the problem in different ways.

The TPA is the primary source of consumer protection at the federal level. The *TPA* imposes strict liability in the sense that s 52 does not require any element of a subjective intention to mislead or guilty mind (*mens rea*). While, in general, there is no mandatory disclosure, if information is disclosed it must be accurate or the person imparting the information will be strictly liable for any inaccuracy.

2.2 TPA and the Corporations Act

In *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 it was held that s 52 was capable of applying to fundraising (in that case sending a 'prospectus' for the demutualisation of the two NRMA companies to their members and that this was in trade or commerce). Failure to disclose information may be misleading and a breach of s 52 of the TPA if there is a reasonable expectation of disclosure on the part the applicant (the victim of the non-disclosure). Section 52 imposes strict liability in the sense that there are no defences for the failure to disclose where there is a reasonable expectation of disclosure.

The *Corporations Act 2001* (Cth) seeks to ensure that there is sufficient information in capital markets to allow fund raising and investment to operate efficiently. Unlike the *TPA*, which has only a limited mandatory disclosure regime, the *Corporations Act* provides for intensive mandatory disclosure. The directors of corporations seeking to raise capital must not only disclose all known information, they must also conduct due diligence inquiries to find out information. The *Corporations Act* is designed to regulate capital markets. It looks to ensure that there is adequate information available in market to allow the market to operate efficiently. It does this through extensive mandatory disclosure, which requires not only disclosure of all known information but also requires due inquiry to be made to find out information. The objective is to encourage investors to invest.

However, so long as company directors have conducted due diligence and made due inquiry to find out information they will be able to rely on due diligence defences and will not be strictly liable if information is not disclosed or is inaccurate or misleading.

It was thought that such strict liability was too onerous in the case of capital fundraising, and that misleading conduct in relation to fundraising should be regulated solely by the *Corporations Act* and not the TPA.

In summary, liability under the *Corporations Act* depends on the thoroughness of the preparation of the disclosure documents. If the disclosure documents have been prepared thoroughly and due diligence has been exercised, no liability should arise even though the disclosure document may nevertheless contain misleading information. This distinction which exempts fund raising disclosure documents from strict liability is soundly based as a matter of economic theory and consistent with the objective of achieving economic efficiency in the regulation of markets.

2.3 TPA and the ASIC Act

The situation with regard to the TPA and the ASIC Act is less clear cut. The consumer protection provisions of the TPA and the mirror consumer protection provision applying to financial services in the *ASIC Act* and the *Corporations Act* cover three broad areas:

- Unconscionable conduct
- Unfair practices
- Statutory conditions and warranties in consumer contracts

In this part we consider first the TPA as the template legislation in relation to these three areas and then examine the equivalent provisions in the *ASIC Act* and the *Corporations Act*.

2.3.1 Unconscionable conduct

Pt IVA of the TPA contains three prohibitions of unconscionable conduct:

- General prohibition on unconscionable conduct, recognised as part of the common law of Australia (s. 51AA).
- Unconscionable conduct in consumer transactions (s. 51AB) –consumer transactions for goods or services ordinarily acquired for personal, domestic or household use or consumption (s. 51 AB (5)).
- Unconscionable conduct in business transactions (s. 51AC) - this section specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

Factors to take into account

The law sets out the factors that the courts may consider in determining whether conduct is unconscionable. The court may have regard to all or none of the factors when making a determination, and may also consider any other factors that it deems to be relevant.

In consumer transactions (s51AB), the factors listed are:

- the relative bargaining strengths of the parties;
- whether the consumer was required to comply with conditions that were not reasonably necessary;
- whether the consumer understood any documentation used;
- whether any undue influence, pressure or unfair tactics were used;
- the circumstances under which the consumer could have acquired identical or equivalent goods or services from another.

In business transactions (s51AC), the above factors plus the following additional factors may be taken into account:

- whether the supplier's conduct was consistent with conduct in similar transactions;
- requirements of any applicable industry code;
- requirements of any other industry code, if the consumer reasonably believed that the supplier would comply with that code;
- the extent to which the supplier failed to disclose certain information;
- the extent to which the supplier was willing to negotiate;
- the extent to which the supplier and business consumer acted in good faith.

Limitations

The scope of the Pt IVA of the TPA prohibitions is constrained by some factors:

- Sections 51AA and 51AB do not apply to conduct engaged in relation to financial services; and
- Section 51AC does not apply to conduct before 1 July 1998 or where the supply or possible supply is in excess of \$3 million.

Section 51AC does not apply to publicly listed companies.

2.3.2 Unfair Practices

The statutory prohibitions against unfair practices are contained in Pt V Divs1, 1AA and 1AAA of the TPA. The following unfair practices are prohibited:

- conduct that is actually misleading or likely to mislead or deceive (s. 52 TPA).
- false representations in relation to the supply of goods and services(s. 53 TPA);
- false representations in relation to land (s. 53A TPA);
- false representations in relation to employment (s. 53B TPA);
- full cash price to be stated in certain circumstances (s53C);
- falsely offering prizes (s. 54 TPA);

- misleading the public as to the nature and characteristics of goods and services (s. 55 TPA);
- bait advertising (s. 56 TPA);
- false and misleading statements about referral selling (s. 57 TPA);
- accepting payment without intending or being able to supply (s 58 TPA);
- misleading representations about work from home schemes (s. 59 TPA);
- engaging in harassment or coercion (s60 TPA);
- engaging in certain conduct in relation to unsolicited goods and services (ss 63A, 64 and 65TPA); and
- engaging in pyramid selling schemes (Div 1AAA TPA).

The prohibition and definitions of pyramid selling differ in s12DK of the ASIC Act from those contained in Part V Div 1AAA of the TPA. The Explanatory Memorandum to the *Trade Practices Amendment Act (No 1) 2002* states that the purpose of the Act was to include a plain English re-write of the pyramid selling provisions in the TPA. The provisions in the ASIC Act have not been similarly rewritten. While it is unclear whether the amendments to the TPA have been successful in clarifying the definition of pyramid selling, in any event it is recommended that s12DK of the ASIC Act be similarly amended to follow the redrafted definition in the TPA.

On 21 April 2005 the government announced that it would amend s 53C because of the increased use of component pricing. State and Territory jurisdictions at the meeting of the Ministerial Council on Consumer Affairs (22 April 2005) agreed to any necessary legislative changes to the relevant State and Territory fair trading regimes to “tighten up” the provisions relating to advertising “part” prices.

The amending Commonwealth legislation has been drafted and circulated for comment, but has not yet been enacted.

2.3.3 Statutory conditions and warranties in consumer contracts

Pt V, Div 2 of the TPA seeks to improve the position of consumers by ensuring that the contracts by which they acquire goods and services impose certain basic contractual obligations on the supplier.

This is done by statutorily implying a number of terms into such consumer contracts and preventing the supplier from avoiding the obligations created by those terms by the use of exclusion clauses.

The TPA requires that:

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- the supplier of the product has the right to sell it, the product is free from any undisclosed security and the consumer has the right to quiet enjoyment (or undisturbed possession) of the product (s. 69(1) TPA);
 - goods will comply with their description or, if provided, their sample (ss. 70,72 TPA);
 - goods must be as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable (merchantable quality) (s 71(1) and 66(2) TPA);
 - where the product's purpose is made known by the consumer, it must be reasonably fit for that purpose (s. 71(2) TPA);
 - services must be rendered with due care and skill and any material supplied in connection with those services must be reasonably fit for the purpose for which they are supplied (s74(1)TPA);
 - where the consumer makes known any particular purpose for which the services are required or the result which he or she desires the services to achieve, there is an implied warranty that the services will be reasonably fit for that purpose (s74(2) TPA) (Services of a professional nature supplied by a qualified architect or engineer are excluded from this provision).

The TPA treats goods as being supplied when the consumer acquires the right to possession. Services are treated as being supplied once they are provided, granted or conferred. 'Supplied' is interpreted broadly and includes 'give-aways' as well as sales, leases, exchanges, hires and hire-purchases.

The TPA's statutory conditions and warranties are implied into any contract involving a person (including a corporation) who, as an end user, acquires goods or services: with a value of up A\$40 000 (other than those bought for use in trade or for re-supply); or goods or services of a type normally bought for personal use (whatever the cost) including any commercial vehicle primarily for use on a public road.

The TPA does not apply to goods purchased through auctions or by competitive tender or commercial goods and services. It does not apply to donations of goods by persons or organisations not acting 'in trade', such as charitable organisations.

The remedies available in a particular case will depend on whether a condition or warranty of the contract was breached. Conditions are essential terms of the contract. If a condition is breached, the consumer is entitled to rescind the contract and receive a refund. If a warranty is breached, the contract is still valid. However, the affected party may seek relief for the breach of that warranty, such as damages representing the cost of replacement.

The conditions implied by the TPA operate as if the parties to the contract had inserted them into the agreement themselves. As such, a breach of one of these conditions or warranties operates like any other breach of contract. If a breach occurs, consumers can bring a common law cause of action for breach of contract. The ACCC does not bring actions on behalf of consumers for breach of these implied terms.

The ACCC undertakes education programs to ensure consumers are aware of their statutory rights under the conditions and warranties provisions of the TPA.

2.4 Consumer Protection for Financial Services

A key consideration in the Commission's terms of reference for this study is:

'...the scope for avoiding regulatory duplication and inconsistency through reliance on industry-specific consumer regulation and making greater use of general consumer regulation.'

In conducting the inquiry and making recommendations, the Commission is also required to consider

'... the need to maintain consistency between the consumer protection provisions of the TPA and the mirror consumer protection provisions applying to financial services in Australian Securities and Investments Commission Act 2001 (Cth) and the Corporations Act 2001 (Cth).'

ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system (s12A (2) ASIC Act).

Pt II Div 2 of the ASIC Act was inserted into the ASIC Act in 1998 to give effect to a recommendation of the Wallis Report into Australia's financial system which recommended that a single body regulate the finance industry so as to promote market integrity and protect consumers.

Pt II Div 2 of the ASIC Act contains three subdivisions:

- Sub div C deals with unconscionable conduct;
- Sub div D deals with consumer protection – unfair practices; and
- Sub div E implies certain conditions and warranties into consumer transactions.

The provisions parallel those in Pt IVA, Pt V Div 1 and Pt V Div 2 of the TPA.

2.4.1 Avoidance of overlap

To avoid overlap, the TPA was amended to exclude from its operation the provision of financial services.

As explained above, Pt IVA of the TPA comprises three statutory prohibitions aimed at unconscionable conduct: s 51AA, s 51AB and s51AC.

Section 51AAB (1) provides that s 51AA does not apply to financial services.

Section 51AAB (2) provides that s 51AB does not apply to financial services.

This suggests that s51AC may continue to apply to financial services; however, s12CC of the ASIC Act deals with unconscionable conduct in the supply or acquisition of financial services in business transactions in the same terms as s 51AC, so there does not appear to be any scope for the continued operation of s 51AC in relation to financial services.

In relation to Pt V Divs 1 and 2 of the TPA, s 51AF provides that the Part does not apply to financial services.

In relation to Pt VC (criminal liability) of the TPA, s 75AZA provides that the Part does not apply to financial services.

2.4.2 Scope of Pt 2 Div 2 of the ASIC Act

Pt II Div 2 of the ASIC Act applies where “a person” has, in trade or commerce, engaged in conduct in connection with the supply or possible supply of financial services. Thus, the Part will apply not just to natural persons who provide financial services, but also to banks and financial institutions.

The Commission is required to take account of the consumer protection provisions for financial services in the ASIC Act and the *Corporations Act 2001* (Cth), where they mirror those in the TPA. The relevant mirror provisions are listed in following table.

Table 1: Comparison of the Provisions of the Trade Practices Act and the ASIC Act relating to Unconscionable Conduct and Consumer Protection

TPA	ASIC Act
s.51AA Unconscionable Conduct at common law	s.12CA(1)

s.51AB Unconscionable Conduct in consumer transactions	s.12CB(1)
s51AC Unconscionable conduct in small business consumer transactions	s12CC
s.52 Misleading or deceptive conduct	s.12DA
s.51A Statements about the practice	s.12BB
s.53 False or misleading representations	s.12DB
s.53A False representations in relation to land	s.12DC
s.53C Not specifying full cash price	s.12DD
s.54 Offering Gifts and Prizes	s.12DE
s.55A Misleading Conduct as to purpose on quality of services	s.12DF
s.56 Bait Advertising	s.12DG
s.57 Referred Selling	s.12DH
s.58 Accepting payment without intending to supply	s.12DI
s.60 Harassment and Coercion	s.12DJ
s.63A Unsolicited Debit Cards	s.12DL
s.64 Unsolicited Financial Services	s.12DM
s.65A Prescribed Information Provider's Defence	s.12DN
Part V, Div 1AAA (ss65AAA – 65AAE) Pyramid Selling	s.12DK
s.74(1) Implied Warranty: Care and Skill	s.12ED(2)
s.74(2) Implied Warranty: Fitness for purpose	s.12ED(2)
s.79 Criminal offences	s.12GB

s.80	Injunctions	s.12GD
s.80A	Disclosure of Information	s.12GE
s.82	Damages	s.12GF
s.87	Other orders	s.12GM
s.87A	Orders to prohibit payment or transfer of money or other property	s.12GN
s.87B	Empowerment of Undertakings	s.93AA

2.4.3 Definitions

The ASIC Act contains a very broad definition of “financial service” which is linked with the definition of “financial product”.

Section 12BAB provides:

- ‘... a person provides a *financial service* if they:
- (a) provide financial product advice (see subsection (5)); or
 - (b) deal in a financial product (see subsection (7)); or
 - (c) make a market for a financial product (see subsection (11)); or
 - (d) operate a registered scheme; or
 - (e) provide a custodial or depository service (see subsection (12)); or
 - (f) operate a financial market (see subsection (15)) or clearing and settlement facility (see subsection (17)); or
 - (g) provide a service that is otherwise supplied in relation to a financial product; or
 - (h) engage in conduct of a kind prescribed in regulations made for the purposes of this paragraph.’

Financial services are similarly defined in s. 766A of the *Corporations Act 2001* (Cth) except that the above clauses (f) and (g) are not included.

A ‘financial product’ is defined in s. 12BAA of the ASIC Act:

- ‘... a *financial product* is a facility through which, or through the acquisition of which, a person does one or more of the following:
- (a) makes a financial investment (see subsection (4));
 - (b) manages financial risk (see subsection (5));
 - (c) makes non cash payments (see subsection (6)).’

This general definition of ‘financial product’ is then followed by a number of specific products that are included within the general concept (set out in subsection (7)), and a number of specific products that are excluded from the general concept (set out in subsection (8)).

Section 12BAA (7) provides that the following transactions are financial products:

- (a) a security;
- (b) any of the following in relation to a managed investment scheme:
 - (i) an interest in the scheme;
 - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
 - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
- (c) a derivative;
- (d) a contract of insurance (see subsection (9)) (except health insurance provided as part of a health insurance business as defined by Division 121 of the *Private Health Insurance Act 2007*);
- (e) a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance (see subsection (9));
- (f) a beneficial interest in a superannuation fund (as defined by section 10 of the *Superannuation Industry (Supervision) Act 1993*);
- (g) an RSA (retirement savings account) within the meaning of the *Retirement Savings Accounts Act 1997*;
- (h) any deposit-taking facility made available by an ADI (within the meaning of the *Banking Act 1959*) in the course of its banking business (within the meaning of that Act), other than an RSA (RSAs are covered by paragraph (g));
- (i) a debenture, stock or bond issued or proposed to be issued by a government;
- (j) a foreign exchange contract;
- (k) a credit facility (within the meaning of the regulations);
- (m) anything declared by the regulations to be a financial product for the purposes of this subsection.

A credit facility for the purposes of s 12BAA (7)(k) is defined in Regulation 2B.

Regulation 2B lists nine separate transactions and deems each to be a credit facility:

‘(1) For paragraph 12BAA (7) (k) of the Act, each of the following is a *credit facility* :

- (a) the provision of credit:
 - (i) for any period; and
 - (ii) with or without prior agreement between the credit provider and the debtor; and

- (iii) whether or not both credit and debit facilities are available;
 - (b) a facility:
 - (i) known as a bill facility; and
 - (ii) under which a credit provider provides credit by accepting, drawing, discounting or indorsing a bill of exchange or promissory note;
 - (c) the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker);
 - (d) the provision of credit by the trustee of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate;
 - (e) the provision of credit by an employer, or a related body corporate of an employer, to an employee or former employee (whether or not it is provided to the employee or former employee with another person);
 - (f) the provision of a mortgage that secures obligations under a credit contract (other than a lien or charge arising by operation of any law or by custom);
 - (g) a guarantee related to a mortgage mentioned in paragraph (f);
 - (h) a guarantee of obligations under a credit contract;
 - (i) a facility for making non-cash payments (within the meaning of section 763D of the Corporations Act) if payments made using the facility will all be debited to a facility mentioned in paragraphs (a) to (h).
- (2) The provision of consumer credit insurance that includes a contract of general insurance for the *Insurance Contracts Act 1984* is not a credit facility.

(3) In this regulation:

credit means a contract, arrangement or understanding:

- (a) under which:
 - (i) payment of a debt owed by one person (a *debtor*) to another person (a *credit provider*) is deferred; or
 - (ii) one person (a *debtor*) incurs a deferred debt to another person (a *credit provider*); and
- (b) including any of the following:
 - (i) any form of financial accommodation;
 - (ii) a hire purchase agreement;
 - (iii) credit provided for the purchase of goods or services;
 - (iv) a contract, arrangement or understanding for the hire, lease or rental of goods or services, other than a contract, arrangement or understanding under which:

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- (A) full payment is made before or when the goods or services are provided; and
 - (B) for the hire, lease or rental of goods — an amount at least equal to the value of the goods is paid as a deposit in relation to the return of the goods;
 - (v) an article known as a credit card or charge card;
 - (vi) an article, other than a credit card or a charge card, intended to be used to obtain cash, goods or services;
 - (vii) an article, other than a credit card or a charge card, commonly issued to customers or prospective customers by persons who carry on business for the purpose of obtaining goods or services from those persons by way of a loan;
 - (viii) a liability in respect of redeemable preference shares;
 - (ix) a financial benefit arising from or as a result of a loan;
 - (x) assistance in obtaining a financial benefit arising from or as a result of a loan;
 - (xi) issuing, indorsing or otherwise dealing in a promissory note;
 - (xii) drawing, accepting, indorsing or otherwise dealing in a negotiable instrument (including a bill of exchange);
 - (xiii) granting or taking a lease over real or personal property;
 - (xiv) a letter of credit.'

In essence, the provision of a financial service involves advising, dealing or selling a financial product. Financial products include general insurance, life insurance, banking, superannuation, managed investments, the provision of credit and shares.

The concept of 'consumer' is relevant to two provisions, s12DH (referral selling) and 12DJ Undue harassment in relation to debt collection) and the implied terms regime in sub div E.

2.4.4 Misleading or deceptive conduct in relation to financial services

Part II, Div 2, Sub div D mirrors Pt V Div 1 of the TPA. It contains a broad general prohibition (s12DA) against misleading or deceptive conduct, the equivalent of s 52 of the TPA and then contains two sets of more specific prohibitions – first, the making of specific false or misleading representations in relation to financial services or financial products involving interests in land; and, secondly, unfair sales techniques.

Section 12DA provides:

'(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

(1A) Conduct:

- (a) that contravenes:
- (i) section 670A of the Corporations Act (misleading or deceptive takeover document); or
 - (ii) section 728 of the Corporations Act (misleading or deceptive fundraising document); or
- (b) in relation to a disclosure document or statement within the meaning of section 953A of the Corporations Act; or
- (c) in relation to a disclosure document or statement within the meaning of section 1022A of the Corporations Act;

does not contravene subsection (1).'

The test for deciding whether conduct is misleading under s52 of the TPA and s12DA of the ASIC Act is the same, namely whether the conduct is likely to mislead a reasonable member of the class at whom the conduct is directed: *National Exchange Pty Ltd (ACN 006 079 974) v Australian Securities & Investments Commission* [2004] FCAFC 90 (22 April 2004)

The effect of s 12DA (1A) is that the section does not apply to dealings in securities involving:

- a misleading takeover document; or
- a misleading fundraising document; or
- a financial services guide; or
- a product disclosure statement.

Section 12DB of the ASIC Act (concerning false or misleading representations) also contains a subsection equivalent to 12DA (1A).

Section 1041H of the *Corporations Act 2001*(Cth) deals with misleading or deceptive conduct in connections with any dealings in securities by a person. It is not confined to dealings in the securities of any particular kind of body (corporation, co-operative). It applies to the conduct of a person. It does not require that the conduct be in trade or commerce. Rather than employing a narrow definition of dealing in securities, s1041H extends to cover the issuing of securities, as well as advising and advertising in relation to securities.

It provides:

'(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

(2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

- a. dealing in a financial product;
- b. without limiting paragraph (a):
 - i. issuing a financial product;
 - ii. publishing a notice in relation to a financial product;
 - iii. making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;
 - iv. applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
 - v. permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);
 - vi. a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with a beneficiary of that entity as such a beneficiary;
 - vii. a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;
 - viii. applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product;
 - ix. an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;
 - x. carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

(3) Conduct:

(a) that contravenes:

(i) section 670A (misleading or deceptive takeover document); or

(ii) section 728 (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of section 953A; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.'

To determine whether conduct is misleading for the purposes of s 1041H of the *Corporations Act*, the Court applies the same principles that are applied in relation to s 52 of the TPA: See *National Exchange Pty Ltd v ASIC* [2004] FCAFC 90 (22 April 2004).

The effect of s 1041H (3) is that the section does not apply to dealings in securities that involve:

- a misleading takeover document or
- a misleading fundraising document or
- a financial services guide or
- a product disclosure statement.

Section 670A regulates misleading statements in, or omissions from, **takeover documents**. Defences are provided in s 670D if the maker of the statement can prove that they did not know that the statement was misleading or they reasonably relied on information provided by another.

Misleading takeover documents and misleading **fundraising documents** are regulated by s 728 of the *Corporations Act*.

Section 728 provides:

(1) A person must not offer securities under a disclosure document if there is:

(a) a misleading or deceptive statement in:

- (i) the disclosure document; or
 - a. application form that accompanies the disclosure document; or
 - (iii) any document that contains the offer if the offer is not in the disclosure document or the application form; or

(b) an omission from the disclosure document of material required by section 710, 711, 712, 713, 714 or 715; or

(c) a new circumstance that:

- (i) has arisen since the disclosure document was lodged; and
- (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged.

(2) A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular.

Offence if statement, omission or new matter materially adverse

(3) A person commits an offence if they contravene subsection (1) and:

- (a) the misleading or deceptive statement; or
- (b) the omission or new circumstance;

is materially adverse from the point of view of an investor.’

Section 731 of the *Corporations Act* contains a **due diligence defence** in relation to disclosure documents.

It provides:

‘(1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a misleading or deceptive statement in a prospectus if the person proves that they:

- (a) made all inquiries (if any) that were reasonable in the circumstances; and
- (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive.

Reasonable inquiries and reasonable belief--omissions

(2) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of an omission from a prospectus in relation to a particular matter if the person proves that they:

- (a) made all inquiries (if any) that were reasonable in the circumstances; and
- (b) after doing so, believed on reasonable grounds that there was no omission from the prospectus in relation to that matter.’

Other defences are provided in s 732 and 733.

Misleading conduct in relation to **financial services guides** as defined in s 953A is subject to liability within its own Chapter (with relevant defences).

Misleading conduct in relation to **product disclosure statements** as defined in s1022A is subject to liability within its own Chapter (with relevant defences).

In summary, the TPA regulates misleading conduct generally, but does not apply to financial services. The ASIC Act regulates misleading conduct in relation to financial services, but does not apply to dealings in securities involving a disclosure document. Fund raising in relation to traditional securities (shares and debentures) is regulated by Chapter 6D of the *Corporations Act*. Financial services guides and product disclosure statements are regulated within their own Chapters of the *Corporations Act* (with relevant defences). Otherwise, it would appear that all other conduct relating to financial services that is misleading or deceptive will be subject to the ASIC Act.

2.5 Review Recommendation

One of the government's intentions in passing the *Financial Sector Reform (Consequential Amendments) Act 1998* which came into force on 1 July 1998 was to remove regulatory overlap between ASIC and the ACCC. The objective was for ASIC to become the specialist regulator for consumer protection in the financial system. This was achieved by introducing s 51AF into the TPA and enacting Pt II Div 2 of the ASIC Act.

State and Territory Fair Trading or Consumer Affairs agencies administer fair trading legislation that mirrors the consumer protection provisions in the ASIC Act.

For example s 42 of the *Fair Trading Act 1987* (NSW) has not been amended so as to exclude conduct in relation to financial services. Thus, if misleading conduct occurs in relation to financial services in trade or commerce s42 is also applicable. This would appear to conflict with the Australian Government's intention to make ASIC solely responsible for consumer protection in relation to financial services: *Cleary v Australian Cooperative Foods* [1999] 32 ASCR 582 (per Austin J). It must be noted however, that ASIC cannot cover the field in this area because of constitutional issues.

Section 1041H of the *Corporations Act* does not require that the dealing in securities be in trade or commerce. Both s 12DA of the ASIC Act and s 42 of the *Fair Trading Act* contain that requirement.

State and Territory enforcement authorities also regulate consumer credit under the *Uniform Consumer Credit Code*.

While the ACCC is not responsible for financial services it retains responsibility for enforcing consumer protection in relation to health insurance (See e.g. *Medical Benefits Fund Of Australia Limited v Cassidy* [2003] FCAFC 289 (16 December 2003) and *Cassidy v Saatchi & Saatchi Pty Ltd* [2004] FCAFC 34 (25 February 2004).

The division of consumer protection responsibilities between these bodies is not always clear-cut, and has been a source of confusion to industry and consumers. For example, the ACCC and ASIC have collaborated to produce a joint publication *Debt Collection Guideline: for collectors and Creditors* (October, 2005). It is necessary to ask: how did the debt arise and does it come within the expanded definition of 'credit' in Regulation 2B set out above?

For example, does a contract for the purchase of a motor vehicle on 30 days credit give rise to a debt for which the ACCC has responsibility in the event of harassment for non-payment? This is clearly a financial product and comes within the definition of credit facility.

Does it make any difference if the motor vehicle is the subject of a lease? Somewhat surprisingly this too comes within the definition of a credit facility and would be a financial service. See Regulation 2B (3)(b)(iv).

In broad terms, ASIC takes responsibility for dealing with misconduct associated with debt collection activity when the debt relates to the provision for a financial service. The ACCC is responsible for dealing with misconduct associated with debt collection activity when the debt does not relate to the provision of a financial service.

There will be areas of overlap, for example, where the conduct relates to a range of debts, including debts for both financial services and non-financial services. Furthermore, the ACCC retains responsibility for any misleading conduct concerning the underlying goods or services to which the debt relates.

It can be a waste of enforcement resources trying to decide whether the debt arose as a result of the provision of a financial service. For example, misleading conduct associated with a get-rich-quick scheme involving shares will be the responsibility of ASIC. The same misleading conduct associated with a get-rich-quick scheme involving land or an interest in land will be the responsibility of the ACCC. If the “scammers” are only in Australia for a short period and it is necessary to obtain an urgent interlocutory injunction to restrain them, precious time can be lost trying to establish who has responsibility. It is not a sufficient answer to say that ASIC should delegate its enforcement function to the ACCC. The court may insist that ASIC is joined as a party.

This issue requires further clarification.

For consumer protection of financial services the relevant Australian regulator is ASIC, since it has primary responsibility for administering the ASIC Act and the *Corporations Act*. However, it should be noted that s 102 of the ASIC Act enables ASIC to delegate a function or power to a member of staff of the ACCC, if the Chairperson of the ACCC consents to the delegation in writing.

Similarly, s 26 of the TPA enables the ACCC to delegate a function or power in relation to unconscionable conduct, consumer protection, offences and remedies to a staff member of ASIC, if the Chairperson of ASIC consents to the delegation in writing.

To reduce regulatory duplication, ASIC has a Memorandum of Understanding with the ACCC. The role and functions of the ACCC are considered in other parts of this report in the context of the general consumer protection provisions of the TPA.

ASIC administers the regulatory system of consumer protection for the following financial products:

- deposit-taking activities

- general insurance (except health insurance)
- life insurance
- superannuation
- retirement savings accounts
- managed investment schemes
- securities
- derivatives
- debenture stock or bond issued by a government
- foreign exchange contracts
- credit.

Consumer protection for these products includes:

- requirements about the information that must be disclosed to consumers
- general prohibition against misleading or deceptive conduct and other unfair practices
- licensing of people who give advice on or are dealing in financial products
- requirements for conduct of financial services providers
- approval of alternative dispute resolution schemes and industry codes.

The only important exception applies to businesses that offer only lending products, such as credit cards, loans, and hire purchase agreements. They operate under State and Territory laws. However, ASIC does make sure that businesses do not give misleading information about loans when they advertise.

ASIC generally deals with matters that have a cross-border element and/or have national implications. State and Territory regulators tend to focus on matters that occur primarily within their jurisdiction. To facilitate cooperation with other regulators, ASIC has entered into a memorandum of understanding with each of its State and Territory counterparts. ASIC is also a member of the Standing Committee of Officials of Consumer Affairs and its responsible Minister is represented on the Ministerial Council on Consumer Affairs.

Part III: Comparison of Commonwealth TPA with State and Territory Fair Trading Regimes

3.1 Introduction

The terms of reference for this study require the Commission to consider '*...ways to improve, the harmonisation and coordination of consumer policy and the development and administration across jurisdictions in Australia, including ways to improve institutional arrangements and to avoid duplication of effort.*'

Before considering ways to harmonise and coordinate the Commonwealth and State and Territory consumer protection laws it is necessary to identify the material differences.

In this Part we compare the TPA (the template legislation) with the equivalent provisions of the State and Territory Fair Trading legislation including the enforcement powers of the State and Territory regulators, noting the material differences.

This comparison will be made under the following headings:

- S 2 : Object of the Act;
- S2A/2B: Application of the Act;
- Extraterritorial Operation of the Act;
- S4: Definition of consumer;
- Pt IVA: Unconscionable conduct;
- Pt IVB: Industry codes;
- Pt V: Consumer protection (except div 1AA);
- Pt VC: Offences;
- Pt VI: Enforcement and remedies;
- Pt VIA: Proportionate liability for misleading or deceptive conduct;
- Pt VIB: Claims for damages or compensation for death or personal injuries (compared to negligence/ other avenues for redress under State and Territory laws).

