



Allens Submission to the Australian Consumer Law Review

PART A GENERAL

1 Introduction

Allens welcomes the opportunity to participate in this important review of the Australian Consumer Law (**ACL**).

Allens has a market-leading consumer law practice. We advise local and international clients on all aspects of the ACL, including compliance, regulatory investigations and enforcement.

This review provides an opportunity for all stakeholders to consider whether the provisions of the ACL are operating as intended and meeting the objectives outlined in the Intergovernmental Agreement for the Australian Consumer Law (**IGA**) signed by the Council of Australian Governments in July 2009.

The IGA states that the overarching objective of the national consumer policy framework is:

To improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.¹

This overarching objective is supported by six key operational objectives, being:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purposes for which they were sold;
- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.²

The ACL provides vital protections for both consumers and business and important guidance on accepted standards of commercial behaviour. However, a number of provisions require amendment and clarification to ensure that these objectives will be met in practice. This submission outlines our views on seven key areas within the ACL and our recommendations on how those sections could be amended and clarified.

¹ Intergovernmental Agreement for the Australian Consumer Law (2009), paragraph C.

² Intergovernmental Agreement for the Australian Consumer Law (2009), paragraph D.

In addition to these specific recommendations, which are summarised below, Allens submits that the Review Panel should have regard to five general recommendations in which we advocate for increased certainty and clarity, principles-based prohibitions, simple and streamlined provisions and the avoidance of duplication and unreasonable compliance burdens on business.

Our submission is structured as follows:

- > **Summary of recommendations (Part A)**
- > **Misleading or deceptive conduct (Part B)**
- > **Consumer guarantees and the indemnification provisions (Part C)**
- > **Unconscionable conduct, unfair terms and unfair practices (Part D)**
- > **Product safety (Part E)**
- > **Enforcement (Part F)**
- > **Online commerce (Part G)**

2 Summary of recommendations

ALLENS' OVERARCHING RECOMMENDATIONS

1. It is imperative that that the ACL and any guidelines issued by ACL regulators are clear and certain. It is vital that both consumers and business understand how the ACL operates in practice.
2. Principles-based prohibitions are generally preferable to prescriptive regulation. Principles-based prohibitions ensure that our laws are simple, clear and sufficiently flexible to respond to emerging technology and business models.
3. Duplication should be avoided. New prohibitions should only be introduced following the identification of a specific harm (or specific potential harm) which the current provisions cannot adequately address.
4. The ACL provisions should be as simple and streamlined as possible. Grouping related provisions together (such as provisions related to misleading conduct and false representations, the consumer guarantees and unsolicited contracts) assists both consumers and business to navigate the ACL and understand their rights and obligations.
5. The ACL should not impose unreasonable compliance burdens on business, and any regulation imposed should be proportionate to identified harm. Laws which are unclear or overly prescriptive lead to increased compliance costs and, ultimately, increased prices for consumers.

Allens' recommendations on the ACL provisions are:

Misleading or deceptive conduct

- 1 It is appropriate to maintain the current approach to silences or omissions where it is not misleading unless there is a 'reasonable expectation' that a consumer or business would be informed of the omitted fact. The current approach is sufficiently flexible, does not intrude unduly into private contractual negotiations and promotes certainty in contractual negotiations, advertising and other commercial dealings.
- 2 Penalties and criminal sanctions should not be available for breach of section 18. Prohibitions which carry a penalty need to be identified in specific terms. Section 18 establishes a norm of conduct and is too general and too broad to be properly the subject of penalties and criminal sanctions.

Consumer guarantees and the indemnification provisions

- 3 The definition of 'consumer' could be improved to provide greater clarity and to ensure that the ACL provides basic rights to those that ought to be protected by providing that a person is taken to be a 'consumer' if the person *acquires* the goods or services for personal, domestic or household use or consumption.
- 4 The concepts of 'durability' and 'rejection period' are too uncertain and should be clarified by new regulations and/or ACCC guidance. In particular, both consumers and business require guidance on the time periods for which products should reasonably be expected to last before a defect amounts to a breach of the consumer guarantees.
- 5 Additional guidance (e.g. ACCC guidelines) could be provided to suppliers regarding recommended internal processes for assessing when the rejection period has ended. These recommended processes should include consultation with the manufacturer who is often best placed to assess whether a fault is major or minor, and how the fault is best remedied.
- 6 The concept of 'major failure' (where remedies are at the election of the consumer) is excessively broad and requires amendment. The current definition arguably leaves little role for the provisions regarding non-major failures (where remedies are at the election of the supplier).
- 7 Suppliers should be able to offer partial refunds for breach of the consumer guarantees in appropriate circumstances. In particular, the current regime requires suppliers to grant full refunds to consumers for product defects, notwithstanding that consumers may have used and enjoyed the product for a period prior to the defect appearing.
- 8 The prescribed requirements for documents containing 'warranties against defects' are excessively broad. The requirements should be amended to reduce unnecessary compliance costs. The prescribed text for documents containing 'warranties against defects' is inadequate and, in some respects, is liable to mislead consumers as to their statutory rights. The requirement should be either removed, or modified so that it does not mislead consumers (although not with retrospective effect).
- 9 The ACL or ACCC guidelines should be amended to make clear that suppliers can consult with manufacturers about product defects in the course of responding to customer complaints.

Unconscionable conduct, unfair contract terms and unfair practices

- 10 No further statutory guidance on the meaning of unconscionable conduct is necessary. It is appropriate that the courts continue to develop and clarify the concept. As a norm of conduct that requires an evaluation of business practices in all the circumstances, unconscionable conduct may not be capable of precise definition.
- 11 The listed companies exception should not be removed. The purpose of the unconscionable conduct provisions is to protect businesses who are vulnerable and suffer from inequality of bargaining power. Removing the exception would encourage opportunistic litigation and substantially lower the threshold as to what conduct amounts to unconscionable dealing.
- 12 There is no need to introduce a general prohibition on unfair commercial practices and to do so would only create duplication. The existing provisions of the ACL contain both broad and flexible prohibitions and specific prohibitions on particular forms of unfair commercial conduct.
- 13 Penalties should not be introduced for contravention of the unfair contract terms provisions. The existing remedies are sufficient. Imposing a penalty in circumstances where the party offering the term may legitimately believe that the term is necessary to protect their interests would be excessive and unnecessary.

Product safety

- 14 The current product safety regime could be made more efficient by introducing automatic adoption of 'trusted' international standards, publication of ACCC guidelines on product standards and the introduction of permits or waivers to supply products varying from the exact requirements of a safety standard in appropriate circumstances.
- 15 There is no need for a prohibition against the supply of unsafe goods, as the existing regime is sufficient. Products that are unsafe breach the guarantee of acceptable quality.
- 16 Business needs increased certainty regarding when mandatory reporting of serious injury and illness is required. The current definitions of 'serious injury or illness' and 'use or foreseeable misuse' are ambiguous, difficult to apply in practice and require clarification. An express exception for minor injuries would be consistent with the purpose of the scheme and reduce compliance costs for business.
- 17 The existing provisions already provide sufficient guidance on whether an unsafe product has a 'major failure'.

Enforcement

- 18 The existing remedies available to the ACCC and to private litigants are sufficient to discourage behaviour in contravention of the ACL.
- 19 There is merit in reviewing the appropriateness and effectiveness of the criminal offence provisions in the ACL. Criminal penalties should only be available for egregious conduct (such as cartel conduct) and it is unclear what role criminal penalties play in the ACL.
- 20 The ACCC has a broad power to bring representative actions for contraventions of the ACL and no amendments of these provisions are necessary.

Online commerce

- 21 The ACL does not need to be amended to include specific provisions for regulating online commerce. The ACCC has demonstrated that it is able to take enforcement action against businesses engaging in trade or commerce online using the existing provisions of the ACL. The ACL should be technology or platform neutral as far as possible.

PART B MISLEADING OR DECEPTIVE CONDUCT

3 Is the current approach to silence and omissions appropriate?

The Issues Paper asks whether it is appropriate to maintain the current approach to silences or omissions where it is not misleading unless there is a 'reasonable expectation' that a consumer or business would be informed of the omitted fact.³

Allens submits that the current approach to silences and omissions in the context of section 18 of the ACL is appropriate.

