

Dealing with consumers

In this section we consider the statutory rules regulating the advertising and selling of products to consumers. It is extremely important that any business dealing directly with members of the public be familiar with these rules, and with the potential consequences of contravening them.

Consumer protection regulation

Most of the rules regulating advertising and selling to consumers are now found in the Australian Consumer Law (the **ACL**). The ACL is set out in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the **CCA**).

ACL (Australian Consumer Law) Schedule to the CCA regulating consumer protection in Australia

CCA (Competition and Consumer Act) legislation regulating consumer protection and competition in Australia; previously known as the TPA (Trade Practices Act)

Prior to the passage of the ACL, the system of regulation was much more confusing. Some consumer transactions were regulated by Commonwealth legislation, some were regulated by State or Territory legislation, and some were regulated by the basic principles of contract law. In 2010 the ACL replaced a large number of Commonwealth, State and Territory laws.³ There is now a single, national law regulating consumer protection and fair trading in a consistent manner across all Australian jurisdictions.

The ACL is applied and enforced as a law of each Australian jurisdiction. As a law of the Commonwealth it applies to the conduct of corporations and those associated with them. As a State or Territory law it applies to the conduct of all businesses not covered by the Commonwealth law. This ensures that the ACL applies to all businesses and all business transactions in Australia, regardless of the particular business structure.

Activity 7.2 — Reflect

As a Commonwealth law, why is the application of the Australian Consumer Law limited to corporations and those associated with them? (Hint: Refer back to chapter 2 and the exclusive, concurrent and residual powers of the Federal and State Parliaments.)

The provision of financial products and services to consumers is regulated by the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act). The ASIC Act was amended in 2010 to bring the regulation of consumer credit into line with the ACL.

Law in context: Law and politics

The political history of the Australian Consumer Law

³ The legislation replaced by the ACL includes Parts IVA, V VA, VC of the *Trade Practices Act 1974* (Cth), the *Fair Trading Act 1992* (ACT), the *Fair Trading (Consumer Affairs) Act 1973* (ACT), the *Door to Door Trading Act 1991* (ACT), the *Lay by Sales Agreements Act 1963* (ACT), the *Fair Trading Act 1987* (NSW), the *Consumer Affairs and Fair Trading Act 1990* (NT), the *Fair Trading Act 1989* (Qld), the *Fair Trading Act 1987* (SA), the *Consumer Transactions Act 1972* (SA), the *Manufacturers Warranty Act 1974* (SA), the *Fair Trading Act 1991* (Tas), the *Fair Trading (Reinstatement of Regulations) Act 2008* (Tas), the *Door to Door Trading Act 1986* (Tas), the *Fair Trading Act 1999* (Vic), the *Fair Trading Act 1987* (WA), the *Consumer Affairs Act 1971* (WA), and the *Door to Door Trading Act 1987* (WA).

In 2005, in its Review of National Competition Policy Reforms, the Australian Productivity Commission identified consumer protection legislation as one of four priority areas for reform. The Commission stated that ineffective national coordination mechanisms had led to regulatory inefficiencies and inconsistencies to the detriment of both consumers and businesses. The Commission recommended that the Commonwealth, State and Territory governments establish a national review into consumer protection policy and administration.

In 2008 the Productivity Commission completed its *Review of Australia's Consumer Policy Framework* and recommended the implementation of a national consumer protection law. Later that year, in the *National Partnership Agreement to Deliver a Seamless National Economy*, the Commonwealth, State and Territory governments agreed to complete the legislative process to implement such a national consumer protection law by 31 December 2010, and that it would commence in all jurisdictions on 1 January 2011. In 2009 the Council of Australian Governments (COAG) agreed to the *Inter-Governmental Agreement for the ACL*.

In 2010 the Federal Parliament passed the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*. This Act inserted the ACL as a Schedule to the *Trade Practices Act 1974* (Cth). Subsequent legislation changed the name of the *Trade Practices Act* to the *Competition and Consumer Act 2010* (Cth). The ACL drew on the conclusions of the 2008 Productivity Commission report as well as best practice in existing Commonwealth, State and Territory laws.

