



Australian  
Competition &  
Consumer  
Commission

**Submission to the Productivity Commission  
inquiry into Australia's  
consumer policy framework**

June 2007



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# Summary

In December 2006 the Treasurer announced that the Productivity Commission would undertake an inquiry into Australia's consumer policy framework and its administration. The ACCC welcomes this review.

Australia's consumer policy framework comprises legislative, co-regulatory and self-regulatory mechanisms to address consumer issues. It also relies heavily on market forces—including consumers' own ability to participate in markets without the need for regulatory intervention.

The *Trade Practices Act 1974* (Trade Practices Act) is one of the key legislative components of the consumer policy framework. The Australian Competition and Consumer Commission (ACCC) has the role of enforcing the consumer protection and fair trading provisions in the Trade Practices Act.

Considerable change has occurred in the Australian marketplace since the introduction of the Trade Practices Act in 1974. As a result of a number of factors—including technological change, deregulation and competition reform and decreasing barriers to international trade—consumers are faced with a broader range of products and services from a greater number of sources. While more choice provides more opportunities for consumers, it also presents heightened challenges to exercising choice wisely in the marketplace.

Notwithstanding the dramatic changes in the nature and structure of the Australian economy over the last 30 years, the broad scope, flexibility and adaptability of the Trade Practices Act has served Australia well. In the ACCC's view, the Act's two-sided approach promoting competition on the supply side of the market and fair trading on the demand side of the market has responded effectively to changing market and technological developments and should continue to do so. Moreover, there are valuable synergies in having a single agency—the ACCC—engaged in both competition and consumer protection law enforcement.

However, that is not to say that the Trade Practices Act and, more broadly, Australia's consumer policy framework cannot be improved.

Much of the ACCC's submission is designed to assist the Productivity Commission in understanding the role of the Trade Practices Act and the ACCC in Australia's consumer protection framework. However, the submission also addresses a number of critical issues raised in the Productivity Commission's issues paper, which was released in January 2007.

## Overall framework

### Uniform laws

There are currently nine separate general fair trading and consumer protection laws, including the Trade Practices Act. These laws impose increasingly divergent behavioural and technical standards on traders, which may result in significant costs for consumers, business and regulators. While maintaining state-based implementation is critical to ensuring that local needs are addressed at a local level, a uniform law would

minimise both the cost to businesses operating in multiple jurisdictions and consumer confusion.

## **Research**

Research into consumer issues informs the development of consumer policy and the response of regulators to issues in the market. The ACCC submits that consideration should be given to mechanisms for improving the quantity and quality of research into consumer issues.

## **Generic v. industry-specific regulation**

While the ACCC broadly favours regulation of general application, which is flexible enough to apply across a whole range of industries, sometimes industry-specific regulation is warranted.

## **Enforcement and redress issues**

### **Adding to mechanisms enforcing the Trade Practices Act**

The ACCC submits that the following changes to the Act would enhance the effectiveness with which it can respond to potential breaches of the Act.

- An ability to seek redress for consumers affected by breaches of Act, other than by way of representative proceedings.
- An ability to seek pecuniary penalties where traders fail to meet prescribed fair trading standards.
- An ability to use substantiation notices in connection with traders making public claims about their goods or services.
- An ability to use its compulsory information-gathering powers after a court grants an interlocutory injunction. Currently, the ACCC risks contempt of court if it uses its powers to investigate breaches identical to, or connected with, conduct that is the subject of the interlocutory injunction.

### **Adding to substantive obligations imposed by the Act**

The increasing complexity of products and services and the move to standard form contracts (which are not in any real sense negotiable) has changed the environment in which consumers engage with traders. These developments have added to the difficulties that time-poor consumers face accessing and processing information. It is unclear whether these difficulties warrant any specific legislative response.

Several models exist for addressing difficulties of this kind, including proscription of unfair trading practices, proscription of 'unfair contract terms' (either in standard form contracts only or in all consumer contracts) and disclosure mechanisms to improve consumer understanding of the terms of a trader's offering.

The ACCC takes the view that before any substantive amendments are made to the Trade Practices Act to deal with these issues, policy-makers need to weigh carefully the extent of any problem and the benefits and costs of any proposed intervention. The



ACCC notes that some mechanisms for dealing with unfair contract terms have lower risks and costs than others.

The ACCC notes that further research to compare and evaluate various approaches taken to unfair contract terms in different jurisdictions would help inform decision-makers in this area.

### **Jurisdictional responsibilities**

To eliminate the risk of regulatory failure, the ACCC submits that Productivity Commission should consider giving the ACCC and the Australian Securities and Investment Commission concurrent responsibility for consumer protection in financial services.

# 1. Introduction

The Treasurer has asked the Productivity Commission to undertake a public inquiry into Australia's consumer policy framework and its administration. The Productivity Commission has been asked to report on ways to improve the framework to assist consumers meet current and future challenges. First amongst the key considerations listed in the terms of reference was the need to ensure that the benefits of well-targeted consumer policy, including the contribution to consumer wellbeing, market efficiency and productivity, are delivered without unnecessarily burdening consumers and business, including small business.

This submission argues that the *Trade Practices Act 1974* (Trade Practices Act) has provided and can continue to provide a robust foundation for protecting the rights of consumers. The flexibility and adaptability of the framework, including the administrative architecture prescribed in the Trade Practices Act represents one of its greatest strengths and the enforcement and implementation of policy under it has evolved to meet the challenges over the last 30 years, and can continue to evolve to meet future challenges. That said, there are a number of refinements and enhancements, both to the Trade Practices Act and to the broader consumer policy framework, which should be considered to enhance the overall effectiveness with which the market operates to meet the needs of consumers and business alike.

To effectively examine the consumer policy framework it is important that the needs and actions of consumers are fully understood so that appropriate interventions and institutions can be designed to support their participation and engagement in the market place. Australian consumers and businesses generally want to operate freely in the market place and make decisions unencumbered by unnecessary government interference. However, if a problem occurs, consumers and businesses alike want the matter resolved quickly and effectively, whether that resolution is provided by the parties themselves, or by a third party intervention, such as the government.

The overall architecture of the consumer policy framework, including the administration of that framework, is of little concern to the individual consumer or business. However it is exactly that architecture that will provide them with the protections and avenues for redress that they desire for their individual grievance. Under the Trade Practices Act, the Australian Competition and Consumer Commission (ACCC) has the role of enforcing the consumer protection and fair trading laws. Accordingly, the focus of this submission is on how the Trade Practices Act and the other elements of the overall consumer regulatory framework can be administered effectively to ensure that the needs of the individual consumer or the individual business for a fair and equitable market environment can be met. It is in this broader context that this submission to the Productivity Commission is situated.

One of the key objectives of consumer policy is to empower consumers to participate with confidence in markets. At the same time, considerable changes have occurred in the Australian marketplace over the last 30 years. This introductory chapter provides a brief overview of the objectives of consumer policy and changes that have occurred in the marketplace, as it is against this backdrop that the continued effectiveness of the legislation must be measured.

The Trade Practices Act is one of the key elements of the consumer policy framework. It is the cornerstone for consumer welfare law in Australia, providing a general standard of conduct for traders dealing with consumers and other businesses. The ACCC has a role in enforcing the consumer protection and fair trading laws. Chapters 2 and 3 provide a discussion of the Trade Practices Act and of the way in which the ACCC operates to enforce it. Central to the discussion is the way in which the broad scope and flexibility of the Trade Practices Act is one of its enduring strengths—allowing for the implementation of consumer policy as prescribed by it to adapt as circumstances change.

In administering the Trade Practices Act within the broader consumer policy architecture, the ACCC promotes a three-pronged approach of strong law, vigorous enforcement and educated consumers. The ACCC's approach to enforcement and education is presented in chapter 3. Effective enforcement of consumer protection cannot be done in isolation by the ACCC. The way in which the ACCC works with other national regulators, state regulators and international regulators to provide effective consumer protection is also discussed.

The discussion in chapters 2 and 3 outlines the underpinning framework provided by the Trade Practices Act and its administration. Against this background chapter 4 focuses on a set of specific issues relating to the consumer policy framework that have been raised in the issues paper prepared by the Productivity Commission. In particular, the submission notes: the complementarity between the enforcement of competition regulations and consumer protection and fair trading regulations; that questions remain around the efficacy of amending the Trade Practices Act to incorporate an unfair practices prohibition; that questions also remain as to whether the benefit to consumers at large of unfair contract terms legislation outweigh the costs to individual consumers who are able to protect themselves; and that while the Trade Practices Act provides an important layer of protection for vulnerable and disadvantaged consumers, very carefully designed interventions should be considered to meet the special needs of this group.

Chapter 5 presents a discussion of possible enhancements to the Trade Practices Act to ensure that the ACCC and other regulators have the right tools to enable its most efficient application. These enhancements include:

- introducing civil pecuniary penalties and banning orders
- appropriate consumer redress mechanisms for non-named parties
- allowing the issuing of substantiation notices in the course of an investigation.

Mindful of the concerns outlined in the terms of reference, particularly in regard to avoiding unnecessary duplication and complexity, chapter 6 outlines the relationship between the state/territory fair trading regimes and the national Trade Practices Act. To minimise the compliance burden on business, particularly as increasing numbers of businesses operate under multiple state jurisdictions, it is critical that there is greater cooperation and consistency in the administration and laws governing fair trading. Implementation at the state level is central to providing speedy recourse for consumers and business, but compliance costs will be lowered as the state laws are made more uniform.

The issues paper also discusses the increasing proliferation of industry-specific regulation, and the Productivity Commission is asked to report on the scope for reducing duplication by making greater use of general consumer regulation. The pros and cons of industry-specific regulation are discussed in chapter 7. There is a need for industry-specific regulation that goes beyond the generic consumer laws in some cases. However, the need for industry-specific regulation must be balanced very carefully against the increasing red tape burdens on businesses, particularly businesses that span multiple industries; and importantly the increased complexity for consumers in seeking redress from multiple regulations and multiple regulators.

In order to respond to emerging consumer trends and concerns, it is important that there is an appropriate level of research into these issues and that education campaigns are conducted to disseminate the results of this research. This issue is addressed in the final chapter of the submission.

## **1.1 Objectives of consumer policy**

The ACCC submits that the key objectives of consumer policy are to:

- empower consumers to participate with confidence in markets to access the goods and services that meet their needs
- provide appropriate protections for vulnerable or disadvantaged consumers who have substantial difficulties in participating in markets
- ensure that regulatory responses to such issues deliver net benefits to society and that the regulatory mechanism which is most able to achieve benefits at the least cost is being utilised.

In order to identify whether regulatory intervention is warranted to achieve these aims and the appropriate form of any such intervention, it is important to have a good understanding of how both traders and consumers operate in marketplaces. This understanding can be drawn from a number of disciplines including economics and psychology.

Efficient markets generally empower consumers to access goods and services that meet their needs. Because firms respond to market signals from consumers, the socially optimal mix and level of output is produced and allocated through sales and purchases to those parties who most value the relevant products. Economic analysis can provide useful insights about when markets are less likely to operate efficiently, or even fail, putting consumers at risk. This provides a basis for determining when regulatory intervention should be considered.

There is a growing recognition of the potential usefulness of applying psychology and, in particular, an understanding of behavioural biases exhibited by consumers, to designing effective regulation (often referred to as ‘behavioural economics’).

A key challenge faced by consumer policymakers is to identify and weigh up the benefits and detriments associated with intervening in areas where consumers may be at risk. That is, to perform a robust regulatory impact analysis.

As the magnitude and complexity of issues faced by consumers are increasing, there may be a growing perception that consumers face more risks which require greater regulatory intervention. This environment demands a fair, consistent and robust framework for regulatory impact analysis which considers the costs of over-protection and ineffective regulation, as well as failing to regulate. Ultimately, consumers pay for the costs of protection in the prices they pay for goods and services.

A more detailed explanation of circumstances where markets are less likely to operate efficiently, circumstances where protection of vulnerable or disadvantaged consumers may be appropriate and ways to approach regulatory impact assessment is provided in appendix A.

## **1.2 Changes in the marketplace**

### **1.2.1 Market developments since the introduction of the Trade Practices Act**

The environment facing consumers has changed considerably in recent years, particularly with the introduction of new technologies, more sophisticated products and global trading.

Nevertheless, there are some striking similarities between the issues faced by consumers today and the issues faced in 1974 when the Trade Practices Act was introduced.

The Trade Practices Act was introduced following growing concerns about the impact on consumers of changes in manufacturing and production arising after World War II. As one commentator has written:

Coupled with the technological revolution that the war had inspired, a new range and variety of products rapidly emerged into the consumer marketplace. Many of these were far more complex in engineering and design than their precursors, and because of mass production techniques, far more accessible to a broad spectrum of the community.

The rapid expansion of commercial radio, with its enticing advertisements, and the advent of television provided a further impetus to consumers' rapid advance. To complement this new and burgeoning consumer market came new methods of financing products.<sup>1</sup>

From this it is clear that changes in the marketplace are constant phenomena that were a major consideration in the design of the Trade Practices Act.

However, although the nature of issues faced by consumers today is similar to the challenges faced in the 1970s, the magnitude and complexity of these issues has increased dramatically and will continue to do so.

#### ***Increasing choice of traders due to the internet and e-commerce***

Globalisation and new technologies, particularly in the electronic and mobile commerce areas, have created enormous benefits for consumers in the form of increased convenience, choice, and efficiency.

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<sup>1</sup> S Smith (ed.), *In the Consumer Interest: A selected history of consumer affairs in Australia 1945–2000*, p. 34.

The internet in particular, has connected consumers to a wider range of businesses and individuals, both nationally and globally. The internet also provides consumers with more tools for comparing prices and products which promotes a vigorous competitive environment.

***Increasing range and complexity of product offerings***

Along with the massive expansion of choice resulting from increases in international trade, industry deregulation and competition policy has also enhanced the choices of products, services and traders available to consumers. In particular, as markets in telecommunications, energy and financial services have opened up, consumers now have a greater range of products, services and traders to choose between in these areas.

Increased competition and technological advancements have seen a significant growth in innovation and new types of products. Indeed, many products that are commonplace today simply did not exist 30, 20 or even 10 years ago. Compulsory superannuation, genetically modified food, internet service provision, mp3 players and digital content are all examples of products that did not exist when the Trade Practices Act was introduced.

The products themselves that are being released on the market are becoming more complex in nature. For example, the content of food products is becoming increasingly complex with issues such as the production technique used, or whether products contain genetically modified ingredients, certain types of fats or additives. Digital rights management or some other copyright protection system, for example, often restricts a consumer's use of digital content. While the ACCC recognises the importance of a sound intellectual property regime, it is essential that consumers fully understand, and are accurately informed of, any restrictions that may be placed on their use of digital content. Financing options are also far more varied and complex than in the past.

Further, the rate of introduction of new and more sophisticated products appears to be increasing.

As well as increasing complexity in the products themselves, consumers are also being confronted with more complex pricing structures, such as the rapid growth of bundling goods and services. As competition intensifies in some areas, this encourages traders to differentiate their products and to provide innovative features to attract customers. In some cases, particularly when the underlying product itself is of a homogenous nature, differentiation often takes the form of tailoring pricing and service plans. For example, different mobile phone plans work better for different customers with different usage patterns.

While bundling of products and other forms of differentiation can provide many benefits for consumers, it can also make comparisons between product offerings very difficult.

In this environment, marketplaces have seen the development of intermediaries to assist consumers in comparing complex product and service offerings. The consumer group CHOICE, recently noted:

The market is changing, bundling of services makes it far more complex, and intermediaries, such as financial planners, are gaining in importance.<sup>2</sup>

### ***Increased disposable income***

In recent times most Australians have enjoyed a substantial increase in disposable income—putting a far greater range of products within their reach.<sup>3</sup>

The proportion of consumer spending on services has also increased significantly. The services industry group contribution to Gross Domestic Product increased from around 30 per cent in the early 1960s to just less than 49 per cent in 2003-04.

Areas of spending which have exhibited significant growth in the five years to 2003-04 include:

- mortgage payments (increased by 47 per cent)
- rental payments (increased by 23 per cent)
- mobile phone charges (increased by 183 per cent)
- health practitioners' fees (increased by 44 per cent)
- education fees (increased by 41 per cent)
- child care (increased by 34 per cent)
- accident insurance (increased by 34 per cent)
- domestic fuel and power (increased by 32 per cent)<sup>4</sup>

As essential items such as mortgage and rental payments increasingly account for higher amounts of spending, this makes it increasingly important that consumers make the choices that are best for them in other areas. This can be particularly challenging for vulnerable or disadvantaged groups in society.

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<sup>2</sup> See 'The review of Australia's policy framework', *CHOICE*, February 2007 (see [www.choice.com.au](http://www.choice.com.au)).

<sup>3</sup> Real Equivalised Disposable Household Income (i.e., income minus taxes and adjusted for inflation and household composition) increased from an average of \$455 per week in 1994-05 to \$549 in 2003-04, a rise of 21 per cent. See the Australian Bureau of Statistics, *6523.0—Household Income and Income Distribution, Australia, 2003-04*, August 2005, online at [www.abs.gov.au](http://www.abs.gov.au). Household consumption has increased in nominal terms (i.e. not adjusted for inflation) from just over \$9 billion in September 1974 when the Trade Practices Act was introduced, to \$144 billion in December 2006. See the Reserve Bank of Australia, *Bulletin Statistical Tables*, accessed 30 March 2007 at [www.rba.gov.au/Statistics/Bulletin/G11hist.xls](http://www.rba.gov.au/Statistics/Bulletin/G11hist.xls).

<sup>4</sup> Australian Bureau of Statistics, *6530—Household expenditure survey, Australia, Summary of Results 2003-04*, August 2005, online at [www.abs.gov.au](http://www.abs.gov.au).

### **Cultural shifts in what is important to consumers**

As products and services are changing, so are consumers' requirements. For example, consumers are increasingly factoring health, environmental and ethical considerations into their purchasing decisions. That is, price is not necessarily the most important consideration for some consumers, although it will still be the key factor for some consumers in purchasing decisions.

Markets are responding to these factors with increased emphasis in advertising on health, environmental and ethical claims.

#### **1.2.2 What does this mean for consumers?**

As choice and competition increases, consumers increasingly face the challenge of how to exercise choice wisely. Some of the issues that arise include:

- difficulties in comparing the quality of high technology goods where consumers are unfamiliar with the performance characteristics of such goods
- difficulties in comparing the price/quality of goods and services involving bundling of a number of products and services, or sophisticated pricing models
- difficulties in participating in dispute resolution processes with traders located in other jurisdictions
- dealing with intermediaries to compare products and prices on behalf of consumers, sometimes in situations where intermediaries have pre-existing relationships with some suppliers, creating potential conflicts of interest
- exposure to unscrupulous traders, e.g. the plethora of scams disseminated via the internet or email.

The above issues may be exacerbated for vulnerable or disadvantaged consumers.

#### **1.2.3 International experiences**

The challenges outlined above are not unique to Australia. The issues outlined above have been identified in other key international jurisdictions including the European Union, the United States of America, Canada, the United Kingdom and New Zealand.

The European Union has identified that:

The sophistication of retail markets is increasing the role of consumers. The greater empowerment of consumers has also led to greater responsibilities for them to manage their own affairs. While many can benefit, the most vulnerable are less well equipped—and the growth in consumption by children and an ageing population are increasing the number of more vulnerable consumers. Our need for confident consumers to drive our economy has never been greater, however.

Services in general and liberalised services in particular are set to grow, as electricity, gas, post and telecommunications liberalisation develops further. While considerable benefits can be expected, the transition will pose challenges for consumers and regulators to ensure consumer welfare is maximised. Goods and services will be increasingly interlinked.<sup>5</sup>

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<sup>5</sup> Commission of the European Communities, *EU Consumer Policy Strategy 2007–2013, Empowering*



It has also been noted in the European Union that the benefits of e-commerce have not developed to the extent expected due to a range of factors including lack of consumer confidence and regulatory obstacles.

The European Union has also identified growing concerns regarding the difficulty for consumers to conduct comparisons between goods, sometimes referred to as ‘confusopoly’. In particular, it has highlighted concerns in relation to products such as mobile phones where the proliferation of different tariffs tailored to different needs makes comparisons between suppliers difficult. Confusopoly has been attributed to reluctance by consumers to switch suppliers, leading to a detrimental impact on competition.<sup>6</sup>

In the United States of America, the Federal Trade Commission has also noted that marketplaces are increasingly global and characterised by changing technologies, but while this holds great promise for consumers, it also brings challenges, including privacy and security concerns. The Federal Trade Commission has also noted the potential use of technology to reach young consumers and that marketers are making creative use of technology to convey messages to young consumers through ‘advergaming’, behavioural targeting and viral or ‘word of mouth’ marketing that relies on pre-existing social networks to increase awareness of a product or brand.<sup>7</sup>

In Canada, the recent *Consumer Trends* report<sup>8</sup> has identified strong economic growth, more open marketplaces and high levels of technological change as being the major economic trends in the Canadian jurisdiction. This has produced significant benefits for consumers in the form of less expensive, more reliable and more convenient goods and services. However, keeping up with changes and learning how to adapt and benefit from them has been a major challenge for consumers. That is:

In essence, the modern consumer marketplace is becoming an information-intense, complex and radically changed place. Knowing how to process large volumes of information and understanding the implications of what can be very complex product and service offerings or transactions are important skills for today’s consumer.<sup>9</sup>

#### **1.2.4 Challenges for regulation and enforcement agencies**

The ACCC believes that the changes in the marketplace that have occurred have also raised challenges for regulation and regulators. For policy makers, it raises the challenge of continually examining and evaluating the consumer policy framework to ensure that it continues to meet the needs of society. At the same time, it is critical that

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*consumers, enhancing their welfare, effectively protecting them*, COM (2007) 99, p. 3.

<sup>6</sup> M. Kuneva, ‘Consumers and competitiveness’ in a speech to the Lisbon Council’s *2007 Growth and Jobs Summit*, held in Brussels on 27 February 2007. This speech is available on the Lisbon Council website ([www.lisboncouncil.net](http://www.lisboncouncil.net)).

<sup>7</sup> Federal Trade Commission, *Prepared Statement of the Federal Trade Commission before the Subcommittee on Financial Services and General Government of the Committee on Appropriations, United States House of Representatives, 28 February 2007*, pp. 13–14. This statement is available on the Federal Trade Commission website ([www.ftc.gov](http://www.ftc.gov)).

<sup>8</sup> Office of Consumer Affairs, Canada, *Consumer Trends Report*, November 2004. This report is available on the Office of Consumer Affairs website ([www.strategis.ic.gc.ca](http://www.strategis.ic.gc.ca)).

<sup>9</sup> *ibid.*

such examination be carried out in a well-informed, robust manner, underpinned by robust regulatory impact analysis.

This Productivity Commission review has been commissioned in part to consider what changes may be necessary to the consumer policy framework given the changes to the economy in general and various specific markets over the last 30 years. The following two chapters outline the way in which the Trade Practices Act has operated over the last 30 years. They highlight the way in which the implementation of the Trade Practices Act, including the implementation and enforcement architecture that sits under it, has evolved to effectively address these changing circumstances. In this context, chapter 3 outlines in detail how the ACCC has responded to a number of specific changes and challenges, including:

- remaining well informed of the latest trends in market developments and consumer issues
- identification of the most appropriate issues or matters for compliance activities
- ensuring the organisation has the ability to manage its resources in such a way that enables it to respond quickly to significant emerging issues
- ensuring that its compliance program contains the most effective mix of litigation, enforceable undertakings, administrative settlements, persuasion and education to promote compliance in an increasing number of areas
- maintaining close links with international bodies to continue to develop effective strategies in relation to cross border issues.

At the same time there are a number of areas where the effectiveness of the implementation of the Trade Practices Act and the broader consumer policy framework could be enhanced. These include:

- remedies and enforcement mechanisms available under the Trade Practices Act
- relationship between state/territory fair trading regimes and the Trade Practices Act
- relationship between the Trade Practices Act and other consumer regulatory regimes
- consumer research and education.

Possible refinements to the current framework to support these improvements are outlined in the remainder of this submission.

# **Part I—Scope and operation of generic consumer laws in the current economic environment**

## **2. National fair trading laws in Australia—the Trade Practices Act**

The cornerstone of the Australian consumer policy framework is the *Trade Practices Act 1974* (the Trade Practices Act).

The objective of the Trade Practices Act is to enhance the welfare of Australians through promoting vigorous competition in the marketplace, fair trading and protecting consumers against particular unscrupulous or unfair practices.

The Trade Practices Act meets the objectives of consumer policy in a number of ways.

The Australian Competition and Consumer Commission (ACCC) believes that the broad scope, flexibility and adaptability of the provisions of the Trade Practices Act have served Australia well over the last three decades and it continues to provide a highly effective foundation for protecting the rights of Australians in many areas. The strength of the fair trading provisions of the Trade Practices Act lies in the fact that, with few exceptions, the provisions apply in relation to any industry, service or product. They form a general standard for trading that applies in almost all circumstances, including new products and new forms of communication.

Where the Trade Practices Act does not apply to activities within Australia, those activities are generally subject to the equivalent or similar protections enacted under the state or territory fair trading legislation.

The fair trading and consumer protection provisions of the Trade Practices Act do not apply to financial services. Mirror provisions to these provisions are contained in the *Australian Securities and Investments Commission Act 2001*, administered by the Australian Securities and Investments Commission (ASIC).

### **2.1 The introduction of the Trade Practices Act**

Prior to the enactment of the Trade Practices Act, consumer protection laws had existed, but were generally limited in both geographic scope and the type of protection afforded.

Growing recognition of the need for national, comprehensive fair trading and consumer protection laws developed in response to the changing economic conditions of the post-World War II era. At this time, Australia and most other western societies experienced a boom in consumer goods and unprecedented levels of economic growth. While this offered consumers many benefits it also raised concerns of growing inequality of bargaining power between consumers and traders, as traders became larger and more sophisticated and the products they sold became more complex.

During the 1960s the development of consumer policy gained significant momentum. In 1962, US President Kennedy announced basic ‘consumer rights’ as being: the right

to safety; the right to be informed; the right to choose; and the right to be heard. In the United Kingdom, the Moloney report<sup>10</sup> was published, discussing the need for the establishment of a 'Consumer Council' and consumer protections, such as, statutory implied conditions and compulsory care labelling for clothing.

In Australia, the Trade Practices Act was introduced in 1974 with the aim of providing a national law for fair trading and consumer protection and to prohibit certain anti-competitive conduct. While national legislation relating to anti-competitive conduct had been enacted previously, it was not until the 1974 legislation that specific rules relating to fair trading and consumer protection were developed and incorporated into trade practices legislation<sup>11</sup> alongside the anti-competitive conduct rules.

The rationale for the introduction of consumer protection provisions within the Trade Practices Act is set out in Senator the Hon. Lionel Murphy's second reading speech on the Bill:

In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor*—meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.

... Consumer protection also assists in the fight against inflation... The Bill gives effect to a recommendation by the Council of the Organisation of Economic Co-operation and Development in December 1971 concerning action against inflation in the field of competition policy. The recommendation urged member governments of OECD, as part of the action to be taken by them against inflation, to adopt stronger measures to control restrictive trade practices and protect consumers.<sup>12</sup>

The Government has a firm electoral commitment to introduce effective legislation in the areas of restrictive trade practices and consumer protection. This implements the promises made by the Government at the last two general elections.

Murphy also noted in his speech that:

The Bill recognises that in many consumer protection matters there is a need for a national approach and that the effectiveness of State laws is necessarily limited.

A key feature of the Trade Practices Act was that in incorporating fair trading and consumer protection provisions into the same legislative framework as anti-competitive conduct rules, it not only recognised the issues faced by consumers in dealing with larger, more sophisticated businesses, but the Trade Practices Act also recognised the close links between fair trading and competition laws and the importance of consumers and demand-side issues in competitive processes.

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<sup>10</sup> Board of Trade, Committee of Consumer Protection, *Committee of Consumer Protection Final Report*, vol. xii, Her Majesty's Stationery Office, 1962.

<sup>11</sup> However, some consumer laws existed at the state and/or territory level prior to the introduction of the Trade Practices Act.

<sup>12</sup> Senator the Hon. Lionel Murphy, second reading speech, 30 July 1974, Australia, Senate 1974, *Debates*, pp. 540–48.

The first annual report of the Trade Practices Commission stated:

The Act has a double thrust—

- (i) to strengthen the competitiveness of private enterprise at the various levels of production and distribution of industrial and consumer goods and services—to the benefit of the public as ultimate consumers and to the benefit of business in general.
- (ii) to strengthen the position of consumers relative to producers and distributors—to the benefit of consumers (and ethical traders), and to the benefit of the competitive process, since producers and distributors will be activated to compete more on the fundamentals of price and quality.

The trade practices provisions of the Act are really competition provisions, and the consumer protection provisions are really provisions for fair play in competition. The provisions, each affecting the same companies, dovetail with each other as they do in the legislation of Britain and the U.S.A.<sup>13</sup>

## 2.2 How the Trade Practices Act has changed over time

### 2.2.1 Changes to the fair trading and consumer protection provisions

Since 1974 a number of important changes have been made which have significantly enhanced the operation of the Trade Practices Act and the Australian consumer policy framework. Nevertheless, changes have generally occurred on an ad hoc basis.

Consumer protection and fair trading provisions of the Trade Practices Act were initially contained in Part V of the legislation and included provisions prohibiting misleading and deceptive conduct, a regime for product safety and product information standards, and implied certain terms and conditions in contracts for the supply of goods and services. Contravention of any provision of Part V (except s. 52) was an offence. If guilty, an individual was liable for a fine of up to \$10 000 or up to six months' imprisonment, and a corporation was liable for a fine of up to \$50 000. Any person who suffered loss or damage as a result of an act in contravention of Part V could recover damages. The Trade Practices Act also gave the court the ability to grant an injunction.

The Swanson Committee undertook the first substantive review of Part V of the Trade Practices Act in 1976. Generally, the Committee supported the retention of Part V and recommended amendments to strengthen and extend the fair trading and consumer protection provisions, including the insertion of Division 2A, which imposed liability for certain defects in goods on manufacturers or importers.

An important amendment was made to the fair trading and consumer protection provisions in 1986 with the introduction of provisions prohibiting unconscionable conduct.<sup>14</sup> This amendment was aimed to 'give the Act a greater ability to deal with the general disparity of bargaining power between buyers and sellers.' Other important amendments made in 1986 included the introduction of a requirement to state the cash price in certain circumstances, the introduction of a new product safety and product information division, and a new provision which enabled the ACCC to obtain

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<sup>13</sup> Trade Practices Commission, *Annual Report, 1974–75*, Australian Government Publishing Service (AGPS), Canberra, 1975, p. 1.

<sup>14</sup> This followed recommendations from a Government Green Paper, *The Trade Practices Act: Proposals for Change*. The introduction of unconscionable conduct provisions was recommended initially by the Swanson Committee.

compensation for consumers in certain circumstances, in order to give consumers easier access to the courts at a lower cost.

Since the 1980s, a number of substantive changes have been made to the fair trading and consumer protection provisions of the Trade Practices Act including:

- the introduction of provisions regarding liability of manufacturers and importers for defective goods in 1992
- shifting responsibility for consumer protection in the financial services sector from the ACCC to the Australian Securities and Investments Commission in 1998
- the introduction of a regime for enforcement of prescribed codes of conduct between businesses and between businesses and consumers in 1998
- the introduction of more detailed country of origin provisions in 1998
- a restatement of the pyramid selling provisions to clarify the scope of prohibitions on pyramid selling in 2001
- the introduction of Part VIB regarding the ability to bring actions for damages for personal injuries or death resulting from misleading and deceptive conduct and other unfair practice provisions of the Trade Practices Act in 2004
- the introduction of Part VIA regarding proportionate liability for misleading and deceptive conduct in 2004.

Amendments have also been made to strengthen the remedies available under the Trade Practices Act including:

- giving the ACCC power to intervene in private proceedings and institute representative actions for contravention of the restrictive trade practices provisions
- giving the court the power to impose non-monetary penalties such as community service orders, probation orders (s. 86C) and adverse publicity orders (s. 86D) for contravention of the Trade Practices Act
- extending limitation periods for bringing proceedings to six years<sup>15</sup>
- increasing the level of penalties a Court may impose for a contravention of the fair trading provisions of the Trade Practices Act from \$200 000 for a corporation and \$40 000 for an individual to \$1.1 million for a corporation and \$220 000 for an individual
- the introduction of new search and seizure powers in 2006 (commencing 1 January 2007).

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<sup>15</sup> Note that the limitation period varies depending on the type of proceedings. For example, the limitation period for bringing criminal prosecutions in relation to consumer protection matters is three years.

Currently, a further Bill amending the operation of s. 53C has been proposed, but has not yet been introduced at the time of writing. This proposal is designed to amend the Trade Practices Act to prohibit corporations from using a component price to make a representation as to the price of a good or service without also prominently specifying the single figure, total minimum price the consumer must pay to obtain the product or service.<sup>16</sup>

Aspects of the consumer protection and fair trading provisions have also been considered in a number of recent Productivity Commission reviews. In 2005, the Productivity Commission's research report, *Australian and New Zealand Competition and Consumer Protection Regimes*, considered the regimes of both jurisdictions. It found that the systems were sufficiently similar that they are not an impediment to an integrated trans-Tasman business environment. However, the Productivity Commission made some recommendations to improve cross-border cooperation, including amendment to the Trade Practices Act to permit the ACCC to share information with other government agencies both domestically and overseas. The Government has recently introduced such legislation.

In January 2006 the Productivity Commission released a research report, *Review of the Australian Consumer Product Safety System*, which recommended a national approach to product safety. The Productivity Commission's recommendations are currently being considered by the Ministerial Council on Consumer Affairs. The issue has also been canvassed recently by COAG, with the Commonwealth offering to take over the product safety function. It was agreed that these issues would be considered further.

### **2.2.2 Other changes to the Trade Practices Act**

Other elements of the Trade Practices Act have also been amended over time to ensure that the legislation continues to effectively promote consumer welfare.

In 1992, a committee of inquiry led by Professor Fred Hilmer put forward recommendations for the implementation of a national competition policy. Following the report of that Hilmer Committee<sup>17</sup> an access regime was introduced into the Trade Practices Act.

In 1995, the ACCC was established to take over the functions of the Trade Practices Commission and the Prices Surveillance Authority to achieve better coordination of consumer, competition and prices policy. The ACCC also became much more closely linked with broad issues of microeconomic reform, taking a regulatory role in areas such as communications, energy and transport. In 2005, the Australian Energy Regulator (AER) was established as a constituent part of the ACCC to take responsibility for regulation of the energy sector on a national level, to streamline regulation for the benefit of both consumers and business.

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<sup>16</sup> The Bill also makes consequential amendments to the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to maintain consistency between the consumer protection provisions in the financial services sector and the consumer protection provisions that apply more generally under the Trade Practices Act.

<sup>17</sup> Independent Committee of Inquiry into a National Competition Policy for Australia, *National Competition Policy: Report by the Independent Committee of Inquiry*, AGPS, Canberra, August 1993. Also known as the Hilmer report.

Following from the recommendations of the Dawson Inquiry<sup>18</sup>, civil pecuniary penalties for breaches of the anti-competitive conduct laws have increased to the greatest of \$10 million, three times the value of the benefit reasonably attributable to the conduct, or, if that figure cannot be ascertained, 10 per cent of the annual turnover of the offender. Also, as a result of that inquiry, legislation is currently being drafted to introduce criminal sanctions for cartel behaviour, one of the most harmful causes of consumer detriment.

## **2.3 The Trade Practices Act as it exists today**

The Trade Practices Act meets the objectives of consumer policy in a number of ways.

The Trade Practices Act addresses both supply-side and demand-side failures in markets by providing laws which prohibit certain types of anti-competitive conduct and certain types of information failure. In particular, it prohibits traders from putting misleading and deceptive information in the market.

It also provides protections for vulnerable or disadvantaged consumers through its general fair trading and competition laws and through more targeted laws prohibiting harassment and coercion, and unconscionable conduct.

The Trade Practices Act provides an institutional framework to support the effective operation of the legislation through the establishment of the ACCC to play a role in enforcing the legislation and promoting compliance, as well as by creating rights of private action. In particular, the courts have played a fundamental role in clarifying the operation of the law, and the standard of conduct required of traders.

The Trade Practices Act is not intended to cure all instances of market failure, or address every instance of where markets are not working well for particular segments of society. Rather, its purpose is to provide a general framework of protections which are appropriate in any market. Where particular markets exhibit problems which are highly specific to that market, the Trade Practices Act provides a general level of protection, but industry-specific rules may provide additional or alternative protections.

### **2.3.1 Key provisions of the Trade Practices Act**

Part V of the Trade Practices Act contains the primary fair trading and consumer protection provisions of the legislation. These provisions apply generally to regulate the conduct between corporations (and in some cases non-corporate entities engaged in commercial activities) and their trading counterparts—whether those counterparts are private individuals (consumers) or other businesses.<sup>19</sup>

Section 52 is the cornerstone of the fair trading and consumer protection provisions of the Trade Practices Act. It prohibits engaging in misleading or deceptive conduct that may induce consumers to make errors in choosing goods or services to their detriment. Part V, Division 1 of the Trade Practices Act also prohibits traders whose activities fall

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<sup>18</sup> Trade Practices Act Review Committee, *Report of the Trade Practices Act Review Committee*, Department of Communications, Information Technology and the Arts, January 2003. Also known as the Dawson report. The report is available on the Treasury website ([www.treasury.gov.au](http://www.treasury.gov.au)).

<sup>19</sup> Except for certain prohibitions that apply only in relation to traders' dealings with consumers.



within the scope of the legislation from engaging in specific forms of deceptive or unfair conduct including:

- making false or misleading representations in relation to important characteristics of products or services including price, place of origin, standard or composition, and sponsorship
- bait advertising
- falsely offering prizes
- accepting payment without intending to supply;
- demanding payment for unsolicited goods or services
- pyramid selling
- harassment or coercion.

While the main focus of the fair trading and consumer protection provisions of the Trade Practices Act is to ensure that consumers are not tricked by misleading information, thus empowering consumers to participate in competitive markets, it also recognises that in certain circumstances it is more effective and appropriate to protect consumers' interests by imposing some specific obligations onto traders. Accordingly, the Trade Practices Act also provides a product safety standard regime and ensures that all consumer contracts include certain basic protections for consumers that cannot be removed by traders. Implied conditions and warranties in consumer contracts include protections, such as the right to enjoy quiet possession of the goods, that services must be carried out with due care and skill, and goods must be fit for their purpose.

Parts IVA and IVB of the Trade Practices Act also contain important consumer provisions relating to unconscionable conduct and enforcement of specified industry codes of conduct. In particular, the unconscionable conduct provisions prohibit such conduct in dealings between businesses and in consumer transactions. The aim of such provisions is to ensure that the stronger party in negotiations does not take advantage of its position by behaving in an unfair or unreasonable manner. These provisions are particularly important to vulnerable or disadvantaged consumers who are more likely to be the target of such conduct.

The Trade Practices Act also plays a direct role in ensuring consumer rights by prohibiting anti-competitive conduct and regulating national infrastructure services. By encouraging competition, the Trade Practices Act plays an important role in empowering consumers to participate in markets. Key competitive provisions that impact on consumer rights include prohibitions on misuse of market power and price fixing, authorisation and notification provisions that enable the ACCC to take into account public benefits in determining whether certain practices should be allowed in the marketplace, regulation of energy and telecommunications markets and prices surveillance.

Further details of the relevant provisions of the Trade Practices Act are provided in appendix B.

### **2.3.2 Institutional framework**

The Trade Practices Act not only establishes a series of rules regarding commercial conduct in the marketplace, but an institutional framework designed to promote widespread compliance with those rules.

In addition to enabling private individuals to take action in relation to breaches of the legislation, the Trade Practices Act also establishes an independent statutory authority, the ACCC, to promote compliance with the legislation and take enforcement action in its own right or on behalf of consumers when appropriate to do so.

Key activities of the ACCC include promoting compliance with the Trade Practices Act through taking enforcement action against breaches of the Trade Practices Act, as well as engaging in education, persuasion and liaison to promote a culture of compliance in Australian businesses.

The Trade Practices Act confers powers on the ACCC to obtain information, documents and evidence when investigating possible contraventions of the Trade Practices Act and other specified functions pursuant to s.155. Section 155 also enables the ACCC to require a person to appear before it to give evidence orally or in writing. Failure to comply with s. 155 is a criminal offence. Part XIX of the Trade Practices Act enables the ACCC to enter and search premises—either with consent or after obtaining a search warrant from a magistrate—and allows for the seizure of evidential material.

While the ACCC's role is to investigate potential contraventions of the Trade Practices Act, it does not determine whether a person has contravened the legislation. This is a question for the relevant courts to decide.

### **2.3.3 Remedies**

The Trade Practices Act provides a range of penalties and remedies for breaches of the fair trading and consumer protection provisions.

The objectives of the penalties and remedies available are to provide for compensation for persons who have suffered loss as a result of contravening conduct, prevent the continuation of the contravening conduct, deter the wrongdoer from re-offending in the future (specific deterrence), and deter others from engaging in such conduct (general deterrence).

#### ***Criminal sanctions***

Criminal sanctions apply in relation to breaches of the certain unfair practices outlined above pursuant to Part VC of the Trade Practices Act. Part VC contains criminal offences replicating the substantive prohibitions contained in Part V, Division 1.<sup>20</sup> Monetary penalties of up to \$220 000 for individuals and \$1.1million for companies apply. While breaches of these provisions attract criminal penalties, a person cannot be imprisoned for contravening these provisions. In addition, adverse publicity orders, probation orders, community service orders and corrective advertising orders can be sought in relation to contraventions of Part VC. Criminal sanctions do not apply in relation to breaches of unconscionable conduct, prescribed codes of practices, implied conditions and warranties, or certain actions against manufacturers or importers.

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<sup>20</sup> With the exception of s. 52. Part VC does not contain a mirror provision of s. 52, which is therefore not subject to criminal penalties.

## **Civil proceedings**

Contraventions of the provisions of Part V, Division 1 are also subject to civil sanctions and remedies.

Remedies available include injunctions to prevent the prohibited conduct continuing or being repeated or to require some action be taken, damages, probation orders, community service orders and corrective advertising orders, and ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct. Such ancillary orders may include orders for specific performance, rescission or variation of contracts, refunds or provision of spare parts or repairs.

The majority of fair trading and consumer protection matters initiated by the ACCC are civil proceedings.

The nature of remedies available for other breaches of the fair trading and consumer protection provisions of the Trade Practices Act such as product safety and implied conditions and warranties are outlined in more detail in appendix B.

### **Who may bring proceedings?**

Only the federal Director of Public Prosecutions may prosecute an offence of Part VC. That is, only the Director or Public Prosecutions can bring action to impose a monetary fine in relation to a contravention of the unfair practices provisions.

The ACCC, the minister or any other person can ask the court for an injunction. A person who takes such action can also apply for ancillary orders where the person has suffered, or is likely to suffer, loss or damage as a result of the conduct.

Where the ACCC takes proceedings in relation to a contravention, it can seek orders on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage for compensation or to prevent or reduce the loss or damage suffered. However, the ACCC can only make such an application in relation to persons who have consented in writing, prior to the application being made, to the making of the application.<sup>21</sup>

Private persons may bring their own civil actions for damages. Further, if in a proceeding it is proved that a person has engaged in a contravention of Part V, Division 1, a finding of fact made by a court may be used as prima facie evidence in subsequent related proceedings by a person for compensation. For example, if the ACCC takes action seeking orders for declarations that a contravention has occurred and/or injunctions to stop the contravening conduct continuing, a private person may be able to use the findings of fact from those proceedings in his or her separate action for compensation. This may provide assistance to consumers seeking individual redress by reducing the burden of private actions.

Compensation for death or personal injury is not generally available except in certain circumstances where the death or personal injury results from tobacco use.

It is important to note that the ACCC cannot take action in relation to breaches of implied conditions and warranties. Consumers may take their own actions in these matters.

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<sup>21</sup> *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; *Medibank Private Ltd v Cassidy* [2002] FCAFC 290.

### ***Non-litigated resolutions***

The ACCC may accept a written undertaking given by a person in connection with a matter in relation to which the ACCC has a power or function under the Trade Practices Act pursuant to s. 87B. A section 87B undertaking (also known as an ‘enforceable undertaking’ or ‘court-enforceable undertaking’) can be accepted to provide a resolution to an alleged breach of the provisions of Part V, Division 1. If the undertaking is breached, the ACCC can take action for:

- an order directing compliance
- an order to pay the Commonwealth up to the amount of any financial benefit that can be reasonably attributed, directly or indirectly, to the breach, and/or
- any order the court considers appropriate to compensate a third party for loss or damage resulting from the breach; and/or
- any other order the court considers appropriate.

Section 87B undertakings are commonly used to provide a fast, effective solution to fair trading and consumer protection issues. The use of undertakings enables a flexible approach to remedies that may include refunds and other corrective actions, and a commitment from the offender to establish and maintain a trade practices compliance program to avoid future breaches.

#### **2.3.4 Access to justice**

The Trade Practices Act recognises that an important element of ensuring compliance with the legislation is to enable persons who have suffered loss or damage as a result of a contravention of the Trade Practices Act to take action against the wrongdoer. The Trade Practices Act provides for access to justice through either action by the enforcement agency— the ACCC, or private action.

All matters taken by the ACCC are brought in the Federal Court.

Private actions may be taken on an individual basis or, where several individuals have each suffered injury, loss or damage as a result of similar conduct in breach of the Trade Practices Act, a person may take a representative or class action on behalf of seven or more such persons.<sup>22</sup>

Since 1999, consumers have been able to pursue actions under the Trade Practices Act in the Federal Magistrates Court (for damages up to \$750 000). Private actions may also be taken in state and territory courts including small claims courts, magistrates’ courts and supreme courts. In state and territory lower courts, remedies are available subject to any limitations on the remedies a court may grant under state or territory law.

The cost for initiating court action varies. For example, it costs \$735 to initiate an action in the Federal Court in addition to solicitor fees and the possibility of costs being awarded against the consumer. Filing an application in the Federal Magistrates Court costs \$350 for an individual and \$698 for a corporation. In contrast, the costs of initiating a small claims action through tribunals or a local Magistrates’ Court will start

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<sup>22</sup> *Federal Court of Australia Act 1976*

from \$13.50 in Queensland to \$82 in South Australia, with costs not generally being awarded in these matters.

### **2.3.5 Scope of operation of the Trade Practices Act**

The Commonwealth Constitution does not provide an express power for the Commonwealth to regulate in relation to fair trading or consumer protection matters. Rather, it relies primarily on the corporations power (under s. 51(xx) of the *Commonwealth of Australia Constitution Act 1900* (United Kingdom) to provide the constitutional basis for regulation of consumer matters under the Trade Practices Act.

Accordingly, the Trade Practices Act applies to trading, financial and foreign corporations engaged in intrastate or interstate trade or commerce.

Section 6 of the Trade Practices Act also extends its ambit ‘corporations’ where certain constitutional prerequisites are met. The other constitutional heads of power relied upon in s. 6 of the Trade Practices Act are:

- interstate and overseas trade and commerce power—s. 51(i) of the Commonwealth of Australia Constitution Act
- territories’ power—s. 122 of the Commonwealth of Australia Constitution Act
- executive power of the Australian Government coupled with the incidental power—ss. 61 and 51.(xxxix) of the Commonwealth of Australia Constitution Act
- postal services power—s. 51(v) of the Commonwealth of Australia Constitution Act

Section 6(2) of the Trade Practices Act extends the operation of the fair trading and consumer protection provisions to persons other than corporations, to the extent that they are engaged in interstate, overseas or territorial trade, or dealings with the Commonwealth. Section 6(3) of the Trade Practices Act extends the operation of the fair trading provisions to persons other than corporations, to the extent that their conduct involves the use of postal or broadcasting facilities.

Therefore, while the Trade Practices Act extends to a broad range of businesses, it does not provide universal coverage of all trading activities within Australia. Certain types of traders, particularly non-incorporated traders operating on an intrastate basis, may only be regulated by the appropriate state legislation. Section 75 of the Trade Practices Act provides expressly that Commonwealth and state laws should operate concurrently. The clear intention of this section is that the Trade Practices Act is not intended to ‘cover the field’ but that state legislation could operate concurrently with the Trade Practices Act.<sup>23</sup>

Each state and territory has its own fair trading legislation based on the fair trading provisions of the Trade Practices Act. On this basis, unincorporated traders which do not operate across state boundaries and which are, for constitutional reasons, not covered by the Trade Practices Act must nevertheless meet fair trading requirements. The interaction between the Commonwealth, state and territory laws is discussed in more detail in chapter 6.

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<sup>23</sup> *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545.

The Trade Practices Act extends to conduct outside of Australia to the extent that the party engaged in the conduct is:

- incorporated within Australia
- carrying on a business within Australia
- an Australian citizen, or
- a person ordinarily resident in Australia.

## **2.4 Relationship between the Trade Practices Act and other elements of the consumer policy framework**

The Trade Practices Act and other state and territory general fair trading and consumer protection regimes operate in conjunction with a number of industry-specific regimes.

In addition to the Trade Practices Act, the Commonwealth also administers a number of industry-specific regulatory regimes. Key areas include financial services, telecommunications, food safety, and therapeutic goods. Also, the energy industry is progressing towards a national regulatory regime.<sup>24</sup> In each case, the form of industry-specific regulatory regimes varies, as do the enforcement mechanisms. Industry-specific regimes may range from licensing regimes to direct standards of conduct imposed by legislation or through government-endorsed industry codes of conduct. In some cases, a mixture of mechanisms may be utilised. For example, in the telecommunications industry there are a range of specific consumer protections including a specific universal service obligation requiring Telstra to provide a standard telephone service accessible to all people, and additional protections prescribed under codes of conduct developed by industry representatives and consumer organisations and registered with the Australian Communications and Media Authority (ACMA).

Generally, industry-specific regulators and dispute-handling bodies are established to administer these regimes. For example, in the telecommunications industry, ACMA has responsibility for enforcement of systemic breaches of registered codes of conduct. The Telecommunications Industry Ombudsman (TIO) is an example of a complaint-handling body in the telecommunications industry.