3.1 Current law

The ACL makes clear that misleading or deceptive conduct can include refraining from doing an act,⁴ except where it is inadvertent.⁵ There is no general duty of disclosure under section 18 and whether a disclosure is required depends on the relevant circumstances of the case. If the circumstances of a particular case give rise to a 'reasonable expectation' that, if a fact existed, it would be disclosed, the failure to disclose the relevant fact may amount to misleading or deceptive conduct.

This approach seeks to strike a balance between (1) the need for commercial parties to take responsibility for their own due diligence before entering into a contract or arrangement; and (2) an acknowledgement that there are circumstances in which silence or omission by a party may create an erroneous impression that creates a 'reasonable expectation' that a particular matter will be disclosed.

Whether a reasonable expectation of disclosure arises depends on the relevant facts and circumstances of the case, as well as the relationship between the parties (including the level of equality in bargaining power),⁶ their experience and commercial interests,⁷ and the materiality of the information that is not disclosed.⁸ The current approach is therefore highly flexible and operates to effectively protect consumers' and business' interests in appropriate cases.

In *Henjo Investments v Collins Marrickville Pty Limited*,⁹ in relation to negotiations for the purchase of a restaurant business, the Court found that the operation of a restaurant business over the capacity permitted under the relevant liquor licence held by the business created an implied representation that the restaurant was in fact licensed to seat more customers. In such circumstances, the failure of the vendor to disclose to the purchaser the actual limitations in its liquor licence amounted to misleading or deceptive conduct.

³ Issues Paper, 13.

⁴ ACL s2(2).

⁵ ACL s4(2)(a). See also *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477.

⁶ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, [22].

⁷ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, [10].

⁸ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, [58].

⁹ (1988) 39 FCR 546.

In contrast, in *Allianz Australia Insurance Ltd v Haddad*,¹⁰ the Court did not find that Allianz had engaged in misleading or deceptive conduct by omitting to send a renewal notice to the customer or notify the customer that their insurance policy was about to expire. Although Allianz had in prior years issued renewal notices, Allianz never undertook to offer any renewal and, in the circumstances, its conduct did not convey that Allianz would renew or extend the current year's policy without any agreement to that effect.

3.2 The current approach is flexible and promotes certainty in commercial dealings

In requiring that there be a 'reasonable expectation' of disclosure, the case law establishes an appropriate test to distinguish lawful commercial negotiations from conduct that is misleading or deceptive. The body of case law developing the concept of 'reasonable expectation' demonstrates that the approach to considering when an obligation of disclosure arises is based on a common-sense appraisal of the relevant facts and circumstances of the case. Moreover, the case law demonstrates that the current approach is sufficiently flexible to apply in circumstances so as to protect appropriately the interests of both consumers and business.

To remove the requirement for there to be some 'reasonable expectation' of disclosure would be too far an intrusion into private contractual negotiations. It would lead to an unduly wide interpretation of when a duty to disclose arises and could undermine certainty in contractual negotiations. In the context of advertising and other representations about consumer goods and services, removal of the 'reasonable expectation' requirement would also substantially increase compliance costs. This is because it would create significant uncertainty as to what information or facts should be included when making these representations.

4 Is it appropriate to introduce penalties for conduct prohibited by section 18?

The Issues Paper asks whether it is appropriate to introduce penalties for conduct prohibited by section 18 such as those that exist for false representations.¹¹ There are important differences between the general prohibition against misleading or deceptive conduct in section 18 and the specific prohibitions against false or misleading representations in sections 29 (civil) and 151 (criminal). These differences are relevant to the question of which consequences should apply for a contravention. In our view, section 18 is expressed too generally, and its reach is too extensive, to be properly the subject of financial penalties or criminal sanctions.

4.1 Section 18 establishes a norm of conduct

The purpose of section 18 is to set general standards, or a norm of conduct in the market, which is flexible and adaptable to changing business practices.¹² In considering a misleading or deceptive conduct claim brought under the *Fair Trading Act 1987* (NSW) (as it was before the introduction of the ACL), Allsop P stated:

¹⁰ [2015] NSWCA 186.

¹¹ Issues Paper, 13.

¹² See, e.g. *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101, 114.

The legislative purpose is to promote, in the broad sphere of Australian economic activity (trade and commerce), informed commercial activity, not based on misinformation, but rather on accurate information. That purpose goes beyond honest dealing in good faith.¹³

Section 18 captures far greater conduct than sections 29 and 151. Section 18 applies to conduct generally (rather than 'representations') and to conduct carried out in trade or commerce (rather than to conduct relating to the 'supply or possible supply of goods or services').

In our view, section 18 is expressed too generally, and its scope is too broad, to be properly the subject of financial penalties or criminal sanctions. Prohibitions which carry a penalty need to be identified in specific terms to enable individuals and corporations to know, with a high level of certainty, what conduct will expose them to a financial penalty or criminal sanction.

4.2 Existing enforcement options and remedies are sufficient

In our experience, the threat of private or regulatory enforcement action creates a sufficient deterrent against misleading or deceptive conduct and it is not necessary to introduce penalties and criminal sanctions.

Currently, the ACCC or a private litigant can seek declarations and an injunction to restrain a contravention of section 18. Private litigants can also seek compensation for loss or damage suffered and other compensatory orders such as a declaration that a contract is void or orders to vary a contract, return property or undertake repairs. The prohibition on misleading or deceptive conduct is one of the most litigated statutory provisions. Given the extent to which private litigants are able to use the section to obtain remedies including damages, there appears to be no need to attach pecuniary penalties to the section.

4.3 Specific concerns should be addressed through amending the specific prohibitions

If there is concern that particular forms of conduct should attract pecuniary penalties and criminal sanctions, this can be addressed through bespoke expansion of the specific prohibitions in sections 29 and 151.

This has been done in the past. For instance, when the ACL was first introduced, the legislature introduced a number of additional prohibitions to those that had existed previously when the provisions were contained in the *Trade Practices Act 1974* (Cth) (*TPA*), including false or misleading representations concerning the requirement to pay for a warranty or guarantee that is wholly or partly equivalent to a statutory guarantee provided for in the ACL.¹⁴ In our view, this would be a more appropriate method of penalising certain egregious conduct, rather than imposing penalties for section 18 conduct.

¹³ *Bullabidgee Pty Ltd v McCleary* [2011] NSWCA 259.

¹⁴ Section 53(g) of the *Trade Practices Act 1974* (Cth) prohibited 'false or misleading statements concerning the existence or effect of any warranty or guarantee'.

PART C CONSUMER GUARANTEES AND THE INDEMNIFICATION PROVISIONS

5 Overview: Consumer Guarantees

The Issues Paper calls for submissions on a number of issues relating to the consumer guarantees, including:

- whether the definition of 'consumer' is appropriate for the ACL (particularly for the consumer guarantee regime);
- whether the concepts of 'durability', 'major failure' and other key aspects of the consumer guarantee regime are sufficiently clear and working effectively;
- the length of time a good should reasonably be expected to last;
- whether the available remedies are appropriate; and
- whether the indemnification provisions contained in section 274 are operating effectively.¹⁵

In Allens' view:

- the concepts of 'durability' and 'rejection period' are too uncertain and should be clarified by new regulations and/or ACCC guidance. In particular, both consumers and business require guidance on the time periods for which products should reasonably be expected to last before a defect amounts to a breach of the consumer guarantees;
- the concept of 'major failure' is excessively broad and arguably leaves little room for the operation of the remedy provisions regarding non-major failures;
- the current refund regime has the potential to put consumers in a better position than they would have been if there had been no breach of the consumer guarantees;
- the prescribed requirements for warranties against defects are excessively broad and the prescribed text requirements are liable to mislead consumers; and
- it should be clarified that suppliers may consult with manufacturers about product defects in the course of responding to customer complaints.

6 Is the definition of 'consumer' appropriate for the consumer guarantee provisions?

6.1 Current law

The Issues Paper asks whether the ACL's treatment of 'consumer' is appropriate and in particular, whether the \$40,000 threshold remains an appropriate threshold for consumer purchases.

As stated in the Issues Paper, the person protected under the ACL varies depending on the provision in question. For the purposes of the consumer guarantee provisions (and others), the person protected is a

¹⁵ Issues Paper, 21- 2.