The Productivity Commission has estimated that the reforms introduced by the ACL could provide benefits to the Australian community of between \$1.5 billion and \$4.5 billion a year.⁴

Regulators

As a law of the Commonwealth, the ACL is administered by the Australian Competition and Consumer Commission (the ACCC). The ACCC seeks to promote competition and fair trade in the market place, and regulates national infrastructure services. Its primary responsibility is to ensure that individuals and businesses comply with Commonwealth competition and consumer protection laws.

ACCC (Australian Competition and Consumer Commission) the Australian regulatory body primarily responsible for administration of the CCA and the ACL

Activity 7.3 — Research

Visit the ACCC website at www.accc.gov.au. What is the procedure for lodging a complaint with the ACCC about the conduct of a business?

As a State or Territory law the ACL is administered by the relevant State or Territory consumer protection agency (see table 7.1).

Table 7.1 — State/Territory consumer protection agencies

Jurisdiction	Agency	Website
Australian Capital Territory	ACT Office of Regulatory Services	www.ors.act.gov.au
New South Wales	NSW Fair Trading	www.fairtrading.nsw.gov.au
Northern Territory	NT Office of Consumer and Business Affairs	www.consumeraffairs.nt.gov.au
Queensland	Department of Employment, Economic Development and	www.consumer.qld.gov.au

⁴ Productivity Commission 2008, *Review of Australia's consumer policy framework* — inquiry report No. 45 Australian Government, p. 323.

	Innovation - Fair Trading	
South Australia	SA Office of Consumer and Business Affairs	www.ocba.sa.gov.au
Tasmania	Consumer Affairs and Fair Trading Tasmania	www.consumer.tas.gov.au
Victoria	Consumer Affairs Victoria	www.consumer.vic.gov.au
Western Australia	WA Department of Commerce - Consumer Protection	www.docep.wa.gov.au/consumerprotection

The consumer protection provisions in the ASIC Act relating to the provision of consumer credit are administered by the Australian Securities and Investments Commission (**ASIC**).

ASIC (Australian Securities and Investments Commission) the statutory authority responsible for monitoring compliance with the Corporations Act

The administration and enforcement of the ACL and the related ASIC Act provisions is facilitated at an operational level by a Memorandum of Understanding (MOU) between the ACCC, ASIC and the various State and Territory consumer protection agencies.

Meaning of ‘consumer’

The term **consumer** is defined in ACL s. 3 as follows:

- (1) A person is taken to have acquired particular goods as a consumer if, and only if: the goods 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.
- (2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods: for the purpose of re-supply; or for the purpose of using them up or transforming them, in trade or commerce in the course of a process of production or manufacture; or in the course of repairing or treating other goods or fixtures on land.
- (3) A person is taken to have acquired particular services as a consumer if, and only if, the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

consumer a person who purchases goods or services for personal, domestic or household use and not for the purpose of re-supply or use in a manufacturing process

For example, if someone buys a quantity of packaged meals from Lame Duck Organics Pty Ltd with the intention of reselling them in their own restaurant, they are not a ‘consumer’ within the meaning of the ACL.

The definition of consumer in the ACL is wide enough to include many businesses, to the extent that they are not buying products for resale. For example, if Johnny buys new cutlery for his restaurant he will be a consumer and protected by the provisions of the ACL, since cutlery falls within the category ‘goods ... of a kind ordinarily acquired for personal, domestic or household use or consumption’ and he is not acquiring them for the purpose of re-supply.

Caution!

The protection provided to consumers by the ACL is also available to other businesses buying products for their own use and not intended for resale.

General protections

Chapter 2 of the ACL prohibits certain general forms of conduct by a business. The chapter includes:

- a general prohibition of misleading or deceptive conduct in trade or commerce,
- a general prohibition of unconscionable conduct in trade or commerce and specific prohibitions of unconscionable conduct in consumer and some business transactions, and
- a provision that makes unfair contract terms in consumer contracts void.

