The consumer protection provisions Part V of the *Trade Practices Act 1974*: Keeping Australia up to date

A Report by the Consumer Action Law Centre

May 2008

This Report is the result of a grant from the TPA Consumer Trust.

It reviews the consumer protection provisions of Part V (and Part IVA) of the *Trade Practices Act 1974* (Cth), and how these may be reformed to reflect international best practice in consumer protection legislation, looking at developments in comparable OECD jurisdictions.

The Consumer Action Law Centre is an independent, not-for-profit casework and policy organisation based in Melbourne, Australia. It was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and builds on the significant strengths of these two centres.

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List of acronyms

ACCC	Australian Competition and Consumer Commission
Act (the)	*Trade Practices Act 1974* (Cth)
ASIC	Australian Securities and Investments Commission
CAV	Consumer Affairs Victoria
CFR	Code of Federal Regulations (US)
COAG	Council of Australian Governments
DTI (now BERR)	Department of Trade and Industry (UK) (now Department for Business, Enterprise and Regulatory Reform)
EC	Commission of the European Communities
ESCV	Essential Services Commission (Victoria)
EU	European Union
FTC	Federal Trade Commission (US)
FTC Act	Federal Trade Commission Act (United States Code Title 15 Chapter 2 Subchapter I)
MCCA	Ministerial Council on Consumer Affairs
NSW	New South Wales

OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading (UK)
SCOCA	Standing Committee of Officials of Consumer Affairs
TPC	Trade Practices Commission (one of two forerunners to the ACCC)
UCPD	Unfair Commercial Practices Directive (EU)
UK	United Kingdom
UCC	Uniform Commercial Code (US)
UKCC	Competition Commission (UK)
US	United States of America
U.S.C.	United States Code
VCAT	Victorian Civil and Administrative Tribunal

1. Report information

1.1 Foreword

This report has been several years in the making and would not have been possible without the contribution of many staff and volunteers at the Consumer Law Centre Victoria and subsequently, Consumer Action Law Centre.

The CLCV identified the need for the report in 2005. Since that time the (then) Federal Government also reached the conclusion that a review of Australia's consumer policy framework was needed and commissioned the Productivity Commission to undertake a review.

The Productivity Commission's Final Report of its Inquiry into Australia's Consumer Protection Framework was released as this report was sent to print. It is pleasing to observe that the PC has recommended, in whole or in part, a number of reforms that are identified in this report- including formulating an overarching objective for consumer policy, the introduction of unfair contract terms legislation and enhanced remedies and enforcement powers for regulations. Indeed, sections of this report informed consumer submissions advocating these reforms, prior to publication.

Other reforms, such as market inquiries, super complaints and a general unfair trading prohibition have not been recommended by the PC. Consumer Action will continue to pursue these reforms in the interests of consumers and a well functioning competitive market – that is a competitive market that is fair, effective and sustainable.

Catriona Lowe and Carolyn Bond
Co- CEOs
Consumer Action Law Centre

1.2 Project background

This report reviews the consumer protection provisions of Part V (and Part IVA) of the *Trade Practices Act 1974* (Cth), and whether these should be reformed to reflect international best practice in consumer protection legislation, looking at developments in comparable OECD jurisdictions.

It has been written by the Consumer Action Law Centre with an appendix contributed by Dr Rhonda Smith of the University of Melbourne.

The report is the result of a grant from the TPA Consumer Trust.

1.3 Acknowledgements

Nicole Rich Research and report writing
Rhonda Smith Economic analysis of unfair contract terms laws
Catriona Lowe Project management, editorial review
Anna Stewart, Singithi Silva, Liz Sharp, David Evans and numerous volunteers for their research, contributions and commentary.

1.4 Feedback

This report contributes to the Consumer Action Law Centre's work in the field of consumer and competition law. Comments are welcome and should be sent to:

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1.5 Report structure

Section 2 contains an executive summary of the report together with a consolidated list of recommendations.

Section 3 examines the history of the consumer protection provisions in Part V of the Act, discusses the objects of the Act and explains why the consumer protection provisions should be reviewed.

Section 4 discusses the rationales for consumer protection laws, including both economic and social policy goals, and examines developments that should be considered in formulating best practice consumer protection laws. It then examines whether the Act's objectives remain valid in the light of identified best practice principles and whether the consumer

protection provisions of the Act remain effective in meeting such objectives.

Section 5 reviews international developments in consumer protection laws in the light of best practice objectives, focusing on the comparable OECD jurisdictions of the US, the UK, the EU and Canada, as well as developments in the Australian States and Territories. It recommends changes to the Act to ensure that it reflects international best practice.

2. Executive summary

This report reviews the effectiveness of the consumer protection provisions of the *Trade Practices Act 1974* (the **Act**), particularly in light of international developments since 1974. It does not cover industry or market-specific consumer protection laws, but only reviews developments relating to general or market-wide consumer laws.

Introduction

When enacted, the Act was groundbreaking in its comprehensive legislative treatment of the regulation of anti-competitive conduct and consumer protection in one statute, and could arguably have represented world's best practice. It was also the first time that consumer protection had been given stringent support in federal legislation.

Between 1985 and 1992, the States and Territories gradually enacted legislation to mirror the consumer protection provisions of the Act, extending the provisions to unincorporated traders conducting business within a single state. As a result, the Federal Government became a national standard-setter for consumer protection legislation, despite not having express powers to legislate for consumer protection under the Australian Constitution. For the first time, all Australians enjoyed broadly similar consumer protection.

The Act states its objective in, section 2:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The objects clause was only introduced in 1995 but reflects the goals apparent in the Act from its beginning, including the provisions for regulating anti-competitive conduct and for fair trading for consumers and business. However, the object also makes it clear that the Act's provisions to promote competition and fair trading and protect consumers are a means to an end. Its overall goal is to enhance the welfare of Australians. This is an important aspect of the object as it signifies that neither competition nor consumer policy are ends in themselves but serve a broader objective.

It has been over 30 years since the Act was first made. Since then, it has been subject to various reviews, some comprehensive. However, these have mostly concentrated on the competition provisions. The reviews have given the opportunity for widespread consultation on relevant provisions of the Act and for advances in competition policy to be incorporated into recommendations for change – including overseas developments. These reviews have naturally led to various amendments and updates to the competition provisions of the Act since 1974.

By contrast, while there have been some important substantive amendments to the consumer protection provisions of the Act since it was first introduced, these were the result of comparatively piecemeal additions, rather than comprehensive reviews. In fact the consumer protection provisions of the Act have not been comprehensively reviewed since it was first passed, except for the Swanson committee report in 1976, more than 30 years ago. This is despite significant changes in consumer markets since the 1970s, together with a more sophisticated understanding of both consumer behaviour and consumer policy.

This report therefore seeks to review the consumer protection provisions of the Act in light of international developments, with a view to suggesting reforms to ensure the Act continues to reflect best practice in consumer protection legislation.

Best practice consumer protection laws

Australia's consumer protection legislation will not meet best practice if it does not consider new developments in understanding the role of consumer policy. A review of these developments can help determine some best practice principles for consumer protection laws.

Consumer protection laws are not a new in Australia, despite the fact that it was not until 1974 when the Act was introduced that Australia gained a comprehensive body of national consumer protection legislation. Examples of consumer protection regulation can be found as far back as the early 1800s. Even the earliest Australian consumer protection laws were underpinned by economic and social policy, a dual-characterisation that continues to underpin today's consumer policy initiatives, including consumer protection legislation.

The Productivity Commission's Issues Paper and Draft Report for its inquiry into Australia's consumer policy framework recognised that consumer policy could address economic concerns. These included inadequate information about goods and services, social justice concerns such as helping disadvantaged or vulnerable consumers to participate effectively in markets and paternalistic concerns, such as regulating the consumption of tobacco products. Promoting general fair trading could be added to this, as it addresses individual market relationships and overall trading conditions.

Attempting to address both social and economic goals with one set of laws may sometimes prove challenging, but modern consumer protection laws must strive to do so. In some cases it may be possible to craft laws that meet both goals. In other cases we may need to choose between economic efficiency and upholding a minimum set of rights or standards. Either way, consumer protection interventions should incorporate the latest understandings on both the economic and social policy fronts if they are to continue to meet best practice.

Box 1 (below) summarises best practice principles from a review of these developments.

Box 1 - Best practice principles for modern consumer protection laws

Modern consumer protection laws should:

1. Address both social and economic goals

In many cases it will be possible to craft laws that meet both goals. In other cases laws may need to choose between economic efficiency and upholding a minimum rights or standards.

2. Protect and promote consumers' ability to drive effective competition from the demand side of the market

Effective competition will not necessarily occur just because the supply side of a market is structurally sound. Consumers must also be able to choose effectively from among the options.. The benefits of such laws should outweigh their costs.

a) Do this by addressing consumer information problems, such as asymmetries, search and switching costs and bounded rationality

This includes taking into account the huge changes in consumer markets over the past few decades.

(b) Do this by drafting laws that take consumer biases and other behavioural insights into account

This includes using behavioural insights in laws designed to address information problems and in assessing the conduct of suppliers.

3. Promote fair trading - fairness in individual transactions between traders and consumers

Ensuring fairness in markets has both social justice and economic benefits.

4. Address the particular needs of, or problems faced by, low-income and disadvantaged consumers in markets

This cannot be a purely economic question (although cost/benefit analysis is still relevant), as it must involve judgements about outcomes and may constitute a separate basis for legal intervention, distinct from overall market interventions.

5. Make use of more sophisticated market or industry analysis and flexible rules.

Identifying problems using comprehensive market or industry analysis allows for laws that will tackle these problems in more creative and sophisticated ways. Where appropriate, flexible and market-wide rules can reduce the costs and increase the efficacy of laws by prohibiting undesirable conduct while avoiding overly- prescriptive and inflexible requirements. Laws targeted at the disadvantaged consumers can also be used to avoid unnecessary costs and rules for the rest of the market.

Economic role for consumer protection laws

The two areas of competition and consumer laws are economically linked, as laws that protect consumers against restrictive trade practices and unfair trading practices can also promote fair trading or fair competition.. This link has been evident since the early days of the Act.

However, the economic benefits of consumer policy and consumer protection regulation and their potential to improve competition, have only recently become apparent. This is due to an increasingly sophisticated approach to consumer policy, which recognises that in many cases, together with competition policy it can improve market outcomes as well as achieve social justice. In Australia, it is now widely recognised that consumers are not simply passive beneficiaries of competition. Rather, they play a critical role in its success. Consumer protection laws can help make this possible.

Two strands of work in particular have been central to help us understand how consumer protection laws might be used to improve competition. The first examines *information* deficiencies that prevent consumers from making rational choices that maximise their self-interest. This work fits within "conventional" economic thought, assuming consumers will try to act rationally to maximise their self-interest and fulfil their pre-determined preferences. The second strand draws on *behavioural* economics, which finds that consumers are subject to systematic biases in their decision-making that can mean they do not always choose in their rational self-interest, nor do they always come to a transaction with pre-formed preferences.

It is now accepted that information problems can cause consumers to make poor decisions or even walk away from decisions altogether. Information deficiencies include asymmetries between consumers and suppliers, search and switching costs, and recognising that consumers have limited ability to collect and process information before making decisions. This is often referred to as "bounded rationality". Also, suppliers may simply lie or provide misleading information. These information deficiencies affect consumers' abilities to make choices that reflect their actual preferences and rational self-interest. This, in turn, gives misleading messages to suppliers about consumer preferences and affects competition. Individually, these problems can make consumers unhappy with their purchases, result in harm or make them feel "ripped-off.

Modern consumer protection laws need to address information problems, especially search and switching costs. Large-scale changes in consumer markets over the past few decades have magnified these information problems. Technological change and new markets have resulted in consumer markets becoming more complex. Product and service bundling is commonplace, which causes further complexity and can create additional switching costs. The growth of mass markets and mass

consumption has also led to the almost ubiquitous practice of standard-form contracts; with very one-sided terms. Consumers tend to concentrate on core contract terms, such as price and the nature of the goods or services in making their decisions, as they have neither the ability nor desire to consider all contract terms.

The insights from behavioural economics highlight that even when enough information is available, consumers may not use this information as expected nor make choices that maximise their self-interest. Rather, consumer decision-making is subject to systematic biases and can be influenced within the context of the transaction itself. Understanding actual consumer behaviour in a market in which problems have been observed can help determine the type of intervention that may be required and how it might be effectively implemented.

In the past two years, there have been several attempts to help policy-makers incorporate behavioural findings into consumer policy, including the OECD's Committee on Consumer Policy examination of behavioural economics for consumer policy. This work recognises that best practice in consumer policy must consider behavioural insights when making laws. As the consumer protection provisions of the Act were not drafted with behavioural economics principles in mind, there is at least some potential for improvements in this regard.

The next step is to incorporate these developments in understanding the economic role of consumer policy when making consumer protection laws. This should involve using tools that can analyse markets and market problems from both the supply and demand side, to determine what interventions might be warranted. Ideally, if a problem is identified, any competition action or a consumer empowerment action will improve both competition and consumer outcomes. Without a full market analysis, the risk is that a competition outcome could increase rivalry between firms but be detrimental to consumers, and that a consumer protection action might raise standards for consumers but significantly impede competition or innovation.

Information and behavioural economics should both inform consumer law interventions. This may be challenging but it is also necessary to ensure that the effectiveness of interventions is more rigorously assessed. A "do no harm" approach would assess markets from both a conventional and behavioural economic standpoint. Interventions that can address consumer risks from both viewpoints are preferable. Interventions that are

only justified under one approach would require further consideration, including ways to at least partially address concerns under one approach while doing no harm under the other.

There are no obvious solutions to addressing demand-side problems in every case, but a flexible and creative approach is useful. For example, using more sophisticated market or industry analysis to identify problems and their causes works better than simply banning conduct, or providing a glut of information for consumers. The costs and benefits of potential interventions such as consumer protection laws must also be assessed so that only interventions that provide overall benefits are considered.

Social justice role for consumer protection laws

While the social policy goals of consumer protection laws are recognised, the focus in Australia has been more on the economics of consumer policy and its role in enhancing competition.

There has been some tendency to regard social policy goals as conflicting with economic goals, particularly where consumer protection laws have a redistributive function. However, if the aim of a policy that promotes efficient market outcomes is to ultimately benefit consumers by providing products and services at prices and levels of quality that consumers want, then that policy clearly addresses both economic efficiency and equity.

Nevertheless, promoting economically efficient results will not always sit harmoniously with socially just outcomes. There have always been trade-offs between social justice and economic efficiency. For example, there are limits on the sorts of market transactions allowed. Economics cannot say whether such a trade-off should be made, as inevitably some economic benefits will be sacrificed. Whether a particular trade-off is worthwhile involves value judgements about what is acceptable in our society.

The most significant development in the social policy goals of consumer protection laws has been the shift in focus to the needs of low-income or disadvantaged consumers. The basic consumer law relationship is between a consumer and a business, but this focuses on the fair treatment of consumers generally, obscuring problems faced by different groups of consumers. However, changes in modern consumer markets have often exacerbated problems experienced by disadvantaged consumers, showing that while effective competition can bring overall consumer benefits it can

also exclude some consumers. This highlights the important role that consumer protection laws can play in helping these consumers.

There are concerns that intervening to address consumer disadvantage may limit or distort market outcomes, may be inefficient and costly. The alternative approach is to enhance efficient, competitive market outcomes, while using the broader taxation and transfer (welfare) system *ex post* to meet social welfare goals, such as redistributing market gains to the disadvantaged.

This economic focus may be unduly hindering the use of consumer protection laws to meet best practice social justice standards. Using such laws to address disadvantage should of course be subject to cost/benefit analysis. But, importantly, judgements should be made about whether the economic costs of the intervention can be justified by the social welfare goals to be achieved.

One way to reduce any costs or market-distorting effects of consumer protection laws that seek to eliminate the most egregious practices, is to target laws so that they only operate in particular circumstances and avoid universal requirements unnecessary for the rest of the market. If market-wide laws are appropriate, distortions and costs can be minimised by avoiding overly prescriptive laws such as outright bans (for example, prohibition of certain contract terms; or bans on all door to door sales would be outright bans on conduct) in favour of more flexible laws that prohibit unfair conduct in these contexts.

Gaps in our current consumer protection provisions

The consumer protection provisions of the Act provide a reasonably comprehensive framework of laws targeting unfair practices and practices that distort competitive market outcomes from the demand side. They benefit from two fundamental and flexible provisions prohibiting misleading and deceptive conduct and to a lesser extent, unconscionable conduct. These provisions set broad market standards that can adapt to changing or emerging practices but, particularly in the case of section 52, are nevertheless reasonably well-understood. They are also particularly relevant in tackling the sorts of unfair practices that tend to target disadvantaged consumers.

However, there are at least four identifiable gaps in the current consumer protection provisions, when compared against best practice as outlined in Box 1.

First, the provisions do not give the regulator or any other government body a mechanism to take a step back from the flow of complaints and enforcement actions and take stock of an entire industry or market. This is necessary when there are problems that would benefit from more comprehensive scrutiny before deciding any potential interventions.

Secondly, the provisions that tackle consumer information problems, such as the prohibitions on misleading and deceptive conduct and false or misleading representations have not changed much in more than 30 years. As our understanding of these problems has become more sophisticated, along with the importance of ensuring effective competition, there is scope for further improvement, particularly to address search and switching costs and bounded rationality problems.

Thirdly, the provisions were framed with little input from behavioural economics principles. The existing provisions partly address conduct that is unfair because it distorts information or information processing but conduct that is unfair because it distorts consumer decisions by taking advantage of, or even manipulating, cognitive biases is not necessarily prohibited. Behavioural insights could be better used to design more effective interventions.

Finally, the provisions allow some unfair conduct targeting low-income and disadvantaged consumers to slip through gaps between the prohibitions on unconscionable conduct and misleading and deceptive conduct. The prohibition on unconscionable conduct relies on proving that conduct within the context of an individual transaction was beyond conscience: However, it does not necessarily allow the regulator to stop more general or broader, market conduct that deliberately targets particular groups of consumers, but where no conduct of particular note occurs during each individual transaction. Section 52 prohibits conduct likely to mislead or deceive, which could encompass conduct likely to mislead or deceive because of the sorts of consumers it targets. But if the conduct constitutes other unfair practices, such as pressured or aggressive marketing and sales practices short of coercion or simply taking advantage of the market position of low-income and disadvantaged consumers generally, rather than being misleading or deceiving, it may not be a breach of the Act.

There are several international developments in consumer protection laws that provide options to address these gaps in the Act.

The objectives of our consumer protection laws

The Act's objectives need to reflect recent understandings about the economic and social policy roles of consumer protection laws so that the consumer protection provisions can meet best practice. Articulating an overarching objective for Australia's consumer policy framework, of which the Act forms the centre piece, would assist in interpretation as well as guiding future reform. The framework articulated for national competition policy provides a useful example.

The overarching objective could be consistent with the Act's objective, amended as suggested above. It could place consumer welfare at the centre of the objective and recognise consumers' role in activating effective competition. It could recognise the need to address issues impacting on disadvantaged and vulnerable consumers.

The objects clause of the Act benefits from having been inserted more recently than most of the provisions it corrals. At the time, the Government made clear that it wanted to promote reform through competition and economic efficiency, but as part of a broader public policy - including social considerations. For this reason, it remains a valid and appropriate objective, even in light of developments since the Act was introduced.

It might be improved by an amendment referring to 'effective' competition, given that historically competition has been taken to mean only the supply-side interventions in the Act, whereas today it is recognised that the consumer protection provisions can also promote competition. The objects clause could also better recognise the goal of addressing the needs of low-income and disadvantaged consumers. At present, the object appears to be more concerned with consumer welfare generally, rather than the welfare of different groups of consumers.

Recommendation 1 – Amend the objects clause of the Act

Amend the objects clause of the Act, either through direct amendment to the current object or by inserting facilitating objectives, to clarify that the Act is concerned with:

a) promoting effective competition on both the supply and demand side of markets; and

b) enhancing the overall welfare of all Australians, including low-income and disadvantaged consumers.

Recommendation 2 – Identify an overarching objective for consumer policy

The overarching objective could be consistent with the Act's objective, amended as suggested above. It could place consumer welfare at the centre of the objective and recognise consumers' role in activating effective competition. It could recognise the need to address issues impacting on disadvantaged and vulnerable consumers.

Market studies and investigations powers

At present, the Act largely locks the regulator into complaints handling and enforcement without any formal tools for a more in-depth assessment of a market or requesting another body to do so. This is a major gap in the Act as identified in Box 1.

The UK provides the leading example of including market analysis mechanisms in its consumer protection laws, by providing for both market studies and market investigations in its *Enterprise Act 2002*. The OFT, the UK's independent competition and consumer protection regulator, conducts market studies as part of its statutory information gathering and analysis function. It uses market studies to identify and address all aspects of market failure, from competition issues to consumer detriment and the effect of government regulations. A market study may lead to various actions, including publishing information, recommendations for legislative change or enforcement action.

The OFT (and other industry regulators) may also direct the UKCC to investigate any feature of a market that it suspects restricts or distorts

competition in connection with the supply or acquisition of any goods or services. These may include supply and demand-side features of a market. If the UKCC finds any adverse effects on competition, it must address these, and any detrimental effects they have had on consumers, through undertakings and orders, including orders relating to pricing, standards and information provision.

This has resulted in a wide variety of important investigations in areas where consumer detriment has been observed, including door-stop selling, debt consolidation, extended warranties, payment protection insurance and personal bank accounts. Outcomes have included national consumer education campaigns, recommendations to the UK government to amend legislation and UKCC orders to provide information and different payment options to consumers at the point of sale.

The UK regime also provides a super-complaints mechanism to feed into the market studies powers. Consumer bodies designated under the *Enterprise Act* can complain to the OFT about a feature of a market that is or appears to significantly harm the interests of consumers. The OFT must respond to the super-complaint within 90 days. This can be done in a number of ways, including starting a market study or a market investigation reference to the UKCC. The super-complaints mechanism helps ensure demand side or consumer problems are analysed and recognises that consumer organisations can provide valuable information to regulators. It has played a significant role in initiating important market studies and investigations in the UK.

US competition and consumer protection laws do not facilitate market studies and investigations as clearly as the UK *Enterprise Act*. They provide the FTC, the US independent competition and consumer protection regulator, with reasonably broad powers to investigate. These investigations tend to focus on whether there have been violations of the law, rather than general market or industry analysis. However, if the FTC wants to remedy unfair or deceptive acts or practices occurring industry-wide, it can make rules prohibiting defined acts and practices as unfair or deceptive. For example, it has made rules requiring door-to-door sellers to give consumers information about cooling-off rights and preventing funeral providers from bundling certain products and services.

Recommendation 3 – Introduce market studies and investigation powers

Introduce market studies and investigation powers into the Act, based on the model in the UK *Enterprise Act 2002*.

Recommendation 4 – Introduce super-complaints provisions

Introduce a super-complaints mechanism into the Act to support new market studies and investigation powers, based on the model in the UK *Enterprise Act 2002*.

General prohibition on unfair conduct

The UK DTI conducted a detailed comparative study of consumer policy regimes in various leading EU and OECD countries in 2003. Its report found that a general duty to trade fairly was useful and concluded that the UK was behind best practice in its legal framework for consumer protection due to its lack of a similar provision.

A general duty to trade fairly, or a prohibition on unfair trading, also accords well with the best practice principles in Box 1. Its flexible and market-wide provision promotes fair trading generally. It can also take into account insights from information and behavioural economics in considering whether conduct is unfair.

Examples of a broad duty to trade fairly can be found in the US, the EU and the UK. The US *Federal Trade Commission Act* prohibits unfair or deceptive acts or practices in or affecting commerce. It was deliberately broad so it would be flexible enough to deal with new and unpredicted forms of unfair conduct. The prohibition on deceptive acts or practices is similar to the Australian Act's general prohibition on misleading and deceptive conduct and further prohibitions on false or misleading representations. But there is no corresponding provision on unfair acts or practices in the Australian Act.

While flexible, the US prohibition is not open-ended. Its main focus is to prevent *unjustified* consumer injury If conduct causes substantial injury overall, it will be unfair. Such conduct is considered unfair because it *distorts* consumer decision-making, leading to individual detriment and making competitive markets less effective. This approach allows us to

consider how new information and behavioural insights can distort consumer decisions US case law has shown that it is able to deal with new forms of unfair conduct that would not be covered by current provisions in the Australian Act.

The Unfair Commercial Practices Directive (UCPD), adopted in May 2005, is a recent addition to the EU's consumer protection laws. This prohibits unfair commercial practices in business to consumer transactions and requires all EU member states to include its provisions in their national laws.

The UCPD prohibits unfair commercial practices, particularly misleading commercial practices and aggressive commercial practices and practices that distort consumers' decisions. It also contains a list of specific practices that are always regarded as unfair. Its main thrust is to prevent bad faith trading practices that have a material or appreciable effect on a consumers' ability to make informed decisions in the market, making them more likely to, make decisions they would not otherwise make.

The UCPD also tries to protect disadvantaged and vulnerable consumers. In considering whether a practice is unfair because it materially distorts the average consumer's economic behaviour, it says that the average consumer should be taken to be the average member of the group of consumers whom the practice reached, to whom the practice was addressed or directed or who were particularly vulnerable to the practice or the underlying product.

The UK is currently implementing the UCPD in its domestic laws. In including the definition of the average consumer, it has focused on protecting the interests of disadvantaged and vulnerable consumers as well as general consumers. Introducing UCPD will also help to simplify the UK's consumer protection regime. For example, the regulations provide for many provisions of the current laws, particularly industry-specific laws, to be repealed. The government's partial Regulatory Impact Assessment for the draft regulations identify benefits to business and enhancement of competition as well as benefits to individual consumers, resulting from the regulation.

There is no general prohibition on unfair trading or unfair commercial practices in Canadian federal law or in the consumer protection laws of the Canadian Provinces. However, some of the provincial statutes prohibit

various unfair business practices, some similar to those prohibited under the Australian Act, as well as some that are not.

The fact that these statutes vary from one Province to the next, and from the Australian Act, indicates that there will be gaps when relying on drafting provisions that cover specific practices, and underscores the benefits of a more flexible and general unfair-trading prohibition.

In summary, a general unfair practices prohibition has proven both flexible and workable in the US, and has now been recognised as best practice by the EU and the UK. It allows consumer protection regulation to be simplified and avoids the practice-by-practice approach that otherwise tends to dominate, and which leads to gaps in protection

While a key strength of the Australian Act's consumer protection provisions is two flexible, market-wide provisions in the prohibitions on misleading and deceptive conduct and unconscionable conduct, neither constitutes a general prohibition on unfair trading. Some forms of clearly unfair conduct are not prohibited by these provisions. For example, aggressive sales and marketing practices short of coercion, poor quality services and exploitative pricing. These practices tend to target disadvantaged or vulnerable consumer. Introducing a general prohibition on unfair conduct in Australia could improve the ability to identify and address such unfair practices.

The general prohibition on unfair practices is also the only provision that understands how certain trading practices can be economically harmful as well as unfair, as it focuses on conduct that unjustifiably distorts consumers' decisions. It allows new information and behavioural insights to inform its application. This distinguishes it from the current prohibition in the Act on unconscionable conduct in consumer transactions, which has remained limited to the conduct in an individual transaction, and is less able to address market-wide unfair practices.

The longer that Australia waits to introduce a general prohibition on unfair conduct, the longer the Act remains behind best practice in this area and the longer it will take for Australia to build useful case law and guidance on our own provisions. If Australia is serious about meeting both economic and social goals with consumer protection laws, it must consider how it will incorporate a general unfair conduct prohibition into the Act.

Recommendation 5 – Introduce a general prohibition on unfair trading conduct

Introduce a general, market-wide prohibition on unfair conduct or practices towards consumers into the Act.

The prohibition should incorporate the concept that conduct or practices are unfair if they unreasonably or unfairly distort consumer decisions, based on the models provided by the US, the EU and the UK.

The prohibition should also provide for unfairness to take into account the typical consumer to whom the conduct or practices are directed at, not only the average consumer.

The general prohibition may be supported by examples of specific unfair practices. Other consumer protection regulation that overlaps with the general prohibition, particularly industry specific regulation, could then be repealed.

Unfair contract terms regulation

Standard form contracts are now the norm in most forms of retail transactions in Australia. This means that the supplier drafts their terms of supply in advance and consumers generally have little if any opportunity or ability to negotiate these terms (other than the core terms of what goods or services are being purchased and at what price). While standard form contracting may be efficient, there is long-standing and widespread concern regarding their *content*, both in Australia and abroad. The main concern is whether terms unnecessarily favour of the supplier.

The main problem here is not one that springs from the circumstances of individual transactions. Rather, the problem is a market-wide concern, albeit with individual impact. Whilst on their face existing prohibitions on unconscionable conduct could address the problem, it is clear that Australian courts have been reluctant to interpret the provisions in this way. The best practice principles in Box 1 are that consumer protection laws should promote a consumer's ability to choose effectively, taking into account new consumer information problems and behavioural biases. Following a "do no harm" approach, the main question must be to the best ways of addressing the problem.

The leading model for laws addressing unfair terms in consumer contracts is from the UK. The UK's Unfair Terms in Consumer Contracts Regulations 1999 provide that an unfair term in a consumer contract is not binding on the consumer and preserve the rest of the contract if it is capable of continuing in existence without the unfair term. The regulations do not prohibit any specific terms or any conduct or practices. The test of unfairness is a general, overarching test followed by an indicative and non-exhaustive list of terms which may be regarded as unfair.

The test does not leave the determination of unfairness to purely subjective value judgements by a court or the regulator. While it is broad enough to be adaptable, it is a good guide to what may lead to unfairness, concentrating on an imbalance in the rights and obligations between the parties and a lack of fair dealing, while also ensuring the total context is considered, including other terms in the contract.

The UK's unfair contract terms regulations implement the EU's 1993 Directive on unfair terms in consumer contracts into UK law and remain very faithful to the EU directive. Under the directive, member states must ensure that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts, as distinct from the national laws that state unfair terms are not binding on consumers. Thus the directive recognises a need for both individual relief for consumers from the effects of unfair terms and more systematic means to eliminate unfair contract terms from the market.

Giving enforcement powers to regulators is one of the main benefits of these laws. It allows industry or market-wide unfair contract terms to be addressed, rather than relying solely on individual consumers to suffer detriment and seek redress. This is critical given that the problem is a market-wide problem generally associated with the common use of standard-form contracts, rather than just individual instances of unfairness. This model has been highly effective in the UK, with the OFT tackling unfair terms in contracts across a number of industries and markets.

Victoria introduced laws regulating unfair terms in consumer contracts in 2003, largely based on the UK model. This includes the two-fold method for determining whether a term is unfair. The Victorian provisions were introduced after an extensive review of its fair trading legislation, recognising that the existing prohibitions on misleading and deceptive and unconscionable conduct did not necessarily address unfair contractual content. But unlike the UK laws, the Victorian provisions apply to all terms

in consumer contracts, whether they are individually negotiated or not and whether they are core (price, subject-matter) terms or non-core terms. Other EU member states have also decided not to include such exclusions in their national unfair contract terms laws and the UK is now considering removing its exclusion for individually negotiated terms.

As in the UK, the legislation has had a positive effect in Victoria, as the government is able to 'step in'. The regulator's actions have had a substantial effect on contract terms, with CAV negotiating many changes to terms in consumer contracts across several industries. In 2006 CAV brought its first case under the legislation. In this, VCAT agreed that several terms in the trader's mobile phone contracts were unfair. The judgment has provided additional guidance on several matters, including the effect of negotiating a term or bringing it to the consumer's attention on whether it will be unfair. This supports the view that a well-drafted market-wide unfairness test can be successfully applied, with guidance and clarification developing over time.

The US does not have specific unfair terms in consumer contracts regulation as in the EU, UK or Victoria. US law does contain a well-developed concept of unconscionability that allows the court to refuse to enforce a contract, or contact terms, if they are found to have been unconscionable at the time the contract was made. However, generally consumers must show that the terms of the contract are unreasonably unfair and that the circumstances surrounding the entering into the transaction were unfair, before the court will find unconscionability. It is a defence only, and available to individuals but not the regulator. It also generally revolves around the particular circumstances of the individual's transaction, as opposed to addressing market-wide unfair terms by recognising broader information and behavioural causes, as the EU/UK and Victorian laws do. It is no doubt an important remedy in individual cases, including ones where consumers seek court assistance to resist a manifestly unfair agreement drafted by a supplier. But it is clearly not equipped to deal with the market problem of unfair terms in consumer contracts more generally.

Canada also does not have unfair terms in consumer contracts regulation. However, some of the Provinces have included a prohibition on consumer agreements, transactions, terms or conditions that are harsh, oppressive or excessively one-sided in their consumer protection statutes. The offending terms are not themselves declared to be unlawful, but the act of including them in the contract leaves the trader open to action under the statute for

engaging in an unfair practice. This may have some merit as it harmonises the treatment of unfair contract terms with other consumer protection matters and applies uniform enforcement and remedies to both. However, this approach stigmatises the conduct of the trader rather than focusing on the terms themselves, making both government regulators and courts more likely to hesitate before exercising their enforcement powers.

Two main reasons have traditionally been given for opposing national Australian legislation to address unfair terms in consumer contracts. The first is that other laws in Australia already sufficiently address the problem. The second is that the costs of such regulation may outweigh the benefits. However, it is reasonably clear that the current consumer protection provisions in the Act do not address the problem. In particular, the prohibition on unconscionable conduct in the Act, while broader than equitable unconscionable conduct, will not prohibit unfair terms in consumer contracts without something more in the conduct of the supplier within the context of the individual transaction in question. This means that, like the US unconscionability, it is limited largely to individual cases.

Further, the ACCC may take action where conduct has been, or is proposed to be, engaged in that may be unconscionable, but it cannot seek declarations that terms in a standard form contract are themselves 'unconscionable' or obtain an injunction against their continued use in the absence of unconscientious conduct by the supplier against one or more consumers. There is no market-wide focus to the provisions or recognition of the economic harm that can be caused by unfair contract terms. The, only concern is with harsh and unreasonable behaviour in individual transactions. Perhaps the best evidence that the existing prohibition on unconscionable conduct does not address the market problem of unfair terms in consumer contracts is the fact that since the introduction of unfair contract terms regulation in Victoria in 2003, the regulator has negotiated substantial amendments to unfair terms in standard form contracts across a range of different industries. This has not occurred anywhere else in Australia, nor did it occur before 2003.

Various alternatives should be explored to determine which form of unfair contract terms regulation will be effective in addressing the market problem with the least costs or distortions. However, the model provided by the EU, UK and Victoria is attractive for its "do no harm" approach, and so appears to be the best alternative.

First, this model does not diminish the substantial efficiencies associated with standard-form contracting as a process. Instead, it targets inefficient and unfair content in such contracts. Secondly, it provides a general test that is flexible enough to deal with new terms that emerge in the market, but does not inflexibly ban certain terms as unfair regardless of their context. Thirdly, it provides a potentially effective remedy regardless of whether the problem is regarded from an informational or behavioural approach. The alternative regulatory approaches that rely on disclosure in particular could make the problem worse rather than better in this instance, overloading the consumer with too much information on non-core terms that are unlikely to be properly taken into account in any case. Finally, approaches that rely on regulated or model contracts would probably require more regular revision and amendment to adjust to changing market conditions, increasing associated costs. They also require strong consumer participation and at present, effective collective bargaining by consumers would probably not be feasible.

Unfair terms in consumer contracts are themselves a market distortion. They do not necessarily represent an efficient outcome simply because the process of preparing contracts on a mass basis is efficient. Therefore, regulation designed to address unfair terms may help correct this distortion. The cost/benefit analysis of unfair contract terms intervention by Dr Rhonda Smith and included in the Appendix to this Report demonstrates that regulatory intervention to address unfair terms in consumer contracts can make the market more efficient as it corrects over-willingness to buy. Thus, while intervention naturally entails some costs, these must be assessed against corrected market outcomes, rather than the current inefficient market situation.

Recommendation 6 – Introduce national regulation of unfair terms in consumer contracts

Introduce general, market-wide regulation of unfair terms in consumer contracts into the Act, based on the EU/UK and Victorian models.

The regulation should incorporate a general test of unfairness that takes into account the substantive nature of contract terms, rather than the conduct of the supplier.

The general test of unfairness should address whether a term creates an unfair imbalance in rights or obligations to the consumer's detriment but

should also require an examination of terms in 'all the circumstances' including in the context of the contract as a whole.

The general test of unfairness should be supported by examples of unfair terms that can guide the application of the general test.

The regulation should give individual consumers a remedy or defence against unfair contract terms, but must also give the regulator (and possibly other designated parties) powers to take action against unfair contract terms that exist in current market contracts.

Unit pricing

The best-practice principles in Box 1 identify that consumer protection laws should address consumer information problems, helping to drive effective competition by allowing consumers to choose more effectively. This is not always straight-forward, which is why market studies and investigations powers can be highly useful. However, in other cases information problems may be reasonably clear and it is time to develop potential means to address them, as with unfair terms in consumer contracts.

In the EU and the UK, and to a lesser extent in the US, unit pricing regulation has been introduced to address the difficulties consumers can face in making useful price comparisons in everyday shopping, particularly grocery shopping. For several years there have also been calls in Australia to make price comparisons easier for retail shoppers. However this is yet to be addressed.

Problems in effectively comparing information, especially prices, between different choices for goods or services, has been shown to lead to sub-competitive outcomes. Suggested solutions include making pricing more transparent and setting standards to facilitate comparisons between different choices for a product.

In retail shopping, consumers are presented with different options for products, many of which are commodities. However, making price comparisons while trying to complete a shopping trip in a reasonable and practical amount of time can be difficult, as competing products are often packaged in different quantities, or the quantities included in familiar packaging can change. If consumers are unable to take accurate prices

into account, they are more likely to make purchasing decisions at odds with their preferences. This means that they are unable to drive efficient and effective competition.

Unit pricing means, in addition to the total price, showing the price of goods per a specified unit of measure. It allows consumers to make accurate price comparisons between different choices quickly and easily, rather than requiring them to convert, for example, a price for a 545g tin to a price that will be easily compared with its competitor which comes in a 730g tin. It is an information solution to an information problem and meets the prescriptions for effective policy measures in this area by setting a simple standard for the transparent disclosure of highly relevant information to consumers where and when they need it.

The EU has had unit-pricing laws for many years. The current directive was adopted in 1998 and applies generally and market-wide for all products offered by traders to consumers. The directive recognised the overall economic benefits that can flow from correcting consumer information problems, however, it also allowed some transitional exemptions for small retailers, recognising the potentially greater burden that the requirements may place on them, and for certain products where the benefits of unit pricing may not outweigh costs. These provisions are now being reviewed.

The UK Price Marking Order 2004 also provides that a price indication must be given in proximity to the product and placed so that consumers don't need to ask for it., and sets out the units of measurement to be used for various types of products. A recent review of the effect of unit pricing regulation after its implementation in the UK concluded that it had had a large positive net impact in financial terms.

European studies indicate that consumers are interested in unit pricing and that small retailers agree consumers use unit pricing to make clearer price comparisons. There are also indications that interest in unit pricing increased after its introduction. There is also some evidence from the US, that exposure to unit pricing can increase consumers' awareness and use of it. There are no national laws in the US requiring retailers to indicate the unit price for products being sold to consumers, but some states and cities have legislated to require it while in other areas some stores have voluntarily introduced it.

The combination of local-based laws and voluntary adoption means that the availability of unit pricing to US consumers varies considerably depending on where they live and where they shop. In addition, the standards and scope of coverage varies between the different laws. Where there are no mandatory standards about display requirements units of measurement, stores are free to indicate the unit price of products in different ways, making unit prices more or less prominent or using different units of measurement, which can undermine a consumer's ability to make informed decisions.

The US experience highlights the benefits of uniform national regulation on unit pricing. In Australia, large retailer ALDI has recently introduced unit pricing in its supermarkets but it is not clear that other retailers will introduce in voluntarily. Australian retailers claim there is no consumer demand for it, but this ignores the evidence from both the EU and the US that suggests consumers are more likely to understand and use unit pricing, if they are exposed to it. If it is accepted that unit pricing gives consumers useful information that helps them make better decisions and drive competitive outcomes, then national, uniform unit pricing standards may be the best way to provide this. A concurrent public education campaign might also help accelerate Australian consumers' understanding of how to use unit pricing.

Recommendation 7 – Introduce national requirements for traders to indicate the unit price of products offered to consumers

Introduce general, market-wide regulation requiring traders to indicate the unit price, in addition to the total price, for products offered to consumers, based on the EU/UK model.

The regulation should prescribe requirements for the clear display of unit price indications at the point where consumers look at price indications, and for the use of consistent units of measurement depending on the type of product.

The regulation could incorporate appropriate exemptions from the requirements in situations in which the costs of implementing such requirements would exceed their benefits, to be determined through the regulatory impact assessment process.

Whether it could effectively be incorporated into national trade measurement legislation or into the Act should be assessed and an appropriate enforcement model determined.

National unit pricing regulation should be accompanied by a consumer education campaign on how to use unit pricing effectively.

Enforcement and redress mechanisms

The enforcement and remedies provisions in Part VI of the Act do not themselves provide for substantive consumer protections and so they are not the focus of this Report. Nevertheless, it is recognised that they are integral to the effectiveness (or otherwise) of the substantive provisions found in Part V (and Part IVA) of the Act.

The Act's enforcement and redress regime is a mix of public and private remedies. This means it is flexible and does not rely on any one party - consumers, businesses or the government - to enforce it. However, there is room for improvement, particularly in making action by consumer protection enforcement agencies more effective and in promoting collective or representative consumer action.

At the most basic level, effective enforcement is necessary to ensure that the substantive consumer protection provisions are, complied with and contraventions dealt with. A recent report for the OECD on best practices

in consumer protection enforcement regimes also noted that effective enforcement mechanisms can reduce the need for government intrusion into business activity through inspections and monitoring, providing a greater deterrent to non-compliance.

The ACCC has argued for several amendments to the Act to improve enforcement. Its calls for a civil penalty regime to be introduced into the Act are supported by recent OECD work on this issue, which found that civil pecuniary penalties can be a cost-effective means of enhancing compliance with consumer protection laws and banning orders are appropriate in the worst cases. The UK is also reforming its enforcement regime to strengthen the penalties for contraventions. The MCCA has also been considering introducing a civil penalty regime for consumer protection laws and appears broadly supportive, although a final decision has not yet been released. Civil pecuniary penalties are also already available in Canada for breaches of provisions under the *Competition Act,* covering practices that are prohibited as consumer protection matters under the Australian Act. Finally, civil pecuniary penalties and disqualification orders are already available under the Act for contraventions of Part IV.

For quick or immediate action to limit or prevent harm to consumers in certain consumer protection matters, it has sometimes been argued that the ACCC requires administrative cease and desist powers. The US regulator has such powers but the safeguards built into the process to ensure a fair hearing for the trader with appropriate time periods means it is quicker and more effective for the regulator to seek court injunctions in most such cases. Administrative cease and desist powers are also available to some degree in Victoria and NSW but again, are subject to strict limitations.

The ACCC considers that its current ability to seek interim injunctions is working well and means it can act quickly when necessary, so administrative cease and desist powers are unnecessary. This seems to accord with experience in other jurisdictions, particularly in the US. However, the ACCC faces the dilemma that in initiating court action for an interim injunction, it cannot use its section 155 compulsory information-gathering powers. This is so even if the ACCC is still investigating a matter, and has taken the early court action to obtain an interim injunction to prevent ongoing or further potential harm while investigations continue.

This deters taking early action to prevent harm, or undermines the ability to pursue successful action seeking more permanent remedies. If the

rationale underlying both provisions is accepted – that interim injunctions should be available to stop or limit ongoing consumer harm until a permanent decision can be made ; and that the ACCC should have the compulsory information-gathering powers as set out in section 155 to facilitate investigations – it follows that the second should not undermine the first. An amendment to the Act to provide a limited extension to section 155 so it can be used after interim proceedings have been issued, but before substantive proceedings are issued would prevent further undermining of this essential provision.

Third party enforcement actions also require consideration. The EU injunctions directive specifically recognises that it can be useful to give enforcement powers to organisations (other than government regulators) with an interest in consumer protection. This is influenced by the fact that some EU member states have a consumer protection model that involves little government intervention and relies instead on private actions by consumers or other businesses. But even in the UK, the Consumers' Association has been granted enforcement powers in accordance with this directive. The OECD has also recognised that providing third party enforcement rights could be a cost-effective way to increase the deterrence value of consumer protection laws, as it raises the likelihood of action being taken against a trader.

Even so, enforcement action by third parties is unlikely to provide a major source of enforcement activity, due to the costs and risks of court action, particularly for public interest organisations with limited funds. For example, the Act already allows any person, including consumers and public interest organisations, to seek an interim or permanent order from the court against a trader breaching the consumer protection provisions of the Act. However, the Australian experience in third party enforcement under the Act has been limited, partly due to the expense of litigation and the difficulties in meeting security for costs orders. While the extent of third party enforcement actions may remain limited, it still has an important role to play as a potential check on regulator inactivity.

The OECD's recent recommendation on consumer dispute resolution and redress sets out three categories of consumer redress measures that should be available in best practice regimes: redress for a consumer acting individually, redress for consumers acting collectively and mechanisms for consumer protection enforcement authorities to obtain or facilitate redress on behalf of consumers.

Australia largely compares well with these best practice principles. The Act, together with supporting legislation and other measures, provides all three types of dispute resolution and redress mechanisms. However, there is room for improvement, particularly with collective redress, as the Act does allow for collective redress to consumers other than by general class action.

Regulators can play an important role in facilitating consumer redress given the difficulties of individual action. Regulator actions for redress can also improve enforcement results. For example, in the US the regulator can seek equitable ancillary relief from the court, including redress for consumers, as part of proceedings for an injunction to restrain unfair acts or practices. However, the Act does not currently allow the ACCC to seek redress for consumers other than identified, individual consumers who have provided consent to the ACCC's application on their behalf in writing before the application is made. The Act needs amending to allow the ACCC to seek orders for redress as part of other proceedings, whether affected consumers are named parties or not.

The Act also does not allow for representative actions for consumer redress taken by a consumer or a public interest organisation (as opposed to a class action where they are the lead plaintiff). Even if an amendment were made to the Act to facilitate these, similar constraints to those arising in third party enforcement actions are likely to limit its use, particularly costs concerns. However, a representative proceedings mechanism would give further consumer redress, even if used only occasionally. As with third party enforcement actions, such a mechanism would be another potential check on regulator inactivity. The UK government has recognised benefits in allowing representative actions and assessing introducing them to the UK consumer protection law system.

Finally, the Act does not give the courts any mechanism to order consumer redress where the individual consumers affected by a consumer protection law contravention cannot be practicably identified for the purposes of restitution, or the costs of administering the refunds of small amounts of money to large numbers of consumers outweigh the benefits being refunded, rendering restitution to individuals unfeasible. A provision allowing the court to order *cy pres* remedies would address such issues., This would also help prevent a wrongdoer from retaining the profits from their contravention of the law, merely because it is too difficult to identify every victim of the wrongful conduct.

A Victorian Law Reform inquiry into civil justice is proposing that Victorian courts be given the express power to order *cy pres* remedies, initially in class actions only, but with scope to extend the remedy outside the class action context in light of practical experience. The details canvassed by this inquiry highlight that the precise details of any *cy pres* mechanism would also need to be considered carefully, so an inquiry into how such a mechanism could and should operate would be appropriate.

Recommendation 8 – Introduce a civil penalty and banning order regime for consumer protection contraventions

Introduce a civil penalty and banning order regime into the Act for contraventions of the consumer protection provisions.

The civil penalty regime should provide for civil pecuniary penalties and disqualification orders in certain circumstances, as are now available for breaches of Part IV of the Act.

Recommendation 9 – Amend the ACCC's section 155 information-gathering powers to enable their use after the commencement of interim proceedings but before the commencement of substantive proceedings

Amend the Act to clarify the case law regarding the ACCC's ability to use its section 155 compulsory information-gathering powers in relation to a party once court proceedings have been begun against that party.