'consumer', which is defined in section 3 of the ACL. A person is taken to have acquired goods or services as a consumer if, and only if:

- the amount paid or payable for the goods or services did not exceed \$40,000; or
- the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.¹⁶

6.2 The definition of 'consumer' could be improved

In our view, the definition of consumer could be improved to provide greater clarity and to ensure that the ACL provides basic rights to those that ought to be protected, (namely, consumers), without applying more broadly to those that do not need protecting (big business). While the comments below are made in the context of the consumer guarantee provisions, the definition of consumer should be consistent throughout the legislation.

The \$40,000 threshold is arbitrary and uncertain in its application given that it may capture goods that are plainly intended for use only in a business or commercial context. In addition, the definition of consumer lacks clarity as it depends on the nature of the goods or services in question, (i.e. whether they are of a kind 'ordinarily acquired' for personal, domestic or household use or consumption), rather than the actual purposes for which the person is acquiring the goods or services or the identity of the acquirer.

While the 'ordinarily acquired' test is unlikely to be problematic in sectors where the goods or services are supplied *en masse* to those who are intuitively consumers, the question becomes more difficult and uncertain where the goods or services may be acquired for both personal, domestic or household use or consumption as well as business or commercial use or consumption. The 'ordinarily acquired' test therefore has the potential to broaden significantly the scope of the consumer guarantee provisions to sophisticated parties including large national and multinational businesses who have significant bargaining power and resources and the ability and means to negotiate liability and other clauses that appropriately allocate risk.

The arbitrariness of the \$40,000 threshold together with the inappropriateness of the 'ordinarily acquired' text is exposed when one considers the following scenarios:

- There may be high value products acquired by a person for personal, domestic or household use where the person does not receive the benefit of the consumer guarantee provisions, because the price is above \$40,000. In our view, the person in this scenario should receive the benefit of the consumer guarantees due to the significant detriment that may result if the good is faulty and the fact that they are likely to be in a weaker bargaining position vis-a-vis the supplier with limited or no access to legal advice or may be unaware of the need to receive appropriate legal advice.
- Conversely, as mentioned above, sophisticated parties may receive the benefit of the consumer guarantees even though they are not acquiring the goods or services for personal, domestic or

¹⁶ ACL ss3(1) and 3(3).

household use or consumption and regardless of the price paid, simply because the goods may also be 'ordinarily acquired' for personal, domestic or household use or consumption.

In the light of the above, the definition of 'consumer', at least insofar as it applies to the consumer guarantee provisions, should be amended to:

- remove the \$40,000 threshold; and
- remove the 'ordinarily acquired' test and replace with the test:
 - a person is taken to be a consumer if the person *acquires* the goods or services for personal, domestic or household use or consumption.

7 Do the concepts of 'durability' and 'rejection period' require clarification?

In our experience, one of the greatest difficulties faced by suppliers in seeking to comply with the consumer guarantees is determining the length of time that particular goods are reasonably expected to last before the appearance of a fault amounts to a failure to comply with a guarantee. This uncertainty is due primarily to the complexity of the consumer guarantees and, in particular, the lack of clarity regarding when a product is 'durable' (relevant to the guarantee of acceptable quality) and when the 'rejection period' for a consumer good has ended (relevant to a number of the guarantees).

7.1 Current law

The ACL defines goods as being of acceptable quality if they are, among other things, as 'durable' as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable, having regard to factors such as the nature of the goods and the price of the goods.¹⁷ The definition requires an assessment of the particular good in question and all relevant circumstances.

If goods are not 'durable', and the supplier has breached the guarantee of acceptable quality, consumers have different remedies depending on the nature of the breach. For minor breaches, (i.e. breaches that are not 'major failures'), the consumer can require the supplier to remedy the failure within a reasonable time.¹⁸ For 'major failures', the consumer can keep the goods and be compensated for any reduction in value, or 'reject' the goods provided that the 'rejection period' has not ended.¹⁹ The 'rejection period' is defined as the period 'within which it would be reasonable to expect the relevant failure to comply with a guarantee...to become apparent' having regard to factors such as the type of goods, the length of time for which it is reasonable for them to be used, and the amount of use to which it is reasonable for them to be put before the failure becomes apparent.²⁰

¹⁷ ACL s54.

¹⁸ ACL s259(2).

¹⁹ ACL s259(3).

²⁰ ACL s262(2).

7.2 Concepts of 'durability' and 'rejection period' are inherently uncertain

When a consumer finds that they have purchased a faulty good, they will only have a right to return the good on the basis that it is not of acceptable quality if the good is not 'durable' and the 'rejection period' has not ended. A consumer's right to reject goods on the basis that other guarantees have been breached also depends on whether the product fails within the 'rejection period'.

Consumers and suppliers are required to grapple with these concepts on a daily basis but they are inherently uncertain. While it is uncontroversial (and intuitive) that a good which fails shortly after purchase will entitle the consumer to reject the goods on the basis of a major failure, the more time that elapses since purchase, the more acute the lack of precision in the legislation becomes. This imprecision is likely to result in the consumer guarantee provision being applied inconsistently to the detriment of both suppliers and consumers.

We are aware that many suppliers are concerned that the lack of clarity regarding these concepts makes it extremely difficult to train sales and service staff about how to deal with customer complaints effectively and efficiently and in accordance with the consumer guarantees.

To illustrate, it would be helpful to provide staff with internal guidelines as to what time periods might be considered reasonable for their products to last under the ACL. However, suppliers are concerned that doing so might be viewed as seeking to limit consumers' rights under the ACL. Suppliers are therefore left to assess claims on a case-by-case basis, which is not only costly, time consuming and inefficient from a supplier's perspective, but is likely to result in the law being applied inconsistently, and lead to delays in resolving consumers' claims. Without proper guidance, some suppliers may apply an overly cautious approach while others may approach the provisions too narrowly to the detriment of consumers. An overly cautious approach also results in consumer detriment, as consumers will ultimately bear suppliers' increased compliance costs.

We are also aware of suppliers who would prefer to provide customers with express warranties regarding the time periods for which they guarantee that their products (or components of their products) will last. However, some of these suppliers are concerned that if their express warranties are for a shorter duration than ACL regulators would expect, then their express warranties could be construed as a misleading representation regarding the consumer's rights under the ACL.

The ambiguous nature of these concepts also means that consumers are unlikely to be properly informed of their rights. Consumers' views on what is considered 'reasonable' may differ significantly. Their views will likely be influenced by their familiarity with the goods in question and not necessarily by what is the reasonable life span for a modern product having regard to evolving technologies.

7.3 Additional guidance is required on reasonable time periods for product durability

In our view, the effectiveness of the consumer guarantee provisions would be significantly enhanced by providing clear regulatory guidance regarding the length of time a good should reasonably be expected to last. This will assist to ensure that both consumers and suppliers have a better understanding of their respective rights and obligations under the ACL.

Greater clarity could be achieved in a number of ways:

- **ACCC Guidelines:** The ACCC could publish specific guidance on the time periods for which goods should reasonably be expected to last. The time periods could be specified according to the type of product, the purchase price of the product, or a combination of both.
- **Regulation making power:** The ACL could be amended to allow for regulations to be made specifying the 'rejection period' for particular products based on product categories, pricing bands, or both. This option could be in addition or as an alternative to more specific ACCC guidance.

ACCC guidelines could also address:

- the circumstances in which suppliers can offer express guarantees that their products will last for a particular period; and
- the processes suppliers can adopt to determine whether the rejection period has ended. As discussed further in section 12 below, this should include consultation with the manufacturer. In our view, it is entirely appropriate and often necessary for a supplier to liaise with manufacturers to determine the likely cause of a fault and to seek manufacturers' input on whether the rejection period has ended.

8 Does the concept of 'major failure' require clarification?

8.1 Current law

The distinction between 'major' and non-major failures is intended to strike a balance between having adequate remedies for consumers who purchase faulty goods and imposing unreasonable compliance burdens on business.

- As noted above, if a supplier has breached a consumer guarantee and the breach is a 'major failure', the consumer can keep the goods and be compensated for any reduction in value, or 'reject' the goods provided that the 'rejection period' has not ended.²¹
- If a breach is not major, the supplier must remedy the failure within a reasonable time and, if it fails to do so, the customer can remedy the failure and recover their reasonable costs.²²
- Damages for loss or damage can also be recovered for either major or non-major failures (although a consumer is unlikely to be able to demonstrate loss or damage where the breach of the guarantee was only a non-major failure).