Misleading or deceptive conduct

The ACL prohibits misleading or deceptive conduct by a business. According to ACL s. 18:

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

This section provides the same protection as that previously provided by s. 52 of the *Trade Practices Act 1974* (Cth) (the **TPA**). Most of the cases considered below relate to TPA s. 52, but are of direct relevance to an understanding of ACL s. 18.

TPA (Trade Practices Act) see CCA

A person who suffers loss because a business has engaged in misleading or deceptive conduct can commence legal proceedings against the business and seek one or more of the wide range of remedies offered by the ACL. Alternatively, the person can lodge a formal complaint about the business with the ACCC, who will take action against the business on behalf of the consumer. Unlike the other prohibitions, however, no criminal penalty is imposed on the business.

This prohibition is one of the most relied-upon legislative provisions in Australian law. The broad application of the prohibition can be attributed to a number of factors:

- In establishing a contravention of the prohibition, the intention of the business is irrelevant. It does not matter if the business intended to mislead or deceive or if it believed that it was acting honestly and reasonably; if the conduct is misleading or deceptive the prohibition has been contravened.
- In assessing the conduct of the business as misleading or deceptive, the standard applied is lower than the common law's 'reasonable person' standard; it is the standard of the 'unsuspecting modest member of the community'.⁵
- There are very few defences set out in the ACL.
- Liability cannot be avoided by use of a **disclaimer**.

disclaimer (also known as an exemption clause or an exclusion clause) a statement that one of the parties to a contract will not be liable for the consequences of a failure to perform their obligations

Australian Competition and Consumer Commission v Telstra Corporation Limited [2007] FCA 1904

Telstra made various claims in its advertising for its Next G mobile network, including the claim that it had 'coverage everywhere you need it'. The ACCC alleged that in making such a claim Telstra had engaged in misleading or deceptive conduct. Telstra argued that some of the advertisements directed consumers to its website, where there was information about the actual extent of its network coverage. The court decided that this disclaimer did not prevent Telstra's conduct from being misleading or deceptive, as it did not sufficiently communicate the information to potential customers.

⁵ *Henderson v Pioneer Homes Pty Ltd* (1980) ATPR 40–168 at 42,327.

- The range of remedies provided by the ACL for contravention of the section is much wider than that available at common law for **misrepresentation** or breach of contract.

misrepresentation a false statement of fact made by one person to induce another person to enter into a contract

- The section can be relied upon not only by consumers but also by interested members of the public and by other businesses, including competitors.

Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations (1993) ATPR 41–199

The Australian Federation of Consumer Organisations (AFCO) commenced proceedings against the Tobacco Institute of Australia Ltd for contravention of TPA s. 52, claiming that newspaper advertisements placed by the Tobacco Institute denying a link between passive smoking and diseases caused by the inhalation of smoke by non-smokers were misleading or deceptive. The court confirmed that although the AFCO was not a consumer it was still entitled to sue under TPA s. 52.

Eveready Australia Pty Ltd v Gillette Australia Pty Ltd [2000] ATPR 41–751

Television advertisements for Duracell batteries showed the Duracell bunny outlasting other toy bunnies powered by competing batteries. The advertisements included the claim that Duracell batteries would ‘last four times longer’ or ‘up to four times longer’ than the opposition. The manufacturers of Eveready batteries brought a civil action against Gillette Australia Pty Ltd, the manufacturers of Duracell batteries, claiming that Gillette had engaged in misleading or deceptive conduct. The court decided that although Eveready was a competitor and not a consumer it was entitled to bring an action under TPA s. 52. The court held that Gillette had contravened s. 52: the advertisements did not make it clear that Duracell alkaline batteries were being compared with the zinc–carbon batteries of other manufacturers, and that since alkaline batteries generally last up to four times longer than zinc–carbon batteries Duracell batteries did not offer any particular advantage over the batteries of Gillette’s competitors.

Law in context: Law in the media

Comparative advertising causes headaches⁶

GlaxoSmithKline Consumer Healthcare, the maker of Panadol, published advertisements in newspapers and via television commercials across Australia that compared Panadol Caplets to Herron Capseals and said that Panadol Caplets were ‘Made in Australia by Australians’, while Herron Capseals were ‘Made in the USA by Americans’. Caplets are 500 mg of paracetamol, and Capseals are 500 mg of paracetamol enclosed in a gelatin cover. Both are similarly shaped.