Finally, we will compare State and Territory legislation which deals with unfair and unjust terms.

S 2: Object of the Act

3.2 Comparative Table

Table 2: Comparison of Objects of TPA and FTAs

	Legislation	Details
Cth	<i>Trade Practices Act</i> <i>ASIC Act</i>	s2: The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. s1: Objects includes “to promote the confident and informed participation of investors and consumers in the financial system”.
NSW	<i>Fair Trading Act</i>	No specific provision Long title: - regulate supply, advertising and description of goods and services and land - other purposes
Qld	<i>Fair Trading Act</i>	s3: “The principal objective of this Act is to provide for an equitable, competitive, informed and safe market place.”
Vic	<i>Fair Trading Act</i>	s1. The main purposes of this Act are— - protect consumers - regulate trade practices - provide statutory conditions and warranties in consumer contracts - provide for unfair terms in consumer contracts to be void - product safety & information - provide for codes of practice.
SA	<i>Fair Trading Act</i> <i>Consumer Transactions Act</i>	No specific provision Long title: - appointment, powers and functions of Commission - unfair or undesirable trade practices - other purposes No specific provision: Long title: to provide for protection of consumers who enter consumer contracts
WA	<i>Fair Trading Act</i>	No specific provision Long title: - to regulate supply, advertising and description of goods and services and land - unfair or undesirable trade practices - conditions and warranties to be applicable in consumer transactions - establishment of Codes of Practice as between certain classes - related purposes

	<i>Consumer Affairs Act</i>	Long title: An Act to provide for the protection of the interests of consumers, to establish a Consumer Products Safety Committee, and for incidental and other purposes.
Tas	<i>Fair Trading Act</i>	No specific provision Long title: - unfair or undesirable trade practices - related purposes
ACT	<i>Fair Trading Act</i> <i>Fair Trading (Consumer Affairs) Act</i>	No specific provision long title: "protection of consumers". No specific provision. Long title: - protection of consumers - protection of traders against unfair commercial practices -
NT	<i>Consumer Affairs and Fair Trading Act</i>	No specific provision Long title (includes): - product safety & information, - unfair practices, - implied conditions, - door-to-door trading, - codes of practice

3.3 Material differences between TPA and FTAs

The objects provision of a statute can be significant as an aid to interpretation depending on the willingness of the particular judge to adopt a purposive as opposed to a literal approach to interpretation.

The objects provision in s2 of the TPA has been a matter for debate in relation to the interpretation of the competition provisions¹ but is rarely referred to in the interpretation of the consumer protection provisions.²

As regards the State and Territory FTAs, only the Queensland and Victorian Acts contain a specific provision detailing the object of the Act. Victoria's Fair Trading Act is more detailed and refers to various elements of consumer protection.

¹ See Kathryn McMahon, "Competition Law, Adjudication and the High Court" (2006) 30 *Melbourne University Law Review* 782.

² See the dissenting judgement of McHugh and Kirby JJ in *Butcher v Lachlan Elder Realty* [2004] HCA 60, especially at [97] and [172-177] with respect to the object of consumer protection provisions.

The long titles of FTAs refer to the following objects:

- Regulating supply, advertising, description of goods and services (NSW, Qld, SA, WA);
- Providing for consumer authorities (Qld, SA);
- Provisions re: unfair practices (WA, Tas, NT);
- Provisions re: implied conditions (WA, NT); and
- Provisions re: codes of practice (WA, NT).

These minor differences are of no great significance. The object provisions of the legislation have only been relevant on the rare occasion a court is required to construe an ambiguous substantive provision of the relevant Act.

S2A/2B: Application of the TPA

3.4 Introduction

The limitations placed on the Commonwealth Parliament's legislative power in the Australian Constitution restrict the field of application of the TPA. Sections 2A and 2B of the TPA relate to its application against the Crown, both in right of the Commonwealth and the States and Territories. Under the Australian federation each manifestation of the Crown is a separate legal person.³ The Crown is sometimes referred to as 'the government'. The government acts through its departments and officers. Thus, 'the Crown in right of a State' refers to the executive, as distinct from the legislative branch of government, represented by the Ministries and the departments and officers who attend to its business. These government departments are not separate legal entities. In discharging executive functions under ministerial direction they are considered to be the Crown.

When the TPA was first enacted it did not bind Commonwealth, State or Territory governments. As a result of a recommendation by the Swanson Committee,⁴ the TPA was amended in 1977. Section 2A was inserted to apply the TPA to the Crown in right of the Commonwealth in so far as it 'carries on a business' and 'business' was defined in s 4(1) to include a business not carried on for profit. Thus, the Crown in right of the Commonwealth is subject to the TPA including the consumer protection provisions.

Following a recommendation by the Hilmer Committee,⁵ s 2B was inserted into the TPA in 1995. It provides that Pt IV (the competition provisions) of the TPA applies to the Crown in right of each of the States and Territories in so far as the Crown carries on a business, but not the consumer protection provisions of the TPA. The reason for this is that the consumer protection provision in the each State and Territory contained in the FTAs binds the Crown in right of that State or Territory.

³ The ten manifestations of the Crown are: the Commonwealth, the six States, (New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia) and the three Territories (the Northern Territory, the Australian Capital Territory and Norfolk Island).

⁴ Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (1976), p 87 [10.25]-[10.26].

⁵ Report of the Independent Committee of Inquiry, *National competition Policy* (AGPS, Canberra, 1993), pp xxvii and 343.

3.5 Application to the Crown

3.5.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
2A(1) 2B	3(1)	7	5	4	3	12	-	3

3.5.2 Similarities between FTAs and TPA

ASIC and TPA bind crown in right of the Commonwealth in so far as it carries on a business. All FTAs, except the ACT, expressly bind the Crown in right of the State. In all cases, other than NSW, this is done in broad terms. For example, s5 of the Victorian FTA provides that the Act 'binds the Crown not only in the right of Victoria but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.'

NSW follows the wording of the TPA and binds the Crown in right of the State but only insofar as it carries on a business

The ACT FTA makes no express provision for the State to be bound.

3.6 Crown not liable for penalty or prosecution

3.6.1 Comparative Sections

TPA	ASIC	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
2A(3)	12AD		3(2)	7(a)					3(1)

3.6.2 Similarities between FTAs, TPA and ASIC

Qld, Vic and NT FTAs include a provision similar to the TPA stating that nothing in the Act renders the Crown liable for pecuniary penalty or prosecution. Only ASIC & Vic also provide the exception to this provision, found in the TPA, which excludes authorities of the Commonwealth or State.

3.6.3 Material Differences between FTA and TPA

Most States do not include a provision limiting the liability of the Crown with regards to pecuniary penalties or prosecution. While all States and Territories (except the ACT) expressly provide for the Crown to be bound by the provisions of the Act, the methods of enforceability against the Crown are limited. In most states, the Crown is not susceptible to prosecution or penalty, leaving only other remedies such as damages, injunctions or other orders.

Extraterritorial Operation of the TPA and FTAs

3.7 Extra-territoriality and Conflict of Laws

The extent to which State and Territory FTAs operate beyond the boundary of the State or Territory to regulate the conduct of suppliers in another State or Territory is particularly relevant to transactions over the internet. The analysis of State and Territory legislation reveals a number of inconsistencies in the protection afforded consumers particularly in the area of “non-excludable” implied terms and unfair terms. This may allow unscrupulous traders to provide for the proper law of the agreement to be the law of a low protection State thereby avoiding the laws of a high protection State, such as Victoria.

While most of the FTAs include provisions for the extra-territorial operation of the legislation this does not of itself prevent a term of the contract from specifying the proper law of the contract. A governing or proper law clause will not, affect the operation of ‘mandatory legislative provisions’ or provisions of the TPA or FTAs that regulate the conduct of parties, such as s 52 TPA and its equivalents. A mandatory legislative provision is one that is expressed to apply irrespective of the party’s choice of law. (Nygh P, *Autonomy in International Contracts*, Clarendon Press, Oxford, 1999 pp 140-141)

This part will therefore consider two issues:

1. What is the extra-territorial operation of each of the State and Territory FTAs in relation to the conduct of suppliers or others outside the geographical area of a State or Territory?
2. Can a supplier avoid the operation of the non-excludable terms provisions in NSW, Vic, SA, WA and NT, and the unfair terms provisions in Victoria, by specifying that the proper law of the contract is the law of another jurisdiction?

Extra-territoriality

The application of the TPA and the State and Territory FTAs is extended in certain circumstances to cover conduct which occurs outside the relevant geographical area.

- (i) **TPA** – The operation of the TPA is extended by the operation of ss 5 and 6 to transactions between Australia and places outside Australia.

Section 5 provides that the application of Parts IV, IVA, V (other than Div 1AA), VB and VC are extended to conduct engaged in outside Australia by bodies corporate incorporated or carrying on business within Australia, or by citizens or ordinary residents of Australia.

Section 6 (2) extends the operation of the Act to persons engaged in:

- a. Interstate or overseas trade and commerce; or
- b. Trade or commerce between territories or within a territory

Section 6(3) also extends the operation of the TPA to person engaged in conduct involving the use of postal, telegraphic or telephonic services.

Relevantly, it has been held that s 52 is applicable to the conduct of an individual/corporation placing misleading material on a website outside Australia where consumers in Australia have used telephonic services to access the site: *ACCC v Hughes (t/a Crowded Planet)* [2002] ATPR 41-863; *ACCC v Chen* (2003) 132 FCR 309. These decisions were based upon the operation of ss 6(2) and 6(3) of the TPA.

- (ii) **NSW** - The application of the NSW FTA is extended by s5A, which was introduced in 2006. That section states that the Act is intended to have extra-territorial application in so far as the legislative powers of the State permit. Section 5 of the *Constitution Act 1902* (NSW) provides that the legislature shall have power to make laws for the peace, welfare and good government of NSW. Section 5(2) clarifies this by stating that the FTA extends to conduct outside NSW that is in connection with goods or services supplied in NSW, or which causes loss in NSW, or which affects a person in NSW.
- (iii) **Qld** - Section 4 of the Qld FTA extends the application of the Act to cover situations where at least part of a transaction occurred in Qld, even if other acts or omissions occurred outside the State. It provides that:
- “Where acts or omissions occur that would constitute a contravention of this Act if they all occurred in Queensland and any of the acts or omissions occur in Queensland, the person who does the act or makes the omission shall be taken to have committed that contravention of this Act.”
- (iv) **WA** – Section 4 of the WA FTA provides a range of circumstances in which a jurisdictional nexus with WA will be found to exist, and to which the FTA will apply. In relation to the acquisition or supply (or proposed acquisition or supply) of goods or services, or the disposal or proposed disposal of an interest in land, the FTA will apply where:
- i. The person who is to acquire or supply the goods or services signs a document in WA relating to the acquisition or supply;
 - ii. The person by or to whom the interest in land is to be disposed of signs a document in WA relating to the disposal;
 - iii. The goods or services are to be delivered or supplied in WA;
 - iv. The land to be disposed of is situated in WA.

The Act also extends to conduct which is engaged in by a body corporate registered or carrying on business in WA, or by an ordinary resident of WA, even if that conduct occurs outside WA.

Notably, s4(3) provides that where the proper law of a contract would be that of WA but for a term in the contract which provides otherwise, the FTA applies in spite of such a choice of law

clause. This is equivalent to s 67 of the TPA and is likely to have the effect stated below (governing law clauses) in relation to contracts for goods or services

- supplied to residents of WA,
- supplied by persons residing or carrying on business in WA
- where the contract or other documents are signed in WA.

(v) **ACT** – Section 10(1) of the ACT FTA extends the application of Part 2 (unfair practices) to conduct outside the ACT which is carried out by bodies corporate incorporated or carrying on business within the ACT, or by ordinary residents of the ACT.

Section 10(2) and (3) require that, in an application for damages under s46, or for another order under s50, a person who wishes to rely at a hearing on conduct to which subsection (1) applies must do so only with written consent of the Minister. Such consent would not be given where the conduct was specifically authorised by the law of the place where it occurred.

(vi) **Tas.** Section 12 of the Tasmanian FTA extends the application of the Act to:

- i. transactions that take place within the State
- ii. conduct that occurs within the State
- iii. representations that are made within the State,

whether wholly or partly.

(vii) **Vic** – Section 6(1) of the Victorian FTA states that the Act applies within and outside Victoria. Subsection (2) states that the Act applies outside Victoria “to the full extent of the extra-territorial legislative power of the Parliament.”

The Victorian *Constitution Act 1974* gives the Parliament power to make laws “in and for Victoria in all cases whatsoever.”

(viii) **SA** – The South Australian FTA is silent on the extra-territorial application of that Act. The South Australian *Consumer Transaction Act* applies to every consumer contract under which goods or services are to be delivered or rendered in SA (s6(2)). Under s6(1), the Act applies to every consumer contract where the law of SA is the proper law of the contract. Unlike s 67 of the TPA it does not render a governing law clause irrelevant to a consideration by a court of the proper law of the contract. This may result in a court taking into account a governing law clause when deciding the law of the contract. Refer to the discussion below in relation to governing law clauses.

(ix) **ASIC Act** – Section 4 of the ASIC Act provides that:

“(1) This Act applies:

- (a) in this jurisdiction; and

- (b) in a State that is not a referring State (but only to the extent to which the application would be within the legislative powers of the Parliament (including powers it has under paragraphs 51(xxxvii) and (xxxix) of the Constitution)); and
- (c) in such external Territories (if any) as are prescribed.”

Summary of extra-territorial application

Each of the TPA and the State and Territory FTAs purport to have wide extra-territorial operation. Each of the extra-territorial provisions is expressed in different ways and may upon a close analysis in a given situation have different extra-territorial application. As a general rule a State or Territory is able to legislate extra-territorially if the law is for the peace, welfare and good government of the State or Territory. As such, it is generally accepted that there needs to be a some type of connection with the State or Territory. Although the State and Territory FTAs are differently expressed some of the common connections to a State that may allow its FTA to have extraterritorial effect in relation to the conduct of a person or corporation that occurs outside of the jurisdiction may include:

1. where some of the conduct occurs within the relevant State or Territory;
2. the conduct is directed to a person situated within the State or Territory (this is relevant to transactions via the internet); or
3. the conduct occurs in the course of a transaction with a resident of the State or Territory.

The conduct provisions of the State and Territory FTA will most likely apply to protect consumers within the home jurisdiction from the conduct of corporations and individuals resident in other jurisdictions provided the relevant conduct occurs within the home jurisdiction.

The exact extent of extra-territoriality of State and Territory FTAs is most relevant to transactions that occur via the internet. Although there has been judicial consideration of the application of the TPA to the conduct of foreign individuals on websites accessed and directed to Australian consumers, a similar consideration of the State and Territory legislation has not occurred. Given the similarity of the misleading conduct provisions within the State legislation and the extended application of the TPA to the conduct of individuals acting in interstate trade and commerce, the point is unlikely to be litigated. In the event of uncertainty in relation to the governing FTA, the majority of consumers could resort to a claim under the TPA and thereby avoid the issue of extra-territoriality of State legislation.

The more relevant issue is the impact of governing law clauses on the application of the non-excludable implied warranties in the NSW, Vic, SA, WA and NT Acts or the unfair terms provisions of the Vic FTA.

Governing law clauses

At common law the proper law of the contract is the system of law chosen by the parties either expressly or inferentially, or if no choice is made the system of law with which the transaction has its

closest and most real connection. (Nygh, *Autonomy in International Contracts* (Clarendon Press, Oxford, 1999), pp 747-775). This approach favours party autonomy as it requires the court to refrain from imposing a law by default until it ascertains whether the parties have exercised their choice. (Greene, "Party Autonomy in Choice of Law in Contract: Through the Lens of *Akai Pty Ltd v The People's Insurance Company*" (1997) 25 ABLR 330 at 330; Bell B, "Proper Law – Ignoring the Contract? A Note on *Akai Pty Ltd v The People's Insurance Co Ltd*" [1997] Syd LR 400 at 410 at 406) The system of law with the closest and most real connection is usually determined by considering a range of objective factors such as the place of formation of the contract, the place of performance, the currency and place of payment, the place of residence or business of the parties, and references in the contract to the application of a particular legal system or forum.

Implied Warranties

Ordinarily, a court will give effect to the express choice of law by the parties subject to a contrary intention being expressed in legislation. An example of a legislative provision which applies to the contrary is found in s 67 of the TPA which attempts to extend the operation of the non-excludable implied warranties to contracts with suppliers outside the jurisdiction. Section 67 provides:

Where:

- (a) *the proper law of a contract for the supply by a corporation of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of Australia;*
- (b) *a contract for the supply by a corporation of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country or of a State or Territory for all or any of the provisions of this division*

this Division applies to the contract notwithstanding that term.

Although it is not beyond doubt, s 67 is likely to have the following effect:

1. Section 67(a) requires a court to disregard the governing law clause in a contract and establish the proper law of the contract by applying the usual common law test to establish the jurisdiction with the real and substantial connection (This is usually established by reference to objective factors such as the place of formation, the place of performance, the place of payment, the parties' place of residence.) If after this assessment the proper law of the contract is the law of Australia, s 67(a) will render the governing law clause, and most likely a governing forum clause unenforceable.
2. Section 67(b) prevents the substitution of provision in the law of another country for the provisions of Pt V Div 2. Unlike s 67(a), the operation of s 67(b) is not dependent upon Australian law being the proper law of the contract. It is suggested that s67(b) indicates that Pt V Div 2 contains internationally mandatory rules which require a foreign court to apply the rules at the expense of the forum rules. See for example *Laminex (Aust) Pty Ltd*

v Coe Manufacturing Co [1999] NSWCA 370 where the New South Wales Court of Appeal stayed proceedings in the Supreme Court of New South Wales on the condition that the respondent (an Oregon company) allowed the appellant to bring its claim for breach of the implied terms under Pt V Div 2 of the TPA in an Oregon court'.

Section 67 operates in conjunction with s 68, which invalidates provisions of a contract which purport to exclude, restrict or modify the application of s 68 to the contract. Section 68 will only have operation, however, if the implied warranties have prima facie application to the contract. The following interpretations could result:

1. Arguably, this requires the proper law of the contract to be the law of Australia so that s 68 may apply to invalidate the restriction in the contract. Therefore, if s 67 were not in the TPA and the parties include a governing law clause, s 68 may not operate.
2. The alternative argument is that s 68 invalidates a governing law clause because it excludes the application of Pt V Div 2 to the contract. On this basis, the governing law clause would not be applicable but the court would still be required to consider the proper law of the contract according to the common law rules referred to above. There is doubt that s 68 invalidates a choice of forum clause in a contract. This clause, along with the fact a contract is formed and performed outside of Australia, may result in the court concluding that the proper law is the law of another jurisdiction.
3. The other basis upon which a governing law clause may be considered invalid is if a purposive approach to the application of the TPA is applied and it is considered that the choice of law was not bona fide, and was aimed at avoiding the application of the TPA.

This uncertainty in relation to the impact of s 68 on governing law and forum clauses is heightened by the fact there are no reported decisions in relation to this provision. For a discussion of s 67 and s 68 of the TPA and their likely effect see Ma, "What's my choice – Deciphering the provisions on conflict of laws in the Trade Practices Act" (2003) 11 *Trade Practices Law Journal* 149.

An analogue of section 67 appears only in the FTA in WA. A modified version of s 67 appears in the SA FTA but whether it has the same effect as s 67 of the TPA is uncertain. An analogue of s 68 of the TPA is included in the FTAs of NSW, Vic, SA, WA and NT. In the absence of s 67, the exact effect of a provision similar to s 68 is not clear and may, depending upon the approach of the court, not apply to the contract due to the parties express or implied choice of law or forum being the law of another State or Territory.

The absence of s 67 may, however, be irrelevant due to the extended operation of Pt V Div 2 of the TPA to interstate trade and commerce by persons and corporations. A consumer purchasing goods interstate or over the internet will, therefore, be entitled to rely on the non-excludable warranties in the TPA, irrespective of the location of the supplier or place of formation and performance of the contract. The uncertainty in relation to the impact of the equivalents to s 68 of the TPA on governing law and forum clauses may, however, result in a consumer being unable to rely on State or Territory legislation

and therefore being unable to seek low cost redress through State tribunals. This result could be avoided if each of the FTAs included non-excludable warranties.

Unfair Terms

The other area in which there is opportunity for suppliers to affect the protection open to consumers is unfair terms. To date only Victoria has enacted unfair terms provisions as part of their FTA.

The unfair terms provisions in Part 2B of the Vic FTA apply to consumer contracts. An unfair term in a consumer contract is void under s 32Y. Consumer contracts are defined as being contracts for the purchase of domestic or personal goods or services for personal or domestic use. The question is whether this provision applies to contracts entered into outside of the State of Victoria. Prima facie, the provisions could apply to any contract that complies with the definition of consumer contract irrespective of the residency of the parties, the place of formation of the contract or the place of performance. However, the legislation is not as wide as it appears and will not apply to a contract between, for example, a resident of New South Wales and a resident in Queensland.

The question that arises is: what is the necessary connection to Victoria before Part 2B will apply to a contract?

The impact of this provision outside of Victoria can be usefully examined through an example.

1. X (a resident of Qld) in the course of its business, advertises for sale goods of a domestic nature,
2. Y (a resident of Vic) purchases goods from X via the website.
3. The terms of the contract displayed on the website include:
 - a. This contract shall be governed by the law of Queensland.
 - b. The courts of Queensland shall have exclusive jurisdiction to determine any disputes arising from this contract.
4. The contract is formed in Queensland. (X makes an offer to sell and Y communicates acceptance through the website to X).
5. Payment under the contract is made in Queensland via the website.
6. The goods are sent FOB so that the risk passes to Y as soon as the goods are delivered to the carrier.

If the contract contained several unfair terms, would Pt 2B of the Vic FTA apply?

There are several ways in which a court may approach this question.

1. First, a court may approach the question in the same way as a claim for misleading conduct under the Vict FTA. This would require a consideration of the extent to which the Vic FTA applies to contracts entered into outside of Victoria, but in this case with a resident of Victoria.

Section 6 provides that the Act applies outside Victoria “to the full extent of the extra-territorial legislative power of the Parliament.” Whilst this refers to the constitutional power of the Victorian parliament, the extent to which this power has been exercised in respect of the FTA must be determined by reference to the provisions of the FTA. Part 2B is stated to apply to ‘consumer contracts’. The definition of consumer contract makes no reference to the type of parties to the contract, nor is there a provision equivalent to ss 67 or 68 of the TPA which may indicate an intention by the parliament to extend the operation of Part 2B beyond transactions occurring in Victoria. The absence of clear indicators as to the operation of the provisions leaves the consumer in a state of uncertainty. It would be open to a court to decide any of the following:

- a. The provisions apply only to contracts entered into in Victoria;
- b. The provisions apply only to suppliers of consumer goods and services operating a business in Victoria;
- c. The provisions apply only to consumers in Victoria under contracts with suppliers in Victoria; or
- d. The provisions apply to consumers in Victoria irrespective of where the supplier is carrying on business.

As Part 2B applies to ‘contracts’ and not ‘conduct’, and given the lack of indicators in the FTA, a likely result is that the legislation is restricted to transactions within Victoria.

2. Second, a court may approach the issue in the same way as the implied warranties under the Vic FTA. As Part 2B implies terms into the contract, a court may consider that the provision only has application if the governing law of the contract is the law of Victoria. This approach leaves it open to a supplier to choose the law of a different State through a governing law or governing forum clause. There is no conflict of laws provision equivalent to s 67 and, therefore, a court will determine the governing law according to the common law. Under the common law a governing law clause will carry significant weight in determining the law of the contract. It is also possible for a supplier, as stated in the example above, to ensure the other indicia (place of formation, place of payment and performance) occur within their chosen jurisdiction thereby ensuring a choice of law as stated in the contract. Unlike the TPA, the Vic FTA does not contain any provisions that would prevent a court from reaching that conclusion.

Recommended Review Issues:

The terms of reference of this report require a consideration of new consumer protection issues which could arise as a consequence of new forms of consumer transactions.

The increase of cross-border internet transactions as a result of the development of e-commerce in Australia raises significant questions in relation to the application of State and Territory consumer protection legislation. Where a transaction involves parties in different jurisdictions, issues arise as to which consumer protection framework applies. These issues may be further complicated where a

consumer contract specifies a different jurisdiction as the governing law of the contract, which differs from that where the contract is formed.

Significant uncertainty surrounds the extra-territorial application of the State and Territory legislation and the extent to which unscrupulous dealers can choose, as the governing law of the contract, the jurisdiction which offers the least protection to consumers. The existence of these uncertainties creates additional costs for consumers making a claim under the State or Territory FTAs which could be minimised through harmonisation of the State and Territory provisions.

The differences in implied warranty provisions between States and Territories and the existence of unfair terms legislation in Victoria but not elsewhere, are examples of gaps in protection which could potentially be exploited by a carefully chosen governing law clause and a properly designed website.

S4: Definition of consumer

3.8 Introduction

The TPA and the State and Territory FTAs all include a definition of consumer.

As indicated in the table below this definition is used to restrict the application of certain provisions to consumers as defined by the respective legislation. The extent to which certain provisions are limited in their application to consumers varies across the jurisdictions.

For example, the statutory implied terms in Pt V Div 2 are only implied into contracts with a 'consumer'; the s 51AB unconscionable conduct provisions in each of the Acts are limited to transactions involving consumers; and some of the prohibitions in Pt V Div 1 (unfair conduct) only apply if the conduct involves a consumer.

Table 3: Comparison of provisions to which definition of "consumer" applies

	TPA	ASIC	NSW	Qld	VIC*	SA	WA	Tas	ACT	NT
51A B	Unconscionable conduct		43		8	57	11	15	13	
57	Referral selling (also s75AZK)		52	57	18	66	20	26A	23	53
60	Harassment and coercion (also s75AZN)		55	50	21	69	23	26	26	55
65C	Product safety standards and unsafe goods (also s75AZS)		27		33		51		25, 27 FT(CA)A	
65D	Product information standards (75AZT)		39		46		60		28 FT(CA)A	
65F	Compulsory product recall				50		54 FTA			
65Q	Power to obtain information, documents and evidence						see s19 CAA			
67	Conflict of laws									
69	Implied undertakings as to		40O		32G		36			62

	TPA	ASIC	NSW	Qld	VIC*	SA	WA	Tas	ACT	NT
	title, encumbrances and quiet possession									
70	Supply by description		40P		38H		37			63
71	Implied undertakings as to quality or fitness		40Q		32I		38			64
72	Supply by sample		40R		38HA		39			65
73	Liability for loss or damage from breach of certain contracts									
73A	Continuing credit contract									
73B	Loan contracts									

* In Victoria the *Fair Trading Act* uses several different approaches to the meaning of consumer as outlined at [3.9.3].

Identifying who is a consumer is therefore, critical to the application of these provisions. Despite each FTA purporting to have the same general purpose of providing greater protection to consumers, the definition of consumer is different across the jurisdictions.

The comparison identified three broad issues for reconsideration by the Commonwealth and States:

- Is an identifiable group of consumers disadvantaged by the definition adopted in a particular jurisdiction?
- Should the definition of consumer be widened to include business consumers, particularly in relation to implied terms?
- Which definition provides the greatest protection for the most consumers?

3.9 Comparison of definitions of consumer

3.9.1 TPA

The definition in s 4B of the TPA provides for a consumer to be:

- a buyer (individuals and corporations) of goods or services the price of which does not exceed \$40,000; or

- if the price exceeds \$40,000, the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle.

In either case 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. The same definition of consumer is used in the ASIC Act.

Synopsis

- a. Consumers may be corporations or individuals
- b. Goods or services purchased for under \$40,000 can be of any kind
- c. Goods or services purchased for more than \$40,000 must be of a kind ordinarily acquired for personal, domestic or household use or consumption or are a commercial road vehicle;
- d. Goods must not, irrespective of the price be acquired for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land. Notably, this does not prevent a person who purchases goods for use in a business, outside of these specific areas, from being a consumer.
- e. Services purchased for less than \$40,000 may therefore, be any service and could include services purchased for use in a business (telecommunication services, web services). Where the service is worth more than \$40,000 a business consumer may still be a consumer if the services are of a kind ordinarily acquired for personal, domestic or household use (mobile telephone services: *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493).
- f. Services, includes the acquisition of an interest in real property in the course of trade and commerce under a contract, such as but not limited to an insurance contract, consultancy contract, royalty agreement, but not an employment contract. Therefore, a person acquiring commercial or industrial land or a lease of such land is unlikely to be a consumer for the purposes of the TPA.

3.9.2 WA, SA and Tas

The FTA in WA (s 6) and Tas (s 5) have a similar definition to the TPA.

First, there is a general definition of a consumer as a person who acquires or proposed to acquire goods or services or an interest in land, not being land used or intended to be used for industrial or commercial purposes. This general definition is then limited in relation to the acquisition of goods or services. A person acquires goods or services as a consumer if:

- the price of does not exceed \$40,000; or

- if the price exceeds \$40,000, the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods were a commercial road vehicle;

In either case 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.

3.9.3 Victoria

In Vic the FTA approaches the application of its provisions to consumers in different ways.

In the case of unconscionable conduct, safety and information standards, and door to door selling, telemarketing and 'non contact' selling, the sections themselves limit their application to goods or services of a kind ordinarily used for person, domestic or household use or purposes. In the case of unconscionable conduct there is a further exclusion of goods supplied for the purpose of re-supply or for using them up or transforming them in trade or commerce. In relation to the other provisions there is an exclusion for goods supplied to a purchaser who is in the business of buying or supplying that types of goods, or to a body corporate. It is noteworthy however that a separate provision for unconscionable conduct against business consumers is included at s 8A.

In the case of referral selling and unfair contract terms a definition of 'consumer contract' is used to limit the application of the provisions. Consumer contract is defined to mean:

'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.'

Notably this definition differs from the first by requiring the goods or service to be of a kind ordinarily acquired for personal or domestic use and for the purpose of the acquisition to be personal and not business use.

The third iteration is in the the case of implied terms. Section 32D defines a contract for the supply of goods or services to be a contract where the price:

- does not exceed \$40,000; or

- if the price exceeds \$40,000, the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption.

This is further limited by s 32DA which excludes:

- (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*; and
- (e) in the case of a supply by way of lease of goods sections 32NA, 32O, 32P and 32PA do not apply.