Provide that the ACCC may continue to use its section 155 powers in relation to a party until substantive proceedings in a matter have been begun against that party, even if interim proceedings have been taken against the party.

Recommendation 10 – Conduct an inquiry into means to alleviate costs problems associated with third party enforcement actions under the Act

Conduct an inquiry into ways to address the obstacles to starting and maintaining enforcement actions by third parties, , particularly class and public interest actions. Such obstacles include the cost of court action, the risk of adverse costs orders and the difficulties of meeting security for costs orders.

Recommendation 11 – Enable the ACCC to seek orders for consumer redress as part of other enforcement proceedings under the Act

Amend the Act so the ACCC can seek orders from the court for redress for affected consumers as part of other proceedings taken under the Act, for example under section 80.

Such orders should be available without the need for the consumers to be parties to the proceeding.

Recommendation 12 – Conduct an inquiry into the means to introduce representative action and *cy pres* remedies provisions into the Act

Conduct an inquiry into the means to best introduce improved consumer redress provisions to be inserted into the Act.

The inquiry should consider mechanisms to allow consumer representative actions and to allow the court to make orders for *cy pres* remedies in appropriate cases.

3. Introduction

3.1 Background

When it was first enacted, the *Trade Practices Act 1974* (Cth) (the **Act**), was groundbreaking in its comprehensive legislative treatment of the regulation of anti-competitive conduct and consumer protection[1] and could arguably have represented world's best practice.

This report focuses on reviewing the ongoing effectiveness of the consumer protection provisions of the Act, particularly in light of international developments since 1974. Its scope does not include industry or market specific consumer protection laws,[2] but reviews developments in general or market-wide consumer laws only.

Speaking about the Trade Practices Bill 1974, the then Attorney General, Senator Lionel Murphy, noted:

> 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.[3]

Before the Act was introduced, attempts to outlaw anti-competitive practices through national legislation had been limited, and there had been minimal federal consumer protection action. The *Australian Industries Preservation Act 1906* (Cth), based on the United States Sherman Act of

[1] See, eg, Simon Smith, 'Consumer Affairs: The Cinderella of government policy making' (2003) 28:4 *Alternative Law Journal* 182; David Tennant, *Reviewing and updating the consumer protection provisions of the Trade Practices Act – Recognising and navigating the speed humps*, Presentation to the National Consumer Congress, March 2004.
[2] For example, consumer credit or other financial services, energy, telecommunications, real estate or motor vehicle sales regulation.
[3] Senator the Hon L.K. Murphy QC, Attorney General, *Trade Practices Bill 1974 Second Reading Speech, 30 July 1974*.

1890, largely did not withstand early High Court constitutional challenges.[4] The *Trade Practices Act 1965* (Cth) was the next serious attempt at federal legislation aimed at preventing restrictive trade practices but was also found constitutionally invalid insofar as it legislated for intrastate commerce. This led its replacement by the *Restrictive Trade Practices Act 1971* (Cth), which was similar but based largely on the corporations power in the Constitution.[5]

The current ACCC chairman has noted that 'before the introduction of [the] Act, Australia's relatively small and closed economy was riddled with bid-rigging, cartels, price fixing, anti-competitive practices and deception in marketing and advertising'[6] The first chairman of the TPC under the Act, formerly the Commissioner for Trade Practices under the previous acts from 1966 to 1974, noted that the annual reports required to be produced under the earlier acts 'showed that the position on the ground was so serious that much more effective legislation than the 1965 Act was needed to deal with it. Thus they contributed to the eventual repeal of the 1965 Act and its replacement by the 1974 Act'.[7]

For consumers, the Act was 'the first time in Australian federal law that consumer protection was given stringent legislative support'.[8] The States and Territories had enacted various laws relating to particular consumer protection matters before 1974, such as weights and measures, used-car sales and credit purchases. But it wasn't until the 1960s that they began to look at consumer protection more broadly. For example, Victoria was the first to establish a government consumer body, the Consumer Protection Council, in 1965, followed by a government Consumer Affairs Bureau in

[4] Graeme Samuel, 'The Trade Practices Act – The first 30 years', *ACCC Update No.16*, December 2004, at 3; ACCC, 'Chronology of Trade Practices Regulation in Australia', *ACCC Update No.16*, December 2004, at 6.
[5] ACCC, 'Chronology of Trade Practices Regulation in Australia', *ACCC Update No.16*, December 2004, at 8. It was also followed by the *Restrictive Trade Practices Act 1972* (Cth).
[6] Graeme Samuel, 'The Trade Practices Act – The first 30 years', *ACCC Update No.16*, December 2004, at 3.
[7] Ron Bannerman, 'Web of anti-competitive restriction', *ACCC Update No.16*, December 2004, at 5.
[8] Jenny Hocking. *Lionel Murphy – A political biography*, Cambridge University Press, 1997, at 205, quoted in David Tennant, *Reviewing and updating the consumer protection provisions of the Trade Practices Act – Recognising and navigating the speed humps*, Presentation to the National Consumer Congress, March 2004, at 2.

1970 and the 1972 *Consumer Protection Act*.[9] New South Wales established a Consumer Affairs Council and Consumer Affairs Bureau through its 1969 *Consumer Protection Act*.[10]

These initiatives followed the rise of consumer policy in the 1960s. In particular, US President Kennedy's declaration in 1962 of four basic consumer rights – the right to safety; the right to be informed; the right to choose and the right to be heard – spurred the development of a modern consumer movement and modern consumer policy.[11] However, interest in the area had already been growing in Australia and other western countries. The Australian Consumers' Association, now CHOICE, was founded in 1959, largely due to the efforts of Western Australian MLC Ruby Hutchinson who was herself influenced by overseas visits to by *Which?***,** the British product testing and publishing organisation, and *Consumer Reports* and *Consumers Research Magazine*, two American publications.[12] In the UK, the Government initiated a review in 1959 to, 'consider and report on what changes if any in the law and what other measures, if any, are desirable for the further protection of the consuming public.'[13] Other important influences at this time came from the consumer movement, including the founding of Consumers International (then the International Organisation of Consumers Unions) in 1960 and the publication of US activist Ralph Nader's book *Unsafe at Any Speed* in 1965.[14]

The Act was the first time that competition and consumer protection laws had been brought together in one statute in Australia. It provided a

[9] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 4-5.
[10] NSW Office of Fair Trading, *A brief history of consumer protection in NSW,* available atwww.fairtrading.nsw.gov.au/youth/schoolprojects/abriefhistoryofconsumerprotectioninnsw.html
[11] Message from the President of the United States relative to Consumers' Protection and Interest Program, Doc. No. 364, House of Representatives, 87th Cong., 2nd. sess., March 15 1962. See also Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 4.
[12] Louise Sylvan, 'The development of a modern Australian consumer movement', *ACCC Update No.16*, December 2004, at 12.
[13] Board of Trade (UK), *Final Report of the Committee on Consumer Protection* (the Molony Committee), July 1962. See also Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 4; Aubrey L. Diamond, 'The Molony Committee Final Report of the Committee on Consumer Protection', (1963) 26:1 *Modern Law Review* 66.
[14] Ralph Nader, *Unsafe At Any Speed: The Designed-in Dangers of the American Automobile*, 1965.

comprehensive legislative treatment of trade practices and fair trading policy, providing a range of provisions and remedies and a regulator with broad powers to administer the law. The explanatory memorandum to the Trade Practices Bill 1974 notes some of the important advances from past laws:

> …RESTRICTIVE TRADE PRACTICES
>
> Differences between provisions of Bill and existing Restrictive Trade Practices Act
>
> 2. The main differences between the proposed restrictive trade practices provisions and the existing Act are -
>
> (a) Practices are to be prohibited by the Act itself instead of by ad hoc restraining orders made by the Trade Practices Tribunal after time-consuming inquiries.
>
> (b) Private individuals will be able to take court proceedings in respect of prohibited practices.
>
> (c) 'Vertical' exclusive dealing arrangements are prohibited in certain circumstances.
>
> (d) Limitations to the scope of the present practice of discriminatory dealing are removed.
>
> (e) Anti-competitive mergers are covered.
>
> (f) A Trade Practices Commission constituted by several members is to replace the Commissioner of Trade Practices.
>
> (g) The Trade Practices Tribunal will become a body to review determinations by the Commission It will also retain its existing functions under the overseas cargo shipping provisions.
>
> …
>
> CONSUMER PROTECTION
>
> 57. The Bill prohibits a number of commercial practices that are unfair to consumers. Unlike the position with restrictive trade practices, there is no provision for persons to be authorized to engage in conduct that is otherwise prohibited. The Bill also includes provisions to prevent the exclusion from consumer transactions of certain conditions and warranties designed to protect the consumer. The Trade Practices

> Commission is given a role in the enforcement of the consumer protection provisions…[15]

The States and Territories gradually enacted legislation to mirror the consumer protection provisions of the Act between 1985 and 1992, after the Standing Committee of Consumer Affairs Ministers agreed in 1983 to adopt uniform fair trading laws based on Part V of the Act.[16] This was important because, as with the previous act, the Constitution limited the Federal Government from legislating to cover all trading. To introduce the Act, it relied mainly on its power to make laws regarding corporations. State legislation extended the provisions to unincorporated traders carrying on business within a single state.[17]

Through the Act, the Federal Government became a national standard-setter in consumer protection legislation, despite the fact that it does not have express powers to legislate for consumer protection under the Australian Constitution. For the first time, Australians enjoyed broadly similar consumer protection across the entire country.

3.2 The objective of the Act

The Act's objects clause, section 2 states its objective:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

This object was not in the Act as originally introduced. Rather it was inserted into the Act in 1995 by the *Competition Policy Reform Act 1995* (Cth)[18].

Debate on the original Bill shows that these goals were clear from the start of the original Act. For example, in concluding his second reading speech

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[15] Trade Practices Bill 1974 Explanatory Memorandum, Circulated by the Minister for Manufacturing Industry the Hon. Kep. Enderby, M.P. Q.C..

[16] National Competition Council, 'Chapter 11: Fair trading legislation and consumer protection', *2002 Assessment of governments' progress in implementing the National Competition Policy and related reforms*, at 11.3; ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 118.

[17] Other benefits of State legislation include local enforcement by State regulators and local redress for consumers through access to State courts and tribunals.

[18] *Competition Policy Reform Act 1995* (Cth), s.3.

on the Trade Practices Bill 1974 in the Senate, the Attorney General, Senator Lionel Murphy, said:

> Mr President, it will be apparent to honourable senators that the Bill is of great importance. It represents a great advance in areas of restrictive trade practices and consumer protection and attends to a wide variety of problems. This is intended to promote efficiency and competition in business, to reduce prices and to protect all Australians against unfair practices.[19]

Senator Murphy also noted that:

> The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices…These practices cause prices to be maintained at artificially high levels…they interfere with the interplay of market forces which are the foundation of any market economy; (and) they allow discriminatory action against small businesses, exploitation of consumers and feather-bedding of industries.[20]

From the start, the Act's structure and provisions reflect the objects clause, providing for the regulation of anti-competitive conduct and for fair trading for consumers and business, although provisions originally talked more of preventing practices "in restraint of trade" or that constituted "monopolization", whereas these provisions now prevent practices that "affect or lessen competition" or "misuse market power".[21] Part IV of the Act prohibits anti-competitive practices, such as agreements that restrict dealings or affect competition,[22] misuse of market power,[23] exclusive dealing[24] and mergers that would result in a substantial lessening of competition.[25] Part V prohibits unfair trading practices that harm consumers (and also harm businesses trading fairly) such as misleading and deceptive conduct,[26] false or misleading representations,[27] bait

[19] Senator the Hon L.K. Murphy QC, Attorney General, *Trade Practices Bill 1974 Second Reading Speech*, 30 July 1974.
[20] As above.
[21] See, eg, ss.45 and 46 as originally enacted; cf ss.45 and 46 in the current version of the Act. The United States legislation still refers to contracts in restraint of trade or commerce and monopolizing trade or commerce: 15 U.S.C. ss.1 and 2.
[22] S.45.
[23] S.46.
[24] S.47.
[25] S.50.
[26] S.52.
[27] S.53.

advertising,[28] harassment and coercion[29] and pyramid selling.[30] In addition, Division 1A of Part V includes product safety obligations[31] and Division 2 of Part V implies certain conditions and warranties into contracts for the supply of goods or services to consumers, including the quality and fitness for purpose of those goods or services.

Further, the objects clause, although inserted later, is implied as early as 1975 in the first annual report of the TPC:

> 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.[32]

However, the object makes it clear that the Act's provisions to promote competition and fair trading and protect consumers are a means to an end, with its overall goal to enhance the welfare of Australians. This is an important aspect of the object as it signifies that neither competition nor consumer policy are ends in themselves but service a broader objective. The second reading speech on the Competition Policy Reform Bill specifically states:

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[28] S.56.
[29] S.60.
[30] Originally s.61. Division 1AAA was inserted by the *Trade Practices Amendment Act (No. 1) 2002*.
[31] Originally ss.62 and 63. Division 1A inserted by the *Trade Practices Revision Act 1986* s.35.
[32] Trade Practices Commission, *Annual Report 1974–75*, Australian Government Publishing Service, Canberra 1975, at 1; as quoted in ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 15.

> It is important to understand that this Government is not interested in reform or competition for its own sake. The package recognises that economic efficiency is one element of a broader public policy context which also includes social considerations. Explicit recognition is given to these broader elements of the public interest in the bill and in the Competition Principles Agreement. The package gives appropriate recognition, not only to competition and efficiency considerations, but to all the other policy objectives which governments must balance in making policy decisions, such as ecologically sustainable development, social welfare and equity considerations, community service obligations, and the interests of consumers.
>
> An objects clause is to be inserted into the Trade Practices Act, indicating that its purpose is to enhance the welfare of Australians, through the promotion of competition and fair trading practices and provision for consumer protection.[33]

Although the object was largely reflected in the legislation itself, even before the objects clause was inserted, it is significant that it was inserted as part of the National Competition Policy reforms in the mid-1990s. These reforms brought competition policy to the fore and the object reflects this. It also reflects an increasing sophistication in understanding the links between competition policy and consumer protection policy,[34] although the first TPC annual report also shows an early awareness of these links.[35]

However, the increasing understanding of the links between the two policy areas is not the only change since 1974. There have also been large changes in consumer markets and in understandings about consumer behaviour in the past few decades, as discussed in section 4.1 below.

3.3 Context for this Report

It has been over 30 years since the Act was first made. Since that time there have been various reviews, some comprehensive. However, almost

[33] Senator The Hon R.A. Crowley, Minister for Family Services, *Competition Policy Reform Bill 1995 Second Reading Speech*, 29 March 1995.
[34] See, eg, Timothy J. Muris, 'Economics and Consumer Protection', (1991-1992) 60 *Antitrust Law Journal* 103; Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994; Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713.
[35] See above, n 32.

all have concentrated on the competition provisions.. The most recent was the *Review of the Competition Provisions of the Trade Practices Act 1974*, commonly known as the Dawson review, completed in 2003. The Dawson review recommended various changes to the competition provisions of the Act.[36] Another significant review in the Act's history was the *Independent Committee of Inquiry into National Competition Policy* (the Hilmer Committee), established in October 1992. This led to the report *National Competition Policy* the following year and a subsequent package of reforms including the *Competition Policy Reform Act 1995*.

Such reviews have provided the opportunity for widespread consultation on relevant provisions of the Act[37] and for advances in competition policy, including overseas developments, to be incorporated into recommendations for change. For example, in responding to the Dawson review, recommendation 1.1 of the Federal Government's response was that 'consideration of possible changes to Australia's regulatory framework should continue to have regard to international developments in the area of competition.'[38]

Since 1974, these reviews have naturally led to various amendments and updates to the competition provisions of the Act. The ACCC's update marking 30 years of the Act lists a chronology of trade practices regulation in Australia spanning several pages of reviews and legislative amendments of note.[39] Of these, only three relate to consumer protection. The first is the addition in 1986 of a provision prohibiting unconscionable conduct,[40] which constitutes a change in substantive law. The second and third are the transfer of responsibility for consumer protection in relation to financial

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[36] Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Report, January 2003 ("Dawson review").

[37] For example, the Dawson review received 212 submissions and an additional 320 written representations from consumers, and approximately 50 meetings with interested parties: Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Report, January 2003 at 3.

[38] *Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974*. See: www.treasurer.gov.au/tsr/content/publications/TPAResponse.asp.
Two of the Dawson review committee members also undertook 26 meetings with persons concerned with administering competition laws in Canada, the United States, France, the United Kingdom and the European Union: Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Report, January 2003 at 3.

[39] *ACCC Update No.16*, December 2004, at 8, 10, 14, 16, 18 and 20.

[40] *ACCC Update No.16*, December 2004, at 10.

services matters to ASIC in 1998 and 2001[41] and the increase in the maximum penalty payable for breaches of the consumer protection provisions in 2001[42] respectively - both of which are important changes but neither constitute additions or amendments to the substantive obligations arising under Australia's consumer protection laws.

There have been some other important substantive amendments to the consumer protection provisions of the Act since it was first introduced. The most significant was the new 1986 provision prohibiting unconscionable conduct, noted above.[43] However, other important amendments include the insertion of Division 2A into Part V in 1978, which makes manufacturers and importers liable to compensate consumers for loss or damage caused by defects in supplied goods that broadly correspond with defects covered by the implied conditions and warranties in Division 2,[44] and the insertion of Part VA into the Act in 1992 to make manufacturers and importers more broadly liable for the supply of defective goods if they cause injury or loss to consumers.[45] Other amendments have improved the ACCC's enforcement powers, and the remedies available to the ACCC or individual consumers for breach of the consumer protection provisions of the Act.[46]

While these were important and worthwhile additions, they were the result of comparatively piecemeal additions to the Act rather than comprehensive reviews;. In fact, unlike the competition provisions, the consumer protection provisions of the Act have not been comprehensively reviewed since the Act was first passed, with the exception of the first review -, the 1976 Swanson committee report - now more than 30 years old.[47]

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[41] *ACCC Update No.16*, December 2004, at 16 and 18.
[42] *ACCC Update No.16*, December 2004, at 18.
[43] This was originally inserted into the Act as s.52A by the *Trade Practices Revision Bill 1986* s.22 and was renumbered as s.51AB and placed into a new Part IVA – Unconscionable Conduct by the *Trade Practices Legislation Amendment Act 1992* s.8.
[44] *Trade Practices Amendment Act 1978* s.14.
[45] *Trade Practices Amendment Act 1992*.
[46] A more comprehensive list of changes to the fair trading and consumer protection provisions of the Act, including substantive changes and changes to enforcement and redress provisions, is provided by the ACCC in its *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 15-17.
[47] Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, 1976 ("Swanson review"). The insertion of Division 2A into Part V resulted from this review. See also Nicola Howell, 'Searching for a National *Consumer* Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294, at 295.

This is despite the fact that, there have been significant and large-scale changes in the operation of consumer markets since the 1970s, together with a growing and more sophisticated understanding of both consumer behaviour and consumer policy more generally, discussed in section 4.1.

This report therefore seeks to review the consumer protection provisions of the Act in light of international developments, with a view to suggesting reform to ensure the Act continues to reflect best practice in consumer protection legislation.

This is particularly important now, as the Productivity Commission is conducting a comprehensive inquiry into Australia's consumer policy framework. This inquiry is considerably broader than a review of just the consumer protection provisions of the Act, as it is concerned with all aspects of the framework, including the development of consumer policy, institutional and administrative arrangements and consumer education and information approaches as well as consumer regulation, which includes not only the Act but various other pieces of legislation, regulations and codes.[48] However, the consumer protection provisions of the Act clearly play an important role in Australia's consumer policy framework and it is clear that they will be a focus of the inquiry. This is reinforced by a strong focus in the Terms of Reference for the inquiry to consider ways to reduce, revise or repeal consumer regulation.[49]

Such a focus is not surprising given the emphasis on regulation review and tackling the regulatory burden on business that has been seen in Australia over the past few years. As it affects business, consumer protection legislation, has necessarily been the subject of review as part of these processes. For example, the Taskforce on Reducing Regulatory Burdens on Business included a review of consumer-related regulation in its final report to the Federal Government and recommended that 'COAG, through the Ministerial Council on Consumer Affairs, should initiate an independent public review into Australia's consumer protection policy framework and its administration',[50] a recommendation that the Federal Government took up

[48] Peter Costello MP, Treasurer, *Terms of Reference - Review of Australia's Consumer Policy Framework*, 11 December 2006, available at www.pc.gov.au/inquiry/consumer/information/tor.
[49] As above.
[50] Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January 2006, recommendation 4.44, at 52. A national review into consumer protection policy and administration in Australia was also recommended by

by referring the inquiry to the Productivity Commission.[51] The Taskforce explicitly noted:

> Growing divergence in consumer protection regulations goes against the original intent of governments in amending Part V of the *Trade Practices Act 1974* in 1983 to have nationally consistent laws.
>
> …
>
> There has not been a comprehensive review of the consumer protection provisions of the Trade Practices Act since they were introduced in 1983. The Parliamentary Secretary to the Treasurer has committed to work with the Ministerial Council on Consumer Affairs to achieve a nationally uniform consumer framework. The Taskforce endorses the call by the Productivity Commission…in its recent review of National Competition Policy for a comprehensive review of Australia's consumer protection framework.[52]

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the Productivity Commission in its report *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, recommendation 10.2, at 283.

[51] Australian Government, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business – Australian Government's Response*, August 2006, at 24.

[52] Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January 2006, at 51-52.

4. Best practice consumer protection laws

Australia should strive to ensure that its consumer protection legislation remains at world's best standards. This is important for both economic and social policy considerations. Our laws will not meet best practice if they do not include new understandings about the roles of consumer policy.

But in assessing whether the consumer protection provisions of the Act continue to represent best practice, we must first ask whether the objects of the Act are still appropriate in light of such developments. Do the consumer protection provisions meet these goals and if not, what changes might be required?

4.1 The rationales for consumer protection laws

Consumer protection laws are not a new phenomenon in Australia, despite the fact that Australia had no comprehensive body of national consumer protection until the Act was introduced in 1974 As early as the first decade of the 1800s the colony of NSW (which then included Victoria) began licensing various professions, while it introduced price controls for bread in 1825 and adopted British weights and measures laws in 1832.[53]

McAuley notes that, even earlier, the first recorded example of consumer protection intervention in Australia was the action by NSW Governor King in 1800 to break up the trade monopoly held by the NSW Corps officers' commissary – the rum trade monopoly – which was particularly valuable given rum was often used as currency in the new colony.[54]

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[53] NSW Office of Fair Trading, *A brief history of consumer protection in NSW,* available at www.fairtrading.nsw.gov.au/youth/schoolprojects/abriefhistoryofconsumerprotectioninnsw.html; see also Louise Sylvan, 'The development of a modern Australian consumer movement', *ACCC Update No.16*, December 2004, at 12.

[54] Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 1; see also NSW Office of Fair Trading, *A brief history of consumer protection in NSW,* available at www.fairtrading.nsw.gov.au/youth/schoolprojects/abriefhistoryofconsumerprotectioninnsw.html.

The justifications for that intervention were potentially multifaceted:

> They were justified in terms of economic efficiency, for the monopoly was interfering with the economic life of the colony, especially as it was restricting supplies of essential commodities, such as agricultural seed. There was a social justice concern, for the commissary was marking up goods 1000 percent or more. And there was a degree of paternalism, as Governor King believed that the commissary's monopoly had led to dependence on rum both as a common currency and as a source of intoxication.[55]

McAuley draws some broader lessons from this example:

> The notions of economic efficiency, social justice and paternalism have always been intertwined in consumer protection interventions.
> …
> While all three policy bases for intervention persist and coexist, there are long term shifts in the weighting given to them. Often there is often [sic] a trade-off between equity and efficiency, but there is a large arena in which no such trade-off is necessary.[56]

Thus the earliest Australian consumer protection laws display both economic and social policy underpinnings, a dual-characterisation that continues to underpin today's initiatives, including consumer protection legislation. In 2007, the Productivity Commission's Draft Report for its inquiry into Australia's consumer policy framework recognised that consumer policy can address economic concerns (such as inadequate information about goods and services), social justice concerns (such as assisting disadvantaged or otherwise vulnerable consumers to participate effectively in markets) and paternalistic concerns (such as regulating the consumption of tobacco products).[57] To this could be added another well-recognised goal of consumer protection laws - the promotion of general fair trading - which carries both social and economic connotations as it addresses individual market relationships and overall trading conditions.[58]

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[55] Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 1.
[56] Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 1.
[57] Productivity Commission, *Consumer Policy Framework: Productivity Commission Draft Report*, December 2007..
[58] See, eg, Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 17.

McAuley also makes the point that in terms of consumer protection intervention, it is the relative importance, or 'weighting', given to the different potential rationales that have tended to change over time, not the existence of different rationales. This can be clearly seen in trends in consumer policy, from the growth of modern consumer policy in the 1960s to today.

While attempting to address both social and economic goals with one set of laws may sometimes prove challenging, modern consumer protection laws must strive to do so. In some cases it may be possible to craft laws that meet both goals. In other cases we may need to choose between economic efficiency and upholding a minimum set of rights or standards.[59] Either way, consumer protection interventions should incorporate the latest understandings on both the economic and social policy fronts.

4.1.1 Economic role for consumer protection laws

Given its origins in the rise of the consumer movement and events such as President Kennedy's declaration of basic consumer rights,[60] it is not surprising that consumer policy in the 1960s and 1970s emphasised social justice and fair trading.[61] Economic considerations were also present as shown by the second reading speech on the Trade Practices Bill[62] and the TPC's first annual report.[63] However, more consistent economic analysis was not necessarily brought to bear when considering consumer protection interventions.[64]

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[59] See, eg, Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*, Cambridge University Press 2001; Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994; see also Nicola Howell, 'Searching for a National *Consumer* Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294.

[60] See text at n11–14 above.

[61] See Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 5-6; see also Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 4-5.

[62] See text at n19–20- above.

[63] See text at n32 above.

[64] See, eg, Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 54.

The two areas of competition and consumer laws are economically linked, as prohibitions of restrictive trade practices and unfair trading practices targeting consumers can be seen as both promoting fair trading or fair competition between businesses and between businesses and consumer. For example, a prohibition on misleading representations aims to protect consumers from being misled into making poor or unwanted choices based on false information, but they may also protect honest businesses from losing customers due to dishonest practices by competitors. Conversely, prohibiting the misuse of monopoly (or substantial) market power aims to promote competition, protecting competitors and business customers of the monopoly business from unfair and uneconomic pricing or practices. But it also ensures that end-consumers are paying fair, competitive (and often lower) prices for goods and services.

An awareness of this link is shown in the TPC's first annual report, where it notes '[t]he trade practices provisions of the Act are really competition provisions, and the consumer protection provisions are really provisions for fair play in competition.'[65] However, this view still sees the two sets of rules sitting somewhat separately, albeit working together. Indeed, the two sets of provisions are contained in distinctly separate Parts of the Act. Comments by Mason J (as he then was) in a case before the High Court in 1981 regarding the application of section 52 of the Act – the prohibition on misleading and deceptive conduct – are particularly apposite here:

> [T]here is a complex issue as to the relationship between s. 52 and…the statutory object of promoting freedom of competition reflected in the provisions of Pt IV of the Act dealing with "RESTRICTIVE TRADE PRACTICES"
>
> …
>
> The object of Pt V is to protect the consumer by eliminating unfair trade practices, just as the object of Pt IV is to promote competition by eliminating restrictive trade practices. Knowledge of the history of the legislative proposals, of the legislation and of the controversy which has surrounded it might suggest that the dominant object of the Act is the promotion of freedom of competition. But examination and analysis of its provisions yields no acceptable foundation for this conclusion. The two Parts are independent and there is no direction that one Part is to be read subject to the other. Although they have to be read together as parts of the

[65] Trade Practices Commission, *Annual Report 1974–75*, Australian Government Publishing Service, Canberra 1975, at 1; as quoted in ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 15.

> same statute, they might in other circumstances have been enacted as separate statutes with not very much difference in legal effect.
> …
> The statutory policy, as it seems to me, is that the interests of a consumer of goods or services will best be served when manufacturers compete vigorously without adopting restrictive practices and observe prescribed standards of conduct in their dealings with consumers.[66]

In other words, the two sets of provisions in Parts IV and V of the Act fit together but without any underlying theoretical cohesiveness.

However, the economic roles of consumer policy and consumer protection regulation have since become much more prominent, particularly their potential to improve competition[67] This is due to an increasingly sophisticated approach to consumer policy that recognises its direct links with competition policy and its potential to improve market outcomes as well as achieve social justice.. New insights from competition, consumer and behavioural economics have prompted for these developments, so that consumer policy now attracts a more overtly economic focus or 'weighting', analysing not only its role in protecting consumers from unfair or inappropriate practices, but also how it may help make competition more effective..

By 1984, Ron Bannerman, still chairman of the TPC, wrote in the TPC's annual report:

> If we are thinking more broadly about general standards of living, then the forces that can maintain or improve industry efficiency are vital…Competition is one such force. Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in a position to do so.[68]

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[66] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, Mason J at 204.

[67] See, eg, Louise Sylvan, *Consumer regulation – How do we know it is effective?*, Speech to the National Consumer Congress, 15 March 2004. Sylvan also quotes Michael Porter: 'It might seem that regulation of standards would be an intrusion of government into competition that undermines competitive advantage. Instead the reverse can be true…Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage.': Michael E. Porter, *The Competitive Advantage of Nations*, Free Press, 1990.

[68] Ron Bannerman, in Trade Practices Commission, *Annual Report 1983–84*, Australian Government Publishing Service, Canberra 1978, at 184.

This view sees consumer protection laws as playing a more integral part in ensuring the success of competition policy and thus overall welfare, not simply by outlawing unfair practices, but by establishing the environment for consumers to be able drive competition.

By the mid-1990s, there was growing recognition for this economic role for consumer protection laws and the importance of including economic analysis in consumer policy. For example, Timothy Muris noted the benefits of applying economics to consumer protection issues in 1991, concluding:

> Like antitrust, economics can inform consumer protection policy. Like antirust, that informing function has in fact happened: consumer protection has been significantly changed over the last twenty years by economic analysis.[69]

More recently Muris, while chairman of the FTC, observed:

> Consumer protection works to ensure that consumers can make well-informed decisions about their choices and that sellers will fulfil their promises about the products they offer…If sellers make a habit of lying about their products, a pernicious atmosphere of consumer distrust may well develop…By striving to keep sellers honest, therefore, *consumer protection policy does more than safeguard the interests of the individual consumer – it serves the interest of consumers generally and facilitates competition…well-conceived competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare* [our emphasis].[70]

In Australia, it is now widely recognised that not only do fair, effective and competitive markets generally deliver the best price, quality and access to goods and services to most consumers, but that consumers are not simply passive beneficiaries of competition. Rather, they play a critical role in its success. Consumer protection laws have the potential to help ensure this.[71]

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[69] Timothy J. Muris, 'Economics and Consumer Protection', (1991-1992) 60 *Antitrust Law Journal* 103, at 121. Muris was the Director of the FTC's Bureau of Consumer Protection from 1981-1983, and Director of the FTC's Bureau of Competition from 1983-1985.

[70] Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Paper presented at The Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York City, 31 October 2002, at 4-5.

[71] See, eg, Productivity Commission, *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, box 10.3, at 280; Louise Sylvan, 'Activating competition:

Two strands of work have been central to increasing our understanding of how consumer protection laws might be used to improve competition[72] The first examines *information deficiencies* that prevent consumers from making rational choices that maximise their self-interest. This work fits within "conventional" economic thought in that it assumes consumers in general will try to act rationally to make choices that maximise their self-interest and fulfil their pre-determined preferences. The second strand draws on *behavioural economics*, which finds that consumers are subject to systematic biases in their decision-making that can mean they do not always make choices in their rational self-interest, nor do they always come to a transaction with pre-formed preferences.

Much has been written recently about both sets of work and their importance in developing consumer policy,[73] so it would be a duplication to include a detailed discussion here. However, a summary helps show how they should influence our thinking on best practice consumer protection laws.

(a) Information deficiencies – consumers' experience in markets

It is now reasonably well recognised that, as the OECD notes in the record of its April 2006 meeting of the Committee on Consumer Policy:

> Even where there is structural soundness on the supply side, however, consumer detriment can result. Policies to ensure a competitive supply

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The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1; see also, in the US, Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713; and in the UK, John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003.

[72] See OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 10-13; Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 54; Louise Sylvan, 'The Interface between Consumer Policy and Competition Policy', *Consumer Affairs Victoria 2006 Lecture*, March 2006; Joshua S. Gans, '"Protecting consumers by protecting competition": Does behavioural economics support this contention?', (2005) 13 *Competition & Consumer Law Journal* 40.

[73] Including in the Consumer Action Law Centre's recent *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 42-49.

> side are necessary, but not sufficient, to ensure there is no consumer detriment.[74]

This is because information problems in the market can cause consumers to make poor decisions or even walk away from decisions altogether.[75] Information deficiencies include asymmetries, or unequal information between consumers and suppliers, which can lead to problems such as Akerlof's famous example of creating a market for "lemons" that drives out higher quality goods - as consumers cannot judge the difference in quality, they refuse to pay for higher quality because they don't know whether that is what they are getting.[76]

Other information problems may result because the costs of obtaining and/or processing relevant information are too high for consumers relative to the benefits of doing so, or are perceived to be too high. These are often referred to as search and switching costs. It is recognised that consumers have limited ability to collect and process information before making decisions. This is called "bounded rationality".[77] Further, suppliers in a market may simply lie or provide misleading information.

These information deficiencies affect consumers' abilities to make choices that reflect their actual preferences and rational self-interest. This, in turn, affects the efficient signalling of consumer preferences to suppliers and the

[74] OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 9.
[75] See, eg, John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 5.
[76] George A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', (1970) 84:3 *Quarterly Journal of Economics* 488. Akerlof was awarded the Nobel Prize in economics in 2001 together with Michael Spence and Joseph Stiglitz for their analyses of markets with asymmetric information. The Royal Swedish Academy of Sciences, which awards the prize each year, said of this paper: 'Akerlof's 1970 essay, "The Market for Lemons" is the single most important study in the literature on economics of information.': The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2001, *Information for the Public*, available at http://nobelprize.org/nobel_prizes/economics/ laureates/2001/public.html.
[77] See OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 10. On bounded rationality, see Herbert Simon, 'A Behavioral Model of Rational Choice', in *Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting*, Wiley, New York 1957.

effective competition. Individually, these problems can lead to consumers being unhappy with their purchases, harmed or simply "ripped-off".[78]

Averitt and Lande put forward a unifying theory of antitrust and consumer protection law in an important paper in 1997, demonstrating that these are linked by the concept of consumer sovereignty – that is, '[t]here must be a range of consumer options made possible through competition, and consumers must be able to choose effectively among these options'.[79] Their theory of the overarching unity of consumer sovereignty is clearly based on understandings from the economics of information:

> Consumer protection laws…seek to protect the ability of consumers to make informed choices among competing options, but the laws do not necessarily strive to ensure that consumers have absolutely perfect information or that they act with absolutely perfect rationality…We ask that consumers be enabled to make rational choices to the extent that they wish to concentrate on doing so. Consumer protection law ensures that buyers are protected from coercion, deception, and other influences that are difficult to evade or to guard against, but it does not protect buyers from the milder, knowable influences of things like "image" advertising, which consumers could set aside if they desire.[80]

Similarly, John Vickers, then-chairman of the UK OFT, noted in a 2003 lecture that effective competition depends on effective consumer choice, which will not occur when consumers are uninformed.[81] He recognised that market mechanisms will not always fix information problems, so while consumer protection interventions may improve consumer outcomes, care must be taken not make things worse.[82]

UK academics such as Klemperer and Waterson have examined the problems for consumers caused by search and switching costs in detail, and competition more broadly. Waterson found that in markets with

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[78] See, eg, Productivity Commission, *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, box 10.3, at 280.

[79] Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713 at 713.

[80] Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713 at 716-717.

[81] John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 5.

[82] John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 11.

significant search or switching costs, firms' prices were higher (or even at the monopoly pricing level).[83] Klemperer found that switching costs are widespread and generally raise costs and create deadweight losses.[84] They both conclude that there is role for policy or interventions to address these problems. Waterson states:

> Search behaviour may be thought to be a characteristic of individual consumers and therefore not something that may be influenced by public policy, unlike the actions of firms. However, this is untrue since consumers' search costs are manipulable by those who supply the good in question…Therefore, by enforcing or prohibiting particular practices, public agencies may influence search costs…Similarly, and perhaps more obviously, switching costs are altered by various means by the suppliers in their own interest.[85]

Modern consumer protection laws therefore need to take into account the potential to address information problems, especially search and switching costs (where possible, without the costs of intervention outweighing the benefits).

The effects of information problems not being addressed by consumer protection laws have been magnified by large-scale changes in consumer markets over the past few decades.[86]

Consumer markets in Australia (and globally) are now much more diverse and complex. New products and ways of transacting are common, especially due to technological change. There are also new markets where previously Australian consumers did not need to make choices. For

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[83] Michael Waterson, *The Role of Consumers in Competition and Competition Policy*, University of Warwick Economic Research paper no.607, July 2001.

[84] Paul Klemperer, 'Competition when Consumers have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics, and International Trade', (1995) 62 *Review of Economic Studies* 515.

[85] Michael Waterson, *The Role of Consumers in Competition and Competition Policy*, University of Warwick Economic Research paper no.607, July 2001, at 5.

[86] Market changes are discussed in detail in Consumer Action Law Centre's *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 18-39; the following text is a mere summary. See also Michael J. Trebilcock, 'Rethinking consumer protection policy', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 68; Nicola Howell, 'Searching for a National *Consumer* Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294, at 297; Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 10-13.

example the formerly state-run monopolies such as energy and telecommunications. Markets have also become increasing national and international. Product and service bundling is also common, which causes further complexity and can create additional switching costs.

The need to wade through this complexity has brought large numbers of intermediaries into markets, such as financial advisers and brokers, to help consumers make decisions. However, this has created a new set of problems with suppliers often competing to attract broker business rather than consumer business. This distorts broker incentives to guide consumers to choices that best reflect their interests.

Transactions between consumers and traders of the "corner store" variety are now the exception rather than the norm. The growth of mass markets and mass consumption has led to the almost ubiquitous practice of standard-form contracts; that is, suppliers formulate their contracting terms in advance so that consumers are presented with these on a "take it or leave it" basis. This has led to very one-sided contracts that often contain a large number of terms strongly and unfairly weighted to the supplier's advantage. In making decisions, consumers tend to concentrate on core contract terms such as price and the nature of the goods or services to be purchased, as they do not have the ability or desire to consider all contract terms. This is bounded rationality in action.[87]

All these changes have accelerated since the Act was introduced in 1974 and must therefore be considered in any updates to the consumer protection provisions of the Act.

(b) Behavioural economics – consumers' behaviour in markets

New insights from behavioural economics are arguably a greater challenge to incorporate into our consumer policy and protection laws than the lessons from the economics of information. This is because they highlight that even with enough information, consumers may not use this information as expected nor make choices that maximise their self-interest. Rather, consumer decisions are subject to systematic biases[88] and can be

[87] See also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, (2003) 70 *The University of Chicago Law Review* 1203.

[88] A summary of important known biases is provided in Consumer Action Law Centre's *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 47-48. A list of biases in consumer behaviour is also provided in OECD Committee on Consumer Policy, *Roundtable on Demand-side*

influenced within the context of the transaction itself.[89] In other words, behavioural economics challenges traditional economic assumptions about how consumers behave and attempts to replace these assumptions with models of actual consumer behaviour.

The importance of this is reasonably clear. Understandings of actual consumer behaviour in a market in which problems have been observed can help determine the sort of intervention required and how it should be implemented to ensure it is effective. For example, in a recent paper Shafir pointed out that this increased understanding of actual consumer behaviour suggests that new interventions may be warranted.[90] In concluding the paper, he stated:

> Theory makes highly plausible and intuitively compelling assumptions that simply happen not to be good descriptions of how people behave. Assumptions about novelty and variety seeking stand in contrast with the status quo bias and the reluctance to decide in the face of a proliferation of alternatives; assumptions about planning and self-control ignore the actual power of contextual factors, ranging from strong temptations to the impact of imperceptible nuances; and minor psychological obstacles and channel factors have consequences that are substantially greater than any plausible cost-benefit analysis would ever imply.
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> …
>
> Because preferences can be malleable, confused, and misguided, *consumers can benefit from some attention and help*. One form in which these may be delivered is *through laws and protections appropriately structured to defend against others' unwelcome influences*, which may take any of a number of forms, including misleading advertising, hidden clauses, pressure tactics, and so on. *Another, perhaps less obvious form of help, could consist of clever arrangements structured to combat consumers' own weaknesses*, such as bad planning, myopia,

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Economics for Consumer Policy: Summary Report, 20 April 2006, Appendix II. Behavioural Biases, at 36.

[89] See, eg, Richard Thaler, 'Toward a Positive Theory of Consumer Choice', (1980) 1 *Journal of Economic Behavior and Organization* 39; Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 54; Joshua S. Gans, '"Protecting consumers by protecting competition": Does behavioural economics support this contention?', (2005) 13 *Competition & Consumer Law Journal* 40; Louise Sylvan, 'The Interface between Consumer Policy and Competition Policy', *Consumer Affairs Victoria 2006 Lecture*, March 2006.

[90] Eldar Shafir, *A Behavioral Background for Economic Policy*, Paper presented to Roundtable on Behavioural Economics and Public Policy, Productivity Commission, Melbourne, 8 August 2007.

> procrastination, overconfidence, forgetfulness, distraction, peer pressure, confusion, susceptibility to framing effects, misguided beliefs, and other such very human traits [our emphasis].
> …
> As it turns out, a behaviourally informed perspective may also need to reconsider what ought to count as ethical, and perhaps legal.[91]

In the past two years the OECD's Committee on Consumer Policy has begun examining more extensively how behavioural economics might be incorporated into consumer policy,[92] while other efforts to help policy-makers incorporate behavioural findings have also emerged.[93] This work recognises that best practice in the consumer policy now involves taking behavioural insights into account in formulating interventions, including drafting laws.

As the consumer protection provisions of the Act were certainly not drafted with behavioural economics principles in mind, at the very least this means that there is potential for change and improvement. It has also been highlighted that suppliers already manipulate consumer biases to their own benefit, whether they are conscious of doing so or not, given market incentives to increase sales.[94] Thus consumer protection laws may be needed to counteract such influences. This includes taking potential behavioural biases into account when designing interventions to address information problems, given that behavioural economics have shown that consumers may not process or use information as predicted under the "rational consumer" model.[95]

However, as behavioural economics depends greatly on empirical research, its full implications for addressing particular market concerns are

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[91] As above at 15-16.
[92] See OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006; OECD Committee on Consumer Policy, *Roundtable on Economics for Consumer Policy: Summary Report*, 26 July 2007.
[93] New Zealand Ministry for Economic Development, *Behavioural analysis for policy – New lessons from economics, philosophy, psychology, cognitive science and sociology*, October 2006; New Economics Foundation, *Behavioural economics: seven principles for policy makers*, London 2005.
[94] Jon D. Hanson and Douglas A. Kysar, 'Taking Behavioralism Seriously: Some Evidence Of Market Manipulation' (1999) 112 *Harvard Law Review* 1420.
[95] See, eg, Iain Ramsay, 'Consumer redress and access to justice', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 21; Nicola Howell, 'Searching for a National *Consumer* Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294, at 299-300.

yet unknown. Further research, including field testing of specific consumer protection interventions, is required. This may mean that while there is strong *potential* for interventions based on behavioural insights, *actual* interventions based on behavioural grounds may, for now, be limited in scope.[96]

(c) Applying the economics to consumer protection laws

While these new developments in "economics for the demand-side"[97] are, or are becoming, reasonably well-recognised, the next step will be to incorporate them more effectively into consumer policy and protection laws.

Sylvan has previously proposed a basic model for analysing both competition and consumer concerns before intervening in markets.[98] The OECD has also been developing a draft checklist and toolkit for analysing markets from both the supply and demand side to determine what, if any, interventions might be warranted.[99] This is important because intervention in consumer markets can have different outcomes. While the best result is improved competition and consumer outcomes, it is also possible that a competition outcome could increase rivalry between firms at the detriment of consumers, or a consumer protection action might raise standards for consumers but significantly impede competition or innovation.[100]

The classic example might be deregulation of an industry that was previously a state-run monopoly, introducing competition for domestic

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[96] See, eg, Koichi Hamada, 'Endogenous preferences and consumer protection: A view from Japan's legal perspective', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006 at 68; see also Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 54.

[97] Louise Sylvan, 'The Interface between Consumer Policy and Competition Policy', *Consumer Affairs Victoria 2006 Lecture*, March 2006, at 2.

[98] Louise Sylvan, 'Activating competition: The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1, at 18-27.

[99] Michael Jenkin & Louise Sylvan, *Consumers and Competition: making policies that work together*, Presentation to the National Consumer Congress, Melbourne 15 March 2007, available at www.treasury.gov.au/ncc/content/congress_proceedings.asp. It is still under development: see OECD Committee on Consumer Policy, *Roundtable on Economics for Consumer Policy: Summary Report*, 26 July 2007, at 37.

[100] Louise Sylvan, 'Activating competition: The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1, at 19-20.

consumers.[101] In many cases where this has occurred, competition outcomes have been enhanced with more suppliers and lower prices (especially business customers). However, it has also led to more complex contract terms and pricing structures, which has increased search and switching costs, making it difficult for consumers to compare offers and choose between suppliers, and thus failing to drive further price decreases. This also creates incentives for suppliers to compete for customers by creating forms of product differentiation other than price or product quality, and to use aggressive and sometimes misleading marketing techniques.

Competition is not necessarily going to be effective in such situations without interventions to enhance consumers' abilities to make good choices. This entails being able to examine markets as a whole to determine whether concerns are being caused by either, or both, competition or consumer problems and what laws or other interventions, might be applied to improve overall market outcomes for consumers.[102] This might lead to new types of laws, for example to provide simplified and/or standardised information to be made available to consumers.[103]

Sylvan has also argued that both information and behavioural economics should inform consumer law interventions. She sees conventional and behavioural economics as a powerful and complimentary combination rather than being in conflict because:

> [Their combination] makes ultimately for better implementation of policy decisions in consumer protection. If one is intervening in a market, either for the purposes of reform and improvements in competition or in relation to consumer empowerment and protection, one wants to be sure to have the desired effect and to get the results intended.[104]

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[101] Louise Sylvan, 'Activating competition: The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1, at 29-31; Michael Waterson, *The Role of Consumers in Competition and Competition Policy*, University of Warwick Economic Research paper no.607, July 2001.

[102] See, eg, Louise Sylvan, 'Activating competition: The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1 at 14-17; cf Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713, at 744-746.

[103] Michael Waterson, *The Role of Consumers in Competition and Competition Policy*, University of Warwick Economic Research paper no.607, July 2001 at 20; see also John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003.

[104] Louise Sylvan, 'The Interface between Consumer Policy and Competition Policy', *Consumer Affairs Victoria 2006 Lecture*, March 2006, at 13.

Smith and King agree, noting that while it will be challenging, this is precisely why the two approaches should be integrated:

> Development of a more rigorous theory of consumer behaviour, incorporating insights from neoclassical and from behavioural and experimental economics may result in a consumer protection policy that is more effective in preventing undesirable conduct. Not only may this reduce the amount of harmful conduct, it may do so at a reduced cost to society.[105]

They suggest some useful principles for beginning to incorporate both approaches into policy and law making, as well as two basic propositions that should underpin all interventions. These are that intervention is only justified when the market is unlikely to respond adequately or in a timely fashion, and that the benefits of intervention exceed the costs. Essentially, their model involves taking a conservative or "do no harm" approach to intervention based on insights from both streams of economics.[106]

They propose that markets be assessed from both a conventional and behavioural economic standpoint. Where both approaches identify risks to consumers (and thus to good market outcomes), policy intervention may be warranted. However, this does not mean that the cause of any consumer risk has been identified. If intervention can be designed that addresses the risk, regardless of whether the problem can be explained by an informational or behavioural analysis, such intervention can be implemented. Smith and King give the example of dummy bidding at real estate auctions. This practice causes consumer problems under both an informational analysis (it transmits false information) and a behavioural analysis (it excites the crowd and changes bidder attitudes and behaviour). Laws to make dummy bidding illegal, and/or to require bidders to pre-

[105] Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 67.