According to the ACCC:

Although factually correct, GlaxoSmithKline neglected to mention that it also produces a similar comparable product to Herron Capseals, the Panadol Gel Caps. Those products are also made in the United States of America. In other words Caplets were being compared to Capseals. The ACCC has informed GlaxoSmithKline that this sort of comparative advertising raises concerns under section 52 of the Trade Practices Act 1974 which prohibits misleading and deceptive conduct or conduct which is likely to mislead or deceive.

The ACCC has already stated that particular care is needed when comparisons are made between products of competing traders so that the comparisons don’t mislead. Advertisements must be considered as a whole, and they must be in context. A comparison can be misleading by the omission of information that would be necessary to render the comparison fair. Comparative advertising is good

⁶ Source: <http://www.accc.gov.au/content/index.phtml/itemId/87868>

for competition. Unlike some countries, Australia does not prohibit competitors from comparing products. But special care is needed to ensure that comparisons are not misleading.

ACL s. 18 can be used in a wide range of situations. It applies whenever a business engages in misleading or deceptive conduct in trade or commerce. An action against a business for contravention of ACL s. 18 may be brought in conjunction with, or as an alternative to, an action against the business for:

- the tort of negligence,⁷
- the tort of passing off,⁸
- the tort of defamation,⁹
- breach of contract,¹⁰
- misrepresentation,¹¹ or
- infringement of intellectual property rights.¹²

Checklist

A business will have contravened ACL s. 18 if all of the following requirements are satisfied.

- ☐ The business has ‘engaged in conduct’.
- ☐ The conduct was ‘in trade or commerce’.
- ☐ The conduct was ‘misleading or deceptive or ... likely to mislead or deceive’.

To establish that a business has contravened s. 52, three requirements must be satisfied.

Requirement 1: The business has ‘engaged in conduct’

A business ‘engages in conduct’ if it makes a statement or a claim or a promise, or if it performs an action, or if it refuses to do any of these things.

In certain circumstances, even silence can be conduct. If, for example, Johnny is negotiating with a buyer and he is aware of information of which he knows the buyer is ignorant, Johnny has an obligation to pass on that information to the buyer, and if he fails to do so he has engaged in conduct that is misleading or deceptive.

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd [1989] 89 ALR 539

Henjo Investments Pty Ltd was negotiating the sale of a restaurant to Collins Marrickville Pty Ltd (CM). When CM viewed the restaurant it had seating for 128 people. However, the restaurant licence limited the seating capacity to only 84 people. When following the sale CM learned of the limit in the licence, it commenced proceedings against Henjo. The court decided that Henjo’s silence on that point was misleading and deceptive conduct.

It does not matter if the conduct is unintentional, or the business did not intend the conduct to be misleading. In establishing a contravention of ACL s. 18, the intention of the business is irrelevant.

7 *Henville v Walker* [2001] HCA 52.

8 *Pacific Dunlop v Hogan* (1989) 23 FCR 553.

9 *Nixon v Slater & Gordon* [2000] FCA 531.

10 *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* [2004] VSCA 232.

11 *Fencott v Muller* [1983] HCA 12.

12 *MK Hutchence (trading as ‘INXS’) v South Sea Bubble Co Pty Ltd* (1986) ATPR 40–667.

Requirement 2: The conduct was ‘in trade or commerce’

The second requirement in establishing a contravention of ACL s. 18 is that the conduct of the business was ‘in trade or commerce’. ‘Trade or commerce’ is defined in ACL s. 2 as meaning:

trade or commerce within Australia; or
trade or commerce between Australia and places outside Australia;
and includes any business or professional activity (whether or not carried on for profit).

Conduct that takes place in a non-commercial context will not contravene ACL s. 18.