Synopsis

Similar in effect to the other States and TPA except:

- (a) no inclusion of commercial road vehicles like SA, WA, Tas or TPA;
- (b) the acquisition of interest in land is not dealt with specifically (check definition of services);
- (c) a consumer contract is not limited by a monetary amount, except in relation to the acquisition of goods and services for the purposes of implied conditions and warranties;
- (d) The re-supply exemption is more specifically articulated in relation to raw material used or transformed in a production or manufacture process, to be goods ordinarily supplied for that purpose;
- (e) Contracts for the supply of services where the services are to be re-supplied to a third party are not entitled to the benefit of the implied warranties.
- (f) Contracts for the supply of goods or services pre 1 June 2004 are not entitled to the benefit of the implied warranties and conditions under the Vic FTA but are entitled to the benefit of the implied warranties and conditions under Part 4 of the *Goods Act 1958* (Vic).

3.9.4 New South Wales

In NSW, s 5 a consumer is a person who:

- Acquires goods or services from a supplier;
- Acquires an interest in land, other than land used, or intended to be used for industrial or commercial purposes

A person is not a consumer if goods or services are acquired for the purposes of 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.

In the case of implied warranties and undertakings s 40L further requires that the goods or services be of a kind ordinarily acquired for personal, domestic or household purposes.

Synopsis

- (a) There are no monetary limits. A person or corporation who acquires goods or services of any value, other than for the purpose of re-supply, using for manufacture or production or the repair of goods or fixture in the course of a business will be a consumer.
- (b) In the case of implied warranties and conditions, the goods or services must be of a kind ordinarily acquired for domestic, personal or household purposes.
- (c) A person who purchases goods or services for the purposes of a farming undertaking will be a consumer unless they are acquired for re-supply to a third party.
- (d) No inclusion of commercial road vehicles like SA, WA, Tas or TPA
- (e) Contracts entered prior to 25 August 2003 do not have the benefit of implied warranties under the Act and are subject to the *Sale of Goods Act*.
- (f) Contracts for the supply of services where the services are to be re-supplied to a third party are not entitled to the benefit of the implied warranties.
- (g) A consumer will be a person who acquires an interest in land, except where it is for industrial or commercial purposes.
- (h) The definition of services, like the TPA, includes the acquisition of an interest in real property in the course of trade and commerce under a contract, such as but not limited to an insurance contract, consultancy contract, royalty agreement, but not an employment contract. Therefore, a person acquiring commercial or industrial land or a lease of such land is unlikely to be a consumer for the purposes of the NSW FTA.

3.9.5 Queensland

In Queensland, s 6 a consumer is defined to be a person who acquires or proposed to acquire goods or services or an interest in land. This general definition is then limited in relation to the acquisition of goods or services or an interest in land. A person acquires goods or services as a consumer if:

- the person is an individual and they acquire the goods, services or interest in land otherwise than for a business carried on by the person; or
- the price of the goods does not exceed \$40,000 (applies to corporations and individuals)

If the goods are acquired for re-supply by way of sale, exchange, lease, hire or hire purchase then the person is not a consumer.

Synopsis

- (a) a corporation cannot be a consumer if the price of the goods is greater than \$40,000. This would have an impact on corporate consumers entering contracts for the purchase of goods, services or land over \$40,000 for domestic purposes.
- (b) There is no express prohibition on acquiring goods 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. This is a prohibition imposed in other jurisdictions on both limbs of the definition. Due to the exclusion of goods acquired other than for business purposes arguably this same restriction will apply to individuals acquiring goods, services or land over \$40,000. Goods under \$40,000 can be acquired for any purpose except re-supply.
- (c) Unlike the other FTAs the acquisition of an interest in land is specifically dealt with in the definition and limits on the definition.

3.9.6 ACT

In ACT, s 6 a consumer is a person who acquires goods or services from a supplier.

A person is not a consumer if goods or services are acquired in the course of a business, or the person acquires or holds themselves out as acquiring goods or services:

- (i) for the purposes of re-supply, or
- (ii) using them or transforming them by a process of manufacture or production, or
- (iii) using them for the repair or treatment of other goods or of fixtures on land.

Synopsis

- (d) There are no monetary limits. A person or corporation who acquires goods or services of any value, other than in the course of a business, for the purpose of re-supply, using for manufacture or production or the repair of goods or fixture, will be a consumer.

- (e) No inclusion of commercial road vehicles like SA, WA, Tas or TPA or farming undertaking like NSW.
- (f) Contracts for the supply of services where the services are to be re-supplied to a third party are not entitled to the benefit of the implied warranties.
- (g) There is no express provision concerning the acquisition of interests in land.
- (h) The definition of services, like the TPA, includes the acquisition of an interest in real property in the course of trade and commerce under a contract, such as but not limited to an insurance contract, consultancy contract, royalty agreement, but not an employment contract.

3.9.7 NT

In NT, s 5 a consumer is a person who acquires goods or services from a supplier.

A person is not a consumer if goods are acquired or are held out as acquired:

- (i) for the purposes of re-supply, or
- (ii) using them or transforming them by a process of manufacture or production,

For the purposes of parts 5 (implied conditions and warranties) and part 6 (enforcement) goods are also excluded if they are purchased for using them for the repair or treatment of other goods or of fixtures on land.

Synopsis

There are no monetary limits. A person or corporation who acquires goods of any value, other than in the course of a business, for the purpose of re-supply, using for manufacture or production or the repair of goods or fixture, will be a consumer. A person who acquires services from a supplier will be a consumer irrespective of the use to which the services are acquired.

No inclusion of commercial road vehicles like SA, WA and Tas or farming undertaking like NSW.

Contracts for the supply of services where the services are to be re-supplied to a third party are not entitled to the benefit of the implied warranties.

There is no express provision concerning the acquisition of interests in land.

The definition of services, like the TPA, includes the acquisition of an interest in real property in the course of trade and commerce under a contract, such as but not limited to an insurance contract, consultancy contract, royalty agreement, but not an employment contract.

3.10 What are the material differences between the FTA's and TPA?

To establish the significance of differences between the jurisdictions it is useful to consider the categories of consumers who are protected under the TPA and where they are also protected under each of the State FTAs. Consumers of goods and services will be divided according to (i) their legal

nature (ie person or corporation) and (ii) the purpose for which the goods or services are purchased (personal or business use).

3.10.1 Individual consumer acquiring goods for personal or domestic purposes

Individual consumers acquiring goods for personal or domestic use, and by definition are not re-supplying or using them in a business, are generally considered consumers under the TPA and all State FTAs subject to the following:

- (i) **TPA** – under \$40,000 the goods can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature), but over \$40,000 the goods must be of a kind ordinarily acquired for personal or domestic use unless it is a commercial road vehicle. This means that a person acquiring goods that by their nature are ordinarily acquired for business purposes, such as large machinery, are unlikely to be a consumer.
- (ii) **WA, SA and Tas** - under \$40,000 the goods can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature), but over \$40,000 the goods must be of a kind ordinarily acquired for personal or domestic use, unless it is a commercial road vehicle.
- (iii) **Vic** - has the same operation as the TPA, in relation to the definition of consumer for implied terms and warranties, but excludes consumers who acquired goods before 1 June 2004 (these consumers are entitled to the warranties in the *Goods Act 1958 (Vic)*). The definition of consumer contract (which applies to the unfair terms provisions) requires the goods or service to be of a kind ordinarily acquired for personal or domestic use and for the purpose of the acquisition to be personal and not business use. In the case of unconscionable conduct, safety and information standards, and door to door selling, telemarketing and 'non contact' selling, the sections themselves limit their application to goods or services of a kind ordinarily used for person, domestic or household use or purposes irrespective of the price of the goods or services.
- (iv) **Qld** – under \$40,000 the goods can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature), but over \$40,000 the goods must be acquired other than for 'a business carried on by the person'. Therefore, a person who acquired goods, of any value, that by their nature are ordinarily acquired for business purposes will be a consumer if they are acquired for personal use.
- (v) **NSW** – where goods of any value are purchased for domestic or personal purposes the person will be a consumer, irrespective of their nature. However, the implied warranties and conditions will only apply if the goods are of a kind ordinarily acquired for personal, domestic or household use. Therefore, a person who acquires goods, of any value, ordinarily acquired for business purposes will not be a consumer for the purposes of the implied warranties but may be a consumer for the purposes of other provisions.
- (vi) **ACT and NT**- where goods of any value are purchased for domestic or personal purposes the person will be a consumer, irrespective of their nature. Therefore, a person who acquired

goods, of any value, that by their nature are ordinarily acquired for business purposes will be a consumer if they are acquired for personal use.

Material Differences

A comparison of the application of the TPA and the FTAs to the acquisition of goods by an individual for personal or domestic use reveals:

- (i) An individual acquiring consumer goods⁶ of any value for personal use is a consumer for the purposes of the TPA and all FTAs;
- (ii) An individual acquiring business goods⁷ under \$40,000 for personal use is a consumer for the purposes of the TPA and all FTAs, except NSW and Victoria. In NSW, a person purchasing business goods of any value for personal use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Victoria a person acquiring business goods under \$40,000 for personal use will only be entitled to the benefit of the implied warranties. The unfair terms provision are limited by the definition of consumer contract to goods of a kind ordinarily acquired for personal use and the safety and information standards, and door to door selling, telemarketing and 'non contact' selling provisions are likewise limited (see [3.9.3]);
- (iii) An individual acquiring business goods over \$40,000 for personal use is not a consumer under the TPA. In Victoria such a person would not be entitled to the protection of any provisions of the FTA (refer to the explanation at [3.9.3]). In WA, SA and Tas such a person is also not a consumer unless they are acquiring a commercial road vehicle. In Qld, ACT and NT the person is a consumer. In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions.

The main reason for the differences in relation to the acquisition of business goods for personal use is the restriction imposed under the TPA and in Vic, WA, SA, Tas and NSW for the goods to be of a kind ordinarily acquired for domestic or personal use (and in the case of unfair terms in Victoria also acquired for personal use). This same restriction does not exist in Qld, ACT or NT. In Qld and ACT this can be explained by the lack of non-excludable implied warranties in the FTAs. In the NT there are implied warranties and conditions in the FTA.

Review recommendation

- The application of the TPA and FTAs to the acquisition of business goods for personal or domestic use needs to be reviewed. Some jurisdictions include the purchase of business goods therefore extending the meaning of consumer to any person or corporation buying goods or services of any kind for personal use.

⁶ Goods of a kind ordinarily acquired for person, domestic or household use.

⁷ Goods of a kind ordinarily acquired for business or commercial purposes.

- The desirability of retaining monetary limits for the acquisition of consumer goods for personal or domestic use

Summary of Application to the acquisition of goods for personal use

	TPA	WA	SA	Tas	Vic	Qld	NSW	ACT	NT
Consumer goods under \$40,000 for personal use	√	√	√	√	√ ⁸	√	√ ⁹	√ ¹⁰	√ ¹¹
Consumer goods over \$40,000 for personal use	√	√	√	√	√ ¹²	√	√	√	√
Business goods under \$40,000 for personal use	√	√	√	√	√ ¹³	√	√ x ¹⁴	√	√
Business goods over \$40,000 for personal use	x	x ¹⁵	x ¹⁶	x ¹⁷	x	√	√ x ¹⁸	√	√

3.10.2 Corporate consumer acquiring goods for personal or domestic purposes

A corporation may in limited circumstances arguably acquire goods or services for domestic purposes, such as in the case of a corporate trustee of a family trust that owns the family residence. Corporate consumers acquiring goods for personal or domestic use, and by definition are not re-supplying or

⁸ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer goods of any value. Refer to [3.9.3].

⁹ No monetary limits.

¹⁰ No monetary limits.

¹¹ No monetary limits.

¹² The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer goods of any value. Refer to [3.9.3].

¹³ Only in the case of implied warranties. For all other provisions of the Victorian FTA, the person would not be a consumer.

¹⁴ A person who acquires business goods of any value will not be a consumer for the purpose of the implied warranties.

¹⁵ Except if a commercial road vehicle.

¹⁶ Except if a commercial road vehicle.

¹⁷ Except if a commercial road vehicle.

¹⁸ A person who acquires business goods of any value will not be a consumer for the purpose of the implied warranties.

using them in a business, are generally entitled to the same protection as individual consumers under the TPA and all State FTAs except for the following:

- (i) **Qld** – A corporate consumer who acquires goods valued at less than \$40,000 is treated in the same way as an individual consumer. A corporation acquiring goods of any kind over \$40,000, for any purpose is not a consumer.

Given the fact that in all other States no distinction is drawn in the legislation between corporate consumers, and assuming they can in some limited circumstances acquire goods or services for personal use, the rationale for denying a corporate consumer the protections of the unfair practices provisions of the Qld FTA should be reviewed.

Review recommendation

- The rationale for maintaining a different position for corporate consumers purchasing goods in excess of \$40,000 in Qld compared to all other jurisdictions.

3.10.3 Individual consumer acquiring goods for business purposes

Individual consumers acquiring goods for business use are treated in varying ways across the TPA and FTAs:

- (i) **TPA** – under \$40,000 the goods can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature) and acquired for any purpose. Goods valued at over \$40,000 must be of a kind ordinarily acquired for personal or domestic use, unless it is a commercial road vehicle. A person may therefore, still be a consumer if goods of a domestic or personal nature are acquired for business purposes where they are valued at more than \$40,000. Both categories are, however, subject to the goods not being acquired for:
 - a. Re-supply; or
 - b. Using them or transforming them in trade or commerce in the course of:
 - i. production or manufacture; or
 - ii. repairing or treating other goods or fixtures on land.

Subject to those provisos a person will be a consumer if he or she acquires goods of any kind for personal or business purposes under \$40,000 or if he or she acquires consumer goods (a kind ordinarily acquired for personal use) for personal or business purposes over \$40,000. If the goods are ordinarily acquired for business purposes and worth more than \$40,000 the person is not a consumer irrespective of the purpose for which it is purchased.

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- (ii) **WA, SA and Tas** - under \$40,000 the goods can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature) and acquired for any purpose subject to the re-supply proviso discussed above. Over \$40,000 the goods must be of a kind ordinarily acquired for personal or domestic use, unless it is a commercial road vehicle. These provisions therefore operate in the same way as the TPA,.
- (iii) **Vic** - has the same operation as the TPA in relation to the implied terms and warranties in the Vic FTA except:
- a. It excludes consumers who acquired goods before 1 June 2004 (these consumers are entitled to the warranties in the *Goods Act 1958* (Vic));;
 - b. Goods supplied for the purpose of production or manufacture or repairing or treating other goods or fixtures on land includes raw materials.

The definition of consumer contract (which applies to the unfair terms and referral selling provisions) requires the goods or service to be of a kind ordinarily acquired for personal or domestic use and for the purpose of the acquisition to be personal and not business use.

Therefore, a person acquiring goods for other than domestic purposes would not be entering a consumer contract, even though the goods are of a kind ordinarily considered to be domestic or personal.

In the case of unconscionable conduct, safety and information standards, and door to door selling, telemarketing and 'non contact' selling, ('unfair practices provisions') the sections themselves limit their application to goods or services of a kind ordinarily used for person, domestic or household use or purposes irrespective of the price of the goods or services.

- (iv) **Qld** – under \$40,000 the goods can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature) and for any purpose, provided they are not for re-supply by way of sale, exchange, lease, hire or hire purchase. Over \$40,000 the goods must be acquired other than for 'a business carried on by the person'. Therefore, a person who acquires goods of any kind for more than \$40,000 for business purposes is not a consumer. This is potentially wider than the re-supply proviso in the TPA.
- (v) **NSW** – where any types of goods, of any value, are purchased for business purposes the person will be a consumer, subject to the following exclusions:
- a. Goods acquired for the purposes of re-supply; or
 - b. Goods acquired in the course of a business, except a farming undertaking, for transforming or using them in manufacture or production or using them for the repair of other goods or fixtures on land.

However, the non-excludable implied warranties and conditions will only apply if the goods are of a kind ordinarily acquired for personal, domestic or household use. Therefore, a person who acquires goods, of any value, ordinarily acquired for business purposes will not be a consumer for the purposes of the implied warranties but may be a consumer for the purposes of other provisions.

- (vi) **ACT** – A person who acquires any type of goods for any value in the ‘course of a business’ will not be a consumer. Likewise a person who acquires any type of goods for the purpose of re-supply or using them in a process or manufacture or for repair of other goods or fixtures on land, is not a consumer.
- (vii) **NT**- A person who acquires any type of goods for any value from a supplier is a consumer provided they are not acquired for the purpose of re-supply or using them in a process or manufacture or for repair of other goods or fixtures on land.

Material Differences

A comparison of the application of the TPA and FTAs to the acquisition of goods by an individual for business use reveals:

- An individual who acquires goods for the purpose of re-supply, use or transformation in a process or manufacture, or for repair of other goods or fixtures on land is not a consumer irrespective of the cost or nature of the goods.
- An individual acquiring consumer goods¹⁹ under \$40,000 for business use (other than the excluded uses of resupply, transformation or repair of fixtures) is a consumer for the purposes of the TPA and all FTAs, except the ACT and Vic. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract. Refer above;
- An individual acquiring consumer goods over \$40,000 for business use (other than the excluded uses) is a consumer for the purposes of the TPA and all FTAs, except the ACT, Qld and Vic. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract. Refer above
- An individual acquiring business goods²⁰ under \$40,000 for business use (other than the excluded uses) is a consumer for the purposes of the TPA and all FTAs, except NSW, ACT and Vic. In NSW, a person purchasing business goods of any value for any use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Victoria the

¹⁹ Goods of a kind ordinarily acquired for person, domestic or household use.

²⁰ Goods of a kind ordinarily acquired for business or commercial purposes.

person will be a consumer for the purposes of the implied terms but not for any other provision. Refer above;

- An individual acquiring business goods over \$40,000 for business use (other than the excluded uses) is not a consumer except in the NT and NSW. (In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions). In WA, SA, Tas and TPA such a person is not a consumer unless they are acquiring a commercial road vehicle.

In this analysis Qld and the ACT stand out as providing the least protection for individuals purchasing goods for business purposes under \$40,000. Over \$40,000 there is very little protection for purchasers of goods for business purposes except in NT where these individuals are entitled to the benefit of all consumer protection provisions including implied warranties and conditions.

Review recommendation

- The application of the FTA in Qld and ACT to the acquisition of consumer goods for business purposes should be reviewed;
- The application of the FTA in ACT to persons who acquire goods for business purposes and whether it should be consistent with other States;
- Whether the TPA and FTA (other and NT) should be widened to include the purchase of business goods for business purposes, other than the exclusions.
- Review of whether the monetary limit of \$40,000 is a sufficient indicator for differentiating between consumer and non-consumer transactions.

Summary of Application to the acquisition of goods for business use (individual)

	TPA	WA	SA	Tas	Vic	Qld	NSW	AC T	NT
Consumer goods under \$40,000 for business use other than re-supply, using in production or manufacture, or in repairing other goods or fixtures on land.	√	√	√	√	√ ²¹	√	√ ²²	x ²³	√ ²⁴
Consumer goods over \$40,000 for business use other than re-supply, using in production	√	√	√	√	√ ²⁵	x	√	x	√

²¹ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer goods of any value. However, the purchase of consumer goods for business use will not be a consumer contract for unfair terms or referral selling provisions..

²² No monetary limits.

²³ No monetary limits.

²⁴ No monetary limits.

or manufacture, or in repairing other goods or fixtures on land.									
Business goods under \$40,000 for business use other than re-supply, using in production or manufacture, or in repairing other goods or fixtures on land.	√	√	√	√	√ ²⁶	√	√ x ²⁷	x	√
Business goods over \$40,000 for business use other than re-supply, using in production or manufacture, or in repairing other goods or fixtures on land.	x	x ²⁸	x ²⁹	x ³⁰	x	x	√ x ³¹	x	√

3.10.4 Corporate consumer acquiring goods for business purposes

Corporate consumers acquiring goods for business use are generally entitled to the same protection as individual consumers acquiring goods for business use under the TPA and all State FTAs except for the following:

- (i) **Qld** – A corporate consumer who acquires goods valued at less than \$40,000 is treated in the same way as an individual consumer. A corporation acquiring any type of goods over \$40,000 for any purpose is not a consumer.

²⁵ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer goods of any value. However, the purchase of consumer goods for business use will not be a consumer contract for unfair terms or referral selling provisions.

²⁶ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer goods of any value. However, the purchase of consumer goods for business use will not be a consumer contract for unfair terms or referral selling provisions. The person acquiring business goods will also not be a consumer for unfair practices provisions, which require goods ordinarily for domestic, household or personal use.

²⁷ A person who acquires business goods over \$40,000 will not be a consumer for the purposes of the implied warranties provisions.

²⁸ Except if a commercial road vehicle.

²⁹ Except if a commercial road vehicle.

³⁰ Except if a commercial road vehicle.

³¹ A person who acquires business goods over \$40,000 will not be a consumer for the purposes of the implied warranties provisions.

Although the Qld legislation distinguishes between individuals and corporations, the position of a corporation acquiring goods for business purposes over \$40,000 will be the same as in every other jurisdiction, except NT. The only difference is in the treatment of corporations purchasing consumer goods for business purposes over \$40,000. In all jurisdictions except ACT and Vic such a corporation would be a consumer. In Victoria the corporation will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract. Refer above.

Review Recommendation

We make no recommendations for review unless the Commission is also proposing to review the position of acquisition of business goods for business purposes. In that case consistency with other jurisdictions should be achieved.

3.10.5 Individual consumer acquiring services for personal or domestic purposes

Individual consumers acquiring services for personal or domestic use, and by definition are not re-supplying or using them in a business, are generally considered consumers under the TPA and all State FTAs subject to the following:

TPA – under \$40,000 the services can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature), but over \$40,000 the services must be of a kind ordinarily acquired for personal or domestic use. This means that a person acquiring services that by their nature are ordinarily acquired for business purposes would not be a consumer.

WA, SA and Tas - under \$40,000 the services can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature), but over \$40,000 the services must be of a kind ordinarily acquired for personal or domestic use.

Vic - has the same operation as the TPA (in relation to the definition of consumer for implied terms and warranties) but excludes consumers who acquired services before 1 June 2004. (These consumers are entitled to the warranties in the *Goods Act 1958* (Vic)). The definition of consumer contract (which applies to the unfair terms provisions) requires the services to be of a kind ordinarily acquired for personal or domestic use and for the purpose of the acquisition to be personal and not business use. In the case of unconscionable conduct, safety and information standards, and door to door selling, telemarketing and 'non contact' selling, the sections themselves limit their application to services of a kind ordinarily used for person, domestic or household use or purposes irrespective of the price of the goods or services.

Qld – under \$40,000 the goods can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature), but over \$40,000 the services must be acquired other than for 'a business carried on by the person'. Therefore, a person who acquired services, of any value, that by their nature are ordinarily acquired for business purposes will be a consumer if they are acquired for personal use.

NSW – where services of any value are purchased for domestic or personal purposes the person will be a consumer, irrespective of their nature. However, the implied warranties and conditions will only apply if the services are of a kind ordinarily acquired for personal, domestic or household use. Therefore, a person who acquires services ordinarily acquired for business purposes will not be a consumer for the purposes of the implied warranties but may be a consumer for the purposes of other provisions.

ACT and NT- where services of any value are purchased for domestic or personal purposes the person will be a consumer, irrespective of their nature. Therefore, a person who acquired services ordinarily acquired for business purposes will be a consumer if they are acquired for personal use.

Material Differences

A comparison of the application of the TPA and FTAs to the acquisition of services by an individual for personal or domestic use reveals:

- An individual acquiring consumer services³² of any value for personal use is a consumer for the purposes of the TPA and all FTAs;
- An individual acquiring business services³³ under \$40,000 for personal use is a consumer for the purposes of the TPA and all FTAs, except NSW and Victoria. In NSW, a person purchasing business services of any value for personal use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Victoria a person acquiring business services under \$40,000 for personal use will only be entitled to the benefit of the implied warranties. The unfair terms provision are limited by the definition of consumer contract to services of a kind ordinarily acquired for personal use and the safety and information standards, and door to door selling, telemarketing and 'non contact' selling provisions are likewise limited (see [3.9.3]);
- An individual acquiring business services over \$40,000 for personal use is not a consumer under the TPA and FTAs in Vic, WA, SA and Tas. In Victoria such a person would not be entitled to the protection of any provisions of the FTA (refer to the explanation at [3.9.3]). In Qld, ACT and NT the person is a consumer. In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions.

The main reason for the differences in relation to the acquisition of business services for personal use is again the restriction imposed under the TPA and in Vic, WA, SA, Tas and NSW for the goods to be of a kind ordinarily acquired for domestic or personal use (and in the case of unfair terms in Victoria also acquired for personal use). This same restriction does not exist in Qld, ACT or NT

³² Services of a kind ordinarily acquired for person, domestic or household use.

³³ Services of a kind ordinarily acquired for business or commercial purposes.

Review recommendation

- The application of the TPA and FTAs for their application to the acquisition of business services for personal or domestic use needs to be reviewed;
- The desirability of retaining monetary limits for the acquisition of consumer services for personal or domestic use

Summary of Application to the acquisition of services for personal use

	TPA	WA	SA	Tas	Vic	Qld	NSW	ACT	NT
Consumer services under \$40,000 for personal use	√	√	√	√	√ ³⁴	√	√ ³⁵	√ ³⁶	√ ³⁷
Consumer services over \$40,000 for personal use	√	√	√	√	√ ³⁸	√	√	√	√
Business services under \$40,000 for personal use	√	√	√	√	√ ³⁹	√	√ x ⁴⁰	√	√
Business services over \$40,000 for personal use	x	x	x	x	x	√	√ x ⁴¹	√	√

3.10.6 Corporate consumer acquiring services for personal or domestic purposes

A corporation may in limited circumstances arguably acquire goods or services for domestic purposes, such as in the case of a corporate trustee of a family trust that owns the family residence. Corporate consumers acquiring goods for personal or domestic use, and by definition are not re-supplying or using them in a business, are generally entitled to the same protection as individual consumers under the TPA and all State FTAs except for the following:

³⁴ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer goods of any value. Refer to [3.9.3].

³⁵ No monetary limits.

³⁶ No monetary limits.

³⁷ No monetary limits.

³⁸ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer goods of any value. Refer to [3.9.3].

³⁹ Only in the case of implied warranties. For all other provisions of the Victorian FTA, the person would not be a consumer

⁴⁰ No implied warranties or conditions for business services of any value.

⁴¹ No implied warranties or conditions for business services of any value.

- (i) **Qld** – A corporate consumer who acquires services valued at less than \$40,000 is treated in the same way as an individual consumer. A corporation acquiring services over \$40,000 for any purpose is not a consumer.

Given the fact that in all other States no distinction is drawn in the legislation between corporate consumers, and assuming they can in some limited circumstances acquire goods or services for personal use, the rationale for denying a corporate consumer the protections of the unfair practices provisions of the Qld FTA should be reviewed.

Review Recommendation

The rationale for maintaining a different position for corporate consumers purchasing services in excess of \$40,000 in Qld compared to all other jurisdictions.

3.10.7 Individual consumer acquiring services for business purposes

Individual consumers acquiring services for business use are treated in varying ways across the TPA and FTAs:

- (i) **TPA** – under \$40,000 the services can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature) and acquired for any purpose. Services valued at over \$40,000 must be of a kind ordinarily acquired for personal or domestic use. A person may therefore, still be a consumer if services of a domestic or personal nature, such as the provision of web services or mobile technology services are acquired for business purposes where they are valued at more than \$40,000. Unlike goods there are no exemptions for services that are acquired for re-supply or used in a process or production or manufacture. If the services are ordinarily acquired for business purposes and worth more than \$40,000 the person is not a consumer irrespective of the purpose for which it is purchased.
- (ii) **WA, SA and Tas** - under \$40,000 the services can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature) and acquired for any purpose. There are no exclusions for the re-supply or use of services in manufacture or production. Over \$40,000 the services must be of a kind ordinarily acquired for personal or domestic use. These provisions therefore operate in the same way as the TPA.
- (iii) **Vic** - has the same operation as the TPA in relation to the implied terms and warranties in the Vic FTA except:

- a. It excludes consumers who acquired goods before 1 June 2004 (these consumers are entitled to the warranties in the *Goods Act 1958* (Vic));;
- b. Goods supplied for the purpose of production or manufacture or repairing or treating other goods or fixtures on land includes raw materials.

The definition of consumer contract (which applies to the unfair terms and referral selling provisions) requires the goods or service to be of a kind ordinarily acquired for personal or domestic use and for the purpose of the acquisition to be personal and not business use. Therefore, a person acquiring goods for other than domestic purposes would not be entering a consumer contract, even though the goods are of a kind ordinarily considered to be domestic or personal.

In the case of unconscionable conduct, safety and information standards, and door to door selling, telemarketing and 'non contact' selling, the sections themselves limit their application to goods or services of a kind ordinarily used for person, domestic or household use or purposes irrespective of the price of the goods or services.

- (iv) **Qld** – under \$40,000 the services can be of any kind (ie ordinarily domestic or personal or ordinarily of a business nature) and for any purpose. Over \$40,000 the services must be acquired other than for 'a business carried on by the person'. Therefore, a person who acquires services of any kind for more than \$40,000 for business purposes is not a consumer.
- (v) **NSW** – where any types of services, of any value, are acquired for business purposes the person will be a consumer unless the services are acquired for the purposes of re-supply. However, the non-excludable implied warranties and conditions will only apply if the services are of a kind ordinarily acquired for personal, domestic or household use. Therefore, for the purpose of the implied warranties a person who acquires services ordinarily acquired for personal or domestic purposes in the course of a business will be a consumer but if the goods are ordinarily acquired for business purposes they will not be a consumer.
- (vi) **ACT** – A person who acquires any type of services for any value in the 'course of a business' will not be a consumer. Likewise a person who acquires any type of services for the purpose of re-supply or using them in a process or manufacture or for repair of other goods or fixtures on land, is not a consumer.
- (vii) **NT**- A person who acquires any type of services for any purpose from a supplier is a consumer.