Section 260 of the ACL sets out five instances where a failure to comply with a guarantee will constitute a 'major failure'. These include (in summary):

- (a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- (b) the goods depart significantly from the demonstration model or sample;
- (c) the goods are substantially unfit for purpose for which similar goods are commonly supplied;

²¹ ACL s259(3).

²² ACL s259(2)

- (d) the goods are unfit for a purpose disclosed by the consumer to the supplier; and
- (e) the goods are unsafe.²³

8.2 The definition of 'major failure' is excessively broad

The definition of 'major failure' is excessively broad and lacks precision. As currently drafted, it has the potential to capture any issue with a good and arguably leaves little role to play for the provisions regarding non-major failures.

It is possible that some may argue that no reasonable consumer would acquire a good knowing that it had a fault, no matter how minor. Sub-section 260(a) is drafted in such broad terms that it arguably subsumes most, if not all, of the other situations in which a failure could be considered a major failure. As a result, even minor faults which do not materially affect the performance or capabilities of a product may be elevated to a 'major failure' irrespective of whether the failure can be easily remedied within a reasonable time.

The implications flowing from the broad drafting of sub-section 260(a) are not merely theoretical. If a failure is minor, the consumer is not entitled to reject the goods and the remedy is at the supplier's election. A supplier's entitlement to select the remedy is key to their ability to manage and control compliance costs for non-major failures. This is because the supplier can remedy the failure in a way that makes commercial sense, whether that be a replacement, refund or repair. In some cases, a replacement or refund may be preferred if repair costs are uneconomic. Yet the ability for consumers to elevate almost any failure to comply with a guarantee to the level of a major failure effectively removes the balance sought to be struck between the compliance burden imposed on businesses and the consumer detriment sought to be addressed. The result is that businesses will likely incur increased costs in the form of higher rates of refunds or replacements, as well as increased legal fees, training costs and costs arising from the diversion of resources, which costs are disproportionate to the detriment flowing from non-major failures.

The definition of a major failure should, therefore, be amended to ensure that there is a clear distinction between failures that are major and failures that are not major. Where there is a dispute as to whether a failure is a major failure, there is currently little guidance on the approach manufacturers or suppliers can take when dealing with a claim they believe may not be well founded. In this regard, further guidance from the ACCC would be useful, including whether and how suppliers or manufacturers can use testing data relating to the durability or functioning of a product.

9 Suppliers should be able to offer partial refunds in some circumstances

9.1 Current law

The ACL provides that where a consumer rejects goods for a major failure to comply with a guarantee or where the failure cannot be remedied, the consumer may elect to receive a refund of:

- **any money paid by the consumer for the goods;** and

²³ ACL s260.

- an amount that is equal to the value of any other consideration provided by the consumer for the goods (*emphasis added*).²⁴

The same provisions also apply where a failure to comply with a guarantee is not a major failure and the supplier elects to remedy the failure by providing a refund.²⁵

9.2 Partial refunds may be appropriate where consumers have already used and enjoyed the goods

The right to receive as a refund 'any money paid by the consumer for the goods' means that the supplier is, in effect, obliged to provide a consumer with a full refund whenever a right to reject a good arises. The ACL does not, therefore, make any adjustment to accommodate the rights of suppliers and consumers in circumstances where a consumer has already benefited from possession, use or enjoyment of the good in the period prior to the failure arising. This means a consumer who elects to receive a full refund is put in a better position than they would have been had there been no breach of a consumer guarantee.

The entitlement to receive a full refund in respect of rejected goods (or where the supplier elects to provide a refund for non major failures) is also inconsistent with the corresponding entitlements in respect of services²⁶ and for services that are connected with rejected goods.²⁷ These provisions entitle the consumer to receive a refund but the refund is limited to the extent that the consumer has not already consumed the services at the time the service contract is terminated. The concept of accounting for previous consumption and enjoyment is therefore not new to the ACL.

Courts have also previously accounted for previous use and enjoyment in the context of awarding damages for faulty goods. For example, in *Peters v Panasonic Australia Pty Ltd*,²⁸ the Victorian Civil and Administrative Tribunal considered the claim that a fault in a television constituted a failure to comply with the guarantee as to acceptable quality. The Tribunal considered that the life of the television in question was eight years and that the rejection period for the good had passed. The defect did not become apparent until almost a third of the life of the television had passed. On this basis, the Tribunal reduced the applicant's damages to take into account the benefit the applicant had received from the television for the years that it was in working condition.

In our view, the entitlement to a refund in respect of rejected goods (or where the supplier elects to provide a refund for non major failures) should be amended so that suppliers can offer partial refunds in circumstances where the consumer has previously used, consumed or enjoyed goods prior to the fault arising.

²⁴ ACL s263(4).

²⁵ ACL s261(d).

²⁶ ACL s269(3).

²⁷ ACL s265(3).

²⁸ *Peters v Panasonic Australia Pty Ltd* (Civil Claims) [2014] VCAT 1038.

10 The prescribed requirements for warranties against defects are excessive

10.1 Current law

The ACL prescribes special requirements where suppliers make a 'warranty against defects' in a document provided to a consumer. A warranty against defects is defined broadly as:

- any representation to a consumer in connection with the supply of goods or services;
- made at or about the time of supply;
- that if the goods or services are defective, the supplier will repair or replace the goods, resupply or rectify services or compensate the consumer.²⁹

Section 102(2) of the ACL provides that a person must not give a document to a consumer that evidences a 'warranty against defects' unless it complies with regulation 90 of the *Competition and Consumer Regulations 2010* (Cth). Regulation 90 requires that the document:

- state the period within which a defect must appear;
- set out the procedure for claiming under the warranty;
- set out the contact details for the supplier; and
- contain the prescribed text: *'Our goods come with guarantees that cannot be excluded under the [ACL]. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure'*.

In our view, these requirements are deficient in a number of respects.

10.2 It is unclear whether section 102(2) applies to distributors and retailers

Section 102 is also unclear as to the position of suppliers and retailers that do not themselves offer a warranty against defects and only resupply goods that come with a warranty against defects offered by the manufacturer. In particular, it is unclear if the supplier is liable for non-compliant warranty documentation provided inside product packaging where the goods are manufactured and packaged by the original manufacturer or other third party.

The references in sections 102(2) and 102(3) to 'in connection with the supply' suggest primary liability for providing compliant warranty documentation may rest with the person who supplies the goods to the consumer, namely the distributor or retailer, and not the manufacturer.³⁰ This is the case even though the supplier may have no control over the manufacturer's warranty documentation and even if the supplier takes steps to procure compliance by, for example, requiring the manufacturer to warrant or declare their compliance.

²⁹ ACL s102(3).

³⁰ ACL s102.

Accordingly section 102 should be amended to clarify the liability of distributors and retailers for non-compliance with section 102 when the documents have been prepared by manufacturers. To this end, section 102 could be amended to make clear that it is only the person who is offering the warranty against defects that is liable for non-compliance. Alternatively, section 102 could be amended to provide that a supplier is not liable where the supplier relies on a representation by the manufacturer as to their compliance with section 102.

10.3 The mandatory text for warranties against defects is liable to mislead consumers

In our view, the 'mandatory text' in regulation 90 does not accurately reflect the position under the consumer guarantees. In particular, the mandatory text does not reflect the differing positions of manufacturers and suppliers, nor does it accurately reflect consumers' entitlements. This is an undesirable state of affairs which creates confusion and is liable to mislead consumers as to their rights. To illustrate:

- Where a supplier offers a 'warranty against defects', the mandatory text does not refer to the fact that a supplier is entitled under section 64A to limit their liability in certain circumstances and in certain ways. A supplier is therefore put in a difficult position of being legally compelled to include text that is inconsistent with other required text concerning permitted limitation of liability.
- The mandatory text includes the words '[y]ou are entitled to a replacement or refund for a major failure...'. These words suggest to consumers that they will always be entitled to a replacement or refund whenever there is a major failure, when this is not always the case. There are a number of circumstances where this is not correct, including where the 'rejection period' has passed, or the failure is not a major failure.
- Section 102 references 'warranties against defects' for both goods or services. However, the mandatory text only refers to goods and not services, resulting in the unsatisfactory situation where service providers are required to include text that has no application to their services and which creates confusion for consumers.