The Trade Practices Act interacts with each of these industry-specific regimes. With the exception of financial services, the Trade Practices Act operates concurrently with each regime. That is, the provisions of the Trade Practices Act operate in addition to any industry-specific obligations placed on traders. Generally, such obligations are not inconsistent with the standard of conduct required by the Trade Practices Act and form a complementary set of standards to meet the specific needs of the industry in question.

In addition, states and territories have enacted their own industry specific regulation in some areas, some of which are administered by the state and territory fair trading offices.

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<sup>24</sup> The AER will have a role in the administration of this regime.

### **3. Role and activities of the Australian Competition and Consumer Commission in consumer matters**

Effective and efficient enforcement of the *Trade Practices Act 1974* is a critical element of the consumer policy framework.

The objectives of the Australian Competition and Consumer Commission (ACCC) are to promote effective competition and informed markets, encourage fair trading and protect consumers, and regulate infrastructure service markets and other markets where competition is restricted.

Key activities of the ACCC include promoting compliance with the Trade Practices Act through taking enforcement action against breaches of the Trade Practices Act, as well as engaging in education, persuasion and liaison to promote a culture of compliance in Australian businesses.

The ACCC adopts the following principles to ensure that its activities meet the needs of consumers in rapidly developing markets:

- remaining well informed of the latest trends in market developments and consumer issues
- selecting the most appropriate issues or matters for compliance activities
- ensuring that it has the ability to manage its resources in such a way that enables it to respond quickly to significant emerging issues
- ensuring that its compliance program contains the most effective mix of litigation, enforceable undertakings, administrative settlements, persuasion and education to promote compliance in an increasing number of areas
- maintaining close links with other regulators, particularly international bodies, to continue to develop effective strategies in relation to cross border issues.

While the ACCC has a role in promoting compliance with both competition and consumer protection laws, one area is not favoured over the other. In terms of the overall caseload of the ACCC, the overwhelming majority of matters which it investigates and takes enforcement action relate to the fair trading and consumer protection provisions of the Trade Practices Act.

The ACCC's role is not to investigate or take action in every matter which may involve a breach of the fair trading and consumer protection provisions of the Trade Practices Act. Rather, it takes a risk/cost assessment based approach to selecting matters or industry-wide issues of concern which are appropriate for intervention. In particular, the ACCC focuses on matters of national significance and/or widespread consumer detriment. Other matters may be best dealt with through private action, intervention by a state or territory fair trading agency, or another regulator such as an industry-specific regulator or an ombudsman scheme.

In determining which compliance mechanisms should be used in each matter, the ACCC considers a range of issues including how to achieve compliance in the most cost effective way and achieving fast and effective results for consumers. For example, only a small percentage of investigations result in litigation. In many cases, the ACCC will accept a court enforceable undertaking (pursuant to s. 87B of the Trade Practices Act) because this can produce a quicker outcome that better meets the needs of consumers.

Recognising the importance of being well informed of the latest trends in market developments and consumer issues to inform its compliance priorities, the ACCC is placing increasing importance on its information gathering, analysis and liaison activities to more effectively recognise and understand emerging trends and the level of consumer detriment associated with such conduct. For example, in 2001 the ACCC established a Consumer Consultative Committee to develop its links with Australian consumer organisations.

Links with international agencies and participation in international forums have been increased to better equip the ACCC's cross-border enforcement and compliance efforts and share information about developing trends and effective enforcement techniques.

The ACCC will continue to adapt its activities to meet the needs of the changing marketplace.

### **3.1 Overview of the ACCC**

The ACCC is a national law enforcement agency established in 1995 by the Australian Government under the Trade Practices Act. The Australian Energy Regulator (AER) is a constituent part of the ACCC.

The ACCC's ultimate purpose is to enhance the social and economic welfare of the Australian community by fostering competitive, efficient, fair and informed Australian markets. Its primary responsibility is to ensure that individuals and business comply with competition, fair trading and consumer protection laws, in particular the Trade Practices Act.

The ACCC applies this law without fear or favour, with the aim of achieving compliance with the legislation.

The ACCC is an independent statutory authority which means that, while it is essentially a government organisation, it acts independently of government.

The ACCC strives to produce results in the public interest by:

- being accessible, transparent, independent and fair in its dealings with the community including consumers, business and governments
- performing its role in a prompt, effective, efficient and consistent manner that respects the confidentiality of information provided to assist it.

The ACCC does not have power to decide whether or not someone has broken the law. Nor does the ACCC have any power to impose injunctions, monetary penalties, fines or other orders for compensation or redress for breaches of the law. This is the responsibility of the courts. Rather, the ACCC's role is to investigate and bring



appropriate matters before a court, and to use a range of non-litigious tools at its disposal to achieve compliance with the Trade Practices Act.

## **3.2 Structure of the ACCC and AER**

### **3.2.1 The Commission**

The ACCC currently consists of a chairperson, a deputy chairperson, and five full-time members.

Commission members (also known as ‘commissioners’) are appointed by the Governor-General for terms of up to five years. An appointment is made after the majority of state and territory jurisdictions support the selection.

Commission members are collectively referred to as ‘the commission’ and they usually meet weekly to make decisions on matters of importance.

The Treasurer may also appoint associate members of the Commission, with the support of a majority of state and territory jurisdictions. The two state/territory AER members are associated members of the ACCC.<sup>25</sup>

### **3.2.2 The Australian Energy Regulator**

The AER was established under Part IIIAA of the Trade Practices Act as a constituent part of the ACCC. The AER performs economic regulation of the wholesale electricity market and electricity transmission networks in the National Electricity Market, and enforcement of the National Electricity Law and National Electricity Rules. Once enabling legislation is passed, the AER will be responsible for the economic regulation of gas networks and compliance with the gas law and rules in all jurisdictions except Western Australia. In particular, agreement has been reached at a ministerial level for the AER to be responsible for the economic regulation of electricity and gas retail markets, to the extent determined by the Ministerial Council on Energy.

The AER also provides input and assists the ACCC with energy competition matters such as merger issues and energy authorisations.

The AER consists of three members, appointed by the Governor-General:

- one federal member who must also be a member (commissioner) of the ACCC and who is appointed on the recommendation of the Chair of the ACCC; and
- two state/territory members who are appointed on the recommendation of a two-thirds majority of the state/territory ministers. State/territory AER members are taken to be associate members (ex-officio commissioners) of the ACCC.

### **3.2.3 ACCC staff**

The ACCC employs nearly 600 people throughout Australia (including AER staff). The total ACCC budget for the 2006–07 financial year is \$108.093 million. The ACCC operates regional offices in each state and territory capital city, as well as in Townsville. The head office of the ACCC is in Canberra.

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<sup>25</sup> Pursuant to s. 8AB of the Trade Practices Act. The Trade Practices Act imposes some limits on the role of AER members as associate members of the ACCC.

The ACCC's work with regard to the fair trading provisions of the Trade Practices Act is carried out, for the most, part by staff in the Enforcement and Compliance Division. The Enforcement and Compliance Division budget for the 2006–07 financial year is \$36.080 million or 33.4 per cent of the ACCC's total budget.<sup>26</sup>

### **3.2.4 The ACCC's decision-making processes**

Section 16 of the Trade Practices Act provides that the Chairperson shall convene meetings of the Commission as they think necessary for the efficient performance of the ACCC's functions. The Commission meets each week to discuss matters and to make decisions on specific issues. Key decisions made at Commission meetings include decisions to institute proceedings for alleged breaches of the fair trading provisions of the Trade Practices Act.

To streamline decision making, the Commission also has internal committees, comprising Commissioners, on areas including enforcement, communications, mergers, transport and prices oversight, information and liaison, and adjudication. The committees provide a basis for developing ongoing expertise and consistency in decision making in key areas of the ACCC's work. As with the Commission meetings, staff present submissions, papers and oral reports to these committees.

AER members meet regularly as the AER board to decide on matters related to energy regulation. As with meetings of the ACCC Commission, AER staff present submissions to the AER Board for decision.

### **3.2.5 ACCC accountability and transparency**

ACCC staff abide by the Australian Public Service code of conduct when carrying out their duties, including a requirement to uphold the APS values.

The ACCC also adheres to a service charter which sets out the standards of service the public may expect from the ACCC and the steps they may take if these standards are not met. The ACCC also issues detailed processes and guidelines about how it operates to ensure that its roles and responsibilities are carried out in a fair, impartial and transparent manner.

The ACCC's activities are oversighted by parliamentary committees, the Commonwealth Ombudsman, and the Office of Best Practice Regulation.<sup>27</sup> The ACCC is also accountable for its activities and use of funds through appearances before a number of Parliamentary Committees. It is also subject to various laws including the *Freedom of Information Act 1982*, the *Administrative Decision (Judicial Review) Act 1977*, actions for defamation and contempt of court.

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<sup>26</sup> This does not include support costs, etc., such as corporate costs that support enforcement operations. The functions of the division include competition, consumer protection, outreach and liaison. Given the integrated nature of the functions carried out by staff within the division, it is not possible to provide a more detailed breakdown of the budget in relation to consumer protection.

<sup>27</sup> In relation to recommendations to the minister regarding mandatory product safety or information standards and bans.

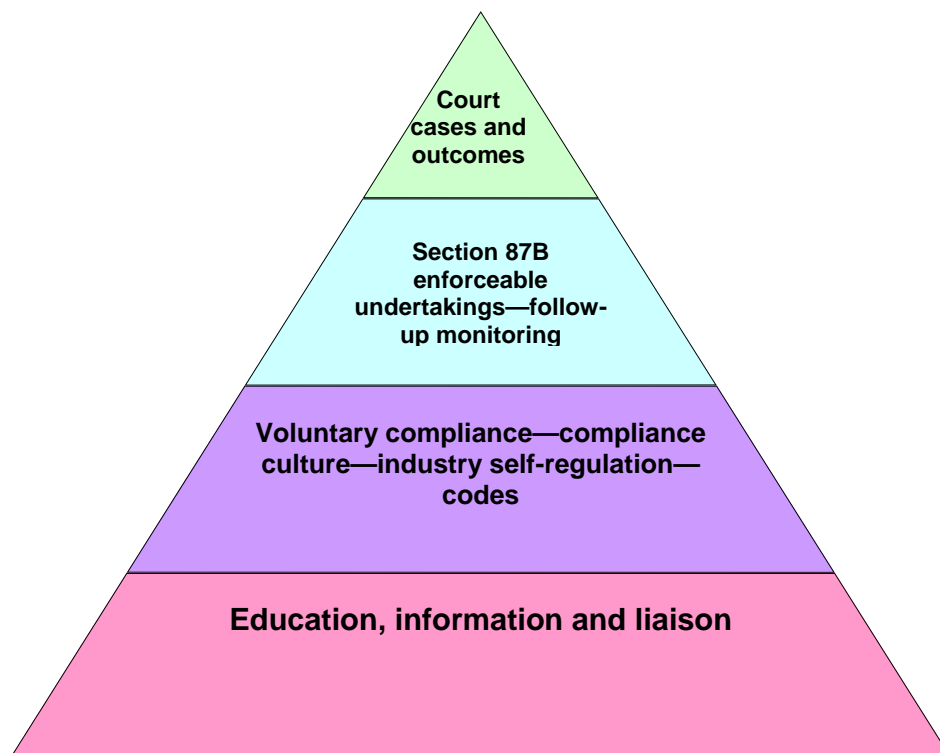
### 3.3 The ACCC's approach to enforcement and compliance activities relating to fair trading and consumer protection laws

Like all regulators, the ACCC faces the challenge of how to best ensure compliance with the law given the resources available to it.

In particular, to promote compliance in a modern economy, the ACCC believes it is critical that the regulator uses the most effective mix of litigation, enforceable undertakings, administrative settlements, persuasion and education, to promote compliance with the law in a broad range of areas.

Enforcement action, that is the investigation and resolution of breaches of the fair trading and consumer protection provisions of the Trade Practices Act, is the cornerstone of the ACCC's approach to compliance. However, education, outreach and liaison tasks are also fundamental to engendering a culture of compliance in Australian business.

It is not necessary, or desirable, for the ACCC to prosecute every matter in court to obtain desired outcomes. This point was made strongly by Ayres and Braithwaite who introduced the concept of an enforcement pyramid.<sup>28</sup> An approach to compliance consistent with the pyramid aims to maximise the benefits while minimising the costs of government regulation. The ACCC enforcement pyramid is set out below.



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<sup>28</sup> I Ayres and J Braithwaite, *Responsive regulation: transcending the deregulation debate*, Oxford University Press, Oxford, 1992.

The apex of the pyramid is court-based enforcement. This is the tool most suitable for use where there has been blatant disregard for the Trade Practices Act, where there has been severe consumer detriment, where the ACCC wants to send a clear signal to those being regulated or where the application of the law to particular facts requires clarification.

The next level in the pyramid is formal negotiated settlement of the ACCC's concerns. The 's. 87B' mechanism set out in the diagram refers to a section of the Trade Practices Act under which the ACCC may accept a written Court enforceable undertaking in connection with its enforcement of the Trade Practices Act. So, for example, if a business has breached the Trade Practices Act (or may have breached the Trade Practices Act) the ACCC may accept the business's undertaking to do certain things which address the ACCC's concerns. The ACCC also pursues compliance through less formal administrative settlements with businesses, following an ACCC initial investigation.

The ACCC also encourages the implementation of voluntary compliance programs and voluntary codes of conduct to achieve compliance. Codes of conduct can assist in compliance with the Trade Practices Act, but are not a substitute for the legislation. That is, even if a code of conduct is in place, the ACCC may nevertheless consider it appropriate to take enforcement action when the conduct in question also involves a breach of the Trade Practices Act.

At the base of the ACCC's enforcement pyramid, a number of ACCC resources are devoted to education, advice and persuasion, aimed at informing businesses and consumers about their rights and obligations. Recognising that many traders will wish to comply with the law, the ACCC's education and liaison programs deliver compliance with the Trade Practices Act. The bulk of the ACCC's contact with business occurs at this level.

To support all of these initiatives, the ACCC devotes considerable effort to gathering and analysing information from both public and non-public sources, as well as the many thousands of complaints made to the ACCC each year. By analysing the information available to it, the ACCC is in a better position to identify issues requiring a response from the regulator, and to identify the most efficient and effective course of action to take to ensure ongoing compliance with the Trade Practices Act.

### **3.4 The ACCC's combined competition and consumer protection function**

The welfare of Australian consumers is the ACCC's fundamental consideration when administering the fair trading, consumer protection and competition provisions of the Trade Practices Act.

As outlined above, consumer and competition laws are both mechanisms used to enhance competitive processes and promote the welfare of Australians. Anti-competitive practices generally restrict consumers' choice of goods and services, raise the price they pay for those goods and services, and innovation. Prohibitions on these practices in appropriate circumstances improve markets for consumers. Similarly, the fair trading and consumer protection provisions of the Trade Practices Act improve markets for consumers by enabling them to make informed decisions which enhance

their individual welfare and at the same time, drives competition between producers to supply goods and services that consumers want, at prices they are willing to pay. These provisions also promote a level playing field for competition as firms are prevented from obtaining an advantage over competitors by diverting consumers from purchasing competing products through misleading conduct.

Accordingly, there is a close nexus between these laws. This nexus means that agencies responsible for both consumer and competition laws enjoy certain synergies in enforcement and compliance roles, as well as offering logistical advantages.

The ACCC's dual role in relation to competition and consumer matters remains consistent with other jurisdictions where agencies are given similar enforcement and compliance roles over both areas of regulation.<sup>29</sup>

The ACCC's work in competition matters enhances its ability to administer the fair trading provisions of the Trade Practices Act. For example, understanding the competitive dynamic of a market can assist in the assessment of the likely detriment arising from misleading or deceptive conduct which serves to give the offending business an unfair trading advantage. A more complete view of the market can therefore assist the ACCC when deciding upon organisation priorities.

The administration of competition laws has a direct impact on consumers. Accordingly, it is important that the regulatory agency has a strong commitment to consumer welfare in its administration of competition laws, or market regulation. Giving the agency a role in the administration of fair trading and consumer protection laws is an effective and efficient way of maintaining the consumer focus in all the agency's activities.

The following provides a number of examples of applications of competition regulation that have direct implications for consumers.

### **3.4.1 Anti-competitive conduct—cartels and resale price maintenance**

The anti-competitive practices proscribed by Part IV of the Trade Practices Act serve to artificially inflate prices or limit the choices of Australian consumers. For example, where businesses agree to keep prices at a certain level, be it through bid rigging or price-fixing, consumers ultimately pay more for the products on sale than if there had been genuine competition in the market. This may occur directly through the price they pay for products or services, or indirectly through artificially inflated prices paid by business customers that are then passed on to consumers.

Another example arises in relation to resale price maintenance. The practice of resale price maintenance involves suppliers preventing retailers from discounting products below a price decided by the supplier. Such a practice results in denying consumers the potential benefits of a competitive market.

### **3.4.2 Regulating markets—telecommunications**

One area commonly considered to fall within the category of competition rather than fair trading laws that has a direct consumer policy element is the regulation of telecommunications pursuant to the Trade Practices Act. This work has very real

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<sup>29</sup> Jurisdictions where the relevant enforcement agency has a dual competition and consumer protection role include the United Kingdom, Canada, the United States of America, New Zealand, Korea, Poland, Papua New Guinea, Chinese Taipei, Fiji and Vietnam.

benefits for all Australian consumers. For example, in July 2006, the ACCC decided that the unconditional local loop (or ULLS), which allows Telstra's competitors access to the copper wire between an end-user customer and a telephone exchange, should remain a declared service. This means that telecommunications companies can access the ULLS to offer innovative services to consumers such as Asynchronous Digital Subscriber Line (ADSL) high speed broadband. This has provided consumers with more choice and also, due to the competition it faces, prompted Telstra to remove limits on its ADSL speeds, thus enhancing the quality of service it provides to its own customers.

### **3.4.3 Authorisations**

The Trade Practices Act recognises that there are circumstances where conduct that may be anti-competitive should nevertheless be approved, because it provides an overall public benefit. The authorisation process is one way businesses may apply to the ACCC to obtain immunity for such conduct, but only where they can demonstrate that the public benefit from the arrangements or conduct outweighs any public detriment.

In recent years the ACCC has considered various arrangements which it has found delivered particular consumer benefits:

- Medicines Australia Code of Conduct—the code governs the activities of pharmaceutical companies when they promote prescription medicines to doctors. In its decision, the ACCC imposed a condition of authorisation requiring a significantly greater level of disclosure and transparency. The ACCC's condition of authorisation is currently under appeal to the Australian Competition Tribunal
- in 2006, the ACCC re-authorised part of the Investment and Financial Services Association's (IFSA) Genetic Testing Policy. The policy involved agreement between life insurers not to require applicants for life insurance to undergo genetic tests
- the 2001, WA Funeral Directors decision involved an agreement between funeral directors for the provision of services to an Australian Pensioners League funeral fund at a fixed concessional rate

At a logistical level, ACCC staff are trained to investigate both fair trading and competition matters. This not only provides staff with a more complete view of the issues affecting Australian consumers, but also enables the ACCC to maintain a critical mass of resources. The ACCC is able to deploy resources to areas where they are most needed at any particular time. In fact, many staff work on both types of matters at the same time.

Further, there are significant cost savings associated with sharing supporting infrastructure between competition, consumer, and regulatory functions, including call centre, legal support, and general administrative support. In addition, liaison links with consumer organisations can be shared across functions.

### 3.5 The balance between the ACCC's fair trading and competition activities

From an operational perspective, the ACCC applies exactly the same criteria to determining whether to take enforcement action in relation to fair trading and consumer protection issues, and anti-competitive conduct matters. At the heart of the ACCC's priorities is whether the conduct in question involves significant consumer detriment. Thus, the ACCC's allocation of resources to matters at any given time is not based on an arbitrary 'split' between its functions, but is applied in accordance with its goal, the welfare of Australian consumers. There may be a perception that broad scope of the ACCC's functions has led to an imbalance in the ACCC's focus, in particular, tackling anti-competitive conduct matters over fair trading and consumer protection issues. This is not the case.

This perception may have arisen because areas such as cartel investigations have attracted a higher profile with the media in recent years, due largely to the anticipation of the introduction of criminal sanctions in this area, and growing global concern about the impacts of international cartels on consumers.<sup>30</sup> In fact, pursuing cartel behaviour is critical to consumer welfare, as outlined above and, in any event, cartels account for a small proportion of the ACCC's caseload. Currently, the ACCC has over 20 in-depth cartel investigations on hand, which accounts for about 21 per cent of the total number of in-depth investigations on hand.<sup>31</sup>

The majority of the ACCC's initial and in-depth investigations relate to fair trading and consumer protection matters. Approximately 87 per cent of investigations leading to enforcement action or s. 87B undertakings in 2005–06 were consumer matters.

The statistics in table 1 illustrate the ACCC's strong emphasis on tackling fair trading issues.

**Table 1: Comparison of enforcement outcomes**

Enforcement Outcomes	Part IV (Restrictive trade practices)		Part V (consumer protection and fair trading)		Part IV A/B (unconscionable conduct), & other		Total	
	First instituted	s. 87B	First instituted	s. 87B	First instituted	s. 87B	First instituted	s. 87B
2006–07*	10	12	9	31	3	2	22	45
<b>Total</b>	<b>22 (32 %)</b>		<b>40 (60 %)</b>		<b>5 (8 %)</b>		<b>67</b>	
2005–06	5	3	9	50	0	1	14	54

<sup>30</sup> S Hammond, Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice, noted that the perception of cartels as “Gentlemen’s agreements” that cause little, if any, harm’ was rapidly fading with the recognition that cartel activity ‘is a crime—no different than common fraud or theft’. S Hammond, *Caught in the Act: Inside an International Cartel*, speech to the Organisation for Economic Co-operation and Development Competition Committee Working Party No. 3, Paris, 18 October 2005. This speech is available on the Department of Justice website ([www.usdoj.gov](http://www.usdoj.gov)).

<sup>31</sup> Figures current as at week ended 13 April 2007.

Enforcement Outcomes	Part IV (Restrictive trade practices)		Part V (consumer protection and fair trading)		Part IV A/B (unconscionable conduct), & other		Total	
	First instituted	s. 87B	First instituted	s. 87B	First instituted	s. 87B	First instituted	s. 87B
<b>Total</b>	<b>8 (12 %)</b>		<b>59 (87 %)</b>		<b>1 (1 %)</b>		<b>68</b>	
2004–05	8	5	20	49	3	1	31	55
<b>Total</b>	<b>13(15 %)</b>		<b>69 (80 %)</b>		<b>4 (5 %)</b>		<b>86</b>	
2003–04	6	7	15	24	1	2	22	33
<b>Total</b>	<b>13 (24 %)</b>		<b>39 (70 %)</b>		<b>3 (6 %)</b>		<b>55</b>	
2002–03	15	6	23	24	1	0	39	30
<b>Total</b>	<b>21 (30 %)</b>		<b>47(68 %)</b>		<b>1(2 % )</b>		<b>69</b>	
* To 4 May 2007								

In 2005–06 consumer protection matters accounted for 86.8 per cent of matters where an enforcement outcome (litigation commenced or s. 87B undertaking) was obtained, whereas anti-competitive conduct matters, including cartels, only accounts for 11.8 per cent. For the year to date, 2006–07, consumer protection matters account for approximately 60 per cent of enforcement outcomes. It is also relevant to note that the proportion of consumer protection matters has increased over recent years, indicating that the emphasis on consumer matters is increasing, rather than decreasing or remaining stable.

The emphasis of consumer protection and fair trading matters in the ACCC's caseload is further illustrated by the proportion of in-depth and initial investigations attributable to consumer protection (Part V) matters. For example, for the year to date 2006–07, Part V and Part IVA/B investigations account for 60 per cent of initial investigations commenced. Similarly, the table below shows that Part V matters alone accounted for over 60 per cent of in-depth investigations commenced in 2005–06, and the figures for the first three quarters of 2006–07 indicate a similar trend.

**Table 2: Comparison of in-depth investigations commenced**

Year	Part IV in-depth investigations commenced	Part V in-depth investigations commenced	Part IV A/B in-depth investigations commenced	Other in-depth investigations commenced**	Total
2006–07*	28 (27 %)	63 (61 %)	7 (7 %)	5 (5 %)	103 (100 %)
2005–06	51 (32 %)	97 (61 %)	5 (3 %)	7 (4 %)	160 (100 %)
2004–05	72 (36 %)	115 (57.5 %)	10 (5 %)	3 (1.5 %)	200 (100 %)
* To 31 March 2007					
** These relate to other parts of the Trade Practices Act, including access regimes, price monitoring and AER matters.					



As part of its enforcement and compliance work, the ACCC also issues media releases to inform the public about their consumer rights and the results of enforcement action. The majority of these media releases relate to consumer protection and fair trading issues, as demonstrated in the table below.

**Table 3: Comparison of ACCC enforcement and compliance media releases**

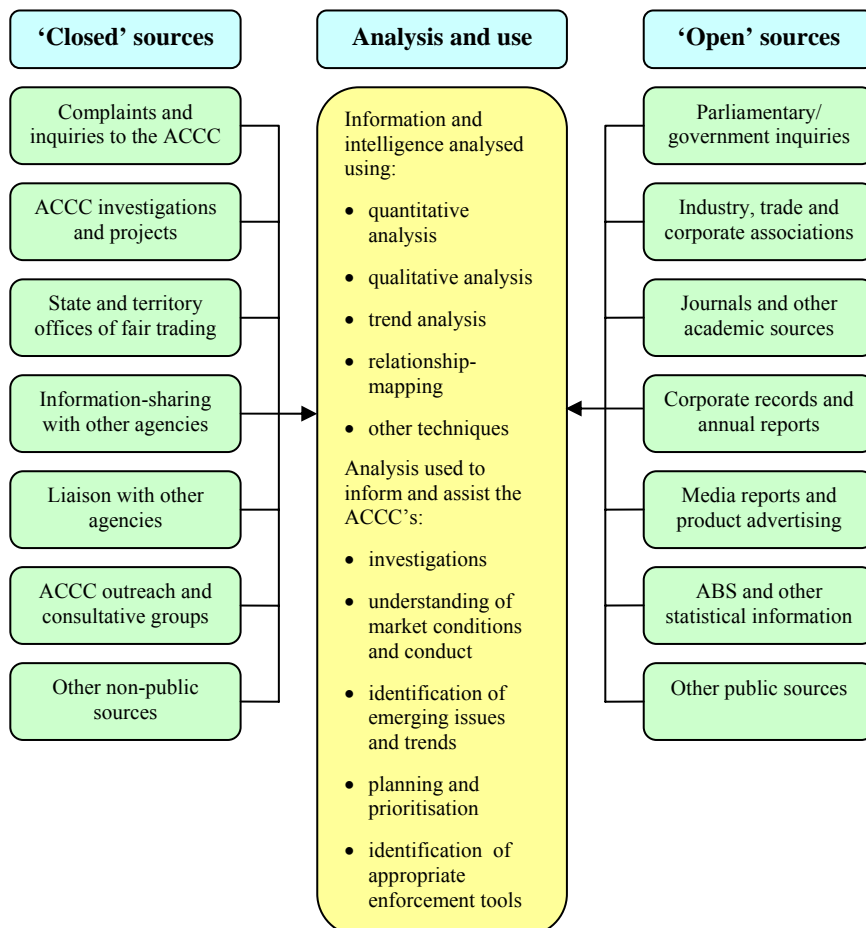
Year	Part IV media releases	Part V media releases	Part IV A/B & other media releases	Total enforcement and compliance media releases
2006–07*	23 (27 %)	58 (67 %)	5 (6 %)	86 (100 %)
2005–06	30 (25 %)	79 (67 %)	9 (8 %)	118 (100 %)

\* To 31 March 2007

### 3.6 The ACCC’s information gathering and analysis role

As the range of issues facing consumers is increasing, developing information and analysis capability to inform the ACCC’s compliance program is vital to effective enforcement. The ACCC’s enforcement and compliance activities are informed and guided by the ACCC’s strong emphasis on intelligence and information gathering and analysis. The ACCC endeavours to direct its resources to the areas of fair trading which will result in the best outcomes for Australian consumers. The ACCC continually seeks to improve its information and analysis gathering skills.

To this end, the ACCC proactively gathers and analyses information and intelligence from a wide range of sources, as set out in diagram 2 below.



### 3.6.1 Complaints and inquiries

The ACCC receives approximately 75 000 telephone and email contacts per annum. Many of these will not raise issues pursuant to the Trade Practices Act, or may be inquiries which can be dealt with on the spot. Other matters will be referred to ACCC officers for further investigation, or otherwise recorded in the ACCC's database for the purposes of monitoring issues that may be of relevance and trends arising in the marketplace. The majority of complaints and inquiries received are handled by the ACCC Infocentre in the first instance.<sup>32</sup>

Complaints and inquiries are an immensely valuable information resource to the ACCC. This provides the ACCC with information regarding alleged breaches of the Trade Practices Act which may be appropriate for the ACCC to pursue, the level of concern and potential detriment within the community, and emerging trends. The ACCC's Infocentre also provides a direct resource to the community by providing on-the-spot guidance/education in relation to consumer issues.

#### ***Volume of complaints and inquiries received***

Table 4 below highlights that the total number of contacts are increasing, and that over the past three years, the number of contacts serviced is relatively steady.

**Table 4: Total contacts**

	2001–02*	2002–03*	2003–04	2004–05	2005–06	2006–07 (YTD)^
<b>Telephone calls</b>						
<b>Received</b>	<b>87 078</b>	<b>65 349</b>	<b>54 773</b>	<b>57 308</b>	<b>57 601</b>	<b>51 308</b>
Served	75 108	62 205	52 239	53 417	52 644	43 809
Abandoned	7 948	2 910	2 462	3 710	4 453	6 003
Engaged	2 041	69	35	122	468	1 487
Voicemail	1 981	165	37	59	38	9
<b>Emails</b>						
<b>Number of emails received</b>	<b>12 333</b>	<b>8 348</b>	<b>8 922</b>	<b>10 923</b>	<b>17 718</b>	<b>46 850</b>
Answered by telephone response	5 675	4 937	4 093	3 564	4 589	4 852
Answered by return email	4 924	1 843	2 456	3 493	2 225	2 182
Sent elsewhere for response	431	398	488	621	560	669

<sup>32</sup> As well as the general Infocentre phone number (1300 302 502), the ACCC also ensures vulnerable and disadvantaged consumers can easily contact the ACCC. The Infocentre is accessible through a teletypewriter (TTY) service (1300 303 609) for people with hearing or speech difficulties; the Translating and Interpreting Service (131 450) for non-English speaking consumers; and the Indigenous Infoline (1300 303 143).

	2001–02*	2002–03*	2003–04	2004–05	2005–06	2006–07 (YTD)^
No response required (predominantly spam)	1 303	1 170	1 885	3 245	10 344	39 147
<b>Totals</b>						
All calls + all emails	99 411	73 697	63 695	68 231	75 319	98 158
<b>Calls served + emails served (answered or sent elsewhere)</b>	<b>86 138</b>	<b>69 383</b>	<b>59 276</b>	<b>61 095</b>	<b>60 018</b>	<b>51 512</b>
* Calls and emails relating to the introduction of the new tax system (GST) are the primary cause for the higher contact numbers in 2001-02 and—to a lesser extent—2002–03.						
^ 2006–07 (year-to-date) figures cover the period of 1 July 2006 to 30 April 2007.						

Not every call or email to the ACCC is logged into the ACCC’s complaints and inquiries database. For example, where a call or email is entirely unrelated to the ACCC’s responsibilities or obviously raises no Trade Practices Act concerns, the contact will usually not be entered into the ACCC database. Similarly, where a consumer’s inquiry can be immediately answered, this contact is usually not logged in the database.

Nevertheless, the ACCC records a significant proportion of complaints and inquiries, even where they may not warrant further investigation, because this better informs the ACCC of the state of the marketplace. In particular, this assists the ACCC in identifying whether issues are becoming systemic and causing significant consumer detriment, as it is difficult to make such judgements on the basis of an isolated complaint.

The ACCC also records complaints by category in order to better understand the types of issues and industries that are generating significant numbers of complaints.

The table below highlights the composition of complaints and inquiries entered into the ACCC database over the last five financial years.

**Table 5: composition of complaints and inquiries entered into the ACCC database**

	2001–02	2002–03	2003–04*	2004–05*	2005–06*
Calls and emails served (from table 4)	86 138	69 383	59 276	61 095	60 018
<b>Total number of complaints and inquiries entered into ACCC database***</b>	<b>46 080</b>	<b>53 528</b>	<b>48 706</b>	<b>49 090</b>	<b>47 112</b>
<b>Possible contraventions of the fair trading provisions of the Trade Practices Act (Top 8 Categories only)</b>					
Misleading or deceptive conduct	11 106	9 601	11 605	11 735	13 193
Retail warranties	2 805	4 848	5 450	4 713	4 741
Price misrepresentation	1 881	1 657	1 911	1 348	1 188
Accepting payment—non-supply	616	461	670	875	854

	2001–02	2002–03	2003–04*	2004–05*	2005–06*
Misrepresentation of performance	808	525	1 015	939	761
Misrepresentation of grade, quality	n/a**	667	1 055	583	613
Harassment and coercion	n/a**	n/a**	n/a**	399	588
Manufacturers and importers warranties	n/a**	n/a**	n/a**	283	447
<p>* From 2004–05 onwards, for complaints alleging more than one Trade Practices Act contravention, each contravention was counted separately. Prior to this date, only the primary contravention was counted.</p> <p>** N/A indicates that the category was not one of the top categories recorded in that financial period.</p> <p>*** Note that total number of complaints and inquiries includes multiple complaints about the same conduct</p>					

The top ten industries for complaints and inquiries for financial years 2001–02 through to 2005–06 are listed below in table 6.

**Table 6: Top ten industries for matters recorded in the ACCC complaints and inquiries database**

	2001–02	2002–03	2003–04	2004–05	2005–06	Total
<i>Total number of complaints and inquiries entered into ACCC database</i>	46 080	53 528	48 706	49 090	47 112	244 516
<b>Industry classification</b>						
Telecommunication services	6 798	4 247	5 125	5 592	4 391	<b>26 153</b>
Business services generally	2 123	2 536	4 664	3 836	4 590	<b>17 749</b>
Domestic appliance retailing	3 065	3 117	3 285	3 688	3 617	<b>16 772</b>
Retailing generally	1 412	2 055	2 078	1 835	1 929	<b>9 309</b>
Automotive fuel retailing	1 964	1 836	1 169	1 279	1 835	<b>8 083</b>
Car retailing	931	1 008	1 158	1 236	1 404	<b>5 737</b>
Real estate agents	1 155	962	1 556	889	748	<b>5 310</b>
Services to finance and investment	905	902	990	902	819	<b>4 518</b>
Banks	1 102	966	610	549	767	<b>3 994</b>
General insurance	1 342	825	871	556	351	<b>3 945</b>

In late 2006 the ACCC adopted the revised and more detailed ANZSIC codes for industry classification.<sup>33</sup> This will enable the ACCC to monitor particular issues in a more targeted manner in the future.

<sup>33</sup> Revised Australian and New Zealand Standard Industrial Classification (ANZSIC) codes were released by the Australian Bureau of Statistics in early 2006.

The table below sets out the top ten industries for complaints and inquiries logged in the first three months of 2007.

**Table 7: Top ten industry complaints—1 January 2007 to 31 March 2007**

<b>Industry classification (2006 ANZSIC codes)</b>	
Total number of complaints and inquiries entered into ACCC database	12 931
Fuel retailing*	717
Lottery operation^	494
Electrical, electronic and gas appliance retailing	403
Other auxiliary finance and investment	384
Non-store retailing	347
internet service providers and web search portals	325
Wired telecommunications network operation	303
Other telecommunications network operation	248
Computer and computer peripheral retailing	238
Car retailing	207
* primarily relating to high or allegedly fixed prices	
^ primarily relating to potential scam lotteries or lottery systems	

It is notable from the above tables that even the largest category listed, telecommunications services, only accounts for approximately 9 per cent of complaints lodged. This is indicative of the diverse range of industries where the ACCC receives complaints and the importance of maintaining a compliance program covering a broad range of areas.

***Complaints and inquiries—specific areas***

The ACCC also closely monitors areas that may not account for the largest categories of complaints, but have particular relevance to society as a topical or emerging issue. For example, the ACCC monitors complaints in areas such as vulnerable and disadvantaged consumers, e-commerce, and referrals to other agencies.

***Disadvantaged or vulnerable consumers***

As part of the ACCC’s campaign to protect disadvantaged or vulnerable consumers, complaints and inquiries from or on behalf of disadvantaged or vulnerable consumers are closely monitored by the ACCC. Where a consumer’s status as a disadvantaged or vulnerable consumer is readily apparent, this is recorded in the ACCC database. The ACCC’s campaign commenced in mid-2003 and continues today. Over this time, the number of complaints has increased considerably. For example, while 93 complaints and enquiries were received during the six-month period between December 2003—

May 2004, 264 complaints and enquiries were received within a comparable period from September 2006 to February 2007. This growth is due in part to the ACCC's promotion of the campaign and other attempts to investigate the issues affecting disadvantaged and vulnerable consumers. The largest category of complaints appears to relate to the elderly. Caution must be taken with these figures, as, in the ACCC's experience, disadvantaged or vulnerable consumers are less willing or able to contact a national agency such as the ACCC, or may not identify themselves as falling into any of these categories, so the data may under-estimate the extent of fair trading issues amongst vulnerable or disadvantaged consumers.

Reflecting the broader category of consumers, misleading or deceptive conduct was the primary concern for disadvantaged or vulnerable consumers contacting the ACCC. However, complaints from, or on behalf of, disadvantaged and vulnerable consumers are more likely to concern scams, unconscionable conduct, or harassment and coercion, than complaints from other consumers.

***E-commerce***

**Table 8: Complaints and inquiries about an online trader or e-commerce**

Year	No. of complaints
20010–2	2327
20020–3	2926
20030–4	3204
20040–5	3479
20050–6	2883

The table indicates that while complaints relating to online traders or e-commerce appeared to increase steadily from 2001–02 to 2004–05, by 2005–06, complaint numbers appeared to be falling to some degree. Nevertheless, the ACCC considers that caution should be used in relying on these figures to provide a full picture of the level of concern about e-commerce issues.

***Consumers referred to other organisations by the ACCC***

Where the ACCC is not best placed to assist a consumer, it will refer them to a more appropriate government agency, industry ombudsman or dispute resolution scheme. In this respect, the ACCC Infocentre acts as a 'clearing house' for consumer complaints and inquiries from throughout Australia. A large proportion of the contacts not entered into the ACCC database are referred to other agencies by ACCC Infocentre staff. Of those complaints and inquiries that are entered into the ACCC database, statistics regarding referrals to other agencies are set out in the table below.

**Table 9: Referrals to other agencies recorded in the ACCC complaints and inquiries database**

	2004–05	2005–06
<i>Total number of complaints and inquiries entered into ACCC database</i>	49 090	47 112
Referrals to other agencies		
Australian Securities and Investments Commission	1182	998
Office of Fair Trading (state/territory)	6978	5979
Industry Ombudsman	1212	1082
Commonwealth Ombudsman	113	96
Other government agency	1545	1657
Non-government agency	595	480
Other	651	824

Clearly, the highest proportion of complaints referred are those directed to the relevant state or territory fair trading agency.

### 3.6.2 Other information sources

The ACCC recognises that to base its priorities solely on a large number of complaints in relation to a particular issue may not achieve the desired result. There are a number of reasons why consumers may not contact an agency such as the ACCC with their fair trading concerns. Consumers may:

- be unsure about which agency to contact
- be unaware that a potential breach of fair trading laws may have occurred
- consider that the detriment suffered is not significant enough to warrant a complaint, or
- be embarrassed or otherwise reluctant to raise their concerns (e.g. in relation to victims of scams, harassment or coercion; or with complaints related to certain goods or services).

Also, the number and type of complaints can be significantly influenced by the issue of the day, including media exposure of the ACCC's own activities.

For these reasons, the ACCC believes that usage of complaint data on its own to indicate the level of non-compliance in a particular area, or to indicate changes in behaviour over time are not particularly reliable if looked at in isolation. A large number of complaints in a particular area does not mean the ACCC should focus more of its enforcement activities in that area. Some areas may indicate lower numbers of complaints, but more significant consumer detriment.

Given the reliability issues associated with complaint data, the ACCC is continually developing its other sources of information in order to identify compliance issues that may require a regulatory response.

The ACCC conducts national product safety surveys to monitor compliance with mandatory product safety and information standards and bans. Retail outlets in capital cities and regional centres are monitored, as well as trading on popular auction websites and other retail websites. Where appropriate, the ACCC coordinates its surveys with state and territory fair trading agencies to ensure the widest possible coverage.

Continuous work has also been done over the past few years to develop the ACCC's outreach and liaison network. Liaison initiatives are targeted at consumer and business organisations, other domestic regulators, particularly those with similar roles to the ACCC such as state and territory offices of fair trading, the Australian Securities and Investments Commission (ASIC) and international bodies.

The ACCC's intelligence and analysis initiatives also draw on information from authorisation and notification decisions, investigations into anti-competitive conduct and its industry-specific regulatory roles, except where prohibited because of confidentiality or statutory limitations.

To support its enforcement and compliance initiatives, the ACCC also utilises the wide range of relevant publicly available material, as set out in diagram 1 above. Publicly available information regarding economic, social, technological, legal and other matters provides the ACCC with a more complete picture of an alleged breach of the fair trading laws and its potential affect on consumers.

The ACCC is also a partner in the national AUZSHARE notification system and database, along with several state and territory offices of fair trading. This system enables a greater degree of information sharing regarding complaints and coordination or investigations amongst participants.

### **3.6.3 How the ACCC analyses and applies information**

Identifying compliance issues that require a regulatory response involves not only developing effective methods of collecting information, but also developing procedures to collate and analyse information in a timely manner.

In 2006, the ACCC further refined its operational and strategic intelligence activities to analyse ACCC complaint data in conjunction with complaints data from other agencies, feedback from relevant stakeholders obtained through liaison activities, and international investigation, compliance, enforcement and litigation trends. By drawing together all these information strands and analysing them, the ACCC seeks to hone its selection of issues further to achieve effective outcomes to meet the needs of consumers in changing market conditions, prioritise ongoing investigations, and determine the most effective mechanisms to achieve compliance.

In addition, the ACCC's Enforcement Committee monitors the 'state of play' of complaints and inquiries data on a monthly basis.



## **3.7 ACCC investigations and enforcement activity**

### **3.7.1 Enforcement priorities**

The ACCC investigates a large number of potential breaches of the Trade Practices Act each year.

In 2005–06, the ACCC commenced well over 4,000 initial investigations. Well over 50 per cent of these investigations related to Part V matters.

A large proportion of these matters are discontinued on the basis that further investigation has revealed that no breach of the Trade Practices Act has occurred. A small number of these initial investigations proceed to the more serious in-depth investigation stage. In 2005–06, the ACCC commenced 160 in-depth investigations, with 97 (or 61 per cent) of these relating to the fair trading provisions of the Trade Practices Act.

The ACCC's choice of action is informed by whether the matter involves conduct that:

- constitutes an apparent blatant disregard of the law
- is by a person, business or industry with a history of previous contraventions of competition or consumer law, including overseas contraventions
- causes significant detriment to consumers and/or businesses, has a significant number of complaints or has a disproportionate effect on disadvantaged groups
- is of major public interest or concern
- is 'industry-wide' or is likely to become widespread if the ACCC does not intervene, and/or
- has the potential for action to have a worthwhile educative or deterrent effect and achieve a likely outcome that would justify the use of the resources.

The ACCC, through the Enforcement Committee, oversees its enforcement program to ensure ongoing prioritisation to achieve outcomes in priority matters and the most effective use of its resources. This ongoing approach to prioritisation is increasingly important in the modern economy where new issues emerge constantly.

To achieve this, the ACCC has enhanced its investigative capacity through the implementation of a sophisticated matters management system that enables senior management to perform a continuous stock-take of existing investigations and cases, to ensure that investigations are progressing in a timely manner, and that the overall 'mix' of matters is meeting the organisation's aim to maximise compliance with the Trade Practices Act.

### **3.7.2 Court-based enforcement**

On average, the ACCC has approximately 35 litigation matters on hand at any given time, and commences, on average, five proceedings each quarter.

Although only a small percentage of ACCC investigations result in litigation, court based enforcement is a critical element of vigorous enforcement of the legislation.

There are matters that the ACCC believes can best be dealt with by litigation, particularly matters involving widespread consumer detriment, or blatant contraventions and a lack of cooperation with the ACCC to satisfactorily resolve an issue.

Litigation provides a strong deterrence to the offender and to others who may be engaged in similar conduct. It is the most effective way to clarify how the law operates in a particular area and the consequences if the law is breached.

Criminal proceedings for breaches of fair trading laws are sometimes taken by the ACCC where appropriate. Although criminal proceedings are more resource intensive than other court based enforcement, they are the only option to adequately punish particularly offensive and detrimental breaches of the Trade Practices Act. For example, successful criminal prosecutions result in a criminal record for the offending business, while fines are only available through criminal prosecutions at the current time.

The following table sets out the criminal actions that the ACCC has taken since 2001.

**Table 10: Completed ACCC criminal actions from 2001**

(actions grouped together are related)

<i>ACCC v Dimmays Stores Pty Ltd ACN 073 979 781</i> [2001] FCA 299
<i>ACCC v Hartwich</i> [2002] FCA 273
<i>ACCC v Commercial and General Publications Pty Ltd</i> [2002] FCA 900
<i>ACCC v Commercial and General Publications Pty Ltd (No 2)</i> [2002] FCA 1349
<i>ACCC v Allans Music Group Pty Ltd</i> [2002] FCA 1552
<i>ACCC v GIA Pty Ltd</i> [2002] FCA 1298
<i>ACCC v Murray</i> [2002] FCA 1252
<i>ACCC v Murray (No. 2)</i> [2003] FCA 47
<i>ACCC v Murray (No 3)</i> [2003] FCA 295
<i>ACCC v Will Writers Guild Pty Ltd</i> [2003] FCA 1231
<i>ACCC v Chubb Security Australia Pty Limited</i> [2004] FCA 1750
<i>ACCC v Skippy Australia Pty Ltd</i> [2006] FCA 1343

### 3.7.3 Use of court enforceable undertakings

As indicated in table 1, Comparison of Enforcement Outcomes, the composition of the ACCC's litigation activities has shifted in recent years with a greater proportion of court enforceable undertakings being accepted.

There are a number of reasons for the increased utilisation of court enforceable undertakings by the ACCC.

First, court-based enforcement can be an extremely resource intensive option. While the ACCC will not hesitate to take court action where appropriate enforceable undertakings are often a much more cost-effective means of achieving the same, if not better, result for consumers.

Second, the court process can lead to significant delays in achieving outcomes. In some cases, delays can be such that notwithstanding that the ACCC is successful in the proceedings it does not achieve the outcomes it sought. For example, in a number of matters the ACCC has been unable to obtain corrective advertising orders because the courts found there was no utility in ordering corrective advertising given the amount of time that had passed.<sup>34</sup> Enforceable undertakings can be negotiated and implemented relatively quickly.

Thirdly, following the *Medibank Private* case<sup>35</sup>, the ACCC cannot obtain refunds for consumers through a civil court-based outcome<sup>36</sup> unless those consumers are listed as part of an ACCC representative action. Accordingly, court enforceable undertakings provide a mechanism to obtain compensation for consumers who have suffered loss due to breaches of the fair trading and consumer protection provisions of the Trade Practices Act, particularly in matters involving large numbers of consumers where it is impractical to gain written consent from each in order to bring proceedings on their behalf. As the ACCC considers that consumer redress is a critical component of the administration of consumer laws, the ability to obtain court enforceable undertakings is a vital aspect of its enforcement program. Of the 50 enforceable undertakings accepted during 2005–06 in fair trading matters, 13 involved outcomes, primarily refunds, that would not have been achieved through court orders.<sup>37</sup>

Finally, other more innovative outcomes may be achievable through enforceable undertakings such as funding for consumer education initiatives or compliance training programs for directors, employees, businesses and corporations. For example, in relation to the use of tobacco ‘light’ and ‘mild’ descriptors, the ACCC accepted court enforceable undertakings from three companies which resulted in those companies removing ‘light’, ‘mild’ and related descriptors from their packaging, and contributing \$9M in funding for a consumer education campaign to raise consumer awareness that low yield cigarettes are not necessarily a healthier option.

### **3.7.4 Enforcement focus—covering a diverse range of issues**

The ACCC and its predecessor the TPC developed its compliance strategy over a number of years. In the early 1980s the TPC identified that its role, as national agency,

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<sup>34</sup> For example, see *ACCC v Woolworths Limited* [2002].

<sup>35</sup> *Medibank Private Ltd v Cassidy* [2002] FCAFC 290; (2002) 124 FCR 40; 20 ACLC 1722; ATPR 41-895.

<sup>36</sup> Unless it participates in a class action.

<sup>37</sup> For example, in one matter involving promotion of e-commerce software, the ACCC obtained refunds of \$679 478.88 to consumers (Storesonline). In that case, although the court had the power to prevent the trader transferring funds outside Australia, a refund of these amounts (with interest) had to occur pursuant to a s. 87B. This meant a refund of 94.4 cents in the dollar for each applicant or an average refund per consumer of over \$3800.

was to focus on national problems to complement the more detailed local dispute resolution activities of the state and territory fair trading agencies.<sup>38</sup>

Since this time, the ACCC has continued to develop its program, recognising the importance of responding to emerging issues involving significant consumer detriment, and to engage a mix of enforcement, information and education in order to promote compliance.

### ***New and emerging areas of commerce***

Cases brought by the ACCC and its predecessor have applied the Trade Practices Act to all facets of Australian commerce and have clarified and confirmed its operation in new and emerging areas of commerce.

For example, in response to the introduction of competition in the communications industry and rapid uptake of new products including mobile phones and internet services from the mid 1990s onwards, the ACCC has had a particular focus on this industry. Noting the rising number of complaints and enquiries in this area, during the 1990s the ACCC developed information campaigns warning suppliers of their obligations to comply with the Trade Practices Act and consumers of their need to assess such advertising carefully. Following this, the ACCC (and its predecessor, the TPC) took a number of enforcement actions in the area where traders did not comply with the law. Examples of enforcement actions resolved through court proceedings or enforceable undertakings include:

- Telstra: conduct towards former One.Tel customers
- Total Communications: '\$0' advertising of mobile phones
- Virgin Mobile: stating full cash price
- Dodo internet: statements regarding cost of internet services
- Domain Names Australia: conduct relating to the registration of internet domain names.