Material Differences

A comparison of the application of the the TPA and the FTAs to the acquisition of services by an individual for business use reveals:

- (i) An individual who acquires services for the purpose of re-supply, use or transformation in a process or manufacture is a consumer, except in Vic and NSW.
- (ii) An individual acquiring consumer services⁴² under \$40,000 for business use (subject to the restrictions in Vic and NSW) is a consumer for the purposes of the TPA and all FTAs, except the ACT and Victoria. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract. Refer above;
- (iii) An individual acquiring consumer services⁴³ over \$40,000 for business use (other than the excluded uses in Vic and NSW) is a consumer for the purposes of the TPA and all FTAs, except the ACT, Qld and Vic. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract. Refer above.
- (iv) An individual acquiring business services⁴⁴ under \$40,000 for business use (other than the excluded uses in Vic and NSW) is a consumer for the purposes of the TPA and all FTAs, except NSW, ACT and Vic. In NSW, a person purchasing business services of any value for any use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Vic the person will be a consumer for the purposes of the implied warranties but not for any other provisions.;
- (v) An individual acquiring business services over \$40,000 for business use (other than the excluded uses in Vic and NSW) is not a consumer except in the NT and NSW. (In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions).

In this analysis Qld and the ACT stand out as providing the least protection for individuals purchasing services for business purposes under \$40,000. Over \$40,000 there is very little protection for purchasers of services for business purposes except in NT where these individuals are entitled to the benefit of all consumer protection provisions including implied warranties and conditions.

Review Recommendations

- The application of the FTA in Qld and ACT to the acquisition of consumer services for business purposes should be reviewed;
- The application of the FTA in ACT to persons who acquire services for business purposes and whether it should be consistent with other States;

⁴² Services of a kind ordinarily acquired for person, domestic or household use.

⁴³ Goods of a kind ordinarily acquired for person, domestic or household use.

⁴⁴ Goods of a kind ordinarily acquired for business or commercial purposes.

- Whether the TPA and FTA (other and NT) should be widened to include the acquisition of business services for business purposes.
- Review of whether the monetary limit of \$40,000 is a sufficient indicator for differentiating between consumer and non-consumer transactions.
- Whether the restrictions on the re-supply of services in Vic and NSW should be removed or introduced in other jurisdictions.

Summary of Application to the acquisition of services for business use (individual)

	TPA	WA	SA	Tas	Vic	Qld	NSW	ACT	NT
Consumer services under \$40,000 for business use	√	√	√	√	√ ⁴⁵ x ⁴⁶	√	√ ⁴⁷	x ⁴⁸	√ ⁴⁹
Consumer services over \$40,000 for business use	√	√	√	√	√ ⁵⁰ x ⁵¹	x	√ ⁵²	x	√
Business services under \$40,000 for business use	√	√	√	√	√ ⁵³ x ⁵⁴	√	√ ⁵⁵ x ⁵⁶	x	√

⁴⁵ If person acquires the services for re-supply to a third party it is not a consumer contract.

⁴⁶ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer services of any value. However, the purchase of consumer services for business use will not be a consumer contract for unfair terms or referral selling provisions. .

⁴⁷ No monetary limits. If person acquires the services for re-supply the person is not a consumer.

⁴⁸ No monetary limits.

⁴⁹ No monetary limits.

⁵⁰ If person acquires the services for re-supply to a third party it is not a consumer contract

⁵¹ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer services of any value. However, the purchase of consumer services for business use will not be a consumer contract for unfair terms or referral selling provisions

⁵² If person acquires the services for re-supply the person is not a consumer.

⁵³ If person acquires the services for re-supply to a third party it is not a consumer contract

⁵⁴ The monetary limit of \$40,000 is only relevant to the application of the implied warranty provisions of the Victorian FTA. In all other cases the application of the FTA provisions applies to consumer services of any value. However, the purchase of consumer services for business use will not be a consumer contract for unfair terms or referral selling provisions. The person acquiring business services will also not be a consumer for unfair practices provisions, which require goods ordinarily for domestic, household or personal use.

⁵⁵ If person acquires the services for re-supply the person is not a consumer.

⁵⁶ A person who acquires business services over \$40,000 will not be a consumer for the purposes of the implied warranties provisions.

Business services over \$40,000 for business use	x	x	x	x	x	x	√ ⁵⁷ x ⁵⁸	x	√
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3.10.8 Corporate consumer acquiring services for business purposes

Corporate consumers acquiring services for business use are generally entitled to the same protection as individual consumers acquiring services for business use under the TPA and all State FTAs except for the following:

- (i) Qld – A corporate consumer who acquires services valued at less than \$40,000 is treated in the same way as an individual consumer. A corporation acquiring any type of services over \$40,000 for any purpose is not a consumer.

Although the legislation treats individuals and corporations differently, the position of a corporation acquiring business services for business purposes over \$40,000 will be the same as in every other jurisdiction, except NT. The only difference is in the treatment of corporations purchasing consumer services for business purposes over \$40,000. In all jurisdictions, except ACT and Vic, such a corporation would be a consumer. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract. Refer above

Review recommendation

No recommendation for review unless the Commission is also reviewing the position of acquisition of business goods for business purposes. In that case consistency with other jurisdictions should be achieved.

3.11 Summary of Review Issues

There are material differences in the application of the State Fair Trading Acts to persons or corporations as consumers. Primarily the determination of who is a consumer is based upon the type of goods or services that are being acquired. The inconsistencies create uncertainty for consumers and create potential for traders, in particular in respect of internet transaction to forum shop. Refer to the discussion at [3.7] in relation to the difficulties of determining the applicable laws and appropriate forum under the TPA and State and Territory FTAs. Several policy decisions are required in this area:

- (a) Should State and Territory legislation be harmonised with the TPA and interse?
- (b) How should 'consumer' be defined?

⁵⁷ If person acquires the services for re-supply the person is not a consumer.

⁵⁸ A person who acquires business services over \$40,000 will not be a consumer for the purposes of the implied warranties provisions.

- (i) maintain the current definition based upon the nature of the goods and making this consistent;
- (ii) change the definition across the TPA and States to a purpose definition; or
- (iii) open consumer protection to all buyers of goods and services (like NT);
 - (iv) should business consumers be entitled to some of the protections under the TPA and FTA such as implied warranties.
- (c) Are there any benefits in having different definitions of consumer or consumer contract as in the Vic FTA?

Pt IVA: Unconscionable conduct

3.12 Introduction

Unconscionable conduct is a concept recognised in equity and one incorporated into Pt IVA of the TPA. The equitable concept is generally limited to where a person takes advantage of another person with a constitutional disability. Consequently, it is recognised as being limited to procedural unconscionability, that is, where the offending conduct occurs in the formation process of a contract. Under the TPA it is still unclear whether the concept of unconscionable conduct in s 51AC is likewise limited by the requirement for the victim to suffer from a disadvantage of some type (whether it be constitutional or situational) and if s 51AC is applicable not only to procedural unconscionability but also to substantive or outcomes unconscionability. Substantive unconscionability is a reference to whether the bargain itself contains terms which are unconscionable. (Refer to *West v AGC (Advances) Ltd (1986) 5 NSWLR 610* at 620). In the absence of unfair terms legislation, the continued utility of s 51AC to business consumers, and s 51AB to consumers, will depend on whether the courts are willing to extend the operation of s 51AC to situations of substantive unconscionability in relation to the terms of contracts. To date there is little judicial indication of s 51AC or 51AB being used to determine claims of unfair or unconscionable terms in contracts and given the strong linkages between the equitable and statutory concepts of unconscionability, a clear move in that direction is unlikely to occur.

In equity, the concept of unconscionable conduct was described by the High Court in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 as having the following elements:

- one party to a transaction suffered from a special disability or disadvantage in dealing with the other party
- the disability was sufficiently evident to the stronger party
- the stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.

The circumstances giving rise to the position of disadvantage may include poverty, need of any kind, sickness, age, gender, infirmity of mind or body, drunkenness, illiteracy, lack of education, lack of assistances or explanation: *Blomley v Ryan* (1956) 99 CLR 362 at 405. Courts of equity have traditionally been concerned only with procedural unconscionability and have refused to contemplate a claim of substantive unconscionability. The rationale for this approach is based on the notion of freedom of contract and the assumption that, in the absence of unconscionable conduct in the formation of the contract, the parties are of equal bargaining power.

Section 51AA of the TPA, was inserted in 1992, and provides that “a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law”.⁵⁹ The section expressly provides that it has no application to conduct prohibited by s 51AC or 51AB. This express exclusion gave rise to debate amongst commentators as to whether s 51AA would be given a broad application encompassing not only *Amadio* type unconscionability but also duress and undue influence or whether that would be incorporated within s 51AC or s 51AB. The Explanatory Memorandum to the amending legislation introducing s 51AA made specific reference to s 51AA embodying the equitable concept of unconscionable conduct as recognised in *Blomley v Ryan* and *Commercial Bank of Australia Ltd v Amadio*. This appears to have influenced decisions to date in the Federal and High Courts which have focussed on the narrow situation of a person taking unconscientious advantage of another’s special disadvantage, with disadvantage being limited to ‘constitutional’ as opposed to ‘situational’ disadvantages: *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) 96 FCR 491; *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301. These authorities indicate a reluctance to move beyond the equitable concept of unconscionability in relation to s 51AA, thereby limiting it to procedural unconscionability.

Although there have been a number of court cases since the introduction of s. 51AC in 1998, what amounts to unconscionable under sections 51AB & 51AC is yet to be clearly articulated beyond circumstances giving rise to an ‘overwhelming case of unreasonable, unfair, bullying and thuggish behaviour’: *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd*, (2000) 178 ALR 304 at 320; *Auto Masters Australia Pty Ltd v Bruness Pty Ltd* (2003) ATPR (Digest) 46-229. However, it would seem from the cases decided so far that judges are willing to extend the concept of unconscionable conduct under s51AC beyond the equitable concept in *Amadio*, to include a broader range of conduct, not limited by the need for a special disadvantage. This approach is supported by the list of factors in s51AC which may be considered in deciding whether certain conduct is unconscionable: *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253; 178 ALR 304 (per Sundberg J). Despite the early indications of a widening in the meaning of unconscionable conduct under s 51AC to cover both procedural and substantive unconscionability the courts have not as yet extended s 51AC to a situation of substantive unconscionability. This is despite the criteria a court may consider in s 51AC or s 51AB expressly referring to whether either party acted in good faith. It may be that in deciding whether the supplier acted in good faith, the courts will consider whether the terms of a contract are inherently unfair. This was the approach adopted by the Victorian Civil and Administrative Tribunal in *Free v Jetstar Airways Pty Ltd* [2007] VCAT 1405 in relation to the good faith criterion within the unfair terms provisions of the Victorian FTA.

⁵⁹ At the time of the enactment there already existed s 51AB which was directed at unconscionable conduct in consumer transactions and limited to such conduct in connection with the supply of goods and services ordinarily acquired for personal domestic or household use or consumption [s 51AB (5)].

While the statutory definition of unconscionable conduct appears broader than that found in the unwritten law, the cases have to date required something more than a party seeking strict enforcement of their legal rights, or merely driving a hard bargain. Rather, some additional element of unfairness or unreasonableness is required. For a summary of the position under 51AC refer to Christensen S and Duncan WD “Unconscionability in Commercial Leasing – Distinguishing a Hard Bargain from Unfair Tactics” (2005) 13 *Competition and Consumer Law Journal* 158 – 175.

The ACCC or individuals can apply to the Federal Court for relief from a breach of the unconscionable conduct provisions of the TPA. Under the common law equivalent only individuals who have suffered as a result of the unconscionable conduct or dealing can apply to a court for relief.

The ACCC can apply on behalf of people who have suffered, or are likely to suffer, loss as a result of unconscionable conduct (s.87(1B) TPA). The 1998 Ministerial direction explicitly asks the ACCC to do so.

Under these powers, the ACCC has received complaints, and pursued investigations and enforcement actions for unconscionable conduct. This has been primarily in the areas of franchising and retail shop leasing.

3.13 Unconscionable conduct within the meaning of the unwritten law of the States and Territories.

3.13.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
51AA			7					

3.13.2 Material Differences

The TPA and Vic prohibit unconscionable conduct within the meaning of the unwritten law of the States and Territories. Other States and Territories do not refer to the unwritten law.

While the unwritten law may be enforced through equitable remedies in States other than Vic, specific reference to it in the TPA and Vic FTA allows for the remedies and enforcement procedures in those Acts to be utilised. In particular this allows a consumer to obtain compensation for unconscionable conduct not otherwise available at law.

3.14 Unconscionable conduct in trade or commerce

3.14.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
51AB	43	39	8	57	11	15	13	43

3.14.2 Material Differences

All FTAs prohibit unconscionable conduct in trade or commerce.

Tas, Vic, NSW, Qld and SA follow the TPA wording and specify that the prohibition applies to goods and services of a kind ordinarily acquired for domestic, personal or household use, and which are not for re-supply.

NSW, WA and ACT incorporate the definition of “consumer” into the prohibition on unconscionable conduct. In the NSW Act this allows for a broader application of the provisions to goods and services of any kind where acquired for personal use.

Consumers benefit from the wider protection offered by the FTAs as they apply to unconscionable conduct by individuals in trade or commerce. Because of the restriction of the prohibition to “consumers” or to goods and services for domestic, personal or household use, business consumers (except in NSW and ACT) may not be afforded protection under these sections. However, it is likely that they will be protected by specific provisions relating to business transactions (see below).

3.15 Unconscionable conduct in trade or commerce in relation to business transactions

3.15.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
51AC			8A			15A		

3.15.2 Material Differences

Vic and Tas prohibit unconscionable conduct in relation to the supply of goods and services for business purposes up to \$3m.

The prohibition in the Vic and Tas FTAs relates to supply of goods or services by a person, while the TPA applies to supply by both persons and corporations. No other states include provision for unconscionable conduct in business transactions.

Although only Vic and Tas make specific provision to unconscionable conduct in business transactions, it is arguable that business consumers in all States would be protected by the TPA, as s51AC applies to unconscionable conduct by both corporations and individual persons. By replicating the TPA provisions, the Vic and Tas FTAs give additional avenues for pursuing an action for

unconscionable conduct in business transactions by allowing claims to be brought in State tribunals, rather than being limited to action which can be taken under the TPA alone.

Pt IVB: Industry codes

3.16 Introduction

The *Trade Practices Act* provides for codes to be prescribed by regulations in order to regulate the conduct of members of a particular industry towards other members of the industry, or towards consumers.

Several States and Territories similarly provide for industry codes in their *Fair Trading Act* (or equivalent).

3.17 TPA Provisions

Part IVB of the TPA provides that the regulations may declare that a prescribed code is either mandatory or voluntary, and specifies that a body corporate must not contravene an applicable industry code. While it is not an offence under the TPA to breach an applicable industry code, damages, injunctions and other orders are available where a code has been contravened.

Section 51AD provides: "A corporation must not, in trade or commerce, contravene an applicable industry code".

Section 51ACA(1) defines an applicable industry code to mean the prescribed provisions of any mandatory industry code relating to the industry and the prescribed provisions of any voluntary industry code that binds the corporation.

A "mandatory industry code" is defined to mean an industry that is declared by regulation under s 51AE to be mandatory. In other words, an industry code is only mandatory if it is prescribed by regulation. Three codes have been declared to be mandatory:

- the Franchising Code of Conduct which came into effect on 1 July 1998;
- the Oilcode which came into effect on 1 March 2007; and
- the Horticultural Code which will come into effect on 14 May 2007

Section 51ACA(2) provides that a voluntary industry code only binds a person who agrees to be bound by the Code and who has not subsequently ceased to be bound by the Code.

Section 51AD does not itself create a cause of action.

Thus, if a franchisor breaches a provision of the Franchising Code of Conduct, the franchisor contravenes s 51AD and is liable for damages as provided for in s 82.

3.18.2 Material Differences

Most State and Territory FTAs include similar provisions for industry codes to be prescribed to regulate conduct between industry and consumers.

Most States and Territories, like the TPA, do not create an offence for contravention of an industry code. However, other remedies are available. In NSW, Qld and Vic, as under the TPA, damages are available for loss caused by a breach of an industry code under the act. Other orders for compensation are available in NSW, Qld and WA, and injunctions are available in Qld, Tas, Vic, NSW and WA.

Like the TPA, Qld does not provide any specific enforcement mechanisms for industry codes.

Specific industry codes

While the TPA and other States and Territories refer to industry codes generally, without specifying any particular area of industry, the NSW FTA only provides for codes to be prescribed for the motor vehicle insurers and repairers industry.

Voluntary or mandatory codes

The TPA provides that industry codes can be declared by the Minister to be either voluntary or mandatory.

The State and Territory FTAs do not make this distinction, although the requirement in some FTAs that persons must not contravene industry codes, together with the enforcement mechanisms they impose, indicate that they are mandatory in nature.

The Victorian FTA covers only prescribed codes, rather than voluntary or mandatory codes as covered by the TPA. In Victoria, the Minister will accept draft codes from persons and industry groups who have agreed to be bound by a particular code of practice, and can prescribe an industry code based on such a draft.

Drafting and consultation procedures

Several States and Territories include provision for draft and consultation procedures which will take place prior to an industry code being prescribed. WA, NT and Tas provide that consultation is to be held with industry groups and submissions accepted from other interested parties.

Content of Industry Code

The ACT states that an industry code can include, among other things, a requirement for licensing or registration of suppliers within a particular industry; education or competency conditions for licence holders; or alternative dispute mechanisms for the industry.

Time limits

The WA FTA provides that a prescribed industry code will expire after three years, unless extended.

Enforcement

The TPA provides no specific enforcement mechanisms for industry codes. Several States and Territories do impose enforcement mechanisms however.

Vic specifically makes it an offence to breach a prescribed industry code, imposing a penalty of 20 penalty units. In Tasmania, a magistrate can make an order where a person is in breach of an industry code.

Several states provide for undertakings to be sought from a person who is believed to be operating in contravention of a prescribed code, requiring that they cease this contravening conduct. (WA, ACT, NT). A magistrate has power to make an order where an undertaking is refused or breached. In addition to magistrates' orders, in WA it is an offence to fail to observe and undertaking that has been given.

3.19 Comparison of additional provisions in FTAs

	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
Director may prepare draft code			94		42		33	238
Consideration of draft code prepared by other persons			95					
Consultation with industry bodies, other interested parties						43		
Approval of draft code by Minister							34	
Offence to breach code of practice			97 ⁶⁰					
Power of Magistrate to make orders following contravention of code						45		
Undertakings following contravention of code					44		36	240
Register of undertakings					45			
Powers of Magistrate to make orders							37,	242

⁶⁰ Offence to breach prescribed code. The Vic FTA provides no specific enforcement mechanism for voluntary or mandatory codes.

following contravention of undertaking							51A	
Offence to fail to observe undertaking					45			
Time limits					43			
Content of industry code							33	

Pt V: Consumer protection (except div 1AA)

3.20 Introduction

In Australia, State and Territory Governments also have legislation covering consumer protection. The terms of reference for this study require the Commission to consider "...ways to improve, the harmonisation and coordination of consumer policy and the development and administration across jurisdictions in Australia, including ways to improve institutional arrangements and to avoid duplication of effort". This section is divided into four parts that correspond with the major divisions of Pt V of the TPA:

- Pt V Div 1;
- Pt V Div 1A;
- Pt V Div 2; and
- Pt V Div 2A

Pt V Div 1

3.21 Misleading or Deceptive Conduct

3.21.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
52	42	38	9	56	10	14	12	42

3.21.2 Material differences

All FTAs and the TPA apply to misleading and deceptive conduct in trade and commerce. These phrases have been interpreted by the courts in the same way in both FTAs and TPA.

The State FTAs apply to the conduct of 'persons'. The TPA is generally limited to the conduct of corporations although in limited circumstances s 52 will apply to the conduct of persons, as extended by s 6 of the TPA.

Consumers are benefited by the wider operation of the State FTAs in their application to persons as compared to corporations. Where a corporation is involved it provides consumers with a choice between State and Federal jurisdictions and where a person is concerned the State FTAs cover the

field. The consistency between State FTAs provides consumers with certainty in the approach adopted by courts and the remedies available.⁶¹

3.22 Representations in relation to a future matter

3.22.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
51A	41	37	4	54	9	3(7)-(9)	11	41

3.22.2 Similarities

Every jurisdiction has a provision reversing the onus of proof for future matters. Each of these is drafted in substantially similar terms.

3.23 Specific Misleading Conduct Provisions

False and Misleading Representations – s 53

False and Misleading Representations in relation to Land – s 53A

Misleading conduct in relation to Employment – s 53B

Misleading conduct to which Industrial Property Convention applies – s 55

Certain Misleading conduct in relation to services – s 55A

Misleading representations about certain business activities – s 59

3.23.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
53	44	40	10-12	58	12, 13	16	14	44
53A	45	40A	⁶²	59	12, 13	17	15	45
53B	46	41	13	60	14	18	16	46
55	49	44	10	63	17	20	19	47
55A	50	45	11	64	18	21	20	48
59		54	20	20	68	22	25	25

3.23.2 S53, 53A and 53B: Material Differences

Each State FTA has provisions substantially in the same terms as the TPA, ss53, and 53B. Every state FTA except Victoria has a provision equivalent to s 53A. Consistently with the TPA the

⁶¹ Note however the limitation in the remedial provisions of the Fair Trading Act 1989 (Qld), ss 99 and 100. This is discussed at [].

⁶² *Sale of Land Act* (Vic) contains provisions similar in terms to s53A

equivalent provisions to s 53 and 53A apply to a supply of goods, services or land in trade and commerce.

The provisions equivalent to s 53B concerning employment are not limited to trade and commerce.

Victorian FTA does not contain a provision equivalent to s 53A in relation to false or misleading representations concerning land, however there are provisions in the Victorian *Sale of Lands Act* which provide equivalent protections.

NSW has additional provisions in the equivalent to s 53 TPA covering:

- False representations related to obligations and rights under a residential tenancy for a moveable dwelling
- False representations in relation to a person's rights or obligation under a retirements village contract
- False representations in relation to a person's rights or obligations under a holiday occupation agreement.

Vic, SA, Qld and NSW have provisions which prohibit mock auctions of goods. The provisions are substantially the same in terms of the conduct they prohibit.

Tas has an additional provision prohibiting misleading conduct in relation to PO Box numbers and Vic has a provision prohibiting false testimonials in trade and commerce in relation to goods.

The consistency between the State Fair Trading Acts and the TPA in the areas of goods, services, land and employment provide regulators in each jurisdiction with similar offences to pursue. The benefit to consumers is that conduct or activities, by individuals or corporations that cross jurisdictions (particularly over the internet) can be dealt with no matter where the offender is located. However the lack of a provision in the Vic FTA concerning false representations in relation to land would mean that conduct engaged in by persons as opposed to corporations occurring in that jurisdiction could not be pursued by the State regulator. This allows individuals in any jurisdiction engaged in conduct in Victoria to escape prosecution, unless regulators in the State in which the individual is carrying on business has extra-territorial powers, which is unlikely.

The additional provisions in each jurisdiction extend the power of regulators to pursue individuals for offences. The only significant addition that should be considered for other jurisdictions and possibly the TPA is the prohibition on mock auctions. This is particularly relevant to the conduct of auctions on the internet which may span a number of jurisdictions. Currently, regulators in jurisdictions other than Vic, NSW, Qld and SA wanting to pursue persons engaged in mock auctions would need to use another provisions. This may be:

- The equivalent to s 53 TPA which prohibits false representations in relation to goods. This may be difficult as most of the prohibitions in that section concern the quality, value, nature of the goods themselves and not how the auction is conducted.
- A prohibition in other State legislation. Our investigations have not revealed any equivalent prohibition in any State that would allow the State regulator to bring such a prosecution.

3.24 Statement re Price of goods

Cash Price to be stated in certain circumstances – s 53C

Offering gifts and prizes – s 54

3.24.1 Comparative Sections

TPA		NSW	Qld	VIC	SA	WA	Tas	ACT	NT
53C		47	42	15	61	15	21A	17	50
54		48	43	16	62	16	19	18	51

3.24.2 Material Differences

The State FTAs and the TPA provisions are in the same terms, except that the State FTA's apply to persons acting in trade and commerce.

The combination of the State FTA and the TPA provide appropriate protection to consumers against the conduct of persons or corporations.

3.25 Advertising in relation to Goods

Bait Advertising – s 56

Referral Selling – s 57

Accepting payment without intending or being able to supply as ordered – s 58

Harassment and coercion – s 60

3.25.1 Comparative Sections

TPA		NSW	Qld	VIC	SA	WA	Tas	ACT	NT
56		51	46	17	65	19	22	21	52
57		52	47	18	66	20	26A	23	53
58		53	48	19	67	21	24	24	54
60		55	50	21	69	23	26	26	55

3.25.2 Material Differences

The State FTAs substantially mirror the TPA provisions across all of these sections. The divergences between the States and the TPA arise from additions rather than deletions from the legislation.

Bait Advertising

The bait advertising provisions in each of the States provides for defence information within the provision. The defence provisions in each State are substantially the same and are consistent with the defence articulated in s 75AZJ(4) TPA.

The ASIC Act includes a defence to the offence of bait advertising where a person who has advertised the supply of financial services subsequently offers to supply those services to a customer, or to procure an alternative supplier for those services, and, if the customer accepts such an offer, the services are so supplied.

Accepting payment without intending or being able to supply as ordered

Victoria is the only jurisdiction which omits as an offence a situation where at the time of supply of the goods there are reasonable grounds, of which the person is aware or ought to be aware, for believing that the person will not able to supply in the time specified. However, it appears that this situation would be adequately covered by the prohibition on bait advertising.

There is very little impact on consumers due to the significant similarities in the jurisdictions.

3.26 Unsolicited Goods

Unsolicited credit and debit cards – s 63A

Assertion of right to payment for unsolicited goods or services or for making entry in directory – s 64

Liability of recipient of unsolicited goods – s 65

Application of provisions of Division to prescribed information providers – s 65A

3.26.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
63A	57	-	23	71	28	27	28	57
64	58	52	24,27,28	72	29	-	29	58
65	59	53	25	73	31	-	30	59
65A	60	51	32	74	-	28	31	60

3.26.2 Material Differences

Every State has a similar provision for unsolicited credit and debit cards except Qld. Every State except Tas have equivalent provisions to s 64 and s 65.

Unsolicited Credit and Debit cards – no provision in Qld

Assertion of right to payment for unsolicited goods or services or for making entry in directory – no provision in Tas

Liability of recipient of unsolicited goods – no provision in Tas

Application of provisions of Division to prescribed information providers – no provision in WA

The differences across the jurisdictions are only minor but the omitted provisions identified could be inserted to ensure consistency across all jurisdictions.

3.27 Summary of Additional Provisions in State FTAs not present in TPA

State	Additional Sections
QLD	s 54 False orders
	s 55 Obscene Material not to be sent
NSW	s 51A Prohibition on Mock Auctions
VIC	s 14 False Testimonials
	s 29 Address to be included in Documents
	s 30 Mock Auctions
	s 31 Simplification of Proof
	s 32 Publications which are not prohibited
SA	s 29 Mock Auctions
WA	s 13 False Representations Categorised
	s 25 Offences by promoters, lenders etc
	s 26 Defences to Offences under this division
	s 30 Evidentiary provisions relating to sect 29
	s 32 Power to declare that this Division does not apply to certain Transactions or Publications
TAS	s 23 Provision with respect to statements that include private box number
NT	none
ACT	s 23 Dual Pricing
	s 28B Cash Card Use Disclosure

Pt V Div 1A

3.28 Consumer information and product safety

3.28.1 TPA Framework

A retailer's liability for non-compliance with product safety and information standards is the subject of Pt V Div 1A of the TPA.

Statutory consumer information and product safety standards seek to mitigate information asymmetries that consumers face when purchasing products. By imposing statutory requirements on manufacturers and suppliers of goods to impart certain information to consumers and to ensure that their products meet certain minimum standards, these legislative provisions help to improve consumer confidence and fair competition.

Section 65C (1) of the TPA prohibits the supply of goods which do not comply with a specified consumer product safety standard. These standards generally require the goods to carry a warning of the potential risks from using the goods. Standards of product safety and consumer information are prescribed by regulation.

The relevant Minister is empowered to prescribe consumer product safety standards and consumer information standards in relation to all aspects of design, manufacture and packaging of a particular product. (s. 65E TPA).

Under s. 65D (1) (TPA) it is a criminal offence to supply goods that are intended or are likely to be used by a consumer that breach consumer product information standards. This prohibition does not apply to goods intended to be used outside Australia.

There are currently 29 compulsory product safety and information standards set out on the ACCC's website.

The setting and enforcement of product standards is complicated by the shared responsibilities of the Commonwealth and State and Territory Governments. The States and Territories are not required to adopt a Commonwealth standard as they have powers to issue and enforce their own mandatory standards. A mandatory standard may apply in one State but not elsewhere. All State and Territory legislation allows for the issue of mandatory standards applying to goods. Victoria, Queensland and South Australia have legislation allowing mandatory standards to also be issued for services. In addition to mandatory standards there are a substantial number of voluntary standards relating to goods and services.

The ACCC has a role in relation to public enforcement of the consumer information and product safety provisions of the TPA. The ACCC undertakes random surveys of retail outlets, investigate allegations by consumers and suppliers about non-complying goods, and check goods sold by direct marketing and on the internet. Specifically, it investigates business practices that appear to breach regulations, and brings proceedings to enforce them.

Other government bodies undertake the role of declaring product standards, recalling certain goods and issuing bans against goods deemed unsafe.

Commonwealth Treasury is responsible for product safety policy and product recalls under the TPA (with State and Territory authorities having responsibility under their own legislation).

As with prohibition of unfair practices, the TPA allows for both civil and criminal proceedings for breaches of consumer information or product safety standards.

Suppliers - including manufacturers, importers, distributors, hirers and retailers - can face fines, injunctions, corrective advertising orders and other court imposed orders if found guilty of a breach.

Compulsory product recalls

Where goods do not comply with particular safety standards or are of a kind that might cause injury, the Minister may issue a compulsory product recall order (s. 65F TPA). Although the Minister has power to order a recall of goods, it is intended that the supplier first has an opportunity to take voluntary action. Unless the Minister considers that any delay in the recall could endanger the public, a conference with the affected suppliers of the product will be called.

When a good is deemed 'unsafe' it is banned for an interim period. At the end of this interim ban, the product may be allowed back on the market (revoking the ban) or banned permanently.