Accordingly, there is a clear and compelling need for reform to address the issues identified above. Allens submits that the requirement for the mandatory language should be removed, as it is difficult to summarise consumers' rights in a paragraph, and there are sufficient protections in the ACL to ensure that consumer are not misled about their rights. Alternatively, the mandatory text could be amended so that it is correct, although to avoid further compliance costs for businesses it should only apply to documents brought into existence after the date of amendment.

11 Indemnification provisions

We recommend that the ACL or ACCC guidelines be amended to confirm that suppliers can consult with manufacturers in the course of responding to a consumer complaint about faulty goods.

We are, however, concerned by any suggestions that a supplier presented with an allegedly defective product by a consumer may not be entitled to seek the manufacturer's input whether it is defective or inform a consumer that it is going to do so.

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

Manufacturers are best-placed to determine whether the returned product is faulty and, if it is, the nature of the fault, including whether it is a major or non-major failure. Important consequences flow from allowing a supplier to consult with a manufacturer about a fault, namely:

- **First**, it provides greater certainty that the supplier offers the appropriate remedy to a customer and will be reimbursed by the manufacturer for the costs of offering that remedy. This remedy will depend on whether the fault with the goods is a 'major' or 'non-major' failure. It is often the manufacturer, not the supplier, that is best placed to assess whether a failure is major or non-major.
- **Second**, consultation between supplier and manufacturer alleviates the risks of disputes arising between manufacturers and suppliers seeking indemnification as to whether faults are minor or major. If suppliers were not able to consult manufacturers about alleged faults, the supplier may provide a remedy to the consumer and then seek to be indemnified by the manufacturer, only to be told by the manufacturer that the product was not faulty, that the fault was a result of the consumer's conduct, or that the product could have been repaired differently or in a less costly manner (potentially leading to a dispute about the extent of indemnification to which the supplier is entitled). As it is arguable that the manufacturer must indemnify the supplier for whatever remedy is given, (assuming the supplier is liable to provide remedies to the consumer), there is a real risk of suppliers having adverse incentives to grant remedies to consumers on the basis that a failure is a major failure where the facts do not support such a response. This is also important since a manufacturer is expected to indemnify a supplier and the costs of doing so are therefore greater for a major fault than a minor fault.

We recommend that section 274 or ACCC guidelines be amended to confirm that suppliers can consult with manufacturers in the course of responding to a consumer complaint.

PART D UNCONSCIONABLE CONDUCT, UNFAIR TERMS AND UNFAIR PRACTICES

12 Unconscionable conduct: overview

The Issues Paper highlights several key issues in relation to unconscionable conduct, being:

- whether the provisions should provide guidance to facilitate a more consistent interpretation of 'unconscionable';
- whether the provisions should be extended to protect all businesses, including publicly listed companies; and
- whether the provisions should be extended to prohibit specific forms of unfair commercial practice.³¹

In our view:

- the unconscionable conduct provisions are working as intended and no further clarification is required;
- the prohibition against unconscionable conduct is intended to protect consumers and businesses in circumstances where there is an imbalance of bargaining power. It is unnecessary and inconsistent with the underlying policy of the prohibition to extend the provisions to 'protect' listed companies; and
- the provisions should not be extended to prohibit specific forms of unfair commercial practice.

13 Is additional guidance needed regarding the meaning of unconscionable conduct?

In our view, the unconscionable conduct provisions are working as intended and no further clarification is necessary. There is a substantial body of case law concerning the meaning of unconscionable conduct and the courts continue to develop and clarify the concept. Furthermore, given the nature of the prohibition, and the fact that it requires an evaluation of business conduct in all the relevant circumstances, it is difficult to see what additional guidance could usefully be provided.

13.1 Current law

Section 20 incorporates into the ACL the 'unwritten law' of unconscionable conduct, being the doctrine of unconscionable conduct under common law and equity.³² In *Commercial Bank of Australia Ltd v Amadio*,³³ Mason J stated that unconscionable conduct exists in equity where:

- unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary; or

³¹ Issues Paper, 14.

³² *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301.

³³ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

- unconscientious advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.³⁴

In contrast, section 21 creates a statutory prohibition against unconscionable conduct which is not limited by principles of common law or equity. Under section 21, a company must not engage in conduct in connection with the supply or acquisition of goods or services that is in all the circumstances unconscionable. There is no statutory definition of 'unconscionable'. Section 22 sets out a list of non-exhaustive factors that a court may consider in determining whether conduct is unconscionable.³⁵ These include the relative bargaining strengths of the parties, whether one party was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other and whether any undue influence or unfair tactics were applied.

Previously, a number of authorities emphasised the presence of an element of moral fault or culpability as an 'essential ingredient' in order to arrive at a finding of unconscionable conduct.³⁶ Pursuant to this approach, it was held that unconscionability imports a 'pejorative moral judgment' on the accused,³⁷ and will only be found in circumstances that are 'highly unethical' or which involve a 'significant' or 'high level of moral obloquy'.³⁸

In 2013, the Full Federal Court in *Lux Distributors*³⁹ signalled a move away from this requirement for moral obloquy and towards an approach where unconscionability is determined by reference to the 'norms of society'. The Full Federal Court held:

Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is **conduct against conscience by reference to the norms of society that is in question**. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty (*emphasis added*).⁴⁰

More recently, in *Paciocco v ANZ Banking Group Ltd*,⁴¹ Allsop CJ provided further guidance regarding the standards involved in assessing unconscionability. His Honour held that:

- a sense of moral obloquy can be accommodated within the meaning of unconscionable conduct, provided that the phrase is not taken to import a necessary conception of dishonesty;⁴²

³⁴ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

³⁵ ACL s22.

³⁶ See, e.g., *Director of Consumer Affairs (Vic) v Scully (No 3)* [2012] VSC 444 (Hargrave J).

³⁷ See, e.g., *Hurley v McDonald's Australia Ltd* [2000] ATPR 41-741, [22] (Heerey, Drummond and Emmett JJ).

³⁸ See, e.g., *Director of Consumer Affairs Victoria v Scully & Anor* (2013) 303 ALR 168, [57] (Santamaria JA).

³⁹ *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

⁴⁰ *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41] (Allsop CJ, Jacobsen and Gordon JJ).

⁴¹ (2015) 236 FCR 199.

⁴² *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199, [262].

- an understanding of the meaning conveyed by the word 'unconscionable' is not about identifying synonyms in place of the words chosen by Parliament. Rather, it is to identify and apply the values and norms that Parliament considered relevant to the assessment of conscionability, being the values and norms from the text, structure and context of the legislation;⁴³ and
- elements that may be relevant when assessing whether or not conduct is unconscionable include honesty in commercial dealings, a rejection of trickery or sharp practice, fairness when dealing with consumers, faithful performance of bargains freely made, the protection of the vulnerable, inequality of bargaining power, the importance of certainty in commercial transactions, good faith and fair dealing.⁴⁴

The Full Federal Court's decision in *Paciocco* has been appealed to the High Court, which may provide further guidance on these issues.

13.2 The existing provisions are sufficiently clear and are operating effectively

Allens' view is that there is no need to provide additional statutory guidance as to the meaning of unconscionable conduct for the following reasons:

- As section 14.1 demonstrates, there is a substantial body of case law on the meaning of unconscionable conduct and courts have continued to develop and refine the meaning of the term over time.
- Given the nature of the prohibition against unconscionable conduct, and, in particular, its focus on matters of fairness and morality, unconscionable conduct may not be capable of precise definition and attempts to provide further guidance may only cause confusion and complexity. As stated by Allsop CJ in *Paciocco*:

[267] The place of norms, values and principles in commercial law, lacking particular precision, but stating a value or general standard, can be seen in the common law, statutes on commercial subjects, in Equity, and in other branches of commercial law. **Sometimes, a rule can only be expressed at a certain level of generality, often involving a value judgment. To do otherwise, and to seek precise rules for all circumstances, may be to risk complexity, incoherence and confusion....**

[304] In any given case, the conclusion as to what is, or is not, against conscience may be contestable. That is inevitable given that the standard is based on a broad expression of values and norms. **Thus, any agonised search for definition, for distilled epitomes or for shorthands of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error.** The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules. It is an evaluation of business behaviour (conduct in trade or commerce) as to whether it warrants the characterisation of unconscionable, in the light of the values and norms recognised by the statute (*emphasis added*).⁴⁵

⁴³ *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199, [262].