[106] See also Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue, and Matthew Rabin, 'Regulation for conservatives: Behavioral economics and the case for "asymmetric paternalism",' (2003) 151 *University of Pennsylvania Law Review* 1211: 'We propose an approach to evaluating paternalistic regulations and doctrines that we call "asymmetric paternalism." A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational. Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices.' (at 1212).

register, addresses the problem regardless of which approach is correctly identifying the risks.[107]

However, if different forms of intervention are justified depending on which approach is used to analyse the underlying cause of the risks, or intervention is only justified under one approach, more work may be needed to identify the actual cause of the risk before intervening. Alternatively, different solutions should be formulated that at least partially address concerns under one or both approaches, while doing no harm under the other. Smith and King give the example of high-pressure sales, which should have little or no effect on consumers under an informational approach as consumers will rationally assess their options and choose in their best interests. However, such sales could distort consumer choices if looked at from a behavioural approach. Rather than a solution such as banning door-to-door sales, which may fix the risks but limit consumer choices and harm consumers with limited mobility, it may be better to legislate for a cooling-off period for sales susceptible to high-pressure tactics. This would give consumers time to re-think purchases but would be unlikely to cause much detriment under the informational approach as extra time will not affect decisions.[108]

This approach could be used to analyse other consumer protection problems. For example, as mentioned, product bundling and one-sided standard-form contracts have become more common in modern consumer markets. Both can create a "lock-in" situation, where consumers may get a good deal on price up-front but may then face higher costs for secondary or tied products or may face large switching costs if they exit the contract

[107] Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 63-65.

[108] Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 65-67; but cf Iain Ramsay, 'Consumer redress and access to justice', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, who notes that cooling-off periods might not work in practice due to problems of cognitive dissonance – making use of a cooling-off period requires the consumer to acknowledge their previous choices were incorrect or view themselves as irrational or a victim, which consumers find psychologically difficult to do. Ramsay suggests cooling-off periods might be more effective if framed as "trial periods" (at 29-30). This highlights the complexities of incorporating behavioural economics into the design of consumer protection laws, particularly in the absence of specific empirical testing of proposed or actual interventions.

(through contract terms imposing high early-termination fees). This is sometimes referred to as a "bargain-then-ripoff" situation.[109]

Vickers has pointed out that lock-ins can be seen as an information problem. The consumer may analyse all the relevant information about prices for secondary products or the costs of possible contingencies that might arise, to determine whether to enter a transaction. However, while suppliers benefit from economies of scale that make it worthwhile to process all of this information, it would be irrational for an individual consumer to do so for one transaction. However, this may mean that the consumer enters into a transaction that appears to be beneficial up-front but is in fact inefficient and costly overall.[110]

Gans has looked at how consumers may be led into lock-in situations or over-consuming up-front products due to the bias of hyperbolic discounting, or "short-termism". He says consumers tend to disproportionately value up-front benefits relative to long-term costs and may also both over-estimate how much value they will get from products or services, and under-estimate the costs of switching. Again, this may mean that consumers over-consume compared to what they may have chosen if all relevant costs had been taken into account.[111]

If we wanted to tackle the problem of "lock-ins", both approaches would be useful for designing potential interventions. In fact, both Vickers and Gans draw similar conclusions. They point out that lock-in problems do not mean there should be a rush to restrict consumer and producer choice, for example by imposing pricing regulation, as this might create more costs than benefits. However, neither do they simply conclude that the only solution is to provide more information or education to consumers about these sorts of transactions, although that can be helpful. Rather, both suggest market or industry analysis, examining producer and consumer conduct to identify specific problems and determine the best solutions in each circumstance.[112]

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[109] See, eg, John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 13-14.

[110] John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 13-15.

[111] Joshua S. Gans, '"Protecting consumers by protecting competition": Does behavioural economics support this contention?', (2005) 13 *Competition & Consumer Law Journal* 40.

[112] Cf Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, George Mason University School of Law, Law and Economics Working Paper Series paper no. 04-19, 2004, at 79, 84, where he notes the

Vickers also notes that the UK's unfair contract terms regulations are an appealing remedy as they do not create a blanket restriction on contracting, and only restrict freedom of contract for terms that are contrary to good faith and cause an imbalance against the consumer. Thus there is not much risk that terms that are mutually beneficial and efficient would be rendered ineffective. He sees such interventions as a form of micro-competition policy, as consumers in lock-in situations are vulnerable to the exploitation of market power once in the transaction and consumer policies that address such issues 'combat micro-competition problems in large numbers'.[113]

This indicates that an important role for consumer protection laws now lies in helping address problems in markets, where those problems are causing detriment to individual consumers and/or generally harming efficient market outcomes. There are no obvious solutions to addressing demand-side problems in every case, but taking a flexible and creative approach with consumer protection laws may be useful, particularly by using more sophisticated market or industry analysis to identify problems and their causes rather than using blunt tools that simply ban conduct or, conversely, simply provide more and more information to consumers. It is also clear that any potential interventions, including consumer protection laws, need to be fully assessed for costs and benefits so that only those that provide overall benefits are considered, and interventions that address specific problems do not cause harm or distort outcomes in other ways.[114]

This approach also accords with what Iain Ramsay has identified as applying "Third Way" principles to consumer protection. It moves past disputes about whether consumers simply require more information, or

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importance of the FTC continuing to engage in policy research and development to increase its knowledge base for responding to new issues.

[113] John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 16-17.

[114] The issue of cost/benefit analysis of regulation would form another report in its own right. It is acknowledged here as it is undoubtedly of critical importance. However, much has been written on this issue in Australia in recent times thus it is unnecessary to go into further detail in this Report. For more discussion of this issue see Consumer Action Law Centre, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, section 43 at 55-60. See also, eg, Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January 2006; Productivity Commission, *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, box 10.3, at 280.

whether they require extensive protection in markets. Instead it puts the market in a central position for achieving good results for consumers, while recognising the need for a wide range of other initiatives to meet economic and social policy goals, such as more supply-side competition, empowering consumers by providing better information and reducing switching costs, and eliminating the worst examples of harmful or unfair conduct by suppliers.[115]

4.1.2 Social justice role for consumer protection laws

While the relative weighting given to the economic role of consumer protection laws has increased since the Act was first introduced, the relative importance attached to the social policy role has decreased.

There is still solid recognition that consumer protection laws strive to meet important social policy goals. For example, the Productivity Commission identified both economic and social policy roles for consumer policy in its Draft Report for the current inquiry into Australia's consumer policy framework.[116]

However, compared with developments in applying economics to consumer policy and on consumer policy's role in improving competition, there has not been the same level of debate in Australia on the continued role of social policy in designing consumer protection laws. A good example of this mentioned in the Productivity Commission's report on its review of the National Competition Policy reforms:

> Though having important social objectives, consumer protection policy has significant complementarities with competition policy. Hence, in this area too, there would be advantages in pursuing reform within a broadly-based [economic reform] program.[117]

There has also been a tendency to see social policy goals as conflicting with economic goals, particularly where consumer protection laws have a

[115] Iain Ramsay, *Consumer Credit Regulation as "The Third Way"?*, Keynote Address to the 2nd National Consumer Credit Conference, Melbourne 9 November 2004.
[116] See text at n57 above.
[117] Productivity Commission, *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, at XLI.

redistributive function.[118] Accordingly, the Productivity Commission's Issues Paper in the current inquiry into Australia's consumer policy framework notes:

> In selecting policy tools, the protection of disadvantaged and vulnerable consumers is often a key concern for policymakers. Meeting the needs of these groups poses a number of challenges…designing policy instruments that precisely target those judged to be disadvantaged or vulnerable can be difficult. Accordingly, much consumer policy does not differentiate on this basis. However, the use of 'universal' approaches in order to protect an often relatively small group of consumers may be, on the one hand, costly, or on the other ineffective if too many compromises are made to limit such costs.[119]

It has been pointed out that the distinction between economic and social goals may not be always helpful. If the aim of a policy promoting efficient market outcomes is to benefit consumers by providing quality products at fair prices then such a policy relates to both economic efficiency and equity.[120] A central social policy goal of consumer protection laws has always been to ensure fair trading.[121] Behavioural economics has shown that fairness matters to consumers, so promoting fairness can have economic benefits.[122] Drawing the distinction also belies "Third Way" approaches to consumer policy that involve a range of different interventions.

Nevertheless, promoting economically efficient outcomes will not always sit harmoniously with socially just outcomes. A notable exception has been provided by writers, often consumer advocates, who claim that consumer policy does more than simply encourage better competition, and that

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[118] See Iain Ramsay, *Consumer Credit Regulation as "The Third Way"?*, Keynote Address to the 2nd National Consumer Credit Conference, Melbourne 9 November 2004, at 5.

[119] Productivity Commission, *Consumer Policy Framework: Productivity Commission Issues Paper*, January 2007, at 18.

[120] Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*, Cambridge University Press 2001, at 1-2.

[121] See Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 17.

[122] See, eg, New Zealand Ministry for Economic Development, Behavioural analysis for policy – New lessons from economics, philosophy, psychology, cognitive science and sociology, October 2006, at 18; also discussed in Consumer Action Law Centre, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 47.

efficient competition may conflict with social justice considerations, meaning that social policy concerns may need to be prioritised.[123]

In this way, consumer protection laws become more than simply a handmaiden to competition laws. McAuley has noted:

> Often there is often [sic] a trade-off between equity and efficiency, but there is a large arena in which no such trade-off is necessary…Sometimes, of course, there is no means available to avoid a trade-off. Even the most free-enterprise oriented societies reserve a set of rights which are not to be exchanged in the marketplace. Children may not sell their labour, it is illegal to contract to take someone's life, we cannot (ostensibly) sell our right to vote, and we cannot offer 450 grams of flesh as security for a loan.[124]

Economics cannot answer whether such a trade-off should be made, as inherent in the notion of a trade-off is the fact that some economic benefits will be sacrificed. Whether a particular trade-off is worth making is therefore a question that involves value judgements about what is acceptable. The "Third Way" approach encompasses making such judgements in assessing the range of interventions to be employed. But there is no doubt is that consumer protection legislation has a role to play in meeting these social justice objectives.

There has been significant development in the social policy goals of consumer protection laws in recent times. In section 3.1 it was noted that modern consumer policy, emerging from developments in the 1960s, had a strong social justice and fair trading focus. These concerns aimed to ensure the fair treatment of consumers generally, thus the consumer protection provisions of the Act reflect this general approach.

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[123] See, eg, Nicola Howell, 'Searching for a National *Consumer* Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294; David Tennant, *The Acid Test - Evaluating the outcomes from the think tank sessions from the viewpoint of the disadvantaged consumer*, Remarks to the National Consumer Congress, Sydney, March 2005; Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*, Cambridge University Press 2001; Thomas Wilhelmsson, 'Consumer Law and Social Justice', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 217; Geraint Howells, 'Seeking Social Justice for Poor Consumers in Credit Markets', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 257.

[124] Timothy J. Muris, 'Economics and Consumer Protection', (1991-1992) 60 *Antitrust Law Journal* 103; Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 1.

Wilhelmsson has noted:

> The basic relationship of consumer law is the relationship between a consumer and an enterprise. The problems to be regulated are defined within this relationship…The actors on the scene are "the good consumer" against "the bad enterprise".
>
> This consumer protection ideology is based on an abstract consumer concept…The application of the protective measures does not require that the consumer be given specific characteristics.
> …
> In this sense, one may say that consumer law helps to conceal the unjust distribution of benefits in society. It makes invisible the fact that there are consumers with different problems and different needs.

The different challenges faced by low-income or otherwise disadvantaged consumers in consumer markets, in comparison with consumers in general, has been made less 'invisible'. The social policy focus of consumer policy has shifted to concentrate on the needs of vulnerable groups in the community.[125]

Changes in modern consumer markets brought about by microeconomic reform, such as deregulation and national competition policy, may have brought great overall benefits to the Australian community but have often exacerbated problems experienced by disadvantaged groups, for example by dismantling former hidden cross-subsidies.[126] Howell has also noted that competition can create winners and losers and points out that highly competitive markets with low barriers to entry and exit can, in fact, provide a greater source of risk to disadvantaged and vulnerable consumers as they are more attractive to fraudulent "fly by night" operators.[127] Tennant has stated:

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[125] See, eg, CAV, *Discussion Paper: What do we mean by 'vulnerable' and 'disadvantaged' consumers?*, March 2004; ACCC, *Don't take advantage of disadvantage: A compliance guide for businesses dealing with disadvantaged or vulnerable consumers*, August 2005, produced as part of an ACCC campaign to protect disadvantaged and vulnerable consumers.

[126] See Anna Stewart (ed), *Do the Poor Pay More? – A research report*, Consumer Law Centre Victoria, Melbourne 2005.

[127] Nicola Howell, 'Searching for a National Consumer Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294, at 298.

> For consumer advocacy agencies, particularly those responding to the needs of low income and disadvantaged consumers, concerns about the preoccupation with competition are fundamental. There is no doubt that competition is part of delivering good outcomes to consumers. It is however one tool, not the whole game. Indeed it is often the case that where competition is delivering benefits, they are far from equitably spread.
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> …
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> [I]t is not a matter of consumer advocates seeking to undermine the potential value of good, fair, active competition. It is very much about…recognition that consumer protection is not an automatic by-product, but a policy priority in its own right.[128]

Effective competition does not always work for low-income and disadvantaged consumers because markets tend to naturally exclude them from mainstream products and services. Businesses will seek the most attractive customers and avoid the less profitable, or only service them at a higher price to recover costs. Therefore disadvantaged consumers may not be able to access the benefits of competition (such as lower prices).[129] This is not necessarily an information problem – low-income consumers are usually aware that they are entering expensive or exploitative transactions – however they will still do so because their options are limited.[130]

In Australia, it is generally agreed that we don't want entrenched disadvantage in consumer markets or our general community..[131] Consumer protection laws have been used to tackle some of the issues facing low-income and disadvantaged consumers, for example mandating interest-rate ceilings in the consumer credit market. Other market-wide

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[128] David Tennant, *Reviewing and updating the consumer protection provisions of the Trade Practices Act – Recognising and navigating the speed humps*, Presentation to the National Consumer Congress, March 2004, at 5.

[129] See Anna Stewart (ed), *Do the Poor Pay More? – A research report*, Consumer Law Centre Victoria, Melbourne 2005; David Caplovitz, *The Poor Pay More: Consumer Practices of Low Income Families*, New York: Free Press 1967.

[130] Nicola Howell, 'Searching for a National Consumer Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294, at 299; David Tennant, *The Acid Test - Evaluating the outcomes from the think tank sessions from the viewpoint of the disadvantaged consumer*, Remarks to the National Consumer Congress, Sydney, March 2005, at 3; Dean Wilson, *Payday Lending in Victoria – A research report*, Consumer Law Centre Victoria, 2002, at 77-78, 81-82.

[131] See, eg, Senate Standing Committee on Community Affairs, *A hand up not a hand out: Renewing the fight against poverty - Report on poverty and financial hardship*, March 2004.

provisions may also be relevant for disadvantaged consumers, such as prohibiting unconscionable conduct, harassment and coercion and misleading and deceptive conduct in Parts IVA and V of the Act.[132]

However, there are concerns, such as those expressed by the Productivity Commission about using consumer protection laws to provide "in-market" solutions to address disadvantage. These concerns question whether intervention to address disadvantage may distort market outcomes, becoming inefficient and costly. The alternative approach focuses on enhancing efficient, competitive market outcomes, while using the broader taxation and transfer (welfare) system *ex post* to meet social welfare goals such as redistributing market gains to the disadvantaged.

In other words, the biggest development in understanding the social policy role of consumer protection laws in the past few decades – that they should recognise and address the particular needs of low-income and disadvantaged groups of consumers – is now facing strong obstacles to incorporation in our laws due to the emphasis now being given to the economic role of consumer policy. The result is that there is still some way to go in ensuring best practice social policy is reflected in Australia's consumer protection framework.

This does not mean that any in-market intervention to tackle problems being faced by disadvantaged groups should always be the preferred option. Using consumer protection laws to address disadvantage should, be subject to cost/benefit analysis but, importantly, this should be undertaken *together* with judgements about whether the economic costs of the intervention can be justified by the social welfare goals to be achieved. However, abrogating responsibility for dealing with disadvantaged and vulnerable consumers to the tax and transfer system in all cases could not be seen as best practice.[133]

For example, McAuley has noted that while taxation and transfer payments will be the principal way to achieve distributional goals, governments can also use interventions within markets to do so. Recognising that such interventions can have unintended consequences or costs, he also points

[132] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 86.

[133] In addition to the discussion below, there is detailed discussion of using consumer policy as a tool to address disadvantage, including through targeted measures, in Consumer Action Law Centre, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, section 5.3, at 78-89.

out that in other cases the pure economic theory might suggest they are inefficient, but in practice they might be administratively simpler.[134]

In some cases, market problems for low-income and disadvantaged consumers may also be considered so undesirable or exploitative that they should be eliminated, even at a cost to market efficiency. Wilhelmsson says consumer protection laws cannot remove all such problems without removing the market mechanism. However they can help remove the worst special markets for the disadvantaged.[135] Similarly, Ramsay's application of "Third Way" principles to the consumer policy field moves past traditional tax and transfer programs and may include regulation to stop the most overreaching or unfair conduct in markets.[136]

Best practice may therefore be better represented by the draft checklist and toolkit that the OECD has been developing to help in market analysis and potential interventions, referred to in section 4.1.1(c) above. The expanded decision tree provided to help analyse the demand-side of the market includes a specific focus on whether costs are falling on vulnerable or disadvantaged groups as a basis for action, regardless of the overall cost/benefit of intervention.[137]

Such interventions may be regarded as paternalistic, although as discussed above consumer protection has always involved some paternalistic motives.[138] Howells notes that paternalism can be used as a label to undermine interventions by claiming they interfere with freedom to choose. Alternatively, the same interventions can be seen as common sense, preventing people from harming themselves and creating flow-on

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[134] Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 49-50.
[135] Thomas Wilhelmsson, 'Consumer Law and Social Justice', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 225.
[136] Iain Ramsay, *Consumer Credit Regulation as "The Third Way"?*, Keynote Address to the 2nd National Consumer Credit Conference, Melbourne 9 November 2004, at 5-6.
[137] OECD Committee on Consumer Policy, *Roundtable on Economics for Consumer Policy: Summary Report*, 26 July 2007, at 13; also in Michael Jenkin & Louise Sylvan, *Consumers and Competition: making policies that work together*, Presentation to the National Consumer Congress, Melbourne 15 March 2007, available at www.treasury.gov.au/ncc/content/congress_proceedings.asp.
[138] See text at n55-57 above.

harm and costs to the community.[139] For example, Part V of the Act contains laws that allow for minimum product safety standards, even though imposing such standards reduces consumers' freedom to choose to buy cheaper but more dangerous goods, as in some cases the danger posed by unsafe goods is deemed too high, both for individuals for the community.[140] Howells argues that 'the fact that poverty is one of the circumstances causing the danger does not remove the moral imperative to act'.[141]

The real criticism of paternalism lies when an intervention that limits choice harms the people it is meant to help or protect.[142] Several commentators claim that rather than limiting choices, regulation may be necessary to *protect* consumers' ability to make more effective choices [143] It may be regarded as paternalistic if interventions (or the lack thereof) mean that consumers are still left to make their own choices in dangerous markets, perhaps over-relying on interventions that simply provide more information to consumers, harming the consumers they are meant to empower with freedom of choice.

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[139] Geraint Howells, 'Seeking Social Justice for Poor Consumers in Credit Markets', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 263.

[140] See also Productivity Commission, *Review of the Australian Consumer Product Safety System,* Research Report, Canberra 2006, chapter 2, at 11-48.

[141] Geraint Howells, 'Seeking Social Justice for Poor Consumers in Credit Markets', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 263.

[142] See Geraint Howells, 'Seeking Social Justice for Poor Consumers in Credit Markets', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 276.

[143] Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 50-51; Iain Ramsay, *Consumer Credit Regulation as "The Third Way"?*, Keynote Address to the 2nd National Consumer Credit Conference, Melbourne 9 November 2004, at 12-13; see also, eg, Joshua S. Gans, '"Protecting consumers by protecting competition": Does behavioural economics support this contention?', (2005) 13 *Competition & Consumer Law Journal* 40; Michael Waterson, *The Role of Consumers in Competition and Competition Policy*, University of Warwick Economic Research paper no.607, July 2001; Paul Klemperer, 'Competition when Consumers have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics, and International Trade', (1995) 62 *Review of Economic Studies* 515; Colin Camerer, Samuel Issacharoff, George Lowenstein, Ted O'Donoghue, and Matthew Rabin, 'Regulation for conservatives: Behavioral economics and the case for "asymmetric paternalism",' (2003) 151 *University of Pennsylvania Law Review* 1211.

One way to reduce any costs or market-distorting effects of these types of consumer protection laws is to target laws so that they only operate in particular circumstances and avoid universal requirements that may be unnecessary for others.[144] Another way to reduce distortions and costs is to avoid overly prescriptive laws, such as outright bans (for example, prohibition of contract terms; or bans on all door-to-door sales) in favour of more flexible laws that prohibit unfair conduct in these contexts. More flexible laws put suppliers on notice that they should take consumer interests into account, particularly with regard to disadvantaged consumers, while avoiding overly prescriptive and inflexible requirements on businesses and still allowing for courts or other dispute-resolution forums to make judgments in individual cases.[145] They can also target unscrupulous traders without imposing rigid proscriptions on honest businesses, and are flexible enough to adapt to changes in practises and social mores.[146] By making use of such legal techniques it is, as Howells notes (in the consumer credit context):

> …perfectly feasible to have a competitive free market underpinned by principles of social justice, which require creditors to be sensitive to the concerns of the disadvantaged in our society.[147]

A summary of best practice principles can be derived from the discussion above and is provided in Box 1 below.[148]

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[144] See Consumer Action Law Centre, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 85-87 for more details on using targeted laws and targeted policies. As these would often involve industry-specific rules as opposed to market-wide provisions, they are not canvassed in detail in this Report.

[145] See, eg, Geraint Howells, 'Seeking Social Justice for Poor Consumers in Credit Markets', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 272-276; Paul O'Shea and Charles Rickett, 'In Defence of Consumer Law: The Resolution of Consumer Disputes', (2006) 28:1 *Sydney Law Review* 139; cf John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 15-16 on the benefits of unfair contract terms regulations.

[146] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 22-25.

[147] Geraint Howells, 'Seeking Social Justice for Poor Consumers in Credit Markets', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 279.

[148] Note that these best practice principles for consumer protection law dovetail with the eight principles for updating Australia's overall consumer protection framework set out in

Box 1 - Best practice principles for modern consumer protection laws

Modern consumer protection laws should:

1. Address both social and economic goals

In many cases it will be possible to craft laws that meet both goals; in other cases it may be necessary to choose between economic efficiency and upholding a minimum set of rights or standards.

2. Protect and promote consumers' ability to drive effective competition from the demand side of the market

Effective competition will not necessarily occur just because the supply side of a market is structurally sound. Consumers must also be able to choose effectively among the options provided. The benefits of such laws should outweigh their costs.

a) Do this by addressing consumer information problems, such as asymmetries, search and switching costs and bounded rationality

This includes taking into account the large changes in consumer markets over the past few decades.

(b) Do this by drafting laws that take consumer biases and other behavioural insights into account

This includes using behavioural insights in the design of laws to address information problems and in assessing what conduct by suppliers should be permitted.

3. Promote fair trading - fairness in individual transactions between traders and consumers

Ensuring fairness in markets has both social justice and economic benefits.

4. Address the particular needs of, or problems faced by, low-income and disadvantaged consumers in markets

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the Consumer Action Law Centre's recent *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 51-55.

This cannot be a purely economic question (although cost/benefit analysis is still relevant), as it must involve judgements about acceptable outcomes and may constitute a separate basis for legal intervention, distinct from overall market interventions.

5. Make use of more sophisticated market or industry analysis and flexible rules.

Identifying problems using comprehensive market or industry analysis allows for laws that tackle these problems in more creative and sophisticated ways. Flexible and market-wide rules can reduce the costs and increase the efficacy of laws by prohibiting undesirable conduct while avoiding overly- prescriptive and inflexible requirements. Laws aims at disadvantaged consumers can also be used to avoid costs associated with rules unnecessary for the rest of the market.

4.2 Assessing our consumer protection law objectives

We need to be clear about the objectives of the consumer protection provisions in the Act before we can assess whether they meet best practice. If the provisions effectively implement the Act's objectives but the objectives themselves are outdated, the provisions will not be at world's best standards.

The previous section illustrated that over several decades there have been important developments in the way we understand the economic and social policy underpinnings for consumer policy. Pressures on consumer policy and laws have also arisen from increased market and product complexity, mass- transacting and contracting and the emergence of market intermediaries. These changes suggest that our approach to consumer protection, including the Act, would benefit from an overarching objective for consumer policy. New initiatives and the ongoing effectiveness of the Act can then be assessed against the objective.

The objects clause makes it easier to assess the aims of the Act, as discussed in section 3.2:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.[149]

[149] *Trade Practices Act 1974* (Cth) s.2.

The objects clause benefits from having been inserted more recently than the provisions it corrals. When inserting the clause, the Government made clear that it wished to promote reform through competition and economic efficiency, but as part of a broader public policy including social considerations.[150] That's why it remains essentially a valid and appropriate objective, despite changes since the Act was introduced. Overall welfare requires economic and equity or social policy considerations to be balanced so that all Australians may benefit.

In recognising the need to enhance overall welfare through different means, such as the promotion of competition, fair trading and consumer protection, the object allows for both supply and demand-side initiatives to reach the overall welfare goal. Even if, as Mason J noted in the *Parkdale Custom Built Furniture* case, the restrictive trade practices and consumer protection provisions sit fairly distinctly within the Act,[151] the objects clause is flexible enough to encompass new understandings of how supply and demand-side interventions can each help promote effective competition.. One small change to improve the objects clause in this regard might be to refer to 'effective' competition, given that 'competition' within the objects clause has historically been taken to mean only the supply side interventions in the Act and a change might help to break this line of thinking while reflecting the overall goal.

There are two areas on which the object of the Act could say more. The first concerns the social policy objective of ensuring the needs of disadvantaged consumers are addressed by our consumer protection laws, reflected by principle 4 in Box 1 earlier. The object of enhancing 'the welfare of Australians' is open to an interpretation that encompasses looking after the welfare of different groups of Australians, not just welfare in aggregate. However, on face value it does seem to imply a more utilitarian approach, with the Act perhaps only intended to enhance consumer welfare in total and/or on average, not necessarily ensure that disadvantaged consumers are not left behind.

This sort of utilitarian approach could no longer claim to meet best practice in consumer protection, as detailed in section 4.1.2 above. It is well-

[150] Senator The Hon R.A. Crowley, Minister for Family Services, *Competition Policy Reform Bill 1995 Second Reading Speech*, 29 March 1995.
[151] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, at 204.

recognised that such an approach can be regressive to social justice.[152] While, the existing objects clause could be interpreted to encompass these concerns, it may be wiser to guarantee that best practice on this issue is followed by amending the objects clause so there is no doubt that it intends to ensure that the welfare of all Australians, including low-income or disadvantaged consumers, is enhanced.

The second area in which the objects clause could be improved is in its recognition of the place of the Act and its provisions within the Australian federal system. As noted in section 3.1, when it was introduced the Act overtook previous state efforts at consumer protection legislation despite the Australian Government's lack of explicit constitutional power in the consumer protection area. It became the national standard for consumer protection and was eventually mirrored in each of the States and Territories.[153] The second reading speech on the original Trade Practice Bill states:

> 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.[154]

However, there is no explicit recognition in the objects clause that the Act intends to set national leadership on consumer protection, despite the fact that it is clearly economy-wide legislation and despite the 1983 agreement of the Standing Committee of Consumer Affairs Ministers to adopt uniform fair trading laws based on Part V of the Act.

Several commentators have remarked on the need for national leadership on consumer affairs, particularly since consumer markets have become increasingly global, let alone changes in inter-state or national markets.[155]

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[152] See, eg, Thomas Wilhelmsson, 'Consumer Law and Social Justice', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 222-224; Iain Ramsay, 'Consumer redress and access to justice', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 33-34.

[153] See text at n8-17 above.

[154] Senator the Hon L.K. Murphy QC, Attorney General, *Trade Practices Bill 1974 Second Reading Speech*, 30 July 1974.

[155] See, eg, Simon Smith, 'Consumer Affairs: The Cinderella of government policy making' (2003) 28:4 *Alternative Law Journal* 182; Nicola Howell, 'Searching for a National *Consumer* Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294, at 302-303; David Tennant, *Reviewing and updating the consumer*

Government reports have also remarked on the potential benefits of uniform national consumer legislation, particularly in reducing compliance costs for business (costs which are ultimately passed on to consumers).[156]

While the Act should play a central role in setting standards on national consumer protection laws, it does mean that a federal piece of legislation mirrored by state legislation is the only way to achieve uniform national consumer protection laws,[157] nor that the Act should explicitly set standards for the States and Territories to follow. Nor does the Federal Government need to amend the objects clause of the Act before it can take a leadership role on consumer policy. These are all live issues for the Productivity Commission's current inquiry into consumer policy[158] and while these matters are beyond the scope of this Report, it is simply noted that amending the objects clause to include a reference to the Act's national role could be one option.

In summary, best practice objectives for the consumer protection laws of the Act to strive towards might be framed by simply changing the current objects clause: 'to enhance the welfare of all Australians, including the low-income or disadvantaged, through the promotion of effective competition, fair trading and consumer protection'.

4.3 Meeting our consumer protection law objectives

The consumer protection provisions of the Act, particularly Part V, should focus on meeting the objectives set out above if they are to reflect best practice. This report suggests the provisions partly meet these objectives, but that the Act needs to be updated on several identifiable fronts.

4.3.1 The consumer protection provisions of the Act

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protection provisions of the Trade Practices Act – Recognising and navigating the speed humps, Presentation to the National Consumer Congress, March 2004.

[156] See, eg, Productivity Commission, *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, at 281; Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January 2006, at 51-52.

[157] See, eg, Nicola Howell, 'Searching for a National *Consumer* Policy Reform Program?', (2005) 12 *Competition & Consumer Law Journal* 294, at 302-303; Simon Smith, 'Consumer Affairs: The Cinderella of government policy making' (2003) 28:4 *Alternative Law Journal* 182, at 183-4.

[158] Productivity Commission, *Consumer Policy Framework: Productivity Commission Issues Paper*, January 2007, at 22.

Most of the consumer protection provisions of the Act are contained in Part V, separated into several divisions. Division 1 contains the core prohibitions on a list of general and market-wide unfair practices, including the important prohibition on engaging in conduct that is misleading or deceptive or is likely to mislead or deceive.[159]

Other divisions in Part V include:

- Division 1AAA, which prohibits engaging in a pyramid selling scheme. This prohibition was originally contained in Division 1;[160]
- Division 1A, which sets out a product safety scheme prohibiting the supply of goods that are subject to a ban or do not meet safety or information standards declared by the Minister; and
- Division 2, which implies certain conditions and warranties into contracts for the supply of goods or services to consumers, including conditions that the supplier has the right to sell the goods; that the goods will be of merchantable quality and reasonably fit for any purpose for the goods made known to the supplier; and, where relevant, that goods will correspond with their description or the sample provided; and warranties that the supplier will render services with due care and skill; that any materials supplied in connection with the supply of services will be reasonably fit for the purpose for which they are supplied; and that the services will be reasonably fit for any purpose for the services made known to the supplier. These conditions and warranties cannot be excluded, restricted or modified in any way by suppliers where the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption (in other words, most consumer goods).[161]

Other parts of the Act contain important provisions directly relevant to consumer protection functions, including:

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[159] S.52.

[160] Originally s.61. Division 1AAA was inserted by the *Trade Practices Amendment Act (No. 1) 2002*.

[161] The other divisions in Part V are Division 1AA - Country of origin representations; Division 2A - Actions against manufacturers and importers of goods, which provides for manufacturer and importer liability to compensate consumers for loss or damage caused by defects in supplied goods that broadly correspond with defects covered by the implied conditions and warranties in Division 2; and Division 3 – Miscellaneous, which includes savings of other laws and a right for consumers to rescind a contract for breach of a condition (but not warranty) implied by Division 2.

- Part IVA, which prohibits engaging in unconscionable conduct in connection with the supply or possible supply of goods or services to a person (a consumer). This prohibition was originally contained in Part V;[162]
- Part VC, which replicates the general unfair trading provisions of Part V Division 1, apart from section 52 –misleading and deceptive conduct generally – for the purpose of rendering them criminal offences;[163] and
- Part VI, which provides for enforcement of the substantive consumer protection provisions, including the Part VC criminal offences, and for remedies where a person has suffered loss or damage due to prohibited conduct (discussed further below).[164]

Part IVB of the Act is also often referred to when discussing the consumer protection provisions because it allows regulations to make industry codes mandatory, and the definition of an industry code includes a code regulating the conduct of participants in an industry towards either other participants in the industry or consumers in the industry.

4.3.2 Gaps in our current consumer protection provisions

Taken together, the consumer protection provisions provide a reasonably comprehensive framework of laws targeting unfair practices and practices that distort competitive market outcomes from the demand side. Misleading conduct, such as false advertising or representations, is the most

[162] Originally inserted into the Act as s.52A by the *Trade Practices Revision Bill 1986* s.22, it was renumbered as s.51AB and placed into a new Part IVA – Unconscionable Conduct by the *Trade Practices Legislation Amendment Act 1992* s.8.

[163] Part VC also includes as criminal offences pyramid selling and the supplying of goods subject to a ban or that do not meet safety or information standards declared by the Minister.

[164] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, Appendix B, at 170 contains a good, more detailed, description of the fair trading and consumer protection provisions of the Act. Other Parts of the Act that have some relevance to consumer protection include Part VA - Liability of manufacturers and importers for defective goods, which provides for manufacturer and importer liability for the supply of defective goods if they cause injury or loss to consumers; Part VIB - Claims for damages or compensation for death or personal injury, which regulates claims for personal injury damages and non-economic loss relating to Part IVA, Part V Divisions 1A or 2A (and 1 to some extent for actions relating to tobacco product usage), or Part VA; and Parts XID - Search and seizure and XII - Miscellaneous, which set out the ACCC's inspection, search and seizure and information gathering powers for investigations of potential contraventions of the Act.

fundamental example of trading practices that are considered unfair, but which also prevent consumers from making effective choices.[165] The provisions deal with this through specific rules in Division 1 of Part V against known examples but also through the flexible overarching prohibition in section 52.

Both the product safety and conditions and warranties regimes set baseline levels of consumer protection that limit consumer choices to some degree but that also ensure consumer confidence in buying goods and services, especially if consumers have limited information or experience on which to draw before purchase. They also meet ensure consumers are protected from unfair surprises post-purchase and, most importantly, protect consumers from unreasonable health and safety risks.

The consumer protection laws benefit strongly from the two fundamental and flexible provisions section 51AB and section 52 – the prohibitions on unconscionable conduct and misleading and deceptive conduct respectively. They both set broad market standards that can adapt to changing or emerging practices but, particularly in the case of section 52, are nevertheless reasonably well understood.[166] They are also relevant in tackling unfair practices that tend to target disadvantaged consumers.[167]

However, there are at least four identifiable gaps in the current consumer protection provisions, when compared against best practice as outlined in Box 1.

First, the provisions do not give the regulator or any other government body a mechanism to take a step back from the flow of complaints and enforcement actions and take stock of an entire industry or market. This is needed where there are indications that problems exist in a market that would benefit from more comprehensive scrutiny before any interventions are decided.

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[165] See, eg, John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 3-4; Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Paper presented at The Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York City, 31 October 2002, at 4-5.

[166] See, eg, DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 13; DTI, *Comparative Report on Consumer Policy Regimes: Country Reports - Australia, Canada, Denmark, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, European Union & Summary Table*, October 2003, at 17.

[167] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 86.

Secondly, the provisions that tackle consumer information problems generally,[168] such as the prohibitions on misleading and deceptive conduct and false or misleading representations, have not changed much in 30 years. As there is now are more sophisticated understanding of information problems and their role in ensuring effective competition, there is scope for further improvement, particularly to address search and switching costs and bounded rationality problems. This is especially the case given the complexity and product bundling issues facing consumers in modern markets.

Thirdly, the provisions were framed with little input from behavioural economics principles. Conduct that is unfair because it distorts information provision or information processing is at least partly tackled by existing provisions, but conduct that is unfair because it distorts consumer decisions by taking advantage of, or even manipulating, cognitive biases is not necessarily prohibited. Behavioural insights could be better used to design more effective interventions.

Finally, the provisions allow some unfair conduct that targets low-income and disadvantaged consumers to slip through gaps between the prohibitions on unconscionable conduct and misleading and deceptive conduct. The prohibition on unconscionable conduct relies on proving that conduct within the context of an individual transaction was against conscience. However, it does not necessarily allow the regulator to stop broader, market-wide conduct that deliberately targets particular groups of consumers but where no conduct of particular note occurs during each individual transaction. Section 52 does cover some such conduct, as it prohibits conduct likely to mislead or deceive, and this could encompass conduct likely to mislead or deceive because of the sorts of consumers it targets. But if the conduct constitutes other unfair practices, such as pressured or aggressive marketing and sales practices short of coercion or simply taking advantage of the market position of low-income and disadvantaged consumers generally, rather than being misleading or deceiving, it may not be a breach of the Act.

Several international developments in consumer protection laws, detailed in Section 5, provide options for addressing these gaps in the Act.

4.3.3 Enforcement and remedies provisions

[168] As opposed to, for example, in the product safety context.

Although this report concentrates on the provisions of Part V of the Act (together with the unconscionable conduct prohibition in Part IVA), the enforcement and remedies provisions of Part VI are also relevant. While not substantive consumer protection laws, their effectiveness is critically important to the overall effectiveness of the consumer protection provisions of the Act. No matter what the substantive provisions, if there is little threat of enforcement and/or consumers are unable to assert their legislative rights, there is less incentive for businesses to comply, making the consumer protection provisions ineffective.

The Part VI provisions allow a range of public and private enforcement options. The Government may prosecute the criminal offences under Part VC and the maximum monetary penalties for these have recently been increased.[169] The ACCC can to take civil action under section 80 for a breach of Part V or s.51AB unconscionable conduct and seek an interim or permanent injunction from the court restraining a person from engaging in conduct or requiring a person to do an act or thing (for which the court's powers are broad) But civil pecuniary penalties and orders banning persons from managing a corporation are not available.[170] The ACCC can also seek community service orders, probation orders, information disclosure orders and corrective advertising orders for civil or criminal breaches[171] and adverse publicity orders where a person is guilty of a criminal offence under Part VC.[172] The ACCC also has a broad power to accept written undertakings from persons rather than take court action in relation to breaches of the Act, and can take court action to enforce these undertakings if they are not complied with (at which point the court has broad powers to make orders, including to disgorge any financial benefits reasonably attributable to the breach of the undertaking).[173]

Any person, not merely the ACCC, can apply for an interim or permanent injunction from the court restraining a person from engaging in conduct or requiring a person to do an act or thing.[174] This has been confirmed by the courts to have its literal meaning, namely, *any* other person whether an

[169] To $1.1 million for a corporation and $220 000 for an individual: Part VC and s.6. Imprisonment is not a penalty open to the courts ti impose.
[170] They are available in civil actions for contraventions of the Part IV restrictive trade practices provisions: ss.76 and 86E respectively.
[171] S.86C.
[172] S.86D.
[173] S.87B
[174] S.80: 'on the application of the Commission or *any other person*' [our emphasis].

affected consumer, a business competitor or an interested member of the public or public interest organisation has the ability to seek an injunction for a breach of the Act.[175] Consumers (or other persons) also have the right to take actions for damages under section 82 of the Act against a person who has caused them loss or damage due to a breach of the consumer protection provisions.[176]

The court can make other orders to compensate a person for, or reduce, loss or damage suffered or likely to be suffered due to conduct by another person in breach of the consumer protection provisions, including orders to rescind or vary a contract, refund money, return property, pay compensation, repair goods or provide services. The court can make such orders under section 87 as part of other proceedings, for example for an injunction or action for damages, or upon a separate application by the affected person. Importantly, the ACCC can also apply for orders under section 87 on behalf of one or more affected persons, but *only* if each person consents in writing before the ACCC applies for the orders.[177] The ACCC cannot obtain, and the court cannot order, compensation for affected consumers either individually or as a class if they are not specified parties to proceedings for a breach of the Act or have not consented in writing to the ACCC bringing an application on their behalf. Consumers can however, bring their own representative (class) action for a breach of the Act in the Federal Court of Australia using this court's class action rules.[178]

While the Federal Court is the principal court with jurisdiction under the Act, consumers can also take their actions in the Federal Magistrates' Court. Consumers may also take a private action in their local State court, particularly the cheaper and less formal state small claims/consumer

[175] See, eg, *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 226 per Stephen J, 234 per Murphy J; *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 121 per Stephen J, 128-9 per Mason J, 131 per Murphy J. A constitutional challenge to this aspect of s.80 was rejected in *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) CLR 591.

[176] Consumers can also take their own private actions for breaches of implied conditions and warranties against suppliers (Part V Division 2), and actions against manufacturers and importers for product defects (Part V Division 2A and Part VA) – these provisions provide for consumer rights but do not provide for rules of conduct, thus there are no prohibitions here that can be "enforced" by the ACCC.

[177] S.87(1B).

[178] *Federal Court of Australia Act 1976* (Cth) Part IVA.

courts and tribunals if their jurisdictions allow for this.[179] Further, while not operating market-wide, there are several industry-based alternative dispute resolution schemes in Australia that provide a free and informal way to resolve individual consumers' disputes with businesses across a range of important industries, including banking, insurance, other financial services, telecommunications and energy and water. These schemes can consider relevant consumer protection laws.[180]

There is, of course, a difference between a public authority such as the ACCC enforcing consumer protection laws, and private action by a consumer. Australia's consumer protection legislation clearly values a mix of both types of provisions, rather than relying on the state to regulate and enforce laws or, or leaving individuals and businesses to undertake private consumer law actions.[181]

This issue is too large for this report. It is simply noted that a mix of both private and public enforcement provides a flexible enforcement system that does not rely too heavily on either consumers, businesses or government. Too much reliance on private actions taken by individuals can be socially regressive as low-income and disadvantaged consumers are less likely to take action on their own behalf.[182] Conversely, relying principally on governments or regulators to enforce the law is also a risk as public enforcement may concentrate on issues affecting wealthier consumers due

[179] The powers of state courts and tribunals to grant orders and remedies will differ from those under the Act as their jurisdiction and powers to hear consumer complaints are not based directly on the Act but on their own enabling legislation or inherent jurisdiction.
[180] See, eg, Banking and Financial Services Ombudsman Ltd, *Terms of Reference*, 1 December 2004, cl.7.1; Telecommunications Industry Ombudsman, *Constitution*, 26 April 2007, cl.2A; Financial Industry Complaints Service Ltd, *Constitution*, cl.2.3(b); Energy and Water Ombudsman (Victoria) Ltd, *Charter*, 30 May 2006, §5.1.
[181] See DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 32.
[182] Iain Ramsay, 'Consumer redress and access to justice', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 36-40; see also Thomas Wilhelmsson, 'Consumer Law and Social Justice', in Iain Ramsay (ed), *Consumer Law in the Global Economy: National and International Dimensions*, 1997, at 224. Ramsay also notes that class actions are one attempt to address some of the problem of costs in preventing individuals from taking action, however they often piggyback on public regulation (at 39).

to social and political pressures.[183] Nor can it be assumed that public agencies will always take action.[184]

While the overall model is sound, the review of international developments in the next section highlights some initiatives that may improve the enforcement and remedies provisions of the Act.

[183] Iain Ramsay, 'Consumer redress and access to justice', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 39.

[184] See Michael J. Trebilcock, 'Rethinking consumer protection policy', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 84. In the High Court of Australia case of *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113, Murphy J said (at 131): '…experience shows that enforcement agencies in environmental and consumer protection (as well as those in occupational safety and health) often become unable or unwilling to enforce the law (because of inadequate resources or because they tend to become too close to those against whom they should be enforcing the law). Section 80 expresses the policy that such tendency to non-enforcement or limited enforcement should be overcome by providing that the Court may grant an injunction restraining a contravention of Pts IV or V on the application of the Minister, the Trade Practices Commission or…any other person.'

5. International developments and recommendations for Australia

The previous section identified several areas in which the current consumer protection provisions of the Act are not meeting best practice standards.

This section reviews general (as opposed to industry-specific) consumer protection laws in the comparable OECD jurisdictions of the US, the UK, the EU and Canada, as well as some developments in the Australian States and Territories.[185] The review reveals examples of legislative tools that could be incorporated into the Act to ensure it is updated to reflect international best practice.

In doing this review, this report follows what has become somewhat of a tradition in consumer law. As Ramsay notes:

> [B]oth consumer law and access to justice have often represented laboratories of applied comparative law. One thinks here of the class action, a common law device, which has made a successful bridgehead on Brazil; of the cooling-off period which originated in England but is now ubiquitous; of the spread of the Nordic idea of the ombudsman as a central mechanism of consumer redress in many countries.[186]

[185] The UK DTI has noted that all of these jurisdictions (with the exception perhaps of the EU) could be broadly classified into the same type of overall national consumer protection model – a mix of private and public enforcement of a considerable body of law in the criminal and civil courts. This can be contrasted with a consensual and interventionist model that tries to avoid detriment through more extensive regulation and resolves problems when things go wrong through state led dispute settlement procedures, such as in France or Denmark; and a non-interventionist model, dependent on private action, mostly by individuals, and where consumer protection is weak because of the framework of law and institutions, such as in Germany, Italy, Japan and the Netherlands: DTI, *Comparative Report on Consumer Policy Regimes*, October 2003. This Report's review therefore takes its recommendations from jurisdictions with a similar overall model of consumer protection laws. There may be further benefits to be gained by an extensive review of consumer protection laws in jurisdictions that follow a different model, although such legal transplants might be more difficult to incorporate into the overall structure of Australia's consumer legal system.

[186] Iain Ramsay, 'Consumer redress and access to justice', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 20.

5.1 Objects clause

Section 4.2 (above) noted that the current objects clause of the Act could benefit from some small amendments, to reflect that promoting competition can involve both demand and supply-side initiatives, and to recognise that the laws should benefit all Australians, not merely the average consumer.

Legislative aims contain rarely overtly recognise the needs of low-income and disadvantaged groups, but one that has worked effectively is the legislation establishing Victoria's state independent economic regulator, the Essential Services Commission (**ESCV**). The ESCV administers regulatory schemes for several industries in Victoria that are considered essential services, including electricity, gas, water, ports and grain handling. Being essential services there is a strong public policy interest in ensuring all Victorians benefit from effective regulation.

The legislation establishing the ESCV also sets out its objectives and functions. It sets a primary objective as well as 'facilitating objectives' which the ESCV must consider in achieving its primary objective.[187] In this way, the legislation is able to clarify several important objectives that are clearly compatible with the primary objective but which could also be overlooked if the primary objective were left to open interpretation.

The primary objective of the ESCV is stated as:

> to protect the long term interests of Victorian consumers with regard to the price, quality and reliability of essential services.[188]

The provision goes on to state:

> In seeking to achieve its primary objective, the Commission must have regard to the following facilitating objectives-
>
> (a) to facilitate efficiency in regulated industries and the incentive for efficient long-term investment;
>
> (b) to facilitate the financial viability of regulated industries;
>
> (c) to ensure that the misuse of monopoly or non-transitory market power is prevented;

[187] *Essential Services Commission Act 2001* (Vic) s.8.
[188] *Essential Services Commission Act 2001* (Vic) s.8(1).

(d) to facilitate effective competition and promote competitive market conduct;

(e) to ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation applying to the regulated industry;

(f) to ensure that *users and consumers (including low-income or vulnerable customers) benefit from the gains from competition and efficiency*;

(g) to promote consistency in regulation between States and on a national basis [our emphasis].[189]

The objectives of the ESCV are similar to the Act's, as both are concerned with promoting competition for the overall benefit of consumers. However, the facilitating objectives, have allowed the interests of low-income and disadvantaged consumers to be specifically incorporated. It is interesting that an objective promoting national consistency is also included.