3.28.2 State Regimes

Safety Standards

In the Northern Territory, New South Wales, Queensland, Victoria and Western Australia the fair trading legislation incorporates product safety provisions which, to a greater or lesser extent, are modelled on the (CTH) Trade Practices Act 1974 provisions. Provisions governing product safety are to be found, in the Australian Capital Territory, in the (ACT) Fair Trading (Consumer Affairs) Act 1973, in South Australia, in the (SA) Trade Standards Act 1979 and in Tasmania, in the (TAS) Sale of Hazardous Goods Act 1977.³ State and Territory legislation, subordinate legislation and orders apply concurrently with the Commonwealth provisions, except if there is a direct inconsistency, in which case the Commonwealth law prevails.

Product Information

Part V Div 1A of the (CTH) Trade Practices Act 1974, apart from regulating product safety also provides for the making of product information standards. Similar provisions are to be found in the fair trading laws of the Northern Territory, New South Wales, Queensland and Victoria.⁶³ In the Australian Capital Territory, legislation also provides similar provisions.⁶⁴ In South Australia, trade standards are the subject of separate legislation;⁶⁵ this provides for the making of standards with respect to safety, quality, information and packaging. In Western Australia the fair trading legislation incorporates provisions which are based partly on the uniform scheme, and partly on the South Australian legislation.⁶⁶ In Tasmania, there is legislation governing trade descriptions,⁶⁷ similar legislation has been repealed in all other State and Territory jurisdictions. The trade descriptions legislation laid down special requirements in relation to products such as footwear, textiles and furniture, and these requirements have been reimposed under some of the more recent legislation referred to above. In some jurisdictions the new laws have also imposed care labelling requirements in respect of clothing and fabrics. Other potential applications of the new laws include packaging requirements, warning notices, instructions for use, storage or maintenance and ingredient or composition labelling.

3.28.3 Comparative Table**Table : Product Safety and Information in States and Commonwealth**

Cth		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
s65B	Warning notice to public			58, 162A	ss27, 27A, 31	FTA s49	ss 6 & 7		
s65C	Prohibition on supplying goods in breach of product safety standards or are unsafe goods	s27	s84	33	ss22, 24,	FTA s51			s26
s65C (5)	power to declare goods unsafe				s25				
s65C (7)	power to ban goods	cf s31		35, 39, 43	36, 40,	FTA s51 CAA ss23Q & 23R	cf ss8 & 9	cf s26	

⁶³ (NT) *Consumer Affairs and Fair Trading Act 1990* Pt 4 Div 4; (NSW) *Fair Trading Act 1987* Pt 4 Div 1; (Qld) *Fair Trading Act 1989* Pt 4 Div 1; (Vic) *Fair Trading Act 1999* Pt 3 Div 2.

⁶⁴ *Fair Trading (Consumer Affairs) Act 1973* (ACT)s 28.

⁶⁵ *Trade Standards Act 1979* (SA).

⁶⁶ *Fair Trading Act 1987* (WA) Pt VI.

⁶⁷ *Goods (Trade Descriptions) Act 1971* (Tas).

Cth		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
s65D	Prohibition on supplying goods in breach of product information standard	s39	s82	46	s32	ss58, 59, 60, 62 CAA s23U			s39
s65E	Minister may prescribe safety or information standards	s26 (safety) s38 (info)	ss81 & 83	34, 47	ss23, 33	ss50, 59 CAT s23U		ss25, 27, 28	s25 (safety) s38 (info)
s65F	Compulsory product recall	ss35 & 36		50		cf s54			ss33, 34
65F(2)	reduction in refund	s36A		52		54			s35
65F(4)	undertakings to repair	s36B				54			cf s37
65F(5)	undertakings to replace	s36B				54			
s65G	Compliance with product recall notice	s36C		53		54			
s65H	Loss or damage caused by contravention of product recall notice	cf s36F		54	cf s44	s56, cf s53		s31	
s65J	Opportunity for conference before certain powers exercised (before publication of notice)	cf s36			s27B	s55(2) CAT s23E		cf s24	
s65K	Recommendation after conclusion of conference	cf s36				cf s55			
s65L	Exception in case of danger to public					s55			
s65M	Conference after goods banned								
s65N	Recommendation after conclusion of conference								
s65P	Minister to have regard to recommendation of					s55			

Cth		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
	Commission								
s65Q	Power to obtain information, documents and evidence		cf ss24-36	Part 10 (general power to inspect)		s19 CAA	cf s65		
s65R	Notification of voluntary recall			49	s27C	54, 55			s36
s65S	Copies of certain notices to be published	s36E		50(4), 58(3), 35(3), 37, 41, 42	s48				
s65T	Certain action not to affect insurance contracts	s36T		56		s57			

3.28.4 Material differences

Each state has in place a regime for product safety, certain information standards and product recall. The legislation generally applies to both persons and corporation acting in trade and commerce. The regimes usually place power in the Minister and a committee in relation to standards and recalls. In its current form the legislation in both the State and the Cth is difficult to navigate and from a business or consumer perspective difficult to discern the differences and similarities. Given the importance of this area commonality in approach, terminology and powers is essential to ensure protection of consumers and ease of compliance for business.

Pt V Div 2

3.29 Comparison of Non-excludable Implied Warranties and Conditions in the Trade Practices Act and State Regimes

3.29.1 Introduction

Sale of Goods legislation in each Australian State and Territory provides for implied terms in contracts for the sale of goods. These terms can be effectively modified or excluded by the supplier in some jurisdictions. Although these provisions apply widely to the purchaser of any goods, the ability to exclude the operation of the implied terms denies consumers of access to appropriate redress. To alleviate this impact on consumers the Commonwealth introduced non-excludable warranties and conditions for contracts for the sale of goods or supply of services by corporations to consumers. Only NSW, Vic, WA, SA and NT have followed and introduced non-excludable warranties in their respective

FTAs. In Qld, ACT and Tas similar warranties and conditions are implied into contracts for the sale of goods by the respective *Sale of Goods Act* but these provisions are capable of exclusion or modification. The extension of the TPA by s 6(2) to interstate trade and commerce provides some protection to consumers in Qld, ACT and Tas when engaged in interstate trade and commerce, but consumers dealing with traders within the relevant jurisdictions are only entitled to rely on the relevant *Sale of Goods Act*. Consequently, where the provisions of the TPA do not apply, consumers in those jurisdictions are disadvantaged.

For the purposes of the comparison only the operation of the non-excludable warranties and conditions will be address. One of the final recommendations is that non-excludable warranties be introduced to the remaining jurisdictions.

3.29.2 TPA Framework

What are the implied terms?

The TPA provides for the following implied terms in Pt V Div 2 of the TPA:

- The supplier has the right to sell the goods, the goods are unencumbered and the consumer has the right to quiet enjoyment – s 69(1)
- Goods will comply with their description or same- s 70
- Goods will comply with a sample – s 72
- Goods will be of merchantable quality and fit for the purpose – s 71
- Services will be rendered with due care and skill and any material supplied with the services will be fit for the purpose – s 74(1)
- Services will be reasonable fit for the purpose – s 74(2)

As these terms are implied into the contract, the remedy for breach of these provisions is a claim for damages for breach of a term rather than damages for a contravention under s 82. This also applies in each of the State regimes under either the FTA or SGA in each State.

The TPA has however introduced a statutory right of rescission, s 75A, which a consumer may exercise subject to certain limitations.

Limits on their application

Each of the implied warranties or conditions is limited in their operation to contracts between a corporation in the course of a business and a consumer. The meaning of consumer is discussed at [3.9] – [3.12]. The following persons or corporation will not be consumers under the TPA for the purposes of Pt 5 Div 2:

- (i) An individual or corporation who purchases goods or services not ordinarily acquired for domestic, personal or household use for personal use above \$40,000; or
- (ii) An individual or corporation who purchases goods not ordinarily acquired for domestic, personal or household use for business use above \$40,000.

The operation of Pt V Div 2 is extended by s 6 to include individuals supplying goods in the course of a business if they are involved in:

- (i) interstate or overseas trade or commerce; or
- (ii) trade or commerce between territories or within a territory.

This will provide some protection for consumers dealing cross borders with traders in States with no equivalent State based legislation and consumers dealing with traders within a Territory. The provisions of Pt V Div 2 would apply despite any provision in the contract or any attempt to use State legislation to modify the warranties (*Wallis v Downard Pickford (North Qld) Pty Ltd* (1994) 179 CLR 388. Consumers within Qld and Tas, however, who purchase goods and services from individual traders will not obtain the benefit of non-excludable warranties under the TPA or State FTAs.

Ability to contract out of the provisions

Section 67 of the TPA provides:

Where:

- (c) *the proper law of a contract for the supply by a corporation of goods or services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of Australia;*
- (d) *a contract for the supply by a corporation of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country or of a State or Territory for all or any of the provisions of this division'*

this Division applies to the contract notwithstanding that term.

The purpose of this provision is to ensure that suppliers are not able to avoid Pt V Div 2 by providing for the law of another jurisdiction to apply to the contract. For further discussion refer to [3.7]

Section 68 provides that any provision which purports to modify or exclude any part of Div 2, or the exercise of any right, or the liability of a corporation for breach will be void. Despite this absolute prohibition a corporation may limit their liability for breach of an implied term, other than where goods or services of a kind ordinarily acquired for personal, domestic or household use are supplied. Liability may be limited to:

- (i) In the case of goods to:
 - a. replacement of the goods;
 - b. repair of the goods;
 - c. the payment of the cost of replacing the goods or acquiring equivalent goods;
 - d. the payment of the cost of having the goods repaired; or

- (ii) In the case of services to:
 - a. the supply of the services again; or
 - b. the payment of the cost of having the services supplied again.

In the case of recreational services a corporation is also entitled to exclude restrict or modify:

- (i) the application of s 74 to the supply of recreational services;
- (ii) the exercise of a right conferred by s 74 in relation to the supply of recreational services; or
- (iii) any liability for the corporation for a breach of a warranty implied in s 74 in relation to the supply of recreational services;

provided:

- (iv) the exclusion, restriction or modifications are limited to liability for death or personal injury; and
- (v) the contract was entered into after the commencement.

The comparison of the State regimes will consider:

- a. whether similar warranties or conditions are implied into contracts for the sale or goods or supply of services in state jurisdictions and any significant differences in operation, expression or definitions;
- b. whether implied terms in consumer transactions can be excluded;
- c. whether certain liability can be modified or restricted despite the prohibition on exclusion and
- d. The impact of any jurisdictional difference on consumers.

The combined operation of s 67 and s 68 ensure that contracts between foreign corporations and residents of Australia (either corporate or individual) are subject to the operation of Pt V Div 2. Refer further to [3.7].

3.29.3 Comparison of Ambit of Implied Warranties and Condition in State regimes

3.29.3.1 *Right to sell the goods, the goods are unencumbered and the consumer has the right to quiet enjoyment – s 69(1)*

Comparative Table

TPA		NSW	Qld SGA	VIC	SA CTA	WA	Tas SGA	ACT SGA	NT
69		400	15	32G 32GA	6	36 12 SGA	17	17	62

SGA – Sale of Goods Act

CTA – Consumer Transactions Act (SA)

All other references are to the FTA of the relevant State

Material Differences

Each state jurisdiction has an implied term that the seller has the right to sell the goods, that the consumer will enjoy quiet possession of the goods and that the goods will be free from an encumbrance not disclosed. In all jurisdictions there is no requirement for the seller to be acting in the course of a business for the term to be implied, but the supply must be to a consumer.

Although there are some differences in the formulation of the provisions and the way in which prior security interests are dealt with, there are no significant impacts arising from the different formulations.

The main differences between the States and the TPA are:

- (i) The State FTA legislation has a wider ambit to the TPA applying to supply of goods by a person in instead of a corporation;
- (ii) In SA, the term is implied into a consumer contract for the sale of goods. Consumer contract is defined as a contract where a person (other than a body corporate) goods are buys, hires or otherwise takes the benefit of goods or services but does not include an auction, a sale of goods to a person who trades in those goods, a contract providing a right or licence to occupy land, or an agreement of a kind declared by regulation not to be a consumer contract. This results in a different operation of the implied term provisions than the TPA by applying to all individuals acquiring goods of any description for any purchase, other than a business which trades in the goods, but excluding corporations from the benefit of the provisions.
- (iii) In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts; and
- (iv) The State SGA's also apply to persons but only to a 'sale' of goods. This is a narrower concept than 'supply' which would extend to lease, hire purchase or exchange. In Qld, Tas and ACT a contract for the lease of goods would not be subject to the SGA and if the lease is provided by an individual the TPA would also have no application. A consumer in this situation would have little redress against a supplier if there was no express term about title in the lease itself.

3.29.3.2 Goods will comply with their description or sample- s 70

Comparative Table

TPA	ASIC	NSW	Qld SGA	VIC	SA CTA	WA	Tas SGA	ACT SGA	NT
70		40P	16	32H	6(3)	37 Also 13 SGA	18	18	63

Material Differences

Each jurisdiction listed has an implied term that goods will correspond with their description and if by reference to description and supply by sample also correspond with the sample. Under the TPA, s 70 the term is implied in contracts for the supply of goods by a corporation in the course of a business. The terminology and formulation of the sections across the jurisdictions are uniform. The differences between the jurisdictions and the TPA are:

- In all jurisdiction the provisions apply to the supply of goods by a person and a corporation;
- In SA, the term is implied into a consumer contract for the sale of goods. Consumer contract is defined as a contract where a person (other than a body corporate) buys, hires or otherwise takes the benefit of goods or services but does not include an auction, a sale of goods to a person who trades in those goods, a contract providing a right or licence to occupy land, or an agreement of a kind declared by regulation not to be a consumer contract. This results in a different operation of the implied term provisions than the TPA by applying to all individuals acquiring goods of any description for any purchase, other than a business which trades in the goods, but excluding corporations from the benefit of the provisions;
- In SA, NSW and Vic the sections are similar but in contrast to the TPA there is no requirement for the person to supply in the course of a business.
- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts and only applies to a ‘sale’ of goods.

3.29.3.3 Goods will comply with a sample – s 72

Comparative Table

TPA		NSW	Qld SGA	VIC	SA CTA	WA	Tas SGA	ACT SGA	NT
72		40R	18	32HA	6(4)(b)	39 Also s15 SGA	20	20	65

Material Differences

Each jurisdiction listed has an implied term to the effect that where a contract has a provision that goods are supplied by reference to a same:

- (iii) the bulk of the goods will correspond with the same in quality; and
- (iv) the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- (v) the goods will be free from any defect rendering them unmerchantable that would not be apparent on a reasonable examination of the sample.

Under the TPA, s 72 the term is implied in contracts for the supply of goods by a corporation in the course of a business. The differences between the jurisdictions and the TPA are:

- In all jurisdiction the provisions apply to the supply of goods by a person and a corporation;
- In WA, NSW and NT the provisions follow the TPA formulation;
- In SA there is no separate provision in the CTA but the SGA in SA has a similar provision applying to the sale of goods. Under the SGA the provision can be excluded.
- Vic is significantly different to the other jurisdictions. In Vic the implied warranty applies only if the buyer is shown a sample of the goods and is induced by the sample to buy the goods or goods of a similar kind. The first two warranties in the TPA are mirrored in Vic. The third warranty is similar but requires that the buyer is not aware of the defect at the time the contract is made;
- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts and only applies to a ‘sale’ of goods.

3.29.3.4 Goods with be of merchantable quality and fit for the purpose – s 71

Comparative Table

TPA	ASIC	NSW	Qld SGA	VIC	SA CTA	WA	Tas SGA	ACT SGA	NT
71		40Q	17	32I	6(4)	38 Also s14 SGA	19	19	64

Material differences

Under the TPA where goods are supplied by a corporation in the course of a business to a consumer there is an implied term that the goods are of merchantable quality, except in relation to defect specifically drawn to the consumer’s attention before contract or if the consumer examines the goods, in relation to defects which that examination ought to reveal. This is supplemented by s 66 which provides that goods are of merchantable quality if they are fit for the purpose for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them the price, and all other relevant circumstances.

This provision is mirrored in WA, NSW and NT except that it applies to the supply of goods by a person as well as a corporation.

The differences in the other jurisdictions are:

- In SA and Vic the provision is similar but includes within it a definition of merchantable quality similar to s 66 TPA but including additional criteria;

- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore, may be excluded from all contracts and only applies to a 'sale' of goods. The warranty applies to the purchase of goods by description from a person who deals in goods of that description. There is no equivalent definition of merchantable quality and therefore the common law meaning will apply: *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31; *Grant v Australian Knitting Mills Ltd* [1936] AC 85. Under the common law a good which has more than one common purpose may be of merchantable quality if it is fit for use as any one of those purposes. Under the TPA and equivalents it is arguable that it will only be of merchantable quality if fit for all the purposes for which it is commonly purchased.

Comparison of Fitness for the purpose under TPA and State regimes

The TPA provides that where goods are supplied in the course of a business by a corporation and the consumer makes known a particular purpose for which the goods are being acquired, there is an implied condition that the goods are reasonable fit for that purpose. It is immaterial whether or not that is a purpose for which such goods are commonly supplied, except where the consumer does not rely or it is unreasonable to rely on the skill or judgment of the supplier. WA, NSW and NT mirror this provision except they apply to persons.

The differences in the other jurisdictions are:

- In all jurisdictions the provisions apply to the supply of goods by a person and a corporation;
- In SA the provisions require that the goods be of a description which it is in the course of the person's business to supply. The consumer is required to show reliance on the skill and judgment of the supplier;
- In SA, the term is implied into a consumer contract for the sale of goods. Consumer contract is defined as a contract where a person (other than a body corporate) buys, hires or otherwise takes the benefit of goods or services but does not include an auction, a sale of goods to a person who trades in those goods, a contract providing a right or licence to occupy land, or an agreement of a kind declared by regulation not to be a consumer contract. This results in a different operation of the implied term provisions than the TPA by applying to all individuals acquiring goods of any description for any purchase, other than a business which trades in the goods, but excluding corporations from the benefit of the provisions.
- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts and only applies to a 'sale' of goods. Like SA, in each of these jurisdictions the provisions require that the goods be of a description which it is in the course of the person's business to supply and that the consumer show reliance on the skill and

judgment of the supplier. Further the implied term does not apply to contracts for the sale of a good under its patent or trade name.

- 3.29.3.5** ***Services will be rendered with due care and skill and any material supplied with the services will be fit for the purpose – s 74(1)***
Services will be reasonable fit for the purpose – s 74(2)

Comparative Table

TPA		NSW	Qld SGA	VIC	SA CTA	WA	Tas SGA	ACT SGA	NT
74		40S		32J	7	40			66

Material differences

Under the TPA these provisions imply into a contract for the supply of services, between a corporation in the course of a business and a consumer, a warranty that the services will be performed with due care and skill and where the purpose of the services is made known that the services will be fit for the purpose. The warranty may be excluded in relation to recreational services. Also, certain contracts are excluded from its operation by s 74(3), such as transportation or storage of goods for the customer's business and contracts of insurance. Where the law of a state or territory applies to the contract, a State or Territory law may limit or preclude liability. This is particularly relevant in relation to limits on professional liability and negligence under State laws.

WA and NT mirror the TPA provisions but apply to a supply of services by a person.

In NSW and Vic the provisions are substantially the same but do not exclude transportation of goods, storage of goods or insurance contracts.

In SA the provisions have a similar operation to NSW and Vic but domestic building work is excluded from the operation of the provision.

In Qld, Tas and ACT there are no equivalent provisions. Consumers in those jurisdictions will need to rely upon similar terms implied by the common law in contracts of service.

3.29.3.6 ***Exclusion of Implied Terms***

Comparative Table

TPA	ASIC	NSW	Qld SGA	VIC	SA CTA	WA	Tas SGA	ACT SGA	NT
67					6(1)	4(3)			
68	12EB	40M		32L	8	34			68
68A	12EC			32MA		35			69
68B		40M(3)		32N					68A

The potential effect of ss 67 and 68 on attempts to exclude the operation of the TPA through a governing law or governing forum clause is discussed at [3.7]. Sections 68A and 68B (and their equivalents) allow for the limitation modification or exclusion of the implied warranties in certain situations.

Material differences

The ability of a supplier to limit, exclude or modify the operation of an implied term under the TPA is discussed above in relation to goods or services that are not ordinarily acquired for domestic, personal or household use. If the category of consumers previously discussed in relation to the definition of consumer are used, the exclusion provision impacts on:

- Persons or corporations purchasing goods ordinarily acquired for business purposes when acquired for personal use under \$40,000;
- Persons or corporations purchasing goods ordinarily acquired for business purposes under \$40,000 when acquired for business use.

The liability of a person to a consumer acquiring goods or services ordinarily acquired for domestic or personal use cannot be limited even if the goods are acquired for business purposes.

The TPA also allows liability in relation to recreational services to be excluded totally under s 68B. This is only mirrored in NSW and Vic.

The NT legislation mirrors the provisions of the TPA.

In WA there are mirror provisions to s 68 and 68A but no provision for exclusion of liability for recreational services.

In NSW there is an equivalent to s 68 and 68B. There is no provision for a supplier to limit their liability under an implied warranty to repair, replacement or cost of repair or replacement.

In Vic the FTA mirrors the provisions of the TPA except there is an additional prohibition on limiting the right of a consumer to damages (subject to the equivalent of s 68A) and the right to rely on the limitation of liability in the equivalent to s 68A is subject to it not being unconscionable rather than not being 'fair or reasonable'. The list of criteria for determining if it is unconscionable is listed and are similar to s 51AC TPA. This provides a narrower opportunity for the consumer to challenge the limitation of liability than under the TPA. The limitation of liability provision also does not allow any limit on the implied term in relation to title to goods. In relation to the limitation of liability for recreational services there is an additional requirement that:

- (i) a prescribed form or particulars are used (if any);
- (ii) if a prescribed form is used there is nothing false or misleading in the form; and
- (iii) the term is brought to the attention of the buyer prior to supply.

A limitation of liability for recreational services will not be enforceable if the supplier does or omits to do something that would be a breach of ss 32J or 32JA (equivalent to s 74 TPA) with reckless disregard or without consciousness for the consequences.

In SA there is no limited right to modify or limit liability or a right to exclude liability for recreational services.

From the analysis of implied term provisions across all Australian jurisdictions it is evident that the main impacts on consumer arise from:

- (i) inconsistent application of the implied term provisions to different types of consumer transactions. The jurisdictions which have mirrored the TPA provisions (primarily WA, NSW and NT) provide the greatest consistency with the other jurisdictions ranging from application to all contracts for the supply of goods irrespective of kind or purpose to others where corporate consumers are unable to take advantage of the provisions;
- (ii) The varying ability of suppliers to limit or exclude liability for particular types of goods or services;
- (iii) The varying terminology used to describe the application of the provisions, in some cases to 'sales' and in others to 'supply';
- (iv) In relation to the provisions themselves the different circumstances in which goods must be fit for their purpose and the different meanings of merchantable quality provide significant potential to detrimentally impact on consumers.

These differences further highlight the need for a consistent definition of consumer across all jurisdictions. It is unrealistic to expect that consumers are able to navigate and understand the often subtle difference across jurisdictions. This is particularly important in the purchase of goods or services via the internet where suppliers may try to locate their business in a jurisdiction with minimal protections. While the TPA includes a provision to ensure consumers are not disadvantaged by a governing law provision in a contract (to remove the jurisdiction of the TPA), the State regimes do not

contain the same level of protection. This may allow suppliers who fall outside of the TPA to potentially use the law of low protection State as the law of the contract.

3.29.4 Recommended Review Issues

- (a) Whether there is consistency in the application of provisions to the same consumers – connected to definition of consumer and jurisdictional differences (NT has the widest operation).
- (b) Exclusion of right to modify liability where goods of a kind ordinarily acquired for household purposes – consumers acquiring business goods for personal use are disadvantaged while consumer purchasing consumer goods for business purposes are protected – should a purpose test be introduced instead?
- (c) Right to exclude liability is inconsistent across jurisdictions. In some the implied terms can be excluded altogether, in other partially modified and in others not modified at all.
- (d) The right to exclude liability for recreational services is inconsistent across the jurisdictions.
- (e) Meaning of merchantable quality should be reviewed and harmonised.
- (f) Consistency of expression of warranties – in particular sale by sample, merchantable quality.

Pt V Div 2A

3.30 Actions against Manufacturers and Importers

3.30.1 TPA Framework

Pt V Div 2 will only provide a remedy to a consumer if there is a contract into which the terms can be implied. In many cases consumers will suffer loss or damage as a result of unsatisfactory goods or services but there will be no contractual nexus between the consumer and the manufacturer or supplier. Division 2A creates separate causes of action which consumers may enforce against manufacturers and importers where consumer goods fail to comply with certain standards. The causes of action arise independently of any contractual nexus between the consumer and the manufacturer. Thus, unlike Div 2, Div 2A applies where there is a reseller interposed between the manufacturer and the consumer and it provides that a consumer, or a person who acquires the goods or derives title to the goods through or under a consumer, may take direct action against the manufacturer.

Pt V Div 2A does not apply where there is a contract between the manufacturer and the consumer. It applies where the manufacturer supplies goods to another person, usually a distributor or retailer, who acquires the goods for the purpose of re-supply. It allows consumers to bring separate statutory causes of action if the goods are not of merchantable quality (as fit for the purpose or purposes for which goods of that kind are commonly bought as is reasonable) (s74D TPA) or fit for a particular purpose which has been made known expressly or by implication either directly, or through the person

from whom the consumer acquired the goods or a person by whom any antecedent negotiations in connexion with the acquisition of the goods was conducted (s74B TPA).

3.30.2 State Regimes

Comparative Table

Cth		NSW	NT
	<i>Trade Practices Act</i>	<i>Fair Trading Act</i>	<i>Consumer Affairs and Fair Trading Act</i>
s74A(2)	"Goods" = those for personal, domestic or household use + not for re-supply	s40T(2)	s72(2)
s74A(3)	simplification of proof for "manufacturer"	s40T(3) & (4)	s72(4)
s74A(4)	simplification of proof for "importer"	s40T(7)	s72(7)
s74B	Actions in respect of unsuitable goods	s40U	s73
s74C	Actions in respect of false descriptions	s40V	s74
s74D	Actions in respect of goods of unmerchantable quality	s40W	s75
s74E	Actions in respect of non-correspondence with samples	s40X	s76
s74F	Failure to provide facilities for repairs or parts	s40Y	s77
s74G	Non-compliance with express warranty	s40Z	s78
s74H	Right of seller to recover against manufacturer or importer	s40ZA	s79
s74J	Time for commencing action – 3 years	s40ZB	s80

s74K	Application of Division can't be excluded	s40ZC	s81
s74L	Limitation of liability of manufacturer to seller.		s82

3.30.3 Material differences

Only NSW and NT have similar provisions in relation to manufacturers and importers in the Fair Trading Acts. The provisions in NSW and NT mirror the provisions of the TPA except that they apply to persons or corporations in trade or commerce.

The omission of specific provisions in every other State means any claim by a consumer in those jurisdiction where the manufacturer is not incorporated must be brought either on a contract (if one exists) or in negligence. Whilst this will provide a consumer with a remedy, the circumstances in which negligence may not necessarily include circumstances equivalent to breach of a warranty.

Pt VC: Offences

3.31 Introduction

In relation to criminal liability, Part VC establishes a separate consumer protection regime which will replicate the provisions in Pt V Div 1 but which gives effect to the *Criminal Code Act 1995* (Cth).

Thus, there are separate civil and criminal regimes contained in Part V and Part VC respectively

In accordance with the requirements of the Code, Pt VC seeks to maintain the current statutory and judicial interpretation but re-drafts the provisions clearly identifying any fault elements applicable to each offence, and prescribing a maximum penalty for contravention of each offence. Proceedings under s 79 of the TPA are brought on behalf of the ACCC by an informant and the criminal standard of proof applies.

3.32 Comparison of penalties by state

QLD FAIR TRADING ACT OFFENCES IN RELATION TO TRADE PRACTICES				
FTA		Trade Practices Act Section	Max Penalty Units	Criminal Proceedings
40	False or Misleading representations	53	540	Maximum 1 year Imprisonment for each contravention.
40A	False or Misleading Representation relation to Land	53A	1 – 540 2 - 540	
41	Misleading Conduct in relation to Employment	53B	540	Discretion as to proceed as a summary or indictable offence – decision by prosecutor.
42	Cash Price to be stated in certain circumstances	53C	540	
43	Offering Gifts and Prizes	54	540	Must be brought within 3 years of offence occurring.
44	Certain Misleading conduct in relation to goods	55	540	
45	Certain Misleading Conduct in relation to Services	55A	540	Proceedings may only be started by an inspector appointed for the act or with the commissioner's consent.
46	Bait Advertising	56	1 - 540 2 - 540	
47	Referral Selling	57	540	All offences are of a criminal jurisdiction and therefore require proof beyond reasonable doubt.
48	Accepting payment without intending or being able to supply as ordered	58	540	
49	Misleading representation about certain business activities	59	1 – 540 2 - 540	
50	Harassment and Coercion	60	540	
52	Assertion of right to payment for unsolicited goods or services or for making entry in directory	64	1 – 540 2 – 540 3 - 540	
53	Liability of Recipient of Unsolicited Goods	65		

3.33 Comparison of Maximum Penalties for Offences by Bodies Corporate

TPA	Name	TPA	QLD	NSW	VIC	SA	WA	TAS	NT	ACT
52	Misleading or Deceptive Conduct		540 penalty units				\$100,000	1000 penalty units	\$100,000	Body Corporate penalties do not exist
75AZC	False or Misleading Representations	10,000	540 penalty units	1,000 penalty units	1200 units Also Sale of Lands Act: 50 units or 12 months		\$100,000	1000 penalty units	\$100,000	
75AZD(1)	False representations and other misleading conduct in relation to real estate	10,000	540 penalty units	1,000 penalty units		\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZE	Misleading Conduct in Relation to employment	10,000	540 penalty units	1,000 penalty units	1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZF	Cash Price to be stated in certain circumstances	10,000	540 penalty units	1,000 penalty units	600 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZG	Offering Gifts and Prizes	10,000	540 penalty units	1,000 penalty units	1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZH	Misleading conduct to which Industrial Property convention applies	2,000	540 penalty units	1,000 penalty units	1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZI	Certain Misleading conduct in relation to services	10,000	540 penalty units	1,000 penalty units	1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZJ(1)	Bait Advertising	10,000	540 penalty units	1,000 penalty units	1200 penalty units 1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZK	Referral Selling	10,000	540 penalty units	1,000 penalty units	1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZL(1)	Accepting payment without intending or being able to supply as ordered	10,000	540 penalty units	1,000 penalty units	1200 penalty units 1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZM(1)	Misleading representations about certain business activities	10,000	540 penalty units	1,000 penalty units	1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZN	Harassment or Coercion	10,000	540 penalty units	1,000 penalty units	1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZP(1)	Sending a prescribed card to a person	10,000	540 penalty units	1,000 penalty units	600 penalty units 1200 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZQ(1)	Assertion of right to payment for unsolicited goods or services	10,000	540 penalty units	1,000 penalty units	600 penalty units	\$100,000	\$100,000	1000 penalty units	\$100,000	
75AZQ(4)	Asserting a right to	10,000	540	1,000	600	\$100,000	\$100,000	1000	\$100,000	

	payment for making an entry in a directory		penalty units	penalty units	penalty units				penalty units		
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3.34 Comparison of maximum penalties for individuals

TPA		Max Penalty	Crimes Act	Qld	NSW ⁶⁸	Vic	SA	WA	Tas	NT	
52	Misleading or Deceptive Conduct								200 penalty units	\$20,000	
75AZC	False or Misleading Representations	≤2,000	s.6 2 years	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units		\$20,000	200 penalty units	\$20,000	
75AZD(1)	False representations and other misleading conduct in relation to real estate	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	Sale of Lands Act: 50 penalty units or 12 months	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZE	Misleading Conduct in Relation to employment	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZF	Cash Price to be stated in certain circumstances	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	240 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZG	Offering Gifts and Prizes	≤2,000		540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZH	Misleading conduct to which Industrial Property convention applies	2,000	s.4B(3) 5x penalty	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZI	Certain Misleading conduct in relation to services	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZJ(1)	Bait Advertising	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZK	Referral Selling	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZL(1)	Accepting	≤2,000	s.6	540	200	600	\$20,000	\$20,000	200	\$20,000	

⁶⁸ In NSW, imprisonment only available for second or subsequent offence

TPA		Max Penalty	Crimes Act	Qld	NSW ⁶⁸	Vic	SA	WA	Tas	NT	
	payment without intending or being able to supply as ordered		2 years individual	penalty units 1 year	penalty units 3 year in lieu of fines	penalty units		All indictable offences	penalty units		
75AZM(1)	Misleading representations about certain business activities	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZN	Harassment or Coercion	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZP(1)	Sending a prescribed card to a person	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	240 penalty units 600 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZQ(1)	Assertion of right to payment for unsolicited goods or services	≤2,000	s.6 2 years individual	540 penalty units 1 year	200 penalty units 3 year in lieu of fines	240 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	
75AZQ(4)	Asserting a right to payment for making an entry in a directory	≤2,000			200 penalty units 3 year in lieu of fines	240 penalty units	\$20,000	\$20,000 All indictable offences	200 penalty units	\$20,000	

3.35 Material Differences

There are some differences across jurisdictions in relation to the maximum penalties that can be imposed.