This work continues today, as demonstrated by the ACCC's recent compliance work in relation to the advertising of broadband services, in particular the emergence of the practice of traders using terms such as 'up to' and 'maximum' to advertise ADSL2+ broadband services. The ACCC's approach has been to use education and information as an initial strategy to persuade traders to ensure that their advertising complies with the law through writing direct to traders, incorporating the issue into speeches to highlight the matter to the public, and releasing an Information Paper to assist internet service providers to comply with the Trade Practices Act. The ACCC took this approach because it maximises the chance of quick voluntary compliance. However, the ACCC continues to monitor this area and will take enforcement action if traders do not comply with the law.

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<sup>38</sup> Trade Practices Commission, *Public Discussion Paper on Future Directions of TPC Consumer Protection Work*, May 1983, pp. 1–2.

Another area where the ACCC has responded to emerging issues relates to the issue of fine print advertising. The ACCC has taken a number of enforcement actions in order to clarify the operation of the law in this area. For example, the *Target* case<sup>39</sup> which resulted in the Federal Court clarifying that the use of fine print exclusions may not correct the overall impression of representations made in an advertisement and, accordingly, consumers may be misled by such practices.

A further example arises in the health industry. Given changes to private health insurance legislation and the introduction of competition policy reform during the 1990s, it was identified that the health sector was likely to face increasing exposure to competition and fair trading issues. To assist traders to comply with the law, the ACCC published an educative guide for the industry and engaged in extensive direct contact with the industry. Workshops were held in most capital cities.

A series of enforcement actions were also taken to reinforce the ACCC's educative program, including:

- MBF: Undertakings accepted in relation to alleged misleading representations regarding the need to transfer to 100 per cent coverage due to legislative changes.
- Medibank Private: Undertakings accepted in relation to alleged misleading representations regarding waiting periods.
- NRMA: Court orders made by consent in relation to alleged misleading representations regarding fine print disclaimers in advertising of health insurance products.

Through cases brought by the ACCC, the courts have clarified and confirmed the operation of the Trade Practices Act in new and emerging areas of commerce, particularly in relation to the jurisdictional reach of the Trade Practices Act when dealing with global traders located outside Australia. Examples include:

- in the matter *ACCC v Chen*<sup>40</sup>, the Federal Court granted an injunction under the Trade Practices Act against a person operating an internet site from the USA
- in the *Worldplay Services*<sup>41</sup> case, the Federal court confirmed that the pyramid selling provisions applied notwithstanding that the elements of the scheme were fragmented between a number of jurisdictions.

Nevertheless, there are a number of areas where the ACCC has difficulties taking action in relation to global matters. Depending on the jurisdiction where the trader is located, difficulties can arise in identifying the trader, particularly where overseas internet service providers are used. Courts may not always be willing to make court orders unless they can be effectively served and enforced overseas. The ACCC will sometimes be restricted to taking what action it can to disrupt the trader's activities in

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<sup>39</sup> *ACCC v Target Australia Pty Ltd* (2001) ATPR 41-840.

<sup>40</sup> *ACCC v Chen* [2003] FCA 897; (2003) 132 FCR 309; 201 ALR 40; ATPR 41-948.

<sup>41</sup> *ACCC v Worldplay Services Pty Ltd* [2004] FCA 1138; (2004) 210 ALR 562; ATPR 42-020.

Australia, and must rely on its international links (see 3.10.4) in order to seek further remedies for consumers.

### ***Vulnerable or disadvantaged consumers***

In the area of vulnerable or disadvantaged consumers, the ACCC has taken proceedings in a number of matters.

One matter involved proceedings against Mr Ramon Keshow for engaging in unconscionable conduct and misleading and deceptive conduct in a number of indigenous communities in the Northern Territory. In that case, a number of indigenous women paid substantial sums of money for maths tutorials and received little or no goods in return. The court banned Mr Keshow from entering Northern Territory indigenous communities to conduct his business, and ordered compensation to eight indigenous women.

Other matters pursued include *Lux* (in relation to sale of vacuum cleaners to intellectually impaired persons) in which the Federal Court found that unconscionable conduct had occurred, *Fox Symes* (alleged unconscionable conduct and misleading and deceptive conduct in relation to debt administration) in which a settlement was reached between the ACCC and the parties, noting that Fox Symes did not admit any breach of the TPA, and *Radio Rentals*<sup>42</sup> (alleged unconscionable conduct in relation to sales to an intellectually disabled man), although in that case the court found that the company had not engaged in unconscionable conduct.

In the matter of *NuEra (In liquidation) Paul Rana and Ors*, the ACCC took action in the Federal Court in relation to alleged unconscionable conduct pursuant to s. 51AB of the Trade Practices Act. The alleged conduct involved representations made about cancer cures to cancer victims. In May 2007 the court found that the conduct constituted unconscionable conduct and exercised its discretion to grant default judgement against the respondents. Declaratory and injunctive orders were obtained.

### ***Environmental claims***

Environmental claims is another area where the ACCC has reacted to a new type of issue arising in the market. With concerns for the environment growing, consumers are choosing to purchase more environmentally friendly products. At the same time, this provides scope for misleading and deceptive conduct, as traders have an incentive to make these types of claims in order to sell their products at a premium price. The damage associated with such conduct is not just the higher price that consumers are paying, but that traders have less incentive to develop environmentally friendly products, which ultimately has detrimental effects on society as a whole.

In a recent matter concerning labelling of energy efficiency ratings on air conditioners, LG provided court enforceable undertakings to compensate purchasers of affected models for the potential increase in operating costs resulting from purchasing air conditioners with a higher energy consumption than rated. LG made available up to \$3.1 million in rebates to compensate purchasers of affected models for the potential increase in operating costs. LG also undertook to implement a new testing procedure.

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<sup>42</sup> Radio Rentals Limited operated Radio Rental Stores in South Australia only.

Another court enforceable undertaking was obtained from Hagemeyer Appliances in relation to claims that particular air conditioning units were ‘environmentally friendly’ when this was not correct.

### **Traditional areas of commerce**

While the ACCC recognises the importance of tailoring its enforcement program to incorporate new areas of concern, it also keeps a watchful stance in relation to traditional areas of activity. In fact, in traditional areas, where traders should be well aware of the rules, there is a strong argument for taking enforcement action.

In the real estate industry, the ACCC has taken a number of matters including *Gary Peer & Associates*<sup>43</sup>—a matter involving misleading and deceptive representations regarding the price of a property, and *Henry Kaye and National Investment Institute Pty Ltd*<sup>44</sup>—a ‘get rich quick’ property investment scheme.

The ACCC has also taken a number of cases recently in relation to two-price advertising. In 2006–07, for instance, the ACCC instituted proceedings in two matters relating to jewellery businesses advertising ‘Was/Now’ price comparisons, which the ACCC alleges are false and misleading.

### **Product safety**

Product safety continues to be a very important element of the ACCC’s enforcement program. The ACCC acts promptly against suppliers where consumers are placed at risk through non-compliance with mandatory safety standards. National product safety surveys covering a wide range of goods are conducted throughout the year to check for compliance with mandatory product safety and information standards. In addition to retail outlets, internet based trading on popular auction websites and other retail sites are also monitored. Depending on the circumstances, enforcement outcomes may range from administrative resolution to court enforceable undertakings, civil proceedings or criminal prosecutions.

A specialist nursery retailer, *Skippy Australia Pty Ltd*<sup>45</sup>, was fined \$860 000 by the Federal Court in October 2006 for supplying dangerous baby walkers and cots which did not comply with the mandatory safety standards. Skippy sold its products both online and from its warehouse. Court enforceable undertakings have also recently been obtained from companies supplying a variety of non-compliant infant’s or children’s products including swimming arm bands, cots, baby walkers and bunk beds.

In recent Federal Court proceedings, *Beaver Sales Pty Ltd*<sup>46</sup> was ordered to stop supplying general purpose vehicle jacks that do not comply with the prescribed consumer product safety standard. The ACCC had alleged that Beaver had supplied Black Rat Power Lifter high lift jacks that could not lift their nominated weight and falsely represented that the jacks complied with the mandatory safety requirements. The court also ordered Beaver Sales to conduct a consumer recall, pay legal costs and establish a trade practices compliance program.

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<sup>43</sup> *ACCC v Gary Peer & Associates P/L* [2005] FCA 404.

<sup>44</sup> *ACCC v Henry Kaye* [2004] FCA 1363.

<sup>45</sup> *ACCC v Skippy Australia Pty Ltd* [2006] FCA 1343.

<sup>46</sup> *ACCC v Beaver Sales Pty Limited* NSD1349/2006.

### 3.7.5 Other administrative settlements

If a matter can be corrected quickly and effectively, reflecting the fact that there is a compliance culture within an organisation, more formal enforcement action may not be necessary.

The ACCC will often negotiate a settlement with a business that does not involve court enforceable undertakings. These administrative settlements are usually not made public. As with all enforcement initiatives, the ACCC will consider an administrative settlement if this would provide the best outcome for Australian consumers in all the circumstances.

An administrative settlement can be preferable because it produces speedier outcomes, is much cheaper for both the business and the taxpayer, and is often better at providing restitution for the consumers concerned. The ACCC would be very unlikely to negotiate an administrative settlement if the business has a history of fair trading breaches. In these situations, or when the ACCC's other enforcement priorities are present, the ACCC is likely to pursue court based enforcement action.

## 3.8 ACCC information and education activities

The ACCC devotes considerable effort to consumer information, education and liaison initiatives. Section 28 of the Trade Practices Act provides for the ACCC to undertake, *inter alia*, the following functions:

- (a) to make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the Commission under this Act;
- [...]
- (c) to conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;
- (d) to make available to the public general information in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws;
- (e) to make known for the guidance of consumers the rights and obligations of persons under provisions of laws in force in Australia that are designed to protect the interests of consumers.

Education has become an increasingly important tool in promoting compliance since the introduction of the Trade Practices Act, where it was a relatively minor focus. In 2005–06 the ACCC issued 315 media releases, of which 86 related to specific enforcement activities, 19 to product safety issues, and 36 to educational activities. It undertook 162 speaking engagements and produced 37 consumer and small business articles for external publications.

The ACCC believes strongly that informed consumers are empowered consumers. Where they are aware of their basic legal rights they are much more able to protect their own interests and are more likely to complain when they believe their rights have been breached. Educating traders is the other side of the coin. It reduces inadvertent breaches of consumer protection laws and means retailers will be more



aware of their obligations to customers. It also raises awareness of the serious potential consequences that may flow from breaching those laws.

On both the customer and trader side, increased awareness is likely to result in greater compliance, meaning less unnecessary follow-up by regulators and, more importantly, greater likelihood of consumers' rights being observed. Other benefits may include less unnecessary disruption for businesses and better results for consumers.

The ACCC's approach to education has changed with the demands of the community. Greater emphasis is placed on being responsive to developing issues and working jointly with other agencies and organisations in the dissemination of educational materials. Examples of this include the ACCC's educational work on scams, carried out in conjunction with the Australasian Consumer Fraud Taskforce, and its approach to the development of a joint guideline with ASIC in relation to debt collection.

It is not just the volume of media releases or publications issued that is important, but how education and information tools are being used to combat serious fair trading issues.

In developing educational material, the ACCC looks at a range of factors including:

- Who should the material be targeted towards to achieve the best result—consumers or business or both?
- How should material be presented—booklets, newsletters, media releases, websites?
- When should material be released in order to achieve the best outcome—for example, is it better to provide information about refunds and warranties just before the Christmas or mid-year sales so consumers have their statutory rights in mind when shopping; or is it better to launch these materials just after the sales at a time when consumers are more likely to be experiencing problems with faulty goods?
- How should material be distributed—ACCC regional offices, businesses, consumer organisations, and state and territory offices of fair trading?

Also, the ACCC does not take an 'either/or' approach to enforcement and education as compliance tools. In many cases both tools are used in a complimentary manner to promote industry-wide compliance. For example, in 2005–06 the ACCC undertook extensive consultation with, and promotion of resources for, the jewellery industry. Jewellers were involved in the development of a guideline for jewellery advertising and an industry checklist. Materials were also produced for consumers interested in buying jewellery. In late 2006 the ACCC instituted proceedings against two major jewellers alleging false or misleading representations relating to the price of jewellery, in particular, the use of 'was/now' pricing comparisons. The ACCC did not hesitate to take action against conduct that the industry had been put on notice about.

### **3.8.1 The ACCC's use of the media**

In 2005–06 the ACCC issued 315 media releases and produced 37 consumer and small business articles for external publications.

The ACCC believes there is a strong public interest in disseminating information about its activities. Publicity plays an important role in achieving compliance with the law and is an essential element of the ACCC's educative program.

It is particularly important to provide information to the public regarding the institution of proceedings, the findings of the courts, and enforceable undertakings obtained by the ACCC. This demonstrates clearly to traders the risks associated with breaching the Trade Practices Act and alerts consumers to the types of issues they should be aware of when participating in markets.

Media releases are also used to make traders and consumers aware of the release of publications, and important information from speeches and announcements. Sixty-three per cent of media releases relating to the release of an ACCC publication involved Part V matters in 2005–06.

The ACCC takes a measured approach in relation to its use of media. When communicating information the ACCC deals with parties in a fair, transparent and ethical manner, to ensure that there is no unnecessary damage to reputation.

The ACCC will issue a news release when it decides to institute proceedings in relation to an alleged contravention that accurately describes the allegations and does not imply that the allegations are more than allegations. In practice, the ACCC rarely makes public comments regarding an investigation because of the potential detrimental impact on the reputation of the parties.

The ACCC also capitalises on the educative effect of enforcement outcomes through 'follow-up' media articles and consumer education materials related to the relevant industry, product or practice in question.

### **3.8.2 Publications**

Printed publications are an important means for providing information to consumers and small businesses. In 2005–06 the ACCC produced 83 new publications covering the full range of the ACCC's responsibilities. Overall, the ACCC distributed more than one million copies of ACCC publications to Australian consumers and businesses in 2005–06. Of this number, 221 446 publications were distributed by the Infocentre in response to a complaint or inquiry.

Publications related to product safety are the most demanded ACCC publication. Apart from these, other popular ACCC publications relate to warranties and refunds, scams and debt collection.

**Table 11: Top 10 ACCC publications from 2004–05—YTD 2006–07**

2004–05	
<i>Baby bath aids—Safety alert</i>	70 242
<i>Working under a vehicle—Safety alert</i>	61 494
<i>Warranties and refunds</i>	32 773
<i>Fire safety at home—be prepared</i>	29 509
<i>Small business and the Trade Practices Act—book</i>	21 184
<i>Do retailers have to give refunds</i>	19 657
<i>If it sounds too good to be true—spam and scams</i>	17 305
<i>News for business: Scams protect your business from them</i>	14 658
<i>Blind and curtain cords—Safety alert</i>	12 708
<i>Advertising, selling and the Trade Practices Act—a small business overview</i>	10 898

2005–06	
<i>Understanding petrol pricing in Australia</i>	105 269
<i>Safe toys for kids</i>	89 963
<i>Fire safety at home—be prepared</i>	86 622
<i>Keeping baby safe</i>	64 207
<i>Buying jewellery—know your rights</i>	63 295
<i>Baby bath aids—Safety alert</i>	42 051
<i>Blind and curtain cords—Safety alert</i>	41 880
<i>Basketball rings and backboards—Safety alert</i>	40 734
<i>Warranties and refunds</i>	29 161
<i>Refusal to deal</i>	19 719

2006–07 (9 months to 31 March)	
<i>Keeping baby safe</i>	71 554
<i>Franchisee start-up check list</i>	68 578
<i>Safe toys for kids</i>	46 169

2006–07 (9 months to 31 March)	
<i>Fire safety at home—be prepared</i>	34 426
<i>Household furniture hazards for kids—Safety alert</i>	32 041
<i>Blind and curtain cords—Safety alert</i>	18 986
<i>Hotwater bottles—Safety alert</i>	18 325
<i>The little black book of scams</i>	18 138
<i>Using a ladder—Safety alert</i>	17 052
<i>Warranties and refunds</i>	16 837

The ACCC is continually producing and revising information and educational materials related to the fair trading provisions of the Trade Practices Act. Since July 2005 the ACCC has produced over 45 new or revised information materials relating to fair trading including:

- *Know how to complain*
- *Broadband—connection speeds* (factsheet)
- *Food and beverage descriptors guideline to the Trade Practices Act* (book)
- *Dealing with debt: your rights and responsibilities* (book—in conjunction with ASIC)
- *Buying jewellery? know your rights* (flyer)
- *Keeping baby safe* (book)
- *Safe toys for kids* (book)
- *Little black book of scams* (book—revision)
- *Cartels: a guide for consumers on cartel conduct* (flyer)
- *Understanding petrol pricing in Australia: answers to some frequently asked questions* (book and flyer)
- Various SCAMwatch materials including posters and promotional postcards
- *FairStore: a best practice guide for stores serving remote and Indigenous consumers*

### **3.8.3 Use of other mediums**

Where appropriate, the ACCC will use innovative techniques to reach the desired target audience. This may include the production of videos or DVDs, or the use of regional radio networks to reach sparsely populated areas. For instance, the ACCC's *Competing Fairly Forums*, audiovisual recordings discussing particular trade practices issues, are made available on CD ROMs or for download from the ACCC website. In 2004–05, the ACCC produced a series of feature presentations for broadcast on the national rural and regional affairs program 'On The Land' targeted at people in rural and regional Australia.

ACCC staff and Commissioners often speak at business and consumer group functions and conferences. In 2005–06, the ACCC undertook 162 speaking engagements and briefings. Speeches and presentations offer the ACCC the opportunity to personally address key stakeholders to promote the ACCC's activities as well as compliance with the Trade Practices Act.

### **3.8.4 Recent examples of education and information initiatives**

#### **Scams**

One particular area where the ACCC has focused on educational initiatives for consumers is in relation to scams. Scams are a high priority for the ACCC because they can have a real detriment for consumers, and internet and email are making it easier than ever before for scammers to contact consumers. At the same time, scams are difficult to litigate. Often it is very hard to find the perpetrator and consumers are often embarrassed to complain.

Accordingly, much of the ACCC's work in this area relates to arming consumers with the capacity to recognise and protect themselves from scams.

The ACCC recently launched a revised website specifically addressing consumer and small business scams—[www.scamwatch.gov.au](http://www.scamwatch.gov.au). The ACCC's SCAMwatch website seeks to inform consumers and small business about how to recognise, avoid and report scams.

SCAMwatch was originally developed as a joint initiative between the Treasury, the ACCC, ASIC and state and territory fair trading agencies. The site was launched in October 2001 and was maintained by the Treasury until late 2005 when it was transferred to the ACCC.

The ACCC redesigned, rejuvenated, and expanded the new SCAMwatch website to reflect the needs of consumers and the dynamic environment within which scams are operating.

The SCAMwatch website explains how scams operate and offers guidance to consumers and small business operators about what to look out for and how to minimise their chances of being scammed. SCAMwatch also identifies and discusses a variety of common scams currently targeting consumers and small business in areas such as internet service provision, mobile phones, fake lotteries, online banking, investment opportunities, health and medical remedies, and small business.

In addition to providing an online mechanism for scam victims to report their experiences directly to the ACCC, SCAMwatch also regularly publishes the

experiences of real victims who have been the target of a scam and are willing to share their story.

There is also the opportunity to subscribe to receive free email alerts from the ACCC about widespread or novel scams that have been reported to it (to be featured on the 'SCAMwatch radar'). Since the launch of the revised SCAMwatch website, 14 email alerts have been sent to subscribers.

SCAMwatch acts as the website portal for the annual *Scams Awareness Month* campaign run by the Australasian Consumer Fraud Taskforce (ACFT). Established in March 2005, the ACFT is composed of 18 government agencies and departments who have a remit for consumer protection in relation to frauds and scams. Chaired by the Deputy Chair of the ACCC, the ACFT seeks to enhance the Australian and New Zealand Governments' enforcement activity against frauds and scams, to involve the private sector in the fight against frauds and scams, and to generate interest in research on consumer frauds and scams.

Since 1 July 2006 the ACCC has issued 5 media releases related to scams, and there have been 10 scam-related articles published under the ACCC Chairman's by-line.

### ***Debt collection***

In 2005 the ACCC and ASIC jointly developed a guide for those involved in debt collection. This publication, titled *Debt collection guideline: for collectors and creditors*, revises the ACCC's publication *Debt collection and the Trade Practices Act*, released in 1999.

The guideline was launched on 14 October 2005 and reflects the ACCC's and ASIC's view of how relevant provisions of the Trade Practices Act and the ASIC Act apply to debt collection conduct.

The guideline:

- explains ASIC's and the ACCC's view of the laws that they administer
- provides examples on how the law has been applied in particular cases
- gives guidance on what creditors and collectors should and should not do if they wish to minimise the risk of breaching the Trade Practices Act and ASIC Act
- notes other laws and regulations not administered by the ACCC and ASIC that are relevant to the debt collection context.

The publication also takes account of the significant changes since 1999 to industry practices, case law, jurisdictional changes and the level and substance of complaints made to the ACCC and ASIC.

The ACCC and ASIC also jointly produced a consumer brochure, *Debt collection: your rights and responsibilities*, launched in conjunction with the guideline for collectors and creditors. This consumer brochure was designed to help people who are dealing with debt problems, or being contacted by debt collectors.

### ***Tobacco 'light' and 'mild' campaign***

On 26 December 2005 the ACCC launched a national advertising campaign to inform consumers of the health risks of smoking 'light', 'mild', and similarly described cigarettes and that these 'low yield' cigarettes are not necessarily less harmful than regular cigarettes.

The \$9 million funding for the campaign was contributed by tobacco companies Philip Morris Limited, British American Tobacco Australia Limited, and Imperial Tobacco Australia Limited pursuant to s. 87B court enforceable undertakings accepted by the ACCC in resolution of an investigation into alleged misleading and deceptive conduct by the tobacco companies in relation to implied claims about the benefits of 'low yield' cigarettes.

Media coverage included television—both free-to-air and subscription, radio, print (including national magazines) and outdoor (including bus sides, elevator poster panels, shopping centre posters, and sporting stadia scroll and static advertising boards).

A proportion of the \$9 million was directed to the national Quitline to fund the additional capacity required to service an anticipated increase in calls for assistance to quit, following the launch of the campaign.

Formal evaluation of the campaign reported that it was successful in its objective of increasing and raising awareness and knowledge that 'light' and 'mild' cigarettes and their associates are not necessarily a healthier choice. A report from the national Quit network reported that there was a significant increase in calls to the Quitline following the launch of the campaign and during the period it was broadcast.

### **3.8.5 ACCC support of external consumer education and research**

The ACCC has also been involved in a number of other education and research projects in recent years to better inform its activities, as set out below.

Between 2002 and 2005 the ACCC co-funded a three year research partnership arrangement with the Regulatory Institutions Network (RegNet) Centre for Competition and Consumer Policy at the Australian National University. One of the projects evaluated the effectiveness of ACCC enforcement and compliance activity, finding that the ACCC's most effective compliance outcomes are facilitated by strong enforcement activity of various kinds.<sup>47</sup>

In September 2003 the ACCC approved the establishment of an informal short-term Trade Practices Act Consumer Trust. The purpose of the Trust is to disperse certain monies resulting from a court order made in an enforcement action taken by the ACCC, and two enforceable undertakings provided to the ACCC. An independent trustee was appointed to oversee the Trade Practices Act Consumer Trust and distribute funds. The ACCC provides secretariat functions to the Trust. The Trade Practices Act Consumer Trust has allocated funds to a range of consumer education and research projects.

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<sup>47</sup> Further information regarding the report's findings and details of the other research projects is available at ([www.cccp.anu.edu.au](http://www.cccp.anu.edu.au)).

## **3.9 Liaison**

The ACCC has placed a high degree of importance on developing and enhancing its liaison capabilities in recent years. It is a critical element in developing the ACCC's overall compliance priorities and strategies, particularly given the range of issues faced by consumers in a modern economy.

Liaison is critical to the ACCC's compliance role in a number of ways. Firstly, it provides a conduit for business and consumer groups to highlight to the ACCC issues of concern to the community. This may occur through specific referrals of matters to the ACCC, or provide a more general alert regarding an emerging issue. Secondly, strong liaison channels with other domestic and international regulators also provide intelligence on emerging issues and how to deal with them. Thirdly, liaison work provides the ACCC with an opportunity to educate consumers and businesses about their rights and obligations under the Trade Practices Act. Finally, it provides the ACCC with ongoing feedback on whether it is meeting the expectations of the community.

Liaison initiatives are targeted at consumer and business organisations, other domestic regulators particularly those with similar roles to the ACCC such as state and territory fair trading agencies, ASIC, and relevant international bodies.

### **3.9.1 Consumer Liaison**

The ACCC is in contact with hundreds of Australian consumers each day through its Infocentre. Individual consumers and the information that they provide are essential elements of the ACCC's fair trading activities.

The ACCC meets with consumer representatives on a range of both fair trading and competition issues. The Consumer Consultative Committee (CCC) is the ACCC's primary means of liaison with consumer representatives and organisations (see box 1). The ACCC liaises with consumers and their representatives on an ad hoc basis in the context of particular projects. The ACCC also keenly contributes to, and monitors, a variety of consumer newsletters, journals and other forums, such as the Consumers' Federation of Australia newsletter.

### **3.9.2 Business liaison**

The ACCC liaises with business, professional and community groups on both a formal and an ad hoc basis where appropriate. This liaison may be in relation to a particular ACCC investigation, compliance initiative or education campaign. Liaison with stakeholders is also an important element to the ACCC's efforts to keep stakeholders informed of its recent activities. Some of the more formal ACCC liaison activities are described below.

#### ***Small Business Advisory Group***

This group promotes consultation in the sector, especially bringing the ACCC's attention to particular trade practices issues that affect small business and allowing the ACCC to inform the small business community about its activities. Of course, the ACCC's liaison with small business also assists consumers to the extent that it helps engender a culture of compliance with the Trade Practices Act's fair trading provisions. It met twice in 2005–06.



**The ACCC Consumer Consultative Committee**

The ACCC established the Consumer Consultative Committee ('CCC') in 2001 to provide the ACCC with information on:

- issues affecting consumers that fall within the scope of the ACCC's administration of the Trade Practices Act
- emerging issues or market developments that may be of concern to particular groups of consumers
- information dissemination strategies and appropriate external networks available to enhance communication with community and consumer groups and consumers.

The CCC is also a forum for the ACCC to provide the consumer movement with information about its current enforcement, compliance and education activities. The final key objective of the CCC is to provide tangible outcomes for consumers through work that CCC members undertake in partnership with other members and the ACCC.

By providing advice on the above issues, members assist the ACCC in its administration of the Trade Practices Act and assist the ACCC to identify opportunities to more effectively meet its statutory responsibilities.

The ACCC seeks to maintain a dynamic membership representing the diversity of consumer organisations and individuals working within the community. Participation in the CCC allows members to inform the ACCC about issues that impact on the groups they represent.

Current members of the CCC represent the following organisations:

- Australian Financial Counselling and Credit Reform Association
- CHOICE
- Communications Law Centre
- Consumers' Federation of Australia
- Consumer Action Law Centre
- Country Women's Association of Australia
- Federation of Ethnic Communities' Council of Australia
- National Children's and Youth Law Centre
- National Council on Intellectual Disability
- Public Interest Advocacy Centre
- Tangentyere Council
- Tasmanian Council of Social Service

CCC meetings are held three times a year, usually at the ACCC's Canberra office.

### ***Franchising Consultative Panel***

The panel gives the ACCC an opportunity not only to identify specific issues in the franchising industry, but also to develop specific compliance tools to help both franchisors and franchisees understand their rights and obligations under the Trade Practices Act. Its membership includes franchisors, compliance professionals, franchise associations, franchisees and other members of the Australian Government responsible for franchising policy. The ACCC hosts biannual meetings of the panel.

### ***Health Sector Consultative Committee***

The inaugural meeting of the ACCC's Health Sector Consultative Committee (HSCC) will be held on 29 May 2007. This committee has been formed to continue the process of liaison between the ACCC and the health sector that developed through the operation of the Health Services Advisory Committee (HSAC).

The HSCC will provide a forum for the ACCC to advise the health sector (through its representatives on the committee) on trade practices issues and will also enable committee members to raise trade practices queries or concerns relevant to their position within the sector.

### ***Infrastructure Consultative Committee***

The committee was set up in 2006 to facilitate discussions on the broad issues of infrastructure and infrastructure regulation. It is representative of the diversity of infrastructure interests—water, telecommunication, rail, ports and airports—and is an important mechanism for the ACCC to gain feedback from stakeholders in infrastructure sectors. Its overarching objective is to encourage the efficient use of, and investment in, infrastructure to achieve the best outcomes for end consumers.

## **3.10 ACCC links with other agencies**

The ACCC recognises the need for close cooperation with similar agencies at the state, national and international level. The ACCC therefore maintains strong links with counterpart agencies throughout Australia and the world.

### **3.10.1 States and territories**

Given the similarity between the fair trading provisions of the Trade Practices Act and state and territory fair trading acts, and the importance of ensuring that state, territory and commonwealth resources are allocated to maximise the welfare of Australians, cooperation with offices of fair trading/consumer affairs agencies throughout Australia is essential.

The ACCC has developed close working relationships with state and territory fair trading agencies to deal with individual matters on a day to day basis. It also participates in a number of joint-agency committees to facilitate cooperation, coordination and sharing of information and experiences in promoting compliance with consumer laws.

### ***Day-to-day contact between state and territory fair trading agencies and the ACCC***

ACCC regional offices in each state and territory enjoy close working relationships with their local office of fair trading/consumer affairs agency. The nature of these relationships varies from state to state, however they generally involve:

- regular liaison to discuss current investigations and trends
- coordination of activities to ensure that the enforcement and compliance priorities of the ACCC when applied within a region do not unnecessarily duplicate the efforts of the local office of fair trading
- joint investigations and compliance projects
- arrangements for referrals of complaints
- assistance with consumer education.

Generally, the ACCC will refer, to local offices of fair trading/consumer affairs agencies, complaints confined to a particular state or territory, complaints which can be more appropriately addressed by state or territory redress mechanisms, or matters that may be better dealt with by state-based industry-specific regulation. Local offices of fair trading will usually refer matters to the ACCC that involve conduct occurring across state boundaries or alleged anti-competitive conduct. Both the ACCC and local offices of fair trading will generally refer matters involving conduct known to be already under investigation by the other agency.

Through a process of consultation and collaboration, the ACCC selects and carefully moves a number of the local fair trading matters to the state and territory offices of fair trading, where they are more appropriately dealt with. This enables the ACCC to focus its resources on matters of national importance and of significant, widespread consumer detriment. However, the states and territories must be willing and able, and have the resources, to deal with any matters transferred to them. Where they do not have the resources or the willingness to act, the ACCC will continue to take responsibility for the matter.

ACCC regional offices, in particular Outreach staff, work very closely with their local office of fair trading to distribute each other's publications and educational material. By providing access to each other's distribution networks, and by jointly attending fairs and exhibitions, the ACCC and local offices of fair trading are able to reach a larger proportion of the target audience. This cooperation also provides consumers and small businesses with a fuller range of information from government fair trading agencies in the one location.

The ACCC is also a partner with participating state and territory fair trading agencies in the national AUZSHARE notification system and database. This initiative enables participating agencies to more quickly and easily share complaint and alert information.

### ***MCCA and SCOCA***

The peak formal consumer protection liaison process is constituted by the Ministerial Council on Consumer Affairs (MCCA), which consists of all Commonwealth, state and

territory and New Zealand ministers responsible for fair trading, consumer protection and credit laws.

The role of MCCA is to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues. The ministers currently meet twice a year.

MCCA is supported by the Standing Committee of Officials of Consumer Affairs, which consists of all chief executive officers (Commissioners) of consumer protection agencies. The ACCC is represented on SCOCA. Together, MCCA and SCOCA oversee four advisory committees which meet regularly throughout the year to deal with different aspects of fair trading.

### **FTOAC**

The first of these committees relevant to the work of the ACCC is the Fair Trading Officers Advisory Committee (FTOAC).

FTOAC's protocols and procedures state that the committee was 'established to provide advice on fair trading operational issues (issues relating to enforcement, compliance, dispute resolution, and service functions of consumer agencies) and to establish national uniform reporting protocols'.

FTOAC is also responsible for:

- implementing a national approach to fair trading operational issues where appropriate
- actioning issues referred to it by SCOCA
- providing advice to SCOCA on emerging issues requiring development of national enforcement strategies
- establishing working parties as required to progress fair trading and education issues
- establishing and maintaining efficient and effective reporting systems between participating agencies
- exchanging information of relevance between participants.

FTOAC members are senior managers responsible for operations (complaint handling and investigations) in the state and territory fair trading agencies and the New Zealand Commerce Commission; a senior manager from ASIC's consumer protection directorate; representatives from the Commonwealth Treasury and the New Zealand Ministry of Consumer Affairs; and representatives of ACCC's Enforcement and Co-ordination Branch.

FTOAC members have two face-to-face meetings each year and a telephone hook-up each month. The telephone hook-up is used primarily to update other jurisdictions on current complaints, provide details of outcomes in enforcement matters and to seek assistance in relation to current investigations.

Additionally, there is a continual exchange of emails amongst FTOAC members seeking immediate assistance in relation to particular investigations or informing members of upcoming publications or press releases.

### ***Consumer Products Advisory Committee***

SCOCA established the Consumer Products Advisory Committee to provide advice on consumer safety matters and to develop and implement a national approach to consumer product safety issues. Membership of CPAC consists of officers responsible for product safety policy and compliance (including safety investigations and product recalls) from all Commonwealth, States and Territories of Australia, and New Zealand Consumer Affairs Agencies. Representatives of Standards Australia and Standards New Zealand attend CPAC meetings in a consultative capacity.

CPAC members exchange product safety information on an ongoing basis, form working groups to research and develop an agreed approach on particular product safety issues, hold regular teleconferences and promote effective communications with industry, consumer bodies and other government agencies. CPAC also meets face to face twice each year. CPAC is supported by the MCCA Secretariat.

### **3.10.2 National agencies**

The ACCC maintains close links with other key national agencies relevant to its administration of the Trade Practices Act. As well as the key agencies below, the ACCC liaises with Government departments and statutory bodies from time to time regarding a particular enforcement or compliance project of mutual interest, or in the context of the ACCC's industry regulation and competition work.

#### ***Australian Securities and Investments Commission***

There is a significant degree of overlap and uncertainty between the jurisdictions of the ACCC and ASIC.

Accordingly, the ACCC liaises with ASIC on a regular basis in order to minimise duplication of investigations and determine the appropriate agency to take a particular matter. Formal liaison meetings are held every two months.

A number of measures have been taken to facilitate a high degree of coordination between agencies. In late 2004, the two agencies signed a new memorandum of understanding (MOU) covering liaison, cooperation, assistance, joint enquiries and exchange of confidential information arrangements. The MOU reinforced the cooperative approach the agencies had taken to address wealth creation seminars and get rich quick schemes, as well as misconduct in debt collection. Also, the agencies have entered into cross delegation arrangements to enable one agency to take action where it is possible that a case falls within both jurisdictions.

#### ***The Australian Communications and Media Authority***

Given the ACCC's significant involvement in the telecommunications industry, it enjoys a close working relationship with ACMA. In the area of fair trading, this cooperation occurs primarily through the Regulators' roundtable meetings, which occur three times per year. The Regulators' Roundtable involves staff from the ACCC, ACMA, as well as the Telecommunications Industry Ombudsman (TIO), and discusses consumer issues of concern in the telecommunications industry. As illustrated above, the telecommunications industry frequently tops the list for consumer complaints and

inquiries to the ACCC. As such, close cooperation with ACMA is essential when devising enforcement and compliance strategies to address this serious concern.

Also, in relation to industry codes of conduct, the *Telecommunications Act 1997* requires the ACCC to review draft industry codes for consistency with the Trade Practices Act before ACMA can register them. The ACCC reviews these codes as and when they arise, consulting where appropriate.

The ACCC and ACMA have recently reached an agreement to share information relating to media merger investigations. The agreement seeks to protect confidential information while helping to ensure that each agency's investigation is effective.

#### ***Australian Transaction Reports and Analysis Centre***

In March 2007, the ACCC signed a memorandum of understanding with AUSTRAC to facilitate cooperation and the exchange of information between the two agencies. AUSTRAC is Australia's anti-money laundering and counter-terrorism financing regulator, and specialist financial intelligence unit. AUSTRAC and the ACCC have agreed to provide each other with assistance in relation to the exchange of information, appropriate referral of matters and cooperation in regulation, compliance and enforcement, consistent with relevant laws.

The ACCC's partnership with AUSTRAC will assist with investigations and legal proceedings against beneficiaries of illegal pyramid schemes and other scams, as well as a range of anti-competitive practices.

#### ***Food Standards Australia New Zealand***

The ACCC cooperates closely with FSANZ in the investigation of misleading or deceptive conduct in food sales. The staff contact that occurs between the agencies on a regular basis demonstrates both agencies' commitment to ensuring consumers can make food purchasing decisions with confidence.

### **3.10.3 Ombudsmen and other industry dispute resolution schemes**

The ACCC is involved in the development of alternative dispute resolution schemes through its role of providing guidance on the development of voluntary industry codes of conduct, as well as its authorisation work.

The ACCC also interacts with ombudsmen and other industry dispute resolution schemes on a day to day basis through the referral of complaints and inquiries received by the ACCC Infocentre. The ACCC recognises that ombudsmen and other industry dispute resolution schemes are often better placed to assist particular consumers. The ACCC's role in directing consumers to the appropriate agency is manifest in the processes of the ACCC Infocentre and in ACCC educational materials, such as the *Know how to complain* brochure and the SCAMwatch website.

From time to time, the ACCC also receives referrals from ombudsmen and other industry dispute resolution schemes. These usually relate to alleged Trade Practices Act breaches that may fall outside the referring organisation's jurisdiction, or for which the ACCC is better situated (e.g. the ACCC may be currently investigating the alleged conduct or have more appropriate remedies available to it).

In some cases, the ACCC has agreements in place setting out the situations where referrals between organisations would be appropriate (see Box 2 on following page).

Aside from cooperation related to a particular complaint or series of complaints, the ACCC often liaises with ombudsmen and other industry dispute resolution schemes regarding industry trends and market developments. Ombudsmen and industry dispute resolution schemes are often aware of problems before they reach the ACCC. This liaison greatly assists the ACCC to keep track of potential new forms of conduct that may raise Trade Practices Act concerns.

**Box 2**

**Cooperation between the ACCC and the Telecommunications Industry Ombudsman (TIO)**

The ACCC and the TIO have sought to ensure that complainants have their matters handled by the most appropriate agency.

Before proceeding with an investigation, the ACCC may consult with the TIO to, among other things:

- ascertain if the TIO is already investigating the same or a related issue as a systemic complaint
- gather market information
- assess whether the issue raised has national ramifications.

The ACCC may refer complainants, whose matters it believes are more appropriately dealt with by the TIO, directly to the TIO by providing complainants with the TIO's contact details (1800 062 058).

Before proceeding with a systemic investigation, the TIO may consult with the ACCC to, among other things, ascertain whether the ACCC is already investigating the same or a related issue.

The TIO may refer complainants to the ACCC in circumstances which include the following:

- the complaint relates to issues that fall outside the jurisdiction of the TIO, and appear to fall within the jurisdiction of the ACCC. The TIO will do so by providing the complainant with the ACCC's contact details.
- the complaint relates to an issue which the TIO is aware the ACCC is investigating.
- the outcome sought by the complainant to remedy the problem is, in the circumstances, one which the ACCC is better placed to deliver (e.g. because of the nature of the remedy sought, or any urgency associated with seeking a remedy).
- following a systemic investigation undertaken by the TIO, the issues which are the subject of the systemic investigation are not resolved, and some or all of these issues appear to be ones over which the ACCC has jurisdiction.

### **3.10.4 International links**

International cooperation and coordination is a key priority of the ACCC to facilitate the effective and efficient enforcement of the laws provided in the Trade Practices Act. The borderless nature of global market mechanisms means that unethical traders are better able to avoid compliance with consumer protection regulations and detection, and enforcement by enforcement agencies is more difficult.

In an effort to combat and seek solutions in this new environment, the ACCC is liaising to a greater degree with its international counterparts through the sharing of information and experience and formally cooperating in enforcement action in some instances.

#### ***Growing importance of enhanced integration and cooperation***

Effective domestic enforcement of consumer protection rules is reliant on being able to address cross border frauds that affect Australian consumers. International cooperation assists in the provision of information from foreign jurisdictions to determine whether unlawful conduct took place, to gain experience on dealing with new consumer issues and to improve on the effectiveness of enforcement mechanisms.

Countries such as Canada, the United States of America and the United Kingdom are increasingly looking at consumer complaints on a global basis and enforcing through co-ordination with foreign jurisdictions. Through this trend, co-operation agreements and efforts within international forums to co-ordinate enforcement activities have become increasingly important and effective.

#### ***International cooperation agreements***

International cooperative arrangements are an important means for formalising cooperation between regulatory agencies, particularly to create a channel for the exchange of confidential information.

The ACCC has entered into a number of agency level cooperation agreements with its international counterparts. These agreements detail how information is to be exchanged in relation to cases, investigations and complaints. They provide for notification of enforcement activities which may affect the interests of the other party and for enforcement assistance on cases of common interest. Also to alleviate concerns in relation to confidentiality and privacy, these agreements often contain confidentiality assurances that countries will ensure information is kept confidential in the same way as they would as part of their own investigations.

One important aspect of international agreements is that they produce an environment of continued liaison where understanding and trust between agencies is enhanced and, in turn, generates effective information sharing and enforcement co-ordination. The introduction of information sharing powers will enhance the ability of the ACCC to co-ordinate investigations with other international agencies.

#### ***Participation in international forums***

Another mechanism for sharing information and expertise and facilitating the coordination of enforcement is the establishment of international networks between government agencies. These international networks provide a means for enforcement agencies to communicate about global market activity in their respective countries, consumer protection policy and issues regarding cross-border enforcement. These



networks often also provide an effective alert or preventative system to learn about problems other jurisdictions have experienced in an effort to combat or prevent the problem before the issue escalates domestically. Problems with enforcement and legislative rights in foreign jurisdictions can also be addressed through these networks. In relation to fair trading, the ACCC is an active participant in the International Consumer Protection and Enforcement Network (ICPEN) and in the Organisation for Economic Co-operation and Development Committee on Consumer Policy.

ICPEN is a network of governmental enforcement agencies which provides an international forum to share best practice, information and intelligence and to facilitate effective cross border enforcement cooperation in relation to consumer protection. Major initiatives of ICPEN include a Mass Marketing Fraud working group which has had some success in co-ordinating multi-national enforcement for particular investigations; an International Sweep Day where enforcement agencies combine efforts to search the internet on a particular topic each year to catch offenders and promote compliance; Fraud Prevention Month providing an international campaign against fraud every year, a best practice workshop, as well as efforts to develop a means for consumers to get in touch with the appropriate foreign agency for cross border complaints.

In relation to consumer policy, an Australian delegation participates in the Organisation for Economic Co-operation and Development Committee on Consumer Policy. This international consumer policy forum gathers to discuss, promulgate and implement guidelines and recommendations on best practice on international consumer issues and build consumer confidence particularly in relation to cross border transactions in a fair and transparent marketplace. Current research includes analysing the impact of new technologies and emerging businesses online and examining good practice in consumer policy regimes. Major initiatives from this forum include Cross Border Fraud Guidelines and a Recommendation on Consumer Dispute Resolution and Redress, both of which include reporting requirements on members in relation to implementation.

Consumer issues are not limited to the forums mentioned above. The educating of consumer rights and best practices are also raised in the International Competition Network, other OECD committees, the Asia Pacific Economic Cooperation (APEC) forums and the United Nations Conference on Trade and Development (UNCTAD).

It is the informal interaction between counterpart agencies that the international participation and forums offer that is most effective. These international forums provide a framework for regular face to face contact with counterparts, the meeting of new contacts and for general networking. This networking provides valuable assistance and information particularly in relation to sharing of leads and background information about various industry sectors, relevant actors and agency procedures. The ongoing international dialogue assists in building trust in the public institutions and improves the understanding of ongoing global economic and social changes relevant to consumers.

### ***Capacity building and technical assistance activities***

The development and implementation of effective consumer protection regimes in domestic economies around the world relies heavily on the provision of comprehensive, effective and on-going technical assistance to economies in transition. Various economies benefit from the help more mature agencies can give in developing

a skill base and providing information on cases and strategies in relation to consumer protection and its administration.

A country's fair trading regime can only benefit from these activities, which increase the level of trust, and build relations and cooperation between agencies and countries. Through the support and encouragement provided by these activities the goal is to improve the global trading environment and generate a culture of compliance with consumer protection laws around the world to the benefit of all countries and consumers. The ability to take effective enforcement action overseas depends on the other jurisdiction having appropriate institutional frameworks.

The ACCC has an active capacity building and technical assistance program under which it makes available its resources and expertise to economies with less developed regimes, with a particular focus on the nearby Asia Pacific region. Activities include the hosting of regulatory officials on study visits to the ACCC, commenting on draft legislation and conducting more extensive 'in-country' training including holding regional conferences, workshops, seminars and consultancies to assist on various issues. Capacity building activities are often of greatest practical assistance when the sharing of experience and expertise occurs when the international counterpart encounters the consumer enforcement type issue for the first time.

## Part II—Potential improvements to fair trading and consumer protection laws

### 4. Scope of the Trade Practices Act

The Australian Competition and Consumer Commission (ACCC) considers that the generic fair trading and consumer protection laws and institutional framework for the enforcement of those provisions contained in the *Trade Practices Act 1974* continue to be appropriate for Act's purpose in today's economy.

The Trade Practices Act continues to provide a flexible legal framework that responds appropriately to changing conditions in the marketplace. The ACCC's caseload, which spans a wide range of industries and issues (including new technology and cross-border issues), demonstrates this.

In New Zealand, where the laws closely follow the Australian model, a national survey on awareness and experience of consumer legislation was undertaken in 2005. The results of this survey are worth noting, because they indicated that, on the whole, people see New Zealand as a relatively benign trading environment and that New Zealand consumers are, on balance, relatively confident. The survey also found that while disputes between traders did arise, many of these disputes were minor and many were resolved directly by approaching the trader.<sup>48</sup> This suggests that generic fair trading and consumer protection laws, as currently apply in Australia, are appropriate.

The framework provided by the Trade Practices Act recognises that producers commonly have greater access to information, and greater resources to analyse that information, than have consumers. Generally, the Act prevents producers abusing this information advantage by prohibiting producers from engaging in misleading, deceptive or unconscionable conduct.

However, overseas experience and research suggests that measures designed to impose positive obligations on producers to address information deficiencies in some markets may be justified. This is particularly so where products, information about products and/or common forms of contracting have become complex or information-intensive. It appears that the problem in these markets has evolved from consumers having too little access to information to them being swamped with overwhelming quantities of information. In such circumstances, different consumer protection tools may be appropriate.

While the ACCC believes that the framework provided by the Trade Practices Act, including its administrative architecture, remains robust, this changing environment has led to consumer difficulties in accessing and processing information. The Productivity Commission review provides a good opportunity to examine these consumer difficulties to determine whether improvements to the Act can be made.

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<sup>48</sup> National Research Bureau, *National Consumer Survey on Awareness and Experience of Consumer Legislation*, prepared for Ministry of Consumer Affairs, September 2005. The survey consisted of a random survey of 1000 consumers aged over 18 years.

Key issues for consideration are:

- whether a universal unfair practices law should be introduced
- whether a universal unfair contract terms law should be introduced
- whether more limited provisions should be introduced, such as new measures to regulate complex ‘standard form’ contracts should be introduced
- whether further laws should be introduced to protect the vulnerable or disadvantaged
- whether generic fair trading and consumer protection laws should be extended to small business
- whether the Trade Practices Act is sufficiently robust to deal with cross border issues.

This chapter considers these issues in detail.

The ACCC recognises these emerging issues and considers they should be examined closely. However, the ACCC believes that before the Trade Practices Act is amended substantively in response to such issues, policy-makers need to further examine:

- the extent of consumer difficulties in accessing and processing information
- the nature and extent of potential detriments for consumers
- the overall benefits and costs associated with regulating in relation to these issues.

#### **4.1 Trade Practices Act provisions—comparison with laws in other jurisdictions**

A comparison of the generic fair trading and consumer protection laws in New Zealand, the European Union (EU), the United Kingdom, Canada and the United States of America (US/USA) shows that provisions of the Australian Trade Practices Act provide a similar approach in terms of institutions, substantive laws and remedies.

There are, however, some differences in approach—e.g. particularly in the implementation of unfair contract terms in the European Union and the use of broad prohibitions on unfair practices in the USA, which has recently been adopted in the European Union. New Zealand laws closely follow the Australian model, but New Zealand is considering whether to introduce elements such as generic unfair contract terms legislation. Details of the approach taken in each jurisdiction are contained appendix C.

Whether such laws should be adopted into the Australian context is considered in more detail below.

## 4.2 Unfair practices legislation

In the USA, generic fair trading and consumer protection laws prohibit unfair practices generally. The EU's recently introduced *Unfair Practices Directive*, which is due to come into effect by 12 December 2007, will also prohibit unfair commercial practices.

It is arguable in theory that such laws provide a broader scope of protection for consumers than the Trade Practices Act.

Section 5(a) of the USA's Federal Trade Commission Act prohibits 'unfair or deceptive acts or practices in or affecting commerce'. The unfairness and deception standards are independent of each other; however, in reality an act or practice is often both unfair and deceptive. It was the intention of the US Congress, when drafting this provision in the 1930s, not to provide a complete list of unfair practices, because these could quickly become outdated or create possible loopholes for evasion. Through case law, factors have been identified, and later codified, where unfairness is established when an act or practice causes, or is likely to cause, substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by the countervailing benefits to consumers or competition. Public policy considerations may also be taken into account but do not serve as a primary basis for determination.<sup>49</sup> Examples of the types of practices that satisfied the criteria for unfairness include:

- coercion of consumers into purchasing unwanted goods or services
- failing to generate critical price or performance data, leaving the buyer with insufficient information to make informed comparisons
- exerting undue influence over highly susceptible classes of purchasers
- consumers who buy defective goods or services on credit being unable to assert against the creditor claims or defences arising from the transaction.