Note that the UK electricity and gas laws also establish the objectives of the regulator in similar ways. They establish similar principal objectives and then set out further matters, including the interests of low-income and disadvantaged consumers, which must be taken into account in performing the regulator's functions.[190] The EU's Consumer Policy strategy for 2007-2013 also notes that while one of its main goals is greater consumer empowerment to drive EU economies, the most vulnerable consumers are less well equipped to deal with changes in retail markets and that there are more vulnerable consumers due to increased consumption by children and an ageing population.[191]

The use of secondary or facilitating objectives could therefore be a way of improving the Act's objects clause, although a direct amendment to the clause also remains feasible.

Recommendation 1 – Amend the objects clause of the Act

[189] *Essential Services Commission Act 2001* (Vic) s.8(2).
[190] *Electricity Act 1989* (UK) s.3A; *Gas Act 1986* (UK) s.4AA.
[191] EC, *EU Consumer Policy strategy 2007-2013*, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM/2007/99, Brussels 13 March 2007, at 3. One of its three main objectives is therefore to 'protect consumers effectively from the serious risks and threats that they cannot tackle as individuals. A high level of protection against these threats is essential to consumer confidence' (at 6).

Amend the objects clause of the Act, either through direct amendment to the current object or through inserting facilitating objectives, to clarify that the Act is concerned with:

a) promoting effective competition, meaning on both the supply and demand-side of markets; and

b) enhancing the overall welfare of all Australians, including low-income and disadvantaged consumers.

Articulating an overarching objective for Australia's consumer policy framework, of which the Act forms the centre piece would assist in interpretation as well as guiding future reform. The framework articulated for national competition policy provides a useful example.

The overarching objective could be consistent with the Act's objective, amended as suggested above. It could place consumer welfare at the centre of the objective and recognise consumers' role in activating effective competition. It could recognise the need to address issues impacting on disadvantaged and vulnerable consumers.

Recommendation 2 – Identify an overarching objective for consumer policy

The overarching objective could be consistent with the Act's objective, amended as suggested above. It could place consumer welfare at the centre of the objective and recognise consumers' role in activating effective competition. It could recognise the need to address issues impacting on disadvantaged and vulnerable consumers.

5.2 Market studies and investigations powers

Our best practice principles for consumer protection laws included using more sophisticated and comprehensive market or industry analysis to identify problems and solutions. However, this is one of the major gaps in the current consumer protection laws under the Act. The Act provides no real mechanism for the regulator to do so. The regulator is locked into

complaints handling and enforcement without any formal tools for a more in-depth assessment of a market or requesting another body to do so.[192]

The UK is the leader in incorporating market analysis mechanisms into its consumer protection laws, providing for both market studies and market investigations.

5.2.1 UK market studies and market investigations laws

The OFT, the UK's independent competition and consumer protection regulator, undertakes market studies pursuant to section 5 of the UK *Enterprise Act 2002*, which gives the OFT the overt function of obtaining, compiling and reviewing information about matters relating its functions, so that it has sufficient information to take informed decisions and to carry out its other functions effectively. Section 4(4) gives the OFT the power to prepare and publish reports of its findings. So while market studies are not referred to explicitly, they are achieved by broad and explicit statutory information gathering and analysis function.

The OFT has stated that it introduced market studies as a means of identifying and addressing all aspects of market failure, from competition issues to consumer detriment and the effect of government regulations.[193] Market studies identify whether perceived problems should be addressed through the OFT's other functions.[194]

Market studies can take the form of a short preliminary review, a short study or a more detailed full study.[195] After conducting a market study, the OFT can take a range of actions, including:

- publishing information to help consumers;
- encouraging firms to take voluntary action or adopt a code of practice;

[192] The ACCC does have prices surveillance functions under Part VIIA of the Act, whereby the Minister may require the ACCC to hold an inquiry into a matter or matters relating to prices for the supply of specified goods or services.
[193] Office of Fair Trading, *Guidance on the OFT approach: Market studies*, November 2004, at 3.
[194] Office of Fair Trading, *Guidance on the OFT approach: Market studies*, November 2004, at 4.
[195] Office of Fair Trading, *Guidance on the OFT approach: Market studies*, November 2004, at 5-10.

- making recommendations to the Government or other regulators;
- taking enforcement action for breaches of consumer or competition law;
- making a market investigation reference to the UKCC; or
- deciding that no further action is warranted.[196]

Market investigations are different from market studies, and are conducted by the UKCC, not the OFT. The *Enterprise Act 2002* explicitly gives the OFT (and some other industry regulators) power to make a market investigation reference to the UKCC if they have 'reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK'.[197] For example, the OFT may consider that it should make a market investigation reference regarding features of a market after a study.

Market investigations are not limited to supply-side features. Features are taken to be the structure or any aspect of the structure of the market concerned; any conduct of one or more suppliers or acquirers of goods or services in the market concerned; or any conduct relating to the market concerned of customers of the suppliers or acquirers.[198] The OFT has included problems of information asymmetries and switching costs as structural aspects of a market that might warrant a reference, while search costs (and switching costs) are the primary customer conduct problem that might influence whether a reference is made..[199]

After an investigation, if the UKCC finds any 'adverse effects on competition', it *must* take reasonable and practicable action to both remedy, mitigate or prevent the adverse effect on competition concerned and remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition, by accepting undertakings or making various orders.[200] Some of the orders available to the UKCC include:

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[196] As above at 13.
[197] *Enterprise Act 2002* (UK) s.131.
[198] *Enterprise Act 2002* (UK) s.131(2).
[199] Office of Fair Trading, *Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act*, March 2006.
[200] *Enterprise Act 2002* (UK) ss.138, 159-161.

- prohibiting charging prices differing from those in any published list or notification;
- regulating the prices to be charged for any goods or services;
- requiring a person to supply goods or services to a particular standard or in a particular manner; and
- requiring a person to publish a list of prices or otherwise notify prices for goods or services being supplied, and providing for the manner in which this information is to be published or otherwise notified.[201]

The OFT refers to the market studies and investigations powers under UK competition and consumer protection laws as "diagnostic tools". They complement its preventative tools (such as guidance and consumer education), advocacy tools (such as government advice and encouragement to business and consumers to use private redress mechanisms) and enforcement tools (such as undertakings and court action).[202] These tools are used by the OFT when:

> market forces cannot overcome…threats to consumer welfare, for example because some sellers are unconcerned about repeat business and reputation, where there are structural or behavioural barriers to free competition, or where consumers and harmed businesses are unable to gain redress themselves[.][203]

The OFT clearly sees the use of these tools, including market studies and investigations, within an overall framework of promoting markets that work well for consumers by dealing with both the supply and demand side.[204] Market studies and investigations strengthen the commitment to analysing or "diagnosing" market outcomes from both angles before taking action.

The market studies that the OFT has undertaken have included issues as diverse as door-stop selling, debt consolidation, the estate agency market, extended warranties on domestic electrical goods, payment protection insurance and personal current accounts in the UK.[205] The results have included education campaigns, enforcement action, advice to the

[201] *Enterprise Act 2002* (UK) schedule 8.
[202] Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8.
[203] Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8.
[204] Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8-9; see especially the diagram at 9.
[205] See Office of Fair Trading, *Market studies*, webpage, available at: www.oft.gov.uk/advice_and_resources/resource_base/market-studies/.

government to amend legislation and market investigation references to the UKCC. For example, the door-stop selling study led to a national consumer education campaign by the OFT on consumers' rights and the psychological techniques used by doorstop sellers, and recommendations to the UK government to amend legislation in a number of ways.[206] The UK government has now indicated that it will proceed with legislation on certain identified issues, including extending cooling-off rights to solicited visits.[207]

It is worth noting that the door-stop selling market study was conducted before the EU's Unfair Commercial Practices Directive was adopted. In regard to several OFT recommendations for legislative amendment, the UK government recognised the consumer detriment that the recommendations sought to address, but indicated that implementing this Directive into UK law should help to fix this.[208] The Directive is discussed in further detail in section 5.3 below.

The UKCC has undertaken a number of market investigations following a reference from the OFT, including investigating extended warranties on domestic electrical goods, store card credit services, Northern Irish personal banking services and a current investigation into payment protection insurance, with some of these following market studies by the OFT as noted above.[209] The store credit investigation resulted in store card credit providers being required to warn cardholders on monthly statements that cheaper credit may be available elsewhere (where annual percentage rates are 25 per cent or above), and to offer an option to pay by direct debit and offer payment protection insurance separately from other elements of store card insurance.[210]

The market studies and investigations powers in the UK have therefore resulted in a variety of important investigations in areas where consumer detriment has been observed. This has resulted in a large range of different and considered actions to fix problems. In its 2003 report

[206] Office of Fair Trading, *Doorstep selling: A report on the market study*, May 2004.
[207] DTI, *Doorstep Selling and Cold Calling: Response to the Public Consultation*, September 2006.
[208] DTI, *Doorstep Selling and Cold Calling: Response to the Public Consultation*, September 2006 at 8-11.
[209] Competition Commission, *Market references to the Competition Commission (previously monopoly references): 2000-2007*, webpage, available at: www.competition-commission.org.uk/inquiries/reference_type/market.htm.
[210] Competition Commission, *Store Cards Market Investigation Order*, 27 July 2006.

comparing the different consumer policy regimes of various countries, including the UK, the US, Canada and Australia, the UK DTI concluded that the UK was amongst the best in terms of investigating markets that are not working well for consumers.[211]

5.2.2 US market-wide investigation powers

US competition and consumer protection laws do not facilitate market studies and investigations as clearly as the UK *Enterprise Act*. However, they do give the FTC reasonably broad powers to investigate. The FTC has a very general power to 'prosecute any inquiry necessary to its duties in any part of the United States' under section 3 of the *Federal Trade Commission Act*.[212] It also has general powers to gather information about and investigate 'the organisation, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce' and subsequently to publish reports for the public or for Congress, including making recommendations to Congress for additional legislation.[213]

The FTC uses its investigation powers to conduct market- or industry-wide investigations from time to time. These investigations tend to focus on whether there have been violations of the law, as opposed to general market or industry analysis, such as the UK OFT and UKCC engage in. However, if the FTC considers that it needs to remedy 'unfair or deceptive acts or practices'[214] occurring industry wide, it can use individual enforcement actions. The FTC can initiate a rule-making proceeding if it considers that unfair or deceptive acts or practices are 'prevalent' (for example, because it has information indicating 'a widespread pattern of unfair or deceptive acts or practices').[215]

Under this procedure the FTC may propose rules that will define certain acts and practices as 'unfair or deceptive', meaning they will be prohibited.

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[211] DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 33.
[212] *Federal Trade Commission Act* s.3; 15 U.S.C. s.43.
[213] *Federal Trade Commission Act* s.6(a),(f); 15 U.S.C. s.46(a),(f).
[214] The principal antitrust and consumer protection prohibition enforced by the FTC enforces is established by *Federal Trade Commission Act* s.5(a); 15 U.S.C. s.45(a)(1): 'Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
[215] *Federal Trade Commission Act* s.18(b); 15 U.S.C. s.57a(b)(3). See FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrvw.shtm.

This can include rules that will set requirements to *prevent* unfair acts or practices.[216] The FTC conducts informal hearings that give interested parties the chance to make submissions before making its final decision on promulgating the rules.[217] In this way, the FTC can use industry or market-wide investigation to begin a process that will stop unfair or deceptive practices not sufficiently covered by existing laws or which require an industry-wide response.

Some examples of rules promulgated by the FTC include rules requiring door-to-door sellers to provide information about cooling-off rights to consumers[218] and rules requiring funeral providers to disclose information in certain forms, including about prices, and prevent them from bundling certain products and services together.[219] The rule-making powers allow the FTC to tackle industry-wide practices to some degree, although they are more limited than the similar powers available to the UKCC following a market investigation.

5.2.3 UK super-complaints laws

One other matter of note is the place of 'super-complaints' in the UK's overall market studies and investigations framework. The OFT has included responding to super-complaints as one its diagnostic tools to help it address market failures and help make the market work well for consumers.[220]

Section 11 of the UK *Enterprise Act* creates the super-complaints mechanism. Consumer bodies that are designated by the UK Secretary of State under this section can complain 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'.[221] The making of a super-complaint triggers a statutory obligation for the OFT to respond within 90 days. The OFT must state how it plans to deal with the

[216] *Federal Trade Commission Act* s.18(a); 15 U.S.C. s.57a(a)(1)(B).
[217] *Federal Trade Commission Act* s.18(b),(c); 15 U.S.C. s.57a(b),(c). Promulgated rules can be appealed to the US Court of Appeals before becoming final: 15 U.S.C. s.57a(e).
[218] 16 CFR Ch I, Part 429 - Rule Concerning Cooling-Off Period For Sales Made At Homes Or At Certain Other Locations.
[219] 16 CFR Ch I, Part 453 - Funeral Industry Practices.
[220] Office of Fair Trading, *Annual Plan 2007–08*, March 2007 at 8.
[221] *Enterprise Act 2002* (UK) s.11(1). Note that the grounds for a super-complaint dovetail with the grounds on which the OFT may make a market investigation reference to the UKCC: *Enterprise Act 2002* (UK) s.131, see text at n197 above.

complaint, for example what action (if any) it plans to take and the reasons for its decision.[222] Such actions might include:

- enforcement action by the OFT's competition or consumer regulation divisions;
- launching a market study into the issue;
- making a market investigation reference to the UKCC if there is a competition problem;
- referral to or action by a relevant sectoral (industry) regulator; and/or
- finding the complaint requires no action or is unfounded.[223]

As the OFT has explained, the super-complaint mechanism is not intended for complaints about matters that can be handled directly by existing enforcement powers, particularly single-firm conduct. Rather, it provides a 'fast-track' system whereby certain consumer bodies can bring market features that harm the interests of consumers to the OFT's attention.[224] The super-complaints mechanism is therefore another way to ensure that analysis of demand-side or consumer problems is part of an effective competition regime.

UK Secretary of State for Trade and Industry, Patricia Hewitt, said during the second reading on the Enterprise Bill:

> As strong competition is the best form of consumer protection, all our competition reforms are good news for consumers. In particular, we are putting consumer interests at the heart of the new system with our new super-complaints, where the OFT must make a considered response within 90 days to properly investigated complaints from designated consumer bodies.[225]

The super-complaints mechanism also recognises that organisations that represent consumer interests can provide valuable information and intelligence to regulators about potential concerns. Sylvan has noted that:

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[222] *Enterprise Act 2002* (UK) s.11(2),(3).
[223] Office of Fair Trading, *Super-complaints: Guidance for designated consumer bodies*, July 2003, at 9.
[224] Office of Fair Trading, *Super-complaints: Guidance for designated consumer bodies*, July 2003, at 4.
[225] Secretary of State for Trade and Industry, Ms Patricia Hewitt, *Enterprise Bill: Second reading*, Hansard Commons Debates (UK), 10 April 2002, Volume No. 383, Part No. 125, Column 48.

> Consumer complaints are a particularly rich source of information about market failure as well as a window onto the way in which firms are behaving: when and how they are engaging in attempts at lock in to prevent switching, whether they are disabling consumer search through, for example, highly complex price structures, and so on. This demand side intelligence is especially powerful when combined with behavioural research on how consumers actually do act in markets and provide a compelling insight into what remediation might be needed and might be effective.[226]

The super-complaints mechanism has become an important addition to the UK's competition and consumer laws and plays a central role in initiating market studies and investigations. Several consumer groups have been designated for the purposes of super-complaints, including Which? – the UK Consumers' Association, Citizens Advice – the National Association of Citizens Advice Bureaux (the umbrella organisation for all Citizens Advice Bureaux in England, Wales and Northern Ireland), and the National Consumer Council. They have made several super-complaints to the OFT on matters such as door-stop selling, aged-care homes, payment protection insurance and most recently the Scottish legal profession.

The OFT's door-stop selling market study, which has led to an OFT education campaign and imminent legislative changes, began as a super-complaint from Citizens Advice. The UKCC's current market investigation into payment protection insurance also began life as a super-complaint from Citizens Advice, which led to an OFT market study and a reference to the UKCC for a market investigation. While the UKCC is continuing its investigation into payment protection insurance, its has identified some potential competition issues at the retail level when consumers are buying payment protection insurance together with the attached credit product.[227]

5.2.4 Market studies and investigations in Australia

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[226] Louise Sylvan, 'Activating competition: The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1, at 17; cf Productivity Commission, which has noted that an important role for consumer advocates in the competition reform context is to provide 'a counterbalance to producer groups seeking to maintain anti-competitive arrangements that lead to higher prices, reduced service quality or less market innovation': *Review of National Competition Policy Reforms*, Report no. 33, Canberra 2005, Box 12.4, at 386.

[227] Competition Commission, *News Release: PPI Market Investigation–Emerging Thinking*, 6 November 2007, at 1, available at: www.competition-commission.org.uk/inquiries/ref2007/ppi/index.htm.

Diagnostic tools such as those available to the OFT are simply not available under the Act. Further, the ACCC can't make orders or rules in the same way as the UKCC or the FTC if there are industry-wide practices that need fixing.

Section 28 of the Act sets out the ACCC's general information, law reform and research functions. It allows the ACCC to conduct research, and make general information available about matters affecting consumers, if these are matters for which the Federal Parliament has power to make laws.[228] Section 28 also provides that the ACCC may critically examine the laws in force in Australia regarding consumer protection, but only for matters referred by the Minister, for reporting back to the Minister.[229] It may also conduct research and undertake studies, but only on matters that are referred to it by the National Competition Council,[230] whose functions are generally limited to overseeing national competition policy.

While the ACCC can use its general research powers to investigate potential market or industry-wide problems to a limited degree, the Act could do much more to facilitate independent market and industry analysis, together with providing powers to address identified problems. The UK model is the best example of such powers. The Act should be amended to provide for explicit market studies and investigations powers.

A question in Australia is whether the ACCC, as the sole competition and consumer regulator, should have separate market studies and more in-depth competition investigations powers or whether one set would be enough, with discretion to undertake shorter or fuller investigations as appropriate. There would also be a question about whether the ACCC should have the power to make orders or rules, even if these may be appealed to the courts or the Australian Competition Tribunal. In the UK that power is reserved to the UKCC, which does not have general enforcement functions, rather than the OFT. In the US a more limited power of this sort is available to the FTC which is also prosecutes breaches of the legislation and its rules. It would be possible to involve another body in the process, for example the National Competition Council which is experienced in assessing competition matters and making

[228] *Trade Practices Act* s.28(1)(c),(d).
[229] *Trade Practices Act* s.28(1)(b).
[230] *Trade Practices Act* s.28(1)(ca).

recommendations to the Minister to declare services under the Act's third part access regime for essential infrastructure.[231]

Super-complaints have also proved to be an integral part of the effectiveness of the UK regime and should be incorporated into the Act. The relevant Minister should be given the power to designate Australian consumer organisations to make super-complaints to the regulator, which must then respond within a set time frame. As in the UK, super-complaints should relate to market features, not just single-firm conduct that can be more efficiently and quickly handled via existing enforcement powers. Also as in the UK, provisions could be made for super-complaints to be made to regulators other than the ACCC, or cross-referred. For example ASIC and ACMA could look at some consumer problems in financial services or telecommunications if the problems did not raise general competition concerns.

Whatever the eventual structure, including new market studies and investigations powers in the Act, supported by super-complaints, would bring Australia into line with international best practice, as exemplified by the UK in this area.

Recommendation 3 – Introduce market studies and investigations powers

Introduce market studies and investigations powers into the Act, based on the model in the UK *Enterprise Act 2002*.

Recommendation 4 – Introduce super-complaints provisions

Introduce a super-complaints mechanism into the Act to support new market studies and investigations powers, based on the model in the UK *Enterprise Act 2002*.

5.3 General prohibition on unfair conduct

In section 4.3.2 it was noted that a key strength of the Act's consumer protection provisions is the two flexible, market-wide provisions prohibiting misleading and deceptive conduct[232] and unconscionable conduct.[233]

[231] *Trade Practices Act* Part IIIA.
[232] S.52.
[233] S.51AB.

These can address new practices that were not predicted when the legislation was drafted and are also useful in protecting disadvantaged and vulnerable consumers from unfair practices.

The misleading and deceptive conduct prohibition in particular is seen as the central consumer protection under the Act.[234] For example, the ACCC has submitted:

> 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.[235]

The UK DTI conducted a detailed comparative study of consumer policy regimes in various leading EU and OECD countries in 2003.[236] The study was part of the DTI's efforts to collect evidence to compare with the UK regime, to help meet the UK government's goal of 'bringing UK levels of competition, consumer empowerment and protection up to the level of the best by 2006'.[237] In comparing the different regimes, the main report of the study noted:

> In general, international experience suggests that a broad duty to trade fairly is useful and can be interpreted by the courts which are used to determining concepts of reasonableness and fairness. The leading examples came from the United States and Australia. In the US, under the Federal Trade Commission Act "unfair or deceptive practices are declared unlawful" (section 5). In Australia, the Trade Practices Act states that "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive" (section 52).

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[234] See, eg, ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 18, 170; Productivity Commission, *Consumer Policy Framework: Productivity Commission Issues Paper*, January 2007, at 9.
[235] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 170.
[236] DTI, *Comparative Report on Consumer Policy Regimes*, October 2003; DTI, *Comparative Report on Consumer Policy Regimes: Country Reports - Australia, Canada, Denmark, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, European Union & Summary Table*, October 2003; Geoffrey Woodroffe and Dimitrios Giannoulopoulos, *Comparative Study of Consumer Policy for DTI Consumer and Competition Policy Directorate*, 2003.
[237] DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 5.

> A general requirement to trade fairly did not entirely replace specific legislation in any of the countries but did appear to significantly reduce the need for it, and where both general and specific provisions could be used to take a case forward there was often a preference to use the general provisions that existed.[238]

The report concluded that the UK was behind the best in terms of its legal framework for consumer protection, due to its lack of similar wide-reaching legislation:

> The UK does not have the equivalent of a general duty to trade fairly. This can act successfully as a backstop given the inflexibility of piecemeal legislation and ease of public comprehension of a simply worded basic right as in Australia and the US.[239]

This accords with our best practice principles, which maintain that flexible and market-wide rules can both reduce costs and increase the efficacy of laws. Using a general rule to promote a general duty to trade fairly or a prohibition on unfair trading also helps to promote fair trading generally, another best practice principle.

However, the comparative study commissioned by the DTI as part of the overall study noted that the Act's section 52, while a general catch-all provision, was perhaps *not* a true "duty to trade fairly", as it is narrower.[240] David Cousins, current director of CAV, agrees that the misleading and deceptive conduct prohibition does not cover all unfair trading. He has noted that:

> The consumer framework in Australia has for many years contained broad prohibitions against misleading and deceptive conduct and unconscionable conduct and in this sense could be seen as being ahead of the UK. However, there has been the same piecemeal approach to the development of the consumer framework in Australia…In part, this has been due to a concern that the general prohibitions in Commonwealth legislation have not been wide enough…More generally, the recent development of the Unfair Commercial Practices Directive in the EC

[238] DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 13.
[239] DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 33.
[240] Geoffrey Woodroffe and Dimitrios Giannoulopoulos, *Comparative Study of Consumer Policy for DTI Consumer and Competition Policy Directorate*, 2003, at 100.

> prompts the question of whether Australia should now be considering widening its general prohibitions to cover all conduct, which is unfair.[241]

One of the main gaps identified in our consumer protection laws earlier was that the misleading and deceptive conduct prohibition will not necessarily extend to other unfair conduct, such as pressured or aggressive marketing and sales practices short of harassment or coercion,[242] or simply taking advantage of the market position of low-income and disadvantaged consumers generally (often by excessive prices). Unconscionable conduct also will not necessarily extend to this sort of unfair conduct if it does not specifically pertain to negotiations. Even if it does answer, generally it will not provide a remedy to the general conduct rather it will provide a remedy to individuals, often 'one by one'. Cousins also states that:

> There are gaps in the general consumer law in Australia that a broader unfairness test might address. These gaps relate especially to advertising and marketing practices, the provision of poor quality services and exploitative pricing.[243]

Introducing a general duty to trade fairly or prohibiting unfair trading would cover such gaps. In particular, it would provide a better way to ensure disadvantaged or vulnerable consumers were protected from unfair practices. This is partly because it allows for insights from information and behavioural economics to inform a more sophisticated analysis of unfair conduct, another current gap in the Act's consumer protection provisions.[244] This is clear from a review of how general duties or obligations regarding unfair practices operate in other jurisdictions.

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[241] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 24.

[242] See, eg, *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926, in which the conduct of the salesman was found not to have constituted harassment or coercion although the court accepted that the consumer had been frightened of the salesman and had wanted him to leave her home, leading her to think that she could only get him to do so if she signed the sales contract.

[243] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 24.

[244] See the comments by Eldar Shafir, text at n90-91 above.

5.3.1 US prohibition on unfair or deceptive practices

As the UK DTI report remarked, the leading example of a broad duty to trade fairly (other than Australia's (then) misleading and deceptive conduct prohibition) comes from the US.

The US *Federal Trade Commission Act* (**FTC Act**) provides the basic market-wide consumer protection obligation in the US, together with one of the main provisions in US antitrust/competition laws.[245] This is achieved in one provision, section 5(a) of the FTC Act:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.[246]

The "unfairness" and "deception" grounds for declaring acts or practices unlawful are separate, although in practice many cases involve acts or practices that are both unfair and deceptive.[247] The prohibition on deceptive acts or practices is similar to the Australian Act's general prohibition on misleading and deceptive conduct or conduct likely to mislead or deceive, and the further prohibitions on false or misleading representations. The FTC has clarified that deception cases in the US will generally be underpinned by conduct that is likely to mislead a consumer acting reasonably in the circumstances, so that the consumer's conduct or

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[245] See FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrvw.shtm. The other central antitrust provisions are the Sherman Act which deals with monopolies and combinations in restraint of trade, and the Clayton Act which deals with anticompetitive mergers and acquisitions.

[246] *Federal Trade Commission Act* s.5(a); 15 U.S.C. s.45(a)(1). The "unfair methods of competition" standard is considered the antitrust provision while the "unfair" and "deceptive" acts or practices standards are considered the consumer protection provisions: see, eg, FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002.

[247] See FTC, *Policy Statement on Unfairness*, Letter to Senators Ford and Danworth, Chairman and Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, December 17 1980, available at: www.ftc.gov/bcp/policystmt/ad-unfair.htm; FTC, *Policy Statement on Deception*, Letter to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives, October 14 1983, available at: www.ftc.gov/bcp/policystmt/ad-decept.htm; Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Paper presented at The Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York City, 31 October 2002, n5 at 2.

decision is likely to be affected. This could include, for example, false representations, misleading price claims, sales of defective products or services without adequate disclosures, or failure to disclose other relevant information.[248]

There is no corresponding provision in the Australian Act prohibiting unfair acts or practices. Section 5(a) of the FTC Act was intentionally drafted broadly, as the prohibition needed to be flexible enough to deal with new and unpredicted forms of unfair conduct. In the well-known US Supreme Court case of *FTC v. R. F. Keppel & Bro* Justice Stone outlined the legislative history of the provision.[249] He noted:

> Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories…Congress, in defining the powers of the Commission…advisedly adopted a phrase which, as this Court has said, does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"[250]

Justice Stone quoted from relevant portions of the Congress debates, including:

> The Committee said in its report of June 13, 1914, Senate Report No. 597, 63d Cong., Second Session, page 13:

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[248] FTC, *Policy Statement on Deception*, Letter to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives, October 14 1983, available at: www.ftc.gov/bcp/policystmt/ad-unfair.htm; transformed into a rule of law in 1984 when appended to the FTC decision in *Cliffdale Assocs., Inc*., 103 F.T.C. 110, 174 (1984).

[249] *Federal Trade Commission v. R. F. Keppel & Bro., Inc* (1934) 291 U.S. 304. The FTC Act was introduced in 1914 but originally only declared 'unfair methods of competition' unlawful; it was not until 1938 that an amendment added 'unfair or deceptive acts or practices' to the prohibition to clarify it had a consumer-injury focus in addition to a business-injury focus. However, it was recognised that 'unfair methods of competition' was intended to cover unfair methods targeted at consumers, as the *FTC v RF Keppel* case itself demonstrates, given it was concerned with unfair methods of enticing children to buy the respondent's candy products, thus the comments in this case remain relevant: see *Federal Trade Commission v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233, at 244; see also FTC, *Policy Statement on Unfairness*, Letter to Senators Ford and Danworth, Chairman and Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, December 17 1980, especially at n5 and n11.

[250] *Federal Trade Commission v. R. F. Keppel & Bro., Inc*, (1934) 291 U.S. 304, at 310-312.

> "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason…that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.
> …
> The House Managers of the conference committee…said, House Report No. 1142, 63d Congress, 2d Sess., September 4, 1914, at page 19:
>
> "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country.[251]

The benefits of a broad and flexible standard for the US courts to apply was demonstrated in the *FTC v RF Keppel* case itself. It allowed the Court to prevent an unfair practice that was new to the market and that was unfair because it deliberately targeted a vulnerable class of consumers, in this case children.

The respondent in the case was one of several manufacturers of children's candy packaged in "break and take" packages, in which the pieces of candy were of inferior quality or smaller than pieces in normal "straight goods" packages of candy. However, the break and take packages were sold as a game of chance or lottery where the buyer could potentially win their money back, win a prize, or only find out the purchase price upon choosing and opening the candy wrapper. Children were enticed by the gambling or chance element of these packages to buy them rather than the superior quality normal candy. However, this method of candy retailing could be adopted by any competitor so was not necessarily a monopolisation of trade, nor had it been previously considered by the FTC or the courts.

The Supreme Court's decision clearly shows an understanding of the legislation's intention to prevent unfair practices in a broader sense than just deceptive conduct or conduct already defined as unfair through

[251] *Federal Trade Commission v. R. F. Keppel & Bro., Inc*, (1934) 291 U.S. 304, at 312.

previous cases or statute law. The Court also demonstrates a strong understanding that conduct may be unfair because it is exploitative, given the class of consumer that it targets.[252] The judgment held:

> Although the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception. It would seem also that competing manufacturers can adopt the break and take device at any time and thus maintain their competitive position. From these premises respondent argues that the practice is beyond the reach of the Commission because it does not fall within any of the classes which this Court has held subject to the Commission's prohibition.[253]
> …
> A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought [by previous cases] to involve the kind of unfairness at which the statute was aimed.
> …
> [H]ere the competitive method is shown to exploit consumers, children, who are unable to protect themselves.[254]

Nevertheless, the "unfair acts or practices" prohibition is not open-ended. In fact, it is quite well understood due to guidance and clarification provided by the FTC and the courts, and now the legislation itself. The unfairness standard is further defined in the statute; an unfair act or practice is one that:

> …causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.[255]

The same provision allows established public policies to be considered in determining unfairness, but they cannot serve as the primary basis for such determination.[256]

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[252] The decision also reflects the disapproval of gambling generally as a public policy concern at that time in the US.
[253] *Federal Trade Commission v. R. F. Keppel & Bro., Inc*, (1934) 291 U.S. 304, at 309.
[254] *Federal Trade Commission v. R. F. Keppel & Bro., Inc*, (1934) 291 U.S. 304, at 313.
[255] *Federal Trade Commission Act* s.5(n); 15 U.S.C. s.45(n).
[256] *Federal Trade Commission Act* s.5(n); 15 U.S.C. s.45(n).

This provision was added to the legislation in 2000 to codify the FTC's standards for the unfairness prohibition, as explained in its 1980 policy statement on unfairness. This statement was later appended to the *International Harvester* FTC decision and transformed into a rule of law in 1984.[257] The policy statement was produced to allay concerns the unfair acts or practices prohibition was too broad:

> We recognize that the concept of consumer unfairness is one whose precise meaning is not immediately obvious, and also recognize that this uncertainty has been honestly troublesome for some businesses and some members of the legal profession. This result is understandable in light of the general nature of the statutory standard. At the same time, though, we believe we can respond to legitimate concerns of business and the Bar by attempting to delineate in this letter a concrete framework for future application of the Commission's unfairness authority. We are aided in this process by the cumulative decisions of this agency and the federal courts, which, in our opinion, have brought added clarity to the law. Although the administrative and judicial evolution of the consumer unfairness concept has still left some necessary flexibility in the statute, it is possible to provide a reasonable working sense of the conduct that is covered. [258]

It identified three factors that must be considered in determining if an act or practice is unfair, which have been quoted with approval by the US Supreme Court.[259] These were whether the practice injures consumers; whether it violates established public policy; and whether it is unethical or unscrupulous - all of which the FTC explained in further detail, including how they inter-relate. Some examples of unfair practices drawn from case law at that time included:

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[257] FTC, *Policy Statement on Unfairness*, Letter to Senators Ford and Danworth, Chairman and Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, December 17 1980, available at: www.ftc.gov/bcp/policystmt/ad-unfair.htm; transformed into a rule of law in 1984 when appended to the FTC decision in *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984). See also Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Paper presented at The Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York City, 31 October 2002, n5 at 2.

[258] FTC, *Policy Statement on Unfairness*, Letter to Senators Ford and Danworth, Chairman and Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, December 17 1980.

[259] *Federal Trade Commission v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233, n5 at 244.

- withholding or failing to generate critical price or performance data, leaving buyers with insufficient information for informed comparisons;
- dismantling a home appliance for "inspection" and refusing to reassemble it until a service contract is signed (in some cases this might constitute coercion);
- promoting fraudulent "cures" to seriously ill cancer patients (this is also covered by deception, but the FTC notes that the special susceptibilities of such patients, making it unfair, would be a reason for banning such advertisements entirely rather than relying on a remedy of fuller disclosure);
- bringing debt collection suits in a forum that was unreasonably difficult for the defendants to reach; and
- not refunding to customers any surplus money that was realised after automobile manufacturers and their distributors repossessed and resold their customers' cars (applying the statutory policies of the Uniform Commercial Code).[260]

In Australia, some of these practices would be prohibited by existing prohibitions under the Act on misleading and deceptive conduct, harassment and coercion or unconscionable conduct – but not all. More importantly, however, these cases and the FTC policy statement as a whole demonstrate a more sophisticated understanding of the way in which unfair conduct towards consumers can *distort* consumer behaviour, leading to individual detriment but also harming competitive markets.

For example, the FTC says the main concern of the prohibition of unfair acts and practices is the "unjustified" consumer injury. It acknowledges that competition benefits may sometimes outweigh consumer injury and sometimes consumers may be expected to avoid injury themselves. But if conduct causes substantial injury overall, it will be unfair (considerations seen reflected in the subsequent statutory codification).[261] The FTC states:

[260] FTC, *Policy Statement on Unfairness*, Letter to Senators Ford and Danworth, Chairman and Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, December 17 1980.
[261] See text at n255 above.

> Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects.

and:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice – the ability of individual consumers to make their own private purchasing decisions without regulatory intervention – to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission's unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behaviour that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making.[262]

The FTC notes that the first three examples of unfair practice cases cited above, unjustifiably hindered free-market decisions;

> Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act.[263]

Thus the prohibition on unfair practices and the FTC's approach treat unfairness as a question of whether the conduct complained of *unjustifiably distorts* consumer decisions. Muris confirms this understanding:

> …"consumer protection" is coextensive with the FTC's "unfair and deceptive acts and practices" jurisdiction, which generally can be thought of as policing the market against acts and practices that distort the manner

[262] FTC, *Policy Statement on Unfairness*, Letter to Senators Ford and Danworth, Chairman and Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, December 17 1980 – Consumer injury.
[263] As above.

> in which consumers make decisions in the marketplace. The practices we attack are those that prevent, or at least hinder, honest competition.[264]

Averitt and Lande also saw the provision this way in setting out their unifying theory of antitrust and consumer protection law.[265] They explicitly analyse the common categories of consumer protection violations as market failures that 'occur "inside the consumer's head" and that impede the consumer's ability to choose from among the available options'.[266]

The prohibition on unfair acts or practices therefore accords with the economic rationale for consumer protection laws as well as with fairness motives. It is also evident that the US-style of unfair conduct prohibition has allowed for lessons from information and behavioural economics to inform the law. This is because the unfairness standard creates a clear role for such insights given they help determine when conduct distorts consumer behaviour in an undesirable or unjustified manner. This was seen in the case examples cited by the FTC in its unfairness policy statement, particularly insights from information economics, which is to be expected given the date the statement was produced. The influence of information economics is also very strong in Averitt and Lande's paper.[267]

Averitt and Lande proposed a model antitrust and consumer protection law for a country drafting such laws on 'clean slate'. This consisted of a general prohibition for each aspect, with specific examples where they can be confidently included. For consumer protection, this would comprise prohibitions on specific conduct such as deception, together with a prohibition on 'any other conduct that unreasonably impairs consumers' ability to choose among [the range of competitive] options [that would be present in the market]'. The authors note that the general provision to deal with changing conditions makes their model more flexible. The specific examples show how the prohibition would operate overall. More importantly, they claim their model is superior because it bans conduct because of its unreasonable effects on the exercise of consumer choice,

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[264] Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Paper presented at The Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York City, 31 October 2002, at 2-3.
[265] See text at n79-80 above.
[266] Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713, at 733-734.
[267] See, eg, Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713, at 733-734, 749 and n140.

not just on "unfairness". This means judicial inquiry will be focused on the underlying concept of consumer choice.[268]

From this, it is clear that a general unfair practices prohibition is a valuable addition to national consumer protection laws, if its definition clarifies that unfair practices are those that unreasonably or unjustifiably distort consumer choices or decisions. An unfair conduct prohibition is therefore a worthwhile complement to a general prohibition on misleading or deceptive conduct. Both aim to prevent conduct that unjustifiably and harmfully distorts consumer decisions, but target different ways in which businesses can attempt to do so.

5.3.2 EU Unfair Commercial Practices Directive

The EU has a body of consumer protection laws – together referred to as the EU's consumer acquis. One of the most recent additions is the Unfair Commercial Practices Directive (**UCPD**), adopted by the European Council and the European Parliament in May 2005.[269]

Directives are binding on member states of the EU and require them to implement the directive's provisions in their own jurisdictions, with each member state determining the method according to their national legal framework.[270] The UCPD was to be adopted by all member states into national laws by June 2007 and brought into force by December 2007.[271]

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[268] Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law', (1997) 65 *Antitrust Law Journal* 713, at 745-755. The UK DTI report on different national schemes thought that the current US system's strength was that it already follows this general-plus-specific model to some degree: 'The FTC Act and the supporting detailed legislation and guides seem to be a strength of the US system. The FTC Act has the flexibility to deal with new practices and scams, so there is a general feeling of a mature and stable legal framework. The Act is linked to the more detailed statutes, which set rules similar to those in some EC directives, and the interpretative guides seem to carry considerable force and make traders' obligations very clear': DTI, *Comparative Report on Consumer Policy Regimes: Country Reports - Australia, Canada, Denmark, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, European Union & Summary Table*, October 2003, at 176.

[269] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

[270] If there is a delay in implementation or a directive is not implemented in full, citizens of that member state may invoke the directive directly in their national courts: EU,

The UCPD prohibits unfair commercial practices in business to consumer transactions. It aims to harmonise the rules about these commercial practices across EU member states to eliminate the uncertainty created by disparities in laws for both businesses (who may wish to engage in cross-border business) and consumers (who become uncertain of their rights and lose confidence in the internal market without consistent laws).[272]

The UCPD is a general and market-wide law, so is similar in scope to the US prohibition on unfair acts or practices in or affecting commerce. Recital 13 of the UCPD states:

> …it is necessary to replace Member States' existing, divergent general clauses and legal principles. The single, common general prohibition established by this Directive therefore covers unfair commercial practices distorting consumers' economic behaviour. In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution.

As well as demonstrating the general nature of the UCPD provisions, this passage shows that the focus of the general prohibition on unfair practices is on practices that distort consumers' decisions. The UCPD is similar in this way to the US provisions. This understanding of why some practices are unfair is very clear elsewhere in the UCPD recitals as well. They state:

> (7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products…
>
> (14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice…

'Process and players' on *EUR-Lex: European Union law*, website, at: http://eur-lex.europa.eu/en/droit_communautaire/droit_communautaire.htm.

[271] UCPD, above n269, at art.19. The EC has not yet reported on whether all member states have implemented the UCPD.

[272] UCPD, above n269, at recitals 3 and 4.

> (16) The provisions on aggressive commercial practices should cover those practices which significantly impair the consumer's freedom of choice…

The focus on preventing practices that distort consumer decision-making is more directly reflected in the substantive provisions of the UCPD, than in the US provision. In fact, it is a central concept of the provisions.

The UCPD provides for a three-tiered structure of prohibitions. First, there is a general prohibition on unfair commercial practices. Secondly, provisions stipulate that, in particular, misleading commercial practices and aggressive commercial practices are unfair. Finally, the UCPD lists specific practices that are always unfair.

Article 5 provides the underlying general provision prohibiting unfair commercial practices. It states that an unfair commercial practice is unfair if:

> (a) it is contrary to the requirements of professional diligence;
>
> and;
>
> (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.[273]

Professional diligence is a defined term and incorporates standards of trader behaviour that are honest and in good faith.[274] To materially distort the economic behaviour of consumers is also defined. The UCPD defines this as using a commercial practice to appreciably impair the consumer's ability to make an informed decision, causing the consumer to take a transactional decision that they would not otherwise have taken.[275]

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[273] Art. 5(2).

[274] Art. 2(h): 'Professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.

[275] Art. 2(e). A transactional decision is 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting': art. 2(k).

Article 5(4) provides that, in particular, misleading and aggressive commercial practices are unfair. Articles 6 and 7 define misleading acts or omissions, and articles 8 and 9 define aggressive commercial practices. The misleading practices provisions outline conduct similar to that prohibited under the Australian Act's prohibitions on misleading and deceptive conduct and false or misleading representations. The aggressive practices provisions outline conduct that uses harassment, coercion and undue influence. This is similar to conduct prohibited under the Australian Act's unconscionable conduct and harassment and coercion prohibitions. In all cases, the prohibition only applies if the conduct 'causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise'.

Article 5(5) provides a "blacklist" of commercial practices in Annex I to the UCPD that will always be unfair. This applies to all member states without modification, other than by amendment to the UCPD itself. The list in Annex I is divided into misleading and aggressive commercial practices and the conduct listed is generally prohibited in Australia under the Act. For example, false representations, bait advertising and operating a pyramid scheme are included. However, some of the aggressive commercial practices listed would potentially test the Act. These include prohibitions on failing systematically to respond to pertinent correspondence in order to dissuade a consumer from exercising their contractual rights, or explicitly informing a consumer that if they do not buy the product or service, the trader's job or livelihood will be in jeopardy.[276]

These provisions clearly incorporate similar concepts to the US provision, which targets practices that unjustifiably distort consumer decisions, even if the terminology is different in places.

Aggressive practices under the UCPD include the use of 'undue influence', which is defined as 'exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision'.[277] Regard can also be had to 'the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is

[276] Some of the aggressive practices listed would be prohibited under State or Territory laws relating to door-to-door and telemarketing sales, for example conducting personal visits to the consumer's home, ignoring the consumer's request to leave or not to return.
[277] Art. 2(j).

aware, to influence the consumer's decision with regard to the product'.[278] In Australia these provisions invoke the prohibition on unconscionable conduct, but the UCPD provisions apply more broadly. While unconscionable conduct generally applies to negotiations on an individual contract, the UCPD applies to market-wide conduct. Article 3(1) of the UCPD also clearly applies to practices *before, during and after* a commercial transaction in relation to a product.

The UCPD has a general provision covering unfair conduct that is not explicitly provided for at present, meaning that like the US provision it can cover new practices that emerge in the marketplace. With a general provision targeting any practice that unfairly distorts consumer decisions, it may be influenced by information and behavioural economics in its continued judgment about whether practices are unfair and distort consumer choices.

The other particularly interesting aspect of the UCPD is the way it can protect disadvantaged or vulnerable consumers as well as consumers generally. This is a specific intention of the UCPD, as made clear in the recitals:

> (18) It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases…to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group.
>
> (19) Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is

[278] Art. 9(c).

> appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

This intention is put into practice by articles 5(2)(b) and 5(3) of the UCPD. Article 5(2)(b) says that it is the behaviour of 'the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers' that should be assessed. Article 5(3) says that whether a commercial practice is unfair should be determined based on who the business was intending to target:

> Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group…

Earlier it was argued that one of the main benefits of a general duty to trade fairly (or prohibition on unfair conduct) is its superior ability to protect disadvantaged or vulnerable consumers. The UCPD provides a clear example of this. An unfair practices prohibition incorporates the understanding that what is unfair may depend on whose choices or decisions the trader's is trying to influence..

While still in its infancy, the UCPD is already having a significant influence on EU consumer laws. The EU has been extensively reviewing its consumer acquis since 2004.[279] The review covers eight principal consumer protection directives, including directives on unfair contract terms, door-stop selling and sale of goods.[280] However, not all directives relating to consumer protection are included in the review – including sector-specific directives, such as those on e-commerce, financial services and product safety.[281] The UCPD is also not a formal part of the review, as it post-dates the start.

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[279] EC, *European Contract Law and the revision of the acquis: the way forward*, Communication from the Commission to the European Parliament and the Council, COM/2004/651, Brussels 11 October 2004.
[280] As above at 3.
[281] See EC, *Green Paper on the Review of the Consumer Acquis*, COM/2006/744, Brussels, 8 February 2007, n3 at 3.

A central aim of the review of the EU consumer acquis is to simplify and improve the current consumer regulations.[282] The Green Paper on the review suggested harmonising and consolidating the different consumer protection directives into a horizontal instrument that would simplify and rationalise the existing consumer acquis by adopting common definitions and provisions across common issues. This would allow some issue-specific laws to be repealed, reducing the amount of regulation. It is clear that the UCPD has influenced its thinking:

> Consumer protection legislation until the adoption of the Unfair Commercial Practices Directive ("UCP") in 2005 has mostly been based on the vertical approach, intended to provide specific solutions to particular problems. This approach, however, has given rise to a fragmented regulatory environment. The relation between the different instruments is sometimes unclear as the legal terminology, as well as the relevant provisions, is not sufficiently coordinated.
> …
> A more integrated, "horizontal" approach has begun with UCP.[283]

Most stakeholders, including member states, business and consumers, now support a "horizontal" or market-wide approach to other consumer directives, like the UCPD.[284]

5.3.3 UK prohibition on unfair commercial practices

The UK is now implementing the EU's UCPD into its domestic laws, (thus it is slightly behind the required timetable in the UCPD, although close to completion).

This completes the UK government's reversal in opposition to introducing a general unfairness provision into its consumer protection laws. Introducing the Enterprise Bill in 2002, which provided for important reforms to the UK's competition and consumer protection law framework, then Secretary of State for Trade and Industry, Patricia Hewitt, had the following exchange in parliament:

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[282] See, eg, EC, *European Contract Law and the revision of the acquis: the way forward*, Communication from the Commission to the European Parliament and the Council, COM/2004/651, Brussels 11 October 2004, at 3; EC, *Green Paper on the Review of the Consumer Acquis*, COM/2006/744, Brussels, 8 February 2007, at 4.
[283] EC, *Green Paper on the Review of the Consumer Acquis*, COM/2006/744, Brussels, 8 February 2007, at 8.
[284] EC, *Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis*, Commission Staff Working Paper, October 2007, at 3.