There are also differences in relation to the procedures adopted for bringing criminal proceedings. In some States, such as Queensland, it is possible for the prosecutor to elect whether to pursue the matter as a summary or indictable offence.

In WA the offences are indictable; however, the defendant can request to have the offence treated summarily under s 71 with the approval of the court.

All offences in Victoria are summary. All other States and Territories are classified as either indictable or summary offences.

3.36 Comparison of PART VC, TPA and FTAs: Offences

Cth		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
TPA		FTA	FTA	FTA	FTA	FTA	FTA	FTA	CAFT
Offences relating to unfair practices									
s75AZC	False or misleading representations (s53) 10,000 penalty units	s44 200 units (individual) 1000 units (corp.)	s40 540 units	s12 600 units (individual) 1200 units (corp)	s58 \$20,000 (individual) \$100,000 (corp)	s12 \$20,000 (individual) \$100,000 (corp)	s16 200 units (individual) 1000 units (corp)	s14 200 penalty units	s44 500 (indivi) 2500 (corp)
s75AZD	False representations or misleading conduct in relation to land (s53A) 10,000 penalty units	s45 200 units (individual) 1000 units (corp.)	s40A 540 units		s59 \$20,000 (individual) \$100,000 (corp)	s13 \$20,000 (individual) \$100,000 (corp)	s17 200 units (individual) 1000 units (corp)	s15 200 penalty units	s45 500 (indivi) 2500 (corp)
s75AZE	Misleading conduct in relation to employment (s53B) 10,000 penalty units	s46 200 units (individual) 1000 units (corp.)	s41 540 units	s13 600 units (individual) 1200 units (corp)	s60 \$20,000 (individual) \$100,000 (corp)	s14 \$20,000 (individual) \$100,000 (corp)	s178 200 units (individual) 1000 units (corp)	s16 200 penalty units	s46 500 (indivi) 2500 (corp)
s75AZF	Cash price to be stated in certain circumstances (s53C) 10,000 penalty units	s47 200 units (individual) 1000 units (corp.)	s42 540 units	s15 240 units (individual) 600 units (corp)	s61 \$20,000 (individual) \$100,000 (corp)	s15 \$20,000 (individual) \$100,000 (corp)	s21A 200 units (individual) 1000 units (corp)	s17 200 penalty units	s50 500 (indivi) 2500 (corp)
s75AZG	Offering gifts and prizes (s55) 10,000 penalty units	s48 200 units (individual) 1000 units (corp.)	s43 540 units	s16 600 units (individual) 1200 units (corp)	s62 \$20,000 (individual) \$100,000 (corp)	s16 \$20,000 (individual) \$100,000 (corp)	s19 200 units (individual) 1000 units (corp)	s18 200 penalty units	s51 500 (indivi) 2500 (corp)
s75AZH	Misleading conduct to which Industrial Property Convention applies (s55) 2,000 penalty units	s49 200 units (individual) 1000 units (corp.)	s44 540 units	s10 600 units (individual) 1200 units (corp)	s63 \$20,000 (individual) \$100,000 (corp)	s17 \$20,000 (individual) \$100,000 (corp)	s20 200 units (individual) 1000 units (corp)	s19 200 penalty units	s47 500 (indivi) 2500 (corp)
s75AZI	Misleading conduct re: services (s55A) 10,000 penalty units	s50 200 units (individual) 1000 units (corp.)	s45 540 units	s11 600 units (individual) 1200 units (corp)	s64 \$20,000 (individual) \$100,000 (corp)	s18 \$20,000 (individual) \$100,000 (corp)	s21 200 units (individual) 1000 units (corp)	s20 200 penalty units	s48 500 (indivi) 2500 (corp)
s75AZJ	Bait advertising (s56) 10,000 penalty units	s51 200 units (individual) 1000 units (corp.)	s46 540 units	s17 600 units (individual) 1200 units (corp)	s65 \$20,000 (individual) \$100,000 (corp)	s19 \$20,000 (individual) \$100,000 (corp)	s22 200 units (individual) 1000 units (corp)	s21 200 penalty units	s52 500 (indivi) 2500 (corp)
s75AZK	Referral selling (s57) 10,000 penalty units	s52 200 units (individual) 1000 units (corp.)	s47 540 units	s18 600 units (individual) 1200 units (corp)	s66 \$20,000 (individual) \$100,000 (corp)	s20 \$20,000 (individual) \$100,000 (corp)	s26A 200 units (individual) 1000 units (corp)	s23 200 penalty units	s53 500 (indivi) 2500 (corp)
s75AZL	Accepting payment without intending or being able to supply as ordered (s58) 10,000 penalty units	s53 200 units (individual) 1000 units (corp.)	s48 540 units	s19 600 units (individual) 1200 units (corp)	s67 \$20,000 (individual) \$100,000 (corp)	s21 \$20,000 (individual) \$100,000 (corp)	s24 200 units (individual) 1000 units (corp)	s24 200 penalty units	s54 500 (indivi) 2500 (corp)
s75AZM	Misleading representations about business activities (s59)	s54 200 units (individual)	s49 540 units	s10 600 units (individual) 1200 units (corp)	s68 \$20,000 (individual)	s22 \$20,000 (individual)	s25 200 units (individual)	s25 200 penalty units	s49 500 (indivi)

	10,000 penalty units	1000 units (corp.)		units (corp)	\$100,000 (corp)	\$100,000 (corp)	1000 units (corp)	units	2500 (corp)
s75AZN	Harassment and coercion (s60) 10,000 penalty units	s55 200 units (individual) 1000 units (corp.)	s50 540 units	s21 600 units (individual) 1200 units (corp)	s69 \$20,000 (individual) \$100,000 (corp)	s23 \$20,000 (individual) \$100,000 (corp)	s26 200 units (individual) 1000 units (corp)		s55 500 (individual) 2500 (corp)
s75AZO	Pyramid selling 10,000 penalty units	s60 U 200 units (individual) 1000 (corp)	s55D 540 units	s22 240 units (individual) 600 units (corp)	s70 \$20,000 (individual) \$100,000 (corp)	ss24 & 25 \$20,000 (individual) \$100,000 (corp)	s26B 200 units (individual) 1000 units (corp)	ss25A – 25D 200 penalty units	ss60E 60C 500 (individual) 2500 (corp)
s75AZP	Unsolicited credit or debit cards (s63A) 10,000 penalty units	s57 200 units (individual) 1000 units (corp.)		s23 (1) 240/600 units (2) 600/1200 units	s71 \$20,000 (individual) \$100,000 (corp)	s28 \$20,000 (individual) \$100,000 (corp)	s27 200 units (individual) 1000 units (corp)	s28 200 penalty units	s57 500 (individual) 2500 (corp)
s75AZQ	Assertion of right to payment for unsolicited goods or services, or for making an entry in a directory (s64) 10,000 penalty units	s58 200 units (individual) 1000 units (corp.)	s52 540 units	s24 240 units (individual) 600 units (corp)	s72 \$20,000 (individual) \$100,000 (corp)	s29 \$20,000 (individual) \$100,000 (corp)		s29 200 penalty units	s58 500 (individual) 2500 (corp)

Offences relating to product safety & information standards

TPA		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
s75AZS	Product safety standards and unsafe goods (s65C) 10,000 penalty units	s27 200 units (individual) 1000 units (corp.)	s84 540 units	s33 240 units (individual) 600 units (corp)	ss22, 24 Trade Standards Act \$10,000	s51 \$20,000 (individual) \$100,000 (corp)		s30 200 penalty units	s26 500 (individual) 2500 (corp)
s75AZT	Product information standards (s65D) 10,000 penalty units	s39 200 units (individual) 1000 units (corp.)	s82 540 units	s46 240 units (individual) 600 units (corp)	s32 TSA \$10,000	s60 \$20,000 (individual) \$100,000 (corp)		s30 200 penalty units	s39 500 (individual) 2500 (corp)
s75AZU	Compliance with product recall notice (s65F) 10,000 penalty units	s36C 200 units (individual) 1000 units (corp.)	s86 540 units	s53 240 units (individual) 600 units (corp)	s16A TSA \$10,000	s54 \$20,000 (individual) \$100,000 (corp)			s31 500 (individual) 2500 (corp)

ADDITIONAL OFFENCES

	NSW	Qld	Vic	SA	WA	Tas	ACT	NT
Country of origin representations	s44A 200 units (individual) 1000 units (corp.)							
False orders		s54 100 penalty units						
Obscene material		s55 100 penalty units						
Mock auctions	s51A	s56	s30	s28				

	200 units (individual) 1000 units (corp.)	100 penalty units	600 units (individual) 1200 units (corp)	\$2500				
False testimonials			s14 240 units (individual) 600 units (corp)					
Misleading or deceptive conduct (cf TPA s52)						s14 200 units (individual) 1000 units (corp)		
Unconscionable conduct (cf TPA s53)						s15 200 units (individual) 1000 units (corp)		
Must include street address as well as PO Box number						s23 200 units (individual) 1000 units (corp)		
Dual pricing	s40 50 units						s22 200 units	
Credit card contracts & increases in credit card limit							s28A 200 units	
Cash card use disclosure							s28B 200 units	
Prohibition on supply of goods in contravention of quality standard				s29 TSA \$10,000	s65 \$20,000 (individual) \$100,000 (corp)			
Prohibition on supply of goods in contravention of packaging standard				s24 TSA \$10,000	s67 \$20,000 (individual) \$100,000 (corp)			

Pt VI: Enforcement and Remedies

3.37 Introduction

Section 52 of the TPA is a general provision dealing with misleading conduct and only gives rise to civil liability.

The remaining provisions of Pt V, Div 1 of the TPA prohibit various kinds of specific misleading conduct and unfair business practices, all of which give rise to criminal as well as civil liability. Proceedings under one or more of the remedy provisions in Pt VI of the TPA are brought by a private litigant and the civil standard of proof applies.

In addition to seeking the imposition of fines under Pt VC, the ACCC can seek a range of additional enforcement orders including:

3.38 Injunctions

Section 80(1) provides:

‘Subject to subsections (1A), 1(AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

- (a) a contravention of any of the following provisions:
 - (i) a provision of Part IV, IVA, IVB, V or VC;
 - (ii) section 75AU or 75AYA;
- (b) attempting to contravene such a provision;
- (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
- (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) conspiring with others to contravene such a provision;

the Court may grant an injunction in such terms as the court determines to be appropriate.

...

(1AA) Where an application for an injunction under subsection (1) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).

...

Section 80 does not prescribe a time limit within which an application for injunction must be made.

Section 80(4) removes the normal rule that an injunction is only to be granted to restrain threatened or impending conduct. It provides that the power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

- '(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;
- (b) whether or not the person has previously engaged in conduct of that kind; and
- (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.'

The terms of an injunction based on past conduct should be limited to restraining a repetition of precisely that conduct. However, in the case of an injunction based on an intention to commit future contemplated conduct the injunction can be cast more widely to catch conduct of the kind threatened or intended.

3.39 Non-punitive Orders

The *Trade Practices Amendment Act (No 1) 2001* (Cth) repealed s 80A and inserted two new provisions, ss 86C and 86D. Section s 86C provides:

- ' (1) The Court may, on application by the Commission, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.
- (2) The orders that the Court may make in relation to the person are:
 - (a) a community service order; and
 - (b) a probation order for a period of no longer than 3 years; and
 - (c) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
 - (d) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
- (3) This section does not limit the Court's powers under any other provision of this Act.
- (4) In this section:
 - "community service order"* , in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:
 - (a) is specified in the order; and
 - (b) relates to the conduct;
 - for the benefit of the community or a section of the community.

Example: The following are examples of community service orders:

- (a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and
- (b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a product to carry out a community awareness program to address the needs of consumers when purchasing the product.

“*contravening conduct*” means conduct that:

- (a) contravenes Part IV, IVA, IVB, V or VC or section 75AU or 75AYA; or
- (b) constitutes an involvement in a contravention of any of those provisions.

“*probation order*” , in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:

- (a) an order directing the person to establish a compliance program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
- (b) an order directing the person to establish an education and training program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and
- (c) an order directing the person to revise the internal operations of the person’s business which lead to the person engaging in the contravening conduct’.

Section 86(1) provides that a non-punitive order may only be made if there is a finding that a person has engaged in contravening conduct. The type of probation order which may be made may only relate to the ‘contravening conduct, similar conduct or related conduct’ so that there must be a nexus between the contravening conduct and the order.

The heading ‘Non-punitive orders’ indicates that s 86C will be construed to protect the public interest rather than by way of punishment.

Section 86D provides:

- ‘(1) The Court may, on application by the Commission, make an adverse publicity order in relation to a person who:
 - (a) has been ordered to pay a pecuniary penalty under section 76; or
 - (b) is guilty of an offence under Part VC.
- (2) In this section, an *adverse publicity order*, in relation to a person, means an order that:
 - (a) requires the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession

of or access to; and

- (b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

(3) This section does not limit the Court's powers under any other provision of this Act.'

Section 86D is headed 'Punitive Orders-Adverse Publicity'. Unlike s 86C which is protective in nature, s 86D is intended to punish wrong-doing.

These orders can only be made by the court on the application of the ACCC.

3.40 Undertakings

Section 87B was inserted as part of the 1992 amendments. It authorises the ACCC to accept an undertaking in relation to any matter in which the ACCC has a power or function under the TPA. Such undertakings are in the nature of consent injunctions, and avoid the need for a trial. In the event of a breach, the court may make all or any of the orders set out in s 87B (4).

Section 87B provides:

'87B(1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Pt X).

'87B(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.

'87B(3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the court for an order under subsection (4).

'87B(4) If the court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

- (a) an order directing the person to comply with that term of the undertaking;
- (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
- (d) any other order that the court considers appropriate.'

In 1999 the ACCC published a guideline which is intended to inform interested parties when administrative resolution is an appropriate strategy, rather than litigation, and the approach it will adopt in relation to enforceable undertakings under s 87B. In choosing between s 87B undertakings and

litigation the ACCC will take into account which alternative is likely to achieve the desired market place outcome and lasting compliance with the TPA.

In deciding whether administrative resolution, by way of a s 87B undertaking, is the appropriate strategy the ACCC will take the following factors into account:

the nature of the alleged breach of the Act in terms of such factors as:

- the impact of the conduct on third parties and the community at large;
- the type of practice;
- the product or service involved;
- the size of the business or businesses involved.

the history of complaints against the business or businesses and of complaints involving the practice, the product or the industry generally and any previous court or similar proceedings;

the cost effectiveness of pursuing an administrative resolution instead of court action;

prospects for rapid resolution of the matter; and the apparent good faith of the corporation (if the company acts in a bona fide way, settlement is more likely to be acceptable to the ACCC if it is seen as the approach most likely to achieve the desired results);

other relevant factors particular to the case under consideration.

The ACCC does not require that the corporation admits breaching the TPA since such an admission could result in third party claims by means of private enforcement. However, undertakings will not be accepted if they include a denial of liability.

Section 87B(2) provides for withdrawal or variation of undertakings and the ACCC states in its Policy Statement that it will sympathetically consider a request to vary if undertakings are found to be too difficult to comply with or not practical.

3.41 Recommendations for Additional Enforcement Powers

The Australian Law Reform Commission has recommended that a civil penalty regime should be enacted to strengthen the ACCC's enforcement powers in relation to Pt V of the TPA:

“Criminal offences should remain in Pt V

9.10 The Commission is persuaded that a criminal conviction is likely to have a greater deterrent effect than a civil penalty, for corporations and individuals. Consultations revealed that many corporations and individuals are more fearful of criminal conviction than of liability to a civil penalty, even if the civil penalty is greater in monetary terms than the criminal penalty. Criminal law has a legitimate role in denouncing and penalising unacceptable behaviour. It also forms part of the background to the process of negotiation and settlement and the entry

by corporate contraveners into undertakings to improve their compliance controls. The Commission is satisfied that criminal liability is an effective deterrent and an appropriate sanction for contraventions under Pt V that involve the requisite mental state. It **recommends** that criminal penalties be retained in PtV, for both individuals and corporations, but that criminal liability should depend on proof of a particular advertent mental state. There should be no strict criminal liability under Pt V. Restricting criminal liability to advertent conduct adheres to principle.

Civil penalties should be introduced to Pt V

9.11 Although there is an important role for the criminal law in Pt V of the TPA, the Commission considers that it has been over-emphasised and overused in this context. Not all contraventions of Pt V warrant treatment as offences, most certainly not as strict liability offences. The Commission **recommends** that civil penalties should be made available in Divisions 1 and 1A of Pt V, in addition to the regime of criminal penalties. This recommendation does not apply to s52, contravention of which is not subject to penalty. As well as narrowing the application of the criminal law, and thereby increasing its impact, introducing civil penalties to Pt V will increase the range of responses available to the TPC and thereby improve its ability to enforce the TPA. In terms of the 'pyramid of enforcement' model, criminal liability should form the peak of the pyramid - the most serious and therefore the least used enforcement response.”

The ALRC's report, *Compliance with the Trade Practices Act 1974* is available on its website at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/68/ALRC68.html>

The State and Territory regimes contain a number of enforcement powers that are not available to the ACCC under the TPA which are considered below.

3.42 State and Territory Enforcement (Unfair conduct)

There is a potential for overlap between the TPA (applying to corporations and sole traders or partnerships whose activities cross State boundaries) and the State and Territory laws, because the State and Territory laws apply to any 'person'. A corporation carrying on business in New South Wales, for example, could be subjected to an action for an alleged breach of both the TPA and the relevant State legislation.

Any differences in the laws, enforcement provisions and remedies give those seeking relief for loss or damage suffered as a result of a contravention the choice to pursue the breach under Australian and/or State and Territory laws. Where a consumer protection agency is instigating an action, there is likely to be coordination between the relevant agencies.

3.42.1 State and Territory agencies

There are several agencies involved in administering and enforcing consumer protection policy at the State and Territory level:

New South Wales: New South Wales Office of Fair Trading, Department of Commerce

Victoria: Consumer Affairs Victoria

Queensland: Queensland Office of Fair Trading

South Australia: Office of Consumer and Business Affairs

Western Australia: Department of Consumer and Employment Protection

Tasmania: Tasmanian Office of Consumer Affairs and Fair Trading

Australian Capital Territory: Australian Capital Territory Office of Fair Trading

Northern Territory: Northern Territory Office of Consumer and Business Affairs

3.42.2 Material Differences

The States and Territories generally possess most of the enforcement powers included in the TPA, all of them have powers that are beyond those in the TPA.

States and Territories also impose **pecuniary penalties** for criminal offences. No states have the power to apply civil penalties. (see [3.47] – [3.48]).

All States and Territories except Tasmania and the Australian Capital Territory have provision for courts to grant **injunctions**. Victoria includes specific provisions for both positive and negative injunctions, interim injunctions and **injunctions to cease trading**.

The major power that States have that is not found in the TPA is the power to require the **substantiation of claims** made in the promotion of goods or services. This power is included in the legislation of all States and Territories except WA, Tas and NT. The relevant director or commissioner may require a person to provide proof of any claims or representations that they make with regards to the goods or services they supply. It is an offence to fail to provide adequate proof.

Most States and Territories include a provision equivalent to **s 87 of the TPA relating to other orders**. NSW, Vic, ACT & NT also have provision for non-punitive orders similar to those provided for by s86C of the TPA. South Australia does not have a provision in the terms of s87, but does elsewhere provide for a court to grant orders for compensation (s85) or for sequestration (s86).

Some states also grant powers to **inspectors** to investigate potential contraventions of the legislation. Qld, NSW, VIC, SA & Tas grant inspectors power to enter and search premises, and to seize goods or documents, question people, and make other inquiries and examinations as required (Qld, ss 89 - 91G; NSW ss18-23; Vic s121A; SA s77; Tas ss30, 31). Offences are created for obstruction of the inspectors' investigations (Qld s91; SA s77; Tas s32).

NSW grants the Director-General power to issue a person suspected of engaging in conduct in contravention of the Act with a **show cause notice**, requiring them to show reasons why they should not be prevented from trading (ss66A, 66B).

NSW and Victoria also provide for **penalty or infringement notices** to be served where it appears that a person has committed an offence. (NSW s 64; Vic s160A) .

3.43 Remedies under the Commonwealth Regime

Pts IVA, IVB, and V of the TPA contain the statutory consumer protection prohibitions but these Parts do not contain any remedies for contraventions of them. The civil causes of action for contravening these provisions are contained in Pt VI of the TPA. The principal remedies are:

- Declarations (s 21 Federal Court of Australia Act 1976 (Cth))
- Injunctions (s80)
- Damages (s82)
- Other orders including order for compensation of loss or damage, or to prevent or reduce loss or damage (s87).

The Court also has power to prohibit payments or transfer of money or property (s87A).

3.44 Remedies for breach of Implied Terms

The object of Pt V Div 2 of the TPA and equivalent State and Territory legislation is to strengthen the position of consumers. That legislation implies into transactions certain conditions and warranties, breach of which will give rise to an action in contract

In cases of breach of contract, the remedies available to a consumer are:

- rescission of the contract and rejection of the goods;
- specific performance;

- damages for breach of contract.

3.45 Remedies under the State and Territory regime

All States and Territories provide for **damages** (although slightly different frameworks regarding which contraventions give rise to claim for damages – especially with regard to personal injuries).

All States and Territories except Tasmania and the Australian Capital Territory have provision for courts to grant **injunctions**. Victoria includes specific provisions for both positive and negative injunctions, and interim injunctions.

The Australian Law Reform Commission in its report, *Compliance with the Trade Practices Act* note the following differences in relation to the State and Territory enforcement regimes:

‘2.11 **FTA remedies in lower courts.** Unlike the TPA, the fair trading legislation in many States and Territories specifically gives lower courts the power to make ancillary orders and to grant injunctive and other relief. For example, injunctions and ancillary orders may be obtained under the relevant fair trading legislation in the County Court of Victoria, the Magistrates Court of the ACT and the District Courts of WA, Queensland and SA. Damages may be sought in any State or Territory court subject to the local jurisdictional limitations on the amount of the claim and the type of property involved. Prosecutions under fair trading legislation may be conducted as summary or indictable proceedings at the discretion of the prosecuting authority. In practice it appears that most offences are dealt with in summary proceedings before a lower court. By conferring certain remedies on lower courts, the fair trading legislation helps litigants avoid the complexity and expense involved in proceedings in superior courts.

...

Consumer claims tribunals and small claims courts

2.13 An important consumer protection mechanism in each State and Territory is the consumer claims tribunal or small claims court. These generally provide a quick, effective and relatively cheap alternative to litigation for small claims under the relevant fair trading laws or other legislation. The tribunals and courts can only deal with issues concerning goods and services to the value of \$5000, except in NSW where the Consumer Claims Tribunal has a monetary jurisdiction of \$10000 for consumer matters. The main features of these tribunals and small claims courts are an emphasis on conciliation or settlement of disputes, informal hearings where technical rules of evidence do not apply, limited rights to legal representation, limited rights of appeal from decisions of the tribunal or court and no, or only a limited, right to recover costs from the other party to the dispute. There are some differences between the

remedies available in each tribunal and court. Orders for damages, performance of work and return of goods are available in all States and Territories. Other orders include relief from payment of money, replacement of goods and the supply of services. Where a dispute cannot be settled, the tribunal or court determines it in accordance with the general law. In Queensland and NSW, however, the final order may be tempered by the tribunal's statutory obligation only to make orders that are fair and equitable to all the parties to the dispute.' [Footnotes omitted]

3.46 Remedies for breach of implied terms State and Territory legislation

The general provisions of the Sale of Goods Acts are substantially the same in each State and Territory.

In cases of breach of contract, the remedies available to a consumer are:

- 4 rescission of the contract and rejection of the goods;
- 5 specific performance;
- 6 damages for breach of contract.

3.47 Enforcement Powers

	Cth		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
	<i>Trade Practices Act</i>		<i>Fair Trading Act</i>	<i>FTA</i>	<i>FTA</i>	<i>FTA</i>	<i>FTA</i>			
	Civil pecuniary penalties									
s79	Offences against Part VC – aiding/abetting/inducing etc; conviction of more than one offence;		s62	ss92, 92A, 92B, 93	s142	s187	ss69 - 70	s33	s41	ss88
s79A	Enforcement and recovery of fines imposed								s42	
s79B	Preference given to compensation for victims								s43	
s85	Defences				155		s83	s40	s49	s94

	Cth		NSW	Qld	Vic	SA	WA	Tas	ACT	NT
s86C	Non-punitive orders community service order s86C(2)(a); probation order ((2)(b)); order to disclose ((2)(c)); order to publish ((2)(d))								s45	s90
s86D	Non-punitive order requiring adverse publicity		s67		s153					

3.49 Material differences

State and Territory Government consumer affairs agencies handle the majority of consumer protection matters. The ACCC concentrates on significant matters that cross state boundaries, involve corporations or require a national approach.

The Federal Court has jurisdiction to hear matters under Pt VC of the TPA. Under cross-vesting rules, Supreme Courts in each State may hear certain criminal matters, depending on the particulars of a given case. Lower courts, such as State or Territory District Courts or Small Claims Tribunals, may hear civil matters depending on the amount of damages involved.

Pt VIA: Proportionate liability for misleading or deceptive conduct

4.1 Introduction

As part of the lpp reforms to the law of negligence, the Commonwealth and States introduced the concept of proportionate liability for certain claims involving economic loss or property damage. The overall objective of proportionate liability is to ensure that those who are jointly or severally liable in respect of the "same loss or damage" are not exposed to paying for the whole of the loss caused, but are only required to compensate the injured party for the proportion of the loss that is relative to their culpability. This results in an obvious benefit to wrongdoers and their insurers who, once their proportion of responsibility is determined, cannot be required to contribute to the damages payable by another "concurrent wrongdoer" in the claim. Theoretically, the proportioning of loss between co-respondents should not impact on the policy of ensuring an injured party receives the whole of the loss suffered by awarding compensation under s 82. When examined more closely, however, the drafting of the proportionate liability provisions exposes a potential threat to the underlying policy of the TPA, by shifting the risk of recovery of compensation awarded from the wrongdoers to the claimant. This shift is of most concern in the case of claims by consumers against several wrongdoers for misleading or deceptive conduct under s 52 TPA.

4.2 TPA Framework

The Commonwealth has introduced proportionate liability for claims against wrongdoers for damages under s 82 for economic loss or damage to property caused as a result of a contravention of s 52 TPA (s 87CB). If the provisions are applicable to a claim the concurrent wrongdoers will only be liable for the proportion of the claim ordered by the court, rather than being jointly and severally liable for the whole of the claim (s 87CF). For the claim to be apportionable there must be a concurrent wrongdoer. This is one of 2 or more persons whose "acts or omissions caused independently or of each other or jointly, the damage or loss that is the subject of the claim". It is irrelevant that a wrongdoer is insolvent, being wound up or died. This has the potential to disadvantage consumers where one or more of the wrongdoers is insolvent or ceased to exist.

A wrongdoer is not entitled to the benefit of proportionate liability if they have fraudulently or intentionally caused the loss of the claimant (s87CC). Such a wrongdoer will be an excluded wrongdoer and liable jointly and severally for the loss suffered. The proportionate liability provisions are also stated as not preventing:

- (i) a person being vicariously liable for a proportion of the claim for which another is liable;
- (ii) a partner from being held severally liable with another partner fro a proportion of a claim;

(iii) the operation of any other Act to the extent that it imposes several liability on any person in respect of an apportionable claim.