Generally, it would appear that most of the above practices may fall within the scope of the prohibitions on misleading or deceptive conduct laws, harassment or coercion, or unconscionable conduct contained in the Trade Practices Act. However, the unfairness standard applied in the United States may provide some scope to take action on some practices that may not fall within the current scope of the Trade Practices Act. In a recent case, the US Federal Trade Commission took action against a company for installing adware on consumers' computers by deception and unfairly making it difficult for consumers to identify and remove the program. This action appeared to contain elements of unfairness, in making the program difficult to remove, that went beyond deception.<sup>50</sup>

Under the European model, the *Unfair Commercial Practices Directive* will introduce a general prohibition requiring traders not to treat consumers unfairly. The EU intends that this prohibition will act as a safety net within its consumer protection legislation;

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<sup>49</sup> 12 USC, s. 45(n).

<sup>50</sup> FTC news release, *Zango, Inc. Settles FTC Charges*, 3 November 2006. In this case, Zango consented to give up \$3 million in ill-gotten gains to settle the charges.

however, because of the directive's current implementation status, it is difficult to anticipate the scope of application of the prohibition. However, the ACCC notes that the directive's test for unfair practices requires the meeting of a number of complex threshold tests before the prohibition of a practice. In particular, it is necessary that the practice be 'contrary to the requirements of professional diligence', and 'likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches'.

With respect, the ACCC believes that the provision of any certainty about the standard of conduct required by this test requires the development of a substantial body of case law.

The European model provides a list of practices deemed unfair, and in this its provisions are substantially similar to those of the Trade Practices Act. In particular, the EU directive will oblige businesses not to mislead consumers through acts or omissions, or subject them to aggressive commercial practices (such as high-pressure selling techniques). In practice, it is likely that the European directive will provide a level of protection similar to that provided by the Trade Practices Act. However, it is unlikely to be apparent for a number of years that the EU model has provided substantive further protections—until its courts have interpreted the meaning of the general provisions.

Accordingly, the ACCC considers it would be prudent for policy-makers to examine the scope and operation of the new European prohibition as it develops and the use of the unfairness prohibition in the US when determining whether the introduction of an unfair practice prohibition would significantly enhance the operation of the Trade Practices Act.

### **4.3 Unfair contract terms legislation**

The Productivity Commission's issues paper notes that an area of debate in the consumer policy concerns the need for unfair contract terms legislation (UCTL). This type of legislation has been enacted in a number of jurisdictions—including Victoria (Australia) and member states of the EU—and could provide some insight into the effectiveness of such a regulatory mechanism for changing marketplace behaviour vis-a-vis unfair contract terms.

Generally, UCTL aims to prohibit unfair terms in consumer contracts, making such terms (but not necessarily the whole contract) void. While the precise formulation and scope of UCTL varies between jurisdictions, generally such legislation aims to deem a term to be unfair if it is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer.

UCTL has universal application and applies as a general obligation on business, rather than on an industry-by-industry basis. However, some jurisdictions, such as the United Kingdom, limit the application of UCTL to standard form terms, while models in other jurisdictions, such as Victoria, also cover situations where terms have been individually negotiated.

UCTL focuses on unfairness in non-core terms of contracts, rather than core terms of price and performance characteristics of goods or services.

It follows that UCTL is more likely to affect areas where there is more scope for complex non-core terms—e.g. ongoing service agreements or mixtures of products with ongoing service provision—rather than ‘one-off’ sales of goods or discrete services where the transaction terms and conditions are usually relatively straightforward.

### **4.3.1 Policy rationales for UCTL**

There are two separate but interlinked policy rationales for UCTL.

First, such laws may be necessary for standard form or ‘take it or leave it’ contracts because consumers are unable to negotiate the terms and conditions of such contracts. Such contracts are unilaterally determined by suppliers and may disadvantage consumers. Protection from unfair contract terms strikes at contract terms demonstrating such a degree of imbalance in power in the deal struck that, had they been truly negotiated between the parties, would not have arisen. The rationale for protection against unfair contract terms can be considered similar to unconscionability where, effectively, a consumer’s ability to make choices in their best interests are overwhelmed.

While competitive pressures are one constraint on the insertion of such terms in contracts by traders, it is easy to find situations where such terms arise in competitive markets. This suggests that even in competitive markets, the competition tends to take place on core terms such as the price, nature and quality of the good or service itself rather than on fine print or non-core terms. On this basis, some would say that UCTL should be of universal application rather than targeted to markets exhibiting a lack of competition.

Lack of competition on non-core terms does not necessarily indicate the existence of market failure. It may be that consumers genuinely do not care about non-core terms, or consider that the merits of a particular product outweigh any disadvantages in non-core terms and conditions.

Secondly, UCTL may be justified by the recognition that in ‘not caring’ about non-core unfair terms in contracts, consumers may be acting to reduce transactions costs or acting under conditions of bounded rationality and/or behavioural biases. That is, consumers may systemically choose to enter into contractual terms and conditions that are not in their best interests because the transactional costs associated with reading all the ‘fine print’ and understanding it are too great<sup>51</sup>, and/or their ability to accurately assess the risks associated with such contracts is impaired due to behavioural biases. For example, one behavioural bias identified as occurring on a systemic basis is that consumers have difficulty accurately assessing the impact of possible outcomes with very low probability. Accordingly, when faced with a standard form contract stating that the supplier may continue to charge the consumer for a service, even when it may not be provided because of the supplier’s own fault, consumers may discount the potential ramifications of such a term when assessing the value of the contract as a whole.

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<sup>51</sup> The supplier, on the other hand, because it is spreading the cost of understanding the contract over thousands of consumers is well placed to comprehend fully each and every term of a standard form contract.

John Vickers, former Chairman of the United Kingdom's Office of Fair Trading, categorised the impact of bounded rationality and behavioural biases on contract terms as providing suppliers with 'micro' market power over consumers.<sup>52</sup> This form of market power stems from the assumption that consumers will not react negatively to products despite the existence of unfair terms, which enables suppliers to impose such terms without fear of loss of customers or profits.

While this indicates that unfair terms could be a symptom of a form of market failure, it is necessary to consider the benefits and detriments of UCTL to determine whether intervention is justified, and, if so, what form this intervention should take.

### 4.3.2 Examples of UCTL

#### *Victorian model*

In 2003 the Victorian the Fair Trading Act was amended to incorporate UCTL that prohibits unfair terms in consumer contracts and unfair terms in standard form contracts proscribed by regulation.<sup>53</sup> An unfair contract is one contrary to the requirements of good faith and in all the circumstances causes a significant imbalance in the rights and obligations arising under the contract to the detriment of the consumer. While the legislation does not define the term 'good faith', Consumer Affairs Victoria has taken the view that it means:

A principle of open and fair dealing; that is 'playing fair', especially when one party is in a position of dominance over a consumer who is vulnerable relative to that dominance or power.<sup>54</sup>

The legislation also provides that a written contract must be legible, in a minimum of 10 point if printed, and must be clearly expressed.

The legislation provides a list of factors that can be considered when determining whether a term is unfair. Unfair terms may include<sup>55</sup>:

- Lock-in terms that allow the supplier to vary important terms of a contract, or not perform a contract, or perform it in a different way than agreed or expected by the consumer without providing fair and reasonable adjustments, or without the consumer being allowed to terminate the contract without penalty—e.g. a term that requires a consumer to continue to pay for a service that is not being provided, but does not allow the consumer to terminate the contract.
- Punitive dispute resolution terms that restrict a consumer's options regarding dispute resolution—e.g. terms requiring disputes to be taken to a higher jurisdiction court than is appropriate for the dispute, or require an expensive arbitration when a less expensive option is more appropriate.

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<sup>52</sup> John Vickers, British Academy Keynes Lecture, *Economics for consumer policy*, October 2003 (see [www.econ.ed.ac.uk](http://www.econ.ed.ac.uk)).

<sup>53</sup> Some contracts are exempt from the legislation, in particular contracts covered by the *Consumer Credit Act 1995* (Victoria).

<sup>54</sup> Consumer Affairs Victoria, *Preventing unfair terms in consumer contracts*, p. 4.

<sup>55</sup> *ibid.* pp. 9–11.



- Terms that avoid, limit, or restrict the supplier's liability—e.g. terms that make the consumer carry a risk that the supplier is better able to bear.
- Penalty clauses that allow the supplier to retain prepayments (other than deposits) on the consumer's cancellation of a contract, or terms that require a consumer who fails to fulfil their contractual obligations to pay a disproportionately high sum in compensation or in cancellation penalties or charges—e.g. a requirement to pay unreasonable interest on outstanding payments.

Whether a term will be considered unfair can depend on the context in which it is used. Consumer Affairs Victoria has stated that 'While a term may be considered fair in one context, it may be deemed unfair in another circumstance if it is detrimental to the consumer.'

Consumer Affairs Victoria has the ability to take enforcement action over an alleged unfair contract term or a proscribed term. It can apply to the Victorian Civil and Administrative Tribunal for an injunction and declarations, or request an advisory opinion from VCAT on whether a term is unfair. Using a proscribed term is an offence that attracts penalties. Individuals may also take private actions over an unfair term in a consumer contract.

For example, in December 2004 Consumer Affairs Victoria initiated proceedings in VCAT alleging that AAPT mobile and prepaid phone contracts contained unfair terms. On 2 August 2006 VCAT issued a decision that found that many of the terms identified in the AAPT contracts were unfair.

### ***United Kingdom***

UCTL in the United Kingdom (UK) is derived from a European Union directive leading to the Unfair Terms in Consumer Contracts Regulations 1994 (superseded in 1999). Contractual terms in consumer contracts are considered unfair and not binding on consumers if they are contrary to the requirement of good faith. Such terms cause a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers.

Good faith means that sellers must deal fairly and openly with consumers. Terms may be drafted to protect commercial interests, but must also take into account the rights of consumers by going no further than necessary to protect legitimate commercial interests. Assessing fairness involves taking into account the nature of the goods and services, the circumstances surrounding the making of the contract, the other terms of the contract and the content of any other contract linked to the one under review.

The legislation also requires that sellers shall ensure that any written term of a contract is expressed in plain, intelligible language. Certain terms are not covered by the legislation—i.e. terms setting the price<sup>56</sup> or defining the product or service being supplied ('core terms'), terms that have been specially negotiated and business-to-business agreements.

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<sup>56</sup> The exemption does not cover sums payable under a default or a similarly subsidiary term to which the consumer might have paid little attention.

The objective of the legislation is to ensure that contractual clauses generally reflect what the law considers a reasonable person would have agreed to after reading the ‘fine print’ clauses.

The UK law includes an indicative, non-exhaustive list of terms that may be regarded as unfair. The UK Office of Fair Trading can take enforcement action to seek an injunction against unfair terms. A consumer can also take private action to have a contract term set aside.

The UK law has recently undergone a review by the Law Commission and Scottish Law Commission<sup>57</sup>, which, among other matters, recommended the following:

- unification of the Unfair Terms in Consumer Contracts Regulation and the Unfair Contract Terms Act
- inclusion of both individually negotiated and non-negotiated terms in this unified system
- establishment of an unfair contract terms regime to protect small business, which would apply to non-negotiated, non-core terms.

It is understood that the UK Government has accepted these recommendations, subject to the completion of a regulatory impact assessment.

#### ***Differences between the Victorian and UK models***

The UK and Victorian approach to UCTL is similar in many respects. However, some key differences include:

- The Victorian model allows Consumer Affairs Victoria to identify and prohibit a specific ‘black list’, while the UK model provides an indicative list of terms that may be considered to fall within the scope of the legislation. Thus, the Victorian model potentially provides more certainty about what terms will be considered unfair, but is potentially more prescriptive and less flexible.
- The Victorian model enables consideration of specifically negotiated terms, while the UK model limits the scope of the legislation to standard form contract terms—i.e. terms that have not been negotiated by the parties to the contract.<sup>58</sup>
- The Victorian model covers terms relating to the setting of prices and core product terms, while the UK model excludes such terms (as long as they meet the plain language requirement).

#### ***Other Australian examples***

Although no other Australian jurisdiction has yet introduced generic UCTL, a number of industry-specific codes of practice do incorporate a requirement of fairness.

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<sup>57</sup> The Law Commission and the Scottish Law Commission, *Unfair Terms in Contracts*, February 2005.

<sup>58</sup> A term will be regarded as not having been individually negotiated where it was drafted in advance and the consumer was therefore not in a position to influence its substance.

In the telecommunications sector, the Australian Communications Industry Forum (ACIF, now known as the Communications Alliance) developed a Consumer Contracts Code (ACIF C620:2005). As well as requiring contract terms to be accessible and clear, s. 6.1.1 of this code states that a term in a contract must not be unfair. The code sets out a series of considerations relevant for assessing terms for unfairness (s. 6.2), as well as a range of exceptions (s. 6.3).

Under s. 114 of the *Telecommunications Act 1997*, the code gives the Telecommunications Industry Ombudsman the power to receive and resolve code complaints. The TIO can make binding decisions up to the value of \$10 000 and recommendations up to the value of \$50 000. Under Part 6 of the Telecommunications Act, if an ACIF code is registered by the Australian Communications and Media Authority, the authority then has the power to issue warnings to providers about breaches of the code and to direct industry participants to comply with the provisions of a code. ACMA registered the Consumer Contracts Code in May 2005.

The Uniform Consumer Credit Code (UCCC) applies generally to the provision of credit, consumer leases, related insurance contracts and related sales contracts. Section 70 of the UCCC allows the court to reopen unjust contracts.

#### **4.3.3 Issues with the introduction of UCTL for Australian consumers**

##### ***Is there evidence of unfair contract terms in Australian markets?***

As UCTL does not fall within the scope of the Trade Practices Act, the ACCC does not collect data specifically relating to the level or extent of unfair contract terms. The ACCC is unaware of any comprehensive data collection undertaken to establish the extent of unfair contract terms in the Australian economy.

Nevertheless, the ACCC understands that concern about unfair contract terms is widespread in Australia.

In its inquiry into unfair terms in consumer contracts, the New South Wales Legislative Council Standing Committee on Law and Justice noted anecdotal evidence indicating a wide range of unfair contract terms across a number of industries. It found there was a growing use of standard form contracts that could leave consumers open to unfair terms, particularly if contracts were very lengthy, not written in plain English and referred to additional material not provided with the original contract. Problematic areas included mobile phones, gym membership, cable television, internet service provision, banking services and hire cars.

Similarly, a survey conducted by the Communications Law Centre in 2003 also indicated widespread incidents of unfair contract terms in mobile phone contracts.

##### ***What is the consumer detriment associated with unfair contract terms?***

The degree of consumer detriment associated with unfair contract terms is uncertain.

Because unfair non-core contract terms are triggered by events that may or may not occur—such as defaults on loans or failure to provide a service—quantifying the actual consumer detriment associated with such terms is problematic.

Further, while some consumers may be unaware, or fail to comprehend the nature, of all the terms and conditions of a contract and accordingly are not driving competition to achieve market outcomes in their best interests, other consumers may not be acting under information asymmetry and will suffer no detriment.

Nevertheless, it has been argued that:

... the long term prognosis will see lost opportunities for future transactions, higher grievance procedure costs and a reduction in the trust critical for successful and smooth operation of the dynamic marketplace. True competition within the market place may well increase consumer confidence and lead to an increase in economic activity.<sup>59</sup>

The fact that actual consumer detriment is difficult to quantify does not necessarily mean that UCTL cannot be justified. Consumer detriment is not necessarily bound to concepts of actual financial loss. Detriment can be exhibited in a number of ways, including intangible detriments such as dissatisfaction at apparent 'unfairness' in traders' dealings with consumers.

For example, although misleading and deceptive conduct laws are well accepted as a fundamental aspect of consumer policy, they are not solely based on the concept of consumer detriment. Just as it is uncertain whether consumers who purchased products where misleading claims were made acted because of the false information, it is also uncertain whether consumers acted under conditions of misinformation or misunderstanding of information in entering contracts with unfair contract terms.

In such cases, the relevant consideration is whether the detriments associated with introducing such a law are significant. The more significant the detriment, the greater the need to quantify the benefits (or reduction in consumer detriment) that can be achieved by introducing a law. As discussed in more detail below, the ACCC considers that the potential detriments associated with the introduction of UCTL are more complex than those associated with a misleading and deceptive conduct law and, accordingly, require close scrutiny.

***To what extent do unconscionability laws and implied conditions and warranties in consumer contracts alleviate concerns?***

The current provisions of the Trade Practices Act are unlikely to prohibit the wide range of contractual terms likely to fall within the scope of UCTL. Nevertheless, current provisions do cover situations of unfairness evident in unconscionable conduct and prevent serious forms of unfairness relating to core terms of contracts through the imposition of non-excludable implied conditions and warranties in consumer contracts.

The Trade Practices Act currently prohibits unconscionable conduct by corporations when they supply goods or services ordinarily acquired by consumers for their personal, domestic or household use, but not for resupply or use in trade or commerce. The legislation prohibits conduct that is unconscionable within the meaning of the common law (s. 51AA) and conduct that in all the circumstances is unconscionable (s. 51AB). It is generally considered that s. 51AB provides a broader scope of protection than common law unconscionability because it sets out a range of factors to be considered when determining whether conduct has been unconscionable. These factors include the relative bargaining strengths of the parties, use of undue tactics, whether the consumer was required to comply with conditions not reasonably necessary for the protection of the interests of the corporation and whether the consumer understood any documentation used. The list is broad and non-exclusive.

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<sup>59</sup> L Griggs, *The [ir]rational consumer and why we need national legislation governing unfair contract terms*, (2005) 13 CCLJ 51.

It is considered generally (although this is not altogether clear from the case law) that the common law doctrine of unconscionability applies only in cases where the consumer is under some special disability or is placed in some special situation of disadvantage.<sup>60</sup> It is unlikely that the mere fact that unfair terms exist in a contract would be considered sufficient to show common law unconscionability. In that regard, the common law action of unconscionability, while it may overlap with UCTL to some degree, is unlikely to provide as broad a level of coverage.

The broader provisions of s. 51AB have greater scope to overlap with UCTL. The list of factors indicates that the unconscionability provisions could be used to address some problems associated with unfair contract terms. For example, factors—e.g. whether the contract's terms were not reasonably necessary for the protection of the interests of the corporation—come close to the factors considered in an UCTL.

However, in the ACCC's view, it is unclear that the law of unconscionability will develop to address mere substantive (as opposed to procedural) unfairness. For example, in the case of *Hurley v McDonalds Australia Ltd*, the court stated:

Before s. s 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or 'wrong'.<sup>61</sup>

This approach is consistent with the wording of the section itself, which focuses on 'conduct' rather than, say, 'contracts'. While the interpretation of s. 51AB could be expanded over time, such expansion is far from certain.

The Trade Practices Act already provides certain protections for consumers in contracting with traders through the imposition of implied conditions and warranties in consumer contracts. These implied rights cannot be waived and, accordingly, provide a minimum acceptable standard for terms and conditions in consumer contracts. Generally, these implied rights go to issues of ensuring that the consumer obtains clear title to products and that they are fit for purpose.

These provisions would not cover the broad scope of terms and conditions envisaged by the Victorian or UK models of UCTL. The implied conditions and warranties primarily apply to core terms regarding the nature and quality of the product or service, rather than other terms relating to issues such as dispute resolution, lock-in, etc. Nevertheless, there may be some degree of overlap, particularly for services where there is an implied warranty that these services must be carried out with due care and skill. This would overlap with grossly unfair contract terms that attempted to shift all risk in the performance of contracts onto consumers.

### ***The costs and benefits of a national unfair contract term law***

The introduction of a national unfair contract term law (UCTL) is desirable if the benefits of such a law outweigh the costs. However, these costs and benefits depend on the exact nature of the law, including its scope and mode of operation. When considering any UCTL, care must be taken to ensure that the benefits and costs of such a law are appropriately identified.

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<sup>60</sup> *Blomley v Ryan* (1956) CLR 362.

<sup>61</sup> [1999] FCA 1728.

The removal of terms from a contract will alter the nature of the contract, and the law needs to ensure that the consequences of such a change are regarded appropriately. For example, the removal of a particular term may alter prices or may limit the legitimate choice of some consumers. This does not mean that the contract term should not be removed. Rather, it means that care needs to be taken to recognise the existence of such costs and to ensure that the law only applies when any costs are outweighed by benefits created by removal of the contract term.

Poorly designed laws may impose administrative burdens on business and consumers, and this also applies to UCTL. When considering such a law, attention must be given to the burden that compliance may place on businesses and consumers.

In jurisdictions where UCTL has been introduced, administrators of those laws have generally taken the view that the costs to business and consumers associated with the implementation of UCTL have not been overly onerous.

Dr David Cousins, Director of Consumer Affairs Victoria, stated that:

Our experience is, and I guess we can only go on what business feeds back to us, is that there have not been major costs on business. In fact, the reality has been that business does from time to time review and change contracts. And the process of taking account of the Victorian legislation in many cases has actually just been absorbed as part of the normal process of change and reviewing contracts.<sup>62</sup>

Nevertheless, others have raised concerns. For example, the Housing Industry Association stated that:

It is our experience that these laws lead to virtual regulation of contracts by imposing requirements at the regulator's opinion and without public consultation or consideration of net public benefit.<sup>63</sup>

The European Union has recently assessed the impact of the unfair contracts directive in member states. It noted that a fundamental problem seen in many member states (especially in Belgium, Poland and Malta) is that many traders have problems complying with the law. A recent Polish study examining the brochures, leaflets and contracts used by organisers of tourist events and language schools revealed that 95 per cent contained prohibited clauses.<sup>64</sup>

#### **4.3.4 Other possible models**

A number of other approaches could be used to reduce the incidence of unfair contract terms.

##### ***A prescribed list of unfair contract terms***

One alternative approach would be to legislate a 'black list' of terms in contracts that would be prohibited as unfair, unless the supplier can show that the term in question is fair, having regard to legitimate business interests.

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<sup>62</sup> Dr Cousins, evidence to the New South Wales Legislative Council Inquiry into Unfair terms in Consumer Contracts, Report 32, November 2006, p. 67.

<sup>63</sup> Housing Industry Association, evidence to the New South Wales Legislative Council Inquiry into Unfair Terms in Consumer Contracts, October 2006.

<sup>64</sup> European Commission, *Consumer Law Compendium*, p. 413.

Terms to be included on the list would be terms that appear to cause a substantial imbalance in contractual rights and obligations, and are unlikely to be justified on the grounds of legitimate business interests.

The prohibition would be limited to terms drafted in advance where the consumer was not in a position to influence its substance.

Examples of prescribed terms could include:

- terms imposing arbitrary time limits on claims
- terms providing for exclusions of liability for failure to perform contractual obligations unless due to circumstances beyond the control of the supplier
- terms enabling the supplier to alter the terms of the contract or any characteristic of the product or service to be provided on a unilateral basis without a valid reason
- terms enabling the supplier to terminate a contract without reasonable notice except where there are serious grounds to do so
- terms automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early
- terms giving the supplier the right to determine whether the goods or services supplied conform with the contract, or exclusive right to interpret any term of the contract
- terms obliging the consumer to fulfil all obligations, even where the supplier does not perform theirs due to factors within the supplier's control.
- terms excluding or restricting a consumer's right to take legal action or exercise any other legal remedy.

Such an approach would provide a regime with a higher degree of certainty than a broad UCTL, and therefore would be likely to achieve a higher prospect of compliance and increased consumer confidence. It could also have the potential to limit regulatory costs substantially compared with general UCTL.

This approach would still require a process to identify the type of terms that are or are not allowable and considerable consultation.

***Prominent disclosure of prescribed categories of terms***

Another approach could be to require businesses to provide consumers with prominent disclosure about a list of specific issues before entering into a contract, including:

- costs associated with default
- ability of supplier to change terms unilaterally
- rights of parties to terminate
- restrictions on consumer's rights to take legal action in relation to the contract

- steps required to notify claims or the notification of termination of contract.

An example of this exists relates to credit contracts, issued pursuant to the Uniform Consumer Credit Code, which requires certain information to be presented in a pre-contractual statement and information statement. For example, such statements outline default rates of interest and how a person will be informed about changes to a contract.

Greater prominence of potentially unfair terms may increase consumer awareness of them, and reduce the ‘search cost’ associated with discovering unfair terms before entering into a contract. Arguably, giving prominence to such terms empowers consumers to activate competition on terms previously not considered for competition by suppliers.

There is little evidence on the impact of mandatory disclosures on consumer behaviour. First, as consumers often do not accurately assess risks, it could be argued that such disclosures may not substantially change their choices. In addition, increasing the amount of ‘paper’ associated with a transaction could result in confusion and further discourage consumers from switching suppliers. Secondly, a prominent display of patently unequal terms could so offend consumers that they may walk away from transactions, even if on the balance the transaction may have been favourable to them.

Some research has indicated that disclosure may have some unintended outcomes. For example, one study found that when financial advisors provided disclosure of conflict of interest, it lowered consumers’ wariness, while at the same time lifted moral restraints on financial advisors not to provide biased advice.<sup>65</sup>

### ***Mandatory cooling off periods***

A different approach could be the provision of a statutory cooling off period in all non-negotiated consumer contracts. Such a cooling off period, of three days or any other time considered appropriate, would provide consumers with an opportunity to reflect on the terms and conditions of a contract.

Cooling off periods are already used in Australia in sectors such as property transactions, car sales and door-to-door selling. This approach raises questions about how much time for reflection consumers require to make sound decisions, and how much protection should be afforded to allow for this time. Allowing time for reflection may improve decision-making and related consumer outcomes.

However, there may be some difficulties with such an approach, including that:

- Such a right would enable consumers to change their minds in any situation, including about core contractual terms of which they were well aware and fully understood when they entered the contract.
- Many consumers may not use the benefit of a period of time to consider the terms of a contract, leading them either to go ahead no better informed than if there were no cooling off period, or to pay less attention to the consequences of signing contracts at the time. They may operate on the presumption of ‘I’ll sign now and think about it later’, and then allow the cooling off period to elapse.

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<sup>65</sup> Cain, Moore and Loewenstein, ‘The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest’, *Journal of Legal Studies*, January 2005.



There is little evidence on the relative merits of these pros and cons for cooling off periods. It may be that these periods are more appropriate where it is likely that the consumer may be operating under some form of specific vulnerability, such as high-pressure selling environments—e.g. doorstep- selling situations, where consumers require protection from making decisions relating to core terms that, on reflection, they would not make outside the heat of the moment. The difficulty is identifying all such, and only such, environments.

### ***Regulated standard form contracts***

Another approach to removing unfair terms from contracts is regulating the standard terms and conditions in contracts. This can take various forms, including self-regulatory models, co-regulatory models or legislated terms and conditions.

Generally, such models involve the development of a specific standard form contract in relation to a specific industry, as it is difficult to tailor standard terms and conditions suitable for every eventuality.

An example of the application of the standard form contract approach occurs in the Netherlands. The Dutch model encourages trade and industry associations to establish general terms and conditions for their consumer contracts through dialogue with consumer organisations. These consultations take the form of a self-regulation coordination group, headed by an independent chairperson and supported by an independent secretariat. The group, which includes both business and consumer interests, develops an agreed set of general terms and conditions, using a manual providing examples of general terms and conditions equitable for both the company and the customer. The group will often agree the establishment of a consumer complaint board for that industry or sector.

More than 20 sectors across the Netherlands have currently reached agreements on their contractual terms and conditions.

While this is essentially a self-regulation model, it has co-regulatory elements. The Dutch Civil Code enables a person to have certain stipulations in certain general conditions declared ‘unreasonably onerous’ by courts. A consumer organisation loses its right to take action if it has agreed to the use of the stipulation, which gives trade organisations an incentive for agreeing to standard terms and conditions (in consultation with consumer groups) to achieve certainty. The Minister of Justice also has the power to apply the agreed standard terms and conditions to non-members of a trade organisation.

These regulated or proscribed standard form contracts are used in other areas as well. In Australia, for example, standard form contracts (with non-excludable standard terms) are used in residential tenancy legislation.

To implement this model in Australia, consumer organisations would need to be funded appropriately to ensure they could engage effectively with trade associations to develop standard terms and conditions. Further, a cautious approach may need to be taken to dynamic industries where products and services are changing rapidly, as there may be issues in ensuring that the standard contract keeps up with the market.

### ***Prominent disclosure of non-standard terms in regulated standard form contracts***

The regulated standard form contract model could be varied by legislating for model standard form contracts. In this case, businesses would not be obliged to adhere to the standard terms, but would be obliged to disclose whether **their** terms and conditions differed from the **recommended** standard terms and contracts. This would provide a greater degree of flexibility in developing contracts relevant to the circumstances, but, at the same time, warn consumers of potentially unfair contracts. While this approach is similar to a mandatory disclosure requirement, it provides consumers with the additional context of being able to compare the actual terms of a contract with what they should expect in the marketplace.

#### **4.3.5 Summary**

The ACCC considers that the increasing complexity of and information overload associated with many consumer contracts have created a level of consumer detriment that current consumer protection laws may not deal with effectively. The difficulty lies in assessing what form of enhanced consumer protection provisions could be justified to ensure that potential detriments are addressed without causing a net reduction in public benefit.

The design of consumer protection measures right to be introduced in Australia should only be carried out after rigorous research into the detriments and benefits—for both consumers and business—associated with such measures and the likely costs of implementation. The ACCC notes that further research to compare and evaluate the various approaches taken to unfair contract terms in different jurisdictions would be helpful to inform decision-makers.

## **4.4 Vulnerable or disadvantaged consumers**

### **4.4.1 What is vulnerability or disadvantage?**

As outlined above, the ACCC considers that consideration of the needs of vulnerable or disadvantaged consumers is an important element of the Australian consumer policy framework. Such consumers may require special protections for a number of reasons, in particular because special circumstances make it difficult for certain consumers to choose the products or services that are best for them.

Potentially, the concept of vulnerability or disadvantage is extremely broad. Consumers may not choose the products or services that are best for them for a variety of reasons. These may include informational asymmetry or deficit, the individual's attributes or circumstances or a combination of such factors. In this sense, almost all consumer laws have been designed to combat issues of consumer vulnerability.

While certain types of market vulnerability applying to all consumers—e.g. misleading and deceptive conduct or misuse of market power—are already incorporated into the Trade Practices Act, one particular concern is ensuring that the consumer policy framework deals appropriately with other forms of vulnerability or disadvantage that stem from disadvantages or vulnerabilities affecting only a segment of society, or vulnerabilities specific to a particular situation.

One description of these types of vulnerability is that they are personal factors creating consumer vulnerability. The provisions dealing with them are designed to cover particular categories of consumers who have particular vulnerabilities. These provisions differ from the more general consumer protection provisions discussed above, which are designed to protect all consumers.

Consumers may be disadvantaged or vulnerable in some marketplace situations if they:

- have a low income
- are from a non-English speaking background
- have a disability—intellectual, psychiatric, physical, sensory, neurological or learning
- have a serious or chronic illness
- have poor reading, writing and numeric skills
- are homeless
- are very young
- are old
- come from a remote area
- have an indigenous background.<sup>66</sup>

Situational vulnerability may arise due to the nature of the product or market, or the situation of the consumer entering into transactions relating to that product.

Consumer Affairs Victoria has described personal factors creating consumer vulnerability as including:

... temporary 'life events', such as the sudden death of an immediate family member, serious acute illness or retrenchment, where a consumer faces unavoidable complex and/or infrequent transactions and /or the consumer's financial position is significantly altered without warning. The emotional trauma associated with such events may affect the consumer's capacity for critical assessment of information and logical decision-making and expose him or her to manipulation by unscrupulous suppliers.<sup>67</sup>

Where vulnerability arises due to personal factors, this can result in people from certain segments of society facing particular problems not faced by other consumers. For example, a person with a low income obviously faces a problem in acquiring essential services that persons with an average or high income does not face. Such vulnerabilities can also exacerbate issues faced by all consumers to a disproportional degree. For

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<sup>66</sup> ACCC, *Don't take advantage of disadvantage: a compliance guide for businesses dealing with disadvantaged or vulnerable consumers*, available online at [www.accc.gov.au](http://www.accc.gov.au).

<sup>67</sup> Consumer Affairs Victoria, discussion paper, *What do we mean by 'vulnerable' and 'disadvantaged' consumers?*, p. 14.

example, a person from a non-English speaking background may face higher search costs than other consumers and may be more likely to make more errors in choosing products and services.

However, not all consumers with these characteristics are more at risk, as each individual may react differently.

#### **4.4.2 Current approach to disadvantaged or vulnerable consumer issues in the Trade Practices Act**

The fair trading and consumer protection provisions of the Trade Practices Act take into account the vulnerable and disadvantaged in a number of ways, including:

- unconscionable conduct laws
- prohibitions on harassment and undue pressure
- prohibitions on misleading and deceptive conduct and other prohibited conduct.

In this way, the Trade Practices Act prohibits conduct, such as misleading or deceptive conduct, that may have a disproportionately large impact on vulnerable consumers; it also deals with individual circumstances of unconscionability or harassment of vulnerable consumers.

The ACCC focuses on developing strategies to assist vulnerable and disadvantaged persons, because it recognises that, as consumers, they may be especially at risk in the marketplace. This may be because they generally experience greater levels of information asymmetry, have fewer means to combat unfair behaviour and/or less money to cushion the impact of unlawful behaviour, and they also may have lower levels of financial literacy.

In particular, vulnerable or disadvantaged consumers often lack the ability to complain to organisations such as the ACCC or have difficulties providing evidence to courts. Accordingly, the issues faced by vulnerable or disadvantaged consumers are not just that they are more at risk, but that the nature of their vulnerability restricts their ability to access justice.

Some of the ACCC's strategies to assist vulnerable or disadvantaged consumers include:

- targeted enforcement and compliance actions
- publications
- development of a referral guide to assist other agencies in directing relevant complaints to the ACCC
- a system of flagging complaints made by, or on behalf of, vulnerable or disadvantaged consumers, to give further consideration to and identify trends and issues
- taking action to obtain redress for these types of consumers.

The Trade Practices Act does not impose specific informational or other requirements on traders when dealing with vulnerable consumers, other than the general duty not to act in an unconscionable manner, or engage in unfair tactics such as harassment or coercion.

Where vulnerability results from the nature of a product or service—such as funeral services, door-to-door selling—or highly complex products—such as financial services or medical services—industry-specific requirements may be imposed in addition to the Trade Practices Act.

#### **4.4.3 Are the needs of vulnerable or disadvantaged consumers best met through generic approaches or more targeted mechanisms?**

As outlined above, the ACCC believes that existing generic fair trading and consumer protection laws within the Trade Practices Act already provide an important layer of protection for vulnerable or disadvantaged consumers.

The ACCC believes that imposing further protections of general application to vulnerable or disadvantaged consumers is unlikely to provide benefits to such consumers because:

- Defining who is a ‘vulnerable or disadvantaged’ person is problematic. The concept of vulnerability is complex—individuals may be vulnerable in some circumstances, but not in others. An approach listing situations deemed to involve vulnerable or disadvantaged persons is likely to fail to capture sufficiently all the relevant circumstances.
- Traders may have significant difficulties determining when they are dealing with a vulnerable or disadvantaged person and, therefore, what their obligations should be in each case. In many cases, the consumer may not consider that they are vulnerable, or that they may be behaving under the influence of their particular vulnerability.
- The protections required are likely to vary between different groups of vulnerable or disadvantaged persons. Accordingly, further generic protections are unlikely to provide any additional protection than what is already available under the Trade Practices Act.

Key issues associated with applying the Trade Practices Act to vulnerable or disadvantaged consumers relate to ensuring, from an operational perspective, that these segments of society are able to access justice, rather than issues of the substance of the law itself. The ACCC continues to develop its own strategy to enable vulnerable and disadvantaged consumers to access justice where breaches of the Trade Practices Act have occurred. In addition, the ACCC continues to develop its educational materials and outreach networks to enable vulnerable and disadvantaged consumers to arm themselves against unscrupulous traders.

Nevertheless, the ACCC believes that as well as the protections offered to vulnerable or disadvantaged persons under the Trade Practices Act, it may be appropriate to apply targeted mechanisms in appropriate circumstances. Such targeted mechanisms would generally be applied through industry-specific regulation where:

- The harm cannot be dealt with by generic fair trading and consumer protection laws. For example, if a person is cut off from supply of electricity or water, this would not be resolved by the generic fair trading and consumer protection laws unless some element of deception was involved.
- The nature of the product and the circumstances are such that it is likely that consumers will be influenced by their vulnerabilities. For example, decisions about medical procedures where the service is complex and the consumer may be in a distressed situation.

Nevertheless, while the ACCC considers that industry-specific regulation has a role in assisting vulnerable and disadvantaged persons, great care should be taken to ensure that such regulation is necessary and appropriate. Consideration also needs to be given to whether the form of regulation unnecessarily restricts non-vulnerable consumers.

## 4.5 Small business

The Productivity Commission's issues paper questioned whether consumer policy should be extended further to include small business as consumers.

The fair trading and consumer protection provisions of the Trade Practices Act already apply to small business to a certain extent. In particular, small business is afforded protection from misleading and deceptive conduct in the same way that a consumer is. A specific regime for unconscionable conduct relating to small business is contained within s. 51AC of the Trade Practices Act. This regime prohibits unconscionable conduct in small business transactions, having regard to all the circumstances and the criteria listed in the provision. One of the criteria expressly recognises that there may be an inequality in the bargaining position of parties to these types of transactions. While this condition is not sufficient to establish unconscionable conduct, the Trade Practices Act provides a number of other factors that the courts can take into consideration when establishing whether conduct is unconscionable. These factors include:

- whether the business consumer was able to understand documents relating to the transaction
- whether any undue influence or pressure was used against the business consumer
- the extent to which the business supplier was willing to negotiate
- the extent to which the business supplier acted in good faith.

This regime protects small businesses when they acquire goods or services from corporations and are essentially acting in the capacity of a consumer. Further, small business issues in certain areas are addressed through enforceable codes of conduct in the areas of franchising and horticulture.

Key areas of the fair trading and consumer protection laws that do not cover small business relate to implied conditions and warranties. These protections apply only to consumers. A consumer is defined as a person that acquires goods or services where the price of the goods or service does not exceed \$40 000, or, if the price is over \$40 000,

the goods or services are of a kind ordinarily acquired for personal domestic or household use (or a commercial road vehicle). However, a person is not a ‘consumer’ if they acquire goods (at any price) for the purpose of re-supply or for use in trade or commerce as production or manufacturing inputs, or to repair other goods or fixtures.

While the issues faced by consumers and small business in their dealings with larger business are similar—due to the inequality in bargaining power—the ACCC believes that small business considerations can differ from those of consumers. Accordingly, it is necessary to consider carefully whether the regulatory protections provided to consumers will be effective for small business on a case-by-case basis.

For example, if implied conditions and warranties were applied to all small business contracts, this could result in small business bearing higher costs because large business would assume more of the risk in contracts. The ACCC considers that the application of the provision relating to harassment or coercion could potentially benefit to small business when dealing with larger business, but it may be that similar protections are already available under unconscionability provisions.

#### **4.6 Is the Trade Practices Act sufficiently robust to deal with cross-border issues?**

All enforcement agencies face a number of issues face in applying their fair trading and consumer protection laws to cross-border matters. Particular issues include:

- locating traders operating out of other jurisdictions
- ensuring that laws enable enforcement agencies to bring proceedings against such traders when they cause detriment to consumers within the domestic jurisdiction
- ensuring that remedies can be enforced against offshore traders
- cooperation between enforcement agencies to assist in investigations, including ensuring that legislative regimes allow appropriate sharing of information between enforcement agencies.

In some cases, locating offshore traders is neither practical nor possible. However, where it has been possible, the Trade Practices Act has enabled proceedings against the activities of offshore traders.

The ACCC has had difficulty in enforcing judgments in other jurisdictions, but has overcome these difficulties in a number of ways. For example, while the ACCC successfully obtained a judgment in the *Chen* matter, it was unable to enforce it on the trader, who was located in the United States, without the assistance of the United States Federal Trade Commission. In another matter, the ACCC obtained judgments against traders located in Vanuatu by taking action in the Supreme Court of the Republic of Vanuatu.

The ACCC does not wish to understate the complexity of cross-border enforcement actions.

The key element of combating cross border issues is to develop close cooperation with other jurisdictions. The ACCC will continue to work on developing and maintaining strong international ties.

As previously mentioned (3.10.4), a number of international processes seek to improve opportunities for cross-border enforcement action. In addition to the work of bodies such as Organisation for Economic Co-operation and Development and International Consumer Protection and Enforcement Network, individual countries are taking measures to extend protection offered to consumers engaged in global transactions. For example, in 2006 the USA passed its Undertaking Spam, Spyware and Fraud Enforcement with Enforcers Across Borders Act, providing the US Federal Trade Commission with greater powers to provide investigative assistance to foreign law enforcement agencies and clarifies its own jurisdiction over foreign commerce.



## 5. Enforcement powers and remedies under the Trade Practices Act

A critical element in the effective administration of the *Trade Practices Act 1974* is ensuring that it provides the Australian Competition and Consumer Commission (ACCC) with adequate investigation powers to detect contraventions expediently and the ability to seek appropriate remedies on an administrative basis or through the courts. The importance of having effective enforcement tools has international significance as global fraud and deceptive conduct can only be combated if each jurisdiction has adequate mechanisms. The Organisation for Economic Co-operation and Development (OECD) has issued guidelines which call for countries to provide effective measures that are adequate to deter businesses and individuals from engaging in fraudulent and deceptive commercial practices.<sup>68</sup>

As outlined above, the ACCC has a range of enforcement powers available to it to investigate potential breaches of the Trade Practices Act and can seek a number of remedies from the court if a person has been found to have contravened the Trade Practices Act, including court enforceable undertakings, injunctions, declarations, corrective advertising and other compensatory orders on behalf of persons who have suffered loss or damage as a result of the conduct. In serious matters the ACCC may seek criminal penalties.

Nevertheless, the ACCC believes that the range of powers and remedies available under the Trade Practices Act need to be significantly enhanced in order to ensure the effectiveness and flexibility of the Trade Practices Act to a modern economy. In this regard, the ACCC has noted that a number of jurisdictions, both domestically and internationally have certain investigation powers or remedies that are not available to the ACCC.

Significant powers that are not currently available to the ACCC under the Trade Practices Act and could be incorporated into the legislative framework, are:

- civil pecuniary penalties and banning orders
- consumer redress for non-named parties
- cease and desist orders
- substantiation notices
- infringement notices
- public warning notices.

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<sup>68</sup> OECD, *Guidelines on protecting consumers from fraudulent and deceptive practices across borders*, 2003.

The ACCC does not believe that all such powers are appropriate or necessary in the context of the Trade Practices Act, but that there are some significant areas where enforcement of the national consumer law can be improved. In particular, the ACCC believes that the effectiveness of the Trade Practices Act would be significantly enhanced by the introduction of:

- civil pecuniary penalties and banning orders
- consumer redress for non-named parties
- a power to use s. 155 powers until such time as substantive proceedings commence
- a power for the ACCC to issue substantiation notices in the course of an investigation.

## **5.1 Civil pecuniary penalties and banning orders**

The ACCC considers that the ability to obtain civil pecuniary penalties, declarations, injunctive relief, and other measures such as corrective advertising within a single action in relation to fair trading and consumer protection matters would significantly enhance the ability of the ACCC to obtain effective outcomes and provide a higher degree of deterrence.

A ‘civil penalty’ is one imposed by courts applying civil rather than criminal court processes and imposed in respect of a contravention that has been proved on the balance of probabilities, not on the criminal standard of beyond reasonable doubt.

The ACCC has proposed such amendments to the Trade Practices Act on a number of previous occasions. In particular, it raised the issue in its submission to the Parliamentary Joint Committee on Corporations and Financial Services in relation to property investment advisors and through participation in a SCOCA working party, established to prepare a report on the desirability of adopting civil penalties or some other more flexible enforcement strategy in substitution for, or as an alternative to, criminal fines for breaches of Part V of the Trade Practices Act and the state and territory equivalent legislation. The SCOCA working party has not yet finalised its views.

The ACCC has pursued criminal enforcement proceedings in the past and will continue to do so in the future, however, criminal proceedings are not always the most appropriate regulatory option. At present, criminal proceedings represent only a small proportion of the consumer protection actions taken by the ACCC. These cases represent the most serious breaches of the law and the ACCC remains concerned to ensure that criminal sanctions are reserved for only the most blatant, harmful or dishonest conduct. The availability of criminal sanctions is necessary to deter the most serious offenders.

In many fair trading and consumer protection matters it is important to take swift action in order to stop ongoing conduct and minimise damage to consumers. A slow, complex criminal investigation is not appropriate in those circumstances. However, a less complex civil action resulting in lesser penalties may not provide a sufficient level of deterrence.

Accordingly, the ACCC is concerned that there is a significant category of matters where there is a real risk that it will not be able to obtain appropriate remedies.

The ACCC believes that the introduction of civil pecuniary penalties for breaches of certain fair trading and consumer protection provisions would fill this gap in the range of remedies available in relation to breaches of the legislation and would enable the ACCC to more effectively promote compliance with these provisions of the Trade Practices Act.

### **5.1.1 Current position**

#### ***Civil pecuniary penalties***

Currently, remedies for breaches of the fair trading and consumer protection provisions of the Trade Practices Act include criminal sanctions, or civil remedies that include injunctions, declarations, damages, community service orders, and ancillary orders of various kinds in favour of persons who have suffered loss or damage as a result of the conduct.

Criminal sanctions are not available in relation to a breach of s. 52 — the general provision prohibiting misleading and deceptive conduct, unconscionable conduct, or implied conditions or warranties.

Where a breach of the fair trading and consumer protection provisions of the Trade Practices Act occurs, the ACCC can only obtain an order for penalties where it brings criminal proceedings.

Civil pecuniary penalties are available in relation to breaches of the anti-competitive conduct provisions of the Trade Practices Act (except for the boycott provisions). Breaches may result in penalties on corporations of up to the greatest of \$10 million, or, where the value of the illegal benefit can be ascertained, three times the value of the illegal benefit, or, where the value of the illegal benefit cannot be ascertained, 10 per cent of turnover in the preceding 12 months. Breaches by individuals may result in penalties of up to \$500 000. Criminal sanctions will also soon be available in relation to certain types of cartel conduct.

There are significant differences between bringing criminal or civil proceedings that mean that criminal prosecutions are not an appropriate response in a significant number of cases. Key issues include:

- the ACCC is concerned to ensure timely redress for consumers, such as corrective advertising, refunds (where possible) and stopping the conduct, which will generally not be possible with a protracted criminal investigation and prosecution
- the nature of the evidence may not support a criminal conviction
- the additional complexity of a criminal investigation imposes additional resource (people, time and financial) costs on the ACCC and the DPP which limits the number of cases that can be taken and therefore the deterrent effect
- discovery, which is only available in civil cases, may be needed to identify affected consumers or the scope of the conduct

- there may be disparities in the enforcement priorities or resources of the ACCC and the DPP.

In practice, this means that it will only be appropriate to take criminal proceedings in a small number of matters.

### **Banning orders**

Banning orders are not currently available in relation to breaches of fair trading and consumer protection provisions of the Trade Practices Act.

A banning order is a restriction placed on an individual disqualifying him or her from either holding a particular position or engaging in particular activities. A banning order is sometimes referred to as a disqualification order.

Banning orders are a type of civil penalty that limits the future opportunities of a person found by a court to have breached the law. Banning orders are a common enforcement tool used under the *Corporations Act 2001* providing the court with discretion to ban (or disqualify) an individual from being involved in the management of a company where that individual has contravened specific legal corporate governance provisions.

‘Cease trading’ orders (available in most states and territory fair trading acts) have a similar effect to banning orders. For example, s. 66B of the *Fair Trading Act 1987* (New South Wales) provides the court with the power to make an order prohibiting a person from carrying on a business of supplying goods or services.

Banning orders have recently been introduced into the Trade Practices Act in relation to certain breaches of the competitive conduct provisions. Subsection 86E(1) of the Trade Practices Act provides that on application by the ACCC, the court may make an order disqualifying a person from managing corporations for a period that the court considers appropriate if two items are satisfied. These are that (a) the court has ordered the person to pay a pecuniary penalty under subs. 76(1) for a contravention of a provision of Part IV; and (b) the court is satisfied that the disqualification is justified.<sup>69</sup>

Section 80 of the Trade Practices Act provides for injunctive relief in relation to breaches of fair trading and consumer protection provisions, but this has limited utility in delivering the fullness of remedy that can be provided with banning orders. The ACCC had some success in obtaining orders (with some of the features of a banning order) under s. 80 of the Trade Practices Act in two cases where the perpetrators were the subject of previous court orders for similar offences under consumer protection law—*Ramon Keshow—National Maths Academy*<sup>70</sup> 2005 and *Peter Foster—Chaste*

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<sup>69</sup> Item 20 also inserts a note at the end of the new subs. 86E(1). The note observes s. 206EA of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section and that the Corporations Act contains various consequences for persons so disqualified. Subsection 86E(2) provides that in determining whether the disqualification is justified, the court may have regard to (a) the person’s conduct in relation to the management, business or property of any corporation; and (b) any other matters that the court considers appropriate. Subsection 86E(3) requires the ACCC to notify ASIC if the court makes an order under s. 86E and also requires the ACCC to give ASIC a copy of the order. These obligations enable ASIC to meet its obligation to maintain a register of persons who have been disqualified from managing corporations pursuant to s. 1274AA of the Corporations Act.

<sup>70</sup> See further *Australian Competition and Consumer Commission v Keshow* [2004] FCA (NTD19)

*Corporation*<sup>71</sup> 2005 and on appeal, 2006. A constraint of s. 80 meant that the ACCC, in these cases, had to satisfy the court that it [the court] had the power to make the orders and that it was appropriate for it [the court] to make the orders sought. This complexity in the issues to be considered by the court would be eliminated if banning orders were included as part of the civil pecuniary penalty regime. The courts are well skilled in determining banning orders where there is a clear and concise statute.

### 5.1.2 Nature of civil pecuniary penalties

Civil penalties have become a broadly accepted feature of the Australian legal system, imposed in a range of areas. For example, civil penalties have been available under the Customs prosecution procedures in the Customs Act since its enactment in 1901. Civil monetary penalties have been available under Part IV of the Trade Practices Act since its inception in 1974, and are available in relation to Part 9.4B of the *Corporations Act 2001*.