Concrete Constructions (NSW) Pty Ltd v Nelson [1990] HCA 17

Nelson was a worker who was injured when he fell to the bottom of an air conditioning shaft because a foreman had incorrectly explained how to remove a grate. He commenced proceedings against Concrete Constructions claiming that the foreman’s conduct had been misleading in contravention of TPA s. 52. The court decided that TPA s. 52 was not applicable because the conduct was not ‘in trade or commerce’.

Statements made in a political or educational context are not in trade or commerce and are, therefore, not covered by ACL s. 18.

Durant v Greiner [1990] 21 NSW 199

It was claimed that the Premier of New South Wales had made statements about the future of a school that were misleading and deceptive in contravention of TPA s. 52. The court decided that s. 52 had not been contravened because the statements were not made ‘in trade or commerce’.

Plimer v Roberts (1998) ATPR 41–602

Roberts delivered a series of lectures about the location of Noah’s Ark. Plimer argued that Roberts’ claims were misleading or deceptive conduct in contravention of TPA s. 52. The court decided that TPA s. 52 was not applicable because the statements were not ‘in trade or commerce’.

Requirement 3: The conduct was ‘misleading or deceptive’

To establish a contravention of ACL s. 18 it must be shown that the conduct of the business was misleading or deceptive or likely to mislead or deceive. ‘Misleading or deceptive’ is not defined in the ACL, and the courts have to date declined to provide a precise definition. ‘Mislead’ is usually interpreted as simply meaning ‘to lead astray’ or ‘to lead into error’, and ‘deceive’ is interpreted as ‘to cause to believe what is false’.¹³ In deciding whether conduct is misleading or deceptive the court will use an objective test. The High Court explained this test in the following case.

Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177

A restaurant in Sydney owned by Taco Bell Pty Ltd (TB) had been operating under the name ‘Taco Bell’ for some time. There was a chain of restaurants in the United States with the same name, and Taco Company of Australia Inc (TCA) sought to open a restaurant with that name as part of the US franchise. TCA commenced a civil action against TB alleging a contravention of TPA s. 52; TB cross-claimed, alleging the same thing. The court decided that since TB had commenced operations in Australia first, it was TCA that was engaging in the misleading or deceptive conduct.

¹³ *Weitmann v Katies Ltd* (1977) ATPR 40–041 at 17,444.

In making its decision, the court explained the test for determining whether particular conduct is misleading or deceptive:

First, it is necessary to identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether the conduct is, or is likely to be, misleading or deceptive falls to be tested.

Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations.

Activity 7.4 — Reflect

What is the difference between the ‘reasonable person test’ in tort law and the test established by the court in the ‘Taco Bell’ case?

The requirement that the conduct be assessed in terms of the effect upon the target audience means that, for example, an advertisement directed towards children will be assessed differently to an advertisement directed towards doctors.¹⁴

To establish a contravention of ACL s. 18 it need only be shown that a small percentage of the target audience is likely to be misled or deceived. However, a certain amount of intelligence on the part of the target audience can be assumed:

The test is whether in an objective sense the conduct of the appellant was such as to be misleading or deceptive when viewed in the light of the type of person who is likely to be exposed to that conduct. Broadly speaking, it is fair to say that the question is to be tested by the effect on a person, not particularly intelligent or well-informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is, for example, quite unusually stupid. The question is not whether the purchaser was deceived but whether the conduct was misleading or deceptive.¹⁵

ACCC v Powerballwin.com.au Pty Ltd [2010] FCA 378

Powerballwin.com.au Pty Ltd offered a ‘100 per cent guarantee’ that it could correctly predict Powerball numbers. The company set up a website and distributed 163 000 leaflets to households around Australia claiming ‘...an amazing discovery that disputes the theory of random probability and has totally shocked the experts’. The scheme required consumers to pay a \$59 subscription fee in order to receive a series of predicted numbers to help win all divisions of Powerball. The predicted numbers failed to produce any dividend for subscribers. The court decided that Powerballwin had engaged in misleading or deceptive conduct: it was impossible to predict future Powerball numbers. It restrained the further promotion of the scheme and ordered that Powerballwin pay \$48 163 compensation to subscribers and leaflet distributors and to pay the ACCC’s costs.