> Margaret Moran (Luton, South): …The measure [stop now orders] is welcome, but there are concerns that it may cover not all rogue trading, but only that covered by existing legislation. So practices that are designed to get around the law may be excluded…Will my right hon. Friend assure us that the Bill will deal with those sorts of schemes as well as the consumer protection issues that are covered by the law?
>
> Ms Hewitt: Of course, the stop now orders…are designed to deal with rogue traders and others who are in breach of existing statutory provisions that apply to their sector…
>
> Mr. Nigel Waterson (Eastbourne): Before the Secretary of State leaves that matter, will she confirm that, despite the urging of such bodies as the National Consumer Council, the Government have apparently set their face against introducing a general duty not to trade unfairly, which would be a catch-all method of dealing with exactly the matters raised by the hon. Member for Luton, South?
>
> Ms Hewitt: We have looked carefully at the proposals for a general duty not to trade unfairly, but as I hope the hon. Gentleman will accept, we have decided that such a duty—particularly if it is cast in negative terms—would be so vague and general that it would create real uncertainty for business and difficulties for enforcement. For that reason, we have not included it in the Bill. Instead, we are extending the protection of stop now orders to other areas, in particular in the service sector, where consumer interests are harmed by traders who do not meet their legal obligations.[285]

However, in 2003 after its comparative study of consumer policy regimes, the UK DTI concluded that a general duty to trade fairly or equivalent probably was best practice.[286] Its subsequent consumer policy strategy committed the UK government to raising its consumer regime to the level of the best in the world by 2008.[287] The government's principal goal was to simplify the law for the benefit of consumers and business. To achieve this, it introduced a general duty not to trade unfairly.[288] It would do so by transposing the UCPD into UK law, after consulting UK stakeholders.

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[285] *Enterprise Bill: Second reading*, Hansard Commons Debates (UK), 10 April 2002, Volume No. 383, Part No. 125, Column 48-49.
[286] See text at n236-239 above.
[287] DTI, *A Fair Deal For All: Extending Competitive Markets: Empowered Consumers, Successful Business*, June 2005, at 6.
[288] As above at 17.

The UK appears to have overcome the previous concerns about uncertainty and difficulties in enforcement associated with a general duty not to trade unfairly. As part of the consultations on implementing the UCPD into UK law, the DTI stated:

> The coming into force of the Unfair Commercial Practices Directive will mark a new era in UK fair trading history. The Unfair Commercial Practices Directive will allow enforcers to tackle those practices that are unfair but not currently unlawful, taking either civil or criminal enforcement action as appropriate. Simplification and modernisation of the existing framework will also make the law easier for its users – business, consumers and enforcers – to understand and apply. The Government is confident that the wide-ranging changes set out below will help it meet its objective of raising the UK's consumer protection regime to the level of the best in the world.[289]

One of the factors that may have helped to allay concerns about uncertainty is a report that the DTI commissioned from legal experts in July 2003. The report examined the potential impact of adopting a general duty to trade fairly, or a general prohibition on unfair trading practices, on UK law.[290] The report broadly concluded that while this may be significant, it would be relatively easy to incorporate into UK law, including with regard to certainty.

The UK has drafted regulations to implement the UCPD, which will be in force by April 2008.[291] Consultations on the draft Consumer Protection from Unfair Trading Regulations 2007 closed in late 2007.[292] The draft regulations essentially adopt the UCPD provisions, including the same definitions for all the core concepts. The structure is also the same, with a general prohibition on unfair commercial practices, provisions setting out that misleading actions, misleading omissions and aggressive practices are unfair, and a list of unfair practices contained in Schedule 1.[293]

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[289] DTI, *Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive*, December 2006, at 3.
[290] Professor Robert Bradgate, Professor Roger Brownsword and Dr Christian Twigg-Flesner, *The Impact of Adopting a Duty to Trade Fairly*, Report prepared for DTI, July 2003.
[291] DTI, *Implementation of the Unfair Commercial Practices Directive: Consultation on the draft Consumer Protection from Unfair Trading Regulations 2007*, May 2007, at 6.
[292] BERR, 'Unfair Commercial Practices Directive', *BERR - Department for Business, Enterprise & Regulatory Reform*, website, at: www.dti.gov.uk/consumers/buying-selling/ucp/index.html.
[293] DTI, 'Draft Consumer Protection from Unfair Trading Regulations 2007', in *Implementation of the Unfair Commercial Practices Directive: Consultation on the draft*

However, the draft regulations also provide for practical matters, such as enforcement and investigation powers. Part 4 of the draft regulations provide for enforcement through the UK *Enterprise Act.* This means enforcement orders, similar to injunctions, are available to stop practices or impose requirements on traders who breach the prohibitions. Part 3 of the draft regulations also makes most of the prohibitions strict liability criminal offences; although a breach of the general prohibition alone will only be a criminal offence if it is done recklessly or knowingly. The maximum penalty for a criminal offence is a fine or, notably, imprisonment for up to two years if convicted on indictment.[294] Also notable is a new substantiation power given to the court under the draft regulations. The court will be able to require substantiation of any factual claims made by a trader as part of a commercial practice. If the trader fails to provide, or provides insufficient, evidence of the accuracy of these factual claims, the court can treat them as inaccurate.[295]

The UK draft regulations also introduce the concept of the 'typical consumer', rather than the 'average consumer' used in the UCPD. This has been done to make the drafting clearer, as the 'average consumer' encompasses different concepts. It can be the average consumer whom the practice reaches or to whom it is addressed; the average member of the particular group of consumers to whom the commercial practice is directed; or the average member of a clearly identifiable group of consumers whom the trader could reasonably be expected to foresee would be particularly vulnerable to the commercial practice or to the underlying product because of their mental or physical infirmity, age or credulity. [296] The 'typical consumer' concept helps to focus the draft regulations on protecting the interests of disadvantaged or vulnerable consumers, as well as general consumers.

It seems that the claim that a general unfairness prohibition can help simplify consumer protection laws will be borne out by the UK experience. The draft regulations will repeal many provisions in current UK laws,

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Consumer Protection from Unfair Trading Regulations 2007, May 2007, at 32-77. The UK draft regulations more clearly set out the provisions than in the UCPD, but the substance is the same.

[294] As above, draft regulation 13 at 38.
[295] As above, draft regulation 28 at 44.
[296] DTI, *Implementation of the Unfair Commercial Practices Directive: Consultation on the draft Consumer Protection from Unfair Trading Regulations 2007*, May 2007, at 14.

particularly industry-specific laws, including some whole pieces of primary or secondary legislation.[297] This influence is already evident. For example, in the UK government's response to the OFT's doorstop selling market study, some suggestions for specific legislative amendments were rejected because the general prohibition on unfair commercial practices will help to address the consumer detriment of concern.[298]

While it is very difficult to calculate the exact benefits and costs of such regulation, the UK government has produced a partial Regulatory Impact Assessment for the draft unfair trading regulations. The assessment says the regulations will potentially benefit both businesses and consumers significantly, as well as enhancing competition.[299]

5.3.4 Canadian laws on unfair business practices

Canada does not have a large national legislative focus on consumer protection. The Minister for Industry is responsible for consumer affairs,[300] but there is little federal legislation with an overt consumer protection function.[301] The most relevant market-wide federal legislation for our purposes is the *Competition Act*,[302] which aims to promote competition but has a strong focus on the supply-side of the market. For example, while it aims to 'provide consumers with competitive prices and product choices', it lacks any reference to demand-side considerations such as consumer protection or even fair trading.[303]

Nevertheless, some provisions in the Canadian *Competition Act* could be considered consumer protection laws, although here they are framed in terms of promoting fair competition. Part VI sets out competition offences, such the use of false and misleading representations, deceptive

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[297] See DTI, *Implementation of the Unfair Commercial Practices Directive: Consultation on the draft Consumer Protection from Unfair Trading Regulations 2007*, May 2007, at 12; 23-24; 49-67; 72-76.
[298] See text at n206-208 above.
[299] DTI, 'Partial Regulatory Impact Assessment: The Consumer Protection from Unfair Trading Regulations: Implementing the Unfair Commercial Practices Directive', Annex C in DTI, *Implementation of the Unfair Commercial Practices Directive: Consultation on the draft Consumer Protection from Unfair Trading Regulations 2007*, May 2007.
[300] *Department of Industry Act* (S.C., 1995, c. 1), ss.4(1)(d), 5(i).
[301] Federal Canadian consumer legislation includes the *Consumer Packaging and Labelling Act* (R.S., 1985, c. C-38) and the *Weights and Measures Act* (R.S., 1985, c. W-6).
[302] *Competition Act* (R.S., 1985, c. C-34).
[303] As above at s.1.1.

telemarketing practices and operating a pyramid-selling scheme as well as the offences well-known in Australian competition law. The punishment for all these (criminal) offences may be a fine or imprisonment. Part VII.1 also provides for deceptive marketing practices, such as false representations and bait advertising to be 'reviewable'. The regulator can apply to the court for administrative (civil) remedies against a person who is or has engaged in reviewable conduct, including orders not to engage in such conduct, to publish notice of the conduct or to pay an administrative monetary penalty. Part VII also makes contravening an order made under Part VII.1 an offence.[304] The deceptive marketing practices noted here would all generally be prohibited in Australia under the consumer protection provisions of Part V Division 1 of the Act.

However, there is no general prohibition on unfair trading or unfair commercial practices in Canadian federal law.

Most of the Canadian Provinces legislate for consumer protection,[305] laws prohibiting unfair practices against consumers.[306] However, there is no general prohibition on unfair business practices. Rather, they set out a range of practices that are unfair. Some of the statutes do start by prohibiting some broad categories of unfair practices, such as any misleading or deceptive representation and any unconscionable conduct or taking advantage of a consumer, followed by a list of specific but not exhaustive examples of these categories. Either way, however, the unfair practices prohibited, such as false representations and unconscionable acts or practices are similar to the sorts of practices prohibited under the Australian Act. These provisions, like those in the Act, are reasonably broad but not as general as the US or EU prohibitions on unfair practices.

There are some interesting provisions that do not necessarily have a corresponding provision in the Act. For example, both Alberta's *Fair*

[304] As above at s.66.
[305] The Canadian Constitution provides exclusive legislative power over property and civil rights to the Provinces: *Constitution* Act, 1867 s.92(13).
[306] Alberta: *Fair Trading Act* (R.S.A., 2000, c. F-2); British Columbia: *Business Practices and Consumer Protection Act* (S.B.C., 2004, c. 2); Manitoba: *Business Practices Act* (C.C.S.M., 1990, c. B120); Newfoundland and Labrador: *Trade Practices Act* (R.S.N.L., 1990, c. T-7); Ontario: *Consumer Protection Act* (S.O., 2002, c. 30); Prince Edward Island: *Business Practices Act* (R.S.P.E.I., 1988, c. B-7); Quebec: *Consumer Protection Act* (R.S.Q., chapter P-40.1); Saskatchewan: *Consumer Protection Act* (S.S., 1996, c. C-30.1). New Brunswick and Nova Scotia have not legislated to prohibit unfair practices against consumers, nor have the three territories, Northwest Territories, Nunavut, and Yukon.

Trading Act and Saskatchewan's *Consumer Protection Act* prohibit the charging for goods or services at a price that grossly exceeds the price at which similar goods or services are readily available or obtainable.[307] The Alberta and Saskatchewan statutes also prohibit including terms or conditions that are harsh, oppressive or excessively one-sided in a consumer agreement.[308] The statutes of some of the other Provinces allow these factors to be considered in determining whether an act or representation is unconscionable, but they do not directly outlaw them as unfair practices.[309] Similarly, in Australia these are factors that may be taken into account in determining whether a trader has engaged in unconscionable conduct, but they are not unconscionable practices in and of themselves.[310]

These Canadian provincial laws do not provide any broader model for a general unfair practices prohibition than is currently in force under the Act. However, the fact that they differ in small ways in their lists of unfair practices from one Province to the next, and from the Australian Act, shows that there will be gaps when relying on drafting provisions that cover specific practices. It brings to mind the warnings of the US legislators almost a century ago when debating the US FTC Act, that 'there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.'[311] Altogether, Canadian consumer protection laws could not be considered best practice in terms of prohibiting unfair trading practices.

5.3.5 A general prohibition on unfair conduct in Australia

A general unfair practices prohibition has proven to be both flexible and workable in the US, and is recognised as best practice by the EU and the UK. It allows consumer protection regulation to be simplified and avoids the practice-by-practice approach to consumer regulation that otherwise tends to dominate, and which leads to gaps in protection.[312]

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[307] *Fair Trading Act* (R.S.A., 2000, c. F-2) s.6(2)(d); *Consumer Protection Act* (S.S., 1996, c. C-30.1) s.6(r).
[308] *Fair Trading Act* (R.S.A., 2000, c. F-2) s.6(3)(c); *Consumer Protection Act* (S.S., 1996, c. C-30.1) s.6(q).
[309] *Business Practices and Consumer Protection Act* (S.B.C., 2004, c. 2) s.8(3)(c),(e); *Consumer Protection Act* (S.O., 2002, c. 30) s.15(2)(b),(e); *Business Practices Act* (R.S.P.E.I., 1988, c. B-7) s.2(b)(ii),(v).
[310] *Trade Practices Act 1974* s.51AB(2)(b),(e).
[311] See text at n249-251 above.
[312] See also Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 23.

Introducing a general prohibition on unfair conduct in Australia could bring several benefits, including better ways to identify and address unfair practices that particularly target disadvantaged or vulnerable groups of consumers. Cousins has previously identified some of the specific gaps that exist in the Act, especially for vulnerable consumers:

> [S]ome advertising is unfair in that it is directed to vulnerable people, is not balanced in its presentation and emphasises emotions and values designed to prompt behaviour that individuals would not otherwise contemplate. Apart from general concerns relating to sustainability, there is concern, for example, over advertising directed at children encouraging consumption of unhealthy foods, of marketing practices directed to teenagers to promote the use of credit, of marketing practices designed to get people to spend large amounts of money on property investment related services, and so on. The law has largely been ineffective to date in preventing the share trading practices of Mr. David Tweed, but most would regard these practices as being unfair.
>
> Many complaints directed to fair trading agencies relate to shoddy business practices, for example persistent delays in completing work, despite being paid significant deposits, and the failure to respond to complaints. Whilst the cause may often simply be poor business acumen, for the consumer the behaviour is unfair. A significant number of complaints to fair trading agencies also concern prices. If a consumer has made a bad choice, for example brought something later found to be cheaper from another store, this is not something that would warrant intervention. However, some complaints do involve blatantly unfair pricing. This tends to occur when the consumer is vulnerable for some reason and has little alternative but to pay. The behaviour may not go so far as to be unconscionable, but is unfair.[313]

In its most recent annual report, CAV includes a case study describing problems that consumers face in dealing with an internet and telecommunications business. These problems do not involve misleading or deceptive conduct or unconscionable conduct, but they are unfair for the consumers. For example, the business has been mistakenly continuing to bill customers after services have been cancelled, but customers have had problems contacting the business to resolve problems. While individual consumers may have individual legal rights in this situation (such as suing to recover wrongful payments) CAV notes that the problems affect many

[313] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 24-5.

consumers yet it does not have the power to address the conduct on this systemic level. It concludes that a general unfair conduct standard would allow it to address such problems.[314]

While it will take some time for case law on the EU and UK provisions to develop, it is clear that such case law and guidance *will* emerge, as the US provision demonstrates. The provisions themselves have been well-drafted to clarify their overall purpose – to address unreasonable or bad faith practices that materially distort consumer decision-making – a similar focus to the US provision.

Due to this, the general prohibition on unfair practices is the only provision that shows a modern understanding of how certain trading practices can be economically harmful as well as unfair. It also allows for new information and behavioural insights to inform its application, as these show how consumers may be unfairly influenced in their market choices.

This also distinguishes it from the current prohibition on unconscionable conduct in consumer transactions. It is recognised that the unconscionable conduct prohibition addresses conduct beyond what is misleading or deceptive. When it was first introduced, the second reading speech stated:

> The section is directed at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable.[315]

However, the unconscionable conduct prohibition has remained limited to conduct in an individual transaction context, and is less able to address market-wide unfair practices. This is discussed in more detail in section 5.4 below. In its focus on conduct in an individual context that is 'beyond conscience', it also sets a standard that does not necessarily prevent forms of unfair conduct, such as that described in the CAV case study above. The US has a well-developed doctrine of unconscionability, discussed in section 5.4.3 below, which operates separately to the central consumer protection provision prohibiting unfair acts or practices in the FTC Act.

The longer that Australia waits to introduce a general prohibition on unfair conduct, the longer we will remain behind best practice in this area and the

[314] CAV, *Report to the Minister for Consumer Affairs for the year ended 30 June 2007*, November 2007, at 12.
[315] The Hon L.F. Bowen, Deputy Prime Minister; Attorney-General, *Trade Practices Revision Bill 1986 Second Reading Speech*, 19 March 1986.

longer it will take Australia to build up similar case law and guidance on our own provisions. If Australia is serious about meeting both economic and social goals with consumer protection laws, it must begin to consider how to incorporate a general unfair conduct prohibition into the Act.

Recommendation 5 – Introduce a general prohibition on unfair trading conduct

Introduce a general, market-wide prohibition on unfair conduct or practices towards consumers into the Act.

The prohibition should incorporate the concept that conduct or practices are unfair if they unreasonably or unfairly distort consumer decisions, based on the models provided by the US, the EU and the UK.

The prohibition should also take into account the typical consumer to whom the conduct or practices are directed at, not just the average consumer in the market.

The general prohibition may be supported by examples of specific unfair practices. Other consumer protection regulation that overlaps with the general prohibition, particularly industry specific regulation, could then be repealed.

5.4 Unfair contract terms regulation

The growth of mass markets based on mass production and consumption has brought huge changes in modern markets. As noted earlier, this has resulted in suppliers increasingly adopting standard-form contracts, as it is not practicable to negotiate contract terms individually with every customer.

Standard-form contracts are now the norm in most retail transactions in Australia. This means that the supplier drafts their terms of supply in advance and consumers generally have little if any opportunity or ability to negotiate these terms (other than the core terms of what goods or services are being purchased and at what price).

While this *process* is more efficient, there have been large-scale concerns over the *content* of standard form contracts, both in Australia and abroad, for many years. These concerns focus in particular on whether terms in these contracts unnecessarily favour the supplier.

These debates have been canvassed in detail elsewhere.[316] In Australia, the Standing Committee of Officials of Consumer Affairs (**SCOCA**) has considered the concerns over unfair contract terms and possible policy and legislative solutions. In its discussion paper on the issue, it summarised the main concerns well:

> Standard form contracts can have advantages to both supplier and purchaser provided that a fair balance is achieved between both parties to the contract. They reduce transaction costs for the supplier which would otherwise be passed on to the purchaser. They allow for lengthy and detailed contracts to be finalised with the minimum of time and by lay persons who only need to negotiate the specifics such as price, description of goods and services and delivery times. Over a period of time, people become familiar with the contracts because they are standard and may encourage a general understanding of trading practice.
>
> However, standard form contracts do pose problems. These types of contracts will usually have been drafted by professionals on behalf of the supplier. Generally, the purchaser has no time or opportunity to read the contract before signing, let alone obtain the same standard of advice as the supplier. If there is time to read it, it is doubtful whether the purchaser will understand the meaning and impact of each term in the light of the whole contract…
>
> It has become increasingly clear that many such standard form contracts contain clauses which are unfair or unnecessarily one-sided to the detriment of the purchaser. One reason that these have become so prevalent is that there is little, if any, competition in this regard. Purchasers do not usually "shop around" on the basis of the best contract terms: it would be too impractical an exercise for the vast majority of people to decide, for example, which hire-car company to use based on the best contract terms. Purchasers predominantly focus on price and the quality or characteristics of the product. They may not appreciate that a "good" price has been achieved through the imposition of onerous terms. As a result, terms may well be standard across an industry and even if the purchaser went elsewhere, they would be faced with a similar situation.[317]

[316] For example, the Productivity Commission highlighted this issue as a contentious one in the consumer policy framework inquiry: Productivity Commission, *Consumer Policy Framework: Productivity Commission Draft Report*, December 2007; see also, eg, NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006.

[317] SCOCA Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004, at 16-17.

There will always be examples of particularly objectionable terms in an individual consumer's contract or the contracts of a small group of consumers. However, this is a market-wide concern borne from current market conditions, rather than one that springs from unfairness in individual transactions. The sorts of unfair terms regularly cited as revealing a problem are commonly shared across consumer contracts in many different industries. For example, terms that allow the supplier to vary important contract terms unilaterally for any reason or to suspend a service with or without notice and without suspending the consumer's obligations to continue payments.[318]

Our best practice principles identified that consumer protection laws should help consumers make effective choices in the market. To do this they must take into account market changes so that the laws properly address new consumer information problems and the effect of behavioural biases on consumer decision-making. We also identified that the Act could be improved in this respect.

Addressing the problem of unfair terms in consumer contracts is a prime example of this. The consumer risk associated with excessively one-sided and unfair contract terms in consumer contracts may be caused by either information problems or behavioural biases to which consumers are subject.[319]

For example, Trebilcock disagrees that standard-form contracts are unfair simply because they are offered on a 'take it or leave it' basis, as this is consistent with their rationale of dramatically reducing transaction costs. He argues that the more substantial concern is the information asymmetries associated with standard-from contracting:

> Almost necessarily implicit in the transaction cost justification for standard form contracts is the assumption that parties will often not read them, or if they do, will not wish to spend significant amounts of time attempting to renegotiate the terms…Clearly, in many, perhaps most, cases, meaningful consent is absent. Thus, to justify contractual enforcement of these kinds of standard form contracts requires us to move outside the purely internal,

[318] See, eg, SCOCA Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004, at 14-5, 19-20; CAV, *Preventing unfair terms in consumer contracts: Guidelines on unfair terms in consumer contracts*, June 2007.
[319] See also ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 73.

> non-instrumental, basis for contractual obligation as deriving from the will of the parties, and appeal instead to external benchmarks of fairness.[320]

Vickers has also approved of unfair contract terms regulation to address information problems associated with standard-form contracting. He compares unfair terms to consumer lock-in associated with high switching costs. The prospect of customer lock-in can lead to vigorous competition on up-front prices or terms but bargain-then-ripoff pricing. This is a problem because consumers may have been able to obtain a better overall deal with better balanced pricing or quality, or may have chosen not to buy at all if they had realised the non-bargain would follow the up-front "bargain". Suppliers have economies of scale in processing information about future matters but it would be very costly and perhaps even irrational for a consumer to try to process all of this information just for their own transaction.[321] The same issues arise with regard to contract terms dealing with unlikely but possible future contingencies:

> Even the most far-sighted of consumers might reasonably not have thought through the implications of such contract terms, still less factored them into their purchase choices. But for the suppliers the contingencies concerned could be a considerable source of (anticipated) profit.
> …
> At first sight unfair contract terms might seem a long way from the economics of lock-in…But on reflection the parallels seem close. In a literal sense the consumer is contractually locked in. The analogue of the poor deal in the 'aftermarket' is the bad deal in the contingency that the unfair contract term relates to. Whereas in the standard lock-in literature the consumer foresees the bad deal, the victim of the unfair contract term might, without being irrational, not realise that it was there, or what it would

[320] Michael J. Trebilcock, 'Rethinking consumer protection policy', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 93. Trebilcock notes (at 94) that if there is a sufficient margin of informed consumers who negotiate terms or switch their business to suppliers offering better terms, this margin of consumers can discipline the market. However, he also notes this will not work if all consumers assume that others are doing this (see also Waterson, above n83 at 3), if suppliers can distinguish between informed and uninformed consumers or if the market is so disrupted by imperfect information that there is no identifiable margin of informed consumers imposing discipline, in which case individual remedies such as those based on unconscionability are less appropriate than regulatory intervention. Sylvan has also argued strongly that the 'marginal consumer' argument has little substance in relation to standard form contracts: Louise Sylvan, 'Activating competition: The consumer-competition interface', (2004) 12 *Competition & Consumer Law Journal* 1, n15 at 17.

[321] John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 13-15.

> entail. So there are information problems pre-purchase and resulting potential for undue surprise.[322]

Korobkin has also argued, like Vickers, that the market may provide efficient terms beneficial to both the supplier and the consumer on core matters (such as up-front price), but other contract terms will be subject to the "lemons" problem noted earlier.[323] Suppliers will reduce the quality of these non-core contract terms as this helps them compete on the terms that consumers notice and factor into their decision-making. Consumers cannot take account of all non-core terms given cognitive limitations or bounded rationality.[324]

However, Korobkin's analysis also considers various behavioural biases that can influence how consumers make choices relating to contract terms. For example, like Vickers, he uses the example of contract terms that deal with unlikely but possible future contingencies. He points out that consumers are unlikely to take these into account in their decisions due to various cognitive biases, such as the "probabilities" bias (individuals find it very difficult to estimate the probability of risks), the "overconfidence" bias (individuals exhibit over-optimism that they will be able to avoid potential harm), and the "availability" bias (individuals will judge a risk as more likely if they are familiar with it or can easily conceive or imagine it, and less likely otherwise).[325]

In his paper for the Productivity Commission's consumer policy framework inquiry, Shafir also outlined how various cognitive biases can influence consumer decisions. The paper concludes by noting how certain companies have been taking advantage of biases, including by using non-core contract terms to hide features that increase profits at the consumer's expense.[326]

Finally, Dr Rhonda Smith has done a cost/benefit analysis of unfair contract terms regulation, discussed further in section 5.4.5 below. To do this effectively, she takes account of both information and behavioural

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[322] As above at 15-16.
[323] See text at n75-77 above.
[324] Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, (2003) 70 *The University of Chicago Law Review* 1203.
[325] As above at 1232-33. See also Appendix at 7
[326] Eldar Shafir, *A Behavioral Background for Economic Policy*, Paper presented to Roundtable on Behavioural Economics and Public Policy, Productivity Commission, Melbourne, 8 August 2007, at 16-17.

problems, such as those relating to the tendency towards standardisation of the least favourable non-core terms for consumers, the bargain-then-rip-off problem and problems consumers face in processing complex information and calculating risk. Her analysis is found in the Appendix to this Report.

As both a more conventional information approach and a behavioural approach reveal significant consumer risks in dealing with standard form contracts, as well as the general concern about unfair terms in these contracts, it is hard to deny that a problem exists. It is also clear that this is highly unlikely to be corrected by the market itself.

Further, a recent research paper by CAV suggests that significant harm is caused by unfair contract terms. Many consumers suffered financial costs, and low-income and disadvantaged consumers were particularly susceptible to harm, as such costs could add to their financial woes. The research also uncovered negative personal emotional and social costs, which could cause consumer confidence to drop in future transactions.[327] This finding is significant as it suggests that unfair contract terms, was well as being a product of competition problems, could create further problems through future deadweight losses as consumers approach transactions over-cautiously or avoid them.[328]

The principal question, therefore, following a "do no harm" approach,[329] is to consider ways of addressing the problem associated with unfair and inefficient terms without causing unintended harm or distortions, minimising the costs of such solutions so that their benefits outweigh their costs.

Other jurisdictions have adopted laws that address unfair contract terms and these are discussed below. These demonstrate that laws to address unfair contract terms can complement a general prohibition on unfair trading. General unfair trading prohibitions address poor trading conduct generally but do not consider the substantive content of consumer contracts independent of such conduct. Unfair contract terms laws provide a market-wide tool for addressing poor substantive contractual content.

[327] CAV, *Unfair contract terms in Victoria: Research into their extent, nature, cost and implications*, Research Paper No. 12, October 2007.
[328] See also the Appendix at 10.
[329] See text at n105-108 above.

5.4.1 UK and EU unfair terms in consumer contracts regulation

In Australia, the leading model in considering laws to address unfair terms in consumer contracts has been that provided by the UK.[330]

The UK's Unfair Terms in Consumer Contracts Regulations 1999 provide, quite simply, that an unfair term in a consumer contract is not binding on the consumer. The regulations preserve the rest of the contract if it can exist without the unfair term.[331] They also state that written contracts must be in plain, intelligible language.[332] However, the regulations do not prohibit any specific terms nor do they prohibit any conduct or practices.

There is a two-fold method for determining whether a term is unfair. First, regulation 5(1) sets out a general, overarching test. Second, regulation 5(5) provides that terms which may be regarded as unfair are included in Schedule 2. This structure is very similar to the UK's draft unfair trading regulations, based on the EU's UCPD. This also establishes a general test for unfair practices and then lists specific unfair practices (although for unfair trading, the practices in the list are conclusive not indicative of unfairness).[333]

The general test for unfair terms covers only terms that have not been individually negotiated. Terms relating to the definition of the main subject matter of the contract or the adequacy of the price or remuneration for the goods or services supplied are also not covered (except if they are not in plain, intelligible language). Otherwise, a term in a consumer contract is unfair if:

> contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Further, regulation 6(1) says that in assessing whether a contractual term is unfair the nature of the goods or services for which the contract was concluded must be considered, as well as all the circumstances attending

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[330] See, eg, SCOCA Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004; NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006; the Victorian model, discussed below, is based on the UK model.
[331] Unfair Terms in Consumer Contracts Regulations 1999 reg.8.
[332] Unfair Terms in Consumer Contracts Regulations 1999 reg.7.
[333] See text at n293 above.

the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

Thus the general test has three basic elements:

- the term causes a significant imbalance in the rights and obligations of the supplier and the consumer arising under the contract, to the detriment of the consumer;
- this occurs contrary to the requirement of good faith; and
- it is unfair given all the circumstances surrounding the contract, including the other contractual terms and the nature of the goods or services the subject of the contract.

The test does not, therefore, leave the determination of unfairness to purely subjective value judgements by a court or the regulator. While it is broad enough to be adaptable, it is a good guide to what leads to unfairness, concentrating on the imbalance between the parties and a lack of fair dealing. However, it also makes it clear that the total context must be considered. For example, if a term was clearly offset by other terms in the contract in the consumer's favour which were made possible by the first term and valued by the consumer, the term would almost certainly not be unfair 'in all the circumstances'.

The provisions are clearly aimed at tackling the problems associated with standard-form contracts. This shown by the fact that they are limited to terms that have not been individually negotiated. The regulations say that any term that has been drafted in advance, and which the consumer has not been able to influence the substance of, will always be regarded as not individually negotiated. They also clarify that even if a term or terms have been individually negotiated, if an overall assessment indicates that the contract is a pre-formulated standard contract, the rest of the contract will still be covered by the regulations.[334]

The list of indicative unfair terms in Schedule 2 to the Regulations provides further guidance about the terms that might be unfair and therefore further helps in applying the general test.[335] Again, this structure fits with the Averitt and Lande model for good consumer protection laws discussed

[334] Unfair Terms in Consumer Contracts Regulations 1999 reg.5(2),(3).
[335] See also Frank Zumbo, 'Promoting fairer consumer contracts: Lessons from the United Kingdom and Victoria', (2007) 15 *Trade Practices Law Journal* 84, at 86-89.

earlier.[336] Some of the terms listed in Schedule 2 include terms which have the object of:

> a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
>
> (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
> …
> (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
>
> (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
>
> (f) authorise the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
> …
> h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early;
> …
> (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
>
> (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
> …
> (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

[336] See text at n268 above.

> (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
>
> (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
> …
> (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

The UK's unfair contract terms regulations implement the EU's 1993 Directive on unfair terms in consumer contracts into UK law.[337] This directive has been adopted by member states across the entire European Union.[338] The UK regulations remain very faithful to the EU directive, including elements of the general test of an unfair term and the indicative list of terms that may be regarded as unfair.

Article 7 of the EU directive says member states must ensure adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts. This is distinct from article 6, which says member states must provide under their national laws that unfair terms are not binding on consumers. Thus the directive recognises a need for both individual relief for consumers from the effects of unfair terms as well as more systematic means to eliminate unfair contract terms from the market.

In accordance with article 7, under the UK regulations the OFT must consider complaints that a contract term drawn up for general use is unfair.[339] Some industry-specific regulators may also consider complaints about unfair terms.[340] The OFT and the other regulators are able to seek interim or final injunctions from the court against any person who appears to be using or recommending the use of an unfair term in consumer

[337] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[338] See EC, *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, COM/2000/0248, April 2000.
[339] Unfair Terms in Consumer Contracts Regulations 1999 reg.10.
[340] Reg.11. The industry specific regulators are called 'qualifying bodies' in the regulations and are listed in Schedule 1 Part 1.

contracts, and the court has a broad power to grant injunctions on such terms as it thinks fit.[341] The OFT and other regulators may also accept undertakings as to the continued use of unfair terms in consumer contracts.[342]

Giving enforcement powers to regulators is one of the principal benefits of the UK regulations (prompted by the EU directive). It allows industry or market-wide unfair contract terms to be addressed, rather than relying solely on individual consumers to act. This is critical given that the problem is a market-wide problem generally associated with the common use of standard-form contracts, rather than individual instances of unfairness. This model also allows the regulator to take proactive measures to tackle unfair terms, rather than necessarily waiting for consumer complaints, although complaints remain an important trigger for action.

This model has proved to be highly effective in the UK. The OFT has tackled unfair terms in contracts across a number of industries and markets, including package holiday contracts, entertainment contracts, tenancy agreements, health club agreements, aged-care home contracts and default charges in credit card contracts.[343] In the 06/07 financial year, the OFT received more than 1000 complaints about unfair terms and obtained nine undertakings.[344] The previous financial year it changed more than 1000 unfair terms and obtained more than 50 undertakings, including from such notable businesses as BP, British Airways, GE Capital Motor Finance, Eurostar (UK), Travelodge and Tesco.[345] The EC has also observed a significant impact in relation to the UK:

> There has been a considerable increase in the number of cases in several countries, particularly in the field of preventative control (actions for

[341] Reg.12.
[342] Reg.10(3). In addition, if an act or omission harms the collective interests of consumers and contravenes the unfair contract terms regulations, it will be a 'community infringement' under the UK *Enterprise Act 2002* and enforceable by enforcement order under that statute: see text at n525-535 below.
[343] For example, a list of guidances issued by the OFT are available from the OFT website at: www.oft.gov.uk/advice_and_resources/resource_base/legal/unfair-terms/guidance. The OFT has the power to disseminate information and advice about the operation of the regulations under reg.15(3).
[344] OFT, *Annual report and resource accounts 2006-07 Annexe A: Consumer law casework 1 April 2006 to 31 March 2007 – excluding consumer credit*, July 2007, at 2-3.
[345] OFT, *Annual report 2005-06 Web Annexe A: Summary of OFT consumer law casework 2005 to 2006 excluding consumer credit*, July 2006, at 3-4.

> injunctions) of unfair terms. The prime example is the United Kingdom: in the past, there was no control whatsoever; today, the Office of Fair Trading examines over 800 cases annually, and in over 500 cases firms have taken measures which have generally involved a change or elimination of the offending contractual terms.[346]

Another element in the UK laws is that the regulations may specify other 'qualifying bodies' that have the power to seek interim or permanent injunctions, apart from the OFT. The regulations currently specify that the UK Consumers' Association is a qualifying body, providing an additional tool to help address unfair terms.[347] This provision is from article 7(2) of the EU directive, which says member states must include provisions:

> whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.[348]

The EU Directive on unfair terms in consumer contracts, unlike the UCPD, allows for member states to adopt or retain *more* stringent provisions on unfair terms than provided for in the directive.[349] This includes with regard

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[346] EC, *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, COM/2000/0248, April 2000, at 32.

[347] The OFT retains a central coordination role. If another qualifying body wishes to seek an injunction, it must first notify the OFT: reg.12(2). This gives the OFT the opportunity to discuss appropriate action with the qualifying body before anything is initiated. See also reg.14. The Consumers' Association is also a 'designated enforcer' under the UK *Enterprise Act 2002*, meaning it can seek enforcement orders under that statute, after consulting with the OFT and the affected business first: see text at n534-535 below.

[348] The UK government did not originally provide in the regulations for bodies other than the regulator (then the Director General of Fair Trading) to be able to seek injunctions, as directed by article 7(2). The regulations were amended after the Consumers' Association brought the matter to the European Court of Justice: EC, *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, COM/2000/0248, April 2000, at 34.

[349] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, art.8. This is referred to in the EU context as a 'minimum harmonisation' approach, whereby a minimum threshold of laws is set by a directive but member states are free to legislate over and above the directive's requirements. This can be contrasted with the 'maximum harmonisation' approach, such that member states must implement a directive as it is drafted without legislating above its requirements. The UCPD, for example, requires maximum harmonisation.

to the list of indicative terms – the recitals to the directive state that 'because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws'.

Several countries have therefore adopted stricter laws, such as not including the exclusions for individually negotiated terms or for terms regarding the price and subject matter of the contract in their unfair contract terms laws. The EC has previously reported that few problems have arisen in practice as a result.[350] Further, only a few member states have kept an indicative list. Others have included the list as a "blacklist", meaning that the terms are prohibited, or have included both a blacklist and a "greylist" of unfair terms.[351]

The EU Directive on unfair terms in consumer contracts is included in the EU's current review of its consumer acquis,[352] thus it may be revised in next few years. Most notably, it has been proposed that the directive could form the core of a new horizontal instrument consolidating the different consumer directives, given it is already a market-wide instrument itself.[353] This has received strong support..[354] In addition, most member states favour extending the scope of the unfair terms directive to cover individually negotiated terms. However, business stakeholders oppose this and the European Parliament has suggested a clearer definition of individually negotiated terms as a compromise. Most member states and the European Parliament also support black and grey lists of unfair terms.[355]

In the UK, the Law Commission and the Scottish Law Commission have also recommended that regulating unfair contract terms be extended to cover individually negotiated terms.[356] Reasons for this include increased

[350] EC, *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, COM/2000/0248, April 2000, at 14-15.
[351] As above at 17.
[352] See text at n279-284 above.
[353] EC, *Green Paper on the Review of the Consumer Acquis*, COM/2006/744, Brussels, 8 February 2007, at 8.
[354] EC, *Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis*, Commission Staff Working Paper, October 2007, at 3.
[355] As above at 6-7.
[356] The Law Commission and The Scottish Law Commission, *Unfair Terms in Contracts: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*, February 2005, at 31-32.

certainty and the closing off of the loophole that this exclusion has created. Their report noted that '[c]onsumers seldom have sufficient understanding of the possible impact of "non-core" terms to make any negotiation meaningful'. Thus the Commissions recognised an information problem that suggests results will be poor if it is left up to consumers to negotiate efficient and fair non-core contract terms.. The UK government has accepted the Commissions' recommendations in principle and will consider legislation, subject to the regulatory assessment process.[357]

5.4.2 Victorian unfair terms in consumer contracts regulation

Victoria introduced laws regulating unfair terms in consumer contracts in 2003.[358] The Victorian laws are largely based on the UK model.

Part 2B of Victoria's *Fair Trading Act 1999* provides that an unfair term in a consumer contract is void. As with the UK regulations, the contract will still be binding if it can exist without the unfair term.[359] Section 163 of the *Fair Trading Act* also says consumer contracts must be easily legible and clearly expressed and use a 10-point minimum font size if printed or typed.

The two-fold method for determining whether a term is unfair is retained in the Victorian legislation. However, the legislation is not limited to individually negotiated terms, nor are core terms about the price or subject-matter of the contract excluded. The general test of whether a term in a consumer contract is unfair, found in section 32W, is if:

> contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

The general test is therefore very similar to the UK's general test, with the same three basic elements of a significant imbalance; this being contrary to good faith; and it being unfair in all the circumstances.

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[357] Letters from Rt. Hon. Ian McCartney MP, Minister for Trade, Investment and Foreign Affairs to the Chairmen of the Law Commission and the Scottish Law Commission, 24 July 2006, available from BERR website at: www.berr.gov.uk/consumers/buying-selling/sale-supply/unfair-contracts/index.html. The letters do not explicitly mention the recommendation regarding extension of unfair terms protection to individually negotiated terms but do accept the recommendations 'for a unified regime for consumer contracts', of which this recommendation was a part.

[358] *Fair Trading Act* (Vic) Part 2B.

[359] *Fair Trading Act* (Vic) s.32Y.

Section 32X says several matters may be taken into account in determining whether the general test applies to a term. These matters are an important and useful guide for applying the general test.[360] These matters include an indicative list of unfair terms similar to the list in the UK regulations. Although the test is not limited to individually negotiated terms as in the UK, whether the term was individually negotiated may also be taken into account. The indicative list of terms includes those that have the object or effect of:

> (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
>
> (b) permitting the supplier but not the consumer to terminate the contract;
>
> (c) penalising the consumer but not the supplier for a breach or termination of the contract;
>
> (d) permitting the supplier but not the consumer to vary the terms of the contract;
>
> …
>
> (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
>
> (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
>
> (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
>
> …
>
> (k) limiting the consumer's right to sue the supplier;
>
> …
>
> (m) impose the evidential burden on the consumer in proceedings on the contract.

The Victorian legislation includes a few differences from the UK regulations that should be noted. First, as stated above, the Victorian provisions apply to all terms in consumer contracts, whether they are individually negotiated or not and whether they are core (price, subject-matter) terms or non-core terms. While these are important differences, other EU member states have also decided not to include such exclusions in their national unfair

[360] See *Director of Consumer Affairs Victoria v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (2 August 2006), at §46 per Morris J.

contract terms laws and the UK is now considering removing the exclusion for individually negotiated terms.[361] Whether a term has been subject to negotiation remains an important factor in determining unfairness pursuant to section 32X of the Victorian legislation.

Secondly, while the Victorian legislation does not include a "blacklist" of terms, it does include additional provisions that allow regulations to prescribe terms as unfair, thus creating a blacklist.[362] There are three principal effects of prescribing a term as unfair: it will be void in a standard form contract; it can be taken into account under section 32X in determining whether a term in a consumer contract generally is unfair; and most noticeably, it is a criminal offence for a supplier to use or try to enforce a prescribed unfair term in a standard form consumer contract.[363] However, no terms have been prescribed.

Finally, the legislation does not currently apply to consumer credit contacts.[364] This exclusion appears to have been included to avoid deviation from the uniform consumer credit regulatory scheme that the States and Territories are parties to. However, the Victorian government has agreed to remove this exclusion from the legislation as part of its response to the 2005-2006 broader consumer credit review.[365]

Victoria's unfair contract terms provisions were introduced after an extensive review of its fair trading legislation, in recognition that the existing prohibitions on misleading and deceptive and unconscionable conduct did not necessarily address unfair contractual content. In the second reading speech on the Bill introducing the amendments, it was stated:

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[361] See text at n350-357 above.
[362] S.32U.
[363] Ss.32X, 32Y and 32Z.
[364] S.32V.
[365] CAV, *Government Response to the Report of the Consumer Credit Review*, September 2006; CAV, *Application of unfair contract terms legislation to consumer credit contracts: Consultation paper*, April 2007. The report of the consumer credit review noted that in the UK unfair terms in consumer credit contracts were one of the top five priority areas for the OFT due to the number of cases in this area, and that similar issues were likely to be seen in Australia given the similarity in consumer credit markets. Its conclusions on this issue were that 'there is sufficient evidence that unfair contract terms in consumer credit contracts exist and that there is no convincing argument why consumer credit contracts should be quarantined from unfair contract terms legislation': CAV, *The Report of the Consumer Credit Review*, February 2006, at 184-186.

> This bill will transform the act into the most advanced consumer protection legislation of any Australian state or territory, and will make for a fairer Victorian marketplace and more confident consumers.
>
> Specifically, it implements recommendations of the Fair Trading Act Review Reference Panel in its report to the Minister for Consumer Affairs in June 2002.
> …
> This Bill…prohibits unfair terms in consumer contracts, along the lines of similar United Kingdom legislation but with a further provision enabling the government to prescribe terms in standard form consumer contracts as unfair, which will enable the government to step in where consumers sign take-it-or-leave-it contracts, not necessarily because of misleading, deceptive or unconscionable conduct by the trader, but which nevertheless contain terms that tip the balance unfairly and disproportionately in favour of the trader…[366]

The legislation has had a positive effect in Victoria, due to this ability for the government to 'step in'. CAV can seek an interim or permanent injunction from VCAT in similar terms to the OFT's powers to seek injunctions from the court in the UK, and VCAT has broad powers to grant an injunction as it considers appropriate.[367] CAV may also seek declarations or advisory opinions from VCAT[368] and, as in the UK, may also accept undertakings from traders, in accordance with the general undertakings provisions in the *Fair Trading Act*.[369]

Again, it is the regulator's ability to act that has been the biggest benefit. An individual consumer's ability to have terms in their contracts with suppliers struck out does not necessarily effect what is a market-wide phenomenon. By contrast, CAV's actions have had a substantial effect on contract terms in Victoria. For example, CAV has negotiated numerous changes to terms in consumer contracts across several industries, including the hire car, fitness, mobile phone, pay TV, carpets and curtains industries.[370] The NSW Commissioner for Fair Trading has said:

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[366] Mr R Hulls MLA, Attorney-General, *Fair Trading (Amendment) Bill 2003 Second reading speech*, 7 May 2003.
[367] S.32ZA.
[368] Ss.32ZC,32ZD.
[369] S.146.
[370] See, eg, CAV, *Report to the Minister for Consumer Affairs for the year ended 30 June 2007*, November 2007 at 20-24; Minister for Consumer Affairs *media releases*: 'Telcos warned again over unfair contract terms' (18 October 2004); 'Victoria drives hire car contract reform' (22 April 2005); 'Victoria continues charge for fairer contracts' (16 August 2005); 'Foxtel revises digital pay TV contracts' (4 May 2006); 'VCAT disconnects

> I think the important thing about the Victorian and United Kingdom models is that they do not rely on an individual consumer going forward with litigation; they allow a regulatory authority to take action. You get a systemic change to the contract that benefits all, rather than just a remedy for the person who complained and who actually had the money to go to court.[371]

In 2006 CAV brought its first case under the legislation, against telecommunications company AAPT, for declarations that several terms in AAPT's mobile phone contracts were unfair.[372] VCAT agreed that several terms in AAPT's contracts were unfair, including terms that allowed AAPT to vary the contract at any time for any cause, to vary charges without notice to the customer and to suspend mobile phone services for various reasons while leaving the customer liable for ongoing payments during the suspension.[373]

The judgment has provided additional guidance on a number of matters, including the effect of negotiating a term or bringing it to the consumer's attention on whether it will be unfair.[374] This supports the view that a general, market-wide unfairness test can, if drafted appropriately, be successfully applied in practice, with guidance and clarification developing over time.

5.4.3 US unconscionable contract and contract term rules

The US does not have specific unfair terms in consumer contracts regulation like the EU, UK or Victoria. However, US law contains a well-developed concept of unconscionability that does, to a limited degree, address unfair contract terms.

This report will not attempt a detailed analysis of unconscionability in US law. However, some important points regarding unfair terms in consumer contracts are noted below.

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unfair mobile phone contracts' (2 August 2006); 'Victorian consumers protected on loyalty contracts' (4 October 2006).

[371] NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006, at 71.

[372] *Director of Consumer Affairs Victoria v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (2 August 2006).

[373] As above at §§49-54 per Morris J.

[374] As above at §48 per Morris J.

The US Uniform Commercial Code (**UCC**) aims to harmonise laws relating to commercial transactions across the 50 US states. It is not law itself but has been adopted as law by each of the states,[375] although these may accept make modifications. Nevertheless it is largely uniform across the US.

S.2-302 of the UCC deals with unconscionable contracts or contract terms. It provides that:

> If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.[376]

This is a codification of the legal concept of unconscionability that has developed in the US through judicial decision-making, for example in cases from *Hume v United States*[377] through *Campbell Soup Co v Wentz*[378] to *Williams v Walker-Thomas Furniture Co*.[379] The *Williams* case, decided by

[375] It has also been adopted by the District of Columbia and in Puerto Rico, Guam and the U.S. Virgin Islands.
[376] UCC s.2-302(1) (2004).
[377] *Hume v. U.S.* (1889) 132 U.S. 406, 10 S.Ct. 134, 136-7: 'In his celebrated judgment in Earl of Chesterfield v. Janssen, 2 Ves. Sr. 125, 155, Lord HARDWICKE arranged all the forms of fraud, recognized by equity, in four classes, the first two of which he gives in these words: "…(2) It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice…"…And there may be contracts so extortionate and unconscionable on their fact as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption…[the plaintiff] designed to commit the agents of the government to a contract "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other," and [this] is fatal to his recovery.'
[378] *Campbell Soup Co. v. Wentz* 172 F.2d 80, 83 (3d Cir. 1948): 'We are not suggesting that the contract is illegal…We do think, however, that a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation.'
[379] *Williams v. Walker-Thomas Furniture Co.* 350 F.2d 445, 449 (D.C. Cir. 1965): '…where the element of unconscionability is present at the time a contract is made, the contract should not be enforced. Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'

the US Court of Appeals for the District of Columbia Circuit, occurred when the District of Columbia had only recently adopted the UCC into its law. The court recognised the relationship between s.2-302 of the UCC and common law unconscionability:

> Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made…The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of § 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.[380]

As seen from the wording of s.2-302 of the UCC, the provision allows a court to deal with single terms, not just the whole contract. This means that it may potentially address unfair terms in consumer contracts. As the official comments to s.2-302 state:

> Under this section, the court, in its discretion, may refuse to enforce the contract as a whole if the whole contract is determined to be unconscionable, or the court may strike any single term or group of terms which are unconscionable or which are contrary to the essential purpose of the agreement or to material terms to which the parties have expressly agreed, or the court may simply limits the unconscionable results.[381]

What is 'unconscionable' is not defined in the UCC. However, its ordinary meaning includes being beyond what is just and reasonable,[382] or being unrestrained by, or contrary to, conscience.[383] This means it has a relationship to unfairness. It has also been extensively considered by the American courts. The official comments summarise this interpretation:

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[380] *Williams v. Walker-Thomas Furniture Co.* 350 F.2d 445, 448-49 (D.C. Cir. 1965).
[381] UCC s.2-302 (2004) Official Comment 2.
[382] *Dictionary.com Unabridged (v 1.1)*, Random House, Inc, http://dictionary.reference.com/browse/unconscionable.
[383] *The American Heritage Dictionary of the English Language* (4th ed), Houghton Mifflin Company, 2004; *The Oxford American Desk Dictionary and Thesaurus* (2nd ed), Penguin Group (USA Inc., 2001.