French J noted in *TPC v CSR Ltd* that the object of the civil penalties in the Trade Practices Act was to put a sufficiently high price on contraventions to deter potential breaches.<sup>72</sup>

The adoption of civil penalty provisions in Part 9.4B of the *Corporations Act 2001* was based on the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) report *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*.<sup>73</sup>

The aim of introducing civil penalties into the corporations law was to provide a sanction for contraventions that fell short of a criminal offence. The use of civil penalties in the *Corporations Act 2001* emerged in response to the considerable work on regulatory enforcement undertaken in the 1980s and 1990s by theorists such as Ayres and Braithwaite. Under the 'enforcement pyramid' model<sup>74</sup> Ayres and Braithwaite advocated what they describe as a 'tit for tat' approach, by which breaches of increasing seriousness are dealt with by sanctions of increasing severity, with the ultimate sanctions, such as imprisonment, or loss of the licence to carry on business, held in reserve as a threat.

Civil monetary penalties play a key role in the pyramid as they are sufficiently serious to act as a deterrent, if imposed at a high enough level, but do not have the stigma of a

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<sup>71</sup> See further *ACCC v Chaste Corporation Pty Ltd (ACN 089 837 329) & Anor* [2001] FCA (QUD252) and *Foster v ACCC* [2005] FCA (QUD355) (appeal)

<sup>72</sup> *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR 41-076, 52, 152. See discussion in M Gillooly and N Wallace-Bruce, 'Civil Penalties in Australian Legislation' 13(2) (1994), *University of Tasmania Law Review* 269.

<sup>73</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989), AGPS, Canberra.

<sup>74</sup> The model was first put forward by Braithwaite in J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) State University of New York Press, Albany, NY, and was further discussed in B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (1993), Cambridge University Press, Cambridge and in C Dellit and B Fisse, 'Civil and Criminal Liability Under Australian Securities Regulation; The Possibility of Strategic Enforcement' in G Walker and B Fisse (eds), *Securities Regulation in Australia and New Zealand* (1994) Oxford University Press, Oxford, 570.

criminal prosecution. Whilst the criminal sanction is said to be suitable for the control of isolated or instantaneous conduct, the civil sanction is said to be better in cases where continuous surveillance is desired.<sup>75</sup>

### **5.1.3 Why are civil pecuniary penalties and banning orders needed?**

Introducing civil pecuniary penalties and banning orders for breaches of certain fair trading and consumer protection provisions of the Trade Practices Act, in addition to the existing remedies available, would significantly enhance the effective enforcement of these provisions for a number of reasons outlined below.

#### ***Civil pecuniary penalties***

The ACCC is concerned that currently there is a significant category of fair trading and consumer matters where there is a real risk that it will not be able to obtain appropriate remedies. The ACCC may only obtain criminal sanctions in certain matters, due to the factors listed above. However, there are other matters which are not of a nature that should attract criminal sanctions or the circumstances are such that it is impractical to take criminal proceedings, where a penalty is still necessary in order to deter such conduct occurring in the future.

The introduction of civil pecuniary penalties would bridge the existing gap between the civil compensatory measures currently available for breaches of fair trading and consumer protection provisions and the criminal penalty provisions. In particular, it would enable a more proportionate response to breaches of the consumer protection provisions increasing the deterrent effect of existing laws.

The ACCC also believes that it is critical that appropriate fair trading and consumer protection laws attract similar remedies to the anti-competitive conduct provisions of the Trade Practices Act. As outlined above, anti-competitive conduct provisions attract civil pecuniary penalties and will also attract criminal sanctions in some cases. Compliance with the consumer protection provisions of the Trade Practices Act is as important as compliance with the anti-competitive conduct provisions in promoting efficient markets and consumer welfare and should attract equivalent penalties.

The introduction of civil pecuniary penalties would assist the ACCC in performing its role. It would remove some of the tensions the ACCC faces in choosing between implementing a timely response to contraventions of the law so as to prevent ongoing or future detriment and the need to discourage conduct in a way severe enough to warrant penalties, by enabling the ACCC to achieve both outcomes in a single proceeding. It would also better utilise limited enforcement resources. Under the current provisions, obtaining civil penalties for breaches of anti-competitive conduct provisions do not impose significantly greater difficulties than taking civil actions, which do not attract penalties, in relation to fair trading and consumer protection matters, yet the deterrent effect is greater.

Consumers would also benefit because it would allow appropriate cases to be resolved more quickly under civil processes, due to a single enforcement agency taking the proceedings.

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<sup>75</sup> A Freiberg, “‘Civilizing’ Crime: Reactions to Illegality in the Modern State”, thesis, 1985, 119.

It would also reduce disparities between the ACCC and the DPP's priorities, resources, and level of expertise and experience in investigating and conducting consumer protection actions.

The ability to obtain quick preventative action for consumers and achieve an appropriate deterrent against future conduct is particularly important in relation to product safety matters, where deterrence is vital in order to prevent non-complying conduct that can cause physical injury to consumers.

Such a measure would not increase regulatory costs or business compliance costs. Businesses that take their trade practices compliance obligations seriously and implement appropriate compliance systems, stand to lose nothing from the introduction of civil pecuniary penalties, but have everything to gain from improved compliance by their competitors.

### **Banning orders**

Banning orders under the *Corporations Act 2001* serve an important function in protecting the public. Banning orders apply not only in cases involving some form of serious culpability or wrongdoing, but also in cases where the director has failed to act to prevent detriment to shareholders or the public.

In *Rich v ASIC*<sup>76</sup>, Kirby J noted that the reforms to the civil penalty provisions under the corporations laws in 1992 'were designed to implement a principle of a 'pyramid of enforcement' containing a hierarchy of sanctions'.<sup>77</sup>

McHugh J noted the important role of the provisions in protecting consumers and shareholders.<sup>78</sup>

It is, therefore, anomalous that the public should not be afforded the same protection in relation to breaches of the consumer protection laws. Effective corporate governance is as crucial to trade practices compliance as it is to compliance with the corporation law regime.

Directors who fail to take steps to ensure the accuracy of their advertising claims, who fail to ensure that the products they sell or produce comply with mandatory product safety standards or, in the worst cases, who deliberately set out to mislead or deceive the public, should not be permitted to continue to serve in roles where they may re-offend.

This is particularly the case in serious 'fraud' type cases. For example, where companies target consumers with deliberately misleading or deceptive conduct through 'scams' in relation to unsolicited goods or entry into business directories, or where they send fraudulent invoices for goods or services that were never provided or that they do not intend to provide.

Similar considerations apply to 'phoenix' companies. Preventing such individuals from holding company directorships would greatly limit such occurrences.

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<sup>76</sup> [2004] HCA 42.

<sup>77</sup> *ibid.*, at para. 111.

<sup>78</sup> *ibid.*, para. 49.

The ACCC considers that the introduction of banning orders for breaches of Part V of the Trade Practices Act would, in conjunction with civil pecuniary penalties:

- help ensure a proportionate and targeted regulatory response to contraventions of the consumer protection laws
- enhance the ability of the ACCC to protect the public from directors who have demonstrated that they are unable or unwilling to meet their trade practices compliance obligations.

The punitive nature of banning orders will also achieve greater levels of general deterrence. Importantly, they may provide a kind of deterrence that is not possible solely through the imposition of any of the existing remedies under the Trade Practices Act or through pecuniary penalties.

Banning orders will allow the punitive effect of civil penalties to be more specifically targeted at the persons responsible. Where the breach of the law is attributable to the individual rather than the corporation in general, it is appropriate that the individual should face the consequences of the breach, rather than the employees or shareholders or other parties who played no role in the contravention.

The ACCC understands the serious personal consequences of a banning order and the associated publicity and, in particular, the limits they impose on individual's earning capacity.

However, the determination of when a banning order will be appropriate is not up to the regulator. If banning orders were to be introduced for Part V breaches, the courts would make an independent decision as to whether a banning order was appropriate in the circumstances, and if so, for how long.<sup>79</sup>

#### **5.1.4 Other processes for consideration of the introduction of civil pecuniary penalties and banning orders**

The introduction of civil pecuniary penalties has some support from previous inquiries in relation to the operation of the Trade Practices Act. For example, in December 1993 the Australian Law Reform Commission (ALRC) released its discussion paper (DP56)—*Compliance with the Trade Practices Act 1974*. DP56 proposed a penalty regime for Part V in which civil penalties would be available in addition to criminal penalties. The government did not take up this recommendation. Nevertheless, the ACCC believes that with the increasing magnitude and complexity of consumer issues being faced in the contemporary economy, it is timely to consider this issue further..

In 2004, a SCOCA working party was established to report on the desirability of adopting civil penalties or some other more flexible enforcement strategy in substitution for, or as an alternative to, criminal fines for breaches of Part V of Trade Practices Act, and the equivalent state and territory legislation. The Australian

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<sup>79</sup> Provisions under the *Corporations Act 2001* also provide for individuals to apply to a court for leave to manage a corporation (s. 206G). Provisions such as these ensure that the application of such orders would be sufficiently flexible to take into account changes in the individual's personal circumstances.



Government Department of the Treasury is coordinating work on the report and management of the public consultation process, on behalf of the MCCA.

The MCCA discussion paper—*Civil penalties for Australia's consumer protection provision* notes the potential advantages of the introduction of civil pecuniary penalties, stating:

However, in some instances, criminal prosecutions may not be appropriate, possible or in the best interests of consumers.

... Civil penalties are a middle ground, between criminal penalties and civil remedies and may assist in ensuring a proportionate regulatory response to breaches of the law, as well as allowing enforcement agencies to achieve consumer redress outcomes in the same proceeding. The level of civil penalties is often higher than criminal fines. Since a consumer protection law breach will often result in an economic benefit to the trader, a civil penalty of some significance will act as an economic sanction. Like criminal penalties, civil penalties are designed to deter conduct in breach of the law.<sup>80</sup>

The MCCA paper also notes that banning orders could be introduced in addition to civil pecuniary penalties and, as such orders would apply against an individual rather than a business, they may provide an additional deterrent effect. However, the MCCA paper questions whether restricting an individual's earning potential is an appropriate response to a breach of consumer protection laws.

The SCOCA working party is currently assessing responses to the discussion paper, but has not reached a final view.

### **5.1.5 Scope and operation of civil pecuniary penalties and banning orders**

The ACCC believes that a civil pecuniary penalties and banning orders regime in relation to fair trading and consumer protection provisions of the Trade Practices Act should contain the following features:

- the penalties should apply to the substantive provisions of Part V of the Trade Practices Act which attract criminal penalties under Part VC. This would exclude s. 52 conduct from the civil pecuniary penalty regime
- the current criminal regime should also be retained
- provision should be made to ensure that consumer redress receives priority over awarding civil pecuniary penalties by courts.

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<sup>80</sup> Civil penalties for Australia's consumer protection provisions. *A discussion paper, Ministerial Council on Consumer Affairs*, September 2005, p. 3.

### ***Should civil pecuniary penalties or banning orders apply in relation to s. 52 conduct?***

The current criminal regime under Part VC of the Trade Practices Act replicates the provisions of Part V, except for s. 52.

Section 52 prohibits conduct that is misleading or deceptive, or likely to mislead or deceive. It is a broad prohibition and may include acts of silence or omission.<sup>81</sup>

Criminal penalties will typically only apply to conduct that attracts society's moral condemnation. Section 52 is not intended to create liability at all, rather, it establishes a norm of conduct.<sup>82</sup> As such, there will be situations where breaches of s. 52 do not involve serious moral culpability.

Accordingly, the ACCC considers it appropriate that s. 52, or an equivalent provision, be excluded from the criminal regime under Part VC and, similarly, any civil penalty regime. In the ACCC's view, s. 52 should properly retain its broad provision status and not attract civil pecuniary penalties or banning orders.

#### ***Parallel civil and criminal penalties***

The ACCC believes that the current criminal enforcement regime should be retained in addition to the proposed regime for civil pecuniary penalties and banning orders.

For the two systems to operate in parallel, it will be necessary to introduce some legislative safeguards against double jeopardy.<sup>83</sup> Further formal mechanisms to determine the circumstances in which each regime would apply would not be necessary. The ACCC would provide guidance on its approach, including the criteria it would have regard to in deciding what enforcement mechanism it would use in relation to suspected cases of non-compliance.

#### ***Impact on consumer redress***

The ACCC believes that a regime for introduction of civil pecuniary penalties and banning orders should give priority to providing compensation over the payment of penalties. This priority should apply to the court's consideration of the amount of the penalty that will be imposed. This would be consistent with current provisions of the Trade Practices Act concerning payment of compensation and criminal penalties for consumer protection offences.

## **5.2 Redress for non-parties in proceedings taken by the ACCC**

A goal of consumer policy is to provide a range of flexible options in order to prevent and correct instances of consumer detriment. An important component of the consumer protection framework is to facilitate appropriate redress mechanisms for large numbers of consumers in an efficient and effective manner.

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<sup>81</sup> *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (No. 1) (1988), 39 FCR 546.

<sup>82</sup> *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340.

<sup>83</sup> For the purposes of this submission, details have not been included, but can be provided to the Productivity Commission on request.

Following the Full Federal Court's decision in *Cassidy v Medibank Private Ltd.*<sup>84</sup> The ACCC is constrained in its ability to seek redress for large numbers of consumers. There exists a limited range of options, some of which are resource intensive, to ensure redress in cases involving a small number of consumers who have suffered detriment arising from misconduct.

The ACCC, as a public agency, considers a range of approaches to seek compliance when investigating allegations of breaches of the Trade Practices Act. When considering whether or not to institute litigation the ACCC considers if it is in the public interest and whether the focus of the matter should be on punitive action such as penalties, on simply stopping the conduct, or whether there should be redress for affected parties.

Whilst the ACCC can ensure that the alleged breach of the Trade Practices Act comes to an end through injunctive action, there are limitations for the ACCC in seeking to provide redress.

It is the ACCC's view that there should be broad options available to prevent consumer detriment from arising and at the same time correct this detriment when it does arise. Whilst there are mechanisms external to the Trade Practices Act which can assist consumers to collectively, or separately, commence legal action for redress, these mechanisms might not be efficient and are not as effective in promoting good practice and compliance with the Trade Practices Act.

The ACCC considers this is a significant gap in its ability to seek appropriate remedies in consumer matters.

Under the current provisions of the Trade Practices Act, the ACCC lacks the ability to obtain compensation for parties that are not named in proceedings and is therefore unable to seek orders for the benefit of those parties.

When conduct affects a large number of consumers, the ACCC is unable to solely rely on the Trade Practices Act to obtain court orders to cover them all because of difficulties associated with locating and naming all consumers in an action. This problem was identified by the full Federal Court in *Cassidy v Medibank Private Ltd.*<sup>85</sup> In this matter the ACCC alleged misrepresentations in two advertising campaigns in 2000. The alleged misrepresentations were widely broadcast and it was acknowledged that between 100 000 and 300 000 customers could have been misled by the campaign.

Individual consumers misled by the representations may have lost relatively small amounts of money. While at the same time, Medibank Private collected additional premiums that could potentially have totalled millions of dollars.

The ACCC initially sought, under s. 12GD of the ASIC Act using identical powers to s. 80 of the Trade Practices Act, for Medibank Private to comply with its representations and provide a refund, or credit, of the amounts by which the premiums had increased to any person who had been misled or deceived. The Full Federal Court

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<sup>84</sup> [2002] FCA 315.

<sup>85</sup> The High Court of Australia refused special leave to appeal the decision of the Full Federal Court that remedial orders sought by the ACCC pursuant to s. 12GD of the ASIC Act (and its equivalent s. 80 of the Trade Practices Act) are confined to those parties who are identified as a party to the action.

found that an application for such a remedy amounted to an application for compensation, something only available to parties named in the proceedings.

The ACCC's application was amended and consent orders and a corrective advertising order were made by the court. Any windfall gained by Medibank Private due to the conduct was not able to be recovered by consumers unless they commenced their own separate litigation.

Under s. 87 of the Trade Practices Act, the ACCC may seek orders on behalf of persons who are not parties to the original contravention proceedings if it has their written consent to do so. What is not available under s. 87 is an order for a non-party, that is, an unidentified party.

Alternatively, the ACCC may bring a representative proceeding (class action) under Part IVA of the *Federal Court of Australia Act 1976*. However, even if the requirements of Part IVA are met, there remain broad powers available to the Federal Court to order that the action not continue as a representative proceeding.

In the *Giraffe World*<sup>86</sup> case the ACCC initiated a Part IVA proceeding on behalf of consumers allegedly part of the respondents' pyramid scheme. The Court, however, was not convinced that there would be at least seven claims against Giraffe World and suggested that the ACCC's interests may not coincide with the interests of Giraffe World and its group members who were still seeking to recruit members.

Under the Federal Court process parties to a class action are given the opportunity to opt-out of the class. Under the Federal Court process the representative party is required, and must, advertise and notify to ensure awareness of the proceedings. This process, whilst important, can cause delays in achieving redress for consumers.

It is important to note that many private class actions, as well as representative actions, commenced by regulators are resolved either before or after the commencement of litigation if a negotiated settlement is agreed to by the parties. The ACCC through its enforcement processes is often able to resolve issues through the use of enforceable undertakings under s. 87B of the Trade Practices Act.

Even though in some circumstances the matter is resolved in a way which provides adequate redress for consumers, the ACCC believes it is necessary that an appropriate legal framework exists so a court can adjudicate on contested matters.

The constraints inherent in class actions limit the ability of the ACCC to obtain adequate redress, due to the administrative difficulties associated with locating relevant consumers prior to taking an action. In cases involving large numbers of consumers over a broad geographic region the difficulties of obtaining written consent from thousands of affected parties is prohibitive.

This situation has several implications, primarily that individual consumers will have no means of obtaining redress in court where the amount of the claim, though potentially significant, does not warrant the cost of legal proceedings.

The corollary is that corporations that have breached the Trade Practices Act may not be held fully accountable for the damage suffered by all affected consumers. This gap

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<sup>86</sup> (1999) 10 APLR 9.

has the potential to create broader compliance problems for the ACCC if the likely gains to a corporation outweigh the perceived or actual risks of court action.

In any event, where there are multiple claims arising from individuals that have a single root cause of action, individual litigation is an inefficient use of resources.

Key international jurisdictions have the ability to obtain broad remedial orders in relation to non-parties, and Australia's limitations in this area will continue to restrict its ability to provide mechanisms for redress that meet expected standards of protection.

### ***United States of America***

The Federal Trade Commission (FTC) is the primary agency responsible for enforcement of consumer protection laws in the United States of America (US). Section 13(b) of the FTC Act enables the FTC to seek preliminary and permanent injunctions to remedy a breach of any law enforced by the FTC. The US courts have accepted that this power also entitles the FTC to obtain an order not only permanently barring deceptive practices, but also imposing various kinds of monetary equitable relief to remedy past violations, including restitution, disgorgement of profits, rescission of contracts and other remedial orders. There is no requirement that consumers, on whose behalf the FTC may seek such orders, are parties, to, or provide written consent to be represented, in the FTC action.

In one notable case which also concerned Australian consumers, the FTC took action against the Skybiz pyramid selling scheme. A court-ordered settlement including a \$20 million consumer redress fund was obtained. While the ACCC also took action in relation to the operation of Skybiz in Australia and obtained declarations, Australian consumers have had to rely on the FTC judgement to obtain redress. Clearly, when similar cross-border consumer protection cases arise in the future where Australia, rather than the US, is the most convenient jurisdiction in which to take action, Australia will not be able to provide similar global relief to that achieved by the FTC in the Skybiz matter.

### ***New Zealand***

In New Zealand, s. 43 of the Fair Trading Act, which is substantially similar to s. 87 of the Australian Trade Practices Act, allows the court to make compensatory orders in relation to a person, whether or not that person is a party to the proceedings, where it finds that the person has suffered, or is likely to suffer, loss or damage as a result of contravening conduct.

In *Commerce Commission v Alpha Club New Zealand & Others*<sup>87</sup> the court made declarations against a number of defendants involved in a pyramid selling scheme. The Commerce Commission sought an order under s. 43 of the *Fair Trading Act* that an amount of \$320 000 plus accumulated interest be distributed on a pro rata basis to members of Alpha Club who joined after a specific date. The Commerce Commission only had a partly completed list of members. Justice O'Reagan nevertheless declared that the order would be granted on the proviso that the Commerce Commission returned to the court with more details derived from advertisements asking claimants to come forward. The court also recognised that, apart from the Commerce Commission, a

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<sup>87</sup> (2000) 6 NZBLC 103,062.

‘distribution agent’ may be needed to be appointed as a trustee arrangement for distribution to claimants as they came forward.

### **Canada**

The *Canadian Competition Act* has recently been amended to empower the Court to order advertisers who contravene the false and misleading representation provisions of that Act to provide restitution to consumers not exceeding the amount paid for the advertised products. There is no requirement that affected consumers be parties to the action. The order may be made in any manner and on any terms the court considers appropriate. The court may specify in the order any terms that it considers necessary to implement its decision, including specifying how the payment is to be administered, appointing an administrator, requiring the person against whom the order is made to pay the administrative costs, requiring that potential claimants be notified in the time and manner specified by the court, specifying the time and manner for making claims and specifying conditions for the admissibility of claimants.

The importance of cross-border enforcement and redress has been acknowledged by the OECD’s Committee on Consumer Policy. The CCP’s *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* recommends that consumer protection enforcement agencies work jointly to develop a framework to address the problem of fraudulent and deceptive commercial practices, devoting special attention to the development of effective cross-border redress systems. It is further recommended that these measures are of a kind and at a level adequate to deter businesses from engaging in fraudulent and deceptive practices.

From an ACCC perspective, the introduction of a suitable amendment to the Trade Practices Act to enable effective and efficient consumer redress for non-parties would improve the ability of the court to respond to situations when a large number of consumers are affected by unfair consumer practices.

The circumstances of the case, including the number of parties involved, would determine whether it was appropriate to award redress to non-parties, not necessarily in the form of damages, when a large number of consumers suffer similar detriment. This redress could take a number of forms including a refund or an enforceable promise to honour the representations that were made. The redress should match the type of detriment suffered by the consumer.

The introduction of this proposed amendment would enable consumers to continue to make confident decisions, in line with the current consumer policy framework. Consumers should be able to make confident decisions in the knowledge that, in circumstances where they have been misled, they will have access to mechanisms that are able to restore them to the position they were in prior to the illegal conduct occurring.

### **5.3 Cease and desist or ‘Stop Now’ orders**

A cease and desist order is an administrative order issued by a regulator to stop a party from engaging in specific conduct. Such an order is distinguishable from powers to seek injunctive relief because the relevant regulator may issue the notice without having to take court proceedings to obtain a court-ordered injunction.

The rationale for such powers is that it may provide a speedier method of stopping suspected contraventions, and accordingly save consumers from potential further harm while a matter is being investigated.

### **5.3.1 Current scope of the Trade Practices Act**

At present, the Trade Practices Act does not provide the ACCC with powers to issue a cease and desist order in relation to potential contraventions of the fair trading and consumer protection provisions. .

Where the ACCC believes that a breach of the Trade Practices Act may have occurred it will investigate the matter and, on the basis of its findings, determine an appropriate course of action. In many cases the trader will cease the potentially contravening activities when the ACCC notifies it that it may be in breach of the Trade Practices Act, and the matter is speedily resolved by administrative means. Where the ACCC deems it appropriate to take court action, and the alleged contravener has not agreed to discontinue the conduct while the matter is heard, the ACCC may seek an interlocutory court order for the trader to cease the alleged conduct until the matter is determined by the court.

In determining whether to grant an interim injunction, the court must be satisfied that there is a serious question to be tried, and that the balance of convenience favours the granting of the order. This will involve a consideration of whether the potential harm from allowing the conduct to continue if it is found to breach the legislation outweighs the potential damage to the trader being required to cease the conduct where a breach of the legislation is not ultimately established. The ACCC can seek such injunctions on an *ex parte* basis, enabling it to obtain orders very quickly if it is appropriate to do so.

Nevertheless, there are some disadvantages associated with taking swift action to obtain injunctive relief. In particular, once proceedings are instituted, the ACCC can no longer use its investigatory powers pursuant to s. 155 of the Trade Practices Act to collect evidence in relation to a matter.<sup>88</sup> Accordingly, if the ACCC seeks an interim injunction, its subsequent ability to fully investigate the matter is limited and the prospects of success in substantive proceedings are hindered.

While the ACCC does not have the power to issue cease and desist orders, in the case of product safety issues the Minister has the power to order compulsory recalls of consumer goods that do not comply with the relevant standards, or in other particular circumstances. This provides a similar power to issuing a cease and desist order where the matter involves issues of consumer safety and swift action is most needed. The Minister may also impose a ban on goods. A product can be banned from sale under s. 65C of the Trade Practices Act and this is occasionally done for products that are otherwise not subject to regulation, such as a mandatory standard. Bans apply either to a specific, named product or a class of goods. Suppliers are usually provided an opportunity to seek a conference before the ban is affirmed. However, where the matter is urgent, a ban may be applied without such delay.

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<sup>88</sup> This principle has been established by court precedent; see *Brambles Holdings Ltd v TPC & Anor* (1980) ATPR 40-179.

### **5.3.2 Cease and desist powers in other jurisdictions**

Internationally, some regulators have the power to issue cease and desist orders in certain situations, predominantly in relation to matters involving anti-competitive conduct. In relation to fair trading and consumer protection matters, the ability to issue cease and desist orders is less common, and often subject to significant restrictions.

In the United States of America, the Federal Trade Commission can issue an administrative order if it has reason to believe there has been a breach of the legislation. However, the process is complex and the trader must be given 30 days notice before such orders are made, and the order only comes into force 60 days after the order is made.

New Zealand is currently considering the introduction of a cease and desist order in relation to consumer protection issues.

The OFT has cease and desist powers in relation to certain anti-competitive conduct matters, but not in relation to consumer protection matters. In consumer protection matters the UK OFT has the power to seek a ‘stop now/enforcement’ order from a court. This is similar to the ACCC’s power to seek urgent injunctive relief and, accordingly, is not characterized as a ‘cease and desist’ power as such.

Some state and territory fair trading and consumer protection laws provide a form of cease and desist order.

In Victoria, the Director of Consumer Affairs can require a supplier to show cause why it should be allowed to continue to carry on business if it is believed the supplier has engaged in contravening conduct, the conduct is likely to continue, and there is a danger that a person may suffer harm, loss or damage as a result. If the supplier does not respond to the notice it must cease to carry on the business of supplying the goods or services that the notice relates to, or any business of a like kind. The supplier may apply to the Victorian Civil and Administrative Tribunal for review of the decision to issue the notice.<sup>89</sup>

The New South Wales regime also enables the Commissioner of Fair Trading to issue a ‘show cause’ notice, but after the notice is issued the Commissioner must seek court orders to prohibit a person from carrying on that business.<sup>90</sup>

### **5.3.3 Should the ACCC be given a cease and desist power?**

The ACCC considers that while a specific cease and desist power may assist in the enforcement of the Trade Practices Act to some extent, it would be unlikely to deliver significant improvements to the ability of the ACCC to act swiftly to stop conduct that may contravene fair trading and consumer protection laws.

The ability to direct a trader to stop acting in a certain way, or indeed to prohibit that person from trading in relation to a particular product or service, as allowed under the Victorian model, imposes a serious restriction on a trader’s activities which should only be exercised following a thorough investigation of the issues. It is notable that few jurisdictions currently have cease and desist powers in relation to fair trading and

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<sup>89</sup> *Fair Trading Act 1999* (Victoria), s. 106B.

<sup>90</sup> *Fair Trading Act 1987* (New South Wales), s. 66B.



consumer protection matters. Jurisdictions that do have such powers, for instance the United States of America, impose significant restrictions on the exercise of such powers.

As outlined above, the ACCC already has the ability to seek an urgent injunction to prevent alleged contravening conduct continuing. While such an action does involve some administrative costs and time associated with preparing a case to meet the court's criteria, it is unlikely that a cease and desist power could achieve a significantly quicker outcome. Essentially, for a regulatory agency to exercise a power which has such serious implications it would need to be satisfied that the circumstances warranted such action. In practice, because of the time that would need to be taken to form this view the availability of a cease and desist power would not result in a significantly quicker decision than a decision to apply to the court for an urgent injunction. Further, the potential for non-compliance with an order, particularly in relation to rogue traders, means that the ACCC may need to apply to a court in any event in order to have a cease and desist notice enforced. In effect, where non-compliance is likely, it would be quicker and more efficient for the ACCC to seek an urgent injunction in the first instance.

The ACCC also believes that there may be some constitutional issues associated with introducing a cease and desist power that would have to be considered carefully to ensure that such a power was constitutionally valid. The question that arises is whether the issue of a cease and desist order would involve the exercise of judicial power, contrary to Chapter III of the Constitution.

In addition, the ACCC notes that the previous Dawson Inquiry<sup>91</sup> considered whether cease and desist powers should be introduced in relation to certain competition provisions of the Trade Practices Act, but ultimately took the view that it would be inappropriate to incorporate such powers into the Trade Practices Act.

#### **5.3.4 Other options—Express power to use s. 155 powers until such time as substantive proceedings commence**

As outlined above, the ACCC believes that the use of existing mechanisms such as the power to seek interim injunctions are appropriate to take swift action to prevent potentially harmful conduct continuing. Nevertheless, there are a number of ways in which the effectiveness of these procedures could be enhanced.

Because the institution of proceedings prevents the ACCC utilizing its s. 155 powers to investigate a matter further, this is a disincentive for the ACCC to take action early, and can jeopardize the final result of the case. That is, if the ACCC takes early action to stop conduct quickly by seeking an injunction, it then loses the ability to fully investigate that matter, which may ultimately allow the trader to re-engage in the conduct.

The rationale for a limitation on s. 155 powers is that the courts should maintain supervision of information disclosure and exchange between parties to proceedings. The ACCC accepts that it would not be appropriate for it to have s. 155 powers after the commencement of substantive proceedings for a contravention of the Trade

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<sup>91</sup> Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003 (Dawson report), p. 108.

Practices Act. However, the ACCC submits that it is not necessary to limit the application of s. 155 powers to the interlocutory stage, prior to the commencement of substantive enforcement proceedings.

The ACCC should have the ability to seek an interim injunction from the court, maintaining the status quo in a market, without limiting its ability to investigate and gather evidence of the substantive allegations. An extension of the powers under s. 155 until such time as substantive proceedings commence would mean that the ACCC would be better placed to seek early intervention to protect targeted consumers, until judicial proceedings can be brought.

This issue has been raised previously by the ACCC in the context of the competitive conduct provisions of the Trade Practices Act. The Dawson Committee considered this proposal, but took the view that such an amendment was not appropriate, because it believed that the proposal would allow the ACCC to use s. 155 powers during the pre-trial stages of the action and would risk one party being placed at an unfair disadvantage to the other.<sup>92</sup> The ACCC proposal was in fact limited to circumstances relating to interim proceedings, and agrees that it would not be appropriate to use s. 155 powers after substantive proceedings have been instituted, as exchanges between parties are rightly supervised by the court in those circumstances.

The issue of whether s. 155 powers should be available after interim proceedings but not after the institution of substantive proceedings was further considered by the Senate Economic References Committee in its consideration of the effectiveness of the Trade Practices Act in protecting small business. The Committee supported an amendment to the Trade Practices Act to enable the ACCC to seek the permission of the court for the continued use of its powers under s. 155 after the commencement of injunctive proceedings.<sup>93</sup> However, the ACCC was concerned that this approach would not be effective, because it would still face a significant disincentive to taking fast action, because it could not be certain whether the court would allow it to continue to use its enforcement powers after an interim decision was reached or not. The Government did not adopt the Senate Economic References Committee's recommendations.

## 5.4 Substantiation notice powers

Generally, a substantiation notice power provides a relevant enforcement agency with the ability to require a person to substantiate a claim or representation made. If a person does not substantiate the claim, the person will be liable for a penalty.

There are two potential objectives of such notices. First, they provide a mechanism by which enforcement agencies can require a person to provide information to assist in determining whether a contravention of fair trading or consumer protection laws has occurred. This is particularly the case in relation to provisions or offences relating to false or misleading conduct. Second, depending on the nature of the power, they may impose a standard of behaviour on traders requiring them to be able to support the

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<sup>92</sup> Dawson report, *op cit.*, p. 103.

<sup>93</sup> Economic References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 74.

truthfulness of claims or representations made to consumers, as the fact of being unable to substantiate in itself may attract a penalty.

#### **5.4.1 Current scope of the Trade Practices Act**

At present, the ACCC does not have a specific power under the Trade Practices Act to require a trader to substantiate a claim or representation.

The ACCC may request a trader to substantiate a claim or representation on a voluntary basis. It is the general practice in an investigation to outline to traders the alleged conduct and seek their views in order to assist the ACCC in determining whether it believes that a contravention has occurred, and what action it may wish to take. In many cases traders respond to such requests. However, there is always a possibility that traders will not respond, or will not respond adequately.

The ACCC may issue a notice pursuant to s. 155 of the Trade Practices Act to obtain documents and information from any person where there is a reason to believe that the person has documents or information relevant to a matter that constitutes or may constitute a contravention of the Trade Practices Act. Accordingly, where the ACCC is satisfied that the requisite threshold for issuing a s. 155 notice exists it may issue such a notice onto a trader requiring that person to provide information or documents that support its claim or representation.

Section 155 provides the ACCC with a broader power than substantiation notices in that the ACCC can require a person to provide certain categories of documents or information. That means it can require a person not only to provide information to support their claim in a manner of their choosing, but to provide any information or documents in their possession that contradict the information substantiating their claim.

At the same time, s. 155 can only be used where the threshold requirements are met. In many cases involving false or misleading representations, it will not be apparent on the face of the claim whether a breach is likely to have occurred or not. In such cases, use of s. 155 powers may not be available as the threshold requirement—that the ACCC must be satisfied that there is a matter that may constitute a contravention—may not have been met. Accordingly, there are a number of circumstances where s. 155 does not provide an alternative to a power to issue a substantiation notice.

Section 51A of the Trade Practices Act has the effect of taking a representation by a corporation with respect to any future matter as misleading if the corporation does not have reasonable grounds for making the representation (s. 51A(1)). A corporation is deemed to not have reasonable grounds for making a representation unless it adduces evidence to the contrary (s. 51A(2)). Heerey J has noted:

If there was a representation as to a future matter s51A requires the representor to show:

- some facts of circumstances;
- existing at the time of the representation;
- on which the representor in fact relied;
- which are objectively reasonable; and

- which support the representation made.<sup>94</sup>

There is some uncertainty, however, as to whether or not this section actually has the effect of reversing the onus of proof onto the party making the representation.<sup>95</sup> The section is also limited to ‘a representation with respect to any future matter’ and the question of whether a representation meets this test is a question for the courts.

Section 51A can only be relied upon in the context of litigation, and is not an investigatory tool in the sense of a substantiation notice.

#### **5.4.2 Use of substantiation notices in other jurisdictions**

The fair trading and consumer protection laws in New South Wales, Victoria, Queensland, South Australia and Australian Capital Territory enable the relevant enforcement agency to issue a substantiation notice on a person.

In New South Wales, Victoria, South Australia and the Australian Capital Territory, a designated person (usually the director of the state or territory fair trading agency or equivalent person) can issue a substantiation notice on a person that has published or caused to be published a statement promoting or intended to promote the supply of goods or services, requiring that person to provide proof of any claim or representation made in that statement within the time specified by the notice.

It is an offence in these jurisdictions if the person fails to provide sufficient proof to support the claim or representation, or fails to provide that proof within the time period specified by the substantiation notice. In New South Wales and Victoria, it is also an offence to provide information that is false and misleading. In New South Wales, it is a defence to such a prosecution if the person can prove that they did not know and could not reasonably be expected to have known that the information was false or misleading.

Notably, these models do not enable the relevant enforcement agency to issue substantiation notices in every case. Such powers are restricted to matters where a representation has been published, and the representation relates to the promotion of goods and services. Accordingly, it is likely that such powers would be limited to situations involving some kind of advertising of a product, not private communications.

The ACCC understands that substantiation notice powers have not been relied on extensively in New South Wales, Victoria, Australian Capital Territory or South Australia.<sup>96</sup>

The Queensland regime differs in that it involves an additional requirement that in order to issue a substantiation notice there must be reasonable grounds to believe that a person has caused the statement to be published and the statement is false and misleading. The Queensland regime also imposes a minimum time period for responses, and requires the notice to warn the person that it is an offence not to respond unless the person has a reasonable excuse.

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<sup>94</sup> *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511; 158 ALR 710; (1999) ATPR 41-699 at 42,902.

<sup>95</sup> See *ACCC v Universal Sports Challenge Ltd* [2002] FCA 1276; BC200206452. Emmet J said that ‘once the corporation has adduced some evidence, there is no deeming arising from s. 51A(2).’

<sup>96</sup> For example, the 2005–06 Consumer Affairs Victoria annual report states that it served six substantiation notices in 2005–06 compared with 267 information notices.

Internationally, a number of jurisdictions require substantiation of claims.

In the United States, case law<sup>97</sup> has established that failure to be able to adequately substantiate a claim constitutes an unfair practice, and accordingly is prohibited under the legislative prohibition against unfair and deceptive practices. The FTC issued a policy statement, *FTC Policy Statement Regarding Advertising Substantiation*, in 1983 to further articulate its Advertising Substantiation Program, which was developed in the early 1970s, in relation to the FTC's decision making process regarding substantiation. The FTC has no specified rules for enforcing its Advertising Substantiation Program. Rather, if appropriate substantiation cannot be provided, the FTC will consider prosecution under its unfair and deceptive practices provisions.

The premise is that US consumers would be less likely to rely on claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true. Therefore, a firm's failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of s. 5 of the Federal Trade Commission Act. The US model, it could be argued, supports the implementation of a substantiation requirement as a general standard of conduct, capable of investigation in its own right, rather than as an investigatory tool to be used to determine whether false or misleading conduct has occurred. In many US cases it is not the validity of the underlying claim that is at issue but the support that existed for the claim before it was made.

The *Canadian Competition Act 1986* requires advertisers to substantiate all of their material claims when promoting, directly or indirectly, the supply or use of a product. All representations to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product are required to be based on adequate and proper testing.<sup>98</sup>

The United Kingdom has adopted a self regulation model where the British Code of Advertising, Sales Promotion and Direct Marketing requires that marketers must hold documentary evidence for all claims in advertising, whether direct or implied, that are capable of objective substantiation.<sup>99</sup> The Advertising Standards Authority, an independent, non-statutory body who administers and ensures compliance with the code, receives advertising complaints and has the ability to undertake investigations which includes obtaining substantiation of claims. The code requires substantiation evidence to be delivered to the Authority when requested.

The *Control of Misleading Advertisements Regulations 1988* (as amended) provides the legislative backup to the self-regulatory system with the OFT being the legal enforcement body. The role of the OFT under the Regulations is to support and reinforce the existing controls. Actions of the OFT often result only from a referral from the Advertising Standards Authority where the self-regulatory system has not had

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<sup>97</sup> In the matter of *Pfizer, Inc.*, 81 FTC 23 (1972).

<sup>98</sup> Competition Act (Canada), s. 74(1)(b). The testing must be completed prior to the representation being made and the onus of proving the adequacy of the propriety of the test rests with the advertiser. Canada has found that most claims that raise an issue under the Act fall under two broad categories being those that are inappropriate in the context of the actual tests that were conducted; and those that are based on poorly designed test methodologies.

<sup>99</sup> British Code of Advertising, Sales Promotion and Direct Marketing, s. 3.1

the required impact. The OFT does not have specific powers to issue a notice requiring substantiation. The Regulations empower the OFT to seek injunctions from the courts against publication of an advertisement if required.

New Zealand is currently considering the introduction of a substantiation notice power.

### **5.4.3 Issues associated with the introduction of a substantiation notice power into the Trade Practices Act**

How could a substantiation notice power assist in the effective enforcement of the fair trading and consumer protection provisions of the Trade Practices Act?

The power to issue a substantiation notice requiring a trader to substantiate a claim or representation would provide a useful additional tool to the ACCC. Such notices could be used as a quick, efficient way to identify whether an alleged misrepresentation is true or not in the course of an investigation into whether false or misleading representations have been made. In many cases, it is difficult and time consuming for the enforcement agency to identify from a complaint whether a statement is true or not and, accordingly, whether it justifies investigation. Due to lack of information, the ACCC may find itself devoting resources to investigating claims which may prove to be legitimate, or worse, dismissing complaints for lack of evidence where there may be misleading conduct occurring. Further, matters where the misleading elements are not apparent and there is least initial evidence to warrant an investigation are the matters most likely to actually deceive consumers.

Examples of the categories of matters where misleading conduct is more difficult to detect at the outset include:

- *Two part advertising claims.* In cases involving allegations that false comparative prices have been used to persuade consumers that they are receiving a bargain, it is difficult to determine just from the claim whether the comparative price was true or false. Post purchasing, consumers will have little idea of whether they have been misled or not.
- *Business opportunities.* It is often difficult to determine on the face of materials provided whether business opportunity claims can be justified.
- *Food claims.* Claims that foods have a certain property, or are 'fat free' cannot be judged without expensive testing.
- *Environmental claims.* Similarly, it is difficult to determine on the face of a representation whether a product operates to a particular standard of efficiency or not.
- *Product safety claims.* Claims that a product meets a certain standard are also difficult to evaluate in the absence of damage or injury.

Substantiation notices could also be useful in investigating blatantly dubious claims such as miracle cures where the use of notices can save considerable time and resources that would otherwise need to be spent in attempting to disprove a claim. If the person making the claim is required to provide substantiation of that claim and is unable to do so, this may significantly reduce investigation costs and delays in some cases.

At present, the ACCC has some powers to obtain materials to substantiate claims through use of s. 155 powers, or voluntary disclosure. A s. 155 notice may only be issued if the ACCC has reason to believe that a person is capable of furnishing information relating to a matter that constitutes or may constitute a contravention of the Trade Practices Act. In many of the categories of conduct outlined above where potential wrongdoing is not evident on the face of the public representation made, and consumers often cannot identify post-purchase that they have been misled, it may not be possible to issue a s. 155 notice because there is insufficient information on the face of a complaint to suggest that a contravention or likely contravention has or is occurring.

An example of this arises in relation to ‘was/now’ advertisements in the jewellery industry where the ACCC and several state and territory fair trading agencies coordinated their efforts to investigate whether such claims were accurate. It was decided that requests for substantiation would be sent to a range of regional and national traders. While some agencies were able to issue substantiation notices, the ACCC was only able to request such information on a voluntary basis as it did not believe that it had sufficient basis to issue s. 155 notices on specific traders at that time.

A power to issue substantiation notices may enable the ACCC to undertake initial investigations in a greater number of matters, and to deal with matters more quickly and efficiently.

At the same time, if traders are aware that they can be required to substantiate claims, this can foster a higher level of compliance with the law as it motivates them to take more care in the claims they make.

That said, the ACCC recognizes that use of substantiation notices may not lead to a quick result in all cases. It may be that in a significant number of cases where a trader responds to a substantiation notice, the ACCC will still need to make substantial enquiries in order to determine whether the information provided is sufficient to substantiate. For example, in cases involving ‘miracle cures’, the trader may provide apparently credible scientific or medical studies supporting the case, but it will still be necessary to look behind this information to identify whether it provides a reasonable basis for the representation, or sufficient proof to support the claim.

***What additional compliance costs would be faced by traders?***

Generally, the cost of compliance with a substantiation notice should not be high for traders. In most cases, a responsible trader would already take the prudent course of ensuring that they can substantiate the claims they make, so there should be little or no additional burden associated with providing such substantiation to the ACCC.

From an economic perspective, because the trader will know more about their product than anyone else, it is also more efficient and less costly to society to place the burden of substantiating a claim on the trader, rather than on any other party.

However, there are situations where a trader may not have a high degree of knowledge about products. For example, where retailers make representations regarding the performance or standard of an electronic product, where they are relying on the manufacturer’s information and in fact have little first-hand knowledge themselves.

In such cases, it would appear that an obligation to substantiate could place an additional burden on some businesses unless the substantiation notice regime permitted a reference to reasonable reliance on statements by others to be a sufficient response.

***How would a general obligation to be able to substantiate claims operate in conjunction with prohibitions on misleading and deceptive conduct?***

As outlined above, the practical implications of the introduction of a substantiation notice power could potentially go beyond providing the enforcement agency with a new investigatory tool. The introduction of such a power of itself imposes a standard of behaviour on traders to be able to support the truthfulness of claims or representations made to consumers, as the fact of being unable to substantiate in itself may attract a penalty.

There may be some concerns that this could result in a shift away from the use of the substantive provisions of the Trade Practices Act relating to misleading and deceptive conduct, which impose a more rigorous test of prohibiting making representations that are false or likely to mislead. In particular, the false or misleading standard generally requires a consideration of whether the claim made was capable of misleading the ordinary reader.

A substantiation notice power could impose a requirement to substantiate any published claim, even if a court would not have deemed it to have been capable of misleading, and hence causing harm. For example, claims that constitute ‘puffery’ do not currently fall within the scope of prohibited conduct, because they are not considered likely to mislead. Technically, a substantiation power could impose a requirement on traders to substantiate ‘puffery’ claims.

Similarly, it is notable that the requirement to substantiate could encompass both express and implied representations. That is, it is possible that a substantiation law could impose an obligation on traders to substantiate representations that they may not have been aware that they were making at the time. While this can occur now, in those situations a court decides what the relevant representation is, rather than an enforcement agency, such as the ACCC, making such a decision without a full inquiry.

In the United States of America, where it is considered to be a prohibited unfair practice, if a person is unable to substantiate a claim, this issue has been dealt with by imposing a standard that only requires a person to be able to provide a ‘reasonable basis’ for advertising claims, rather than requiring sufficient proof to support a claim.

The US FTC Policy Statement regarding advertising substantiation states that:

The Commission’s determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim. These factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable...

One issue the Commission examined was substantiation for implied claims. Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims. The Commission will take care to assure that it only challenges reasonable interpretations of advertising claims.



While the ACCC notes that in the United States of America guidance has been provided by the regulator in regard to the standard of ‘reasonableness’, the ACCC believes that in practice such a test would not provide sufficient certainty for business, and would make the task of enforcement costly and uncertain for the regulator.

#### **5.4.4 ACCC’s view**

The ACCC takes the view that on balance it would enhance the effectiveness of the Trade Practices Act significantly if the Trade Practices Act were amended to enable the ACCC to issue notices that required a person to substantiate claims or representations made to the public in connection with a statement promoting or intended to promote the supply of goods or services.

To ensure that such a power was not too broad, it would need to be limited to an obligation to provide reasonable basis for the claim or representation made, rather than requiring a person to provide absolute proof of the truthfulness of a claim.

Also, the ACCC believes that the power should be limited to a power to require substantiation for the purposes of an investigation, rather than imposing a general duty on traders to be capable of providing substantiation of a claim. One way to achieve this could be to draft the provision in such a way that it is an offence if a person fails to respond to a notice within the time period specified, or provides a trivial or frivolous response. That is, the act of failing to respond, or responding in a trivial or frivolous manner would attract a penalty in the same way that any other obstruction of an investigation by a statutory agency would attract a penalty, but the fact that a person attempted to respond, but the response was inadequate, would not attract a penalty. Such information would however still be very useful because it could be used by the ACCC in furthering its investigation, or potentially be used as evidence in proceedings to determine if a breach of the substantive provisions of the Trade Practices Act had occurred.

It would also need to be made clear that if traders are asked to substantiate claims, then the fact that the ACCC does not take enforcement action against them in no way can be taken as any form of approval or endorsement of the conduct or the claims made by the trader.

## **5.5 Infringement notices**

In Victoria, New South Wales and Western Australia, the relevant fair trading agency has the power to issue infringement notices requiring a person to pay a fine where there is reason to believe the person has engaged in specified contraventions. If the fine is paid, the matter is closed without proceeding to court.

In Victoria, infringement notices do not apply to general fair trading provisions such as misleading or deceptive conduct. Rather, the power to apply infringement notices apply to minor infringements in areas such as product bans and recalls, and lay-by sales requirements. The maximum fines available under infringement notices are \$1000 for a natural person or \$2000—2500 for a corporation. Similarly, in New South Wales and Western Australia, infringement notices apply in relation to minor offences and attract small penalties although the law has recently been amended in Western Australia to provide for the issue of infringement notices for the general fair trading provisions.

While the ACCC considers that such powers are appropriate in dealing with local issues in a swift and less costly manner than taking court proceedings, as the ACCC's role is focused towards dealing with issues involving widespread detriment, it is unlikely that an infringement power would be often used in the context of breaches of the Trade Practices Act.

Accordingly, the ACCC takes the view that it is not appropriate to incorporate an infringement regime into the Trade Practices Act.

## 5.6 Public warning notices

In New South Wales, Victoria, South Australia, Western Australia and the Australian Capital Territory, the relevant Minister or director of the state or territory fair trading agency can issue a public warning notice. For example, in Victoria, the relevant Minister or Director of Consumer Affairs can issue a public warning statement identifying and giving warnings about a range of matters including unsatisfactory goods or services, unfair business practices and persons who engage in those practices, if it is considered to be in the public interest to do so.

Currently, the ACCC does not have express powers to issue public warning notices, and does not, as a matter of practice, make public statements identifying traders under investigation until such time as proceedings are commenced or another enforcement action, such as accepting a s. 87B undertaking, is taken.

The benefits of public warning notices are that they enable the enforcement agency to put consumers on notice in relation to particular traders whose activities are under investigation, in order to reduce the likelihood of further detriment to consumers while the matter is under consideration. Further, the threat of adverse publicity may of itself induce traders to desist illegal activities while an investigation is underway, or may deter wrongdoing altogether in some cases.

Nevertheless, the use of public warning notices may have some disadvantages. The use of such powers requires a careful balancing of the rights of both traders and consumers. Considerable care must be taken in the use of such powers, because 'naming and shaming' can have significant implications for traders, particularly as further investigation may reveal that their conduct is not in breach of the law. Further, the effect of such notices can be uncertain. Over the course of time, some consumers may remember the name of the trader, but forget the nature of the allegation.<sup>100</sup> This could have the counter-productive result of some consumers actually deciding to deal with a trader because the name or brand is familiar to them.