⁴⁴ *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199, [296].

⁴⁵ *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199.

- The Harper Panel reviewed the unconscionable conduct provisions in 2015 in the context of the CCA as a whole and concluded that the unconscionable conduct provisions are 'working as intended to meet their policy goals' and that no amendments were necessary.⁴⁶
- An expert panel conducted a comprehensive review of the unconscionable conduct provisions in 2010 when it considered whether the meaning of unconscionable conduct could be clarified by a statement of interpretative principles or a list of examples (which would act as statutory presumptions of unconscionability). The panel concluded that a statement of interpretative principles would assist in clarifying the meaning of unconscionability⁴⁷ and these amendments were made in 2012. There is therefore no need to include any further guidance on the meaning of unconscionable conduct given the prior review and conclusions of the expert panel in 2010 and the subsequent legislative amendments.
- Recent successful enforcement action by the ACCC suggests that the provisions are working effectively.

14 Should the protections against unconscionable conduct be extended to listed companies?

14.1 Current law

Section 21 of the ACL prohibits a person from engaging in unconscionable conduct with a person in connection with the supply or acquisition of goods or services, other than a listed company.

14.2 The listed public company exception reflects the policy of the unconscionable conduct provisions

In our view, the protections of the unconscionable conduct provisions should not be extended to listed public companies for the following reasons:

- The prohibition against 'business to business' unconscionable conduct was introduced in 1998 for the express purpose of protecting small businesses, who were considered to be disadvantaged in a similar way to consumers in their dealings with larger companies.⁴⁸ The rationale for excluding listed public companies when the prohibitions were introduced applies equally today.
- The unconscionable conduct prohibitions have their origins in equitable principles designed to protect those with a 'special disability' from exploitation.⁴⁹ While section 21 is wider than the equitable doctrine, the prohibition is still concerned with protecting vulnerable parties. This is reflected in the matters the court has regard to in assessing whether conduct is unconscionable,

⁴⁶ Competition Policy Review, Final Report (March 2015), 62 (*Harper Review*).

⁴⁷ Horrigan, Lieberman and Steinwall, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct* (February 2010), 17.

⁴⁸ See House of Representatives Standing Committee on Industry, Science and Technology, *Small Business in Australia: Challenges, Problems and Opportunities* (January 1990), xxvi; *Trade Practices Amendment (Fair Trading) Act 1998* (Cth).

⁴⁹ See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474.

which include relative bargaining strengths and whether there has been any unfair tactics or undue influence.

- We are not aware of examples where listed public companies have claimed to have been subject to unconscionable conduct. The scope of the prohibition should not be amended in the absence of a specific harm or specific potential harm which the current prohibitions cannot adequately address.
- Expanding the unconscionable conduct protections to listed public companies may lead to opportunistic litigation.
- The current approach is more consistent with the operational objectives of the ACL, including most relevantly 'meeting the needs of those consumers who are most vulnerable or are at the greatest disadvantage'.
- Although it is certainly feasible to imagine large businesses engaging in 'sharp practice' with one another, the unconscionable conduct provisions are not intended to prevent sharp business practices. They are intended to prevent conduct that is against good conscience and that is highly unethical. Listed public companies are not vulnerable and do not lack bargaining power. To enable them to rely on the unconscionable conduct definitions would, by definition, substantially lower the threshold as to what conduct properly amounts to unconscionable dealing.

15 Should a general prohibition against unfair practices be introduced?

The Issues Paper asks whether a general prohibition on commercial practices or business models that are considered unfair (such as those that exist in the European Union and in the United States) should be introduced into the ACL.⁵⁰ In our view, such a prohibition would be unnecessary, as:

- the ACL already provides broad and flexible protections directed at a vast range of unfair commercial practices; and
- the model provisions in the European Union and United States are set in a different context to that of the ACL.

15.1 The ACL already provides sufficient protection with a general 'unfair practices' prohibition

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

- misleading or deceptive conduct: where a business gives other businesses or its customers a misleading or deceptive impression regarding goods or services it offers;

⁵⁰ Issues Paper, 34.

- unconscionable conduct: where a business engages in harsh or oppressive behaviour in its dealings with other businesses or its customers;
- unfair contract terms: where a business seeks to enforce an unfair contract term in a standard form contract with consumers (the regime will be extended on 12 November 2016 to apply to standard form contracts with small businesses);
- specific false or misleading representations and other forms of unfair selling techniques: where a business makes incorrect or misleading claims about products or services it offers; and
- non-compliance with minimum quality standards of goods and services, and the rights to refunds, replacements and repairs (the consumer guarantees).

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

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

15.2 The position in the EU and US is not analogous to the Australian context

The Issues Paper refers to the EU's *Unfair Commercial Practices Directive 2005 (EU Directive)* and section 5 of the US *Federal Trade Commission Act (US Prohibition)*.

The EU Directive contains a general prohibition on 'unfair commercial practices', defined as practices which:

- are 'contrary to the requirements of professional diligence'; and
- materially distort or are likely to materially distort the economic behaviour with regard to the product of the average consumer.
- The EU Directive also contains general prohibitions on 'misleading commercial practices' and 'aggressive commercial practices'. The US Prohibition is also generally worded, applying to unfair 'acts or practices in or affecting commerce' where the injury to the consumer is:
 - substantial;
 - has no offsetting benefits; and
 - cannot be reasonably avoided.⁵¹

As explained above, the existing provisions of the ACL contain both broad and flexible prohibitions and specific prohibitions on particular forms of unfair commercial conduct. It is not clear what introducing a

⁵¹ 15 USC § 45(n).

general prohibition on unfair commercial practices would add to the existing ACL protections. Introducing additional protections would only create duplication in the ACL.

The EU Directive also sets out a list of practices which are deemed to be unfair in all circumstances. Each of the examples set out in this list would likely be covered by an existing provision of the ACL. In particular, the black-listed misleading commercial practices would likely be covered by the misleading or deceptive conduct (section 18) and/or the specific provisions relating to false or misleading representations (section 29). The black-listed aggressive commercial practices would likely be covered by existing provisions such as: unconscionable conduct (sections 20-22A); unsolicited consumer agreements (Part 3-2, Division 2); harassment and coercion (section 50); and offering rebates, gifts, prizes (section 32).

The EU Directive was introduced to harmonise divergent consumer protection regimes in the different EU Member States with varying legal traditions.⁵² The approach of using general catch-all provisions coupled with proscriptive prohibitions is typical of EU legislation. The risk of divergent protection does not exist in Australia. The ACL represents the national standard of consumer protection, replacing provisions in 17 pieces of State and Territory legislation and the TPA. The EU's unique approach to legislating is not one which should be adopted in Australia.

16 Should penalties be introduced for unfair contract terms?

The Issues Paper asks whether regulators should have the power to seek monetary penalties against businesses in contravention of the unfair contract terms provisions, in addition to having the unfair terms declared void.⁵³

16.1 Current law

The ACL protects consumers against unfair contract terms contained in standard form contracts.⁵⁴ Standard form contracts are typically offered to consumers on a 'take it or leave it' basis. Since these kinds of contracts are usually not negotiated, they may contain terms that put the consumer at an unfair disadvantage vis-à-vis the business providing the good or service.

Unfairness is determined by considering whether the term:

- causes a significant imbalance in the parties' rights and obligations under the contract;
- is reasonably necessary to protect the legitimate interests of the party advantaged by the term;
- and

⁵² The stated aim of the EU Directive was to facilitate EU integration and harmonise consumer protection across the EU: 'These disparities [in consumer protection laws] cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market': Recital 4, EU directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, L149/22, 11 June 2005.

⁵³ Issues Paper, 16.

⁵⁴ ACL s23.