4.3 Material differences

Each of the States have introduced proportionate liability to their respective Civil Liability Acts. The legislation that will be compared and their respective commencement dates are:

Civil Liability Act 2002 (NSW) – commenced

Civil Liability Act 2003 (Qld) – commenced

Wrongs Act 1958 (Vic) – commenced

Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) – commenced

Civil Liability Act 2002 (WA) – commenced

Civil Liability Act 2002 (Tas) – commenced

Civil Law (Wrongs) Act 2002 (ACT) – commenced

Proportionate Liability Act 2005 (NT) - commenced

The main difference between the TPA and the State regimes are the types of claims to which each of the provisions apply and the circumstances in which the wrongdoer is unable to take advantage of the proportionate liability provisions despite the existence of an apportionable claim.

4.4 Apportionable Claim – TPA and CLAs

4.4.1 Comparative Table

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
87CB	34	28,30	24AF, 24AH	3	5AI,5AJ	43A	107B, 107C 107D	4, 6

Under the TPA an apportionable claim must be a claim for damages under s 82 for economic loss or property damage arising from a contravention of s 52. The operation of the definition is further clarified in s 87CB(2) which provides that a single apportionable claim will exist in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

Under the State legislation proportionate liability provisions generally apply to claims in contract, tort or otherwise for economic loss or property damage arising from a failure to take reasonable care, or a

claim for economic loss or property damage arising from misleading or deceptive conduct under the equivalent to s 52. A claim for personal injury is not an apportionable claim.

4.4.2 Material differences

Other material differences between the States in the definition of apportionable claim are:

- (i) Qld and ACT exclude from an apportionable claim any claim by a consumer. In Qld a consumer is an individual whose claim is based on right relating to goods or services where they are acquired for domestic, personal or household use or professional services acquired for the individuals use other than for a business carried on by the individual. In the ACT it includes personal financial advice.
- (ii) In Vic a claim under s 9 of the FTA (misleading conduct) is not limited to economic loss or property damage.
- (iii) ACT excludes claims for discrimination, claims under the *Road Transport (General) Act 1999* and workers compensation claims.

The main impact on consumers arising from the differences in State legislation is the exclusion of consumers from the operation of the provisions in ACT and Qld. A consumer bringing a claim for misleading conduct in both of these jurisdictions will be better placed than a consumer in any other jurisdiction or under the TPA where a wrongdoer is insolvent, died or ceased to exist.

4.5 Excluded Wrongdoers

4.5.1 Comparative Table

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
87CC	34A	32D, 32E	24AM	3	5AJA	43A	107E	7

4.5.2 Material Differences

The TPA and all FTAs provide for wrongdoers who have intentionally caused loss or fraudulently caused loss to be denied the benefit of the proportionate liability provisions. The liability of an excluded wrongdoer is decided in accordance with the principles of joint and several liability.

Other wrongdoers are excluded from the operation of proportionate liability in certain jurisdictions:

- (i) In Qld a person is proved to have engaged in misleading or deceptive conduct under the *Fair Trading Act 1989* is an excluded wrongdoer: s 32F
- (ii) Vic only includes an exclusion for fraud and not intent.

The main impact on consumers arising from the differences in State legislation is the exclusion of claims for misleading conduct in Qld. Any wrongdoer who is found to have contravened s 38 of the FTA will be jointly and severally liable. In all other jurisdiction including the TPA such a wrongdoer will be entitled to proportionate liability, subject to a lack of intent or fraud.

Pt VIB: Claims for damages or compensation for death or personal injuries (compared to negligence/ other avenues for redress under State and Territory laws)

5.1 Introduction

Dramatic increases in insurance premiums in the early years of the 21st century prompted a review of the laws of negligence relating to personal injury. State and Territory governments introduced a range of reforms designed to limit liability for personal injury in certain circumstances, and to place restrictions on the amount of damages which could be awarded. At the same time, the Federal Government initiated a review of personal injury laws, chaired by Justice Ipp. The Ipp review made 61 recommendations for reform, including a suggestion that uniform legislation be adopted across Australia. Several amendments to the *Trade Practices Act* were also recommended, most of which have been enacted. However, rather than adopt a uniform framework, State and Territory reforms varied from the Ipp recommendations in a number of ways, and as a result there are several differences between jurisdictions, and between the States and Territories and the TPA, with regards to the availability of damages or compensation for personal injury, and the quantum of awards where available.

5.2 TPA Framework

Under s82 of the TPA, damages are available for personal injury arising from breaches of Part IV (restrictive trade practices), Part IVA (unconscionable conduct), Part IVB (industry codes), and Part V (consumer protection) other than Part V Div 1 (except where the injury is tobacco-related).

Part VIB regulates awards of damages under s82. It specifies the relevant time limits for bringing claims, imposes limits on the amount and types of damages that can be awarded, and sets thresholds for non-economic loss, below which damages are not available. It provides for the circumstances under which a plaintiff can be awarded damages for gratuitous care, and abolishes exemplary and aggravated damages. It also provides that a court can refer to past decisions, and can make consent orders for structured settlements.

s87 provides for other orders to be made, including orders for compensation for loss or damage arising out of personal injury caused by a breach of Parts IV, IVA, IVB, V (except Div 1, where not tobacco-related) or VC.

The TPA and all State and Territory legislation treat actions for death similarly to those for personal injury.

5.3 Availability of damages for death or personal injury in TPA & FTAs

5.3.1 Comparative Sections

TPA	ASIC	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
82		68	99	159	84	79	37	46	91

Under s82 of the TPA, damages are available for personal injury arising from breaches of Part IV (restrictive trade practices), Part IVA (unconscionable conduct), Part IVB (industry codes), and Part V (consumer protection) other than Part V Div 1 (except where the injury is tobacco-related).

5.3.2 Comparative table of availability of damages for personal injury

TPA	TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
Part IVA – Unconscionable Conduct	✓	X	X	✓	X	X	✓	X	X
Part IVB – Industry Codes	✓	✓	✓	✓		X			
Part V Div 1 – unfair practices (other than UC)	X	X	X	✓	✓	✓	X	✓	✓
Part V Div IAAA – pyramid selling	✓	✓	X	✓		✓	✓		✓
Part V Div IAA – Country of origin representations	✓								
Part V Div 1A – product safety & information	✓	✓	✓	✓		✓	✓	✓	✓
Part V Div 2 – implied terms	✓	✓		✓		✓	✓		
Part V Div 2A – actions against manufacturers & importers	✓	✓		✓		✓	✓		

5.3.3 Material differences

SA, WA, NT and ACT allow damages awards of damages for unfair practices, but exclude claims arising from unconscionable conduct.

Tas allows damages for unconscionable conduct, but not for other claims of unfair practices.

Vic allows awards of damages for any breach of the FTA.

Qld specifically excludes damages from breaches of provisions on pyramid selling and assertions of a right to payment for unsolicited goods or services.

Consumers in states where damages are not available either for unconscionable conduct or for other instances of unfair practices are at a disadvantage in terms of remedies available to them where personal injury occurs. However, it is also worth noting that in some states where damages are not available, a court may make an order for compensation for loss or damage suffered.

5.4 Compensation for loss or damage

5.4.1 Comparative Sections

TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
87	72	100	158	85	77	41	50	91

5.4.2 Comparison of availability of compensation

TPA	TPA	NSW	Qld	VIC	SA	WA	Tas	ACT	NT
Part IVA – Unconscionable Conduct	✓	X	X		✓	✓	✓	✓	✓
Part IVB – Industry Codes	✓	✓	✓		✓	✓			
Part V Div 1 – unfair practices (other than UC)	X	X	X		✓	✓	X	✓	✓
Part V Div IAAA – pyramid selling	✓	✓	X		✓	✓	✓		✓
Part V Div IAA – Country of origin representations	✓								
Part V Div 1A – product safety & information	✓	✓	✓		✓	✓	✓	✓	✓
Part V Div 2 – implied terms	✓	✓			✓	✓	✓		
Part V Div 2A – actions against manufacturers & importers	✓	✓			✓	✓	✓		
Part VC – offences	✓								

5.4.3 Material differences

Most FTAs allow orders for compensation where they would be available under the TPA.

NSW and Qld don't allow compensation orders for loss or damage arising out of unconscionable conduct.

In addition, NSW also makes compensation available upon conviction for an offence, up to a maximum of \$60,000.

In WA and NT, compensation is available for unconscionable conduct, where damages are not.

In some states, compensation is available where damages are not, helping to provide consumers with an alternative remedy. There are still some jurisdictions where neither damages nor compensation are available for certain breaches of the FTA.

5.5 Limitation of liability for provision of recreational services

One of the recommendations of the Ipp review was that limitations should be placed on the liability for personal injury of persons or companies that provide recreational services. Section 68B of the TPA allows for a limitation of liability which arises under s74 (warranties implied in contracts for the supply of services) in relation to personal injury where the services are recreational services.

5.5.1 Material differences

The FTAs of NSW, Vic and NT include a limitation of liability similar to that found in s68B of the TPA, limiting the impact of implied warranties in contracts to supply recreational services where personal injury occurs.

Where a limitation is not found in the FTA, the Civil Liability Acts of Qld, SA, WA and Tas include a limitation on liability where personal injury results from recreational activities where there danger was obvious.

In the ACT, neither the FTA nor the CLA includes a limitation on liability in relation to personal injury arising from recreational activities.

5.6 Maximum damages available

The Ipp review recommended that awards for non-economic loss be capped at \$250,000. This recommendation was adopted by the TPA in s87M.

5.6.1 Material differences

All States and Territories except the ACT provide for a maximum amount of damages that can be awarded for non-economic loss. These figures vary, and are subject to change according to indexation.

5.7 Cap on damages for loss of earnings

The TPA places a cap on damages for loss of earnings at two times the average full time weekly earnings.

5.7.1 Material differences

All other jurisdictions place a cap on lost earnings at three times the average weekly wage.

5.8 Threshold for damages

The TPA imposes a threshold for claiming damages at 15% of the most extreme case.

5.8.1 Material differences

NSW, WA and Tas impose a similar threshold.

In Qld and SA, no such threshold is required to be met. Injuries are assessed according to a scale from (0-100 in Qld, 0-60 in SA) with damages being awarded at proportionate rates.

In Vic, damages are available provided that the injury sustained is a significant injury. In SA, a person is ineligible for damages unless their ability to lead a normal life has been significantly impaired for at least 7 days.

ACT and NT have no threshold for damages.

5.9 Court may refer to past decision in determining non-economic loss

The TPA allows for the court to refer to past decisions. This was one of the recommendations of the Ipp review.

5.9.1 Material differences

NSW, Vic, WA, Tas and ACT also allow the court to refer to past decisions.

Qld, SA and NT make no provision for the court to refer to past decisions on non-economic loss.

5.10 Abolition of aggravated and exemplary damages

Section 87ZB of the TPA expressly excludes awards for aggravated and exemplary damages for personal injury.

5.10.1 Material differences

NT excludes aggravated and exemplary damages in the same terms as the TPA.

NSW prevents the award of punitive, exemplary or aggravated damages where the injury was caused by negligence.

Qld excludes exemplary or aggravated damages for personal injury, except where that personal injury was caused intentionally.

5.11 Gratuitous care

Sections 87W and 87X of the TPA provide that damages for gratuitous care will not be available unless certain prerequisites are established. These apply to both care which the plaintiff will require as a result of the accident, and compensation for loss of the plaintiff's ability to provide care which was provided by them prior to the accident. In order for damages for gratuitous care to be available, the care must be provided for at least 6 hours a week, and for a period of at least 6 months. Care which is required by the plaintiff must be necessary and must be a result of the personal injury.

5.11.1 Material differences

NSW, Qld and NT provide similar prerequisites to those in the TPA.

SA does not require that care be provided for 6 hours a week for at least 6 months, but it does limit availability of damages to cases where care is provided by a spouse, parent or child of the plaintiff, and damages are limited to four times the average weekly earnings.

WA requires that care be provided by a member of the same household or family.

Tas and ACT do not impose prerequisites for the availability of damages for gratuitous care.

5.12 Availability of Structured Settlements

The TPA and all States and Territories make provision for the court to grant a consent order for a structured settlement.

State and Territory legislation which deals with unfair and unjust terms

6.1 *Contracts Review Act 1980 (NSW)*

The *Contracts Review Act 1980* (NSW) resulted from the 1976 Report on *Harsh and Unconscionable Contracts* by Prof John Peden. The term 'unjust' is defined in s 4 as including 'unconscionable, harsh or oppressive', and 'injustice' is to be construed in a corresponding manner.

Corporations and individuals entering into contracts in the course of, or for the purposes of a trade, business or profession are precluded from obtaining relief. *Contracts Review Act 1980* (NSW) s 6.

Where a contract or a provision of a consumer-style contract is found to be unjust in the circumstances relating to the contract at the time it was made, s 7 of the Act gives the court a range of options to avoid an unjust result, including refusing to enforce some or all of the contract, declaring the contract void in whole or part, or varying any provision of the contract.

Section 9(1) provides that in determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the court must have regard to the public interest and to all the circumstances of the case, including the consequences of compliance or non-compliance with the provisions of the contract.

The court must also, to the extent relevant to the circumstances, have regard to a non-exclusive list of factors in s 9(2). Factors which will be of particular relevance in the context of electronic contracts include:

- Inequality of bargaining power between the parties (s 9(2)(a));
- Whether the terms of the contract were the subject of negotiation (s9(2)(b) ;
- Whether it was reasonably practical for the party seeking relief (the licensee) to negotiate for the alteration of or to reject any of the provisions of the contract (s9(2)(c); and
- The physical form of the contract, and the intelligibility of the language in which it is expressed s9(2)(g).

Other factors which may be relevant in a particular case include:

- Whether provisions of the contract impose conditions which are not reasonably necessary for the protection of the legitimate interests of the parties to the contract (s 9(2)(d); and

- Whether undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief (the licensee), by any other party to the contract (the licensor), or any other person acting or appearing or purporting to act on their behalf (s9(2)(j)).

The evident intent of the Act is to move beyond the equitable focus upon procedural unconscionability, and to give regard to the public interest and substantive unconscionability. While courts are able to consider substantive unconscionability under the Act, they rarely do so without also considering the impact of procedural unconscionability. The reliance upon procedural unconscionability severely limits the ability of the Act to deal directly with unfair terms in consumer contracts.

6.2 Part 2B of the *Fair Trading Act 1999* (Vic)

Part 2B of the Victorian *Fair Trading Act 1999* (“FTA”), enacted in 2003, is targeted squarely at the problem of unfair terms in consumer contracts. An unfair term in a consumer contract is void, but ss 32Y(1) and (3) provide that the contract ‘will continue to bind the parties if it is capable of existing without the unfair term’. The unfair terms provisions do not extend to credit regulation.

Section 32W of the FTA defines ‘unfair term’ in the following way:

“A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.”

Section 32X of the FTA provides:

“Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect of:

- (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
- (b) permitting the supplier but not the consumer to terminate the contract;
- (c) penalising the consumer but not the supplier for a breach or termination of the contract;
- (d) permitting the supplier but not the consumer to vary the terms of the contract;
- (e) permitting the supplier but not the consumer to renew or not renew the contract;
- (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
- (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
- (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
- (i) limiting the supplier's vicarious liability for its agents;

- (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
- (k) limiting the consumer's right to sue the supplier;
- (l) limiting the evidence the consumer can lead in proceedings on the contract;
- (m) imposing the evidential burden on the consumer in proceedings on the contract."

Section 32ZC of the FTA also allows for terms in a 'standard form contract' to be prescribed by regulation as unfair terms. A 'standard form contract' is defined in s32U as 'a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts used in that industry'. Section 32Z provides that it is an offence to use a standard form contract containing a prescribed unfair term, or attempt to enforce such a term.

6.3 Material Differences

- Under the NSW Act the courts tend to be wary of providing relief where there is substantive unfairness. The emphasis is on procedural injustice. There is no power on the part of the regulator to prescribe unfair terms
- The Victorian FTA focuses on procedural and substantive unfairness. It allows the Governor-in-Council to prescribe terms to be unfair and thereafter it is illegal to include them. CAV can seek declarations and injunctions in the Victorian Consumer Affairs Tribunal regarding unfair terms. The extra-territorial operation of the unfair terms provisions is considered at [3.7].

Summary of Material Differences and Recommendations for Review

Part II: Commonwealth Consumer Protection Regime

Material Differences and Review Recommendation

One of the government's intentions in passing the *Financial Sector Reform (Consequential Amendments) Act 1998* which came into force on 1 July 1998 was to remove regulatory overlap between ASIC and the ACCC. The objective was for ASIC to become the specialist regulator for consumer protection in the financial system. This was achieved by introducing s 51AF into the TPA and enacting Pt II Div 2 of the ASIC Act.

State and Territory Fair Trading or Consumer Affairs agencies administer fair trading legislation that mirrors the consumer protection provisions in the ASIC Act.

For example s 42 of the *Fair Trading Act 1987* (NSW) has not been amended so as to exclude conduct in relation to financial services. Thus, if misleading conduct occurs in relation to financial services in trade or commerce s42 is also applicable. This would appear to conflict with the Australian Government's intention to make ASIC solely responsible for consumer protection in relation to financial services.

Section 1041H of the *Corporations Act* does not require that the dealing in securities be in trade or commerce. Both s 12DA of the ASIC Act and s 42 of the Fair Trading Act contain that requirement.

State and Territory enforcement authorities also regulate consumer credit under the Uniform Consumer Credit Code.

While the ACCC is not responsible for financial services it retains responsibility for enforcing consumer protection in relation to health insurance (See e.g. *Medical Benefits Fund Of Australia Limited v Cassidy* [2003] FCAFC 289 (16 December 2003) and *Cassidy v Saatchi & Saatchi Pty Ltd* [2004] FCAFC 34 (25 February 2004).

The division of consumer protection responsibilities between these bodies is not always clear-cut, and has been a source of confusion to industry and consumers.

The ACCC and ASIC have collaborated to produce a joint publication *Debt Collection Guideline: for collectors and Creditors* (October, 2005). It is necessary to ask: how did the debt arise and does it come within the expanded definition of 'credit' in Regulation 2B set out above?

For example, does a contract for the purchase of a motor vehicle on 30 days credit give rise to a debt for which the ACCC has responsibility in the event of harassment for non-payment? This is clearly a financial product and comes within the definition of credit facility.

Does it make any difference if the motor vehicle is the subject of a lease? Somewhat surprisingly this too comes within the definition of a credit facility and would be a financial service. See Regulation 2B (3)(b)(iv).

In broad terms, ASIC takes responsibility for dealing with misconduct associated with debt collection activity when the debt relates to the provision for a financial service. The ACCC is responsible for dealing with misconduct associated with debt collection activity when the debt does not relate to the provision of a financial service.

There will be areas of overlap, for example, where the conduct relates to a range of debts, including debts for both financial services and non-financial services. Furthermore, the ACCC retains responsibility for any misleading conduct concerning the underlying goods or services to which the debt relates.

It can be a waste of enforcement resources trying to decide whether the debt arose as a result of the provision of a financial service. For example, misleading conduct associated with a get-rich-quick scheme involving shares will be the responsibility of ASIC. The same misleading conduct associated with a get-rich-quick scheme involving land or an interest in land will be the responsibility of the ACCC. If the “scammers” are only in Australia for a short period and it is necessary to obtain an urgent interlocutory injunction to restrain them, precious time can be lost trying to establish who has responsibility. It is not a sufficient answer to say that ASIC should delegate its enforcement function to the ACCC. The court may insist that ASIC is joined as a party.

This issue requires further clarification.

For consumer protection of financial services the relevant Australian regulator is ASIC, since it has primary responsibility for administering the ASIC Act and the *Corporations Act*. However, it should be noted that s.102 of the ASIC Act enables ASIC to delegate a function or power to a member of staff of the ACCC, if the Chairperson of the ACCC consents to the delegation in writing.

Similarly, s. 26 of the TPA enables the ACCC to delegate a function or power in relation to unconscionable conduct, consumer protection, offences and remedies to a staff member of ASIC, if the Chairperson of ASIC consents to the delegation in writing.

To reduce regulatory duplication, ASIC has a Memorandum of Understanding with the ACCC. The role and functions of the ACCC are considered in other parts of this report in the context of the general consumer protection provisions of the TPA.

ASIC administers the regulatory system of consumer protection for the following financial products:

- deposit-taking activities
- general insurance (except health insurance)
- life insurance
- superannuation
- retirement savings accounts
- managed investment schemes
- securities
- derivatives
- debenture stock or bond issued by a government
- foreign exchange contracts
- credit.

Consumer protection for these products includes:

- requirements about the information that must be disclosed to consumers
- general prohibition against misleading or deceptive conduct and other unfair practices
- licensing of people who give advice on or are dealing in financial products
- requirements for conduct of financial services providers
- approval of alternative dispute resolution schemes and industry codes.

The only important exception applies to businesses that offer only lending products, such as credit cards, loans, and hire purchase agreements. They operate under State and Territory laws. However, ASIC does make sure that businesses do not give misleading information about loans when they advertise.

ASIC generally deals with matters that have a cross-border element and/or have national implications. State and Territory regulators tend to focus on matters that occur primarily within their jurisdiction. To facilitate cooperation with other regulators, ASIC has entered into a memorandum of understanding with each of its State and Territory counterparts. ASIC is also a member of the Standing Committee of Officials of Consumer Affairs and its responsible Minister is represented on the Ministerial Council on Consumer Affairs.

Part III: Comparison of Commonwealth TPA with State and Territory Fair Trading Regimes

Objects Provision

The objects provision of a statute can be significant as an aid to interpretation depending on the willingness of the particular judge to adopt a purposive as opposed to a literal approach to interpretation.

The objects provision in s2 of the TPA has been a matter for debate in relation to the interpretation of the competition provisions but is rarely referred to in the interpretation of the consumer protection provisions.

As regards the State and Territory FTAs, only the Queensland and Victorian Acts contain a specific provision detailing the object of the Act. Victoria's Fair Trading Act is more detailed and refers to various elements of consumer protection.

The long titles of FTAs refer to the following objects:

- Regulating supply, advertising, description of goods and services (NSW, Qld, SA, WA)
- Providing for consumer authorities (Qld, SA)
- Provisions re: unfair practices (WA, Tas, NT)
- Provisions re: implied conditions (WA, NT)
- Provisions re: codes of practice (WA, NT)

These minor differences are of no great significance. The object provisions are relevant only rarely when construing a substantive provision of the relevant Act.

S2A/2B: Application

Material Differences between FTA and TPA

Most States do not include a provision limiting the liability of the Crown with regards to pecuniary penalties or prosecution. While all States and Territories (except the ACT) expressly provide for the Crown to be bound by the provisions of the Act, the methods of enforceability against the Crown are limited. In most states, the Crown is not susceptible to prosecution or penalty, leaving only other remedies such as damages, injunctions or other orders.

S4: Definition of consumer

Material Differences

A comparison of the application of the the TPA and the FTAs to the acquisition of goods by an individual for personal or domestic use reveals:

- (i) An individual acquiring consumer goods⁶⁹ of any value for personal use is a consumer for the purposes of the TPA and all FTAs;
- (ii) An individual acquiring business goods⁷⁰ under \$40,000 for personal use is a consumer for the purposes of the TPA and all FTAs, except NSW and Vic. In NSW, a person purchasing business goods of any value for personal use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Victoria a person acquiring business goods under \$40,000 for personal use will only be entitled to the benefit of the implied warranties. The unfair terms provision are limited by the definition of consumer contract to goods of a kind ordinarily acquired for personal use and the safety and information standards, and door to door selling, telemarketing and 'non contact' selling provisions are likewise limited;
- (iii) An individual acquiring business goods over \$40,000 for personal use is not a consumer under the TPA. In Victoria such a person would not be entitled to the protection of any provisions of the FTA (refer to the explanation at [3.9.3]). In WA, SA and Tas such a person is also not a consumer unless they are acquiring a commercial road vehicle. In Qld, ACT and NT the person is a consumer. In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions.

A comparison of the application of the TPA and FTAs to the acquisition of goods by an individual for business use reveals:

⁶⁹ Goods of a kind ordinarily acquired for person, domestic or household use.

⁷⁰ Goods of a kind ordinarily acquired for business or commercial purposes.

- An individual who acquires goods for the purpose of re-supply, use or transformation in a process or manufacture, or for repair of other goods or fixtures on land is not a consumer irrespective of the cost or nature of the goods.
- An individual acquiring consumer goods⁷¹ under \$40,000 for business use (other than the excluded uses of resupply, transformation or repair of fixtures) is a consumer for the purposes of the TPA and all FTAs, except the ACT and Vic. In Victoria, the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract;
- An individual acquiring consumer goods over \$40,000 for business use (other than the excluded uses) is a consumer for the purposes of the TPA and all FTAs, except the ACT, Qld and Vic. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract.
- An individual acquiring business goods⁷² under \$40,000 for business use (other than the excluded uses) is a consumer for the purposes of the TPA and all FTAs, except NSW, ACT and Vic. In NSW, a person purchasing business goods of any value for any use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Victoria the person will be a consumer for the purposes of the implied terms but not for any other provision;
- An individual acquiring business goods over \$40,000 for business use (other than the excluded uses) is not a consumer except in the NT and NSW. (In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions). In WA, SA, Tas and TPA such a person is not a consumer unless they are acquiring a commercial road vehicle.

In this analysis Qld and the ACT stand out as providing the least protection for individuals purchasing goods for business purposes under \$40,000. Over \$40,000 there is very little protection for purchasers of goods for business purposes except in NT where these individuals are entitled to the benefit of all consumer protection provisions including implied warranties and conditions.

A comparison of the application of the TPA and FTAs to the acquisition of services by an individual for personal or domestic use reveals:

- An individual acquiring consumer services⁷³ of any value for personal use is a consumer for the purposes of the TPA and all FTAs;

⁷¹ Goods of a kind ordinarily acquired for person, domestic or household use.

⁷² Goods of a kind ordinarily acquired for business or commercial purposes.

⁷³ Services of a kind ordinarily acquired for person, domestic or household use.

- An individual acquiring business services⁷⁴ under \$40,000 for personal use is a consumer for the purposes of the TPA and all FTAs, except NSW and Vic. In NSW, a person purchasing business services of any value for personal use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Victoria a person acquiring business services under \$40,000 for personal use will only be entitled to the benefit of the implied warranties. The unfair terms provision are limited by the definition of consumer contract to services of a kind ordinarily acquired for personal use and the safety and information standards, and door to door selling, telemarketing and 'non contact' selling provisions are likewise limited;
- An individual acquiring business services over \$40,000 for personal use is not a consumer under the TPA and FTAs in Vic, WA, SA and Tas. In Victoria such a person would not be entitled to the protection of any provisions of the FTA (refer to the explanation at [3.9.3]). In Qld, ACT and NT the person is a consumer. In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions.

The main reason for the differences in relation to the acquisition of business services for personal use is again the restriction imposed under the TPA and in Vic, WA, SA, Tas and NSW for the goods to be of a kind ordinarily acquired for domestic or personal use. This same restriction does not exist in Qld, ACT or NT.

A comparison of the application of the the TPA and the FTAs to the acquisition of services by an individual for business use reveals:

- (i) An individual who acquires services for the purpose of re-supply, use or transformation in a process or manufacture is a consumer, except in Vic and NSW.
- (ii) An individual acquiring consumer services⁷⁵ under \$40,000 for business use (subject to the restrictions in Vic and NSW) is a consumer for the purposes of the TPA and all FTAs, except the ACT and Vic. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract.;
- (iii) An individual acquiring consumer services⁷⁶ over \$40,000 for business use (other than the excluded uses in Vic and NSW) is a consumer for the purposes of the TPA and all FTAs, except the ACT, Qld and Vic. In Victoria the person will be a consumer for the purposes of the implied warranties provisions and unfair practices provisions but the contract will not be a consumer contract;

⁷⁴ Services of a kind ordinarily acquired for business or commercial purposes.

⁷⁵ Services of a kind ordinarily acquired for person, domestic or household use.

⁷⁶ Goods of a kind ordinarily acquired for person, domestic or household use.

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- (iv) An individual acquiring business services⁷⁷ under \$40,000 for business use (other than the excluded uses in Vic and NSW) is a consumer for the purposes of the TPA and all FTAs, except NSW, ACT and Vic. In NSW, a person purchasing business services of any value for any use will not be a consumer for the purpose of the implied warranties and conditions provisions. In Vic the person will be a consumer for the purposes of the implied warranties but not for any other provisions;
- (v) An individual acquiring business services over \$40,000 for business use (other than the excluded uses in Vic and NSW) is not a consumer except in the NT and NSW. In NSW, the person is a consumer for all purposes except in relation to the implied warranties and conditions.

In this analysis Qld and the ACT stand out as providing the least protection for individuals purchasing services for business purposes under \$40,000. Over \$40,000 there is very little protection for purchasers of services for business purposes except in NT where these individuals are entitled to the benefit of all consumer protection provisions including implied warranties and conditions.

Review recommendation

- The application of the TPA and FTAs to the acquisition of business goods for personal or domestic use needs to be reviewed;
- The need to retain monetary limits for the acquisition of consumer goods for personal or domestic use
- The rationale for maintaining a different position for corporate consumers purchasing goods in excess of \$40,000 in Qld compared to all other jurisdictions.
- The application of the FTA in Qld and ACT to the acquisition of consumer goods for business purposes should be reviewed;
- The application of the FTA in ACT to persons who acquire goods for business purposes and whether it should be consistent with other States;
- Whether the TPA and FTA (other and NT) should be widened to include the purchase of business goods for business purposes, other than the exclusions.
- Review of whether the monetary limit of \$40,000 is a sufficient indicator for differentiating between consumer and non-consumer transactions.
- The application of the TPA and FTAs for their application to the acquisition of business services for personal or domestic use needs to be reviewed;
- The need to retain monetary limits for the acquisition of consumer services for personal or domestic use
- The application of the FTA in Qld and ACT to the acquisition of consumer services for business purposes should be reviewed;

⁷⁷ Goods of a kind ordinarily acquired for business or commercial purposes.

- The application of the FTA in ACT to persons who acquire services for business purposes and whether it should be consistent with other States;
- Whether the TPA and FTA (other and NT) should be widened to include the purchase of business goods for business purposes.
- Review of whether the monetary limit of \$40,000 is a sufficient indicator for differentiating between consumer and non-consumer transactions.
- Whether the restrictions on the re-supply of services in Vic and NSW should be removed or introduced in other jurisdictions.

Pt IVA: Unconscionable conduct

Material Differences

The TPA and Vic prohibit unconscionable conduct within the meaning of the unwritten law of the States and Territories. Other States and Territories do not refer to the unwritten law.