Also, it is possible to achieve a similar result to public warning notices by issuing warnings in relation to certain types of conduct. For example, the ACCC currently issues alerts about certain types of conduct on its SCAMwatch website without disclosing the trading name or names of suspected scammers.<sup>101</sup>

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<sup>100</sup> See I Skurnik, C Yoon, D C Park and N Schwarz, 'How Warnings about False Claims Become Recommendations', *Journal of Consumer Research*, 31 (March 2005), pp. 713–24. The authors found that this effect was particularly evident in older consumers.

<sup>101</sup> These warnings are sent via email to subscribers and stored on the 'SCAMwatch radar' page available at ([www.scamwatch.gov.au](http://www.scamwatch.gov.au)). Where a legitimate business (most often a bank) has been specifically

In the product safety area, the regime already provides for warning notices to be issued. Section 65B warnings are generally warnings of possible risks involved in the use of particular goods, or they may advise that specified goods are under investigation to determine whether the goods will or may cause injury. The warnings generally relate to a specific product or class of goods, and brand names or supplier names are usually avoided, unless it is essential for the identification of the product. As well as describing the possible risks, the warnings advise consumers on actions they should take to avoid or minimise the safety risks. Recent examples of 65B notices include warnings on the use of non-prescription contact lenses, potentially ineffective pressure relief valves on LPG tanks installed in motor vehicles, and the temporary availability of novelty products containing poisonous seeds.

In this regard, the ACCC notes the comments made by the OECD in relation to the appropriateness of public warnings in relation to consumer policy:

The issuing of adverse publicity ('naming and shaming'), however, seems to be inappropriate in this context, unless it follows a definitive ruling by a court (for example, following an appeal). The reason is that error costs can escalate if the agency has reached an incorrect decision, and reversing it on appeal will not significantly reduce the harm from adverse publicity.<sup>102</sup>

Accordingly, while the ACCC acknowledges some potential benefits in the use of public warning notices, on balance it believes that it is preferable to utilize publicity at the time when a court has decided whether a person has engaged in a breach of the Trade Practices Act, or a resolution has been reached between the ACCC and the person in question. If such a power were to be introduced into the Trade Practices Act, the ACCC believes it would need to contain significant safeguards to protect the rights of traders.

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targeted by a 'phishing' scam, the warnings may name the legitimate company to assist consumers to identify the scam.

<sup>102</sup> OECD, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, DSTI/CP (2006) 21/FINAL, 20 December 2006, p. 51.

## **6. Relationship between state/territory fair trading regimes and the Trade Practices Act**

Since the introduction of the current form of state and territory fair trading laws in the 1980s, the benefits of uniformity have been well recognised by all parties concerned.

The Australian Competition and Consumer Commission (ACCC) believes that a critical element in achieving a consumer policy framework for Australia that meets the needs of society is to develop a uniform approach to general fair trading and consumer protection laws.

The current framework is characterised by nine separate state, territory and federal fair trading and consumer protection laws, including the Trade Practices Act, which impose increasingly divergent standards. This may result in significant costs for consumers, business, and regulators, and impede regulatory agencies from focussing their attention on promoting compliance in relation to the core standards for consumer protection that are accepted on a national basis.

Nevertheless, the ACCC believes that there are sound arguments for retaining the current multiple regulator approach in relation to the administration and enforcement of fair trading and consumer protection laws. At the same time, improvements can be made within a uniform law/multiple regulator model to minimise potential issues associated with coordinating the work of multiple regulators.

The ACCC recognises that achieving uniformity is a challenging task, but at a minimum, jurisdictions should work towards providing a reasonable level of consistency.

### **6.1 Current areas of inconsistency between state or territory fair trading laws and the Trade Practices Act**

#### ***Development of the current framework***

The states were active in the area of consumer protection prior to the introduction of the Trade Practices Act. However, in 1983 the Standing Committee of Consumer Affairs Ministers agreed that uniform fair trading laws should be pursued by the Commonwealth, states and territories. The rationale for uniformity was to promote efficiency, reduce compliance costs and improve the ability of consumers to seek individual redress.<sup>103</sup> Following this, from 1985 to 1992 all of the states and territories established general consumer protection and fair trading regimes substantially mirroring the consumer protection and fair trading provisions of the Trade Practices Act.

Accordingly, the state and territory general fair trading and consumer protection regimes operate concurrently with the Trade Practices Act.

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<sup>103</sup> As noted in Department of Industry Science and Tourism, *Audit of Consumer Protection Laws—Second Report*, August 1997, p. 1.

With the introduction of mirror legislation, the ACCC stated that:

This move will mean that State and perhaps Territory consumer protection agencies will be more involved in consumer protection matters which were previously only able to be dealt with by the Commission. The Commission will continue to give effect to the broad agreement reached with the State consumer agencies in 1976, giving the Commission prime responsibility for:

- multi-State, national or international matters; and
- matters of such gravity as to warrant exemplary treatment.<sup>104</sup>

### ***Jurisdictional scope and overlap***

Generally, state or territory fair trading laws apply to conduct that occurs within the relevant state or territory. It is not necessary that the trader be located within the jurisdiction. Where conduct occurs outside the jurisdiction, some states or territories may have jurisdiction due to specific provisions within their legislation which extends territorial reach.

Territorial reach varies between jurisdictions. In jurisdictions such as Queensland and Tasmania, the fair trading laws apply to transactions that take place, conduct that occurs, and representations that are made within the state, whether wholly or partly. In Victoria<sup>105</sup>, the fair trading laws extend to conduct that takes place outside Victoria to the full extent of the extra-territorial powers of the Parliament. Recent amendments to the New South Wales Fair Trading Act<sup>106</sup> which commenced on 20 October 2006 make it clear that the Act applies extra-territorially to the full extent of Parliament's legislative power and that it extends to conduct either in or outside New South Wales which is in connection with goods or services supplied in New South Wales, or affects a person in New South Wales, or results in loss or damage in New South Wales.

Determining whether a particular state or territory has jurisdiction will depend on where the conduct occurs, and whether specific extra-territorial reach provisions apply. This will be assessed on a case-by-case basis. In some cases, more than one jurisdiction may apply, including the Trade Practices Act.

For example, if a trader makes misleading representations by email, the conduct could be taken to have occurred in each jurisdiction where the email is read. If it involves inter-state trade, the Trade Practices Act is also likely to have jurisdiction. Further, the state or territory where the trader ordinarily resides may also have jurisdiction where extra-territorial reach provisions apply such as in Victoria.

While a state or territory may have jurisdiction over a matter involving traders not located within that state or territory, particularly when the conduct nevertheless occurred within that area, there are limitations on its ability to enforce a judgement outside its own jurisdiction. In most cases, an injunction can only prevent conduct within the relevant state or territory. Accordingly, it is difficult to obtain a court order

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<sup>104</sup> Trade Practices Commission, *Annual Report 1985–86*, p. 46.

<sup>105</sup> *Fair Trading Act 1999*, s. 6.

<sup>106</sup> Section 5A.

that covers more than one state or territory.<sup>107</sup> However, an order made by one court may be enforced in the court of another state or territory pursuant to the *Service and Execution of Process Act 1992* (Cwlth).

### **Differences in substantive laws**

Areas of inconsistency between the state or territory fair trading laws and the Trade Practices Act include:

- *Unfair contract terms regimes.* As discussed above, Victoria has legislation that prohibits unfair contract terms. This is a significant obligation on traders that does not apply in other jurisdictions at this time.
- *The definition of ‘consumer’ varies across all the jurisdictions.* The Commonwealth, Queensland and Western Australian legislation defines a person as a consumer if the value of goods or services is less than \$40 000, or the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption. Goods acquired for re-supply or use in a production process are excluded. In South Australia, a consumer contract is defined as one involving a consideration of less than \$40 000. Victoria and the Northern Territory do not apply a monetary limit. This means that the application of implied warranties and conditions in consumer contracts may vary between jurisdictions.
- *Implied warranties and conditions.* There are a number of significant differences in the formulation and application of implied warranties and conditions. Some of the differences include different applications of implied warranties regarding merchantable quality, implied terms regarding samples, and implied terms relating to fitness for purpose.<sup>108</sup>
- *Door-to-Door and telemarketing sales.* The state and territory regimes contain a number of different requirements and provisions in relation to direct commerce. These are generally based on the time of day traders can contact consumers without direct invitation, that is, unsolicited. For example, in the Australian Capital Territory a consumer has the right to a ten day cooling off period when purchasing an unsolicited good for an amount over \$50 via a door-to-door sale. Whereas, in New South Wales when goods or services are purchased through door-to-door sales for an amount over \$100 the law provides for a five(clear)-day cooling off period.
- *Harassment or coercion.* Harassment and coercion, or other similar prohibitions about appropriate communications with consumers vary to some degree between jurisdictions. Whilst the Trade Practices Act and the ACCC/ASIC guideline provides some consistency, marginal difference do arise due to legislative variations that have arisen at a state level. For example:

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<sup>107</sup> Such limitations do not apply to actions brought under the Trade Practices Act and some state agencies have brought actions under both their legislation and the Trade Practices Act.

<sup>108</sup> For details, see Ray Steinwall, ‘Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Harmonisation of Legal Systems’, 2005.

- Victoria—a range of conduct in relation to debt collection is deemed to be undue harassment and coercion, including any communication with a person under the age of 18 in relation to a debt, where they are not the debtor.
- South Australia—telephone and personal calls on public holidays or between the hours of 10pm and 7am are prohibited, whereas the ACCC/ Australian Securities and Investments Commission (ASIC) guidelines recommend telephone calls occur between 7:30am and 9pm on weekdays, while recommended times for weekend and all personal calls are between 9am and 9pm. No contact is recommended on national public holidays.
- *Pyramid selling provisions.* Some state or territory jurisdictions adopt different definitions of pyramid selling schemes. For example:
  - In Victoria, the state governor can declare that the pyramid selling provisions do not apply to certain schemes.
  - Western Australia has not adopted the rewording of the pyramid selling provisions contained in Div 1AAA of the Trade Practices Act. The Western Australian legislation enables a declaration, by the state governor, that certain schemes are exempt from the pyramid selling provisions. The legislation also has a defence that simply purchasing goods or services from a promoter of, or participant in, a pyramid selling scheme does not in itself constitute participation in a pyramid selling scheme. This is contrary to the Trade Practices Act and some state fair trading acts.

Other differences include different definitions for country of origin claims, and regulation of trading stamp schemes<sup>109</sup> in some jurisdictions.

#### ***Differences in remedies and enforcement powers***

There are also significant inconsistencies between the remedies available to the ACCC and state and territory fair trading offices. Some remedies are available in some jurisdiction but not others, and where certain types of remedies have been introduced in some jurisdictions, they have not been introduced on a consistent basis. Examples include:

- different fine levels
- some states and territories have ‘substantiation of claims’ powers which enable them to require a trader to substantiate representations
- some states and territories have public warning notice powers

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<sup>109</sup> Trading stamp schemes are arrangements where a customer makes a purchase and receives stamps in return, which can be traded for additional goods or services or a discount. New South Wales’s FTA deems schemes like this illegal if the supplier of the additional goods or services does not carry on a genuine business of retailing the goods, or does not supply the services other than under the scheme.

- some states have the power to issue infringement notices requiring a person to pay a fine where there is reason to believe the person has engaged in certain contraventions
- some states have the power to seek a ‘cease trading’ injunction
- some states have the ability to seek orders for damages or refunds without the need to obtain prior written consent from consumers.

## 6.2 Issues with the current framework

At a time when the level of divergence between laws appears to be increasing, the need for uniformity is becoming more urgent as markets become more national and global in nature.

While the ACCC does not collect data regarding the costs of lack of uniformity, it believes that increasing lack of uniformity is likely to incur significant costs for business, consumers, and regulators.

For business, there are costs associated with identifying circumstances where conduct can be said to fall within each jurisdiction, given differences in provisions relating to extra-territorial reach, and costs associated with meeting different requirements in different jurisdictions when engaged in cross border activities. While it may be possible to reduce such costs by complying with the jurisdiction with the highest level of protection, there may be considerable hidden costs associated with this—because business is taking on the burden of meeting a standard that perhaps the majority of Australian jurisdictions do not believe to be necessary. The costs of adhering to a higher level of compliance will be passed on to all consumers in all jurisdictions.

The difficulties in complying with laws in different jurisdictions may also provide a barrier to reputable international traders doing business in Australia.

Consumers also can suffer detriment from the lack of uniformity of laws. First, as stated above, it is likely that any additional costs for business will be passed on to consumers. Second, where different standards apply in different jurisdictions, consumers are likely to suffer from confusion and false expectations. This makes it difficult for consumers to detect wrongdoing and complain, or assert their rights individually.

There are also costs for governments due to lack of uniformity in developing laws separately, rather than pooling resources.

While the ACCC does not collect data on the impact of diverging laws on business and consumers, it notes that similar concerns in relation to lack of uniformity have been raised in other jurisdictions.

In particular, the European Union’s *Green Paper on the Review of the Consumer Acquis* states that:

The existing EU consumer protection rules are fragmented basically in two ways. Firstly, the current directives allow member states to adopt more stringent rules in their national laws (minimum harmonisation) and many member states have made use of this possibility in order to ensure a higher level of consumer protection... business and consumer stakeholders have pointed out a number of examples of fragmentation which create problems... The differences



usually trigger extra compliance costs for businesses, including costs of acquiring relevant legal advice, changing information and marketing materials or contracts, or in the event of non-compliance, possibly litigation costs. This is often cited by enterprises as one reason among others for not conducting business cross-border.<sup>110</sup>

Concerns about the impact of diverging consumer protection laws, particularly the approach taken by some jurisdictions to impose higher levels of protection, on the development of an integrated internal market has resulted in the European Union taking an approach of ‘maximum harmonisation’ in relation to its Unfair Commercial Practices Directive, by requiring member states not to apply higher standards.

### **6.3 Current coordination arrangements**

There are a number of mechanisms in place which are designed to encourage coordination between the state and territory fair trading bodies and the Commonwealth.

The body with primary responsibility for co-ordination is the MCCA, which is supported by the SCOCA. One of MCCA’s principle strategies is to facilitate and encourage nationally co-ordinated and consistent policy development and implementation by all jurisdictions, including legislative consistency of major elements of consumer protection law and emerging policy issues. Through SCOCA, state, territory and federal jurisdictions work together to develop coordinated policy responses to issues identified by the committee.

Nevertheless, as outlined above, this mechanism has not prevented divergence and duplication of activities.

Key constraints on MCCA/SCOCA include:

- the processes are slow, as MCCA only meets twice a year
- the system relies on each jurisdiction to drive projects, but each has uneven resources and level of commitment to particular issues which can increase delays
- jurisdictions will often instigate a policy response on issues being considered by MCCA/SCOCA on a unilateral basis, circumventing the MCCA/SCOCA processes.

An example of this arises in the area of unfair contract terms. While a SCOCA working group is tasked with investigating options for dealing with unfair terms in contracts, New South Wales has conducted a separate inquiry into the issue.

Accordingly, the ACCC believes that further measures are required in order to achieve uniformity of fair trading and consumer protection laws.

### **6.4 Uniform law, multiple regulator model**

The ACCC considers that a single law, multiple regulator model would provide a framework which best meets the needs of both consumers and businesses. It would provide both with a higher degree of certainty regarding the standard of conduct

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<sup>110</sup> European Commission, *Green Paper on the review of the Consumer Acquis*, COM (2006) 744, p. 6; available at (ec.europa.eu).

required, reduce compliance costs, and enable regulators to better coordinate and focus their combined resources on enforcing the law.

The ACCC believes that jurisdictions should seek to develop uniform generic fair trading and consumer protection laws along the lines of the substantive provisions contained in parts IVA, IVB, V and VA of the Trade Practices Act.

That is, the goal would be to develop a model for uniformity in relation to generic fair trading and consumer protection laws which have universal application, providing a broad standard of conduct that consumers may expect in any pre or post transaction dealings with a trader, as this is the area where it is most likely that consumers and business would initially benefit from uniformity.

Focussing on the generic fair trading and consumer protection laws, at least initially, would be a more achievable aim because there is already substantial agreement between the states, territories and Commonwealth in relation to these laws. Also, as the fair trading laws are of universal application, achieving uniformity in this area should be the highest priority.

Careful consideration would need to be given to whether uniformity should extend to remedies and enforcement powers. While, as a matter of equity, the ACCC believes that similar remedies should be available for contraventions of the law, irrespective of which jurisdiction the conduct occurs in, there are good grounds for retaining a degree of variation in remedies available. For example, while it may be appropriate for state or territory fair trading agencies to be able to impose infringement notices in relation to minor matters, as discussed above, such powers may not be of applicable in cases taken by the ACCC. Accordingly, the ACCC believes that such issues should be considered on a case by case basis.

In relation to extending the scope of a uniform law model to New Zealand, the ACCC notes the Productivity Commission's research report, *Australian and New Zealand Competition and Consumer Protection Regimes* (2004), found that the current Australian and New Zealand consumer protection regimes are already relatively similar and the cost of implementing identical laws and institutions would be high because it would involve substantial matters of sovereignty. Even if the approach was to implement identical laws and retain separate institutions, the Productivity Commission found that the benefits of implementation were not likely to outweigh the costs.

The most challenging aspect of achieving uniformity is to establish a robust framework which is acceptable to all jurisdictions.

The ACCC is aware that attempts have been made to achieve uniformity in a number of areas previously. For example, the Uniform Consumer Credit Code was intended to provide a uniform legislative regime for consumer credit. However, issues have arisen in respect of this scheme. In particular, jurisdictions have diverged on a number of matters and concerns have been raised that the mechanism for approval of changes to the uniform code are too lengthy and cumbersome. Similarly, in the area of food standards regulation, inconsistencies in the law still exist.<sup>111</sup>

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<sup>111</sup> Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, p. 80.

To ensure that a model for uniformity is sufficiently robust, the model would need to incorporate principles along the lines of the following:

- a commitment from all jurisdictions to adopt the principles of uniformity
- agreement between jurisdictions not to introduce generic laws in that jurisdiction which provide a greater or lesser level of protection for consumers in that jurisdiction than the uniform model would provide nationally
- agreement not to introduce further industry specific regimes that may result in greater or lesser protections for consumers than the uniform model in those areas of activity unless it can be demonstrated that such a regime is appropriate to address a local issue
- a review of the need for existing industry-specific regimes to determine whether uniformity should be introduced, having regard to the benefits and detriments associated with uniformity.

## **6.5 Enforcement coordination under a uniform law, multiple regulator model**

### **6.5.1 Is there a need for a uniform law, single regulator approach?**

The ACCC believes that the appropriate model for uniformity should incorporate a uniform law, multiple regulator concept, rather than a one law, one regulator model.

While there may be some benefits associated with a one regulator model, it is questionable whether such an approach would result in net benefits for Australia for the following reasons.

Currently, the state and territory fair trading agencies' activities cover a range of issues important to the functioning of the consumer policy framework that are best dealt with by local agencies, rather than a national agency.

In particular, the state and territory fair trading agencies provide a range of services to consumers in relation to individual matters that may receive less attention from a national agency, whose focus would be on undertaking enforcement action in cases of wide-spread detriment.

Currently, each state or territory fair trading agency provides some form of individual dispute resolution process. For example, Consumer Affairs Victoria provides dispute resolution services to assist parties to negotiate settlements and advocacy services, funded by Consumer Affairs Victoria, to support consumers who are not in a position to advocate for themselves. In 2005–06, Consumer Affairs Victoria recovered almost \$3 million for consumers through dispute resolution services. This type of access to justice for consumers is a critical element of the consumer policy framework which must be continued.

Further, many state and territory fair trading agencies administer a range of consumer protection-related legislation beyond general fair trading laws. Removing the administration of general fair trading laws may not decrease costs significantly as those bodies will still need to operate, and may lead to loss of economies of scale and increase consumer confusion as to what agency to contact.

Nevertheless, for a uniform law/multiple regulator approach to be effective, some measures need to be taken to improve coordination of enforcement activities between jurisdictions. If laws are consistent but each jurisdiction has different interpretations of the legislation, enforcement priorities and resource allocations, this could result in a number of problems that could undermine the potential benefits of uniform legislation. Potential issues include:

- duplication of investigations
- matters ‘falling through the cracks’ between agencies assuming that a matter is better dealt with in another jurisdiction
- uncertainty from consumers and business as to the application of the law if interpreted differently in different jurisdictions
- business forced to adopt the ‘most rigorous’ interpretation of one jurisdiction in order to do business nationally
- consumer dissatisfaction about being referred between various agencies
- lack of a central repository for complaint information (i.e. information about consumer complaints and systemic issues is fragmented between various jurisdictions)
- different levels of funding for different jurisdictions can lead to different enforcement capacities and differing levels of compliance between jurisdictions.

However, the ACCC considers that these issues can be minimised through enhanced coordination between jurisdictions and ensuring appropriate resources are available to each agency, such that the benefits of retaining multiple regulators, as outlined above, outweighs the costs of having multiple regulators.

### **6.5.2 Current coordination of enforcement agencies activities**

As outlined above, the ACCC maintains strong links to state and territory fair trading agencies through its regional offices.

The primary formal mechanism for coordination of enforcement activities is through FTOAC, which meets on a monthly basis. FTOAC’s purpose is to provide advice on fair trading operational issues, to coordinate joint operational activities to achieve nationally beneficial outcomes and to establish national uniform reporting protocols. It is also responsible for:

- implementing a national approach to fair trading operational issues where appropriate
- actioning issues referred to it by SCOCA
- providing advice to SCOCA on emerging issues requiring the development of national education strategies
- establishing working parties as required to progress fair trading operations and education issues

- establishing and maintaining efficient and effective reporting systems between participating agencies
- exchanging information of relevance between participants.

Key activities undertaken by FTOAC/SCOCA include:

- *Development of a framework for joint investigations.* Joint investigation agreements have been developed under which agencies agree to conduct a joint investigation into a particular matter and establish a joint investigation team, with a leader nominated from one agency. The agencies jointly establish a timeframe for investigations, identify the desired remedies and outcomes, and agree on investigation methodology. This is a relatively new development, and as yet, there are only a small number of matters being investigated jointly. Nevertheless, increasing use of joint investigations is likely to reduce duplication, utilise resources effectively, and promote harmonisation of enforcement techniques across each jurisdiction.
- *Development of the AUZSHARE register.* AUZSHARE is shared database of complaints and cases. Currently, three jurisdictions upload complaints to the AUZSHARE system. An alert system enables agencies to post an alert to other agencies that a complaint has proceeded to initial investigation in order to reduce potential duplication of investigations.
- General exchange of information about experiences in enforcement.

These initiatives show that the level of cooperation in terms of enforcement activities is already quite good.

However, while mechanisms for coordinating enforcement action are already developing, there appears to be a lack of coordination of enforcement priorities or education/guidance materials. Lack of coordination can stem from individual resource issues faced by various state or territory fair trading agencies. That is, the appropriate body may not be in a position to take action due to restrictions on its resources.

Cases arise where one jurisdiction may take action in relation to a national trader which other jurisdictions may not consider constitutes an issue. In other cases, one jurisdiction may not be able to take action or achieve effective remedies on a national basis due to limits to its jurisdictional powers and becomes frustrated that other jurisdictions, that may be in a position to take action, may not attribute the matter the same level of priority. This inevitably can lead to claims that matters are ‘falling through the cracks’.

### **6.5.3 Models from other jurisdictions**

Other major jurisdictions also face similar issues in coordinating enforcement of general fair trading legislation by multiple regulators as follows:

#### **Canada**

Misleading and deceptive conduct legislation is enforced by both the Canadian Competition Bureau and the provinces. The legislation is not necessarily uniform. While there is potential for overlap and duplication, problems are minimised through

generally unwritten understandings between agencies as to which should take the lead on particular types of cases. No formal system of allocation of matters appears to exist.

### ***United Kingdom***

Misleading and deceptive conduct legislation is enforced by both the Office of Fair Trading (OFT) and County-based Trade Standards bodies. In 2006, following the recent Hampton Report and introduction, in 2002, of the Enterprise Act, the OFT released guidance to business and consumers on the mechanisms for the enforcement of consumer protection legislation by the various enforcement agencies in the United Kingdom. Part 8 of the Enterprise Act gives the OFT an overall coordination role to ensure that any enforcement action is taken by the appropriate agency. The guide seeks to provide certainty for businesses as well as clarity for consumers as to the approach that will be taken to enforce consumer protection legislation. The Act designates three types of enforcers: general enforcers (the OFT and Trading Standards Service), designated enforcers and community enforcers.

### ***United States of America***

Misleading and deceptive conduct legislation is enforced by the FTC and various state attorneys-general. The legislation is not necessarily uniform. It has been recognised that potential for jurisdictional overlap can impose considerable costs on business. Nevertheless, the US recognises advantages in the multiple regulator approach in that states have the advantage of proximity and knowledge of local markets, federal agencies have a broader scope of focus and a degree of informal cooperation occurs. For example, federal and state attorneys-general do cases on the same issue at the same time, or can be co-plaintiffs in a matter.

### ***European Union***

Considerable efforts have been made within the European Union to coordinate the activities of member state enforcement agencies.

The European Union issued a regulation on cooperation between national authorities responsible for enforcement of consumer protection laws in October 2004. The regulation enables one jurisdiction to ‘request’ another to take all necessary enforcement measures to stop an intra-community infringement. Agencies are also required to coordinate their enforcement activities. Other measures include informing each other about activities in areas such as consumer information and advice.

## **6.5.4 Ways to improve coordination and minimise inconsistency and duplication in enforcement of fair trading and consumer protection laws**

The ACCC believes that there are a number of ways in which the current system of coordinating the activities of the ACCC and state and territory fair trading agencies can be enhanced. These are outlined below.

### ***Appropriate resources of each enforcement agency***

A fundamental requisite for effective coordination of the activities of enforcement agencies is to ensure that each agency has an appropriate level of funding to enable it to take on cases within its jurisdiction. In the absence of adequate resources, compliance with fair trading laws will become ‘patchy’ between regions. In these circumstances, the capacity of other agencies to take on cases in that area will be limited due to

jurisdictional issues, or competing priorities. Currently, in cases where it has jurisdiction, the ACCC does take on cases that may be considered more appropriate for the local body where the relevant enforcement agency signals that it does not have the resources to take on the case. However, the ability to do this is limited.

### ***Uniform provisions for territorial reach***

As outlined above, there is a significant degree of variation between the scope of jurisdiction of each state and territory regime. In addition, there is much scope for overlapping jurisdiction, and uncertainty as to jurisdictional reach. Uniformity in this area would greatly enhance the level of certainty for all regulators and reduce the cost of coordination.

This does not mean that there would be no overlap in jurisdiction. Overlap is unavoidable, particularly in relation to matters such as misleading and deceptive conduct where the conduct may occur simultaneously in a number of jurisdictions where the representation is received. However, by creating a uniform system, this will greatly reduce uncertainty in determining which regions have jurisdiction, as each agency would be considering matters using the same legislative framework with which they are familiar.

### ***Referrals of complaints and investigations between agencies***

Protocols exist between the ACCC and state and territory fair trading agencies to clarify circumstances where matters should be referred to another jurisdiction. However, there are some concerns that these protocols are not working as well as they could. In particular, some jurisdictions are concerned that matters are being referred inappropriately.

As discussed above, the ACCC believes that uniformity in territorial reach provisions across jurisdictions will assist in ensuring that matters are appropriately referred. The ACCC understands that FTOAC is currently reviewing protocols for referrals of complaints and investigations between agencies.

### ***Centralised complaint handling system***

One issue for consideration is whether there should be a centralised complaint handling system which could refer relevant matters to the appropriate jurisdiction. Such a system would prevent consumers being directed through several agencies before they go to the right one, minimise duplication by directing all complaints about one issue/trader to the same organisation, provide a level of consistency in terms of criteria for determining the appropriate agency to send a matter to, provide a degree of consistency in the interpretation of laws by determining what matters require investigation, and enable the development of a central complaints database for the purposes of research and identifying systemic issues. Notably, this type of system has recently been introduced in the UK. The UK 'Consumers Direct' is housed within the OFT.

However, developing a separate centralised complaint handling system would involve considerable costs. Also, because the ACCC and state and territory fair trading agencies have a number of other functions beyond consumer complaints on fair trading issues, it may be necessary for each agency to continue to maintain a call centre, so there would not be substantial cost savings associated with setting up a separate central consumer complaint line centre.

The current AUZSHARE system is capable of providing many of the benefits of the UK ‘Consumers Direct’ model and the ACCC believes that its potential should be more fully explored before engaging in a costly exercise of establishing a central consumer complaint line centre.

AUZSHARE is a secure and effective tool in combating consumer fraud. Generally the system will be limited to complaints of a more serious nature, multiple complaints investigated by the relevant fair trading agency, and complaints subject to law enforcement action.

AUZSHARE provides the facility for authorised agency users across Australia and New Zealand to send out alerts on scams and consumer complaints in real time via email and for users to access complaints data, which will be either downloaded by agencies on a weekly basis or provided by agencies via an online manual data entry facility. The underlying design specification for the AUZSHARE system recognises the requirement for each agency to have discretion in regard to what matters are notified as alerts and what complaints data are uploaded.

The alerts function allows authorised users to post fraud alerts, notify users of an alert by email, specify user groups to be notified, inform other agencies when a complaint has proceeded to initial investigation and search/query for an alert by type of complaint/fraud, business, date and keyword. Information is available in Australia and New Zealand immediately after the information has been posted.

The complaints function allows access to a central database of serious complaints information uploaded from each jurisdiction. Users are able to search for information by type of complaint, business and other details. The system includes a powerful search tool with global search capability. As well as being able to search particular fields for information, users are able to undertake a comprehensive search of textual fields in alerts and complaints.

AUZSHARE has the advantage of enabling direct contact between agencies—each agency maintains direct responsibility for ensuring that coordination works rather than relying on a third party.

AUZSHARE does not provide a ‘one stop shop’ for complaints. However, this issue could be dealt with through development of protocols for cross jurisdictional referrals as discussed above.

Nevertheless, the ACCC believes that the AUZSHARE system needs to be significantly improved in order to develop into a meaningful tool for coordination between jurisdictions. In particular, there needs to be:

- commitment from all jurisdictions to use the system
- agreement reached as to the types of information to be entered to ensure consistency.

### ***Enhanced information sharing powers***

The Government has introduced legislation to amend the Trade Practices Act to clarify the ACCC’s obligations to keep information provided to it by third parties in confidence or pursuant to the ACCC’s powers to acquire information confidential. The legislation will allow information to be shared with other regulators, both domestic and



internationally, to assist in law enforcement matters. This will significantly enhance the ability of the ACCC to operate in conjunction with state or territory fair trading agencies.

## 7. Relationship between the Trade Practices Act and other consumer regulatory regimes

An area of growing concern in the Australian economy is whether the amount of regulation imposed on traders is placing undue burdens on business in the form of ‘red tape’, which ultimately impacts on consumers as such costs are generally passed on. In January 2006, the Taskforce on Reducing the Regulatory Burden on Business reported that:

... the volume of regulation has expanded rapidly over more recent years. Governments have introduced new regulations in areas such as finance, corporate governance, superannuation, business taxation and, most recently, workplace relations, and regulation in social and environmental areas has continued apace.<sup>112</sup>

Nevertheless, the Taskforce also recognised that there were important economic, social and environmental goals that warrant regulation, which should not be traded off simply to improve business competitiveness.

One of the key issues for the Australian consumer policy is to ensure that the regulatory framework appropriately balances generic and industry-specific regulation, co-regulation and self-regulation.

In principle, the Australian Competition and Consumer Commission (ACCC) believes that to the extent possible, the regulatory framework should favour a generic approach, applying the same fair trading and consumer protection laws to all areas of commerce. This has benefits because it reduces confusion for both consumers and business, and reduces compliance costs for businesses. It may also reduce regulatory costs associated with developing and maintaining different sets of rules, and coordinating appropriate responses where overlap exists.

However, the benefits of a generic approach need to be weighed against the particular needs of an industry.

For the ACCC, concerns are more likely to arise where an industry-specific regime involves a ‘carve out’ of the application of the *Trade Practices Act 1974*, but in practice the scope of jurisdiction of each regime is unclear. This situation currently exists in relation to the financial services regime. In this instance, the ACCC believes that a preferable approach would be to confer concurrent jurisdiction on both the ACCC and the Australian Securities and Investments Commission (ASIC).

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<sup>112</sup> Regulation Taskforce, 2006 *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, pp. 1–2.

## **7.1 Key industry specific approaches to consumer regulation**

In addition to the Trade Practices Act, the Commonwealth also administers a number of industry-specific regulatory regimes that define consumer policy within those industries. Key areas include financial services, telecommunications, food safety, and therapeutic goods. Also, the energy industry is progressing towards a national regulatory regime. In each case, the form of industry-specific regulatory regimes varies, as do the enforcement mechanisms. Industry-specific regimes may range from licensing regimes to direct standards of conduct imposed by legislation or through government-endorsed industry codes of conduct. In some cases, a mixture of mechanisms may be utilised.

The following provides a brief overview of some of the key regulatory regimes that interact with the Trade Practices Act.

### **7.1.1 Financial services**

As outlined above, the fair trading and consumer protection provisions of the Trade Practices Act do not apply in relation to financial services. Mirror provisions are incorporated into the ASIC Act, which are enforced by ASIC rather than the ACCC.

ASIC also regulates the financial services industry through administering a licensing regime in respect of certain activities in the financial sector.

In addition to the mirror provisions of the Trade Practices Act, financial products are regulated by the Uniform Consumer Credit Code, which regulates consumer lending and is administered by the states and territories. The UCCC compliments, rather than duplicates general consumer protection provisions, and provides a nationally consistent basis for credit regulation.

Industry codes of practice have also been developed by a number of industry associations in the financial services sector. The content of each of these codes is different. Membership of an industry code is normally voluntary. Generally, the industry codes require companies to have a fair process for dealing with complaints.

ASIC have the power to approve codes in the financial services sector. It is also a legal requirement for most financial services businesses, licensed by ASIC, to belong to an independent complaints scheme. There are a number of independent complaints schemes which cover different areas of the financial services industry.

### **7.1.2 Telecommunications**

In Australia, the regulatory environment for telecommunications consumers includes both specific and general consumer protections. These protections are found at the federal level, with state and territory involvement limited largely to general fair trading laws.

The fair trading and consumer protection provisions of the Trade Practices Act apply to all elements of the telecommunications industry. There are also a number of additional protections that apply on a national basis, including:

- *The Universal Service Obligation*—the USO ensures that standard telephone services (STS) are accessible to all people in Australia on an equitable basis, wherever they live or carry on business.
- *The Customer Service Guarantee*—the CSG standard sets timeframes for the connection of specified services, the repair of faults and the attendance at appointments by all telephone companies.
- *Standard forms of agreement*—the term ‘standard form of agreement’ is a formal term used in legislation to refer to preset contracts which customers agree to by the act of buying a service. Most service providers refer to their SFOA in their own way, for example, as ‘our standard terms and conditions’ or ‘our customer terms’. Irrespective of what it is called, service providers who use SFOA are required to abide by the rules and industry codes that set out how customers are informed about the SFOA and a customer’s rights if the SFOA is changed.
- *Industry Codes*—Communications Alliance is the industry’s self-regulatory body. It is the pre-eminent industry body which develops operation codes, technical standards and consumer codes. Once a code has been developed it is registered with ACMA.<sup>113</sup> There are currently seven consumer codes. Codes include topics such as standards for disclosure of billing information, privacy and caller number display, credit management, consumer complaint handling, disclosure of terms and conditions including price, transfer of services, and unfair contract terms. The industry is currently in the process of consolidating these codes into a single code. ACMA has the power to issue directions to carriers to comply with mandatory obligations under the relevant industry code. The ACCC participates in the code development process through commenting on draft codes and through issuing mandatory consultation certificates which are a requirement of the registration process by ACMA.
- *Self-regulatory schemes*—there have been two industry schemes developed in response to problems arising with premium services.<sup>114</sup> The first is a code of practice for services that involve making a voice or fax call and that use numbers starting with 190. It is administered by the Telephone Information Service Standards Council (TISSC) and sets fair standards for the content and advertising of premium rate services accessed via voice, fax and data. TISSC does not have jurisdiction to deal with text messages which is covered by the *Telecommunications Service Provider (Mobile Premium Services) Determination* (known as the MPSI

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<sup>113</sup> Under the *Do Not Call Register Act 2006*, ACMA is also responsible for establishing and overseeing the operation of the Do Not Call Register and developing and establishing a national industry standard for minimum levels of conduct by the telemarketing and research callers.

<sup>114</sup> Premium services are services that supply various types of content or provide for payment of services via mobile or fixed telephone accounts, at a price that is higher than would be typical of a normal telephone call.

scheme). It specifies rules to restrict and prohibit access to certain categories of content accessible via mobile premium messaging numbers and mobile carrier portals and came into effect in October 2006.

- *Ombudsman*—an ombudsman scheme has been established to assist consumers. The Telecommunications Industry Ombudsman (TIO) is an industry-owned independent complaints handling body that can investigate complaints concerning telephone or internet services, including mobile contracts by residential and small business customers of carriage service providers, privacy matters, customer service and breaches of industry consumer codes (for those codes where Communications Alliance has conferred it the power and the TIO has consented). It acts as an office of last resort. Licensed telecommunications carriers and CSPs who provide eligible services to residential and small business customers are required to be members of the TIO scheme. In 2005 there were 1135 members of the TIO.

### **7.1.3 Therapeutic goods**

Therapeutic goods are currently regulated at a national level in Australia by the Therapeutic Goods Administration (TGA). As well as maintaining a register and carrying out assessments of therapeutic goods (medicine and medical devices), the TGA also receives complaints about the advertising of therapeutic goods.

Advertisements must comply with the Therapeutic Goods Advertising Code, which complements the general provisions of the Trade Practices Act with industry-specific requirements. Complaints to the TGA about advertising are heard by different bodies, depending upon the circumstances:

- the Complaints Resolution Panel handles complaints about advertisements in mainstream media directed to consumers
- the Complementary Healthcare Council and the Australian Self-Medication Industry are self-regulatory complaint panels and handle complaints about advertisements in non-mainstream media directed to consumers and complaints about advertisements directed to healthcare practitioners
- the TGA handle complaints about advertisements for prescription medicines directed to consumers.

The Complaints Resolution Panel can require the withdrawal of advertising, or the publication of retractive advertising. The panel can also refer a complaint back to the TGA for a very serious breach. The TGA can then seek recourse to the courts. The maximum penalty is \$1500. Individual industry organisations can withdraw the membership of a company for failing to meet the advertising code.

On 10 December 2003, the Australian and New Zealand Governments signed an agreement to establish a joint scheme for the regulation of therapeutic products in the two countries (the treaty). The joint regulatory scheme will be administered by a single, bi-national agency (the Agency), which will replace the TGA in Australia and the Medicines and Medical Devices Safety Authority (Medsafe) in New Zealand and will be accountable to both the Australian and New Zealand governments. This agency will be known as the Australia New Zealand Therapeutic Goods Authority (ANZTPA).

Article 3 of the treaty provides for the regulation of the promotion (defined as including advertising) of therapeutic products, including the setting of standards. This will primarily take the form of an advertising code.

Central complaints bodies (the complaint panels) will be established in both Australia and New Zealand as statutory committees to receive and determine complaints about advertisements directed to consumers in Australia or New Zealand, respectively, and complaints about advertisements directed to healthcare practitioners that involve concerns about serious risk to public health and safety. Industry self-regulatory complaints panels will continue to handle complaints about advertisements directed to healthcare practitioners that do not involve matters of serious risk to public health and safety.

The Trade Practices Act will continue to apply to trade or commerce in therapeutic goods (including advertising).

#### **7.1.4 Energy**

Consumer protection in energy matters is currently concentrated at the state/territory level, with a range of codes and guidelines (generally created and enforced by the industry regulator) and specific legislative requirements. These protections generally cover:

- industry-specific concerns, such as metering, disconnection/reconnection, customer transfer/churn, retailers of last resort
- areas that are partially/wholly covered by Trade Practices Act provisions, such as billing, customer transfer, marketing<sup>115</sup>
- other non-Trade Practices Act protections, such as hardship policies, cooling-off periods.<sup>116</sup>

Consumer complaints, including those that would also raise Trade Practices Act concerns, are generally referred to statutory or industry-based ombudsman at the state/territory level such as the Energy and Water Ombudsman of Victoria.<sup>117</sup>

Consumer protection in relation to energy markets is the subject of reform at present. For electricity, the framework consists of a National Electricity Law (NEL) in National Electricity Market jurisdictions, and jurisdictional legislation in Western Australia and the Northern Territory. Under the NEL, the Australian Energy Market Commission is given the power to make National Electricity Rules in addition to any rules put in place by the Ministerial Council on Energy. Similarly, the gas industry will be reformed through a National Gas Law which confers rule-making powers onto the AEMC. Western Australia will pursue its own framework for its electricity market but will

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<sup>115</sup> Marketing regulation may be partially or wholly addressed by state and territory fair trading and door-to-door sales legislation.

<sup>116</sup> Cooling off periods may be partially or wholly addressed in state and territory fair trading and door-to-door sales legislation.

<sup>117</sup> The Energy and Water Ombudsman of Victoria received 13 529 complaints and 4234 enquiries from Victorians during 2005–06 (with only around 10 per cent related to water, the rest to energy). Of these, 5347 proceeded to full investigation.

implement the National Gas Law, enforced by the Economic Regulation Authority. Technical safety regulation of electricity and gas distribution will continue to be regulated at the jurisdiction level.

Consumer protection areas will be the subject of a range of rules that will be enforced by the Australian Energy Regulator—a constituent part of the ACCC—with small customer dispute resolution functions retained by jurisdictionally based ombudsmen.

### **7.1.5 Food regulation**

Industry-specific regulation of food is primarily the responsibility of Food Standards Australia New Zealand (FSANZ), a statutory body that works within an integrated food regulatory system involving the governments of Australia and New Zealand.

In addition to ensuring food safety, FSANZ also develops food standards in consultation with industry. These standards form the *Australia New Zealand Food Standards Code* (the code). The code covers a range of concerns, including hygiene, contaminants and residues, and food safety, as well as specific food labelling requirements that must be followed in addition to the requirements of general fair trading provisions of the Trade Practices Act.

FSANZ does not, however, handle complaints about potential breaches of the code. Instead, these complaints are directed to the relevant government food authority or health department in each Australian state and territory or in New Zealand.

Complaints regarding general fair trading matters can also be directed to the ACCC or local offices of fair trading.

## **7.2 Benefits and detriments associated with industry-specific regimes for consumers and businesses**

The ACCC takes the view that the introduction of an industry-specific regime in some cases may have substantial benefits for consumers and be necessary to achieve the objectives of consumer policy.

It may be necessary to provide a higher level of protection than generic laws, for instance a licensing regime, or a different type of protection in certain situations, for instance specific disclosure requirements or standard form terms and conditions.

As outlined in appendix A, there are a number of complex and complementary rationales for consumer regulation, some of which will have a more direct application to certain industries than to others.

For example, information failures occur to a greater or lesser extent depending on the nature of the product. In areas such as financial services, information failure is more likely to occur than in some other markets because of the difficulties faced by consumers in assessing the nature of the product. In addition, the consequences of information failure are severe for consumers, and accordingly, stronger preventative measures may be justified, such as licensing regimes and specific disclosure requirements on documents such as prospectuses.

Additional protections, such as specific information disclosure requirements, may be appropriate in some cases where the costs associated with detecting breaches of general misleading and deceptive conduct laws are extremely high and, therefore, it is more

cost effective to achieve compliance through a specific disclosure regime. Such regimes may also be considered appropriate in situations where the likely harm from lack of information is very costly to address after the fact.

In other cases, the objective of specific regulation may be to protect persons in a position of vulnerability in post-contractual situations. An example of this arises in relation to utility bills where suppliers are usually required to meet some standard of disclosure of the basis upon which bills have been calculated. Otherwise, consumers have no way of knowing whether their supplier is adhering to the core terms of the supply agreement.

However, an industry-specific approach does have costs for consumers as well as benefits. In particular, proliferation of different regimes can result in confusion. Where regimes are exclusive, there is a danger that the industry-specific regime fails to cover all the areas it should—particularly in a developing market where the nature and scope of the product or service in question may change rapidly. Accordingly, while a generic approach alone may not be sufficient, concurrent jurisdiction with generic laws such as the Trade Practices Act may be used as a ‘back stop’ for consumers.<sup>118</sup>

For business, industry-specific approaches have the advantage of providing a degree of certainty, which may reduce aspects of compliance costs such as legal fees. However, the level of benefit will depend on the nature of the law itself. If it is unduly arduous or unclear, then it may increase compliance costs. Similarly, where concurrent jurisdiction of generic and industry-specific laws exist, this can raise issues for business if the regimes are inconsistent.

Further, general rather than industry-specific approaches are likely to reduce regulatory costs, as it avoids the establishment of separate regulatory agencies, and usually higher cost administration associated with more prescriptive industry-specific regimes.<sup>119</sup>

### **7.3 Issues for regulators**

The ACCC has experienced a number of challenges in operating in conjunction with industry-specific regimes. Nevertheless, such challenges should not be overstated and in many areas, the ACCC has developed mechanisms to minimise potential risks.

#### **7.3.1 Exclusive jurisdiction issues**

In the ACCC’s experience, considerable issues arise in ensuring the effective operation of consumer laws where exclusive jurisdiction applies.

This is an area of concern, particularly in cases where the nature of the product or service is such that it could incorporate elements of both jurisdictions and/or there is uncertainty as to which jurisdiction a product or service falls into. This is increasingly

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<sup>118</sup> Where there is a voluntary code of conduct this can assist in compliance with the Trade Practices Act, but is not a substitute for the legislation. That is, even if a code of conduct is in place, the ACCC may nevertheless consider it appropriate to take enforcement action when the conduct in question also involves a breach of the Trade Practices Act.

<sup>119</sup> See Consumer Affairs Victoria, *Choosing between general and industry specific regulation*, Research Paper No. 8, November 2006, p. 9.



likely as trends show a growth in bundling products and services, and the convergence of different industry sectors.

### **7.3.2 Financial services**

An example of this arises in the area of financial regulation, where the ACCC has a responsibility for administering the fair trading provisions of the Trade Practices Act and ASIC has responsibility for mirror provisions in relation to financial services on an exclusive basis.

#### ***Overlap issues***

The Trade Practices Act does not apply to the supply, or possible supply, of services that are financial services. The definition of a financial service is extremely complex. Broadly, it includes circumstances where a person provides financial product advice, deals in a financial product, provides a service that is otherwise supplied in relation to a financial product or engages in conduct of a kind prescribed in regulations. The ASIC Act contains a complex definition of a financial product which includes credit facilities and anything declared by the relevant regulations to be a financial product.

While on its face the delineation between the respective jurisdictions of the ACCC and ASIC appear quite clear, in practice, there is a significant degree of overlap and uncertainty. In some cases it is unclear which agency has jurisdiction and it may be the case that in some situations one agency will have responsibility for some aspects of a transaction, whereas the other agency will have responsibility for other aspects.

Examples of areas of overlap and uncertainty include debt collection, investment seminars, loyalty schemes and periodic or deferred payments of utility accounts.

*Periodic or deferred payments of utility accounts*—a particular area of overlap arises due to the definition of ‘credit’ in Regulation 2B of the ASIC regulations. This definition extends the meaning of the term to any arrangement whereby payment of a debt owed by one person to another is deferred. This would capture a situation where a utility supplier agrees that a customer can pay their account periodically. The payment of the debt due by the customer at any particular time is deferred to the end of the billing period. The provision of credit in this manner could fall within the scope of the definition of financial services, even though the provision of the underlying utility service would not.

*Debt collection*—a debt collection issue may involve misleading or deceptive conduct about the good or service, for example, that the consumer received supply of a particular product; or about the debt, for example that a certain amount of credit was extended; or both. While the sale or supply of the underlying good or service may generally be governed by the Trade Practices Act, ASIC may have jurisdiction in relation to the provision of credit which caused the debt to arise.

*Investment seminars*—various seminars are advertised and presented offering ‘advice’ or ‘strategies’ or ‘training’ relating to ‘investments’. These investments may include some things which are financial services and some things which are not, such as franchising opportunities which also may involve credit arrangements. Sometimes it is not clear from the advertising of the seminars what types of investments will be spoken about. Often the seminars will include both.

*Loyalty schemes*—many loyalty schemes constitute a form of non-cash payment facility and are therefore a financial product. However, loyalty programs not associated with the use of a financial product, such as ‘frequent flyer’ schemes (not linked to credit cards) or ‘coffee card’ schemes, do not fit naturally within ASIC’s jurisdiction, but technically could potentially fall within the definition of a financial product.

***Implications for regulators, business and consumers***

Determining whether one or both the ACCC or ASIC have jurisdiction in these types of matters is legally complex, and subject to a degree of uncertainty. If the ACCC and ASIC do not correctly determine who has jurisdiction with respect to a particular matter, they each run the risk of acting beyond their statutory power.

Significant resources may be wasted in determining who has jurisdiction, rather than investigating the merits of a particular case.

Further, bringing a number of ‘test cases’ to court to test the limits of jurisdiction is not a satisfactory method of clarifying the law in this area, as the consequences of losing the matter due to lack of jurisdiction may have adverse effects for the consumers involved, and wasted significant organisational resources.

***Measures taken to coordinate activities***

A number of measures have been taken to facilitate a high degree of coordination, including cross-delegation arrangements to enable one agency to take action where it is possible that the case falls within both jurisdictions at the same time.

The ACCC and ASIC have signed a memorandum of understanding which establishes a framework for cooperation between the two agencies. Administrative arrangements have been jointly developed by the agencies to identify areas of potential overlap, and administrative protocols about which agency should run particular cases. In addition, the ACCC and ASIC have entered into standing delegations which empower each agency to act on the other’s behalf in relation to debt collection, and ASIC has provided a standing delegation of GST matters to the ACCC. It is possible to obtain a short-term delegation of powers in relation to a particular matter.

However, the operation of such delegations still remains complex.

While a cross delegation may exist in some areas, it is still necessary for the agencies to determine which agency will take responsibility in each case, and to ensure that consumers are made aware of to whom they should address their complaints.