> The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.[384]

While the wording does not distinguish between 'procedural' and 'substantive' unconscionability, such a distinction has arisen through extensive case law and commentary.[385] For example, in the *Williams v Walker-Thomas Furniture Co* cited above, the court held that both the circumstances surrounding the transaction (the *process* of entering into the contract) and the reasonableness or fairness of the terms of the contract (the *substance* of the contract) were relevant in considering whether enforcement of the contract should be refused for unconscionability.[386]

In general, it seems that from the *Williams* case, the position in the US, is that both elements must be present for a court to refuse enforcement of a contract or contract term for unconscionability.[387] However, this is not entirely clear, as in some cases judgments have held that contracts or terms can be unconscionable if there is a particularly gross disparity or they are particularly outrageous, without the need to prove procedural unconscionability.[388] Perhaps it is best to regard the two elements as inter-related, as Justice White of the California Court of Appeals has stated:

> Presumably, both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable. However, there is a sliding scale relationship between the two concepts: the greater

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[384] UCC s.2-302 (2004) Official Comment 1.

[385] See, eg, Arthur Allen Leff, 'Unconscionability and the Code – The Emperor's new clause', (1967) 115 *University of Pennsylvania Law review* 485, at 487: 'The law may legitimately be interested both in the way agreements come about and in what they provide…Hereafter, to distinguish the two interests, I shall often refer to bargaining naughtiness as "procedural unconscionability," and to evils in the resulting contract as "substantive unconscionability."'; *Ex parte Dorothy B. Foster* 758 So.2d 516, 520 (Ala. 1999); Dorsey *v. Contemporary Obstetrics & Gynecology, Inc.* 680 N.E.2d 240, 243 (Ohio Ct. App. 1996).

[386] *Williams v. Walker-Thomas Furniture Co.* 350 F.2d 445, 449-450 (D.C. Cir. 1965).

[387] See, eg, *24 Hour Fitness, Inc. v. Superior Court* 78 Cal.Rptr.2d 533 (Cal. Ct. App. 1998); *Kohl v. Bay Colony Club Condominium, Inc.* 398 So.2d 865, 867-868 (Fla. Dist. Ct. App. 1981).

[388] See, eg, *Resource Management Co. v. Weston Ranch and Livestock Co., Inc.* 706 P.2d 1028, 1043 (Utah. 1985); *Gillman v. Chase Manhattan Bank, N.A.* 534 N.E.2d 824, 829 (N.Y. 1988).

> the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause.[389]

Regardless, it is clear that unconscionability in the US is available as a potential defence against the enforcement of an unfair contract term, including to consumers. Indeed, unconscionability is relevant in cases involving standard-form or adhesion contracts. These contracts are not automatically unconscionable but, as the official comment to section 2-302 of the UCC states, '[c]ourts have been particularly vigilant when the contract at issue is set forth in a standard form.'[390] For example, the Kansas Supreme Court has noted:

> …courts have identified a number of factors or elements as aids for determining [unconscionability's] applicability to a given set of facts. These factors include: (1) The use of printed form or boilerplate contracts drawn skilfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position…[391]

Cicoria has compared the US unconscionability doctrine and the EU Directive on unfair terms in consumer contracts as implemented into Italian law.[392] She finds that the common need to protect weak contractual parties, such as consumers, from an increasing number of abuses is leading to the convergence in remedies. However, she says that consumers are recognised as having a central role in the market economy, driving the European developments to regulate unfair contract terms, whereas the US law focuses on conduct against the social conscience.[393]

This probably accounts for some of the principal differences between the US and European approaches and the European approach's superiority in dealing with unfair terms in consumer contracts as a market-wide problem. The European approach, for example as implemented in the UK, does allow for individual relief but focuses on eliminating unfair terms from the market more generally, giving the regulator and others power to act

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[389] *Carboni v. Arrospide* 2 Cal.Rptr.2d 845, 849 (Cal. Ct. App. 1991) per White J, Merrill and Chin, JJ concur.
[390] UCC s.2-302 (2004) Official Comment 1.
[391] *Wille v. Southwestern Bell Tel. Co.* 549 P.2d 903, 906-07 (Kan. 1976).
[392] Cristiana Cicoria, 'The Protection of the Weak Contractual Party in Italy vs. United States Doctrine of Unconscionability. A Comparative Analysis' (2003) 3:3 *Global Jurist Advances* Article 2, available at: www.bepress.com/gj/advances/vol3/iss3/art2.
[393] As above at 32.

proactively. This recognises the broader information and behavioural causes of unfair terms in contracts across the market.

The US doctrine of unconscionability allows an individual to resist an attempt to enforce a contract or contract terms against them. It does not permit a party, let alone a government regulator, to *initiate* a legal action proactively to require another party to amend the terms it is using in its contracts. Using the famous phrase, it is a shield not a sword.[394]

The fact that the court's central inquiry in unconscionability cases revolves around the particular, individual circumstances before it reinforces this. Unconscionability is not generally a tool for considering terms being used on generally or market-wide. This is especially due to the need to demonstrate procedural unconscionability, which turns on the process leading to the formation of the contract. Concerns about substantive unconscionability can be applied more easily across a number of contracts, given the common use of standard terms in form contracts in the market. The *Kohl v. Bay Colony Club Condominium* case, which considered whether a class action seeking relief from the terms of a common contract could be sustained on the basis of unconscionability, sums up these difficulties:

> [Quoting the court in *Johnson v. Mobil Oil Corp.* 415 F.Supp. 264, 268 (E.D.Mich.1967)]: The various factors considered by the courts in deciding questions of unconscionability have been divided by the commentators into "procedural" and "substantive" categories…Under the "procedural" rubric come those factors bearing upon…the "real and voluntary meeting of the minds" of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question. The "substantive" heading embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable…
>
> The impression created by the cases we have examined involving an analysis of application of the common law doctrine of unconscionability is

[394] See also *Super Glue Corp. v. Avis Rent A Car System, Inc.* 132 A.D.2d 604, 606 (N.Y. App. Div. 1987): 'Nor does UCC 2-302 create a cause of action to recover damages in favor of a party to an allegedly unconscionable contract…The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery. Under both the UCC and common law, a court is empowered to do no more than refuse enforcement of the unconscionable contract or clause.'

> that the prerequisites for a finding of procedural unconscionability are too individualized to permit of class action proceedings.
>
> Nevertheless at least two Florida cases suggest to the contrary by way of dicta…
>
> Finally we address the question of pleading and proving procedural unconscionability. To meet the threshold test of adequacy the allegations of procedural unconscionability must clearly demonstrate the absence of meaningful choice on the part of the plaintiff. Ordinarily this requires an examination into a myriad of details including plaintiff's experience and education and the sales practices that were employed by the defendant or his predecessor-assignor. However, the basic concept is "an absence of meaningful choice." While we foresee monumental obstacles of proof of such an allegation (which is a legal conclusion only) in a class action setting, we are not prepared to hold that the allegations of the amended complaint are per se insufficient.[395]

While unconscionability will no doubt remain an important remedy in individual cases, including those where consumers seek court help to resist a manifestly unfair agreement drafted by a supplier, it is clearly not equipped to deal with the market problem of unfair terms in consumer contracts more generally.

One final matter to consider is whether the general prohibition on 'unfair or deceptive acts or practices in or affecting commerce' contained in the FTC Act might, in some cases, stretch to encompass the *act of including* unfair or unconscionable terms in a contract. If it did, it would allow the FTC to take action against a supplier who was using grossly unfair terms in their standard contracts, rather than relying on individual consumers to defend actions in their individual cases. It does not appear that the FTC has attempted to bring such a case. Regardless, only the most egregious cases of unfair terms would probably be prevented in this way.

However, it remains a possibility. Indeed, in some state jurisdictions it is explicitly provided for. For example, the California Civil Code provides that 'inserting an unconscionable provision in the contract' is one of a list of specified 'unfair or deceptive acts or practices' that if 'undertaken by any

[395] *Kohl v. Bay Colony Club Condominium, Inc.* 398 So.2d 865, 868-869 (Fla. Dist. Ct. App. 1981).

person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer' is unlawful.[396]

5.4.4 Canadian laws on excessive, harsh or one-sided contract terms

In section 5.3.4, it was noted that most of the Canadian Provinces had introduced laws prohibiting various forms of unfair business practices.[397] Some of these laws attempt to deal with unfair contract terms.

One of the practices specifically listed as unfair in both the Alberta and Saskatchewan statutes is including terms or conditions that are harsh, oppressive or excessively one-sided in a consumer agreement.[398] In this approach, the offending terms are not themselves declared to be unlawful, but the act of including them in the contract leaves the trader open to action under the statute for engaging in an unfair practice, similar to the Californian example cited above.[399] This could include actions by affected consumers for damages for loss suffered or other appropriate orders, and government action seeking injunctions or even criminal prosecution (for which the maximum penalty includes imprisonment). In Alberta, the consumer may also cancel the transaction if the trader engaged in an unfair practice before, during or after the time when the transaction was made.[400]

This approach has some merit as it harmonises their treatment with other consumer protection matters and applies a uniform enforcement and remedies scheme to unfair contract terms and other prohibited trading practices. It could be considered further for the Australian context.

However, its focus on the contract as a whole, both in determining unfairness and in the application of remedies is a problem One of the benefits of the unfair contract terms laws in the UK and Victoria is that they allow unfair terms to be struck out while leaving the rest of the contract on foot where possible.[401] They do this without sacrificing the need to

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[396] California Civil Code, Division 3 Obligations, Part 4 Obligations Arising From Particular Transactions, Title 1.5 Consumers Legal Remedies Act, s.1770(a)(19).
[397] See text at n305-309 above.
[398] *Fair Trading Act* (R.S.A., 2000, c. F-2) s.6(3)(c); *Consumer Protection Act* (S.S., 1996, c. C-30.1) s.6(q).
[399] See text at n396 above.
[400] *Fair Trading Act* (R.S.A., 2000, c. F-2) s.7.
[401] See Frank Zumbo, 'Promoting fairer consumer contracts: Lessons from the United Kingdom and Victoria', (2007) 15 *Trade Practices Law Journal* 84, at 89.

consider the overall circumstances in which a contract term is found, including how it relates to other terms in the contract. As this approach stigmatises the conduct of the trader as opposed to focusing on the terms themselves, it is likely that both government regulators considering taking action and courts considering granting orders, would be more hesitant ; and only cases in which the terms were particularly egregious would be successful.

Quebec's *Consumer Protection Act* also addresses unfair contract terms but in the more "traditional" manner of focusing on the contract terms themselves, rather than the trader's conduct in including them.[402] Section 8 provides:

> The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.

While there is a substantial difference in language between this provision and the EU, UK and Victorian provisions, they contain similar concepts. For example, there is some similarity between "significant imbalance" and "great disproportion" and between "contrary to the requirements of good faith" and "excessive, harsh or unconscionable". However, subsequent provisions in the Quebec statute provide a small "blacklist" of contract terms that are always prohibited.[403] For example, a term that gives the trader the right to decide unilaterally that the consumer has failed to satisfy one or more of their contractual obligations or that a fact or circumstance has occurred, is prohibited.[404] This sort of term is on the indicative list of potentially unfair terms in both the UK and Victorian regimes,[405] but of course these regimes do not currently prohibit specific terms. Including a list of prohibited terms may be partly due to Quebec's civil law tradition, unlike the other Canadian Provinces.

Quebec's Civil Code also contains some provisions relating to contracts of adhesion (standard form contracts) within the provisions relating to

[402] *Consumer Protection Act* (R.S.Q., chapter P-40.1).
[403] *Consumer Protection Act* (R.S.Q., chapter P-40.1) ss.10, 11, 11.1, 13 and 19.
[404] *Consumer Protection Act* (R.S.Q., chapter P-40.1) s.11.
[405] Unfair Terms in Consumer Contracts Regulations 1999 (UK) Schedule 2 s.1(m); *Fair Trading Act 1999* (Vic) s.32X(h).

contracts generally.[406] For example, it provides that an 'abusive' clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause that is 'excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith'.[407] There would therefore be some overlap between these provisions and Quebec's *Consumer Protection Act*. Again, the civil law background is evident.

However, these provisions, similar to the US unconscionability remedy, focus on giving the consumer a defence to the enforcement of unreasonably unfair contracts. They do not provide tools to address unfair terms in consumer contracts as a market-wide concern.

5.4.5 Regulation on unfair terms in consumer contracts for Australia

In section 4.3.2 it was identified that some of the principal gaps in the Act's consumer protection provisions relate to the need to improve the Act's ability to tackle information problems or problems caused by the operation of behavioural biases. This is not necessarily straight-forward.

However, the problem of unfair terms in consumer contracts provides a clear example of market failure, which can be explained by both information and behavioural economics. It seems clear, therefore, that this problem could be one of the first addressed by improvements to the Act.

Of course, Victoria has already introduced unfair contract terms regulation into Australia. However, traditionally two reasons have been given for opposing national legislation to address unfair terms in consumer contracts. The first is that other laws in Australia already sufficiently address the problem. The second is that the costs may outweigh the benefits.

Both these concerns were expressed by the NSW government in its recent response to the NSW Legislative Council Standing Committee on Law and Justice's report of its inquiry into unfair terms in consumer contracts. The inquiry recommended that the NSW government seek an amendment to the *Fair Trading Act 1987* (NSW) to establish a scheme to protect consumers in relation to unfair terms in consumer contracts, modelled on

[406] *Civil Code of Québec* (S.Q., 1991, c. 64) ss.1432, 1435-1438.
[407] *Civil Code of Québec* (S.Q., 1991, c. 64) s.1437.

Part 2B of the Victorian *Fair Trading Act*. [408] The NSW government responded:

> The Office of Fair Trading has been asked to further examine the need for Government intervention to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, having regard to the need to demonstrate that the benefits of any regulatory intervention will outweigh the costs and ensure that any legislation complies with the Government's National Competition Policy obligations.
>
> The Government is mindful of the fact that under the current legal and regulatory framework in New South Wales, the common law, equity and various statutes provide some degree of protection and redress for consumers. In particular, the *Contracts Review Act 1980* permits a consumer to apply to a court or tribunal for relief in relation to an unjust consumer contract; section 43 of the *Fair Trading Act 1987* prohibits a supplier from engaging in unconscionable conduct…and section 70 of the Uniform Consumer Credit Code provides a court or tribunal with the power to re-open a transaction where the credit contract, mortgage or guarantee is considered unjust in the circumstances relating to it at the time it was entered into or amended.[409]

Similarly, the current chairman of the ACCC, Graeme Samuel, was asked at the 2007 National Consumer Congress whether he would find unfair contract terms regulations as in the UK or Victoria useful. He answered:

> …I think it is fair to say this, that we have a threshold that is already contained in part in the existing legislation in 51AB and 51AC relating to unconscionable conduct. And…that relates to contract arrangements or conduct that is grossly unfair, harsh and oppressive. Now how much further below the level of gross unfairness or harsh and oppressive conduct in terms of dealings between business and consumers you lower the bar to deal with what is otherwise described as unfair contract terms, I think is the subject of some quite extensive discussion that we are putting in our submission for [the Productivity Commission].[410]

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[408] NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006, at 60, 78.
[409] NSW Office of Fair Trading, *NSW Government Response to the Legislative Council Standing Committee on Law and Justice Report on Unfair Terms in Consumer Contracts*, April 2007, at 3. This is despite the inquiry report considering these other legal protections in some detail.
[410] Graeme Samuel, *A regulator's reflections on future frameworks*, Transcript of session at the National Consumer Congress, 15 March 2007, at 11.

At the 2005 National Consumer Congress, the then-Parliamentary Secretary to the Treasurer responded to a question about Australia's lack of unfair contract terms regulation as follows:

> I don't agree with you that we have a void of laws. Our view is that the Trade Practices Act, for example, the unconscionable conduct, misleading and deceptive laws that already exist within the Trade Practices Act of Australia are satisfactory from that point of view.[411]

The SCOCA proposal for uniform regulation on unfair terms in consumer contracts appears to have stalled due to similar concerns.[412] For example, the report of the NSW Legislative Council inquiry into unfair contract terms regulation, recounted evidence that the States and Territories had delayed its decision to proceed with uniform regulation due to concerns at the national regulatory impact assessment stage (concerns that were not necessarily agreed with).[413]

Despite this, it is reasonably clear that the current consumer protection provisions in the Act do not address the problem of unfair terms in consumer contracts. The principal provisions cited here are the prohibitions on unconscionable conduct. The relevant provision is section 51AB, which prohibits unconscionable conduct by suppliers in consumer transactions.[414]

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[411] The Hon. Chris Pearce MP, *Effective Partnerships in Consumer Affairs*, Transcript of session at the National Consumer Congress, March 2006, at 7.

[412] See text at n317 above. There was no mention of the unfair terms in consumer contracts project in the Ministerial Council on Consumer Affairs' last meeting communiqué: *Joint Communiqué: Ministerial Council on Consumer Affairs Meeting Friday 18 May 2007*, available at: www.consumer.gov.au/html/download/Final_Communique_May_2007.pdf. Its September 2007 strategic agenda notes that it is to be removed from the MCCA agenda and that pre-determined project timeframes have not been met due to the difficulties experienced in obtaining the Office of Regulation Review's approval: http://www.consumer.gov.au/html/mcca_projects.htm.

[413] NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006, at 53-55; see also Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 31.

[414] The other unconscionable conduct provisions are s.51AC, which prohibits unconscionable conduct in business transactions (generally for the protection of small business); and s.51AA, which adopts common law unconscionability into the Act by prohibiting conduct that is unconscionable 'within the meaning of the unwritten law, from time to time, of the States and Territories'. However, s.51AA only applies to conduct not covered by the other two provisions (s.51AA(2)), thus it is limited in application.

a) Unconscionable conduct prohibitions in Australia

As in the US, the legal concept of unconscionability originally developed in Australia through judicial decision-making.[415] In the leading Australian case on unconscionable conduct, *Commercial Bank of Australia Ltd v Amadio*, the High Court explained the 'special disadvantage' or 'special disability' test for unconscionable conduct:

> …if A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same [per Mason J].[416]

and

> The jurisdiction of courts of equity to relieve against unconscionable dealing…is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it [per Deane J].[417]

These passages demonstrate that the equitable concept of unconscionable conduct, like its US cousin, looks at whether a party can resist the enforcement of an agreement. It places a strong focus on the process leading to the transaction. In the US, this is called 'procedural unconscionability'. If a party takes advantage of a special disability or

[415] See, eg, *Blomley v Ryan* (1956) 99 CLR 362, per Fullager J at §24: 'I am satisfied that we have here an example of a thoroughly unconscionable transaction, which no court of equity could possibly enforce itself, or allow to be enforced at law. I would regard specific performance as out of the question, and to let the contract be enforced at law would, in this particular case, be, in effect, to allow the overreaching party to reap the full reward of his inequitable conduct.'; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[416] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, at 467.
[417] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, at 474.

special disadvantage on the part of the other party that exists in the context of the transaction in question, the stronger party will have engaged in unconscionable dealing or conduct.

Like the US concept, equitable unconscionable conduct in Australia focuses on unconscientious conduct in the lead-up to an individual transaction. This makes it less suited to tackling problems in market-wide unfair contract terms. The fact that a consumer was presented with a standard form contract and had no real ability to negotiate terms would be relevant to the question of whether a supplier had engaged in unconscionable conduct, but it would not be sufficient to sustain a claim. Justice Mason (as he then was) made this clear in his judgment in the *Amadio* case:

> I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle [of special disadvantage] applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.
>
> Because times have changed new situations have arisen in which it may be appropriate to invoke the underlying principle. Take, for example, entry into a standard form of contract dictated by a party whose bargaining power is greatly superior…In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances.[418]

Equitable unconscionable conduct suffers from the same limitations as US unconscionability in dealing with the market problem of unfair terms in consumer contracts, but the Act's statutory provisions on unconscionable conduct, at least on their face, operate differently.

The prohibition on unconscionable conduct now found in section 51AB was incorporated into the Act in 1986.[419] It covers most consumer transactions.[420] In 1992 it was joined by section 51AA, which adopted the

[418] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, at 462-63.
[419] See n43 above.
[420] Subsections 51AB(5) and (6) limit the prohibition to consumer transactions by providing that the conduct must be in connection with the supply of goods or services 'of

equitable unconscionable conduct principles into the Act, providing that a corporation 'must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'. However, the new section 51AA did not apply to conduct covered by section 51AB, thus the equitable principles of unconscionable conduct as adopted into the Act only apply as a set of residual standards where section 51AB does not extend.[421]

The statutory provision on unconscionable conduct in consumer transactions again uses a two-fold method to determine whether conduct falls foul of the prohibition. First, section 51AB(1) sets out the general test that:

> A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Secondly, a non-exhaustive list of five factors in section 51AB(2) which a court may consider when it determines whether a corporation has engaged in unconscionable conduct is helpful when applying the general test. These factors are:

> a) the relative strengths of the bargaining positions of the corporation and the consumer;
>
> (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
>
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on

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a kind ordinarily acquired for personal, domestic or household use or consumption' and not 'for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce'.

[421] For example, they might continue to apply in *Amadio* fact situations, as the supply of a business loan to a relative in exchange for the giving of a guarantee would probably not count as conduct in connection with the supply of goods or services for personal, domestic or household use or consumption. See also n414 above.

behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

The statutory prohibition on unconscionable conduct in consumer transactions seems somewhat broader that its equitable forerunner. In particular, it is not limited by the notion that the consumer must be under a 'special disability' or 'special disadvantage' that the supplier takes advantage of before unconscionable conduct can be said to have occurred. The list of factors that may be considered under section 51AB(2) are arguably broader than the test laid out in the case law and are explicitly said to be non-exhaustive. Further, the second reading speech for the bill that introduced section 51AA into the Act in 1992 distinguishes it from section 51AB:

> A new provision is to be inserted which will prohibit unconscionable conduct not already covered by current section 52A [to become s.51AB]. Section 52A is confined to unconscionable conduct involving goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, and is thus generally concerned with consumer transactions. The new provision will prohibit unconscionable conduct by corporations in trade and commerce and thus will extend, *but in modified form*, the prohibition now in section 52A.
>
> Unconscionability is a well understood equitable doctrine, the meaning of which has been discussed by the High Court in recent times. It involves a party who suffers from some special disability or is placed in some special situation of disadvantage and an `unconscionable' taking advantage of that disability or disadvantage by another. The doctrine does not apply simply because one party has made a poor bargain…
>
> Both the new provision, which will be numbered as section 51AA, and existing section 52A, which will be renumbered, are placed in a new part IVA. *The new provision will not extend the equitable principles of unconscionability beyond their current limits*. The new provision refers to `conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'. All transactions covered by the new provision are already covered by the equitable doctrine [our emphasis].[422]

[422] The Hon M.J. Duffy, Attorney-General, *Trade Practices Legislation Amendment Bill 1992 Second Reading speech*, 3 November 1992. The purpose of incorporating the

The case law to date on the application of the statutory unconscionable conduct provisions also suggests a broader remit than the equitable principles. In the *Hurley v McDonald's* case, the Full Federal Court held that in section 51AB (and section 51AC – business transactions) the term 'unconscionable' carries its ordinary dictionary meaning:

> …namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable…The various synonyms used in relation to the term "unconscionable" import a pejorative moral judgment…[423]

They went on to state that the question of whether unconscionable conduct in sections 51AB and 51AC means something different to equitable unconscionable conduct as adopted in section 51AA had not yet been fully judicially considered. However, they suggested it was possible, casting doubt on Dowsett J's decision at first instance that unconscionable conduct in section 51AB was the same concept as found in equity (and in section 51AA).[424]

Justice French agreed in another Federal Court case shortly afterwards, in which he was considering the application of section 51AA.[425] In the *C G Berbatis* case he compared section 51AA to the other two unconscionable conduct prohibitions:

> There is no reason to suppose that the unconscionable conduct prohibited by s 51AB and s 51AC is limited by reference to specific equitable doctrines. The factors to which the Court may have regard for the purpose of determining whether there has been a contravention of those sections include undue influence and duress and other issues falling outside the equitable doctrines to which reference has been

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equitable principles of unconscionable conduct into the Act was not to increase their scope. Rather, the second reading speech makes clear that section 51AA's advantages 'lie in the availability of remedies under the Act, the potential involvement of the [ACCC], including the possibility of representative actions being brought by the [ACCC] in cases where it seeks an injunction, and the educative and deterrent effect of a legislative prohibition'.

[423] *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 at §22 per Heerey, Drummond and Emmett JJ.

[424] As above at §§34-36.

[425] *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* [2000] FCA 2.

> made. And even then, the listed factors in those sections do not limit the matters to which the Court may have regard.[426]

The question was directly considered not long after this in the *Simply No-Knead* case.[427] This involved section 51AC rather than section 51AB. However, Justice Sundberg's comments are highly relevant. He held that section 51AC was broader than equitable unconscionable conduct and that it was likely section 51AB was also broader:

> Whatever might be the position with s 51AB, in my view "unconscionable" in s 51AC is not limited to the cases of equitable or unwritten law unconscionability the subject of s 51AA. The principal pointer to an enlarged notion of unconscionability in s 51AC lies in the factors to which sub-s (3) permits the Court to have regard… Further, it is to be remembered that the list of factors in sub-s (3) is not exhaustive.
>
> …
>
> French J [in the *C G Berbatis* case] said there was no reason to suppose that the unconscionable conduct prohibited by ss 51AB and 51AC is limited by reference to "specific equitable doctrines", and pointed out that the factors to which the Court is required to have regard for the purpose of determining whether there has been a contravention, "include undue influence and duress and other issues falling outside the equitable doctrines to which reference has been made".
>
> …
>
> The s 51AB(2) factors do not so clearly suggest, as do the s 51AC(3) factors, that unconscionability in s 51AB is a more ample concept than the unwritten law's unconscionability. Nevertheless, as with s 51AC(3), s 51AB(2) does not limit the factors the Court may consider. It would be curious if "unconscionable" in the two provisions had different meanings - in s 51AB the same as in s 51AA and in s 51AC a wider meaning. The Full Court in *Hurley* seems to have assumed the word had the same meaning in both sections…
>
> …
>
> The present case does not involve s 51AB, and it is accordingly unnecessary to decide whether that section is as confined as Dowsett J in *Hurley* thought it is [to the equitable principles as in s.51AA]. But it is necessary to decide the ambit of s 51AC. For the reasons I have given…the section is not confined in the manner Dowsett J thought s

[426] As above at §24 per French J.
[427] *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365.

> 51AB is. Whether conduct is unconscionable for the purpose of s 51AC is at large.[428]

As the Act's prohibition on unconscionable conduct in consumer transactions is likely to be broader than equitable unconscionable conduct, it may be relevant in cases where consumers have entered into unfair agreements. It is also more useful in this sense than the US example contained in the UCC, as a breach of section 51AB may trigger a range of remedies under the Act, as described in section 4.3.3 above.[429] These remedies include the possibility of injunctions sought by any person, ACCC action for injunctions, community service orders, probation orders and orders to publish advertisements for civil or criminal breaches, as well as actions for injunctions, damages or other orders by affected parties.

This means that the regulator or other interested parties may act to prevent, or limit or reverse the harm caused by, unconscionable conduct, not merely the individual affected by the conduct. The prohibition is not merely a shield – action may be *initiated* for a breach. For example, in the case of *Australian Competition and Consumer Commission v Lux Pty Ltd*, the ACCC brought an action seeking orders against a company and its agent for engaging in unconscionable conduct in the way in which it procured the sale of a vacuum cleaner to a vulnerable consumer.[430]

However, despite its broader nature and the remedies available for a breach, it remains ill-suited to addressing problems of unfair terms in consumer contracts. This is mainly because it focuses on the process or conduct in individual transactions rather than the content of those transactions.

Section 51AB does not exclude consideration of questions about the substantive nature of consumer contracts. For example, section 51AB(2) explicitly states that the court may consider 'the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation'. It also states that the court may consider whether 'the consumer, as a result of conduct engaged in by the corporation, was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation'.

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[428] As above at §§31-37.
[429] See text at n170-178 above.
[430] *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926.

However, the overall test in section 51AB is whether the corporation has engaged in *conduct* that is unconscionable, not whether a *contract* or a *contract term* is unconscionable as in the US.[431] The factors listed above could be seen as evidence indicating that conduct was unconscionable (as otherwise such unfavourable terms would not have been agreed to), rather than being unconscionable themselves.

The judgment in the *Amadio* case illustrates that equitable unconscionable conduct requires more than simply unequal bargaining power, such as the presentation of a standard-form contract.[432] In the *Hurley* case, the court confirmed that this also applied to the Act's other unconscionable conduct provisions:

> Before sections 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".[433]

Indeed, in the *Lux* case Justice Nicholson said that it did not matter that the ACCC did not try to argue there was a problem with any of the actual terms of the sales contract that the consumer had signed as, citing the *Hurley* case, there must be some circumstance other than the mere terms of the contract itself that makes relying on the terms of the contract unconscionable.[434] He noted that the proceedings did not involve an allegation of a sale of a vacuum cleaner other than at a standard price with a standard trade-in under a regulated contract,[435] thus there was no consideration of whether the terms themselves were inappropriate.

The Act's prohibition on unconscionable conduct in consumer transactions will not prohibit unfair terms in consumer contracts, without something more in the conduct of the supplier within the context of the individual transaction in question. In other words, it is directed at 'procedural unconscionability', looking at the particular circumstances in question, but

[431] S.4(2) of the Act defines engaging in conduct to mean doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement; but not the making or including of a provision in a contract.
[432] See text at n418 above.
[433] *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 at §31.
[434] *Australian Competition and Consumer Commission v Lux Pty Ltd* [2004] FCA 926 at §94.
[435] As above at §47.

does not address 'substantive unconscionability'.[436] By contrast, as seen in section 5.4.3 the US provision focuses more on 'substantive unconscionability', although 'procedural unconscionability' is still generally required before a finding of unconscionability will be made.

This also means that the Act's provisions cannot be used by the regulator to tackle unfair terms in consumer contracts. The ACCC may act where conduct has been, or is proposed to be, engaged in what may be unconscionable, but it can't seek declarations that terms in a standard form contract are themselves 'unconscionable' or obtain an injunction against their continued use in the absence of unconscientious conduct by the supplier against one or more consumers. The focus of the provisions is not market-wide, nor do they recognise the economic harm that can be caused by unfair contract terms. Their, only a concern is with harsh and unreasonable behaviour in individual transactions.[437]

In NSW the *Contracts Review Act 1980* is also sometimes cited as providing enough protection against unfair terms in consumer contracts. It allows the court to make various orders, including setting aside or varying a contract in whole or in part, if it finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made.[438] 'Unjust' is defined to include 'unconscionable, harsh or oppressive'.[439]

The language of this general test does suggest that it could be used by consumers to resist unfair contract terms, as it focuses on the contract or

[436] In *Automasters Australia Pty Ltd v Bruness Pty Ltd & Anor* [2002] WASC 286, Hasluck J held that conduct engaged in *after* the contract was made (in purporting to terminate a franchise agreement according to the termination provisions) was unconscionable, but this was due to the conduct of the franchisor, not simply the terms of the agreement themselves, thus it was still 'procedural' rather than 'substantive' unconscionability: '…the plaintiff acted capriciously and unreasonably in circumstances where there was not a sufficient basis to terminate the contract. I have found that there was an element of oppression in the plaintiff's conduct, and this was referable to a conscious determination to bring the Franchise Agreement to an end, notwithstanding an awareness that there was a degree of ambiguity surrounding the allegations of default to be relied upon… this is not a case in which the plaintiff can be said to have simply acted in accordance with its contractual rights…' (at §§396-99).

[437] See Frank Zumbo, 'Promoting fairer consumer contracts: Lessons from the United Kingdom and Victoria', (2007) 15 *Trade Practices Law Journal* 84, at 85, 91-94.

[438] *Contracts Review Act 1980* (NSW) s.7. This statute was enacted prior to the introduction into the Act of the prohibition on unconscionable conduct in consumer transactions.

[439] *Contracts Review Act 1980* (NSW) s.4.

contract terms rather than conduct, as with the US unconscionability provision in the UCC. However, in practice it has also been limited largely to matters of 'procedural unfairness'.[440] Further, it also relies largely on individual action to invoke the provisions.[441] Interestingly, section 10 allows the Minster or Attorney General to apply to the Supreme Court for an order prescribing or otherwise restricting the terms upon which a person may enter into contracts of a specified class, if that person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts. However, the SCOCA discussion paper on unfair contract terms regulation noted several difficulties with this provision, including that by requiring unconscionability or oppressiveness the test for unjustness may simply be too high. It pointed out that by 2001 it had only be used once.[442]

Perhaps the best evidence that the existing prohibition on unconscionable conduct (and the NSW *Contracts Review Act*) does not sufficiently address the market problem is, simply, the outcomes resulting from the introduction of unfair contract terms regulation in Victoria. The Victorian regulator, CAV, has negotiated substantial amendments to unfair terms in standard form contracts across a range of different industries since the Victorian provisions were introduced in 2003.[443] This has not occurred anywhere else in Australia, nor did it occur in Victoria before to 2003. CAV director, Dr David Cousins, concluded his evidence to the NSW Legislative Council inquiry into unfair contract terms regulation by saying:

> The only thing to sum up our experience is that we feel the experience has been positive. After three years the world has not caved in. It did not cave in after 10 years in the United Kingdom. I think we are dealing with things that are not dealt with satisfactorily by the existing law, and that has been fairly demonstrated.[444]

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[440] See NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006, at 45; SCOCA Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004, at 25-26.
[441] *Contracts Review Act 1980* (NSW) Part 3.
[442] SCOCA Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004, at 25-27.
[443] See text at n370-373 above.
[444] NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006, at 74.

b) Costs and benefits of regulation to address unfair terms in consumer contracts in Australia

The second main concern regarding national regulation of unfair terms in consumer contracts relates to its potential costs and benefits.

However, this report submits that the model provided by the EU, UK and particularly Victoria, operating as it does in the Australian context, are working examples that do not appear to exhibit the 'unintended consequences' or 'business uncertainty' that often features significantly in such analysis. It is also potentially attractive under the "do no harm" approach for several reasons.

First, it does not diminish the substantial efficiencies associated with the process of standard-form contracting. Instead, it targets inefficient and unfair content in such contracts. Secondly, it provides a general test that is flexible enough to deal with new terms that emerge in the market, but does not ban certain terms as unfair regardless of the context in which they exist.[445] Rather, guidance is provided and the general test must always be applied with regard to 'all the circumstances'.[446]

Thirdly, it provides a potentially effective remedy regardless of whether the problem is analysed from the informational or behavioural approach. Alternative regulatory approaches that rely on disclosure in particular could make the problem worse rather than better, overloading the consumer with information on non-core terms that are unlikely to be properly taken into account anyway.[447] Cooling-off periods have also traditionally been seen

[445] See Alan Schwartz and Louis L. Wilde, 'Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests' (1983) 69 *Virginia Law Review* 1387, at 1458-59 for a relatively conservative approach to unfair contract terms that analyses them solely as an information problem and argues that market forces will correct them in most cases, but still acknowledges that a case-by-case approach to determining unfair terms might be useful in some cases and is superior to general bans. Cf also Leone Niglia, 'Standard form contracts in Europe and North America: one hundred years of unfair terms?', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, at 101.
[446] See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, (2003) 70 *The University of Chicago Law Review* 1203, at 1255; Hugh Collins, *Regulating Contracts*, Oxford University Press, 1999, at 267.
[447] See, eg, Rhonda Smith and Stephen King, 'Insights into consumer risk: Building blocks for consumer protection policy', in OECD Committee on Consumer Policy, *Roundtable on Demand-side Economics for Consumer Policy: Summary Report*, 20 April 2006, at 65-66.

as a useful antidote to some information problems[448] but problems with unfair contract terms do not necessarily relate to pressurised sales or misleading information. Giving the consumer further time may in fact make them less likely to cancel because of behavioural biases such as cognitive dissonance and the endowment effect.[449]

Finally, the options that rely on regulated or model contracts would probably require more regular revision and amendment to adjust to changing market conditions, increasing associated costs. As the ACCC notes, they require a development process with strong consumer participation. At present, the resources supporting consumer protection in Australia would probably make effective collective bargaining by consumers unfeasible.[450]

Cartwright has summarised more general concerns about the costs and distortions of intervention to address contractual unfairness, and Hugh Collins' critique[451] of them:

1) Classical theory argues that most cases of apparent unfairness turn out not to be unfair, for example, most terms that appear unfair will be balanced by corresponding benefits, such as a reduction in price.

   Collins notes that of course we should not jump to conclusions about unfairness and the question is sometimes difficult. However, unfair contracts do exist, thus the important point is to take all the circumstances into account in making an assessment.[452]

2) Classical theory is concerned that allowing contracts to be challenged for unfairness disrupts the proper functioning of the market. While it may seem appealing from the point of view of equity, interference creates uncertainty for contracting parties, which makes it difficult for those parties to predict how their transactions will be judged.

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[448] See, eg, John Vickers, *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003, at 3.
[449] See n108 above.
[450] The Netherlands has been cited as a successful co-regulatory model for standard form contract regulation involving both industry and consumer representation: see www.ser.nl/overdeser/default.asp?desc=en_consumer. Note, however, that the Netherlands also has unfair terms in consumer contracts regulation pursuant to the EU directive.
[451] Hugh Collins, *Regulating Contracts*, Oxford University Press, 1999, Chapter 11.
[452] See also the Appendix at 4.

However, Collins notes that businesspeople do not enter into transactions based on whether the legal documents are sufficiently certain or not but for various other business reasons, thus concerns about legal uncertainty will not generally affect transactions. Further, businesspeople are concerned with expectations, such as long-term business relationships and trade customs. Fairness and good faith actually reflect these expectations and most businesspeople would expect the legal system to protect against abuses.[453]

3) The third concern relates to the paternalism argument noted earlier.[454] Intervention to address unfairness may have unintended costs, harming those it was meant to protect. A common example given is that setting interest rate ceilings to stop unfair lending may exclude poor consumers from the credit market altogether.

   Collins, however, notes that where this has been claimed the evidence has not been clear and it will depend on the issue or market in question.

4) Finally, there are arguments that measures should tackle the market failure causing the unfair contracts to be created.

   Such measures are obviously desirable. However, they cannot create perfect markets or protect all consumers, particularly the most vulnerable.[455]

These responses further support the EU/UK/Victorian model for regulating unfair terms in consumer contracts. This model allows all circumstances in any given case to be taken into account; reflects general expectations of fairness; does not ban certain practices outright but addresses the problem from both an informational and a behavioural approach; and is specifically designed to address market failure.

Unfair terms in consumer contracts are themselves a market distortion. Just because preparing contracts on mass is efficient does not meant that the results are efficient. Therefore, regulation designed to address unfair terms may provide help correct this distortion.

[453] See also Frank Zumbo, 'Promoting fairer consumer contracts: Lessons from the United Kingdom and Victoria', (2007) 15 *Trade Practices Law Journal* 84, at 95.
[454] See text at n133-147 above.
[455] Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*, Cambridge University Press 2001, at 9-10.

This is explained in the cost/benefit analysis of unfair contract terms intervention by Dr Rhonda Smith (see Appendix). It shows that regulatory intervention to address unfair terms in consumer contracts corrects over-willingness to buy, leading to more efficient overall market results. The current market equilibrium must be understood taking into account the sorts of information and behavioural problems noted earlier. That is current demand may reflect over-willingness by consumers to enter into transactions as they are unaware of the true full cost of contracting including the cost of unfair terms.[456] Thus, the cost of intervention must be assessed against corrected market outcomes, not simply the current inefficient market.

Smith concludes by noting that to be truly effective, unfair contract terms regulation must allow for collective consumer action, such as through the regulator, and should be national and market-wide.

Recommendation 6 – Introduce national regulation of unfair terms in consumer contracts

Introduce general, market-wide regulation of unfair terms in consumer contracts into the Act, based on the EU/UK and Victorian models.

The regulation should incorporate a general test of unfairness that takes into account the substantive nature of contract terms, rather than the conduct of the supplier.

The general test of unfairness should address whether a term creates an unfair imbalance in rights or obligations to the consumer's detriment but should also require an examination of terms in 'all the circumstances' including in the context of the contract as a whole.

The general test of unfairness should be supported by indicative examples of unfair terms that can guide the application of the general test.

The regulation should give individual consumers a remedy or defence against unfair contract terms, but must also provide pro-active powers to the regulator (and possibly other designated parties) to take action against unfair contract terms that exist in current market contracts.

[456] See text at n109-111 above.

5.5 Unit pricing

Our best practice principles identified that consumer protection laws should address consumer information problems, driving more effective competition by allowing consumers to choose more effectively. This is not always straight-forward, which is one reason market studies and investigations powers can be highly useful. In other cases information problems have manifested themselves reasonably clearly.

Retail trading is a large industry in Australia,[457] with food and (non-alcoholic) drinks accounting for the largest single category of weekly household expenditure in Australia.[458] Grocery shopping is clearly one of the country's more significant consumer markets.

For several years there have been calls in Australia to make price comparisons easier for consumers, especially for groceries. These calls have, particularly come from the Consumers' Federation of Australia[459] and Choice, the largest consumer organisation in the country.[460] Consumers engaged in retail shopping are presented with different products, many of which are, essentially, commodities. However, comparing prices in a reasonable time can be difficult, as competing products are often packaged in different quantities, or the quantities included in familiar packaging can change.

If consumers can't compare prices easily, they cannot effectively signal preferences and are therefore unable to drive efficient and effective competition.

As a solution unit pricing has been suggested, particularly in larger retail stores such as supermarkets where consumers must make quick comparisons between different choices for the same types of goods. This means that as well as showing the total price, the price of goods per a specified unit of measure, for example price per 100g or per kg, per litre,

[457] See, eg, Australian Bureau of Statistics, *Year Book Australia 2007*, January 2007.
[458] Australian Bureau of Statistics, *Household Expenditure Survey, Australia: Summary of Results, 2003-04*, February 2006.
[459] See Consumers' Federation of Australia, 'Unit pricing', *Consumers' Federation of Australia website* at www.consumersfederation.com/unitpricing.htm.
[460] See Choice, *Truth in pricing*, website, November 2007, at www.choice.com.au/viewArticle.aspx?id=105675&catId=100476&tid=100008&p=1&title=Truth.

per cm or per single item, must be shown. This allows consumers to compare prices between different choices quickly and easily, rather than requiring them to convert, for example, a price for a 545g tin to a price that allows them to compare with a competing product in a 730g tin.

Trade measurement matters are regulated by the States and Territories under an agreement for uniform trade measurement legislation. However, as part of its National Reform Agenda, COAG has agreed to the MCCA's recommendation for a national system of trade measurement regulation funded and administered by the Commonwealth, from July 1 2010.[461] .[462] The move to national regulation is an opportunity to examine the potential for national regulation of unit pricing. The current ACCC Grocery Inquiry provides a similar opportunity.

Waterson draws some interesting conclusions from his analysis. In some cases, the most effective policy measures to promote competition will be in *standard-setting* and *making pricing behaviour more transparent*.[463] In other words, pricing needs to be easily seen and understood by consumers when they need it, while setting standards for the presentation of information helps comparisons. McCauley has also noted that requiring information disclosure can be useful but requires 'standardisation of information, such as size of lettering, use of units, order of ingredient listing. Otherwise those who can manipulate or disguise information so that comparison is difficult have competitive advantage.'[464]

5.5.1 EU and UK regulation of unit pricing

The EU first adopted laws requiring unit pricing in 1979.[465] These have been augmented and amended over the years.[466] Unit pricing is now

[461] COAG, *Meeting Communique*, Canberra, 13 April 2007, at 2.
[462] COAG, *COAG National Reform Agenda: COAG Regulatory Reform Plan*, April 2007, at 3.
[463] Waterson also warns that when search costs are reduced and consumers are better able to see products as commodities, suppliers tend to increase their efforts to differentiate their products on grounds other than price, to try to increase switching costs: at 21-22.
[464] Ian McAuley, *Economic Rationale for Consumer Protection*, Discussion paper prepared for the Trade Practices Commission, September 1994, at 44. He also notes the importance of avoiding overloading consumers with too much information through disclosure requirements.
[465] Council Directive 79/581/EEC of 19 June 1979 on consumer protection in the indication of the prices of foodstuffs.

covered by the current Directive on consumer protection in the indication of the prices of products offered to consumers, which was adopted in 1998.[467] This directive was to be implemented by EU member states by March 2000,[468] although it was not finally implemented by all member states until March 2003.[469]

The price indications directive applies generally and market-wide. This is clearly evident from articles 1 and 3, which provide that the total final selling price and the unit price should be indicated for all 'products offered by traders to consumers' in order to 'improve consumer information and to facilitate comparison of prices'. The starting point of the directive is therefore that it covers all consumer products. It also applies unit pricing requirements to advertisements for consumer products, if advertisements state a selling price.[470]

The directive takes the 'minimum harmonisation' approach – under article 10, member states may adopt or maintain provisions which are more favourable as regards consumer information and comparison of prices. However, the directive also allows member states to make exemptions from the starting rule that it covers all consumer products. For example, they may choose not to apply the rules to products supplied in the course of the provision of a service, to products sold by auction and/or to sales of works of art and antiques.[471] They may also waive the unit price requirement where 'such indication would not be useful because of the products' nature or purpose or would be liable to create confusion'.[472]

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[466] See, eg, Council Directive 88/314/EEC of 7 June 1988 on consumer protection in the indication of the prices of non-food products; Council Directive 88/315/EEC of 7 June 1988 amending Directive 79/581/EEC on consumer protection in the indication of the prices of foodstuffs.

[467] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

[468] Art.11.1.

[469] EIM Business & Policy Research, *Appraisal of Directive 98/6/EC on consumer protection in the indication of unit prices of products offered to consumers: Final report*, August 2004, at 5-6, 145.

[470] Art.3(4).

[471] Art.3(2). This derogation has been used by most member states: EC, *Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers*, June 2006, at 6.

[472] Art.5. All member states have exempted some goods from the unit price requirements, for example products which comprise an assortment of different items sold in a single package, however, there are also some large differences in exemptions

Adopting the Directive explicitly recognised the overall economic benefits that can flow from correcting consumer information problems. The recitals to the directive state that:

> 1) Whereas transparent operation of the market and correct information is of benefit to consumer protection and healthy competition between enterprises and products…
>
> (6) Whereas the obligation to indicate the selling price and the unit price contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons…

However, the EU recognised that costs might make unit pricing more difficult for smaller retailers to implement. For this reason, as a transitional measure, article 6 allowed member states to exempt certain small retail businesses or certain forms of business such as itinerant trade, if it 'were to constitute an excessive burden' for them, due to 'the number of products on sale, the sales area, the nature of the place of sale, [or] specific conditions of sale where the product is not directly accessible for the consumer'.