- if relied on, would cause detriment to the consumer.⁵⁵

A court must also have regard to the extent to which the term was transparent and the contract as a whole.⁵⁶

At present, a regulator may apply to the court for a declaration that a term in a standard form contract is an unfair term. In addition, for proceedings in the Federal Court, the ACCC may seek:

- an injunction;⁵⁷
- a compensation claim on behalf of a person suffering loss,⁵⁸ and
- an order to redress loss or damage to a non-party consumer.⁵⁹

If a declaration is made, the unfair term will be rendered void and unenforceable. The contract will, however, continue to operate insofar as it is able to survive without the unfair term.

In addition, a private litigant may bring an action seeking a declaration, an injunction and/or a compensation order for any loss suffered as a result of the unfair term.⁶⁰

16.2 Test for unfairness is not sufficiently certain to warrant monetary penalties

The meaning of an 'unfair' contract term is not defined nor fixed in time. Unfairness is determined on a case-by-case basis, according to the three-limbed test referred to above, and by reference to the contract as a whole and the context in which the contract operates. The court is required to make a subjective assessment of the term and, in particular, determine whether the term oversteps the mark of legitimate commercial conduct.

The broad and flexible nature of the test for unfairness allows the regime to be used in a wide range of circumstances and to apply to evolving business models and practices. At the same time, this flexibility carries with it some uncertainty for businesses as to whether any particular term may be declared unfair. Rational commercial businesses aim to minimise risk in all their dealings, and it is often the case that contract terms are drafted in such a way so as to reduce exposure to risk. The party offering the term may legitimately believe that the term is fair and balanced, and necessary to protect their interests. However, a court may determine that those interests could be protected by a more balanced term. It would be excessive to impose pecuniary penalties on a business for seeking to rely on a term that it believed to be fair but which a court ruled was not.

Contract terms may be, for the most part, acceptable and appropriate, but have a certain aspect that is considered unfair by a court when the contract is considered as a whole. Whether or not the term is unfair may depend on only a few words, or the structure of the term, or the way it is applied in practice. In these

⁵⁵ ACL s24(1).

⁵⁶ ACL ss24(2) and (3).

⁵⁷ ACL s232.

⁵⁸ ACL s237.

⁵⁹ ACL s239.

⁶⁰ ACL ss250, 232, 237.

situations, it is our view that it would be disproportionate to impose pecuniary penalties on business in circumstances where only minor modifications are required for the term to be considered 'fair'.

16.3 Existing enforcement options and available remedies are sufficient

The available remedies already provide adequate protection against the use of unfair contract terms. Such terms cannot be relied on or enforced and any loss a consumer suffers as a result of the term may be the subject of a compensation order.

A compensation claim may be brought by a private litigant or by the regulator on behalf of a consumer or consumers. This means that, even where a consumer does not have the resources to initiate legal proceedings, the ACCC can seek such an order on his or her behalf, which enhances the overall enforcement of the unfair contract terms regime.

Further, where an unfair contract term is also a false or misleading representation, or where relying on the term amounts to unconscionable conduct, the ACCC may pursue pecuniary penalties under those provisions. For instance, if a court declares that a term is unfair and the business continues to assert the term is legitimate or seeks to enforce or rely on it, the business will be misrepresenting the true state of affairs to the consumer. The ACCC may bring penalty proceedings for false or misleading representations. In circumstances where an unfair contract term is particularly egregious and falls into one of these other categories, it is therefore likely to be the subject of other enforcement action under those provisions.

For example, Europcar were recently penalised \$100,000 due to various terms in their standard rental agreements being unfair and conduct surrounding the enforcement of those terms amounting to false or misleading representations. The relevant terms held customers were liable for vehicle loss or damage regardless of whether the customer was at fault, and were therefore unfair. The Federal Court also found that representations made by Europcar suggesting that the customer's liability for loss or damage was actually capped were false and misleading. In this way, egregious conduct associated with an unfair term was subject to penalties.

Further, where a party aims to rely on an unfair contract term, both the private litigant and the ACCC have the right to seek compensation for any loss suffered. These avenues of redress sufficiently regulate conduct involving unfair contract terms, and provide access to appropriate remedies.

In our experience, the available remedies provide a strong compliance incentive on businesses to ensure their standard form contracts do not contain unfair terms. We are commonly instructed to assist businesses to review their standard contract terms to ensure compliance with the ACL. At present, we are assisting many clients with the extension of the regime to small business and the consequent review of a broader range of standard form contracts.

PART E PRODUCT SAFETY

17 Overview: Product Safety

In relation to product safety, the Issues Paper asks for submissions on a number of issues, including:

- whether there are ways to improve the processes for adopting and updating safety standards, including Standards Australia's standards;
- whether there should be a prohibition against the supply of unsafe goods;
- the effectiveness of the current approach to product recalls and remedies; and
- whether an unsafe product should be deemed to have a 'major failure' for the purposes of the consumer guarantee regime.⁶¹

In our view:

- The current product safety regime could be made more efficient by introducing automatic adoption of 'trusted' international standards, publication of ACCC guidelines on product standards and permits or waivers to supply products which vary from the exact requirements of a safety standard in appropriate circumstances.
- There is no need for a prohibition against the supply of unsafe goods, as the existing regime is sufficient. Products that are unsafe breach the guarantee of acceptable quality.
- Businesses need increased certainty regarding when mandatory reporting of serious injury and illness is required. The current definitions of 'serious injury or illness' and 'use or foreseeable misuse' are ambiguous, difficult to apply in practice and require clarification. An express exception for minor injuries would be consistent with the purpose of the scheme and reduce compliance costs for business.
- The existing provisions already provide sufficient guidance on whether an unsafe product has a 'major failure'.

18 Improving the efficiency of the product safety regime

18.1 Current law

The ACL's product safety regime provides a framework for identifying, preventing and stopping supply, and removing unsafe, or potentially unsafe, consumer goods and product-related services. The ACL:

- provides for the publication of mandatory safety and information standards for consumer goods and related services and makes it an offence to supply consumer goods that do not comply with a mandatory standard;
- provides for the publication of temporary and permanent bans on consumer goods and services where it is reasonably foreseeable that the goods or products may cause injury;

⁶¹ Issues Paper, 29-30 [2.3.7].

- creates a national system for issuing and enforcing recalls to remove an unsafe product from the market, which can be initiated voluntarily by suppliers or by the relevant Federal, state or territory Minister;
- provides for the publication of safety warning notices where a good or service is under investigation or poses a safety risk; and
- creates a mandatory reporting scheme for suppliers to report deaths, serious injuries or illness associated with consumer products.

18.2 Improving the processes for adopting new standards

The current process for adopting Standard Australia's voluntary standards or a 'trusted' international standard as part of a mandatory safety standard can be improved to minimise unnecessary formalities and delays. We consider that a mechanism for automatic adoption would be appropriate, so long as it also provided for reasonable transitional periods to allow suppliers to become compliant.

For example, when the European Union adopted a new toy safety standard, toys that were compliant with the previous standard could continue to be sold so long as they had been placed on the market within a two year period from the new standard entering into force.⁶² Australia could adopt a similar approach to transitional periods, which should be incorporated into any automatic adoption mechanism.

18.3 Minimising the delays in updating a safety standard

There is also a need to minimise the delays in updating a safety standard. As above, if any automatic adoption mechanism is introduced, it must be accompanied by provision for a transitional period to give businesses a reasonable amount of time to comply with the new standard.

18.4 Improving businesses' access to relevant standards

In other areas, such as advertising and selling, the ACCC has usefully published guidance materials helping businesses understand their obligations. The European Union also regularly publishes guidelines on interpretation of regulations to assist compliance efforts. We consider that guidelines on the interpretation of the relevant standards, including practical examples of how they may be applied, would be extremely useful for businesses and improve their access to standards.

18.5 Limited permits or waivers to supply products varying from the exact requirements of a safety standard

Current product safety standards do not only cover safety issues but also extend to cover labelling requirements and performance elements. Therefore, where a product is mislabelled or does not perform as specified in the standard but is otherwise unsafe, it is nevertheless a contravention of the ACL to supply the product. In our view, where a technical or minor non-compliance with a standard does not give rise to a safety issue, supplying the product should not be considered a contravention of the ACL. To this extent, we agree with the introduction of permits or waivers to supply products varying from the exact requirements of a safety standard where appropriate.

⁶² Council Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys [2009] OJ L 170/1, art 53(1).