Further, this does not ultimately avoid the need to determine which legislation applies in a particular case. While delegations make it possible for an agency to bring an action, the court must still determine which legislation has been breached. Accordingly, the current system imposes additional costs on both regulators in that determining these complex legal issues involves obtaining costly legal advice, slows down cases as agencies must seek delegations and prepare legal arguments regarding jurisdiction, and requires each regulator to work with delegated powers with which it is not totally familiar.

To date, delegations have been used in two matters.

A matter is currently before the courts involving alleged misleading and deceptive conduct in relation to the provision of a product where the provider arranged for the purchaser to enter into an equipment lease with a third party financier. In this case, the

ACCC obtained a specific delegation of powers from ASIC and has instituted proceedings under both the Trade Practices Act and the ASIC Act. Nevertheless, the case has still involved complex arguments regarding the definition of a financial service, and whether the ASIC Act or the Trade Practices Act applies.

### **ACCC proposal**

The ACCC considers that a more cost-effective approach to overlapping jurisdiction in relation to financial services would be to introduce concurrent jurisdiction, so either agency would have the ability to take action in relation to all aspects of a matter without requiring express delegations.

This would remove the need to inquire into the legal complexities of which jurisdiction applies to which aspects of a transaction.

Where a matter falls more towards the jurisdiction of one regulator, but lies on the periphery of the other jurisdiction, the enforcement agency more closely concerned would be able to take action without burdening the other agency unduly with the matter.

In practice, coordinating a concurrent jurisdiction approach between the two agencies would not substantially increase the degree of coordination that already has to occur under the current arrangements. The ACCC believes that liaison and coordination between itself and ASIC are working well from an organisational perspective and is confident that such coordination could continue successfully in a concurrent jurisdiction regime.

Further, any concerns about potential duplication of investigations could be minimised through administrative arrangements between the agencies. In particular, arrangements are already in place indicating which agency should be responsible in areas of overlap.

This proposal has been raised previously, in the context of the *Parliamentary Joint Committee on Corporations and Financial Services* inquiry into property investment advice. The ACCC notes that at that time, the Committee formed the view that whilst it saw considerable merit in the proposal, it believed that there had not been sufficient time to evaluate the current procedures to determine whether concurrent jurisdiction was necessary.<sup>120</sup>

It has been nearly two years since that report was published. During that time, while the ACCC believes that both itself and ASIC have given significant priority to making the current arrangements work as effectively as possible, concurrent jurisdiction would significantly improve the ability of both regulators to act quickly and decisively.

### **7.3.3 Concurrent jurisdiction issues**

Where an industry-specific regime operates in addition to the Trade Practices Act, the ACCC needs to devote some resources to obtaining an understanding of the regime, and the enforcement options and remedies available under that regime, in order to inform its own complaint handling protocols and enforcement program. This will generally involve the development of liaison contacts with relevant industry-specific enforcement bodies and ombudsman schemes.

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<sup>120</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Property Investment Advice—Safe as Houses?*, June 2005, p. 19.

This process is important, because the ACCC recognises that there is a danger that if it does not fully understand how the other regime operates, matters may ‘fall through the cracks’ due to misunderstandings about when it is appropriate to refer matters. Equally, good communications between relevant agencies is critical to minimise duplication of investigations.

As outlined in chapter 3, the ACCC has developed links with a number of industry-specific regulators in order to ensure a smooth interface between jurisdictions.

Generally, such processes work well.

However, the ACCC has experienced some difficulties in areas where industry-specific regimes are under-funded, or lack the ability or commitment to taking strong enforcement action. This places undue pressure on the ACCC to take on cases under generic laws that should otherwise have been dealt with under an industry-specific regime. Generally, the ACCC considers that where an industry-specific regime is in place it should be the primary law of application, and the Trade Practices Act used as a ‘back stop’ in relation to matters that fall outside the specific rules.

Another area of concern may arise if an industry-specific regime is inconsistent with the Trade Practices Act. In many areas, this is minimised through participation of the ACCC in the development of industry-specific regimes. For example, the ACCC provides comments on draft telecommunications industry codes and must also be consulted again before ACMA can register the finalised version.

Generally, the ACCC’s experience has been that industry-specific regimes tend to complement the operation of the Trade Practices Act, rather than raise significant issues of inconsistency in approach. For example, ombudsmen schemes which tend to assist consumers in one-on-one disputes with traders in a particular industry provide a method of achieving low-cost remedies to issues, rather than duplicating the work of the ACCC in taking action in relation to conduct that has widespread detriment.

In addition, the existence of such schemes can assist the ACCC by providing valuable information regarding emerging trends in a particular industry.

## **7.4 When should industry specific regulation be adopted?**

The ACCC considers that it is a necessary element of the consumer policy framework that generic and industry-specific regulation operates concurrently in order to achieve the objectives of consumer policy.

However, use of industry-specific regulation should be minimised, and careful consideration be given to ensuring that such regulation is appropriate in the circumstances.

The ACCC believes that some of the issues that could be taken into account in determining whether an industry-specific regime should be developed include whether:

- a particular practice is causing significant consumer detriment.
- an industry-specific regime can address a particular problem in a way that could not be done by generic regulation without imposing restrictions on other markets.

- the industry-specific scheme has the range of enforcement tools it needs.
- it is sufficiently clear what activities fall within the scope of the industry-specific regime?
- the industry-specific regime is likely to complement rather than duplicate generic fair trading and consumer protection laws?
- the industry is changing rapidly, such that prescription, industry-specific rules will quickly go out of date, such that a more flexible, generic approach may be preferable.

The ACCC notes that the Productivity Commission's issues paper raises a question of whether enough use is made of self-regulatory measures. The ACCC has some experience in relation to monitoring the operations of self-regulatory codes of conduct. Generally, the ACCC takes the view that voluntary industry codes of conduct tend to be more effective when the self-regulatory body:

- has widespread support of the industry
- comprises representatives of the key stakeholders, including consumers, consumer associations, the government and other community groups
- operates an effective system of complaints handling.

The ACCC's views on where industry codes of conduct are most likely to be effective are set out in detail in its *Guidelines for developing effective voluntary industry codes of conduct*.

## 8. Research into consumer issues and education

The Australian Competition and Consumer Commission (ACCC) believes that research and education are increasingly important elements of ensuring that the Australian consumer policy framework continues to meet the objectives of a consumer policy.

### 8.1 Research

As noted in chapter 3, the ACCC undertakes a range of research and analysis activities, pursuant to s. 28 of the *Trade Practices Act 1974*. These includes research carried out by the ACCC in the context of its enforcement and compliance activities, cooperation and participation in external research activities, and participation in a variety of domestic and international forums, many of which also undertake research into consumer issues.

Nevertheless, the ACCC notes that consumer organisations are currently fragmented and generally not well funded to engage in research.

At the same time, the need for research is growing.

Analysis of consumer behaviour, in particular the potential application of behavioural biases in assessing the need for regulatory intervention and the type of intervention most likely to achieve benefits, is becoming increasingly complex and challenging. Accordingly, there is an increasing need for research to underpin regulatory impact analysis.

Targeted and thorough research into consumer issues can assist regulators in a number of ways.

Firstly, research can help identify particular industries, products or practices that raise significant fair trading concerns. This information can be used to assist the enforcement and compliance initiatives of agencies such as the ACCC. Together with the ACCC's own intelligence-gathering and analysis work, external consumer research could assist the ACCC's efforts to ensure that its enforcement and compliance initiatives make the most efficient use of resources available.

Secondly, consumer research can provide assistance with the content, design and targeting of consumer education and information initiatives. More broadly, research into consumer issues is useful when determining the appropriate balance of enforcement, compliance and education activities.

Thirdly, robust consumer research can also be a valuable input into the regulatory decisions of agencies such as the ACCC, allowing a greater recognition of consumer experiences in the area concerned to contrast with industry perspectives.

Accordingly, the ACCC believes that consideration should be given to how to increase the level of consumer research in Australia.

## 8.2 Education

The ACCC believes that as markets become more complex, a greater emphasis needs to be placed on coordination of consumer information and education to equip consumers to participate in markets. This is a joint responsibility of government, enforcement agencies, business and consumer groups.

One of the developing trends in consumer policy is the realisation that providing more information is not always the solution to empowering consumers to participate in markets. However, as consumers are confronted with increasing numbers of new, sophisticated products, and sophisticated bundles of services and products, it is increasingly important that consumers are aware of what kind of information to look for when engaging in transactions, and what it means for them.

Information and education for consumers can be provided at a number of levels and for a number of different purposes. Key areas are:

- information about rights and obligations under fair trading laws. This assists consumers to (a) avoid transactions and traders that raise concerns, and (b) make complaints if breaches of the law have occurred.
- information about how to complain and who to complain to.
- education about making particular types of purchases and what you need to understand prior to entering into a transaction.

Information is produced by a range of government and non-government bodies.

The ACCC tends to focus on the first two categories of materials through publications, media releases, speeches etc. It also took over aspects of the consumer information function from the Department of the Treasury, including responsibility for the SCAMwatch website.

At the same time, state and territory fair trading agencies also provide similar information.

The Financial Literacy Foundation raises community awareness of financial literacy issues, works with schools to have financial literacy included in the curriculum, and conducts research. Other organisations, such as the Telecommunications Industry Ombudsman, also provide information about buying products such as mobile phones.

Accordingly, information is available to consumers from various sources, but the challenge is to ensure that lack of coordination does not result in further information fatigue for consumers, and that information is available at the right time.

A possible way to enhance co-operation, and thus increase the dissemination of valuable information to consumers when they need, it could be to establish a joint working group between government, enforcement agencies, and consumer bodies to stocktake existing consumer education measures and develop a future strategy for consumer education.

## Appendix A—Objectives of consumer policy

The Australian Competition and Consumer Commission (ACCC) believes that one of the key objectives of consumer policy is to empower consumers to participate in markets to access goods and services that meet their needs. Consumer policy also plays a vital role in protecting vulnerable and disadvantaged consumers who have substantial difficulties in participating in markets. Against these, consumer policy must ensure that the regulatory responses to market failings deliver net benefits to society and that the regulatory mechanism does so with the least possible cost burden.

### A.1 Empowering consumers to participate in markets

The most effective way to promote the economic welfare of Australians is through a well functioning economy.<sup>121</sup> The most important characteristic of a well functioning economy is the existence of competitive markets, in which rivalry encourages businesses to develop and offer products that consumers value, and to do so at low cost. Competitive markets offer consumers who are not satisfied with the quality or price offered by one seller the opportunity to ‘vote with their feet’ by switching to another supplier. In competitive markets, resources are not intentionally wasted. Resources are generally attracted to activities that generate the most value to consumers, maximising economic welfare.

Competitive processes are generally favoured as the mechanism to best meet the needs of consumer policy not only because in aggregate it delivers the goods and services which consumers value at low cost, but because the involvement or participation of consumers in the competitive process itself is highly valued by society. Empowering consumers to participate in markets reflects broader values of individual liberties and freedoms.

Similarly, the legal maxim *caveat emptor* (‘let the buyer beware’) reflects the principle that mutually satisfactory outcomes between buyers and sellers should be pursued through marketplace negotiation. That is, it is considered that it is up to consumers to protect their own interests in negotiations with the traders. Nevertheless, the law of equity recognises that there are certain circumstances where the individual may not be able to negotiate effectively, or be subject to certain tactics that could lead to loss or damage. Where such circumstances exist, the consumer is provided with a mechanism for seeking redress from the trader for the loss or damage suffered.

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<sup>121</sup> For the purpose of this document, economic welfare is used synonymously with economic surplus. Economic surplus is the sum of consumer surplus—the difference between the price consumers are willing to pay for a good or service and the price paid (i.e. the value a consumer places on a good or service above and beyond the cost of purchasing it)—and producer surplus—the difference between the costs a firm incurs to produce a good or deliver a service and the revenue received (i.e. economic profit).



Equally, economic theories indicate that although the achievement of consumer policy goals is often best left to market forces, markets are not infallible. Conditions of perfect competition are not always met.<sup>122</sup> This can lead to supply-side market failures, such as monopoly, cartel behaviour and misuse of market power. For example, when firms have market power, less of the product is offered for sale than is optimal, reducing overall economic welfare. Profits of firms with market power increase at the expense of consumers.

Competition policy is a key instrument in promoting economic welfare. The aim of competition policy is to create and maintain market structures that are conducive to competition between firms and outlaw conduct that artificially limits or restricts such competition. Competition primarily addresses distortions in the supply-side of the market.

The importance of the actions and behaviour of consumers in affecting competition and market outcomes (demand-side economics) is becoming increasingly recognised. Consumers are not merely recipients of the fruits of competitive markets, but are participants in the process, driving competition and innovation by signalling to firms their preferences regarding price, quality, choice and service.

When consumers are unable to participate effectively in a market, the signals of preferences they send to providers become weak or inaccurate. As a result, resources can be misallocated to the detriment of economic welfare. Demand-side market failures can potentially result from:

- insufficient or inaccurate information about goods or services on offer
- spillovers affecting the welfare of consumers not directly involved in the transaction
- ‘biases’ in consumer behaviour.

Consumer policy can, in some cases, improve the functioning of markets by ensuring consumers receive relevant information and the opportunity to effectively process that information. Consumer protection policy can indirectly encourage more competitive conduct by firms by reducing the risk to consumers in actively participating in markets.

### **A.1.1 Information failures**

Access to information is a necessary part of well functioning markets. When deciding to purchase a product, consumers usually take into consideration the attributes of products, including quality and safety, and the likely price. In addition, they often seek information on the reputation of the manufacturer, the price offered by alternative providers and any warranties provided. This information assists consumers in allocating their financial resources to purchase products that provide them with the greatest enjoyment or utility.

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<sup>122</sup> Perfect competition assumes many suppliers and buyers, none of whom are capable of exerting market power; homogenous product or service; perfect information about price and quality; and no market entry or exit barriers.

In most cases consumers make decision with incomplete information. In some cases consumers do not have the time or cognitive capability to process relevant information. As a result, consumers are likely to make errors in their purchasing decisions.

Although errors from lack of information or the lack of capability to process information will occur, the errors in of themselves do not justify policy intervention. Information can be expensive to collect and disseminate. It is rare that consumers will make a purchase fully informed.

The potential for market failure exists where consumers are provided with, or systematically source, less information than is optimal (relative to the costs) or where there is asymmetric information. In such circumstances, consumer policy, such as information standards or laws prohibiting deceptive and misleading conduct, may play a role in reducing the market distortion.

### **A.1.2 Under-provision of information**

Under-provision of information occurs where the (marginal) cost of sourcing or providing (more) information concerning the product is lower than its expected (marginal) benefit to consumers. That is, the value all consumers place on the additional information, which enables them to make more informed and superior choices, exceeds the additional cost of sourcing and providing that information to consumers.

The following sections outline the major reasons why information may not be provided to, or sourced by, consumers even though the marginal benefit of that information exceeds the marginal cost.

#### ***Public good attributes of information***

Information about product attributes can often have the characteristics of a public good. Public goods are non-rival and non-excludable. Consider information concerning the health consequences of eating beef. This information is non-rival in the sense that one consumer's use of the information does not reduce the value of the same information to another consumer. It is also largely non-excludable in the sense that, once the health consequences of eating beef are known by one group of consumers, it is difficult to prevent the information being passed on to other consumers.

The value to consumers, as a group, of understanding the health consequences of eating beef may be significant. Some consumers may decide to consume more or less beef or none at all. Some vegetarians may decide to include beef in their diet. Other consumers may not care.

The costs of research on the health consequences of eating beef are likely to be much greater than the value of the information to any individual consumer, but may be significantly less than the value of the research, to consumers as a group. As the information is non-rival, it is most efficient for one provider to collect and disseminate the information. However, since it is unlikely that the provider will be able to exclude non-paying consumers (free-riders) from obtaining the information the research exercise may not be of commercial value. As a result, the information is either not provided or under-provided. Therefore, at the margin, the value of the information to consumers as a group is greater than the cost of providing it.

In many cases, there are market-driven solutions to such problems, such as the collection and provision of information by consumer groups. However, this and other market-driven solutions will not always be perfect.<sup>123</sup>

### ***Spillovers in the provision of information by individual firms***

Similar issues can arise if individual manufacturers or sellers collect and disseminate information about a product. Say a manufacturer of fire extinguishers decided to conduct and disseminate research on the value of property saved by the use of household fire extinguishers. This information is likely to better inform consumers on the risk of household fires and the value of fire extinguishers. However, the firm conducting the research will not be the only firm to gain if the research results in more consumers buying fire extinguishers. Other manufacturers will also benefit from this overall increase in sales. Being unable to capture the full benefits of the research, it is unlikely that any individual firm will conduct the research. Socially valuable product information may not be provided.

Again there are often market-driven solutions to information externalities, such as the establishment of industry groups to conduct research which benefits the industry as a whole. These solutions are subject to similar imperfections as the formation of consumer groups to disseminate relevant information.<sup>124</sup>

### ***What role can consumer policy play?***

In some cases market-based solutions do not occur or are inadequate. This may be the case for example where the industry group does not have a strong incentive to provide the information.<sup>125</sup>

In such cases there may be a role for consumer policy such as mandatory information standards. Information standards oblige manufacturers and/or sellers to provide certain information to consumers, such as warning labels. In cases where there is a clear value of disclosing information concerning a product, such as a credible risk of significant harm to the user of the product in the absence of the information, placing an obligation to supply the information on the market participant best placed to do so at the least cost (in this case the manufacturing firm, but potentially the retailers, the government or even consumers themselves) can address the under-provision of information.

### **A.1.3 Asymmetric information**

In some markets, sellers and buyers have asymmetric information. For example, sellers may have more information on the quality and attributes of their products than buyers. Furthermore, it is not always in the interests of the seller to reveal this information to the buyer, or if it is, the buyer may not believe the seller. An example is the used car

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<sup>123</sup> In some cases consumer groups are at least partly funded by subscriptions from consumers. Although this reduces the cost to consumers of accessing the information, there will be some consumers who, while valuing the information, nevertheless choose not access it because the value they place on the information is lower than the asking price.

<sup>124</sup> Industry groups are often funded, at least in part, by membership fees from corporations, resulting in the potential for non-member corporations in the industry to 'free-ride' on the research carried out by the industry group.

<sup>125</sup> This may occur if the information has the potential to discourage consumers from purchasing the product, e.g. information concerning the health impacts of asbestos or cigarettes.

market. The current owner of the car has information on the quality of the car. Potential buyers do not have this information and are unable to easily verify claims made by the sellers. If the car is a 'lemon', the seller is unlikely to reveal this to potential buyers. If the seller truthfully tells the potential buyer the car is in excellent condition, the buyer is unlikely to believe him.

If buyers cannot discern product quality and individual sellers are unable to convince buyers of the quality of their particular wares, products of differing quality are likely to sell at the same or similar price. If high-quality products cost more to manufacture than low quality products, it is more profitable to manufacture the latter. It is, therefore, possible that high quality goods will be 'crowded out' and only low quality products will be traded despite the fact that some consumers are willing to pay a premium for quality. In extreme circumstances, no market may exist at all.<sup>126</sup> This can result in a significant loss in economic welfare.

In many cases there are market-driven solutions to the problem of asymmetric information. For example, sellers of high-quality products often signal the quality of their products to buyers through providing guarantees and warranties or by building brand name reputation.<sup>127</sup>

#### ***What role can consumer policy play?***

In some cases market-based solutions do not occur or are inadequate. In such circumstances, consumer policy may reduce the market distortion. However, unlike the case above, mandating the provision of information will usually not address the problem of asymmetric information. Often the policy needs to alter the incentives facing sellers to encourage them to reveal accurate information. For example, consider the incentives for sellers to act honestly.

There may be potential buyers of good quality products and there may be potential sellers of such products in the appropriate price range; however, the presence of people who wish to pawn bad wares as good wares tends to drive out the legitimate business. The cost of dishonesty, therefore, lies not only in the amount by which the purchaser is cheated; the cost also must include the loss incurred from driving the legitimate business out of existence.<sup>128</sup>

Laws prohibiting misleading and deceptive conduct and the strong enforcement of those laws increase the costs of dishonest behaviour. This reduces the profitability of dishonesty and, consequently, its incidence and the scope for dishonest businesses to crowd out legitimate businesses.

#### **A.1.4 Search costs**

Consumers source information on products and sellers in a number of ways. A major source, particularly for frequent purchases, is trial and error. Other sources include

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<sup>126</sup> This is the classic 'market for lemons' example described in Akerlof, G, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', *Quarterly Journal of Economics*, 84:3, 1970, pp.488–500.

<sup>127</sup> For such signalling to be effective, however, the cost of acquiring the signal must be lower for a manufacturer of high quality products than low quality products

<sup>128</sup> G Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', *Quarterly Journal of Economics*, 84:3, 1970, pp. 495.

search, testimony of friends and family who have used the product, reference to advertising and the use of intermediaries.

The amount consumers spend on searching for information and comparing sellers' offers varies depending on, among other factors, the frequency of the purchase, the type of good or service and the significance of the expenditure. For products involving large outlays (such as cars) or if the consequences can be severe if the choice is inappropriate, consumers tend to spend more on gathering information and making comparisons. For products involving small outlays or if there are limited adverse consequences from making an inappropriate choice consumers tend to do less information gathering.

In some cases the attributes of the product are not known until the consumer has purchased the product and used it (see Box A1). In other cases the attributes of the product are not fully revealed for a considerable time after purchase, for example, financial advice. In such cases consumers tend to spend less on gathering information concerning the product and more on assessing the quality and trustworthiness of the seller or manufacturer.

Consumers face a fundamental trade-off between the search costs they are willing to incur and the benefits they expect to reap from the search effort. The more they search and compare, the more likely they are to buy the product best suited to their needs, but the greater the cost. At some point, the cost of investing in further search efforts will outweigh the additional benefit to be gained. As a result:

...consumers often must choose at what point they should remain rationally ignorant.<sup>129</sup>

As a result, consumers will not always purchase the product that best meets their needs and will not always get the best deal.

Often there are market-based solutions to high search costs. The growth in internet databases of real estate and cars for sale and rent have significantly reduced the search cost of consumers in those markets.

### ***What role can consumer policy play?***

There may be a role for consumer policy to reduce search costs where a market-driven solution cannot occur. Requirements that firms disclose standard key features of the product in a readily accessible form, for example in rental leases, make it easier for consumers to compare competing offers.

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<sup>129</sup> G Hadfield, R Howse, and M Tebilcock, *Rethinking Consumer Protection Policy*, 1997, paper prepared for the Office of Consumer Affairs (Canada).

### **Box A1: Characterisation of goods and services according to their ‘information nature’**

Goods and services can be characterised according to the manner in which consumers obtain and process information concerning their attributes and quality.

**Search goods**—The characteristics or attributes of search goods can largely be determined and assessed prior to purchase. Examples include clothing, home electronics and cameras. Depending on the value of the product and the consequences of an inappropriate purchase, consumers will gather information concerning the product and be able to largely determine its attributes prior to purchase.

**Experience goods**—The characteristics or attributes of experience goods can only be fully assessed after consumption.

Frequently purchased experience goods, such as shoes and clothing, take on the characteristics of search goods as consumers learn from the experience of repeat purchases that enable comparisons of performance/satisfaction. Infrequently purchased experience goods, such as cars and white goods, create greater risks for consumers. Sellers of infrequently purchased experience goods often signal to consumers the quality and attributes of their products through warranties or brand reputation.

**Credence goods**—The characteristics and attributes of credence goods such as cigarettes, legal and medical services, do not become apparent for a long time after purchase, if at all. For example, without expert medical knowledge it is difficult for consumers to judge the quality of a doctor’s diagnosis and treatment of an illness until well after the fact (if at all).

Source: Smith, R, ‘When competition is not enough: consumer protection’, *Australian Economic Papers*, 39:4, 2000.

### **A.1.5 Bounded rationality**

Even if relevant information is available, consumers must invest time and effort to gather and interpret the information in order to compare the attributes of products and the prices offered by competing sellers. As noted by Herbert Simon, who coined the term ‘bounded rationality’:

What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention, and a need to allocate that attention efficiently among the overabundance of information sources that might consume it.<sup>130</sup>

Given the cost of collecting and processing information and recognising the limits on their cognitive abilities, consumers rationally limit the information they seek and process and often develop heuristic methods of decision making such as appealing to intuition or using a rule of thumb. Specifically:

boundedly rational agents experience limits in formulating and solving complex problems and in processing (receiving, storing, retrieving, transmitting) information.<sup>131</sup>

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<sup>130</sup> H Simon, ‘Organizations and markets’, *Journal of Economic Perspectives*, vol. 5, no. 2, 1991, p. 28.

### ***What role can consumer policy play?***

Although it is recognised that the rationality of consumers is bounded and as a result consumers will not always purchase the product best suited to their needs and will not always get the best deal, this in of itself may not be a justification to intervene in markets. As noted above, consumer policy can play a role in requiring the provision of more information. However, consumers following heuristic methods of decision-making, for example, approximate rules of thumb, are unlikely to use that information.

Consumer policy may play a role where consumers' bounded rationality makes it difficult or impossible for sellers to commit to a particular course of action valuable to consumers. Consider a product that is purchased infrequently by consumers, such as a mobile phone service. Although consumers are aware of the contracts, very few read them in detail. Some mobile phone contracts include provisions for significant penalty payments by the consumer in the occurrence of future events that the consumer considers unlikely at the time the contract is agreed. For example, charges for early termination of the contract and for exceeding the chosen dollar value 'cap'. Some consumers may prefer a contract without these provisions and are willing to pay the seller a premium to remove them. Although the seller may be willing to accept a price premium (in exchange for removing the provisions), they may have difficulty in committing to do so. As the consumer will not read the contract, the consumer can never be sure that the provider is meeting their part of the bargain. Mutually beneficial trade will not occur due to the high cost of assessing the relevant information, that is ,reading and understanding the contract.

One way to address this issue is standard form contracts—where a disinterested external party vouches for the content of the contract. This gives the consumer, without incurring the cost of reading and understanding the contract, the confidence that the contract does not contain offending provisions. Mutually beneficial trades take place. For example, a mobile telecommunications industry code<sup>132</sup> prohibits exclusion clauses which limit the liability of a supplier contrary to law, and requires a supplier to provide written notice 21 days prior to a unilateral variation of a fixed period contract, such as a change in call charges, to provide consumers with the opportunity to change their usage patterns accordingly, if deemed necessary.

#### **A.1.6 Spillover effects**

In most cases, the costs and benefits of a trade or activity accrue solely to the buyer and seller—they are internal to the transaction. A trade mutually beneficial to both parties enhances economic welfare.

In some cases however, transactions affect the welfare of third parties, external to the transaction. In such cases, the market price of the good or service does not reflect the full cost or benefit to society of the product.

If there are well-defined property rights and low transaction costs, market mechanisms may arise to address externalities. Coase,<sup>133</sup> noted that, under these circumstances,

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<sup>131</sup> H Simon quoted in O Williamson, 1981, 'The Economics of Organization: The Transaction Cost Approach', *American Journal of Sociology*, 87(3): p. 553.

<sup>132</sup> 'Industry Code ACIF C620:2005 Consumer Contracts'

<sup>133</sup> See R Coase, 'The Problem of Social Cost', *The Journal of Law and Economics*, 1:44. 1960.

parties will negotiate and arrive at the same economically efficient solution no matter which party is liable for damages caused by the externality.<sup>134</sup> The effect of the trade or activity on third parties can be made internal to the transaction.<sup>135</sup>

Transaction costs are not always low, however. In some cases, a large number of external parties may be affected by the activity. It may be infeasible or extremely costly for each of these parties to negotiate with the party causing the spillover. In other cases the identity of affected parties may not be known at the time of the activity or transaction.

In such cases there may be a role for government intervention to reduce or eliminate the externality. If there is a case for government intervention, it is often ideal to allocate the responsibility to reduce the spillover on the party facing the least cost of doing so.

### ***What role can consumer policy play?***

Consumer policy can play a role in addressing spillover effects where market mechanisms are found to be ineffective.

Product bans may be beneficial where there are severe spillover effects. Sellers of firearms may not fully take into account the increased risk to unrelated third parties of the sale of firearms to persons likely to use them in criminal activity. Provisions banning the sale of certain firearms and provisions limiting the conditions under which they can be sold reduce the so-called involuntary third party risk, possibly closer to an optimal level.

Product safety standards can also play a role in reducing negative spillovers. Although the major aims of product safety measures are usually broader than addressing spillovers, such measures can nevertheless act to reduce the risk to third parties that would otherwise not be taken into consideration by the buyers and sellers of the good.

For example, child-proof caps on household bleach and medicines are designed to reduce the involuntarily assumed third party risk of the unintentional consumption of these products by children. The caps may be of no value and may be considered a nuisance in adult-only households, but they nevertheless reduce the risk to third parties if the medicine is lost, for instance, in a public place.

### **A.1.7 'Biases' in consumer behaviour**

There is potential for the traditional economic perspective to be supplemented by the contributions of other disciplines like behavioural economics.

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<sup>134</sup> Although negative externalities may be more common, positive externalities also occur where third parties benefit from the consumption of a good or service without paying for it. For example, third parties benefit from other people's purchases of flu vaccinations because they are less likely to contract flu as a result, even though they have taken no action themselves.

<sup>135</sup> Polinsky provides the example of a factory emitting smoke which damages the laundry hung outside by 5 local residents amounting to a cost of \$75 per person, \$375 in total. The damage can be eliminated either by installing a smoke filter, at a cost of \$150, or the residents buying an electric dryer, at \$50 each—\$250 in total. If residents have the right to clean air—i.e. the factory must compensate them in full for its pollution of the air—the factory will choose to install a filter. If the factory has the right to pollute—i.e. residents must put up with the pollution or take action to tackle it—residents will pay the factory to install a filter. The same economically efficient solution is arrived at regardless of who regulations expect to bear the burden of its implementation (A Polinsky, *An Introduction to Law and Economics*, Little, Brown and Company, 1989, pp. 11–14).



Traditional models used to analyse market conduct and market outcomes are generally based on the assumption that, absent imperfect information, consumers will act ‘rationally’ in pursuit of their own interests.

The economic concept of rationality comes from ‘rational choice theory’, which postulates that a rational individual chooses the best action according to their preferences and the set of actions available. Key assumptions are: completeness—all actions can be ranked in order of preference; transitivity—if action A is preferred to action B and action B is preferred to action C, then A is preferred to C; and individuals have the cognitive ability to weigh all the choices against each other.

An area of current debate relates to the application of behavioural economics to consumer policy. The study of behavioural economics indicates that often consumers don’t always calculate their best options in market transactions and can exhibit systematic ‘biases’ in their behaviour. As a result, the *ex post* decisions of consumers may diverge from their *ex ante* intentions leading to dissatisfaction for consumers. For instance, consumers may pay more for products than they would if they evaluated them on a rational basis.

As outlined in the recent OECD roundtable on demand side economics:

Over the last 30 years, more has been learned about actual consumer behaviour. Studies in the field of behavioural economics using laboratory experiments and studies in markets have shown that consumers exhibit systematic departures from what economics would classify as ‘rational’ behaviour.

Behavioural economics finds market failures resulting not only from information failure, but also from consistent biases in consumer behaviour. For example, even when presented with full information, consumers may not be in a position to understand and/or use that information to their advantage.<sup>136</sup>

There are a number of particular behavioural biases relevant for analysing consumer behaviour and consumer policy. Behavioural biases not only increase the scope for consumers to make mistakes in their decisions, but also provide the opportunity for businesses to develop strategies to exploit these known consumer weaknesses.<sup>137</sup> The major biases identified include:

- *Framing biases*<sup>138</sup>—while traditional economic models generally assume that consumer preferences are established independently, experiments show that consumers may tend to develop preferences within the context in which the decision making process occurs. That is, the way in which a choice is presented, sometimes called the ‘framing’ of information, can influence the consumers’ choice. For example, a claim of ‘92 per cent fat free’ can elicit a different choice by consumers than a claim of ‘8 per cent fat’. Similarly, a cash-back offer can, in some

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<sup>136</sup> OECD, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, April 2006.

<sup>137</sup> For example, one explanation of the lower than anticipated churn in retail electricity markets is the ‘manufacture of complexity’ by some retailers in order to reduce competition.

<sup>138</sup> A Tversky and D Kahneman, ‘The Framing of Decisions and the Psychology of Choice’, *Science* 211, 1981, pp. 453–58.

A Tversky and D Kahneman, ‘Rational Choice and the Framing of Decisions’, *Journal of Business*, 1986, vol. 59, no.4, part 2.

circumstances, be more attractive to consumers than a similar discount. This bias is particularly important in relation to how advertising claims are dealt with.

- *Default bias*—outcomes can differ depending on whether consumers must make a conscious effort to alter their choice. This is particularly the case where consumers must opt-in or opt-out. For example, countries that have an opt-out default have a vital organ donation rate average of 98 per cent compared to 15 per cent for countries with an opt-in default.
- *Choice/information overload*—faced with too many choices consumers may choose randomly, or decide not to purchase the goods or services at all.<sup>139</sup> The costs of accessing and understanding the information necessary to make an informed choice may discourage some consumers from buying the products at all, or changing the providers of a service. This is more likely to occur for consumers who are risk averse. Such decision conflict can also arise in relation to complex decisions, particularly in the case of new technologies and bundling of services. This is often termed as a ‘confusopoly’<sup>140</sup>, which can be deliberately created by firms to reduce competition as default bias has been found to lead consumers to stay with their existing supplier rather than switch to a competitor.
- *A concern for fairness*<sup>141</sup>—consumers are concerned that market transactions should be fair to other consumers and about the conditions of supply (such as labour conditions and use of environmental resources). This is a clear addition to traditional economic analysis of consumer behaviour which assumes consumers maximise their own utility (and those of close family etc.)
- *Unstable preferences*—consumers do not always enter the market with a defined set of preferences over goods and services on offer. Consumers can be persuaded to alter their preferences based on limited new information or false or incomplete impressions garnered from advertising.
- *Conditioned preferences*—some consumers make consumption decisions that they would prefer not to make. This arises particularly in cases of addiction (for example, cigarettes, alcohol, gambling) where many consumers would prefer to have other patterns of consumption, but feel powerless to shift.

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<sup>139</sup> S S Iyengar and M R Lepper, ‘When choice is demotivating: Can one desire too much of a good thing?’, *Journal of Personality and Social Psychology*, 79, 995–1006.

<sup>140</sup> S Adams, *The Dilbert Future*, New York: Harper, 1997, cited by J Gans, ‘Real Consumers and Telco Choice: The Road to Confusopoly’, 2005 paper presented to the Australian Telecommunications Summit, Sydney, November. 2005. Peter Diamond in ‘A model of price adjustment’, *Journal of Economic Theory*, 3 (1971), pp. 156–68, was the first to formally show how small exogenous search costs could lead to monopoly pricing in otherwise well functioning markets.

<sup>141</sup> D Kahneman, J Knetsch and R Thaler, ‘Fairness as a Constraint on Profit Seeking: Entitlements in the Market’, *American Economic Review*, September 1986, 76(4), pp. 728–41.

- *Endowment bias*<sup>142</sup>—research has indicated that consumers tend to value what they have more than what they might have. That is, the fact of ownership of a particular item leads to an endowment of value that the item would not otherwise have for the consumer if the consumer were to purchase that item.<sup>143</sup> This is often driven by aversion to risk associated with change. Such endowment bias can impact on the level of demand-side substitution that can be anticipated to occur within markets. This is particularly relevant for telecommunications and financial products and services where the risk associated with making a choice that ex post may ultimately lead to a worse outcome discourages change in the first instance.
- *Overconfidence*—consumers may over-estimate their ability to reduce or avoid risks. For example, many people invest confident that they can beat the stock market<sup>144</sup>, or underestimate the risk that illness or unemployment may cause difficulty in repaying a loan. This challenges the traditional view that consumers' preferences reflect their own best interest.
- *Difficulty in handling uncertainty and risk*—when gambles (such as insurance choices) are considered in isolation, consumers tend to be irrationally risk averse. Also when consumers consider themselves to be in a loss situation (such as becoming heavily overcommitted on a credit card) they tend to behave recklessly. Furthermore, consumers have difficulty in thinking rationally about possible outcomes with very low probability.
- *Misevaluation of future benefits and costs (hyperbolic discounting, myopia)*<sup>145</sup>—it has been found that consumers do not rationally weigh up present against future benefits and costs, putting too much weight on the immediate, and insufficient weight on the more distant future. This bias can manifest in outcomes such as low retirement savings in the absence of compulsion.
- *Loss aversion*<sup>146</sup>—consumers can display a stronger preference for avoiding losses of a certain amount than for obtaining gains of the same amount. That is, the possibility of a loss can weigh more heavily than the possibility of an equivalent gain. It has been found that the preference for avoiding loss can be almost twice as strong as the preference for gains, even in the case of a 50-50 bet. Phrases such as,

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<sup>142</sup> R.H.Thaler, 'Toward a Positive Theory of Consumer Choice', *Journal of Economic Behaviour and Organisation*, 1980, 1, pp.39–60.

R H Thaler, 'Mental Accounting and Consumer Choice', *Marketing Science*, 4, 1985, pp. 199–214.

<sup>143</sup> Endowment effects have been observed in a number of experiments. For a summary of such experiments, see Kahneman, Knetsch, Thaler, 'Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias', *Journal of Economic Perspectives*, vol. 5, no. 1 (Winter 1991) pp. 193–206.

<sup>144</sup> T Odean, 'Are Investors Reluctant to Realize Their Losses?', *Journal of Finance*, October 1998, 53(5), pp. 1775–98.

<sup>145</sup> D Kahneman, 'New Challenges to the Rationality Assumption', *Journal of Institutional and Theoretical Economics*, 1994, 150, pp. 18–36.

<sup>146</sup> A Tversky and D Kahneman, 'Loss Aversion in Riskless Choice: A Reference Dependent Model', *Quarterly Journal of Economics*, 1991, 106, pp. 1039–61.

‘This is a once in a lifetime opportunity, you will never have this chance again’, triggers loss aversion, even in very well educated people.

- *Confirmation bias*—once a consumer has taken a decision, they can, in some circumstances, subconsciously select information that reinforces that view, while placing a low weight on information that contradicts it. It is a prevalent bias for people who invest on the stock market. Having selected a share, people can often place disproportionate weight on information suggesting that the initial investment decision is a good one and too little weight in information suggesting they should sell the shares.

### **What role can consumer policy play?**

Organisations such as the OECD are working to develop a better understanding of behavioural biases and the implications of this phenomenon for consumer policy. The OECD work, undertaken by the Committee on Consumer Policy in collaboration with the Competition Committee, has brought together regulators and academics to discuss these issues in a series of roundtables.

These roundtables have brought together considerable information about how consumers behave in markets, and how behavioural economics is being used. The following provides some examples drawn from the OECD work.

- Some studies have shown that opt-out provisions are more effective in generating socially beneficial outcomes than opt-in schemes.
- Research in the UK in relation to electricity markets has indicated that consumers do not necessarily act in a way that maximises their own interests. For example, evidence from low income electricity consumers indicated that 32 per cent of those who switched suppliers, switched to an entrant charging more than their previous supplier, and 7 per cent achieved the maximum saving from switching.<sup>147</sup> This study suggested that switching mistakes by consumers are caused by ‘decision complexity’.
- Research in Portugal in 2005 showed that 90 per cent of consumers of mobile phone services had the ‘wrong’ tariff choice, and that each consumer could save more than 100 Euro a year, even without changing supplier.<sup>148</sup>

Although the field of behavioural economics is well established, theoretical and empirical research on the policy implications of biases in consumer behaviour is not fully developed. The potential benefits and costs of widespread intervention to address the negative effects of behavioural biases are not known. As the OECD noted:

... although there has been significant research in some areas (for example in certain financial markets), a more specific evidence base still needs to be identified before there is a more widespread policy approach.<sup>149</sup>

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<sup>147</sup> C Waddams, *Reality Bites—The Problem of Choice*, from OECD, 2006, p. 26.

<sup>148</sup> A Codinha, *Recommendations on Mobile Price Transparency*, from OECD, 2006, p. 29.

<sup>149</sup> OECD, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, April 2006,

Key uncertainties include:

- the extent to which particular biases affect economic welfare
- what kind of policy responses (if any) may be appropriate and the implications of those policies (taking into account consumers with different behavioural biases or none at all)
- whether decisions that appear irrational necessarily imply that consumers are acting under some kind of behavioural bias<sup>150</sup>, and
- whether intervention could stifle consumers from developing better methods of making choices.

Nevertheless, it is clear that there are situations where consumer biases may contribute to market distortions. For example, consider compulsory third party personal injury insurance for motor vehicles. One reason why voluntary third party insurance may result in ‘under insurance’ is that the owner of the motor vehicle does not, in general, fully ‘internalise’ the cost of injury to a third party.<sup>151</sup> Another reason why voluntary third party insurance may result in ‘under insurance’ is the *overconfidence* of some drivers who underestimate the probability of being in a motor vehicle accident and injuring third parties. In this case the behavioural bias combined with the spillover may provide a justification for intervention.

Where intervention can be justified, understanding ‘biases’ in consumer behaviour is valuable at the current time in determining the appropriate form of consumer policy and in identifying unintended consequences of intervention.

For example, the design of New Zealand’s recently instituted ‘KiwiSaver’ (a work-based saving scheme designed to redress New Zealand’s low household savings rate) is based on an understanding of behavioural biases. Under the KiwiSaver scheme, new employees are automatically enrolled in a saving scheme with an ‘opt-out’ option to overcome the *default bias* in consumer behaviour,<sup>152</sup> and to address consumers’ systematic misvaluation of future benefits and costs.

Understanding biases in consumer behaviour is also valuable in identifying unintended consequences of consumer policy.

For example, some research in relation to the use of disclosures of conflicts of interest suggests that such disclosures may not result in consumers treating information provided by conflicted advisors with sufficient caution. Disclosure may actually

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<sup>150</sup> For example, in the case of payday lenders, research shows that consumers do enter into extremely disadvantageous terms because they are desperate rather than because they do not understand. If such products are banned, this could have an even worse immediate impact on those consumers, and fails to address their real problems.

<sup>151</sup> The driving of the motor vehicle creates a (spillover) risk of injury to third parties. To the extent that owners of motor vehicles do not take this into account, they will be less likely take out insurance—even though the insurance is socially beneficial.

<sup>152</sup> Using an ‘opt-in’ option would have substantially reduced the take-up rate.

encourage consumers to place more reliance on such advice, because they perceive the advisor to be honest and open in their dealings. At the same time, providing such disclosure may encourage advisors to exaggerate to overcome the effects of disclosure, and they feel that, once they have made their disclosure, they owe no further duty to the consumer to behave in an impartial manner.<sup>153</sup>

## **A.2 Protection of vulnerable or disadvantaged consumers**

While empowering consumers to participate in markets generally enables them to obtain the products and services they want at a price they are willing to pay, not every consumer will be satisfied in every case.

In most consumer transactions there are risks. Consumers will not, on reflection, consider each and every transaction to be in his/her best interests. Consumer policy should not be about protecting consumers from feeling dissatisfied with the transaction.

However, the ACCC believes that consumer policy should take into account certain types of situations where particular segments of society are at significant risk of suffering harm or loss, even though, in aggregate, market failure has not occurred. In particular, consumer policy should address business activities and behaviour that is expressly aimed at taking advantage of consumers in circumstances of disadvantage or vulnerability.

Consumer disadvantage or vulnerability can vary depending on the:

- personal characteristics and attributes of the consumer
- characteristics of the product
- circumstances under which the transaction is made.

In some circumstances, consumers with particular personal characteristics may be more at risk from loss or harm when transacting in the market. Examples of personal characteristics that may expose a consumer to greater risks than others include age, income, language and literacy/educational attainment. These personal attributes may limit the ability of the person to collect and process information, such as working out what questions to ask, or may make the person more susceptible to unfair trading practices.

Consumers may be more susceptible to loss or harm when purchasing highly complex products or products that they purchase infrequently. For example, the complexity of financial advice and the inability of consumers to observe the quality of the advice until some time after the purchase may make consumers more vulnerable to loss and harm from unfair practices or lack of information. The risk of significant loss and harm may be substantial for even the most capable consumer.

In situations of emotional stress, such as purchasing funeral services after the death of a loved one or tow truck services after a motor accident, consumers may be more susceptible to unfair trading practices and may not have the opportunity or capability to

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<sup>153</sup> Cain, Loewenstein and Moore, 'The Dirt on Coming Clean: Perverse Effect of Disclosing Conflicts of Interest', *Journal of Legal Studies*, Vol 34(1), January 2005.

access and process information. In such circumstances, the risk of significant loss and harm may be substantial for even the most capable consumer.

### **A.3 Ensuring that regulatory responses to such issues deliver net benefits to society**

Having identified potential areas where markets are not working well for consumers, in general, or impose additional hardships on vulnerable or disadvantaged consumers, the third objective of the consumer policy framework is to ensure that any regulatory response to these issues delivers net benefits to society.

Identification of a consumer issue is not of itself sufficient to justify the introduction of regulation. Such intervention is not costless. Ultimately, consumers pay for the costs of protection, including the costs of compliance and transaction risk, in the prices they pay for goods and services.

Key issues to be considered include:

- ensuring that the likely benefits of the proposed regulatory response outweigh the likely detriment
- institutional framework and access to justice
- appropriate remedies.

#### **A.3.1 Ensuring that the likely benefits of the proposed regulatory response outweigh the likely detriment**

Just as there are a number of reasons why consumers may be at risk in the marketplace, there are a range of regulatory tools that can be applied to alleviate the particular concern. Examples of regulatory tools include licensing regimes, information disclosure requirements for particular products or industries, product safety standards, prohibitions against misleading or deceptive conduct, and co-regulatory or self-regulatory industry codes of conduct.

For any regulatory intervention to be justified, the likely benefits of that intervention must outweigh the likely detriment.

Any regulatory intervention is likely to impose some form of compliance cost onto traders. This will vary, depending on the nature of the regulatory tool in question.

The benefits of intervention will also vary, depending on the nature of the issue, the extent to which the market is likely to correct itself, and the level of harm to individual consumers and the market as a whole if no intervention occurs or the wrong type of intervention occurs. For example, imposing product safety standards can have significant benefits in terms of protecting consumers from physical injury. This may justify regulation that imposes greater costs on traders.

A regulation designed to address a particular form of market failure may actually fail to provide net benefits if it results in other forms of market distortion. For example, some regulations may stifle innovation or increase costs. A well known example of this arises in relation to professional services where bans on advertising imposed to ‘protect’

consumers can actually have the negative effect of dampening price competition between service providers to the ultimate detriment of consumers.

The benefits of intervention may be felt disproportionately between consumer groups. For example, alleviating concerns about information asymmetry may have a more beneficial effect on disadvantaged consumers who may have been more likely to be at risk. At the same time, some regulatory intervention may benefit some consumers, but have detrimental effects on others. For example, prohibiting contractual clauses with high default cost clauses and low upfront joining fees may benefit consumers who default, but not consumers who were aware of the risks and willing to take that risk in exchange for a low upfront price.

Consumer and business responses to regulation, including behavioural biases, should also be taken into account in identifying the benefits and detriment of a regulatory response. For example, in markets where there appears to be a systematic under-provision of information, policies requiring firms to provide additional information may not only be ineffective, but also counterproductive. Faced with an overload of information consumers may just choose randomly, or even choose not to choose and walk away from the market. Understanding ‘biases’ in consumer behaviour may encourage policymakers to ensure the most relevant information is provided to consumers in a readily accessible form, rather than simply providing even more information.

In addition, regulatory development costs, and the costs of administering a law must be taken into account.

### **A.3.2 Institutional framework and access to justice**

To ensure that any regulatory response delivers net benefits to society, the regulation must provide an institutional framework that will effectively promote compliance with the law.

This requires consideration of whether the law should be administered through private actions by consumers or enforcement agencies, or both.

In situations where individuals are unlikely to have the resources or sufficient incentives to enforce the law themselves, it will be appropriate to establish an enforcement agency to assist in this role. Equally, enforcement agencies may have at their disposal a range of mechanisms for achieving compliance at low cost that are not available to individuals. For example, the ability to conduct educational campaigns.

### **A.3.3 Appropriate remedies**

Another key element is to ensure that appropriate remedies are available for breaches of the law. Remedies should be flexible, deter non-complying conduct, provide redress for consumers, and punish wrongdoers when appropriate.



## **A.4 Regulatory impact analysis in consumer policy**

One of the key challenges faced by consumer policymakers is to identify and weigh up the benefits and detriment associated with intervening in areas where consumers may be at risk. That is, to perform a regulatory impact analysis to determine whether intervention is justified.

As the magnitude and complexity of issues and choices faced by consumers in the contemporary economy is increasing, there may be a growing perception that consumers are facing increasing risks, requiring an increasing level of regulatory intervention. In this environment, the need for a fair, consistent and robust framework for regulatory impact analysis is acute.

The dangers associated with over-protection can be as acute as the dangers of failing to regulate, or the introduction of ineffective regulation. Ultimately, consumers pay for the costs of protection in the prices they pay for goods and services.

### **A.4.1 Current approach to regulatory impact analysis**

The current approach taken to examining proposals for consumer regulation and review of existing regulation is to perform an impact analysis to identify costs and benefits of a proposed or existing regulation, and to ensure that the analysis canvasses an appropriate range of regulatory and non-regulatory options. Decisions are ultimately made on the basis of whether the estimated benefits of regulation outweigh the costs.

In November 2006, the Office of Best Practice Regulation (OBPR) set out a draft new regulatory framework to improve the analysis applied to regulatory proposals.<sup>154</sup> Key elements of the draft framework include:

- a commitment to consider at an early stage the case for acting in response to a perceived problem, including consideration of whether policy objectives can be achieved by alternative, non-regulatory measures which would impose lower costs on business and the economy
- the policy development process must ensure that the benefits to the community of any regulation actually outweigh the costs, and give some assurance that the option chosen will yield the greatest net benefits
- if a regulation would involve medium or significant business compliance costs, a full assessment of those costs should be carried out using a specific Business Cost Calculator
- if a regulation would have a significant impact on business and individuals, or restrict competition, it must be subject to detailed analysis and documented in a Regulatory Impact Statement. The RIS should include the BCC report on business compliance costs if the impacts include medium or significant business compliance costs
- the need for appropriate consultation

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<sup>154</sup> Office of Best Practice Regulation, 'Best Practice Regulation Handbook' (draft), November 2006.

- the role of the OBPR in providing assistance and comments to policymakers to ensure that the RIS contains adequate analysis.