Under the directive, member states had to complete a report within three years of its implementation, particularly article 6, so the transitional exemption for small retailers could be reviewed.[473] However, as all member states did not finish implementing it until March 2003, the EC did not make any recommendations regarding this exemption in the report, although these are now subject to consultation.[474]

In the UK, the Directive on consumer protection in the indication of the prices of products has been implemented via the Price Marking Order 2004, made under section 4 of the *Prices Act 1974* (UK). The Price

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across different member states: EC, *Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers*, June 2006, at 6-7, 11.

[473] Art.12.

[474] EC, *Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers*, June 2006, at 4.

Marking Order says that, in general, if a trader indicates that any product is or may be for sale to a consumer, the trader must indicate the selling price and the unit price of that product.[475]

However, the order also makes full use of the exemption for products supplied in the course of the provision of a service, sales by auction and sales of works of art and antiques.[476] It also provides for some exemptions from the unit pricing requirements, including any product whose price has been reduced due to its damaged condition or the danger of its deterioration and any product which comprises an assortment of different items sold in a single package.[477]

As required by article 4(1) of the EU directive, the Price Marking Order also requires the indication of selling prices and unit prices to be unambiguous, easily identifiable and clearly legible. Price indication must be given in proximity to the product or, in the case of advertising, to the visual or written description of the product, and must be placed so that consumers don't need to ask for help in order to understand it..[478] It also sets out the relevant units of measurement for various types of products.

The Price Marking Order largely exempts small retailers from the unit pricing requirements. This is done through an exemption for 'any product which is pre-packaged in a constant quantity' for sale in a 'small shop, by an itinerant trader or from a vending machine'.[479] Products that are advertised in a small shop are also exempt.[480] A small shop has a floor area not exceeding 280 square metres.[481]

Article 8 of the EU directive also directed member states to provide effective, proportionate and dissuasive penalties for infringements of their price indications laws, and to take all necessary measures to ensure that

[475] Price Marking Order 2004 arts.4-5.
[476] Price Marking Order 2004 art.3.
[477] The exemptions from the unit pricing requirements are provided for in arts.5(2),(3) and (4), art.9 and Schedule 2.
[478] Price Marking Order 2004 art.7.
[479] Price Marking Order 2004 art.5(3)(d).
[480] Price Marking Order 2004 art.5(3)(a) and schedule 2 art.1(d).
[481] The definitions in art.1(2) provide that a "shop" includes 'a store, kiosk and a franchise or concession within a shop' and the "relevant floor area" is 'the internal floor area of the shop excluding any area not used for the retail sale of products or for the display of such products for retail sale'. In addition, there is an exemption for 'bread made up in a prescribed quantity which is or may be for sale in a small shop, by an itinerant trader or from a vending machine': art.5(3)(c).

these are enforced. In the UK, the order is made under the *Prices Act 1974*, meaning that it is enforceable under that statute. Under the *Prices Act,* it is an offence to contravene the order, punishable by conviction and fine. It is enforced by the local Trading Standards Authorities (rather than a national regulator such as the OFT) under the *Prices Act*.[482] Also, a contravention of the Price Marking Order is a 'community infringement' under the UK *Enterprise Act 2002* if it 'harms the collective interests of consumers', making such contraventions enforceable by way of enforcement orders, similar to injunctions, under that statute. The OFT and the local Trading Standards Authorities, as well as various designated industry specific regulators and the UK Consumers' Association can seek enforcement orders.[483]

In late 2003, the EC's Directorate General for Health and Consumer Protection commissioned a report unit pricing requirements in the directive and their effect on consumers and business, including small retailers.[484] Amongst other matters, the report considered previous studies on unit pricing in specific countries, together with its own survey of 750 small retailers across 15 EU member states.

The 1993-1998 studies of consumers showed some awareness and use of unit pricing but this differed, depending on socio-economic status and age. It was noted that consumers often made decisions based on their familiar choices, but it was helpful when switching brands.[485] A 2001 survey of 3613 European citizens for the EC showed that 68 per cent of respondents were interested in unit pricing.[486]

The small retailer survey undertaken for the report found that 59 per cent of retailers strongly agreed that consumers use unit pricing in their buying choices and behaviour and 72 per cent strongly agreed that that the unit price allowed consumers to make clear price comparisons.[487] Most

[482] Prices Act 1974 (UK) s.7 and schedule 1.
[483] See text at n525-535 below. Other enforcers under the *Enterprise Act* must first consult with the OFT: ss.214-216.
[484] EIM Business & Policy Research, *Appraisal of Directive 98/6/EC on consumer protection in the indication of unit prices of products offered to consumers: Final report*, August 2004.
[485] As above at 104-105.
[486] As above at 106-108.
[487] As above at 109-111. Interestingly, these figures were much lower in the UK, Germany and Spain, but in these countries there was also strong support for the exemption for small businesses. The survey found that retailers who already indicated unit prices for their products were more positive about it, and the report noted this might

disagreed that unit pricing was confusing for consumers.[488] These findings were supported by an Austrian consumer survey conducted shortly after the unit pricing legislation was introduced, which found that 30 per cent of consumers found price comparisons to be very simple on the basis of indication of the unit price for products, and that the extra information was appreciated.[489]

While the findings varied between member states, the report concluded that 'it is clear that consumers do have an interest in and use unit pricing, which is confirmed by small retailers'.[490] The report also said that this interest had increased after unit pricing laws were introduced, although consumer awareness differed depending on gender, age, education, profession and locality type. Use could also depend on whether consumers were making habitual purchases, or were switching brands or making what were perceived to be higher risk purchases.[491]

In the UK, the Price Marking Order 2004 was also recently reviewed as part of a pilot study developing a methodology to assess the effect of regulation, including full costs and benefits.[492] The pilot study identified imperfect information as a clear market failure rationale for the order, echoing the underlying rationale of the EU directive:

> To identify the best product or service to buy amongst a number of alternatives, it is necessary for consumers to be able to easily spot and compare a number of characteristics, including:
>
> - the features of the product or service (e.g., whether it has a WiFi port or whether it is made out of leather);
> - the features of any relevant ancillary products or services (e.g., can it be delivered within 5 working days or is a size 10 in stock); and
> - the price of the product and any ancillary services (e.g., is it £1,000 and/or is delivery free of charge).
>
> It may not always be in the interests of a firm to provide sufficient easily comparable price information to consumers (particularly if its price is

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be because retailers without unit price indications have no actual experience of the potential benefits of unit pricing for consumers in their daily business practice.

[488] As above at 113.

[489] As above at 113-114.

[490] As above at 115.

[491] As above at 118.

[492] DTI, *The impact of Regulation: A Pilot Study of the Incremental Costs and Benefits of Consumer and Competition Regulations*, Occasional Paper No. 7, November 2006.

> higher than that offered by other firms and it is confident that it can convince consumers to buy anyway). The objective of the PMO is to ensure that consumers have access to clear and comparable pricing information, such that they are able to choose the product or service that represents the best combination of characteristics for them.
> …
> When the costs of obtaining such information are sufficiently high, imperfect information can cause consumers to buy too much of a given product or service (i.e., they make the wrong consumption choices) or too little (i.e., consumers are deterred from purchasing products because they do not have enough information).[493]

The analysis in the pilot study mainly considered the unit pricing requirements of the order. It looked at the economic cost of the requirements on UK retailers, the economic impact of increased price competition, the social benefit to consumers and enforcement costs. Its conclusions were based to some degree on estimates, but indicated a positive net impact of between £38m and £122m for those net benefits that were quantifiable.[494]

The information suggests that unit pricing has helped address information problems in European consumer retail markets. Unit pricing is not the only piece of information that UK or European consumers consider in making purchasing decisions and may not be used all the time. However, it remains information that is highly useful and relevant.[495]

As discussed earlier, the EU is in the midst reviewing its consumer acquis, covering eight principal consumer protection directives.[496] The Directive on consumer protection in the indication of the prices of products offered to consumers is included so there may be some changes. However, not many substantive changes to this directive have been proposed. Instead, the focus is on changes to harmonise matters, such as definitions used

[493] As above at 43-44.
[494] As above at 67-68. It also noted that for intervention to be justified it needs to be demonstrated that the market would not otherwise provide unit pricing. Many supermarkets already engaged in unit pricing prior to the order coming into force, but to reach a conclusion it would be necessary to understand why many supermarkets unit priced prior to the order, for example if the decision to unit price was made on the basis of a market decision or in the knowledge that the EU legislation on price marking was about to come into force.
[495] Note also that even if only some consumers use unit pricing information, this group may be enough to drive better market outcomes, particularly if traders cannot distinguish between the two groups: see n320 above.
[496] See text at n279-284 above.

with those used in the other consumer protection directives.[497] The directive might therefore be incorporated into a new horizontal instrument that simplifies and rationalises the consumer acquis.[498] The wide discretion that the directive's provisions give to member states in their choice of exemptions from the unit pricing rules may also be clarified or tightened.[499]

5.5.2 Unit pricing in the US

As in Australia, there are no national laws in the US requiring retailers to indicate the unit price for products being sold to consumers. However, some states and even cities have legislated to require retailers to use unit pricing indications,[500] while in other areas some stores have voluntarily introduced it.[501]

This combination of local-based laws and voluntary adoption means that the availability varies considerably depending on where consumers live and what stores they frequent. In addition, the standards and scope of coverage varies between the different laws. Where there are no mandatory standards as to display requirements or which units of measurement to use, stores are free to show the unit price of products in different ways, making them more or less prominent or using different units of measurement. These can all detract from the benefit of unit pricing in helping consumers make informed decisions.[502]

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[497] See EC, *Green Paper on the Review of the Consumer Acquis*, COM/2006/744, Brussels, 8 February 2007, at 15.
[498] See text at n282-284 and n353-354 above.
[499] EC, *Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers*, June 2006, at 11-14.
[500] See, eg, Massachusetts General Laws Chapter 6, s.115A; New York State Weights and Measures Regulations, Unit Pricing, 1 NYCRR Part 345, February 4, 2002; General Statutes of Connecticut, Chapter 417 General provisions. Pure food and drugs Sec.21a-74; Charter of City of Cleveland, Part Six - Offenses And Business Activities Code, Title III - Consumer Protection, Chapter 647 - Unit Pricing.
[501] See, eg, Maine State, 'What is Maine's law on…?: Unit Pricing', *Maine State Law and Legislative Reference Library website*, www.maine.gov/legis/lawlib/whatis.htm#unit.
[502] See, eg, Anthony D. Miyazaki, David E. Sprott and Kenneth C. Manning, 'Unit prices on retail shelf labels: an assessment of information prominence' (2000) 76:1 *Journal of Retailing* 93. In some US supermarkets, different units can be used for each of several choices for a product, for example this writer has seen examples such as a choice between three different brands of toilet paper where their unit prices are stated per

Despite the somewhat haphazard nature of unit pricing in the US, it appears that many US consumers use unit price indications where they are available, although this varies according to education level, income or race.[503] There is also some evidence that exposure to unit pricing can increase consumers' awareness and use of it.[504] However, the market in the US has certainly not responded by providing for uniform and useful unit pricing across the country.

5.5.3 National unit pricing regulation for Australia

The Act does not contain any provisions providing for standardised information disclosure such as unit pricing.[505] However, provisions, modelled on the UK laws could be introduced. An alternative approach would be including such regulation as part of new national trade measurement legislation to be introduced by 2010.[506] The current uniform trade measurement legislative scheme implemented by the States provides unit pricing only in the limited areas of pre-packed meat, fruit, vegetable and cheese.[507]

In Australia, large retailer ALDI, the relatively new entry into the grocery retailing market, has recently voluntarily introduced unit pricing in its supermarkets.[508] Its website explains how it determines which unit of measurement to use and that it displays the unit prices on the bottom of

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sheet, per cm^3 and per ounce respectively, rendering the unit prices impossible to compare.

[503] Unal O. Boya (1987), 'Consumer usage of unit pricing', (1987) 11:3 *Journal of Consumer Studies and Home Economics* 279.

[504] Kenneth C. Manning, David E. Sprott and Anthony D. Miyazaki, 'Unit price usage knowledge: Conceptualization and empirical assessment' (2003) 56:5 *Journal of Business Research* 367.

[505] Part V Division 1AA of the Act regulates country of origin representations made regarding goods.

[506] See text at n461-462 above.

[507] See, eg, Trade Measurement Regulations 2007 (Vic) reg.78; Trade Measurement Regulation 2007(NSW) reg.78; Trade Measurement (Prepacked Articles) Regulation 1991 (Qld) reg.28; Trade Measurement (Pre-Packed Articles) Regulations 2000 (Tas) reg.27.

[508] Tony Moore, 'Want to know the cost of one egg? Now you can', *Brisbane Times*, 9 November 2007, www.brisbanetimes.com.au/news/queensland/want-to-know-the-cost-of-one-egg-now-you-can/2007/11/09/1194329466251.html; see also ALDI, 'ALDI unit pricing', *ALDI website* at www.aldi.com.au/au/html/service/3798.htm.

the normal price card for an item.[509] ALDI says its voluntary unit pricing in Australia is based on the UK regulations.[510]

While this shows that unit pricing is clearly feasible in Australia, it does not mean other retailers will follow. For example, Woolworths is reported as looking at trialling unit pricing in Australia in 2008 but it is not clear when or to what extent..[511] Coles has been reported as confirming that it 'would not follow the trend in the near future'.[512]

News reports say that lack of consumer demand is one of the main reasons retailers are against introducing unit pricing.[513] This ignores evidence from both the EU and the US that suggests consumers become more aware of, and are more likely to understand and use unit pricing, if they are exposed to it.

In any case, the US experience suggests that relying on state or local laws or voluntary measures to bring about unit pricing can undermine its effectiveness. If it is accepted that unit price indications provide consumers with useful information that helps them make better decisions and drive competitive outcomes, then national, uniform unit pricing standards are the most effective means to do so. ALDI has also indicated it would support regulation on unit pricing.[514] As Cousins has noted in the

[509] www.aldi.com.au/au/html/service/3810.htm.
[510] 'Aldi introduces unit pricing to Australia', *FOODweek online*, 8 November 2007, www.foodweek.com.au/main-features-page.aspx?articleType=ArticleView&articleId=1030; Tony Moore, 'Want to know the cost of one egg? Now you can', *Brisbane Times*, 9 November 2007, www.brisbanetimes.com.au/news/queensland/want-to-know-the-cost-of-one-egg-now-you-can/2007/11/09/1194329466251.html.
[511] As above; Choice, *Truth in pricing*, *CHOICE website*, November 2007, at www.choice.com.au/viewArticle.aspx?id=105675&catId=100476&tid=100008&p=1&title=Truth; Danielle McKay, 'Shoppers support unit pricing', *The Mercury*, 13 November 2007, www.news.com.au/mercury/story/0,22884,22750248-3462,00.html.
[512] Danielle McKay, 'Shoppers support unit pricing', *The Mercury*, 13 November 2007, www.news.com.au/mercury/story/0,22884,22750248-3462,00.html.
[513] See, eg, as above; 'Aldi introduces unit pricing to Australia', *FOODweek online*, 8 November 2007, www.foodweek.com.au/main-features-page.aspx?articleType=ArticleView&articleId=1030; Richard Macey, 'Just the ticket to end trolley tears' *Sydney Morning Herald*, 11 October 2007, www.smh.com.au/news/national/just-the-ticket-to-end-trolley-tears/2007/10/10/1191695991696.html.
[514] Choice, *Truth in pricing*, *CHOICE website*, November 2007, at www.choice.com.au/viewArticle.aspx?id=105675&catId=100476&tid=100008&p=1&title=Truth.

voluntary industry codes context, a significant weakness is that voluntary measures will not cover all relevant businesses and, ultimately:

> Experience suggests that if we want all traders in an industry to adhere to a standard then the standard should be mandatory.[515]

The EU and UK models for unit pricing regulation provide the benchmark in this area, setting general, market-wide standards but allowing exemptions where benefits may not justify costs. Further, to be effective, unit price indications should be easily seen comparable at the point where consumers make decisions. This is provided for in the EU/UK model of regulation, which guides the use of units of measurement and the manner in which the unit price indications must be displayed. The EU/UK model is effective because it is explicitly designed to correct a consumer information problem in retail markets.

The UK rules also provide appropriate enforcement measures. The local Trading Standards Authorities play a role in general enforcement, given they are responsible for general weights and measures and carry out general trade measurement inspections. For more serious breaches of the requirements, national regulators or the Consumers' Association may also act. This structure recognises that unit pricing requirements are similar in character to traditional weights and measures matters but can also play an important role in promoting competition and fair trading more generally.

While Australian consumers are likely to understand and use unit pricing as it becomes more widely available, this may vary between different groups of consumers, with low-income and disadvantaged consumers perhaps less likely to reap personal benefits from unit pricing.[516] A public education campaign might therefore accelerate Australian consumers' understanding of how to use unit pricing. The Consumers' Federation of Australia has pointed out that one of the benefits of introducing a legislative scheme for unit pricing is that a well-organised and publicised consumer education campaign can be designed to accompany the new rules.[517]

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[515] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 25.
[516] They may still share in the general competition benefits of unit pricing if enough consumers use unit pricing effectively to drive competition.
[517] Consumers' Federation of Australia, 'Unit pricing', *Consumers' Federation of Australia website* at www.consumersfederation.com/unitpricing.htm.

Cousins has also noted, in the reverse, that one of the common problems with voluntary measures is a lack of commitment to their promotion.[518]
It is hard to ignore that the first mover on unit pricing in the large Australian retailing market is not an Australian-based company but the new entry, ALDI, a German business. This business is familiar with unit pricing due to its experience in Europe where such standards already exist. Indeed, it has explicitly drawn on this experience to help it introduce unit pricing in its Australian stores. This may be an example of the argument made by eminent economist Michael Porter that setting efficient, stringent government standards can create and upgrade competitive advantage for their national businesses.[519]

National regulations to implement unit pricing requirements should be introduced based on the EU/UK model. This would benefit from regulatory impact assessment, to identify exemptions and/or transitional measures to allow Australian businesses to prepare. The regulation assessment process would help determine the most appropriate enforcement model for Australia, including whether trade measurement authorities, the ACCC or both should be responsible for enforcement. However, without national unit pricing standards, Australian retail markets will be behind best practice in driving efficient and effective market outcomes. It sets a simple standard for the transparent disclosure of highly relevant information to consumers at the point at which they require it.

[518] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 25.
[519] Michael E. Porter, *The Competitive Advantage of Nations*, Free Press, 1990. More recently, see Interview with Professor Michael Porter for the World Economic Forum's Global Competitiveness Report 2007-2008, 31 October 2007 at www.youtube.com/watch?v=kzn9-M2umFQ.

Recommendation 7 – Introduce national requirements for traders to indicate the unit price of products offered to consumers

Introduce general, market-wide regulation requiring traders to indicate the unit price, in addition to the total price, for products offered to consumers, based on the EU/UK model.

The regulation should prescribe requirements for the clear display of unit price indications at the point where consumers look at price indications, and for the use of consistent units of measurement depending on the type of product.

The regulation could incorporate appropriate exemptions from the requirements in situations where costs would exceed benefits, to be determined through the regulatory impact assessment process.

The relative effectiveness of incorporating unit pricing requirements into new national trade measurement legislation or into the Act should be assessed and an appropriate enforcement model determined.

The introduction of national unit pricing regulation should be accompanied by a consumer education campaign on how to use unit pricing effectively.

5.6 Enforcement and redress mechanisms

In section 4.3.3 the enforcement and remedies provisions of Part VI of the Act were outlined. This noted that the overall model of the Act's enforcement regime was a mix of public and private remedies. This strength of this model is its flexibility and lack of reliance on just one group - consumers, businesses or the government -to enforce the consumer protection provisions of the Act.

However, while the Act's overall enforcement and remedies framework appears appropriate, there have been calls to improve specific matters to encourage more effective action by consumer protection enforcement agencies and/or more effective collective or representative consumer action.

The enforcement and remedies provisions do not themselves provide for substantive consumer protections and so they are not the focus of this report. Nevertheless, they are integral to the effectiveness (or otherwise) of the substantive provisions found in Part V (and Part IVA) of the Act.

This report therefore concludes with some comments about the enforcement and consumer redress provisions in Part VI of the Act in light of international experience.

5.6.1 Enforcement provisions

At the most basic level, effective enforcement powers are important to ensure that the substantive consumer protection provisions are complied with and contraventions addressed. A recent report for the OECD on best practices in consumer protection enforcement regimes noted the inverse relationship between effective enforcement mechanisms and the level of government intrusion required in business activity - effective enforcement was a greater deterrent to non-compliance, reducing the need for more widespread inspection and government monitoring.[520]

The Act gives the government and particularly the ACCC various civil and criminal enforcement options to enforce the consumer protection provisions of the Act. Also, anyone can seek an injunction against harmful conduct.[521] However, the current enforcement provisions do not always give the regulator adequate and effective powers to deter or stop conduct in breach of Part V, or Part IVA, of the Act. For example, as noted in section 4.3.3, the ACCC cannot seek monetary penalties or orders banning a person from acting as a director of a corporation as part of civil enforcement proceedings for a breach of the consumer protection provisions of the Act.

In its recent submission to the Productivity Commission inquiry into Australia's consumer policy framework, the ACCC suggested several improvements to the enforcement provisions of the Act: [522]

- Availability of civil pecuniary (monetary) penalties for breaches of certain consumer protection provisions, together with the availability of orders banning or disqualifying individuals from managing a corporation in appropriate circumstances;
- Ability to continue to use the statutory, compulsory information-gathering powers under section 155 of the Act until substantive

[520] OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 9, citing the UK Hampton Report - see text at n537-538 below.
[521] See text at n169-175 above.
[522] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 91-117.

proceedings are issued, even if proceedings for an interim injunction have been initiated (rather than a cease and desist power); and

- Power to issue substantiation notices – these are notices to a trader requiring them to provide proof to support a claim or representation made.

The OECD report into effective enforcement regimes lends some support to the ACCC's contentions. For example, it found that civil pecuniary penalties can be cost-effective in enhancing compliance with consumer protection laws.[523] It also provided some support for banning orders, finding while imprisonment may be justified in the worst cases, a court order depriving the defendant of their ability to trade would be more cost-effective. Also, traders are likely to believe that a court would be more willing to impose this than a prison term.[524]

Comparing UK enforcement powers is also useful. In the UK, the *Enterprise Act 2002* plays a central role in that jurisdiction's competition and consumer protection framework. Part 8 of the *Enterprise Act* provides for a general enforcement procedure for consumer protection laws, but this statute does not contain substantive consumer protection provisions itself – these are found in various acts and regulations, such as the Unfair Terms in Consumer Contracts Regulations 1999 discussed in section 5.4.1 or the Price Marking Order 2004 discussed in section 5.5.1. Part 8 operates by applying to 'domestic infringements' and 'community infringements', which are acts or omissions that 'harm the collective interests of consumers' and are a contravention of, respectively, UK domestic consumer protection laws (listed in an order made under the statute) or UK laws implementing EU directives.[525]

Part 8 of the *Enterprise Act* implements the EU Directive on injunctions for the protection of consumers' interests[526] into UK law. The recitals to the injunctions directive show that it does not intend to affect the ability of individual consumers to take action for harm or loss caused by a breach of consumer protection laws, but provides a general mechanism to protect

[523] OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 51-52.
[524] As above at 55-56.
[525] *Enterprise Act 2002* (UK) ss.211-12. See also OFT, *Enforcement of consumer protection legislation: Guidance on Part 8 of the Enterprise Act*, June 2003.
[526] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

collective consumer interests by stopping unlawful practices.[527] The directive gives the courts power to issue injunctions to traders to stop infringements, on the application of government consumer protection authorities.[528] Member states may also choose to give other organisations that protect the collective interests of consumers the ability to apply for such injunctions.[529]

Part 8 of the UK *Enterprise Act* thus provides that enforcers under the statute may apply to the court for an 'enforcement order'.[530] An enforcement order, essentially an injunction, directs a trader to stop infringing conduct and refrain from engaging in it again.[531] There is also provision made for interim enforcement orders where it is 'expedient that the conduct is prohibited or prevented…immediately'.[532] Enforcers and the court can both accept an undertaking from a trader to stop and not repeat the infringing conduct rather than apply for or make an enforcement order.[533]

Also in accordance with the EU directive, Part 8 provides that the OFT and local Trading Standards Services are 'general enforcers' able to apply for enforcement orders for all types of infringements.[534] In addition, the Secretary of State may by order 'designated enforcers' who may apply for enforcement orders in respect of all or specific infringements as specified in the designation order.[535] Various industry specific regulators have been designated, as has the UK Consumers' Association.

The enforcement orders procedure under the UK *Enterprise Act* does not, therefore, provide the OFT or other regulators with administrative powers to order traders to stop certain conduct. Instead, enforcement orders are similar to the undertakings and interim or permanent injunctions regime under the Australian Act, in that the regulator may accept undertakings or apply to the court, quickly if necessary, to stop harmful conduct in breach

[527] As above at recitals (2) and (3).
[528] As above at arts.2, 3(a).
[529] As above at art.3(b).
[530] Part 8 replaced the previous "stop now" orders regime in the UK under the Stop Now Orders (EC Directive) Regulations 2001, thus enforcement orders are still sometimes referred to casually as "stop now" orders.
[531] *Enterprise Act* s.217.
[532] S. 218.
[533] Ss.217(9), 218(10), 219.
[534] Ss.213(1), 215(2). The Department of Enterprise, Trade and Investment in Northern Ireland is also a general enforcer.
[535] Ss.213(2)-(4),(6)-(7), 215(3).

of consumer protection laws. In fact, the injunctions powers under section 80 of the Act are broader than the enforcement order provisions in the *Enterprise Act*, as discussed shortly below.

However, the UK government has already committed to implementing the Hampton Report in full.[536] This considered the scope for reducing administrative burdens in the UK by promoting more efficient approaches to regulatory inspection and enforcement.[537] The Hampton Report noted the need for regulatory penalties to take the economic value of a breach into consideration as otherwise businesses may face no effective deterrent for illegal activity. It recommended applying tougher and more consistent penalties where these are deserved.[538]

Further, the OECD report into effective enforcement regimes noted that there was no financial penalty for enforcement orders in the UK (although they can be enforced by fine or imprisonment for contempt of court if not obeyed). The report found that more powers would add to the deterrent effect, particularly if the court was able to impose financial penalties in civil proceedings.[539]

This suggests that similar moves might be useful in the Australian context. Indeed, the MCCA has been considering introducing civil pecuniary penalties into the Act[540]. Its discussion paper on the issue suggested it would support this.[541] The CAV director, Dr David Cousins, recently re-

[536] DTI, *A Fair Deal For All: Extending Competitive Markets: Empowered Consumers, Successful Business*, June 2005, at 21.
[537] Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, March 2005.
[538] As above at 6, 8, 38, 115-16. Interestingly, the Hampton Report did not specifically mention the issue of civil pecuniary penalties, although it supported effective financial penalties in court proceedings generally. However, it did specifically recommend that regulators also be able to impose administrative penalties, being penalties that do not first require court intervention, with provision for businesses to be able to appeal to the court: at 40-41, 116. The UK government introduced a Regulatory Enforcement and Sanctions Bill into parliament on 8 November 2007, which includes provisions in Part 3 to allow Ministers to confer on regulators the power to impose civil sanctions, including administrative monetary penalties.
[539] OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 44-45. It also noted that the Australian "probation order" power could add an attractive and effective option, allowing for orders that traders establish compliance and training programs.
[540] See the MCCA website at www.consumer.gov.au/html/mcca_projects.htm.
[541] MCCA, *Civil penalties for Australia's consumer protection provisions: A discussion paper*, September 2005, at 13-17. The discussion paper also suggested more tentative

stated that a civil penalty regime would give a more comprehensive set of remedies against unfair conduct.[542]

Canadian legislation is also interesting in this context. As discussed in section 5.3.4, Canada does not have market-wide national consumer protection laws at the national level. However, its *Competition Act* includes provisions against unfair trading that would be considered consumer protection provisions in other jurisdictions such as Australia.[543] Some of these establish criminal offences, but Part VII.1 of the *Competition Act* also provides for 'administrative remedies' for several types of 'deceptive marketing practices', including false or misleading representations, bait and switch selling, and selling products above the advertised price.

These administrative remedies are equal to civil remedies in the Australian context, as they are imposed by the court[544] after application by the regulator, rather than directly by the regulator or another administrative body. The administrative (civil) orders open to the court if a person is engaging in or has engaged in reviewable conduct are similar to those available under the Australian Act, such as an order not to engage in the conduct or similar conduct (a cease and desist order) or an order for corrective advertising.[545] However, the court may also order a person to pay 'an administrative monetary penalty, in such manner as the court may specify'.[546]

In other words, the equivalent of a civil pecuniary penalty is available in Canada for certain types of conduct that in Australia would constitute a consumer protection law contravention.[547] Administrative monetary

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support for banning orders, perhaps only when the court has already ordered another type of penalty: at 18.

[542] Dr David Cousins, 'Consumer Affairs; Part, Present and Future', *Consumer Affairs Victoria 2007 Lecture*, March 2007, at 29.

[543] *Competition Act* (R.S., 1985, c. C-34). See text at n302-304 above.

[544] The 'court' may be the Competition Tribunal, or the Federal Court or a provincial superior court, depending on where the application is brought: *Competition Act* s.74.09.

[545] *Competition Act* at s.74.1(1)(a),(b).

[546] As above at s.74.1(1)(c). The maximum penalties are $50,000 for an individual ($100,000 for each subsequent order) and $100,000 for a corporation ($200,000 for each subsequent order).

[547] In November 2004 the Canadian government introduced a bill to amend the *Competition Act* that would have increased the maximum administrative monetary penalties for deceptive marketing practices to $750,000 for the first order and $1 million for each subsequent order for an individual, and $10 million for the first order and $15 million for each subsequent order for corporations, however the bill did not pass: Bill C-19: An Act To Amend The Competition Act And To Make Consequential Amendments

penalties have been successfully obtained in Canadian cases involving misleading advertising regarding the savings to be made in a sale and false and misleading claims about material features of a product.[548]

While civil pecuniary penalties are not available under the Australian Act, its injunctions powers are broader than the current enforcement order provisions in the UK *Enterprise Act* (or the cease and desist order available under the Canadian *Competition Act*). Section 80 of the Act allows for the court to grant an injunction 'in such terms as the Court determines to be appropriate'.[549] The provisions state that injunctions to restrain conduct, for example, may be granted whether or not it appears that the person intends to engage again or to continue to engage in such conduct, whether or not the person has previously engaged in such conduct and whether or not there is an imminent danger of substantial damage to any person if they engage in such conduct.[550]

The Full Federal Court recently confirmed the broad scope of the injunctions powers in section 80 in the *Foster v ACCC* appeal.[551] The court held that once it has been established that the court may grant an injunction under section 80, the court has 'the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly'.[552] The court upheld an injunction made at first instance that was, in its terms, very similar to a banning order, as it essentially restrained the defendant from being involved in any similar business for five years. The court said:

> If the Court considers that a complete prohibition, whether permanently or for a specified period, on a respondent's engaging in a particular field of

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To Other Acts, introduced November 2, 2004. See also discussion on the opposition to the administrative monetary penalty provisions in Bill C-19 in Amanda Tait, *The Use of Administrative Monetary Penalties in Consumer Protection*, The Public Interest Advocacy Centre (Canada), May 2007.

[548] See Amanda Tait, *The Use of Administrative Monetary Penalties in Consumer Protection*, The Public Interest Advocacy Centre (Canada), May 2007, at 25-26; Competition Bureau, *Sears deceptive tire marketing case*, media release, Ottawa, April 1, 2005, available at: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00180e.html; Competition Bureau, *Misleading gas-saving device ruling upheld*, media release, Ottawa, May 26, 2004, available at: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00266e.html.

[549] *Trade Practices Act 1974* s.80(1).

[550] S.80(4); see also s.80(5).

[551] *Foster v Australian Competition and Consumer Commission* [2006] FCAFC 21.

[552] As above at §30, citing with approval Lockhart J in *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 256.

> commercial activity or industry is required to protect the public from conduct of the kind which constituted the contravention, s 80 is wide enough to support such a prohibition as a matter of power.[553]

This shows that the courts may agree with the ACCC in considering banning orders in the worst consumer protection cases.[554] Without legislative power, it is not possible to impose a civil financial penalty unless the law is amended,. By contrast, civil pecuniary penalties and disqualification orders are available through the enforcement of the restrictive trade practices provisions in Part IV of the Act.[555]

In the US, broad injunctions powers are also available. The FTC has two principal means of enforcing consumer protection laws such as the general prohibition on unfair or deceptive acts or practices. These are by cease and desist order through an administrative process, or by injunction through the courts.[556] It prefers injunction for most consumer protection cases is by injunction, as it quicker and less cumbersome.[557]

The injunctions power was introduced into the FTC Act in 1973 and authorises the FTC to seek preliminary or permanent injunctions from the court.[558] This power has been interpreted broadly by the US courts and the FTC can obtain injunctions not only restraining specified conduct but also imposing other equitable ancillary relief to remedy fully any past violations, including requiring the payment of restitution to consumers or

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[553] *Foster v Australian Competition and Consumer Commission* [2006] FCAFC 21 at §35.

[554] The ACCC pointed out in its submission that while current section 80 does allow injunctions similar to banning orders, it is a much more complex matter to obtain them than if a clear power to issue a banning order were present: ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 94-95.

[555] *Trade Practices Act 1974* ss.76, 86E.

[556] See FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrvw.shtm.

[557] See, eg, Timothy J. Muris, 'Economics and Consumer Protection', (1991-1992) 60 *Antitrust Law Journal* 103, at 108-110; FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrvw.shtm; DTI, *Comparative Report on Consumer Policy Regimes: Country Reports - Australia, Canada, Denmark, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, European Union & Summary Table*, October 2003, at 179.

[558] *Federal Trade Commission Act* s.13(b); 15 U.S.C. s.53(b).

rescinding consumer contracts.[559] However, it does not permit civil monetary penalties.

Taken together, these US provisions are therefore similar to the enforcement provisions in the Australian Act. The Act gives the court a broad injunctions power under section 80, together with powers under section 87 to make other orders to compensate for, or prevent, loss or damage to a party to the proceedings, including orders to rescind contracts.[560] However, that the FTC can seek remedial orders on behalf of consumers without first obtaining their consent in writing, an important difference discussed in section 5.6.2 below.

The FTC's other principal means of enforcement is the administrative procedure set out in section 5 of the FTC Act, which allows it to make cease and desist orders. 12.43Under this procedure the FTC may issue a complaint setting forth its charges that a person is using an unfair or deceptive act or practice. The complaint is effectively a "show cause" notice asking why a cease and desist order should not be made against them for the alleged violation in the complaint.[561] The complaint must give at least 30 days' notice of a hearing to determine the matter.[562]

The matter may be resolved by consent order, but if the complaint is contested the matter is heard in a trial-like administrative hearing for the FTC.[563] The administrative law judge decides whether to issue a cease and desist order or to dismiss the case. This decision may be appealed to the Full FTC. A final order of the Full FTC may then be appealed to the courts.[564] A final cease and desist order comes into force 60 days after it is made by the FTC, unless stayed pending the outcome of an appeal.

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[559] FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrvw.shtm; see, eg, *F.T.C. v. H. N. Singer, Inc.* 668 F.2d 1107 (9th Cir. 1982); *F.T.C. v. U.S. Oil & Gas Corp.* 748 F.2d 1431 (11th Cir. 1984); see also Timothy J. Muris, 'Economics and Consumer Protection', (1991-1992) 60 *Antitrust Law Journal* 103, at 108-110.

[560] See text at n177 above.12 00

[561] *Federal Trade Commission Act* s.5(b); 15 U.S.C. s.45(b).

[562] As above.

[563] FTC, Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, September 2002, available at: www.ftc.gov/ogc/brfovrvw.shtm.

[564] *Federal Trade Commission Act* s.5(b)-(k); 15 U.S.C. s.45(b)-(k).

Violations of final orders give rise to liability to pay civil penalties, which may be pursued through a further civil action in the courts.[565]

While the US regulator does, therefore, have cease and desist powers, the process for making a cease and desist order requires a proper hearing of the matter in question first - a similar process to applying for a court order - and is also subject to appeal to the courts. Further, the time for both the notice of an initial hearing and before a final order comes into force makes the process fairly useless in cases where the FTC wishes to act quickly to stop harmful conduct. However, this process does recognise a place, albeit limited, for civil penalties to be available for consumer protection violations.

The rationale for cease and desist powers is to allow the regulator to act quickly or immediately to limit or prevent harm to consumers by a breach of consumer protection laws.[566] Administrative cease and desist powers, as opposed to court-imposed orders or injunctions, are therefore seen as quicker to impose, although the US model demonstrates that this is not necessarily so. By comparison, administrative powers to order a person to cease and desist from conduct are regarded as having a greater risk of error or injustice without court oversight.[567]

The Act does not give the ACCC administrative cease and desist powers. In the Australian context, however, both NSW and Victoria have consumer protection laws that provide cease and desist orders. These orders require a trader to stop carrying on business, as well as to cease and desist from specific conduct, so are effectively a banning order.

However, even these powers are limited. In NSW the regulator may issue an administrative "show cause" notice as to why a trader should be permitted to continue carrying on a business if the regulator is satisfied that the trader has breached consumer protection laws more than once.

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[565] *Federal Trade Commission Act* s.5(l); 15 U.S.C. s.45(l); see also s.45(m). The civil penalty is up to $11,000 for each violation - if the violation is through a continuing neglect or failure to obey a final order, each day that this continues is a separate violation attracting a civil penalty. This provision also states that if such an action is brought to enforce a cease and desist order, the court may also grant mandatory injunctions and other ancillary equitable relief to assist in enforcement of the order.

[566] See also OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 52.

[567] See, eg, Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act 1974*, Report, January 2003 ("Dawson review"), at 101.

However, the regulator must then apply to the court to obtain a final order actually prohibiting the trader from carrying on a business and may only do so if it is of the opinion that the person is likely to engage again, or to continue to engage, in consumer law breaches.[568] The Victorian laws provide a truer administrative power, as the regulator may issue a "show cause" notice if it has reasonable grounds to believe that the trader appears to have breached consumer protection laws. If there is no response, this notice makes it an offence for the trader to continue carrying on business. However, before it may issue the notice the regulator must also have reasonable grounds to believe that it is likely the trader will continue to engage in that conduct and that there is a danger that a person may suffer harm, loss or damage as a result of that conduct unless action is taken urgently, providing strict limits on the power's use.[569]

In its submission to the consumer policy inquiry, the ACCC considered that its current ability to seek interim injunctions was working appropriately and allowed quick action when necessary. The ACCC did not consider that it required administrative cease and desist powers.[570] This seems to accord with experience in other jurisdictions, particularly in the US.

However, it argued for an amendment to allow it to continue to use its section 155 information-gathering powers until substantive proceedings are issued, even if proceedings for an interim injunction have been initiated. This proposed amendment relates to the consideration of cease and desist powers.

However, initiating court action for an interim injunction may trigger the end of its section 155 compulsory information-gathering powers. This is so even if the ACCC is still investigating a matter, and has taken the early court action to obtain an interim injunction to prevent ongoing or further potential harm while investigations continue.[571] This dilemma either deters

[568] *Fair Trading Act 1987* (NSW) ss.66A, 66B.
[569] *Fair Trading Act 1999* (Vic) s.106B. Under s.106B(6) the trader may apply to VCAT for a review of the decision to issue the notice.
[570] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 105-07.
[571] Attempting to use the section 155 power to obtain information from a party after the ACCC had commenced court proceedings against that party was held to constitute contempt of court in *Re: Brambles Holdings Limited And: Trade Practices Commission and Ronald Moore Bannerman* (1980) 44 FLR 182. However, this issue has not been conclusively determined: see *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 467-8 per Gibbs CJ, 475 per Murphy J, 475 per

taking early action to prevent harm, or undermines the ability to pursue successful action seeking more permanent remedies. Thus, while the ACCC agrees that its section 155 information-gathering powers should cease once substantive proceedings in a matter have been issued and information exchange is properly regulated by the court, it wants these powers to continue until that time, even if it initiates interim proceedings.

If the rationale underlying both provisions is accepted t follows that the second should not undermine the first. An amendment to allow a limited extension to section 155 to allow its use after interim proceedings have been, but before substantive proceedings are, issued would prevent further undermining. The ACCC's argument therefore appears correct.

The ACCC's other argument was to amend the Act to give it substantiation powers. Its submission gives a good outline of substantiation powers both in other Australian jurisdictions and in the US, UK and Canada. However, it is noted that some form of this power is widely available in these other jurisdictions.[572]

The ACCC prefers having the power to require substantiation of claims as an investigatory tool, to be contrasted with the US approach that considers it an unfair practice under the FTC Act if advertisers are unable to provide reasonable substantiation for claims. Despite the ACCC's preference, introducing a general prohibition on unfair trading conduct into the Act, as recommended in section 5.3, would potentially address this issue as has occurred in the US.

As a final matter, the ACCC in its submission did not discuss the issue of other interested parties taking enforcement action for breaches of the consumer protection provisions of the Act.

The EU injunctions directive specifically recognises that it can be useful to give organisations with an interest in consumer protection, other than government regulators, with enforcement powers.[573] This is no doubt influenced by the fact that some EU member states have a consumer protection model that involves little government intervention and relies

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Brennan J; see also *Re: Kotan Holdings Pty Ltd and Big Rock Pty Ltd and Colin Saul Rockman And: Trade Practices Commission* (1991) 30 FCR 511 at 515-16, 521.

[572] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 108-115.

[573] See text at n526-529 above.

instead on private actions by consumers or other businesses.[574] Indeed, in their national laws transposing the EU injunctions directive, several member states have chosen to give enforcement rights mainly to non-government bodies rather than government regulators.[575] However, even in the UK the Consumers' Association has become a 'designated enforcer' under the *Enterprise Act*, able to apply for an enforcement order in respect of all types of infringements.[576]

The OECD report into effective enforcement regimes also noted that whether consumers, competitor traders or other third parties may contribute to public law enforcement in a country varied depending on that country's legal culture. However, in terms of an overall approach to the issue, the report considered that giving third party enforcement rights could be a cost-effective way of increasing the deterrence value of consumer protection laws, as it action was more likely to be taken against a trader.[577]

Even so, enforcement action by third parties is unlikely to provide a major source of enforcement activity. This is due to the costs and risks of court action, particularly for public-interest organisations with limited funds. The UK DTI comparative study of consumer policy regimes, for example, noted that:

> …it is clear that there are some possible substitutes in terms of who undertakes enforcement but these tended to be of a limited nature. Provision of funding to consumer groups to take legal action, rather than the state becoming directly involved, generally resulted in only marginal involvement by such bodies as they were wary of the potential costs to themselves of launching litigation.[578]

In Australia, section 80 of the Act already allows anyone, including consumers and public interest organisations, to seek an interim or permanent order from the court against a trader engaging in conduct in

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[574] Such as Germany, Italy and the Netherlands: see n185 above; DTI, *Comparative Report on Consumer Policy Regimes*, October 2003.
[575] See EC, *Commission communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Article 2 of this Directive*, 2006/C39/02, 16 February 2006.
[576] The Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005, Order No. 917, came into force 22 April 2005.
[577] OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 57-58.
[578] DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 18.

breach of the consumer protection provisions of the Act.[579] However, experience in third party enforcement has been limited, partly due to costs. While actions for injunctions sought by business competitors have fared slightly better, at least in terms of interim injunctions,[580] this report is aware of only five cases brought by public interest applicants under section 80 for injunctions for breaches of consumer protection provisions of the Act. Without commenting on the substantive merits of these cases, the outcomes were as follows:

- *Phelps v Western Mining Corporation Ltd*:[581] the applicant, concerned about uranium mining in Australia, sought injunctions against members of the Australian Uranium Producers Forum for alleged misleading and deceptive advertisements published on the subject of uranium mining, nuclear power, and other energy sources. While in the reported case the applicant successfully established standing to bring the action under section 80, the applicant later dropped the action due to lack of funds.[582]

- *Glorie v WA Chip & Pulp Co Pty Ltd*:[583] the court held that the statements complained about were not misleading or deceptive.

- *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*:[584] following several complaints about a misleading statement made in tobacco advertising, the TPC accepted an undertaking from the Tobacco Institute to publish a corrective advertisement in return for no further action. However, the applicant wanted undertakings as to future advertisements, and when not forthcoming initiated action for injunctions against the Tobacco Institute restraining future breaches of the Act. Following lengthy proceedings, the applicant successfully obtained

[579] See text at n174-175 above.
[580] See, eg, *Commercial Bank of Australia Ltd v Insurance Brokers Association of Australia* (1977) 16 ALR 161; *Colgate Palmolive Pty Ltd v Rexona Pty Ltd* (1981) 37 ALR 391; *Michael Edgley International Pty Ltd v Ashton's Nominees Pty Ltd* (1979) 26 ALR 419.
[581] *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183.
[582] See Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, 46, at 57.
[583] *Glorie v WA Chip & Pulp Co Pty Ltd* (1981) 39 ALR 67.
[584] *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 81 ALR 701; (1988) 84 ALR 337; (1991) 98 ALR 670.

declarations, however, the court declined to make the injunctions, holding that they were too difficult to frame.

- *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd*:[585] the applicant was an association incorporated especially for the proceedings, whose members were persons involved in organisations concerned about cigarette smoking and its effect on public health. The proceedings were framed as a class action, with the applicant bringing the action on behalf of smokers and public health organisations. The applicant alleged that the respondent tobacco companies promoted the sale of cigarettes while remaining silent about, concealing or making false statements about their addictive properties and the health problems linked to smoking and had thus engaged in misleading and deceptive, and unconscionable, conduct under the Act. The applicant sought declarations and injunctions, and compensation orders under section 87. The Federal Court ordered that the applicant provide security for costs in the sum of $300,000, and the application was dismissed when the applicant was unable to do so.[586]

- *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*:[587] the applicant sought declarations and a mandatory injunction compelling the publication of corrective advertising against Macquarie, which managed two investment trusts, one of which included as an asset a toll road project in Sydney. Macquarie had published a prospectus inviting the public to buy units in the trusts with a statement about the likelihood of traffic volume increasing in the future, alleged to be misleading by the applicant. The High Court confirmed that the applicant could bring the application, even though it had no personal interest in the matter. However, the application was eventually dismissed as the Federal Court ordered that the applicant provide security for costs in an amount over $200,000, which the applicant was unable to do.

While the extent of third party enforcement actions will probably only ever be limited,[588] it still has an important role to play which may be undermined

[585] *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd* [2000] FCA 1004.
[586] See ACCC, *Response to Senate Motion 1031 (24 September 2001): Tobacco*, April 2002, at 23.
[587] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616; [2000] FCA 918; [2000] FCA 1140; [2001] FCA 1603.
[588] In terms of concerns about third party enforcement rights leading to an undesirable flood of litigation, the costs constraints are probably a sufficient answer, but see also

by these costs difficulties. The OECD report into effective enforcement regimes noted that third party enforcement rights:

> …can also – and this may not be a trivial consideration - provide a (minor) constraint on corruption.[589]

Corruption in this sense refers to problems of industry-capture or lack of appetite by the regulator to act, rather than overt inducements by improper means such as bribery. Nevertheless, it is a real concern and remains one reason why an overall enforcement and redress model with a mix of public and private remedies may be preferred.[590] For similar reasons, a model including the option of enforcement action taken by bodies other than the government regulator may give an important and appropriate check against possible regulator inactivity. However, to be effective, the problems around costs, particularly for public interest actions, need to be addressed.[591]

A inquiry into civil justice by the Victorian Law Reform Commission is considering, amongst other matters, ways to address the barriers to class and public interest litigation caused by the large expense involved in bringing such actions, the risk of an adverse costs order and the difficulties in meeting security for costs requirements. It has proposed that Victoria establish a new Justice Fund to act to pay for worthy civil claims.[592] While the outcome of this inquiry remains to be seen, a similar inquiry into such issues under the Act would be timely.