19 Prohibition against the supply of unsafe goods and deeming of unsafe goods as a 'major failure' unnecessary

We are of the view that a general prohibition on the supply of unsafe goods is unnecessary. The current product safety regime, in combination with a host of other consumer protections within the ACL, is sufficient to protect the safety of consumers. In particular, under the consumer guarantee of 'acceptable quality', a supplier guarantees to a consumer that the goods supplied are safe.⁶³ Remedies are available to the consumer where this guarantee is breached.⁶⁴

Rather than introducing a parallel which duplicates an obligation which already exists under the ACL, reform should be directed to simplifying the product safety regime. This does not mean consumer protections and safeguards will be diminished in any way, but will ensure that businesses can be confident they are meeting their product safety obligations.

We also consider that, as for any other failure to comply with a consumer guarantee, it is appropriate for a product which is not of 'acceptable quality' because it is not 'safe' to be assessed as either a minor or major failure, based on the unique circumstances surrounding the failure. This is important because not all safety issues are equally serious. There may be circumstances where a minor safety issue is easily remedied, such that a deemed major failure and associated remedies would be disproportionate to the actual safety threat.

20 Improving the mandatory reporting regime

The mandatory reporting requirement is triggered where a supplier of consumer goods becomes aware of the death or serious injury or illness of any person, and:

- considers that the death or serious injury or illness was or may have been caused by the use or foreseeable misuse of the consumer goods; or
- becomes aware that another person considers that the death or serious injury or illness was or may have been caused by the use or foreseeable misuse of the consumer goods.⁶⁵

The ACL defines 'serious injury or illness' to mean an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place), but does not include:

- (a) an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or
- (b) the recurrence, or aggravation, of such an ailment, disorder, defect or morbid condition.⁶⁶

⁶³ ACL s54(2)(d).

⁶⁴ ACL Pt 5-4.

⁶⁵ ACL s131(1).

⁶⁶ ACL s2.

There are two key elements in the mandatory reporting trigger, namely, a 'serious injury or illness' and the causation element that the death or serious injury or illness was caused by the 'use or foreseeable misuse' of the consumer goods. There are ambiguities present in both of these elements.

The definition of 'serious injury or illness' includes a requirement that the injury or illness is both acute and **requires** 'medical or surgical treatment'. It can be very difficult for a non-medically trained person to determine, within the prescribed two days, whether an injury or illness is acute. There is also no guidance as to what constitutes 'medical treatment'. On one view, it could be any remedy administered by a medical practitioner. An express exception for minor injuries, (whether or not any medical treatment has been received), would significantly ease the compliance burden on businesses, by making their obligations clearer, without jeopardising consumer safety.

The test of 'use or foreseeable misuse' is equally difficult for businesses to apply to real-life scenarios. We submit that ACCC-issued guidance, as referred to in 18.4 above, would be useful in this area. Such guidance is likely to result in benefits for business and consumers alike.

The mandatory reporting trigger also places undue focus on individual incidents of illness or injury, in circumstances where the regime was originally directed to fact gathering and understanding trends.

In the absence of clarity, and given the serious consequences of failing to comply with the mandatory reporting requirements, businesses may choose to apply the most conservative interpretation to ensure compliance, which can lead to over-reporting, thereby increasing compliance costs. This is especially the case where the two-day timeframe for mandatory reporting does not provide an opportunity to fully investigate whether reporting is necessary.

PART F ENFORCEMENT

21 Enforcement Issues

The Issues Paper calls for submission on:

- whether the remedy and offence provisions are effective to deter unlawful conduct;
- whether the 'follow-on' provisions should be strengthened or extended; and
- whether the ACCC has sufficient capability to bring representative actions.⁶⁷

In our view:

- the range of remedies available to the ACCC are sufficient to discourage unlawful behaviour;
- the inclusion of 'follow-on' provisions should be considered; and
- the ACL already provides the ACCC with the ability to bring representative proceedings on behalf of consumers.

21.1 Are the existing remedies available to the ACCC sufficient?

We consider the range of remedies available to the ACCC are sufficient to discourage unlawful behaviour. In our experience, the pecuniary penalties that may be levied on companies that contravene the most serious prohibitions in the ACL act as a significant deterrent.

In addition to the possibility of pecuniary penalties, we consider the other remedies to which companies may be subject in the event of a contravention are effective in deterring contravening conduct. In particular:

- the ability for a court to fashion a non-punitive order has the potential to require a business to make substantial changes to the manner in which it conducts itself;⁶⁸
- the potential of being required to publish corrective or adverse material carries a risk of serious reputational damage;⁶⁹
- in more limited circumstances, the potential risk of being disqualified from managing corporations threatens the livelihood of managers and is likely to act as a personal deterrent;⁷⁰ and
- the ability of a court to declare terms of standard form consumer contracts void risks causing significant disruption to business practices, potentially requiring the business to enter into new contracts with its customers.⁷¹

⁶⁷ Issues Paper, 38-50 [3.2]-[3.3].

⁶⁸ ACL s246.

⁶⁹ ACL ss246(2)(d) and 247.

⁷⁰ ACL s248.

⁷¹ ACL s250.

These non-monetary orders, coupled with the ability to levy substantial pecuniary penalties, are sufficient to deter companies from contravening conduct. The current enforcement regime is effective and there is no need for more remedies or an increase in the severity of existing remedies.

We also consider that there is merit in reviewing the appropriateness and effectiveness of Part 4 of the ACL, namely the criminal offence provisions. The offences created by this part are generally for conduct that should be considered less egregious than, for example, cartel conduct. Further, the penalties available for contraventions of the offence provisions generally mirror those available for contraventions of the non-criminal prohibitions in the ACL. In these circumstances, we question the merit in continuing a separate enforcement regime.

21.2 Should the follow on provisions be strengthened or extended?

The ACL presently does not include an equivalent of section 83 of the CCA (i.e. a provision making findings of fact in a proceeding prima facie evidence of that fact in subsequent proceedings). We consider that there is some merit in considering the inclusion of a similar provision in relation to proceedings under the ACL. In this context, the comments of the Harper Review at pages 71 to 72, 407 to 409 and 417, ought to be borne in mind.

21.3 Does the ACCC have sufficient capability to bring representative actions?

To the extent that there is a suggestion that the extent of representative actions brought by the ACCC for contraventions of the ACL has been insufficient, we do not consider that amendments to the ACL are an appropriate response. The ACCC's ability to bring representative actions, contained in section 239, is broad. Rather, any insufficiency is likely to be a result of funding constraints faced by the ACCC and internal priority decisions. We do not express a view as to whether the ACCC gives representative actions an appropriate degree of priority, or whether more funds should be allocated to this purpose.

In considering the ability of consumers to seek remedies for contraventions of the ACL, it should be borne in mind that there are relatively low-cost options available to them. In particular, consumers may seek remedies for contraventions of the ACL (as incorporated as State law) in the state administrative tribunals. These tribunals provide an avenue for consumers to seek redress at substantially lower cost and, significantly, with substantially lower risk of significant adverse costs orders.

PART G ONLINE COMMERCE

22 Emerging issues – online commerce

22.1 Does the ACL adequately regulate online pricing, comparator websites and online reviews?

We consider that the ACL does not need to be amended to include specific provisions for online pricing, comparator websites or online reviews and testimonials. The ACCC has demonstrated that it is able to take enforcement action against a number of businesses engaging in trade or commerce online using the existing provisions of the ACL. These provisions include section 18 on misleading or deceptive conduct and section 29 on false or misleading representations, which are general provisions with broad application. Recent examples of enforcement action in the online environment include:

- court proceedings against Virgin and Jetstar for alleged 'drip pricing';
- court proceedings against Electrodry for alleged fake online testimonials;
- court proceedings against Valve for alleged false or misleading representations in relation to consumer guarantees for online games;
- infringement notices to Citymove for alleged false or misleading representations about online testimonials; and
- an infringement notice to Compare the Market for alleged misleading advertising regarding its health insurance comparison service.

The ACL should be technology or platform neutral as far as possible. The existing general provisions, including sections 18 and 29, represent the most suitable approach to regulating online activity. Online marketing and selling techniques will continue to evolve, as will the knowledge and understanding of the reasonable consumer who purchases goods or services online. The existing general provisions can apply to new practices and courts and the ACCC are able to take evolving consumer knowledge into account in enforcing the general provisions. In our view, new online-specific provisions or amendments are not required.

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