An important element of the framework is the recognition that restrictions on competition can impose substantial costs through higher prices, reduced choice and impediments to innovation and efficiency. A RIS can only recommend a restriction on competition where the benefits to the community as a whole outweigh the costs and the Government's objectives can only be achieved by restricting competition. In this way, the RIS process adopts an approach which acknowledges the importance of competition in contributing to economic welfare and the objectives of consumer policy.

The RIS process requires a rigorous analysis of costs and benefits. At a minimum, the analysis should attempt to quantify all highly significant costs and benefits and all medium and significant business compliance costs.

#### **A.4.2 Issues associated with measuring costs and benefits of consumer regulation**

While potential areas of risk for consumers can be readily identified, quantifying both the level of detriment associated with such risks, and the benefits associated with the removal of such risk through regulatory intervention, is challenging.

This can be illustrated simply through the example of the analysis of the benefits of the introduction of mandatory disclosure of the nutritional contents on 'health bars'. The rationale for such a requirement is that disclosure will reduce information asymmetry between consumers and traders, thus improving the efficiency of the market and consumer welfare.

Analysing the impact of such a regulation under simplified assumptions that (a) the alternative is no regulation at all, and (b) the regulation is assumed to be 100 per cent successful in providing consumers with perfect information about health bars<sup>155</sup>, it is still apparent that calculating benefit is not an easy task. Two types of consumers may benefit from the introduction of mandatory information disclosure. First, consumers who previously avoided health bars because they had no idea whether they are good for them or not who will now decide with confidence, because of the introduction of better information about the product. Second, consumers who previously bought a particular brand which no longer appears healthy according to the mandatory nutritional information disclosure will benefit because they will now avoid the mistake of buying unhealthy bars at a premium price. Other consumers will not benefit at all from the regulation. They had no idea what was in the health bar and were perfectly indifferent to the health characteristics of their purchase and, hence, the introduction of more information makes no difference to their purchasing habits.

This illustrates that, in empirical terms, the benefits of the introduction of the regulation for each consumer ranges from zero to the cost of a bar, depending on what category the consumer falls into. In order to quantify the benefit, it is necessary to obtain empirical data in relation to the relative size of each category of consumer.

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<sup>155</sup> This assumption is adopted in order to illustrate that even on the most simplistic of assumptions, the empirical exercise is still complex. A more realistic approach to cost/benefit analysis would involve consideration of how different consumers might react to mandatory disclosure—some may not read the label, or may not understand the significance of the information.

A further issue that arises is that costs and benefits cannot always be measured in terms of the price a consumer would have paid for a product under conditions of perfect information. Disappointment about product performance has an emotional cost that cannot be easily measured, including loss of confidence in buying products in general. Moreover, there is a further cost associated with the conduct in that consumption of unhealthy bars may contribute to health issues resulting in a cost to consumers personally, and to the health system in general.

Also, while the above example illustrates a relatively simple situation where some consumers have made losses, but others are indifferent to the regulation, this is not always the case. Some regulation may result in market distortions that have a negative effect on particular groups of consumers. This adds a further layer of complexity to quantifying the costs and benefits of regulation.

The quantification of the benefits of a particular regulatory proposal can become even more complex if more sophisticated models of consumer behaviour, based on behavioural biases, are applied to the analysis.

Approaches to assessing regulatory impact in relation to consumer policy usually adopt the assumption of consumers behaving as fully rational agents. This impacts on the nature of regulatory impact analysis as it presupposes that consumers will act in a particular manner. However, as outlined above, growing awareness of academic studies in fields such as behavioural economics is challenging these views and points to the need for a more sophisticated approach to analysis of consumer behaviour in order to understand the benefits of proposed regulation.<sup>156</sup>

Traditional economic models, for example, are based on the assumption that people will act solely on the basis of individual gain. Behavioural theories, on the other hand, recognise that in many situations people do think about others or concepts of fairness in how they operate in marketplaces. Another example arises in relation to information disclosure. While information disclosure can be assumed to cure information asymmetry problems if the consumer is assumed to be a rational agent who reads and understands the information, in practice the results can be very different.<sup>157</sup>

Incorporating more realistic predictions of consumer behaviour into cost/benefit analysis provides for a more rigorous analysis. At the same time, performing cost/benefit analysis on regulations intended to address undesirable outcomes resulting from behavioural bias and bounded rationality, particularly when the proposed

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<sup>156</sup> For example, the New Zealand Ministry of Economic Development has issued a paper that considers the issue of how to take into account behavioural factors in policy analysis. It notes that people are generally motivated by fairness, status, social norms and personal identity, so policy should incorporate these factors rather than focusing solely on cost/benefit analysis of financial incentives to achieve desired behavioural changes. It notes that behavioural factors can be taken into account in assessing the impact of a particular regulation. See Ministry of Economic Development, *Behavioural analysis for policy, New lessons from economics, philosophy, psychology, cognitive science and sociology*, October 2006.

<sup>157</sup> See, for example, James Lacko and Janis Pappalardo, 'The effect of mortgage broker compensation on consumers and competition: a controlled experiment', US FTC Bureau of Economics staff report 2004, online at [www.ftc.gov](http://www.ftc.gov). The report demonstrated that disclosure of broker compensation did not necessarily lead consumers to make the optimum choice of mortgages.

regulation takes the form of laws to protect consumers from making poor choices, involves sophisticated analysis and should be approached with caution.

As the OECD pointed out:

While protecting consumers from the consequences of costly biases, care should be taken not to impose costs on other consumers. In particular, in financial and similar markets, interventions to protect undisciplined or naïve consumers should not impose significant costs on disciplined or well-informed consumers.<sup>158</sup>

Finally, while consumer benefits and detriments are particularly difficult to quantify, business costs associated with the introduction of regulation are often more easily calculated. Accordingly, there is a danger that because consumer benefits are difficult to quantify, they may be given less weight than more readily quantifiable business costs.

#### **A.4.3 Academic and international research**

The issues associated with applying a cost/benefit analysis approach to the development of consumer regulation have also been identified as an area of consumer policy requiring further consideration by academics and other jurisdictions.

The UK National Consumer Council stated that:

Policy-makers and regulators attempt to mitigate regulatory risks through cost/ benefit analysis and self regulation. However, the current cost/benefit analysis is controversial. It is based on numerical and easily quantifiable variables and, arguably, underestimates other variables. Similarly, it does not take account of consumers' preferences. This may lead to inaccurate assessment of the consumer detriment and faulty regulatory decisions.<sup>159</sup>

Economists have also highlighted the difficulties associated with cost/benefit analysis, particularly the issues associated with balancing benefits to one group of consumers against detriment to other consumers. Camerer et al., 2003, point out that:

Recent research in behavioural economics has identified a variety of decision-making errors that may expand the scope of paternalistic regulation. To the extent that the errors identified by behavioural research lead people not to behave in their own interests, paternalism may prove useful. But, to the extent that paternalism prevents people from behaving in their own best interests, paternalism may prove costly.<sup>160</sup>

That is, Camerer et al. note that behavioural biases are not necessarily universal, so caution should be taken to ensure that paternalistic policies to protect consumers from unwise choices do not place undue burdens on persons who are behaving rationally. They argue that the approach to cost/benefit analysis should focus on whether a law would help those who are not exercising choice wisely while imposing very little harm on other segments of society.

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<sup>158</sup> OECD, *Roundtable on Economics for Consumer Policy: Summary Report*, February 2007, p. 4.

<sup>159</sup> National Consumer Council, *Imperfect Markets*, November 2006, p. 31.

<sup>160</sup> Camerer, Issacharoff, Loewenstein, O'Donoghue, Rabin, 'Regulation for conservatives: behavioural economics and the case for asymmetric paternalism', *University of Pennsylvania Law Review*, vol. 151: 1211 2003, at 1212.

Similarly, Smith and King have noted:

Using a cost/benefit approach involves two important limitations. First, cost/benefit analysis often faces problems of measurement and a high potential for error. If the costs and benefits, either of existing market behaviour or of a proposed policy intervention, cannot be measured accurately then it is difficult to determine whether a policy is socially desirable.

Second, and more importantly, behavioural economics is based on empirical observation. These observations may be consistent with a variety of behavioural explanations. However, this 'theoretical uncertainty' creates difficulties for policy formulation .

If standard cost/benefit analysis cannot be used as an appropriate tool for policy evaluation when dealing with a particular consumer risk, an alternative is to adopt a (more conservative) 'do-no-harm' approach to regulation. Under such an approach a policy intervention would be acceptable if it aids those at risk while doing no harm to others.<sup>161</sup>

#### **A.4.4 Approach to regulatory impact assessment in consumer matters**

The ACCC believes that the current approach to analysing the need for consumer regulation provides a robust framework for policy makers to undertake the task. It is critical that any approach to developing regulatory (including self-regulatory or co-regulatory) responses to consumer issues involves a rigorous 'with/without' analysis that takes into account, and appropriately weights, all relevant benefits and detriment.

However, as outlined above, there are a number of complex issues associated with applying a cost/benefit analysis to consumer policy. In particular some of the costs and benefits are not easily capable of empirical quantification.

The ACCC faces similar issues in dealing with these matters in the context of performing its role in granting immunity from legal action for anti-competitive conduct in certain circumstances.<sup>162</sup>

For example, where an application for authorisation is submitted to the ACCC it will need to weigh potential public benefits, including consumer benefits, against public detriments, including anti-competitive detriment<sup>163</sup> in order to determine whether to authorise that conduct.

The Australian Competition Tribunal has noted that when identifying public benefits and detriment, the ACCC can consider a very wide range of factors. It is not required to consider only economic issues.

In assessing authorisation applications, the ACCC recognises that a strictly quantitative approach to measuring public benefits and detriment is neither practical nor reliable in every case. This approach is supported by the Tribunal which has stated that:

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<sup>161</sup> R Smith and S King, 'Insights into consumer risk: Building blocks for consumer protection policy' in OECD, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, p. 62.

<sup>162</sup> The ACCC may grant immunity against action under the competition provisions of the Trade Practices Act except for misuse of market power. Generally, such authorisations may be granted in response to an application if the ACCC is satisfied that the public benefit associated with the conduct in question is likely to outweigh any likely public detriment.

<sup>163</sup> Technically, the test to be applied differs slightly depending on the type of conduct in question. In practice, there is little difference between the tests.

The benefit ... need not, it is plain, be necessarily capable of quantitative assessment, but it should be sufficiently definable—have sufficient substance—as to permit some factual judgment of its relative importance.<sup>164</sup>

Further, the Tribunal has warned:

... we do not believe there is anything to be gained by fanciful and speculative modelling of benefits where the underlying assumptions are not clearly spelled out, where the estimates have not been subject to rigorous sensitivity analysis, and where the estimating process is not wholly transparent ...

All things being equal, detailed quantification is the best option. However, quantification at all costs is not required by the Act, and has never been sought by the Tribunal. There are diminishing returns to the quantification exercise. Benefits should be quantified only to the extent that the exercise enlightens the Tribunal more than the alternative of qualitative explanation.<sup>165</sup>

While the ACCC encourages quantification by applicants where possible, it recognises that quantification will only provide guidance on the relative weight to be attributed to factors that are capable of quantification. In the ACCC's experience, it is often difficult for parties to quantify the public benefits arising from addressing market failures. Generally, the weight given to public benefit claims of this nature will usually need to be qualitatively assessed.

The ACCC is often required to take into consideration whether benefits that flow to a particular segment of the community, rather than the community as a whole, should be counted as public benefits. The weight given to such benefits will depend on the nature, characterisation, and identity of beneficiaries.

As the process is one of determining net benefit or detriment, the level of assessment of public benefit will depend on whether the proposal is likely to generate a substantial public detriment or not. That is, if the likely public detriment is high, then public benefits must be assessed far more rigorously. Conversely, if the likely public detriment is low, public benefits do not need to be scrutinised as rigorously.

To assess the level or amount of potential public benefit and public detriment a benchmark position must be established. The approach taken by the ACCC in assessing authorisation applications is to compare the position that would, or would be likely to, exist in the future if the authorisation were granted, with the position that would, or would be likely to, exist in the future if the authorisation were not granted. The 'with/without' position is assessed on a case by case basis. This approach may mean that the benchmark applied is the status quo, but this will not necessarily be so in all cases.

The process then becomes one of determining if conduct would generate a net public benefit or a net public detriment.

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<sup>164</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17.243

<sup>165</sup> *Qantas Airways Limited* (2004) ACompT 9.

Similar principles that could assist in undertaking a regulatory impact assessment more broadly include:

- analysis should be supported by a high degree of consultation with consumers and consumer groups
- recognition that non-quantifiable benefits that are relevant to the matter should be taken into account
- costs and benefits identified should be taken into account where they are likely to occur. That is, there must be a real chance, not a mere possibility, of the benefit or cost eventuating for it to be taken into account
- recognition that where benefits or costs are of a non-quantifiable nature, they should not be discounted against quantifiable benefits or costs, but given appropriate weight measured in terms of the level of broad community support
- recognition that a greater level of emphasis should be placed on quantifying costs and benefits where a proposal may have detrimental effects on some consumers. Conversely, when a proposed regulation is likely to benefit a segment of consumers and does no harm to other consumers, less emphasis on quantification may be acceptable
- in assessing costs and benefits, it should not be assumed that all consumers act as rational, profit-maximising agents. However, reliance on alternative models of consumer behaviour must be supported by current and relevant empirical evidence
- costs and benefits should be assessed using the future with/without test. That is, the position that would, or would be likely to, exist in the future if the proposal is accepted, against the position that would, or would be likely to, exist in the future if the proposal is not accepted. Such an analysis should take into account all factors, including the likelihood that market mechanisms will respond to the issue absent a regulatory response, and the existence of other laws. For example, if laws already exist at the state level, there may be smaller costs and benefits associated with introduction at the federal level, but there may also be additional costs if a new federal law is introduced that is inconsistent with existing state laws.

The ACCC recognises that even if such principles are adopted, the issues facing policymakers in undertaking cost/benefit analysis remain significant. In particular, to apply sophisticated models of consumer behaviour involving behavioural economics will often require considerable research and empirical data.

# Appendix B—Fair trading and consumer protection provisions of the Trade Practices Act

## B.1 Unfair Practices

### Misleading or deceptive conduct—s. 52

Section 52 of the *Trade Practices Act 1974* prohibits conduct by business which is misleading or deceptive, or which is likely to mislead or deceive.

Section 52 is the cornerstone of the Australian consumer policy regulation. Essentially, it means that in any commercial activity, a corporation must not engage in conduct that induces or is capable of inducing error. Thus, its primary role is to ensure that consumers are not ‘tricked’ by misinformation into purchases that they would not otherwise have made.

The fact that conduct is likely to produce confusion is in itself insufficient to constitute a contravention of section 52.<sup>166</sup> Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case.

For the purposes of showing a breach of s. 52 the court will also consider how a reasonable person might view a particular representation. Courts recognise that the ‘reasonable’ response can differ between people. Generally, courts apply the reasonable person test in the context of the class of person likely to have been affected by the conduct.

### Misleading representations about the future supply and use of goods and services—s. 51A

Section 51A deems as misleading the making of representations about the happening of any future matter without reasonable grounds for making the representation. A business is deemed not to have had reasonable grounds for making a representation as to a future matter unless it can produce evidence to the contrary.

### False or misleading representations about goods or services—s. 53

Section 53 specifically prohibits a corporation, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services making false, or in some cases misleading, claims about:

- the standard, quality, value, grade, composition, style, model or history of goods or services
- the standard, quality, value or grade of services
- whether goods are new
- the agreement of a particular person to acquire the goods or services
- the sponsorship, approval, performance characteristics, accessories, uses or benefits of goods or services

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<sup>166</sup> *Taco Co. of Australia Inc v Taco Bell Pty Ltd* (1982) 2 TPR 48.



- the sponsorship, approval or affiliation of a corporation
- the price of goods or services, for example that it is less than a competitor's price
- the availability of repair facilities or spare parts
- the place of origin of goods<sup>167</sup>
- a buyer's need for goods or services, or
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 53, therefore, supports s. 52 by listing specific types of misleading conduct that breach the Trade Practices Act. In this way, the Trade Practices Act provides business and consumers with a broad norm of conduct pursuant to s. 52 about how to behave in commercial dealings, as well as specific prohibitions in relation to false or misleading claims which are fundamental to consumers' decision-making processes such as price and quality of goods or services pursuant to s. 53.

### **Prohibitions on other specific types of false or misleading claims or conduct**

In addition to the specific prohibitions set out in s. 53, the Trade Practices Act expressly prohibits the other following types of false or misleading claims or conduct:

- *False representations in relation to land*—s. 53A prohibits a business from making false or misleading representations or using misleading or offensive conduct in relation to the sale of land, e.g. about sponsorship or price.
- *Misleading conduct in relation to employment*—s. 53B prohibits a business from engaging in conduct likely to mislead people seeking employment about the availability, nature, terms or conditions, or any other matter relating to the employment.
- *Misleading the public as to the nature or characteristics of goods or services*—s. 55 prohibits a person from engaging in conduct which is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods. S. 55A prohibits such conduct in relation to any services.
- *Making false or misleading statements about work-at-home schemes*—s. 59 prohibits false or misleading representations about the profits and practicability of home-operated businesses, for example an activity that requires performance of work at or from home or a scheme that requires investment of money and associated work by the investor.
- *Not specifying the full cash price*—s. 53C requires corporations to specify the full cash price when it advertises part of the price of goods or services, for example the deposit or the terms of repayment.

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<sup>167</sup> Division 1AA sets out in some detail tests which must be met to ensure that claims about the country of origin of goods do not breach ss. 52, 53(eb) or 75AZC(1)(i) of the Act. The tests are for three types of country of origin representation—general country of origin claims, 'Produce of'/Product of' claims, and the use of a prescribed logo.

Court decisions arising from two ACCC enforcement actions<sup>168</sup> indicated that a single, all-inclusive cash price was not necessary to comply with s. 53C, as long as the components of the price are clearly stated and do not require complex calculations. On 21 April 2005, the Treasurer announced that the Trade Practices Act would be amended to require the prominent display of a single figure price at which the good or service can be obtained. It is anticipated that amendments will be introduced in 2007.

- *Falsely offering prizes*—s. 54 prohibits corporations from offering gifts, prizes or other free items in connection with the supply of goods or services if it does not intend to provide them as offered.
- *Bait advertising*—s. 56 states that goods or services must not be advertised at a specified (not necessarily a 'special') price if the seller is or should reasonably have been aware that it would not be able to supply reasonable quantities at that price for a reasonable period. What is 'reasonable' will depend on the particular circumstances, including the market in which the goods are sold and the nature of the advertisement.
- *Accepting payment without intending to supply*—s. 58 prohibits a corporation from accepting payment for goods or services where it does not intend to supply them or intends to supply goods or services materially different from those paid for. It may also be a breach if there are reasonable grounds, of which the corporation was (or should be) aware when accepting payment, that it would not be able to supply.
- *Unsolicited goods or services*—Part V of the Trade Practices Act specifically prohibits a corporation from demanding payment for unsolicited goods or services unless it has a reasonable basis for believing it has a right to payment. Section 64 prohibits a corporation from demanding payment for unsolicited advertising and unsolicited directory entries.<sup>169</sup> Section 63A makes it unlawful to send unsolicited debit or credit cards, or cards that can be used for both purposes to any person. Section 65 provides that a person receiving unsolicited goods will not be liable for any loss or damage that occurs to the goods, other than wilful or unlawful damage he or she causes. Specific rules apply to the return of goods.

Essentially, these provisions are directed at protecting consumers from being 'tricked' into paying for goods or services they did not want or request. The practice, commonly known as 'blowing', operates by inducing the consumer to pay for the product, either assuming that they did buy it and forgot, or that they are somehow obliged to pay for the product because it has already been sent. Often these practices combine elements of both deceptive conduct and harassment or coercion.

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<sup>168</sup> *Australian Competition and Consumer Commission v Dell Computer Pty Ltd* (2003) ATPR 41-910; and *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* (2003) ATPR 41-908.

<sup>169</sup> A person receiving unsolicited goods will not be liable for any loss or damage that occurs to the goods other than wilful or unlawful damage he or she causes. Specific rules apply to the return of goods (s. 65).

## **Referral selling and pyramid selling (s. 57, s. 65AAC)**

Section 57 prohibits the sales technique of inducing consumers to buy goods or services by offering them a rebate, commission or some other benefit in return for suggesting potential customers or assisting in any way in selling the goods to other consumers if the inducement is contingent on an event occurring after the sale is made.

Section 67AAC prohibits the promotion of, or participation in, pyramid selling schemes in which a person makes a payment to a corporation with the prospect of receiving payments for the introduction of other participants to the scheme.

Such techniques are prohibited due to the significant uncertainty regarding whether the consumer will receive the promised rebate, commission or other benefit. Quite often participants may pressure family members, friends and other colleagues to join. By their very nature, pyramid selling schemes are inherently unstable and must eventually collapse as they exhaust the number of willing participants, causing detriment to an overwhelming majority of participants.

## **Harassment or coercion (s. 60)**

Section 60 prohibits the use of physical force, undue harassment or coercion by a corporation (or its servants or agents) in relation to the supply of goods or services to a consumer, or payment by a consumer for goods or services. These provisions are not limited to conduct directed at the consumer themselves. They also apply to conduct towards a third party (for instance, a family member of a consumer).

The terms ‘physical force’, ‘harassment’, and ‘coercion’ are not defined in the law. They should be understood in the way they are ordinarily used and defined. Unlike coercion or physical force, harassment must be ‘undue’ to breach the law. For example, inappropriate debt collection behaviour is at risk of breaching this provision. Where the frequency, nature and content of communications from a collector are calculated to intimidate, tire out, demoralise or exhaust a consumer rather than simply convey a demand for payment, the ‘harassment’ could be considered ‘undue’ and therefore a breach of the Trade Practices Act.

This provision only applies in relation to a consumer, who is defined as a person that acquires goods or services where the price of the good or service does not exceed \$40 000, or—if the price is over \$40 000—the goods or services are of a kind ordinarily acquired for personal domestic or household use (or a commercial road vehicle). However, a person is not a ‘consumer’ if they acquire goods (at any price) for the purpose of re-supply or for use in trade or commerce as production or manufacturing inputs or to repair other goods or fixtures.

## **Penalties and remedies**

The Trade Practices Act provides a range of penalties and remedies for breaches of the unfair practices provisions of Part V. Remedies can be pursued through court proceedings as either criminal or civil actions.

The objectives of the penalties and remedies available are to provide for compensation for persons who have suffered loss as a result of contravening conduct, prevent the continuation of the contravening conduct, deter the wrongdoer from re-offending in the future (specific deterrence), and deter others from engaging in such conduct (general deterrence).

### **Criminal sanctions**

Criminal sanctions apply in relation to breaches of the unfair practices outlined above through the operation of Part VC of the Trade Practices Act which contains criminal offences replicating the substantive prohibitions contained in Part V, Division 1.<sup>170</sup> Monetary penalties of up to \$220 000 for individuals and \$1.1 million for companies apply. While breaches of these provisions attract criminal penalties, a person cannot be imprisoned for contravening Part V, Division 1 provisions. In addition, adverse publicity orders, probation orders, community service orders and corrective advertising orders can be sought in relation to contraventions of Part VC.

### **Civil proceedings**

Contraventions of the unfair practices provisions of Part V, Division 1 are also subject to civil sanctions and remedies.

Remedies available for breaches of these provisions under civil proceedings include injunctions to prevent the prohibited conduct continuing or being repeated or to require some action be taken, damages, probation orders, community service orders and corrective advertising orders, and ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct. Such ancillary orders may include, where appropriate, orders for specific performance, rescission or variation of contracts, refunds or provision of spare parts or repairs.

### **Who may bring proceedings?**

Only the federal Director of Public Prosecutions may prosecute an offence of Part VC. That is, only the Director or Public Prosecutions can bring action to impose a monetary penalty in relation to a contravention of the unfair practices provisions.

The ACCC, the minister or any other person can ask the court for an injunction. A person who takes such action can also apply for ancillary orders where the person has suffered, or is likely to suffer loss or damage as a result of the conduct.

Where the ACCC takes proceedings in relation to a contravention, it can seek orders on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage for compensation or to prevent or reduce the loss or damage suffered. However, under the TPA, the ACCC can only make such an application in relation to persons who have consented in writing, prior to the application being made, to the making of the application.<sup>171</sup> (Representative proceedings under the *Federal Court of Australia Act 1976* (Cwlth) are discussed later).

Private persons may bring their own civil actions for damages. Further, if in a proceeding it is proved that a person has engaged in a contravention of Part V, Division 1, a finding of fact made by a court may be used as prima facie evidence in subsequent related proceedings by a person for compensation. For example, if the ACCC takes action seeking orders for declarations that a contravention has occurred, and/or injunctions to stop the contravening conduct continuing, a private person may be able

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<sup>170</sup> With the exception of s. 52. Part VC does not contain a mirror provision of s. 52, which is therefore not subject to criminal penalties.

<sup>171</sup> *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; *Medibank Private Ltd v Cassidy* [2002] FCAFC 290.

to use the findings of fact from those proceedings in his or her separate action for compensation. This may provide assistance to consumers seeking individual redress by reducing the burden of private actions.

Compensation for death or personal injury is not available for conduct contravening Division 1 of Part V except in certain circumstances where the death or personal injury results from tobacco use.

### ***Non-litigated resolutions***

The ACCC may accept a written undertaking given by a person in connection with a matter in relation to which the ACCC has a power or function under the Trade Practices Act pursuant to s. 87B. A s. 87B undertaking can be accepted to provide a resolution to an alleged breach of the provisions of Part V, Division 1. If the undertaking is breached, the ACCC can take action for:

- an order directing compliance
- an order to pay the Australian Government up to the amount of any financial benefit that can be reasonably attributed, directly or indirectly to the breach
- any order the court considers appropriate to compensate a third party for loss or damage resulting from the breach, and/or
- any other order the court considers appropriate.

Section 87B undertakings are commonly used to provide a fast, effective solution to fair trading issues. The use of undertakings enables a flexible approach to remedies which may include refunds and other corrective actions, and a commitment from the offender to establish and maintain a trade practices compliance program to avoid future breaches.

## **B.2 Product safety and product information**

### **Liability of manufacturers and importers for defective goods**

A person who is injured, or whose property is damaged, by a defective product will have a right to compensation against the manufacturer or importer of the product. Goods are defective if their safety is not what persons are entitled to expect in all the relevant circumstances.

### **Compulsory consumer product safety and information standards**

The Trade Practices Act provides that compulsory consumer product safety and information standards may be made by regulation or declared by the Minister by notice.

Corporations are prohibited from supplying goods:

- that do not conform with a prescribed consumer product safety or information standard
- for which there is in force a notice declaring the goods to be unsafe, or
- that are subject to a notice imposing a permanent ban.

There are two types of compulsory consumer product standards—safety standards and information standards.

Safety standards require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish or

packaging rules. There are currently compulsory consumer product safety standards for:

- Babies' dummies
- Baby bath aids
- Baby walkers
- Balloon-blowing kits
- Basketball rings and backboards
- Bean bags
- Bicycle helmets
- Bunk beds
- Child restraints for motor vehicles
- Children's household cots
- Children's nightwear
- Disposable cigarette lighters
- Elastic luggage straps
- Exercise cycles
- Fire extinguishers (portable, non-aerosol)
- Fire extinguishers (portable, aerosol)
- Flotation toys and swimming aids for children
- Jacks—vehicle
- Jacks—trolley
- Motorcycle helmets
- Paper patterns for children's nightwear
- Pedal bicycles
- Portable ramps for motor vehicles
- Support stands for motor vehicles
- Sunglasses and fashion spectacles
- Toys for children under three years

Information standards require prescribed information to be given to consumers when they purchase specified goods. There are currently compulsory consumer product information standards for:

- care labelling—clothing and textile products
- cosmetics and toiletries—ingredient labelling
- tobacco products—labelling

### **Unsafe goods and bans**

The minister can declare goods that may cause injury to any person unsafe by notice in the *Commonwealth Gazette*. The supply of goods that have been declared unsafe is banned for 18 months following the declaration, unless the declaration is revoked before the end of the period or made permanent.

## **Compulsory product recalls**

The minister also has the power to order suppliers to recall consumer goods that have safety-related defects. The power applies to consumer goods which:

- do not comply with a compulsory product safety standard
- are banned goods, or
- are goods which may cause injury to any person, and
- where the supplier has not taken satisfactory action to prevent them causing injury, for example by recalling the goods voluntarily.

## **Penalties and remedies**

Penalties and remedies for breaches of product safety standards or banning orders are similar to the remedies outlined above in relation to unfair practices.

Depending on the amount of damages involved, individuals can seek remedies through a lower court—e.g. state, territory, or small claims tribunal—as a result of the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*.

## **B.3 Unconscionable conduct**

The Trade Practices Act prohibits unconscionable conduct in both commercial dealings and in consumer transactions.

Section 51AA prohibits unconscionable conduct within the meaning of the unwritten laws—it incorporates the unwritten or common law on unconscionable conduct into the Trade Practices Act. Unconscionable conduct at equity is not a static concept. It has developed over the years as a concept in common law and continues to be refined as it is interpreted by the courts.

The incorporation of the common law concept of unconscionable conduct in to the TPA is important because it:

- opens unconscionable conduct in commercial transactions to the scrutiny of the ACCC
- enables the ACCC to take representative action in such circumstances
- gives rise to a more flexible range of remedies under the Trade Practices Act
- allows the ACCC to accept legally enforceable undertakings pursuant to s. 87B of the Trade Practices Act.

In addition to incorporating the equitable notion of unconscionability under s. 51AA, the Trade Practices Act also adopts a set of broader statutory criteria to which the courts may have regard when determining whether a business has acted unconscionably.

Section 51AB prohibits unconscionable conduct by corporations when they supply goods or services that are ordinarily acquired by consumers for their personal, domestic or household use but not for resupply or use in trade or commerce.

In such a transaction the stronger party may not take advantage of its position by behaving in an unfair or unreasonable manner. Although the Trade Practices Act does not define ‘unconscionable conduct’, s. 51AB includes a non-exhaustive list of factors which may be taken into account by the court. These are:

- relative bargaining strengths of the parties
- whether the consumer understood any documentation used
- the use of undue influence or pressure, or unfair tactics
- the imposition of conditions not reasonably necessary to protect the supplier’s legitimate interests
- how much the consumer would have had to pay, and under what circumstances, to buy equivalent goods or services from another supplier.

Section 51AC includes similar provisions to business-to-business transactions, to protect small business in their dealings with larger businesses.

Individuals and the ACCC can bring civil actions in the Federal Court for unconscionable conduct seeking injunctions, damages, or other orders such as monetary compensation, rescission or variation of a contract, refund, or specific performance of a contract. The ACCC can also seek probation orders, community service orders and corrective advertising orders.

Actions under Part IVA can also be brought in state or territory courts of competent jurisdiction, and the extent of remedies available depends on the particular court’s jurisdiction.

## **B.4 Industry codes**

Section 51AD prohibits contraventions by corporations of applicable industry codes of practice.

This provides a mechanism by which breaches of industry codes of practice that regulate the conduct of participants in a specific industry towards other participants or consumers in the industry can be treated as a contravention of the Trade Practices Act. That is, it provides a means of elevating the status of a self-regulatory code to a co-regulatory approach so that the sanctions available for breaches of the code are more serious, and can be enforced by the ACCC.

Part IVB only applies to industry codes that are prescribed by regulation. The decision to prescribe an industry code is made by government. A code is eligible to be prescribed whether it is a mandatory code (i.e. one that is mandatory for the industry in question), or voluntary (i.e. one that is binding on a person who has agreed to be bound by the code).

Franchising is specifically defined as an industry for the purposes of Part IVB. The Franchising Code of Conduct is prescribed as a mandatory industry code by regulation. Two other mandatory codes have been recently introduced: the Oilcode (commenced 1 March 2007) and the Horticulture Code of Conduct (commencing 14 May 2007).

To date, no industry code relating to the conduct of traders towards individual (rather than business) consumers has been prescribed.



Both individuals and the ACCC can bring civil actions in the Federal Court for a contravention of an applicable industry code seeking injunctions, damages, or other orders such as monetary compensation, rescission or variation of a contract, refunds, or specific performance of a contract.

The ACCC can seek, in addition to the remedies above, probation orders, community service orders, corrective advertising orders and orders for disclosure of certain information.

## **B.5 Conditions and warranties in consumer transactions**

Division 2 of Part V of the Trade Practices Act includes a number of post-contractual protections for consumers. These protections take the form of implied conditions and warranties in contracts which cannot be waived.

A seller may not exclude, restrict or modify the statutory conditions and warranties. Any term of a contract which attempts to do so will be void. Any attempt to exclude the implied statutory conditions and warranties, for example, by stating or implying that no refunds will be given under any circumstances, is in breach of s. 53(g), which prohibits the making of false or misleading representations about a consumer's rights.

The objective of these provisions is to ensure that fundamental aspects of a contract cannot be excluded due to the weaker bargaining position of a consumer compared to a trader.

These protections apply whether the transaction in question is a contract for sale, exchange, lease, hire or hire purchase of goods or the supply of services. However, statutory warranties do not cover insurance contracts<sup>172</sup>, transport or storage of commercial goods, or professional services provided by architects or engineers.

Implied conditions and warranties apply only in relation to contracts with consumers.

A consumer, who can be either an individual or a business, is someone who acquires:

- goods or services of a type normally bought for personal or household use, whatever they cost, or
- any other type of goods or services costing \$40 000 or less<sup>173</sup>, or
- a commercial road vehicle or trailer of any cost that is used mainly to transport goods on public roads.

provided that the goods are not acquired solely for reselling or for using up or transforming commercially to produce, repair or treat other goods.

### **The conditions and warranties**

The Trade Practices Act implies the following conditions into contracts:

- The supplier must be able to give the consumer clear title to the goods, including any bought at auction (**s. 69**).

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<sup>172</sup> Insurance contracts are covered by a separate legislative regime.

<sup>173</sup> If goods or services are not of a type normally bought for domestic, household or personal use, a supplier may sometimes be able to limit its liability.

- The goods must be of merchantable quality. This means that they must meet a basic level of quality and performance that would be reasonable to expect of the particular goods, having regard to their price and the manner in which they are described (ss. 71(1) and 66(2)).
- The goods must be fit for their purpose. This means they must be suitable for any particular purpose the consumer made known to the supplier when negotiating or arranging to purchase the goods, or a purpose which is obvious from the circumstances in which the sale took place (s. 71(2)).
- Goods that are supplied by description or sample must correspond with the description or sample (ss. 70, 72).

The Trade Practices Act implies the following warranties in contracts:

- the consumer is entitled to enjoy quiet possession of the goods (s. 69)
- the consumer is entitled to own the goods outright (s. 69)
- services must be carried out with due care and skill (s. 74(1))
- services (except those provided professionally by architects and engineers) and any materials associated with them must be fit for the purpose for which they are supplied—i.e. they should achieve the result that the consumer made known to the supplier, unless the consumer did not rely, or it was unreasonable to rely, on the supplier's skill and judgment (s. 74(2)).

## Remedies

The ACCC cannot bring an action for breach of any of the statutory conditions or warranties.

A consumer may bring a private action for damages in any court or tribunal of competent jurisdiction against a supplier<sup>174</sup> who, for example supplies goods that are not of merchantable quality, or are not fit for their purpose.

Damages can include the cost of repair of goods (including any necessary freight costs) or performing the services again. In some circumstances the court may award compensation for any consequential loss or damage, for example if a defect in an appliance causes damage to a consumer's home. For breach of a condition (not a warranty) a consumer has the right to return the goods to the seller and obtain a refund of the purchase price.

## Rights against manufacturers or importers

The Trade Practices Act also provides rights for consumers to take action against manufacturers or against importers (if the manufacturer has no place of business in Australia) for similar conduct to breaches of implied warranties and conditions. These rights were introduced on the basis that it is the manufacturer placing goods on the

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<sup>174</sup> A credit provider who regularly arranges finance for a supplier's customers, i.e. is 'linked' to the supplier, may be liable jointly with the supplier to compensate a consumer in the event of misrepresentation, breach of contract, failure of consideration or breach of a condition or warranty by the supplier (s. 73(1)).

market who is largely responsible for quality, and therefore should be responsible for statutorily imposed standards regarding the quality of those goods.

These rights apply only to goods that are ordinarily acquired for personal, domestic or household use.

## **B.6 Other key provisions of the Trade Practices Act**

The Trade Practices Act also plays a direct role in ensuring consumer rights by prohibiting anti-competitive conduct and regulating national infrastructure services. By encouraging competition, the Trade Practices Act plays an important role in empowering consumers to participate in the market—promoting an environment where it is possible for consumers to exercise their rights to choose between suppliers and products to maximise their own welfare.

Key areas include:

### **The access regime (Part IIIA)**

Part IIIA of the Trade Practices Act establishes a legislative regime to facilitate third party access to the services of certain essential facilities of national significance such as electricity grids or natural gas pipelines. Its object is to encourage competition in related markets.

### **Anti-competitive practices (Part IV)**

Broadly speaking, Part IV of the Act prohibits the following anti-competitive trade practices:

- anti-competitive agreements and exclusionary provisions, including primary or secondary boycotts
- misuse of market power
- exclusive dealing
- resale price maintenance
- mergers which would have the effect or likely effect of substantially lessening competition in a substantial market.

In some situations the prohibition is subject to a competition test. There are also statutory exemptions listed in the Act.

### **Authorisation and notification (Part VII)**

The Trade Practices Act recognises that there may be circumstances where conduct that is otherwise anti-competitive should nevertheless be allowed to occur, for example, if the conduct delivers benefits to consumers that outweigh the competitive detriment.

Accordingly, the authorisation and notification provisions enable the ACCC to grant immunity against action under the competition provisions of the Trade Practices Act except for misuse of market power.<sup>175</sup> Generally, such authorisations may be granted in

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<sup>175</sup> From 1 January 2007 the Australian Competition Tribunal also has the ability to authorise merger

response to an application if the ACCC is satisfied that the public benefit associated with the conduct in question is likely to outweigh any likely public detriment.

### **Prices surveillance (Part VIIA)**

Part VIIA enables the ACCC, where the minister, or the Commission with the approval of the minister, declares products or services, to examine prices with the objectives of promoting competitive pricing wherever possible and restraining price rises in markets where competition is less than effective.

For example, the ACCC monitors the prices of petrol, diesel and automotive liquefied petroleum gas (LPG) by collecting and analysing retail prices in capital cities and around 110 country towns. The ACCC also monitors international crude oil and refined product prices, published terminal gate prices of the oil majors and the city-country price differentials.

### **Telecommunications (parts XIB and XIC)**

Legislation in March 1997 provided a role for the ACCC in, among other things, regulating access within, and enforcing competitive safeguards in, the Australian telecommunications industry.

Amendments to the Trade Practices Act introduced two new parts, one dealing with anti-competitive conduct in the telecommunications industry (Part XIB), and the other setting out the rules and procedures for guaranteeing access to network services, for the purposes of interconnectivity and interoperability between carriers and service providers (Part XIC). These apply in addition to the parts of the Act which regulate restrictive trade practices and unfair practices in general.

## **B.7 Legal actions and court of jurisdiction**

The Trade Practices Act recognises that an important element of ensuring compliance with the legislation lies with enabling persons who have suffered loss or damage as a result of a contravention of the Trade Practices Act to take action against the wrongdoer. Such proceedings serve the dual purpose of enabling compensation, and deterring wrongdoing.

### **Private actions**

The Trade Practices Act enables private persons to bring action in the Federal Court, the Federal Magistrates Court, and state and territory supreme courts to hear private actions dealing with unfair trading practices, safety and information standards, bans and recalls, actions against manufacturers or importers, industry codes and liability of manufacturers and importers for defective goods.

In state and territory lower courts remedies are available subject to any limitations on the remedies a court may grant under state or territory law.

Cases concerning implied conditions and warranties in contracts (Part V, Divisions 2 and 2A) are heard by the state or territory court which has the jurisdiction to deal with disputes under the relevant contract. The Federal Court may deal with these matters

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transactions if the parties apply for authorisation.

only if they are closely linked to other matters in which the Federal Court has jurisdiction, for example, unfair trading practices.

### **Private representative proceedings**

Where several individuals have each suffered injury, loss or damage as a result of similar conduct in breach of the Act, amendments in 1992 to the *Federal Court of Australia Act 1976* permit a person to take a representative or class action in the court on behalf of a group of seven or more such persons. Each identifiable member of the whole group must be notified of the proceeding and may choose to opt out of the action. Those who do not opt out will receive such share of any compensation granted as the court may award to them but will not be able to bring their own individual actions.

This procedure has the advantage of efficiently resolving a large number of individual claims in one action and granting compensation to individuals who may not have been able to bring their own action. A defendant may also benefit by having to face only one action rather than several.

### **Actions brought by the ACCC**

The ACCC can only bring civil proceedings in the Federal Court. Criminal proceedings for breaches of Part VC are also heard in the Federal Court.

# Appendix C—Generic fair trading and consumer protection laws in other jurisdictions

## C.1 New Zealand

The general fair trading and consumer protection laws in New Zealand, contained within the *Fair Trading Act 1986*, closely follow the provisions of the Trade Practices Act.

The New Zealand Commerce Commission has a role in the enforcement of both consumer laws and anti-competitive conduct laws.

A review of the New Zealand consumer protection laws commenced in March 2006 and is ongoing.

The New Zealand review is considering a number of possible amendments to the consumer regime including:

- unfair contract terms
- unsafe products being removed from sale during an investigation
- cease and desist orders
- substantiation notices
- banning orders
- court enforceable undertakings.

It decided not to progress issues such as industry codes of conduct, super complaints, formal cautions and unconscionable conduct.

These issues are still under consideration in New Zealand.

## C.2 European Commission

The European Commission's consumer policy aims to ensure that the internal market is open, fair and transparent, so that consumers can exercise real choice, rogue traders are excluded, and consumers and business can take advantage of its potential.

The European Commission has issued a number of directives to member states for the implementation of consumer regulations including:

- *Unit Price Directive 1998*—this obliges traders to indicate the selling price and price per unit of measurement on all products which they offer to consumers. The aim is to improve consumer information and facilitate price comparison. The information must be unambiguous, clearly legible and easily identifiable.
- *Sale of Consumer Goods and Guarantees Directive 1999*—this requires a seller to guarantee the conformity of goods with the contract for a period of two years. Standards exist for assessing when conformity can be assumed and when it cannot.

Consumers can ask for the goods to be repaired, replaced, reduced in price, or for the contract to be rescinded.

- *Distance Selling Directive 1997*—the objective of the directive is to put consumers who purchase goods or services through distance communications in a similar position to consumer who buy goods or services in shops. It provides a number of rights to consumers including provision of comprehensive information prior to purchase, right of withdrawing within a specified period and a right to refunds within 30 days of cancellation, delivery within 30 days, protection from unsolicited selling and fraudulent use of payment cards. Exemptions apply to some types of contracts, in particular contracts concluded through an auction.
- *Unfair Contract Terms Directive 1993*—this provides that terms that are found to be unfair are not binding on consumers.
- *Doorstep Selling Directive 1985*—this provides certain protections for consumers in relation to contracts made ‘at the door’. In particular it provides a cooling off period.
- *Timeshare Directive 1994*—this provides purchasers a number of protections including the right to information in a prospectus prior to signing a contract, and requirements for the content of the contract, a cooling off period and a ban on deposits during a cooling off period.
- *Package Travel Directive 1990*—this provides purchasers of packaged travel certain protections including information disclosures and a right to cancel a contract if the provider changes essential elements of the arrangement.

Generally, these laws were developed on the basis of providing specific solutions to specific problems. However, the European Union has recently recognised the advantages of a more integrated approach, similar to the Australian model. This approach is illustrated by the introduction of the *Unfair Commercial Practices Directive 2005*, which prohibits unfair commercial practices between a business and a consumer. Certain practices are deemed to be unfair. These include misleading commercial practices, in particular practices that contain false information or deceive or are likely to deceive the average consumer and are likely to cause the consumer to take a transactional decision he or she would not otherwise have taken. Misleading practices include misleading by omission, and non-compliance with a code of conduct that a trader has represented that it is bound by. The directive also deems aggressive commercial practices, being practices that by harassment, coercion, use of physical force or undue influence significantly impairs the average consumer’s freedom of choice or conduct, as unfair commercial practices.

Certain commercial practices are banned outright. These include:

- claiming to be a signatory of a code of conduct when the trader is not
- claiming that a trader or a product has been approved, endorsed or authorised by a public or private body when it has not
- bait advertising

- falsely stating that a product will only be available for a limited time
- stating a product can be legally sold when it cannot; presenting rights given to consumers in law as a distinctive feature of the trader; pyramid schemes
- claiming that a trader is about to cease trading or move premises when he is not
- falsely creating the impression of free offers
- traders falsely representing themselves as consumers; requiring consumers who wish to make an insurance claim to produce documents that could not reasonably be considered relevant
- creating a false impression that a consumer has already won a prize.

The directive contains provisions aimed at preventing the exploitation of vulnerable consumers. Certain commercial practices are prohibited because they are considered unfair and likely affect especially vulnerable consumers. This includes claiming that products are able to facilitate winning in games of chance, falsely claiming that a product is able to cure illnesses, including in advertisements a direct exhortation to children to buy products or persuade their parents to buy them. In addition, the ‘average consumer’ can be defined as an average consumer within a particular vulnerable group.

The directive is to be the maximum level of regulation in each member state. That is, member states must not provide laws either below or above the level of regulation provided for in the directive.<sup>176</sup>

The European Commission has also issued an injunction directive, which establishes a common procedure to allow a qualified body in one jurisdiction to take action in another. It has also adopted a regulation for cooperation between member states in investigating possible breaches of consumer laws.<sup>177</sup>

The European Commission released its *Consumer Policy strategy 2007–2013* in March 2007. The strategy identifies a number of priorities, including:

- better monitoring of market functions in consumer terms, including the need to develop a more sophisticated understanding of consumer behaviour to devise better regulation
- working towards harmonization of regulation
- capacity building for European-level consumer organisations
- continued work with member states for the implementation of the Unfair Commercial Practices Directive

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<sup>176</sup> However, until at least 12 June 2013 member states will continue to be able to apply more stringent national rules deriving from European directives insofar as it is necessary and proportionate to do so (Article 3(5)), meaning that maximum harmonisation may not be complete before that date. There will be a major review of the operation of the directive by 12 June 2011 (Article 18).

<sup>177</sup> Regulation (EC) No. 2006/2004 on Consumer Protection Cooperation



- better informed and educated consumers
- enhanced cooperation with other jurisdictions to combat rogue traders operating internationally.

Generally, the European Union’s approach to consumer regulation provides a similar regime to the approach taken under the Trade Practices Act. Key elements of both regimes include prohibitions on misleading and deceptive conduct, harassment and coercion, and implied conditions and warranties in contracts. However, the European Union’s approach currently includes unfair contract terms and a number of more prescriptive, industry-specific regulations such as cooling off periods in distance selling arrangements, and disclosure requirements in particular industries such as travel packages.

### **C.3 United Kingdom**

The United Kingdom’s (UK) consumer laws generally reflect the European Union Directives on areas including timeshare, unit pricing, distance selling, and unfair contract terms. The UK is required to implement the directive on *Unfair Commercial Practices* by the end of 2007.<sup>178</sup>

The UK Office of Fair Trading (OFT) is the relevant enforcement and compliance agency for both consumer and competition issues. Its goal is to make markets work well for consumers.

The UK legislative framework enables designated consumer bodies to submit a complaint to the OFT that ‘any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers’. The OFT will then assess the complaint, which may result in a range of outcomes including enforcement action, referring the matter to another body, launching a more in-depth market study into the issue, or finding the complaint requires no further action.

There are a range of enforcement options available for breaches of consumer laws, including administrative action (informal and formal warnings) and civil proceedings (injunctions and enforcement orders). Enforcement orders (commonly known as ‘Stop Now’ orders) can normally be made only where attempts to resolve the issue through an undertaking have failed.

Key difference between the Australian regime and the UK regime are the implementation of unfair contract terms legislation, and the ability of consumer bodies to submit ‘super complaints’ to the OFT for consideration.

### **C.4 Canada**

The federal Canadian consumer laws also impose similar obligations to other jurisdictions relating to misleading and deceptive conduct. They impose obligations on traders not to make false or misleading representations to the public, including

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<sup>178</sup> The UK already has many similar laws in place which will be repealed when its unfair commercial practices law comes into force.

representations regarding comparison prices, and bait advertising. It also imposes requirements that pre-packaged consumer products and consumer textile articles bear accurate and meaningful labelling information, and certain mandatory disclosures. Further, they impose requirements for uniform description and quality markings of articles made of gold, silver, platinum or palladium to assist consumers to make informed choices.

These laws may be enforced by the Canadian Competition Bureau, which also has responsibility for enforcement of anti-competitive conduct rules.

Sanctions for breaches of the misleading advertising laws may attract criminal penalties in some circumstances, and civil sanctions. They may also provide legally binding written opinions on proposed business conduct.

## **C.5 United States**

The *Federal Trade Commission Act* enables the Federal Trade Commission (FTC) to prevent unfair or deceptive acts or practices in or affecting commerce. This provides the basis for a regime to prohibit misleading or deceptive conduct similar to the approach taken under the Trade Practices Act.

The FTC is also responsible for administration of laws prohibiting anti-competitive practices.

The scope of whether a practice is ‘unfair’ is determined by the courts, and the FTC which has the ability to make trade regulation rules to specifically define acts or practices that are unfair or deceptive. It has not been used to incorporate broad unfair contract terms legislation. Notably, the concept of unfair practices has been considered to cover issues such as failure to take reasonable security measures to protect sensitive consumer data in the United States.

The FTC also has responsibility over a number of specific consumer laws, including the *Truth in Lending Act*, which requires mandatory information disclosure and cooling off periods in certain financial transactions, the *Fair Debt Collection Practices Act* which relates to practices of debt collectors, the *Children’s Online Privacy Protection Act* which imposes certain obligations on operators of websites collecting personal information from children, and the *Bankruptcy Abuse Prevention and Consumer Protection Act 2005*, which amends the *Truth in Lending Act* in various respects, including requiring certain creditors to disclose on the front of billing statements a minimum monthly payment warning for consumers and a toll-free telephone number, established and maintained by the FTC, for consumers seeking information on the time required to repay specific credit balances.