Justice Deane's comments in *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183 (at 189): 'The argument that [section 80] would…"open the floodgates of litigation" strikes me as irrelevant and somewhat unreal…Unreal, in that the argument not only assumes the existence of a shoal of officious busybodies agitatedly waiting, behind "the floodgates", for the opportunity to institute costly litigation in which they have no legitimate interest but treats as novel and revolutionary an approach to the enforcement of laws which has long been established in the ordinary administration of the criminal law.'

[589] OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 57-58.

[590] See text and notes at n183-184 above.

[591] In the Canadian province of Alberta, consumers and consumer organisations may also take action seeking declarations or injunctions against a supplier who has engaged in an unfair practice, but the provisions explicitly provide that the court may order that security for costs be furnished: Alberta *Fair Trading Act* (R.S.A., 2000, c. F-2) s.17.

[592] Victorian Law Reform Commission, *Civil Justice Enquiry: Summary of draft civil justice reform proposals as at 28 June 2007: Exposure draft for comment*, June 2007, at 48-54.

Recommendation 8 – Introduce a civil penalty and banning order regime for consumer protection contraventions

Introduce a civil penalty and banning order regime into the Act for contraventions of the consumer protection provisions.

The civil penalty regime should provide for civil pecuniary penalties and disqualification orders in certain circumstances, as are currently available for breaches of Part IV of the Act.

Recommendation 9 – Amend the ACCC's section 155 information-gathering powers so they can be used after the start of interim proceedings but before the start of substantive proceedings

Amend the Act to clarify the unclear position at case law about the ACCC's ability to use its section 155 compulsory information-gathering powers in relation to a party once court proceedings have begun against that party.

Allow the ACCC to continue to use its section 155 powers in relation to a party until substantive proceedings in a matter have been begun against that party, even if interim proceedings have been taken against the party.

Recommendation 10 – Conduct an inquiry into means to alleviate costs associated with third party enforcement actions under the Act

Conduct an inquiry into ways to address the obstacles to the commencement and maintenance of enforcement actions under the Act by third parties, particularly class and public interest actions, posed by the expense of court action, the risk of adverse costs orders and the difficulties of meeting security for costs orders.

5.6.2 Consumer redress provisions

The Act provides a mix of public and private remedies for breaches of the consumer protection provisions. While the public enforcement remedies aim to deter, stop and/or punish harmful conduct, the private remedies lim to provide redress to persons, particularly consumers, who have been adversely affected by conduct in contravention of the Act.

The OECD recently adopted a Recommendation on Consumer Dispute Resolution and Redress.[593] The OECD recommendation was the result of several years work by the OECD Committee on Consumer Policy on developing a best practice framework for effective consumer dispute resolution and to redress mechanisms that could be applied by all member countries, for both domestic and cross-border transactions. This work included a study of member countries' different dispute resolutions frameworks.[594]

The recommendation sets out a three-pronged framework for best practice consumer redress, with each of the three categories of measures 'complementary and mutually reinforcing'.[595] The three categories are:

- Dispute resolution and redress mechanisms for consumers acting individually

  These measures should include low cost and easily accessible procedures that do not require legal help, and that provide for the resolution of disputes on an individual basis and for redress where appropriate. Alternative dispute resolution services and simplified court procedures for small claims are given as examples.

- Dispute resolution and redress mechanisms for consumers acting collectively

  These measures recognise that individual consumers cannot always pursue the resolution of their individual disputes, but collective dispute resolution and redress procedures may make it more practical and efficient, so will be more feasible.

  Examples given include class or representative proceedings (with an individual consumer as lead plaintiff), representative actions by consumer organisations and actions by consumer protection enforcement authorities on behalf of harmed consumers.

- Mechanisms for consumer protection enforcement authorities to obtain or facilitate redress on behalf of consumers.

  These measures expand the collective action principle that apply to actions by government enforcement agencies on consumers' behalf. Recommended examples include powers for consumer protection

[593] OECD, *OECD Recommendation on Consumer Dispute Resolution and Redress*, 12 July 2007.
[594] As above at 5.
[595] As above at 9-11.

enforcement authorities to seek orders for consumer redress as part of civil or criminal proceedings, and/or to act as representative party in taking action for redress.

Australia compares well with these best practice principles. Its enforcement and redress model, and the Act, together with supporting legislation and other measures, provide all three types of dispute resolution and redress mechanisms. The Act itself provides for individual rights of action for consumers under section 82, while consumers also have access to state-based small claims or consumer courts or tribunals, the class action procedure available under the Federal Court's rules or, in many cases, industry-based alternative dispute resolution schemes.[596] Also, any person, including a consumer organisation, may seek an injunction against harmful conduct[597] and the ACCC can also seek orders on behalf of consumers if they consent in writing to such proceedings.[598]

However, the OECD recommendation highlights some areas for improvement, particularly with collective redress, as the Act does not contain provisions allowing for collective redress to consumers other than through general class action. First, the Act does not allow the ACCC to seek redress for consumers other than identified, individual consumers who have provided consent to the ACCC's application on their behalf in writing before the application is made.[599] Secondly, a representative proceeding for consumer redress taken by a consumer or a public interest organisation (as opposed to a class action where they are the lead plaintiff) is not possible.

The OECD recommendation recognises the important role that the regulator can play in obtaining redress for consumers, given the difficulties that individuals can face on their own..[600] The OECD report into effective enforcement regimes added that while this can be justified on fairness grounds, it can also enhance enforcement outcomes:

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[596] See text at n176-180 above.
[597] But see the discussion at text at n579-592 above.
[598] See text at n177 above.
[599] *Trade Practices Act 1974* s.87(1B).
[600] See, eg, Michael J. Trebilcock, 'Rethinking consumer protection policy', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, 68 at 77-78; DTI, *Comparative Report on Consumer Policy Regimes*, October 2003, at 18.

> …adding a compensation order to a financial penalty or other sanction may serve to enhance compliance, since it can give an adequate value to [the overall penalty], if the other sanction alone cannot achieve this; and at relatively low additional administrative cost, that of ensuring that the consumer is paid the compensation.[601]

The ACCC's submission to the Productivity Commission inquiry into Australia's consumer policy framework argued for amendments to the enforcement provisions of the Act, as discussed in section 5.6.1, and also detailed the difficulties it faces in seeking redress for consumers under the current provisions of the Act. The submission compared the Australian situation with powers in the US, Canada and New Zealand.[602] The issue is canvassed in some detail in that submission.[603] However, the problem arises mainly because, under section 87 of the Act, the court can only makes orders for the benefit of parties to the proceedings and the ACCC can only bring proceedings on behalf of consumers (effectively making them "parties") if they consent in writing beforehand.

This can be compared with the situation in the US. As discussed in section 5.6.1, if the FTC seeks an injunction from the court to restrain unfair or deceptive acts or practices, it may also seek equitable ancillary relief, including redress for consumers (whether named or not).[604] In Australia, the Full Federal Court has expressly rejected such a construction of the section 80 injunctions power, as section 87 exists and limits the power of the court to make compensatory orders.[605]

The Act needs to be amended to allow the ACCC to seek orders for redress for affected consumers as part of other proceedings taken under the Act, for example under section 80. Such orders should be available without requiring consumers to be parties to the proceeding. Making of orders for consumer redress would of course remain subject to court oversight.

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[601] OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, at 54.
[602] ACCC, *Submission to the Productivity Commission inquiry into Australia's consumer policy framework*, June 2007, at 100-104.
[603] See also the discussion in the Consumer Action Law Centre's *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 98.
[604] See text at n556-559 above; see also Timothy J. Muris, 'Economics and Consumer Protection', (1991-1992) 60 *Antitrust Law Journal* 103, n12 at 108 and at 110 for cases in which consumer redress was ordered.
[605] *Medibank Private Ltd v Cassidy* [2002] FCAFC 290 at §32.

The second issue identified above was the inability of a consumer or a public interest organisation to bring a representative proceeding under the Act for consumer redress. Even if the Act was amended to facilitate representative proceedings like this,, similar constraints in relation to third party enforcement actions are likely to limit the use of such provisions;[606] in particular, costs concerns would hinder representative proceedings from being initiated and maintained.[607]

Nevertheless, a representative proceedings mechanism would provide an additional means for consumer redress, albeit used perhaps only occasionally. As with third party enforcement actions, this would provide another potential check on regulator inactivity. The UK government also recognised its value in the 2005 UK consumer policy strategy, committing to introducing representative actions for consumers. The UK government stated:

> Sometimes going to court is the only way for consumers to get justice, but some consumers may not feel capable of doing so. We intend to introduce representative actions for consumers. We will consult further on how this might be done, in particular to avoid inadvertently creating a compensation culture and to avoid businesses facing spurious claims. We expect that only certain organisations would be allowed to bring a representative action and it might be necessary, for example, for pre-approval to be obtained from a court before proceeding.[608]

Further consultation on implementing representative actions in the UK is now occurring. The UK government prefers representative actions to be brought by designated bodies on behalf of named consumers, as opposed to on behalf of consumers at large.[609] While representative actions by designated organisations are a different proposition from seeking consumer redress by a government regulator in the course of other enforcement proceedings, the Australian experience with this limitation in

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[606] See text at n577-588 above.
[607] See also Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice*, Cambridge 2003, 46, at 56-58.
[608] DTI, *A Fair Deal For All: Extending Competitive Markets: Empowered Consumers, Successful Business*, June 2005, at 18.
[609] DTI, *Representative Actions in Consumer Protection Legislation: Consultation*, 12 July 2006, at 9-10.

section 87 suggests it may undermine the UK initiative to facilitate representative actions.

A contrasting approach is now being considered in Victoria. The Victorian Law Reform Commission's civil justice inquiry is proposing that Victorian courts be given the express power to order *cy pres* remedies, initially in class actions only, but with scope to consider extending the remedy outside the class action context in light of practical experience.[610]

Cy pres remedies allow the court to make an order for compensation "as near as possible".[611] In other words, if affected individuals and/or individual amounts of loss cannot be practicably identified for the purposes of restitution, the ability to make a *cy pres* order allows the court to order the payment of restitution to compensate as near as possible, for example by requiring payment to a cause that benefits the affected individuals generally. This also ensures that a wrongdoer does not retain the profits from breaking the law merely because it is too difficult to identify specifically each and every victim of the wrongful conduct. In other words, the availability of *cy pres* remedies is another cost-effective means of enhancing the deterrence effect of laws.[612]

For example, the Victorian Law Reform Commission's proposed guidelines for the exercise of a *cy pres* remedies power in Victorian class action proceedings are:

> (a) there has been a proven contravention of the law, (b) a financial or other pecuniary advantage ('unjust enrichment') has accrued to the person or entity contravening the law as a result of such contravention (c) a loss suffered by others is able to be quantified and (d) it is not possible, practicable or cost effective to identify and compensate some or all of those who have suffered the loss.[613]

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[610] Victorian Law Reform Commission, *Civil Justice Enquiry: Summary of draft civil justice reform proposals as at 28 June 2007: Exposure draft for comment*, June 2007, at 43-47.
[611] See also Consumer Action Law Centre, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, at 100-101.
[612] See Anthony J. Duggan, 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in Charles E.F. Rickett & Thomas G.W. Telfer (eds), International Perspectives on Consumers' Access to Justice, Cambridge 2003, 46, at 56.
[613] Victorian Law Reform Commission, *Civil Justice Enquiry: Summary of draft civil justice reform proposals as at 28 June 2007: Exposure draft for comment*, June 2007, at 43.

Such a remedy is particularly apposite to the consumer protection context, where it is often difficult to identify specific consumers affected by a trader's breach even though it is clear that the trader has profited from their conduct. Further, the cost of administering the refunds of small amounts to large numbers of consumers often outweighs the benefits being refunded, making individual restitution unfeasible without a way of aggregating the restitution. *Cy pres* would also be an appropriate remedy to accompany any new power for the ACCC to seek orders for consumer redress as part of enforcement proceedings, for cases where it would be impossible to identify specifically affected consumers.

In Canada, a bill introduced in late 2004 to amend the *Competition Act* included proposed amendments to expand the orders available to the court in cases in which a trader contravened the provisions against making representations to the public that are false or misleading in a material respect.[614] The first new order proposed was to allow the court to order the trader to pay an amount in restitution, to be distributed among the consumers who bought the products the subject of the representations, in any manner and on any terms that the court considered appropriate. The second new order would allow the court to make residual *cy pres* orders, empowering it to designate a not-for-profit organisation in Canada that benefited persons affected or likely to be affected by the conduct, or any other person or organisation considered appropriate, to receive unclaimed or undistributed funds from the restitution. The bill did not pass, however, because of controversy over other elements.[615]

The precise details of any *cy pres* mechanism to be inserted into the Act would need to be drafted carefully, thus a further inquiry into how such a mechanism could and should operate would be appropriate, similar to the inquiries being made by the Victorian Law Reform Commission. While it is difficult to achieve consumer redress in cases where it is impossible to make refunds to individual consumers, this does not mean this should be abandoned.[616]

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[614] *Competition Act* (R.S., 1985, c. C-34) s.74.01(1)(a).
[615] Bill C-19: An Act To Amend The Competition Act And To Make Consequential Amendments To Other Acts, introduced November 2, 2004. See also n547 above.
[616] See Katy Barnett, 'The Uneasy Position of Unjust Enrichment after *Roxborough v Rothmans*', (2002) 23 *Adelaide Law Review* 277, 288.

Recommendation 11 – Enable the ACCC to seek orders for consumer redress as part of other enforcement proceedings under the Act

Amend the Act so the ACCC to seek orders from the court for redress for affected consumers as part of other proceedings taken under the Act, for example under section 80.

Such orders for consumer redress should be available without the need for the consumers to be parties to the proceeding.

Recommendation 12 – Conduct an inquiry into the potential for the introduction of representative action and *cy pres* remedies provisions into the Act

Conduct an inquiry into the potential for improved consumer redress provisions to be inserted into the Act.

The inquiry should consider possible mechanisms to allow for consumer representative actions and to allow the court to make orders for *cy pres* remedies in appropriate cases.

Appendix – Unfair contract terms: Costs and benefits of intervention in relation to unfair contract terms.

Competitive markets, free from regulatory intervention will perform efficiently and this will benefit not only producers but also consumers – the market will supply the products that consumers most value at prices that reflect the value of the resources used to produce them and producers will be responsive to changes in demand and supply conditions. In such markets buyers and sellers are free to enter into contracts relating to the supply of goods and services and they will do so where such arrangements are mutually beneficial and so those contracts will be efficient. Contract provisions are legally enforceable by either party and this is important to ensure efficient outcomes.

Thus, Vickers observes:

'…with symmetric information between a buyer and a seller…freedom of contract should lead to an efficient outcome – the gains from trade should be maximised. Sellers would have every incentive to offer terms that deliver value for money to consumers as efficiently as possible. If a sales contract contained a term that benefited the consumer less than it cost the seller – or harmed the consumer more than it benefited the seller – then the term would be inefficient and would go. Without the inefficient term the seller would be able to offer a deal that would be better both for the seller and the consumer. Likewise there would be every incentive to include efficient terms. In short, deals would be tailored efficiently by unfettered market participants.'[617]

* This paper was prepared by Rhonda Smith, Economics Department, University of Melbourne at the request of , and with participation from, the Consumer Action Law Centre. It forms part of a broader research task which examines Part V of the Trade Practices Act and considers whether it has kept pace with developments around the world and within other Australian jurisdictions.

[617] John Vickers (2003), Economics for consumer policy, p.8, available at www.oft.gov.uk/shared_oft/speeches/spe0503.pdf. See also Russell Korobin (2002), Bounded Rationality, Standard Form Contracts, and Unconscionability, *University of Chicago Law Review, Vol 70, pp1203-*

As noted in the original submission by the Consumer Action Law Centre to the Productivity Commission, standard form contracts, as a process, are efficient and may benefit consumers because in competitive markets reduced transaction costs will be reflected in lower prices or other improvements in sales terms. Thus,

'Standard form contracts can have advantages to both supplier and purchaser provided that a fair chance is achieved between both parties to the contract. They reduce transaction costs for the supplier which would otherwise be passed on to the purchaser. They allow for lengthy and detailed contracts to be finalised with the minimum of time and by lay persons who only need to negotiate the specifics such as price, description of goods and services and delivery times. Over a period of time, people become familiar with the contracts because they are standard and may encourage a general understanding of trading practice.'[618]

Arguably, those who desire and are willing to pay the extra costs of non standard contracts are free to do so and it might be assumed that under competitive conditions firms would respond to such requests. Frequently, it seems that, for various reasons, the reality is otherwise. It is not unusual for purchasers to enter into contracts into which they have had little or no input and frequently these contracts contain terms that are not necessarily fair and may not produce efficient outcomes.[619] Although the discussion of unfair contract terms typically relates to standard form contracts, it may be more appropriate in the present context to consider more generally contracts that are not negotiated between the parties. This is because word processing enables suppliers to customise contracts for particular purchasers quickly and at very little cost but the purchaser still has no input in to the contract terms.

Although many contracts contain unfair terms whether as a consequence regulatory intervention of some sort is necessary or justified requires that the benefits from intervention exceed the cost that intervention imposes on various parties. This in turn raises a question of the welfare standard

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1295 for a discussion of how market structure and willingness of purchasers to acquire information influences the presence of unfair contract terms.

[618] Standing Committee of Officials of Consumer Affairs (2004), Unfair Contract Terms, A Discussion Paper, January, p.16. (hereafter SCOCA)

[619] The Consumer Action Law Centre submission to the Productivity Commission.

against which such an assessment is to be made.[620] Having resolved this issue, if the cost of unfair contract terms is likely to exceed any benefits from non intervention, there are two other issues to be considered. The first is whether there are already adequate provisions in place to address the problem and, if not, what form should any intervention take, recognising that the costs and benefits associated with intervention are likely to be influenced by the particular policy instruments selected. This paper focuses on the costs and benefits of addressing unfair contract terms, and only briefly considers the form that such intervention might take.

The Costs Resulting From Addressing Unfair Contract Terms

Clearly there are costs associated with regulatory intervention in relation to contract terms. They include:

i. an increase in transaction costs - standard form contracts are efficient as they reduce the transaction costs of buyers and sellers associated with negotiating and drawing up a sales contract. In discussing unfair contract terms it seems that often the counterfactual is incorrectly assumed to be ceasing to use standard form contracts so that contracts must be individually negotiated. However, the issue is not standard form (or non negotiated) contracts, it is the terms that are inserted into them. If these contracts do not contain unfair terms, they may still be used;

ii. adjustment costs, that is, the cost of amending and re-negotiating existing contracts. The extent of such costs depends on whether there are unfair terms in the contracts, the length of time before the contract expires and the time allowed for the removal of such terms. Word processing facilities mean that these contracts can be readily altered and at little cost so compliance costs and future transaction costs should not be as significant as they may have been in the past;

[620] In the context of an exemption from Part IV of the Trade Practices Act, the Australian Competition Tribunal canvassed the issue of the relevant welfare standard to apply in the Qantas-Air New Zealand matter. It concluded that the appropriate standard was a modified total welfare standard, a standard that could just as well have been described as a modified consumer welfare standard. In the present context the aim of the proposed intervention is to ensure consumer sovereignty and to avoid certain detriments to consumers. Therefore a consumer welfare standard would appear to be appropriate. However, this should be modified to recognise that the impact on consumer welfare of producer conduct may be indirect rather than direct (for example, efficiency increases free up resources for other uses and so benefits consumers even when there is no direct pass through of benefits in the form of lower prices or improved quality).

iii. a one-off cost to amend contracts offered in future so that they will be compliant (see ii above), as well as the costs associated with monitoring the firm's own compliance in future;

iv. the monitoring and enforcement costs of the regulator. The extent of the former depends in part on whether an existing body is charged with this responsibility as there are likely to be economies from shared overheads and even from better/fuller use of staff.

The costs associated with addressing unfair contract terms are affected by whether such regulation replaces some existing requirements (such as disclosure requirements). If so, the relevant cost is the cost of the new provisions net of the costs of existing, but now redundant, requirements. In addition, in determining the cost of new regulation, the cost savings of having a national regime for firms that operate nationally should be netted out. Further, to the extent that new regulation causes changes that avoid litigation under the existing, but perhaps not very satisfactory, provisions, the consequent saving of enforcement costs should be taken into account.

In his oral evidence to the Productivity Commission Inquiry, Professor Field discussed the costs associated with addressing unfair contract terms.[621] In particular he argued that remedying the problem may deprive consumers of benefit, at least in part because it may reduce competition between rival suppliers. He stated:

'...there's a potentially much more significant cost that's involved than compliance costs and its around the interference with what I would call the complex balance of the contractual bargain. Put simply, the deletion of one term as unfair may see another term which the consumer values affected adversely. What, of course, then seems on its face attractive, which is the protection of powerless consumers from the excessive power of business, may in fact upset the complex balance of the contractual bargain in a way that's harmful to consumers.'[622]

However, reference to the contractual bargain is hardly relevant in that essentially the issue of unfair contract terms arises where purchasers lack input into those terms and, as a consequence, the terms unduly favour the supplier. It is indeed the market power of the business with respect to those terms which is the problem.

[621] Productivity Commission, Transcript
[622] Productivity Commission, Transcript.

Professor Field illustrates his comments with an example relating to contracts containing a term that creates a cost disincentive to discourage consumers from changing from one telecommunications supplier to another early in the contract. He states:

'The pricing offered to consumers to enter into those contracts is premised on the fact that consumers will stay in that contract for a period of time…If you take that clause out, they'll probably act rationally and that is, two months after they've entered that contract they may well find the next contract offered in the market at a cheaper price and they'll move to that.'

He concludes that this may lessen competition in the market.

There may be circumstances where removal of a particular term from a contract has implications for the commerciality of the contract. Nevertheless, the example provided is not appropriate on a number of levels and the conclusions drawn from it are not valid. Thus,

i. a customer who signs up to a contract generally does so for a specified period and so is committed for this period without any need for penalty clauses. Indeed the suggested outcome can be avoided by offering the potential purchaser alternative contract periods with corresponding adjustments to the price;

ii. ignoring (i) and accepting that customers could legally terminate contracts early,[623] it is exactly that risk of losing customers that is the essence of what makes a competitive market work. That risk forces a firm to 'sharpen its pencil', to offer the best possible deals and to engage in innovation to achieve that outcome;

iii. although the statement seems to accept that the penalty clause in the contract is unfair, it implies that if correcting it means additional changes then it should not be changed. One might think that at the very least the relative costs and benefits of the two scenarios would be relevant.

As a consequence of these costs Professor Field's line of reasoning leads to the conclusion that regulatory intervention in relation to the terms of

[623] Perhaps because there is a 'meet the competition' clause in the contract. This is unlikely in a 'take-it-or-leave-it' contract as it is in the interests of the purchaser rather than the supplier.

standard form or non negotiated contracts will reduce the net efficiency with which markets operate, resulting in misallocation of resources (including the deadweight loss associated with responding to, complying with, and enforcing the regulation) and reducing the incentive to innovate and respond to changing market conditions due to any increase in uncertainty/risk and reduced profitability. However, regulation of unfair contract terms is unlikely to have such effects if contract terms are mutually beneficial and hence efficient rather than unfair.

The effect of regulatory intervention in relation to unfair contract terms is illustrated in Diagram 1.[624] From the initial equilibrium C, the introduction of regulatory measures in respect of unfair contract terms increases the costs incurred by suppliers (implementation and compliance costs), represented by P_3FBP_2, and this has the effect of shifting the supply curve to the left. The share of that cost passed through to consumers is P_1EBP_2. The result is reduced supply and assuming that the demand curve is unchanged,[625] increased prices for consumers and a reduction in consumer surplus (by P_2CBP_1) and in producer surplus (by P_3P_1CF). In addition, a deadweight loss of BCE is created. This represents an overall loss of P_1P_2BCF. The significance of these responses from a policy perspective depends largely on the extent of the increase in costs to suppliers, the impact of this on quantity and price (which depends on the relative elasticity of supply and demand) and the size of the deadweight loss. Further, it assumes that currently there is no exercise of market power in relation to the unfair contract terms (see below). If this is not the case, then account must be taken of the reduction or elimination of monopoly rents through regulatory intervention, and the net impact of intervention on the size of the dead weight loss. In addition to the changes represented on the diagram, there may be adverse effects on the incentive to invest (dynamic efficiency), as well as increased costs for government of implementing the regulatory provisions and enforcing them.

[624] An issue is whether the cost associated with regulatory intervention is an additional variable cost or an additional fixed cost. The diagram and discussion could be taken to assume that it is a variable cost. Nevertheless, in the long run (the relevant time period) if the market is competitive the additional cost may result in some smaller firms (or firms with more favourable alternatives) exiting the industry, thereby restoring normal profits but causing the supply curve to shift to the left (as in Diagram 1).
[625] This assumption is relaxed below.

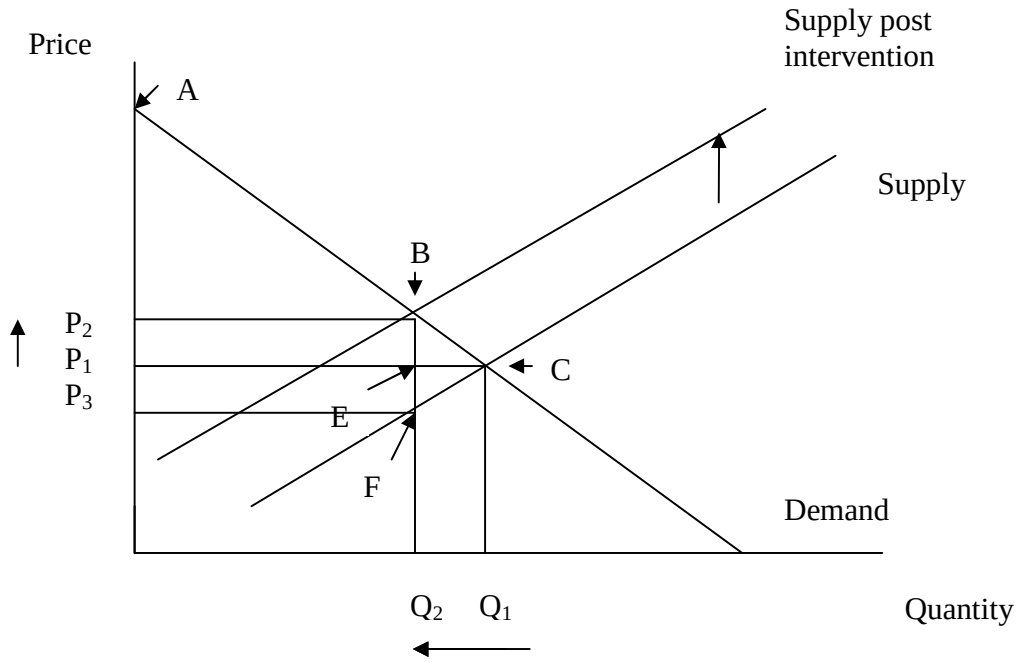

Diagram 1

Whether the above scenario is realistic depends on whether certain conditions are satisfied. The first of these is that:

'…the parties are able to negotiate on an equal footing, have equal bargaining power, are equally able to look after their own interests and have a full understanding of the consequences of their actions and the terms of the contract. In reality, this is not always the case.'[626]

In order to assess the implications of regulating unfair contract terms, the relevant 'price' is not simply the 'ticket price' but the price that takes into account all of the terms and conditions associated with supply, including any that may come into effect in the future. The second condition is that efficient outcomes are conditional on the absence of significant market failures. Yet, in reality, this is rarely if ever the case and so, even when markets are highly competitive, competition may not result in a market that operates efficiently. In relation to unfair terms in contracts, neither of these conditions may be satisfied.

[626] SCOCA, p.16

Unfair Trading Terms and Consumer Sovereignty

Ensuring consumer sovereignty is an accepted justification for consumer protection policy.[627] Informed consumer choice is the distinguishing feature of consumer sovereignty, and it is a necessary condition for markets to function effectively.[628] Consumer sovereignty requires that the market offers a range of options to consumers, and that consumers are able to formulate preferences and choose effectively between the options available.[629] For various reasons (see below), consumers often fail to account fully for non core contract terms[630] when making purchase decisions. Consequently, even if initially suppliers offer different terms, lack of competition on non core terms, is likely to mean that the non core terms of contracts within an industry become standardised to the least favourable terms for consumers – this is analogous to bad products driving out good products as explained by Akerlof.[631] Thus, this has the effect of reducing consumer options and it means that there is little incentive for innovation in respect of the risk resulting from the contingencies to which these terms relate. Unfair contract terms may impair consumer sovereignty.

Although in many situations consumers face a price which they do not negotiate, in imperfectly competitive markets consumers generally are able to choose between suppliers who may offer different price/quality bundles. In many cases these are products that are purchased repeatedly, if not regularly. Consequently, if the consumer is not satisfied with a particular purchase, subsequent purchases may be made from a different supplier. However, in the case of unfair contract terms, even if there is competition in relation to core terms (price/quality attributes), generally there is little or no competition with respect to non core terms, as noted above. Although there are alternative suppliers, this confers market power on suppliers (similar to the effect of a cartel on price) and so the allowance for risk associated with particular contingencies is not reflective of the likely cost associated with those events if they occur and this represents a misallocation of resources. Consumers have the choice of accepting

[627] For a discussion of this issue see Rhonda L. Smith and Stephen King (2007), 'Does Competition Law Adequately Protect Consumers?' *European Competition Law Review*, Vol 28, No 7, July, pp 412-424, at pp 413-414.
[628] Michael Waterson, "The Role of Consumers in Competition and Competition Policy", *Warwick Economic Research Papers*, No. 607, Dept of Economics, University of Warwick, 2001, p.2.
[629] Averitt, Neil W. and Robert H. Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law", *Antitrust Law Journal*, Vol 65, 1997, p 713-756, at pp. 713.
[630] Core terms are price and quality attributes; non core terms are all other contract terms such as the terms and conditions of cancellation, quality guarantees, provision for refunds and the like.
[631] George A. Akerlof (1970), `The Market For Lemons: Quality Uncertainty and the Market Mechanism', *Quarterly Journal of Economics*, Vol 84, pp488-500. This may hurt the producers of good products as well.

contracts that contain unfair terms or not purchasing the particular good or service at all.

From the perspective of individual buyers, the cost associated with unfair contract terms is not, and indeed cannot, be accurately factored into the price of the product. While the probability of a particular event occurring is relevant for firms when determining their risk exposure and may be objectively available, it is not of much assistance to individuals in relation to consumption decisions – they are unlikely to be aware of the probability of such an event occurring, and even if they are, they cannot know the probability of it occurring in relation to themselves. The inherent problems of predicting and assigning a value to the risk of a particular contingency are illustrated by the use of unilateral variation clauses to fundamentally alter the nature of the supply conditions. For example, Telstra offered 'unlimited' download of its Big Pond product but later imposed a download limit on existing customers without providing consumers with an opportunity to exit the contract. Similarly, Citibank marketed a fee free credit card but subsequently introduced a one off fee of $165 on existing customers (the fee could be avoided by spending money on the card). It was not until ASIC intervened that consumers were offered the option to exit the contract (though even this was imperfect given that the offer had enticed consumers to make balance transfers to the Citibank card from other cards, so they had to pay out the balances to achieve exit.

In circumstances where these probabilities and costs are unknown (and unknowable), individuals are likely to discount the likelihood that such an event will occur in relation to their own purchase, especially when it has a low probability of occurring, and so triggering a clause in a contract that may be detrimental to them.[632] This can be illustrated with respect to the inclusion of penalty fees in banking products. Assume that there are 6 million bank accounts, and that each account holder incurs one penalty fee per annum of $20 (this may be fairly conservative as fees can be as high as $50 in the mainstream banking market and much higher in some fringe markets). This represents a cost of $120 million to consumers per annum and is likely to hugely exceed the costs to the bank of the conduct that resulted in the penalty. If these types of terms are being ignored, the product price is underestimated and consequently consumers overbuy the product relative to the position if there were no unfair contract terms. The

[632] See for example the discussion of hyperbolic discounting in the Consumer Action Law Centre's Submission to the Productivity Commission Inquiry.

significance of the failure to take non core contract terms into account is shown in Diagram 2.

Before considering Diagram 2 (and 3), certain qualifications in relation to the diagrammatic representation should be made explicit. First, the implications of regulatory intervention for price and quantity, for the deadweight loss and so on, depend in part on the absolute shifts of the supply and demand curves. Second, while the implications of these changes for quantity are unambiguous, this is not the case for price, and the new equilibrium values post intervention will be influenced by the relative price elasticity of demand and supply. Not withstanding these qualifications, the general result that intervention to address unfair contract terms is likely to lessen inefficiency is justified. The appropriate comparisons are the pre-intervention equilibrium and the post intervention equilibrium that reflects the actual price rather than the ticket price.

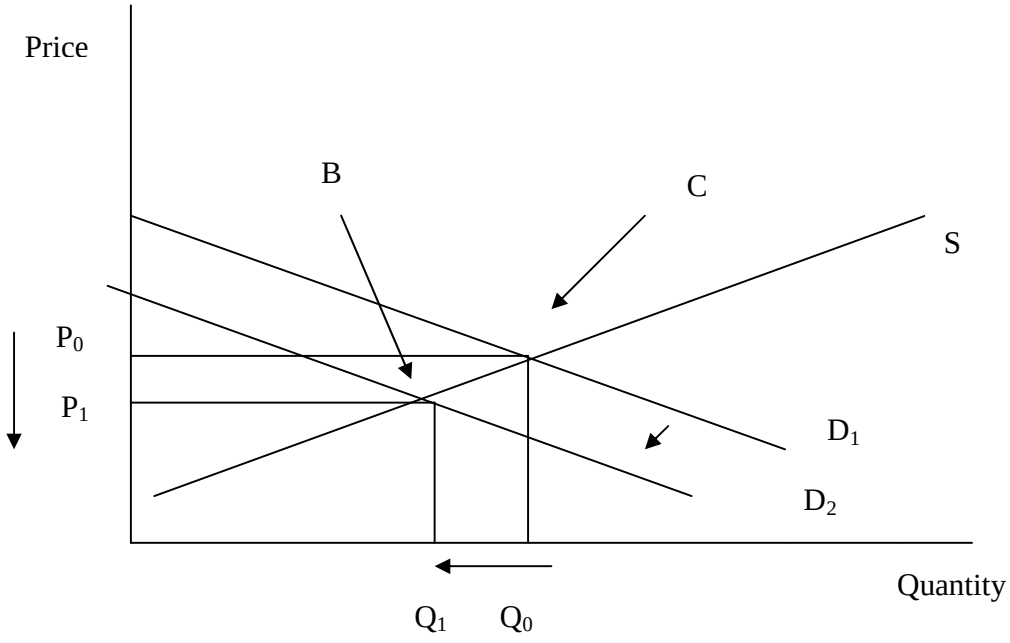

Diagram 2

If consumers fail to account fully for the cost to them of unfair contract terms, then the demand curve in Diagram 1 while representing actual willingness to buy based on the 'ticket price', overstates what that willingness would be if consumers took account of those costs, that is, it misrepresents consumer preferences. As shown in Diagram 2, the true demand curve consistent with consumer preferences is D_2 rather than D_1. As a consequence with demand represented by D_1, the product price is lower than it would otherwise be (it fails to take account of the non core terms) and the equilibrium quantity traded is greater. The efficient equilibrium is B rather than C with Q_1 rather than Q_0 and P_1 rather than P_0.

Given this correction, Diagram 3 re-introduces regulatory intervention to address unfair contract terms, thereby shifting the supply curve to the right (S_1). As a result of reducing or eliminating unfair contract terms, the 'correct' demand curve D_3 will be to the right of D_2 but to the left of D_1, its exact position depending on the cost to consumers of fairly addressing the relevant contingencies. The new equilibrium would be C (the intersection of D_3 and S_1, although if consumers still fail to take account of these costs the actual equilibrium will be the intersection of S_1 and D_1, that is, at B. Nevertheless, this is an outcome that is more efficient than if the unfair contract terms were not regulated in some way. At B, quantity exceeds the efficient level by Q_1Q_2 whereas without intervention quantity exceeds the efficient level by Q_0Q_2. The effect on price is uncertain as the supply response tends to increase price (reflecting increased costs) but the demand response puts downward pressure on price.

In addition, but not shown in the Diagram, regulatory intervention may make buyers more aware of non core contract terms and this may stimulate competition in respect of those terms which will further increase efficiency.

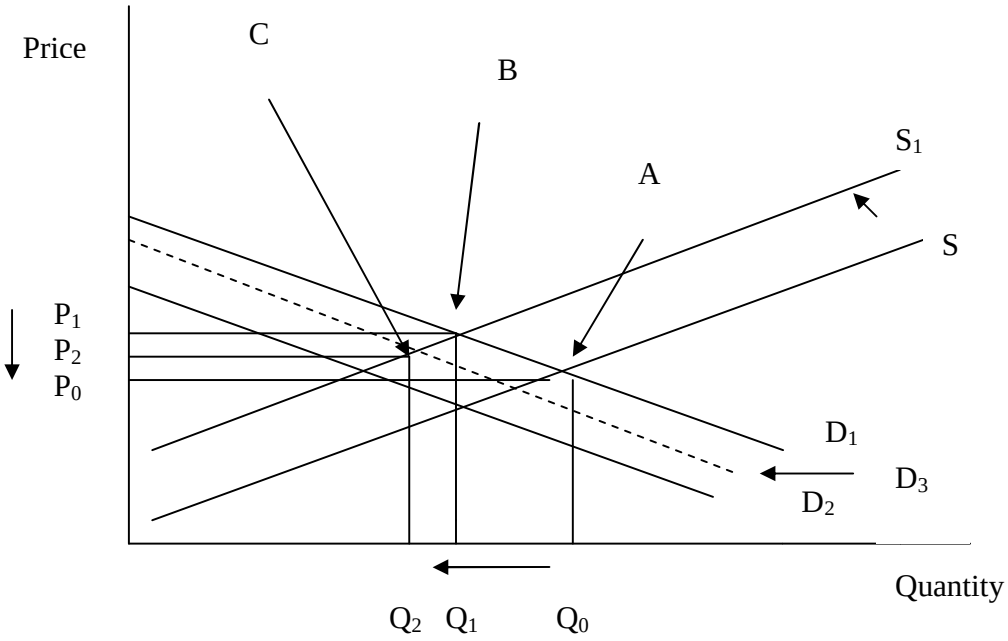

Diagram 3

Some additional considerations

First, publicity may alert consumers to the existence of problems resulting from unfair terms in contracts in particular industries (such as in relation to mobile phone contracts), although they may be only vaguely aware of the specific nature of the problem. In relation to that market at least a proportion of consumers will be more wary than they otherwise would be and may over-invest in seeking information about the nature of the contract in that specific market. The effect will be to move the demand curve to the left of D_1. To the extent that the concern is unwarranted or overstated, the relevant demand curve will be to the left of D_2, resulting in under-consumption compared to a situation where no such uncertainty exists.

However, the adverse effects of unfair contract terms may not be confined to the market in which the contracts exist. Concern about contracts in one market, such as mobile phones, may spill over into other markets, such as those for the supply of electricity or gas. This may mean over-investment in seeking information in these markets as well and/or failure to respond to welfare-enhancing offers available from alternative suppliers. Further, the

consequence may be to dampen competition in these markets not just in relation to the non core terms of the contract, but also in relation to core terms. This is because uncertainty makes consumers reluctant to switch suppliers even when an alternative supplier actually offers a better deal.[633]

Second, if businesses are able to reduce their costs by the use of unfair contract terms, they may be able to offer a lower price for a given product quality than can competitors that operate with fairer contracts.[634] As a consequence consumers may find themselves locked into a supplier for a considerable period because to switch to another supplier will trigger those terms and significantly increase the effective purchase price post purchase.[635] Examples of such terms include penalties for early re-payment of a loan, and terms stating that there will be no refunds in relation to cancellation of pre-booked holiday packages. Consumers often fail to realise that post purchase the contract terms convert the bargain into a rip-off. Awareness of such an outcome may cause at least some consumers to accept a somewhat higher price in exchange for greater flexibility in responding to changes in the market. As noted above, supplier conduct of this type tends either to result in all suppliers offering unfair terms or to drive out those offering fair terms. While the former reduces competition in relation to non core terms, the latter reduces competition in relation to core terms. Thus, removal of unfair contract terms protects competition and more efficient outcomes may result.

Equity benefits from intervention

Although competitive markets can be expected to operate efficiently, absent market failure, there is no reason to expect that they will produce equitable outcomes. Economists are prone to respond to concerns about equity by arguing first that competition should be unimpeded by concerns about equity because other policies such as taxation and welfare are superior instruments to address distribution issues. Second, they may suggest that if markets are efficient they will result in a higher level of economic activity and so everyone will be better off and there will be more wealth to redistribute.

Irrespective of whether these arguments are valid in competitive markets, the counterfactual to intervention to address unfair contract terms is not

[633] However, the adverse effects of unfair contract terms may not be confined to the market in which the contracts exist.
[634] See for example, Centre for Credit and Consumer Law, submission to SCOCA March 2004, p.8.
[635] See earlier discussion of Professor Field's evidence to the Productivity Commission.

about interfering with such markets so that contracts contain unfair terms and markets are less competitive in relation to core terms and not competitive in relation to non core terms, so that they do not operate efficiently. Further, redistribution policies frequently focus on redistribution of income from high income to low income groups, although some policies such as education and health, attempt to address the cause of inequity. In relation to unfair contract terms exposure to such terms is not determined by income level, but rather by the desire to purchase a particular product, that is, by being a purchaser.[636] If intervention is justified in these circumstances, it should be preventative and pro-active rather than reactive.[637]

Lack of consumer response to unfair contract terms

In the face of unfair contract terms, consumers typically continue to base their purchase decisions primarily on core terms and fail to take account of non core terms, although as noted above purchase decisions may be affected when there is awareness of the potential for unfair terms; and do not utilise existing means of redress. These responses (or the lack of them) could be taken to indicate that consumers do not consider unfair contract terms as significant enough to cause them to respond. However, the actual position seems to be otherwise. In order to understand the lack of consumer response it is important to consider why these unfair terms exist (this is also important for determining the nature of any regulatory intervention) and to understand the likely cost of remedial action.

Just as consumer protection problems were, and still are, often attributed to a lack bargaining power on the part of consumers, so too is the presence of unfair contract terms. Consequently, this is a problem that is assumed to arise in markets characterised by limited competition. In such markets consumers have little or no choice of supplier and so have limited bargaining power. The solution is therefore aggressive competition policy.[638]

In perfectly competitive markets consumers are protected because they have plenty of choice of supplier and are they fully informed. This same

[636] All purchasers of the product are exposed to risk and it may be that those who are time poor, but income rich, can afford to engage in less search and so are more likely to realise the consequences of unfair contract terms.
[637] See, for example, Frank Zumbo (2007), 'Promoting fairer consumer contracts: Lessons from the United Kingdom and Victoria, *Trade Practices Law Journal* , vol 15, pp 84-95, at p.88.
[638] For a discussion of this see Smith and King, supra note 10, pp 418-420.

choice constrains suppliers, depriving them of market power. Thus, perfect competition prevents an imbalance of bargaining power between buyers and sellers, and so competition is perceived by many as the best form of consumer protection, including protection from unfair contract terms. However,

i. although markets may be competitive, few are perfectly competitive, and in such markets competitive pressure may result in consumer exposure to risk, including in relation to unfair contract terms (see discussion of switching costs);

ii. nor are consumers fully informed. Information deficiencies, including asymmetry of information, confer power on the party possessing information, and lack of access to relevant information or the cost of obtaining it, may prevent consumers responding so as to avoid or reduce the impact of unfair contract terms. Consumers may make inappropriate choices because the costs of acquiring information and/or using it are too great relative to the expected benefits likely to result.[639]

iii. The findings of behavioural economics indicate that quite frequently consumers fail to acquire and/or to use fully relevant information about transactions. Apparently irrational consumer behaviour may result from inertia, incapacity to process the complex information required to make the decision to switch or, faced with choice, the fear of making the wrong choice.[640] Thus, even when consumers are aware of the potential for consumer detriment as a result of unfair contract terms, frequently they do not respond to that risk but this does not mean that the cost is insignificant. In such circumstances, addressing information deficiencies is not likely to overcome consumer problems of this sort.

[639] Smith and King, supra note 10, pp 415-416.
[640] Eldar Shafir (2006), A behavioural perspective on consumer protection, paper presented to OECD Rountable On Demand-side Economics For Consumer Policy: Summary Report, 2006, available at www.oecd.org/dataoecd/31/46/36581073.pdf. Griggs points out that 'Increasingly the good or service being purchased encompasses the contract as an essential feature of the product or service.'[640] For example, the firm supplying Pay TV supplies the installation services, and associated equipment under a single service contract. Consequently, '…the rational consumer does not and cannot be expected to fully appreciate the embedded contractual complexity…'(Lynden Griggs (2005), 'The [ir]rational consumer and why we need national legislation governing unfair contract terms, CCLJ, Vol 13, pp 51-72, at p.52.)

Addressing consumer detriment from unfair contract terms

It may be argued that if individual consumers are aggrieved in relation to contract terms, they already have avenues of redress and so specific regulation directed at unfair terms simply duplicates regulatory costs. However, to the extent that there may be avenues that individual consumers can currently pursue, the cost incurred by an individual as a consequence of the terms is unlikely to justify the legal costs of seeking redress. In the context of consumer protection policy generally and as applied to the US but equally applicable to unfair contracts terms:

'…for consumer transaction going to court is usually not economically feasible. When disputes involve small losses to consumers, private lawsuits will not work. Nor have class actions evolved to provide adequate enforcement. Further, small claims courts do not sufficiently reduce the costs of litigation. Thus, government consumer protection agencies have become part of the process to enforce the basic rules as well as to provide modification and amplification.'[641]

Yet collectively, the cost to consumers of unfair contract terms may be very large (or to put it slightly differently, the benefit derived by business from such terms may be very substantial). Regulation against such terms provides the basis for collective action that may improve the position of consumers affected by the terms and may reduce the incentive to impose such terms by necessitating that the costs associated with such actions (after factoring in the probability of being caught) be taken into account by firms when determining a course of action.

Unlike the labour market where there are concerns about unfair employment terms in contracts, there is little potential for effective collective action in relation to consumer acquisitions (and possibly not even in relation to businesses purchasing inputs). Other potential remedies also appear flawed or incomplete[642] – for example, it seems that the Australian courts are not prepared to interpret unfair terms in contract as unconscionable conduct; while Victoria's prohibition on certain unfair contract terms has limited cover (it excludes the financial sector) and, of course, is confined to Victoria.

[641] Timothy J. Muris (1991), 'Economics And Consumer Protection', *Antitrust Law Journal*, vol 60, no 1, pp 103-121, at p.105.
[642] This issue has been explored in detail in numerous submissions to the Productivity Commission and in oral presentations and so is not elaborated here.

A Proposal to Address Unfair Contract Terms

It is apparent that the actual costs and benefits resulting from addressing unfair contract terms depend in part on the nature of the process to be employed. Victoria introduced regulation in respect of these terms in 1999 and through the SCOCA process other states are involved, at least to some extent, in consideration of the issue. An outcome likely to result in more significant compliance and administrative costs is for each state to introduce slightly different provisions. A more cost effective outcome is a national approach. This might involve inclusion in the Trade Practices Act of a new provision (for examples 51AAA) which prohibits unfair contract terms and it would apply not only to business dealings with consumers but also with large business dealings with small businesses. This might identify certain types of terms as unfair, while providing a basis for assessing whether other terms are unfair. Assessment of whether a particular term is unfair could be undertaken by the ACCC (or some other body) either at its own instigation or in response to complaints by purchasers. Alternatively, a company could request an administrative decision from the regulator in respect of a particular clause/s or for an entire contract, in a process akin to notification. An appeal process in relation to these administrative decisions should be available (as for authorisation and notification decisions). On legal issues this would be to the Federal Court but otherwise to a tribunal.[643] The remedy for unfair contract terms would be to void those terms in the contract, but not the entire contract. Only where the supplier failed to comply with this requirement would a pecuniary penalty be imposed.

[643] Although this role could be filled by the Australian Competition Tribunal, it would need to be differently constituted when considering cases relating to unfair contract terms, that is, its membership should include a consumer representative.

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