While the unwritten law may be enforced through other means in States other than Vic, specific reference to it in the TPA, and Vic FTA allows for the remedies and enforcement procedures in those acts to be utilised to uphold the unwritten law regarding unconscionable conduct. This affords consumers better protection, and a simpler method of pursuing actions which would otherwise fall under the unwritten law of the States and Territories.

All FTAs prohibit unconscionable conduct in trade or commerce.

The statutory definition of unconscionable conduct in ss51AB and 51AC of the TPA are not restricted by the common law concept of special disadvantage, and so can offer broader consumers broader protection.

Tas, Vic, NSW, Qld and SA follow the TPA wording and specify that the prohibition applies to goods and services of a kind ordinarily acquired for domestic, personal or household use, and which are not for re-supply.

NSW, WA and ACT incorporate the definition of “consumer” into the prohibition on unconscionable conduct.

Consumers benefit from the wider protection offered by the FTAs as they apply to unconscionable conduct by individuals in trade or commerce. Because of the restriction of the prohibition to “consumers” or to goods and services for domestic, personal or household use, business consumers may not be afforded protection under these sections. However, it is likely that they will be protected by specific provisions relating to business transactions (see below).

Vic and Tas prohibit unconscionable conduct in relation to the supply of goods and services for business purposes up to \$3m.

The prohibition in the Vic and Tas FTAs relates to supply of goods or services by a person, while the TPA applies to supply by both persons and corporations. No other states include provision for unconscionable conduct in business transactions.

Although only Vic and Tas make specific provision to unconscionable conduct in business transactions, it is arguable that business consumers in all States would be protected by the TPA, as s51AC applies to unconscionable conduct by both corporations and individual persons.

Pt IVB: Industry codes

Most State and Territory FTAs include similar provisions for industry codes to be prescribed to regulate conduct between industry and consumers.

Most States and Territories, like the TPA, do not create an offence for contravention of an industry code. However, other remedies are available. In NSW and Qld, as under the TPA, damages are available for loss caused by a breach of an industry code under the act. Other orders for compensation are available in NSW, Qld and WA, and injunctions are available in Qld, NSW, Tas, Vic and WA.

Like the TPA, Qld does not provide any specific enforcement mechanisms for industry codes.

Specific industry codes

While the TPA and other States and Territories refer to industry codes generally, without specifying any particular area of industry, the NSW FTA only provides for codes to be prescribed for the motor vehicle and insurers industry.

Voluntary or mandatory codes

The TPA provides that industry codes can be declared by the Minister to be either voluntary or mandatory.

The State and Territory FTAs do not make this distinction, although the requirement in some FTAs that persons must not contravene industry codes, together with the enforcement mechanisms they impose, indicate that they are mandatory in nature.

In Victoria, the FTA covers only prescribed codes, rather than mandatory or voluntary codes. The Minister will accept draft codes from persons and industry groups who have agreed to be bound by a particular code of practice, and can prescribe an industry code based on such a draft.

Drafting and consultation procedures

Several States and Territories include provision for draft and consultation procedures which will take place prior to an industry code being prescribed. WA, NT and Tas provide that consultation is to be held with industry groups and submissions accepted from other interested parties.

Content of Industry Code

The ACT states that an industry code can include, among other things, a requirement for licensing or registration of suppliers within a particular industry; education or competency conditions for licence holders; or alternative dispute mechanisms for the industry.

Time limits

The WA FTA provides that a prescribed industry code will expire after three years, unless extended.

Enforcement

The TPA provides no specific enforcement mechanisms for industry codes. Several States and Territories do impose enforcement mechanisms however.

Vic specifically makes it an offence to breach a prescribed industry code, imposing a penalty of 20 penalty units. In Tasmania, a magistrate can make an order where a person is in breach of an industry code.

Several states provide for undertakings to be sought from a person who is believed to be operating in contravention of a prescribed code, requiring that they cease this contravening conduct. (WA, ACT, NT). A magistrate has power to make an order where an undertaking is refused or breached. In addition to magistrates' orders, in WA it is an offence to fail to observe and undertaking that has been given.

Pt V: Consumer Protection (except Div 1AA)

Misleading or Deceptive conduct: Material differences

All FTAs and the TPA apply to misleading and deceptive conduct in trade and commerce. These phrases have been interpreted by the courts in the same way in both FTAs and TPA.

The State FTAs apply to the conduct of 'persons'. The TPA is generally limited to the conduct of corporations although in limited circumstances s 52 will apply to the conduct of persons, as extended by s 6 of the TPA.

Consumers are benefited by the wider operation of the State FTAs in their application to persons as compared to corporations. Where a corporation is involved it provides consumers with a choice between State and Federal jurisdictions and where a person is concerned the State FTAs cover the field. The consistency between State FTAs provides consumers with certainty in the approach adopted by courts and the remedies available.⁷⁸

S53, 53A and 53B: Material Differences

Each State FTA has provisions substantially in the same terms as the TPA, ss53, and 53B. Every state FTA except Victoria has a provision equivalent to s 53A. Consistently with the TPA the equivalent provisions to s 53 and 53A apply to a supply of goods, services or land in trade and commerce.

The provisions equivalent to s 53B concerning employment are not limited to trade and commerce.

Victorian FTA does not contain a provision equivalent to s 53A in relation to false or misleading representations concerning land.

NSW has additional provisions in the equivalent to s 53 TPA covering:

- False representations related to obligations and rights under a residential tenancy for a moveable dwelling
- False representations in relation to a person's rights or obligation under a retirements village contract
- False representations in relation to a person's rights or obligations under a holiday occupation agreement.

Vic, SA, Qld and NSW have provisions which prohibit mock auctions of goods. The provisions are substantially the same in terms of the conduct they prohibit.

Tas has an additional provision prohibiting misleading conduct in relation to PO Box numbers and Vic has a provision prohibiting false testimonials in trade and commerce in relation to goods.

The consistency between the State Fair Trading Acts and the TPA in the areas of goods, services, land and employment provide regulators in each jurisdiction with similar offences to pursue. The benefit to consumers is that conduct or activities, by individuals or corporations that cross jurisdictions (particularly over the internet) can be dealt with no matter where the offender is located. However the lack of a provision in the Vic FTA concerning false representations in relation to land would mean that

⁷⁸ Note however the limitation in the remedial provisions of the Fair Trading Act 1989 (Qld), ss 99 and 100.

conduct engaged in by persons as opposed to corporations occurring in that jurisdiction could not be pursued by the State regulator. This allows individuals in any jurisdiction engaged in conduct in Victoria to escape prosecution, unless regulators in the State in which the individual is carrying on business has extra-territorial powers, which is unlikely.

The additional provisions in each jurisdiction extend the power of regulators to pursue individuals for offences. The only significant addition that should be considered for other jurisdictions and possibly the TPA is the prohibition on mock auctions. This is particularly relevant to the conduct of auctions on the internet which may span a number of jurisdictions. Currently, regulators in jurisdictions other than Vic, NSW, Qld and SA wanting to pursue persons engaged in mock auctions would need to use another provisions. This may be:

- The equivalent to s 53 TPA which prohibits false representations in relation to goods. This may be difficult as most of the prohibitions in that section concern the quality, value, nature of the goods themselves and not how the auction is conducted.
- A prohibition in other State legislation. Our investigations have not revealed any equivalent prohibition in any State that would allow the State regulator to bring such a prosecution.

Unsolicited credit and debit cards – s 63A

Assertion of right to payment for unsolicited goods or services or for making entry in directory – s 64

Liability of recipient of unsolicited goods – s 65

Application of provisions of Division to prescribed information providers – s 65A

Material Differences

Every State has a similar provision for unsolicited credit and debit cards except Qld. Every State except Tas have equivalent provisions to s 64 and s 65.

Unsolicited Credit and Debit cards – no provision in Qld

Assertion of right to payment for unsolicited goods or services or for making entry in directory – no provision in Tas

Liability of recipient of unsolicited goods – no provision in Tas

Application of provisions of Division to prescribed information providers – no provision in WA

The differences across the jurisdictions are only minor but the omitted provisions identified could be inserted to ensure consistency across all jurisdictions.

Pt V Div 1A

Material differences

Each state has in place a regime for product safety, certain information standards and product recall. The legislation generally applies to both persons and corporation acting in trade and commerce. The regimes usually place power in the Minister and a committee in relation to standards and recalls. In its current form the legislation in both the State and the Cth is difficult to navigate and from a business or consumer perspective difficult to discern the differences and similarities. Given the importance of this area commonality in approach, terminology and powers is essential to ensure protection of consumers and ease of compliance for business.

Pt V Div 2

S69: Right to Sell Goods

Material Differences

Each state jurisdiction has an implied term that the seller has the right to sell the goods, that the consumer will enjoy quiet possession of the goods and that the goods will be free from an encumbrance not disclosed. In all jurisdictions there is no requirement for the seller to be acting in the course of a business for the term to be implied, but the supply must be to a consumer.

Although there are some differences in the formulation of the provisions and the way in which prior security interests are dealt with, there are no significant impacts arising from the different formulations.

The main differences between the States and the TPA are:

- (v) The State FTA legislation has a wider ambit to the TPA applying to supply of goods by a person in instead of a corporation;
- (vi) In SA, the term is implied into a consumer contract for the sale of goods. Consumer contract is defined as a contract where a person (other than a body corporate) goods are buys, hires or otherwise takes the benefit of goods or services but does not include an auction, a sale of goods to a person who trades in those goods, a contract providing a right or licence to occupy land, or an agreement of a kind declared by regulation not to be a consumer contract. This results in a different operation of the implied term provisions than the TPA by applying to all individuals acquiring goods of any description for any purchase, other than a business which trades in the goods, but excluding corporations from the benefit of the provisions.
- (vii) In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts; and
- (viii) The State SGA's also apply to persons but only to a 'sale' of goods. This is a narrower concept than 'supply' which would extend to lease, hire purchase or exchange. In Qld, Tas

and ACT a contract for the lease of goods would not be subject to the SGA and if the lease is provided by an individual the TPA would also have no application. A consumer in this situation would have little redress against a supplier if there was no express term about title in the lease itself.

S70: Compliance with sample or description

Material Differences

Each jurisdiction listed has an implied term that goods will correspond with their description and if by reference to description and supply by sample also correspond with the sample. Under the TPA, s 70 the term is implied in contracts for the supply of goods by a corporation in the course of a business. The terminology and formulation of the sections across the jurisdictions are uniform. The differences between the jurisdictions and the TPA are:

- In all jurisdiction the provisions apply to the supply of goods by a person and a corporation;
- In SA, the term is implied into a consumer contract for the sale of goods. Consumer contract is defined as a contract where a person (other than a body corporate) goods are buys, hires or otherwise takes the benefit of goods or services but does not include an auction, a sale of goods to a person who trades in those goods, a contract providing a right or licence to occupy land, or an agreement of a kind declared by regulation not to be a consumer contract. This results in a different operation of the implied term provisions than the TPA by applying to all individuals acquiring goods of any description for any purchase, other than a business which trades in the goods, but excluding corporations from the benefit of the provisions;
- In SA, NSW and Vic the sections are similar but in contrast to the TPA there is no requirement for the person to supply in the course of a business.
- In Vic there is no equivalent where the supply is also by way of sample, to correspond with the sample;
- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts and only applies to a 'sale' of goods.

S72: Goods will comply with sample: Material Differences

Each jurisdiction listed has an implied term to the effect that where a contract has a provision that goods are supplied by reference to a same:

- (vi) the bulk of the goods will correspond with the same in quality; and
- (vii) the consumer will have a reasonable opportunity of comparing the bulk with the sample; and
- (viii) the goods will be free from any defect rendering them unmerchantable that would not be apparent on a reasonable examination of the sample.

Under the TPA, s 72 the term is implied in contracts for the supply of goods by a corporation in the course of a business. The differences between the jurisdictions and the TPA are:

- In all jurisdiction the provisions apply to the supply of goods by a person and a corporation;
- In WA, NSW and NT the provisions follow the TPA formulation;
- In SA there is no separate provision in the CTA but the SGA in SA has a similar provision applying to the sale of goods. Under the SGA the provision can be excluded.
- Vic is significantly different to the other jurisdictions. In Vic the implied warranty applies only if the buyer is shown a sample of the goods and is induced by the sample to buy the goods or goods of a similar kind. The first two warranties in the TPA are mirrored in Vic. The third warranty is similar but requires that the buyer is not aware of the defect at the time the contract is made;
- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts and only applies to a 'sale' of goods.

S 71: Goods with be of merchantable quality and fit for the purpose

Material differences

Under the TPA where goods are supplied by a corporation in the course of a business to a consumer there is an implied term that the goods are of merchantable quality except in relation to defect specifically drawn to the consumer's attention before contract or if the consumer examines the goods, in relation to defects which that examination ought to reveal. This is supplemented by s 66 which provides that goods are of merchantable quality if they are fit for the purpose for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them the price, and all other relevant circumstances.

This provision is mirrored in WA, NSW and NT except that it applies to the supply of goods by a person as well as a corporation.

The differences in the other jurisdictions are:

- In SA and Vic the provision is similar but includes within it a definition of merchantable quality similar to s 66 TPA but including additional criteria;
- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts and only applies to a 'sale' of goods. The warranty applies to the purchase of goods by description from a person who deals in goods of that description. There is no equivalent definition of merchantable quality and therefore the common law meaning will apply: *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31; *Grant v Australian Knitting Mills Ltd* [1936] AC 85. Under the common law a good which has more than one common purpose may be of merchantable quality if it is fit for use as any one of those purposes. Under the TPA and equivalents it is arguable that it will only be of merchantable quality if fit for all the purposes for which it is commonly purchased.

Comparison of Fitness for the purpose under TPA and State regimes

The TPA provides that where goods are supplied in the course of a business by a corporation and the consumer makes known a particular purpose for which the goods are being acquired, there is an implied condition that the goods are reasonable fit for that purpose. It is immaterial whether or not that is a purpose for which such goods are commonly supplied, except where the consumer does not rely or it is unreasonable to rely on the skill or judgment of the supplier. WA, NSW and NT mirror this provision except they apply to persons.

The difference in the other jurisdictions are:

- In all jurisdiction the provisions apply to the supply of goods by a person and a corporation;
- In SA the provisions require that the goods be of a description which it is in the course of the person's business to supply. The consumer is required to show reliance on the skill and judgment of the supplier;
- In SA, the term is implied into a consumer contract for the sale of goods. Consumer contract is defined as a contract where a person (other than a body corporate) goods are buys, hires or otherwise takes the benefit of goods or services but does not include an auction, a sale of goods to a person who trades in those goods, a contract providing a right or licence to occupy land, or an agreement of a kind declared by regulation not to be a consumer contract. This results in a different operation of the implied term provisions than the TPA by applying to all individuals acquiring goods of any description for any purchase, other than a business which trades in the goods, but excluding corporations from the benefit of the provisions.
- In Qld, ACT and Tas the term is implied by virtue of the relevant SGAs and therefore may be excluded from all contracts and only applies to a 'sale' of goods. Like SA, in each of these jurisdictions the provisions require that the goods be of a description which it is in the course of the person's business to supply and that the consumer show reliance on the skill and judgment of the supplier. Further the implied term does not apply to contracts for the sale of a good under its patent or trade name.

S 74: Services Material differences

Under the TPA these provisions imply in a contract for the supply of services between a corporation in the course of a business and a consumer a warranty that the services will be performed with due care and skill and where the purpose of the services if made known that the services will be fit for the purpose. The warranty may be excluded in relation to recreational services. Also certain contracts are excluded from its operation by s 74(3), such as transportation or storage of goods for the customer's business and contracts of insurance. Where the law of a state or territory applies to the contract a

State or Territory law may limit or preclude liability. This is particularly relevant in relation to limits on professional liability and negligence under State laws.

WA and NT mirror the TPA provisions but apply to a supply of services by a person.

In NSW and Vic the provisions are substantially the same but do not exclude transportation of goods, storage of goods or insurance contracts.

In SA the provisions have a similar operation to NSW and Vic but domestic building work is excluded from the operation of the provision.

In Qld, Tas and ACT there are no equivalent provisions. Consumers in those jurisdictions will need to rely upon similar terms implied by the common law in contracts of service.

S 68: Exclusion of implied terms

The potential effect of ss67 and 68 on attempts to exclude the operation of the TPA through a governing law or governing forum clause is discussed at [3.7]. Sections 68A and 68B (and their equivalents) allow for the limitation, modification or exclusion of the implied warranties in certain situations.

Material differences

The ability of a supplier to limit, exclude or modify the operation of an implied term under the TPA is discussed above in relation to goods or services that are not ordinarily acquired for domestic, personal or household use. If the category of consumers previously discussed in relation to the definition of consumer are used, the exclusion provision impacts on:

- Persons or corporations purchasing goods ordinarily acquired for business purposes when acquired for personal use;
- Persons or corporations purchasing goods ordinarily acquired for business purposes under \$40,000 when acquired for business use.

The liability of a person to a consumer acquiring goods or services ordinarily acquired for domestic or personal use cannot be limited even if the goods are acquired for business purposes.

The TPA also allows liability in relation to recreational services to be excluded totally under s 68B.

The NT legislation mirrors the provisions of the TPA.

In WA there are mirror provisions to s 68 and 68A but no provision for exclusion of liability for recreational services.

In NSW there is an equivalent to s 68 and 68B. There is no provision for a supplier to limit their liability under an implied warranty to repair, replacement or cost of repair or replacement.

In Vic the FTA mirrors the provisions of the TPA except there is an additional prohibition on limiting the right of a consumer to damages (subject to the equivalent of s 68A) and the right to rely on the limitation of liability in the equivalent to s 68A is subject to it not being unconscionable rather than not being 'fair or reasonable'. The list of criteria for determining if it is unconscionable is listed and are similar to s 51AC TPA. This provides a narrower opportunity for the consumer to challenge the limitation of liability than under the TPA. The limitation of liability provision also does not allow any limit on the implied term in relation to title to goods. In relation to the limitation of liability for recreational services there is an additional requirement that:

- (iv) a prescribed form or particulars are used (if any);
- (v) if a prescribed form is used there is nothing false or misleading in the form; and
- (vi) the term is brought to the attention of the buyer prior to supply.

A limitation of liability for recreational services will not be enforceable if the supplier does or omits to do something that would be breach of ss 32J or 32JA (equivalent to s 74 TPA) with reckless disregard or without consciousness for the consequences.

In SA there is no limited right to modify or limit liability or a right to exclude liability for recreational services.

Impacts on Consumers

From the analysis of implied term provisions across all Australian jurisdictions it is evident that the main impacts on consumer arise from:

- (v) inconsistent application of the implied term provisions to different types of consumer transactions. The jurisdictions which have mirrored the TPA provisions (primarily WA, NSW and NT) provide the greatest consistency with the other jurisdictions ranging from application to all contracts for the supply of goods irrespective of kind or purpose to others where corporate consumers are unable to take advantage of the provisions;
- (vi) The varying ability of suppliers to limit or exclude liability for particular types of goods or services within particular jurisdictions;
- (vii) The varying terminology used to describe the application of the provisions, in some cases to 'sales' and in others to 'supply';
- (viii) In relation to the provisions themselves the different circumstances in which goods must be fit for their purpose and the different meanings of merchantable quality provide significant potential to detrimentally impact on consumers.

These differences further highlight the need for a consistent definition of consumer across all jurisdictions. It is unrealistic to expect that consumers are able to navigate and understand the often subtle difference across jurisdictions. This is particularly important in the purchase of goods or services via the internet where suppliers may try to locate their business in a jurisdiction with minimal protections. While the TPA includes a provision to ensure consumers are not disadvantaged by a governing law provision in a contract (to remove the jurisdiction of the TPA), the State regimes do not contain the same level of protection. This may allow suppliers who fall outside of the TPA to potentially use the law of low protection State as the law of the contract.

Recommended Review Issues

- a. Whether there is consistency in the application of provisions to the same consumers – connected to definition of consumer and jurisdictional differences (NT has the widest operation)
- b. Exclusion of right to modify liability where goods of a kind ordinarily acquired for household purposes – consumers acquiring business goods for personal use are disadvantaged while consumer purchasing consumer goods for business purposes are protected – should a purpose test be introduced instead?
- c. Right to exclude liability is inconsistent across jurisdictions. In some the implied terms can be excluded altogether, in other partially modified and in others not modified at all.
- d. Right to exclude liability for recreational services is inconsistent
- e. Meaning of merchantable quality
- f. Consistency of expression of warranties – in particular sale by sample, merchantable quality

Pt V Div 2A: Actions Against Manufacturers and Importers

Material differences

Only NSW and NT have similar provisions in relation to manufacturers and importers in the Fair Trading Acts. The provisions in NSW and NT mirror the provisions of the TPA except that they apply to persons or corporations in trade or commerce.

The omission of specific provisions in every other State means any claim by a consumer in those jurisdiction where the manufacturer is not incorporated must be brought either on a contract (if one exists) or in negligence. Whilst this will provide a consumer with a remedy, the circumstances in which negligence may be found will be different to failing to meeting an implied warranty under Pt5 Div 2A.

Pt V C: Offences

Material Differences

There are some differences across jurisdictions in relation to the maximum penalties that can be imposed.

There are also differences in relation to the procedures adopted for bringing criminal proceedings. In some States, such as Queensland, it is possible for the prosecutor to elect whether to pursue the matter as a summary or indictable offence.

In WA the offences are indictable; however, the defendant can request to have the offence treated summarily under s 71 with the approval of the court.

All other States and Territories are classified as either indictable or summary offences.

Pt VI: Enforcement and Remedies

Material differences

State and Territory Government consumer affairs agencies handle the majority of consumer protection matters. The ACCC concentrates on significant matters that cross state boundaries, involve corporations or require a national approach.

The Federal Court has jurisdiction to hear matters under Pt VC of the TPA. Under cross-vesting rules, Supreme Courts in each State may hear certain criminal matters, depending on the particulars of a given case. States and Territories can also bring actions in the Federal Court.

The States and Territories generally possess most of the enforcement powers included in the TPA, all of them have powers that are beyond those in the TPA.

States and Territories also impose criminal **pecuniary penalties**.

The Australian Law Reform Commission has recommended that the ACCC should also have the power to impose civil pecuniary penalties to increase the range of responses available to the ACCC and thereby improve its ability to enforce the TPA.

All States and Territories except Tasmania and the Australian Capital Territory have provision for courts to grant **injunctions**. Victoria includes specific provisions for both positive and negative injunctions, interim injunctions and **injunctions to cease trading**.

The major power that States have that is not found in the TPA is the power to require the **substantiation of claims** made in the promotion of goods or services. This power is included in the legislation of all States and Territories except WA, Tas and NT. The relevant director or commissioner may require a person to provide proof of any claims or representations that they make with regards to the goods or services they supply. It is an offence to fail to provide adequate proof.

Most States and Territories include a provision equivalent to **s 87 of the TPA relating to other orders**. NSW, Vic, ACT & NT also have provision for non-punitive orders similar to those provided for by s86C of the TPA. South Australia does not have a provision in the terms of s87, but does elsewhere provide for a court to grant orders for compensation (s85) or for sequestration (s86).

Some states also grant powers to **inspectors** to investigate potential contraventions of the legislation. Qld, SA & Tas grant inspectors power to enter and search premises, and to seize goods or documents, question people, and make other inquiries and examinations as required (Qld, ss 89 - 91G; SA s77; Tas ss30, 31). Offences are created for obstruction of the inspectors' investigations (Qld s91; SA s77; Tas s32).

NSW grants the Director-General power to issue a person suspected of engaging in conduct in contravention of the Act with a **show cause notice**, requiring them to show reasons why they should not be prevented from trading (ss66A, 66B).

NSW, WA and Victoria also provide for **penalty or infringement notices** to be served where it appears that a person has committed an offence. (NSW s 64; Vic s160A; WA s73).

Pt VIA: Proportionate Liability

Material differences

The main difference between the TPA and the State regimes are the types of claims to which each of the provisions apply and the circumstances in which the wrongdoer is unable to take advantage of the proportionate liability provisions despite the existence of an apportionable claim.

Other material differences between the States in the definition of apportionable claim are:

- (i) Qld and ACT exclude from an apportionable claim any claim by a consumer. In Qld a consumer is an individual whose claim is based on right relating to goods or services where they are acquired for domestic, personal or household use or professional services acquired for the individuals use other than for a business carried on by the individual. In the ACT it includes personal financial advice.

- (ii) In Vic a claim under s 9 of the FTA (misleading conduct) is not limited to economic loss or property damage.
- (iii) ACT excludes claims for discrimination, claims under the *Road Transport (General) Act 1999* and workers compensation claims.

The main impact on consumers arising from the differences in State legislation is the exclusion of consumers from the operation of the provisions in ACT and Qld. A consumer bringing a claim for misleading conduct in both of these jurisdictions will be better placed than a consumer in any other jurisdiction or under the TPA where a wrongdoer is insolvent, died or ceased to exist.

The TPA and all FTAs provide for wrongdoers who have intentionally caused loss or fraudulently caused loss to be denied the benefit of the proportionate liability provisions. The liability of an excluded wrongdoer is decided in accordance with the principles of joint and several liability.

Other wrongdoers are excluded from the operation of proportionate liability in certain jurisdictions:

- (i) In Qld a person is proved to have engaged in misleading or deceptive conduct under the *Fair Trading Act 1989* is an excluded wrongdoer: s 32F
- (ii) Vic only includes an exclusion for fraud and not intent.

The main impact on consumers arising from the differences in State legislation is the exclusion of claims for misleading conduct in Qld. Any wrongdoer who is found to have contravened s 38 of the FTA will be jointly and severally liable. In all other jurisdiction including the TPA such a wrongdoer will be entitled to proportionate liability, subject to a lack of intent or fraud.

Pt VIB: Claims for death and personal injury

1. Damages for Death or personal injury

Material differences

SA, WA, NT and ACT allow damages awards of damages for unfair practices, but exclude claims arising from unconscionable conduct.

Tas allows damages for unconscionable conduct, but not for other claims of unfair practices.

Vic allows awards of damages for any breach of the FTA.

Qld specifically excludes damages from breaches of provisions on pyramid selling and assertions of a right to payment for unsolicited goods or services.

Consumers in states where damages are not available either for unconscionable conduct or for other instances of unfair practices are at a disadvantage in terms of remedies available to them where

personal injury occurs. However, it is also worth noting that in some states where damages are not available, a court may make an order for compensation for loss or damage suffered.

2. Compensation for loss or damage

Material differences

Most FTAs allow orders for compensation where they would be available under the TPA.

NSW and Qld don't allow compensation orders for loss or damage arising out of unconscionable conduct.

In addition, NSW also makes compensation available upon conviction for an offence, up to a maximum of \$60,000.

In WA and NT, compensation is available for unconscionable conduct, where damages are not.

In some states, compensation is available where damages are not, helping to provide consumers with an alternative remedy. There are still some jurisdictions where neither damages nor compensation are available for certain breaches of the FTA.

3. Limitation of liability for provision of recreational services

Material differences

The FTAs of NSW, Vic and NT include a limitation of liability similar to that found in s68B of the TPA, limiting the impact of implied warranties in contracts to supply recreational services where personal injury occurs.

Where a limitation is not found in the FTA, the Civil Liability Acts of Qld, SA, WA and Tas include a limitation on liability where personal injury results from recreational activities where there danger was obvious.

In the ACT, neither the FTA nor the CLA includes a limitation on liability in relation to personal injury arising from recreational activities.

4. Maximum damages available

The Ipp review recommended that awards for non-economic loss be capped at \$250,000. This recommendation was adopted by the TPA in s87M.

Material differences

All States and Territories except the ACT provide for a maximum amount of damages that can be awarded for non-economic loss. These figures vary, and are subject to change according to indexation.

5. Cap on damages for loss of earnings

The TPA places a cap on damages for loss of earnings at two times the average full time weekly earnings.

Material differences

All other jurisdictions place a cap on lost earnings at three times the average weekly wage.

6. Threshold for damages

The TPA imposes a threshold for claiming damages at 15% of the most extreme case.

Material differences

NSW, WA and Tas impose a similar threshold.

In Qld and SA, no such threshold is required to be met. Injuries are assessed according to a scale from (0-100 in Qld, 0-60 in SA) with damages being awarded at proportionate rates.

In Vic, damages are available provided that the injury sustained is a significant injury. In SA, a person is ineligible for damages unless their ability to lead a normal life has been significantly impaired for at least 7 days.

ACT and NT have no threshold for damages.

7. Court may refer to past decision in determining non-economic loss

The TPA allows for the court to refer to past decisions. This was one of the recommendations of the Ipp review.

Material differences

NSW, Vic, WA, Tas and ACT also allow the court to refer to past decisions.

Qld, SA and NT make no provision for the court to refer to past decisions on non-economic loss.

8. Abolition of aggravated and exemplary damages

Section 87ZB of the TPA expressly excludes awards for aggravated and exemplary damages for personal injury.

Material differences

NT excludes aggravated and exemplary damages in the same terms as the TPA.

NSW prevents the award of punitive, exemplary or aggravated damages where the injury was caused by negligence.

Qld excludes exemplary or aggravated damages for personal injury, except where that personal injury was caused intentionally.

9. Gratuitous care

Sections 87W and 87X of the TPA provide that damages for gratuitous care will not be available unless certain prerequisites are established. These apply to both care which the plaintiff will require as a result of the accident, and compensation for loss of the plaintiff's ability to provide care which was provided by them prior to the accident. In order for damages for gratuitous care to be available, the care must be provided for at least 6 hours a week, and for a period of at least 6 months. Care which is required by the plaintiff must be necessary and must be a result of the personal injury.

Material differences

NSW, Qld and NT provide similar prerequisites to those in the TPA.

SA does not require that care be provided for 6 hours a week for at least 6 months, but it does limit availability of damages to cases where care is provided by a spouse, parent or child of the plaintiff, and damages are limited to four times the average weekly earnings.

WA requires that care be provided by a member of the same household or family.

Tas and ACT do not impose prerequisites for the availability of damages for gratuitous care.

10. Availability of Structured Settlements

The TPA and all States and Territories make provision for the court to grant a consent order for a structured settlement.

State and Territory legislation dealing with unjust terms

Material Differences

- Under the NSW Act the courts tend to be wary of providing relief where there is substantive unfairness. The emphasis is on procedural injustice. There is no power on the part of the regulator to prescribe unfair terms
- The Victorian FTA focuses on procedural and substantive unfairness. It allows the regulator to prescribe terms to be unfair and thereafter it is illegal to include them.