A statement that is literally true can still be misleading or deceptive: the business may present the literal truth in such a way that the overall effect of the conduct is misleading or deceptive. For example, the meals sold by Lane Duck Organics are literally ‘organic’ in the sense that they are made from organic matter, but the description of the meals as organic is nevertheless misleading.

Henderson v Pioneer Homes Pty Ltd (1980) ATPR 40–159

Pioneer Homes Pty Ltd (PH) placed a newspaper advertisement for a house and land package that included a low weekly repayment rate that was in large print, but also a statement in fine print to the

¹⁴ *Astrazeneca Pty Ltd v GlaxoSmithKline Australia Pty Ltd* [2006] FCAFC 22.

¹⁵ *Annand & Thompson Pty Ltd v TPC* (1979) ATPR 40–116.

effect that the low repayment rate was for one year only and would later be increased to a higher commercial rate. The court decided that the overall impression created by the advertisement was a misleading one, even though the advertisement contained all of the correct information.

On the other hand, claims that are not literally true are not necessarily misleading or deceptive. As we have seen in earlier chapters, courts have for many years tolerated a degree of ‘sales puff’, that is, exaggerated and even false claims that are obviously so and clearly made solely to make a product or an advertisement interesting or attractive to consumers. A television advertisement that, for example, portrays a soft drink as giving people the ability to fly is making a false claim about the qualities of the product but it is not misleading or deceptive conduct because no one watching the advertisement would take the claim seriously.

Depending on the circumstances, an exaggeration may be misleading or deceptive conduct.

Given v Pryor [1979] 24 ALR 442

A proposal for a subdivision contained the statement ‘a wonderful place to live’. The court decided that this was an exaggeration and misleading and deceptive conduct because the zoning requirements prohibited the development of dwellings.

Conduct that creates confusion amongst consumers is not necessarily misleading or deceptive conduct.

**McWilliams Wines Pty Ltd v McDonald’s System of Australia Pty Ltd (1980)
ATPR 40–188**

McWilliams Wines Pty Ltd released an extra-large 2 litre bottle of wine that they marketed as the ‘Big Mac’. McDonald’s commenced a civil action against McWilliams alleging a contravention of TPA s. 52. The court decided that, although some members of the public might be confused about a bottle of wine being called a Big Mac and wonder if there was a connection between the two companies, this was not the same as being misled or deceived.

A statement of opinion will be misleading or deceptive conduct if:

- the statement contains a representation of fact that is misleading or deceptive,
- the opinion is not based on reasonable grounds, and
- the opinion is one that is not honestly held.

What if the statement relates to something that is going to happen? Statements about the future are expressly referred to in the ACL s. 4:

If:

a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
the person does not have reasonable grounds for making the representation;
the representation is taken ... to be misleading.

This means that if Johnny tells another person (such as another business during contractual negotiations, or a customer by way of an advertisement) that something may or may not happen in the future, it will be misleading conduct if he does not have any reason to believe that what he is saying is true.

Activity 7.4 — Reflect

Refer to chapter 4 and consider how each of the following torts directly applies to advertising.

- | | |
|-----|------------------------|
| (a) | Deceit |
| (b) | Negligent misstatement |
| (c) | Passing off |

Unconscionable conduct

‘Unconscionable’ means unfair. As we saw in chapter 5, a person engages in **unconscionable conduct** when they unfairly take advantage of a superior bargaining position or of another person’s special weakness or disability.

unconscionable conduct unfairly taking advantage of a superior bargaining position or of another person’s special weakness

The notion that a contract can be set aside on the grounds of unconscionability is an equitable notion developed by the courts, but the legislature has adopted the notion, and unconscionable conduct is now prohibited by Part 2-2 of the ACL. There are two types of unconscionable conduct prohibited by the ACL:

- unconscionable conduct generally, and
- unconscionable conduct when supplying goods or services to, or acquiring goods or services from, a person other than a listed public company.

Unconscionable conduct generally

According to ACL s. 20:

A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

The meanings of ‘in trade or commerce’ and ‘engage in conduct’ were explained above. The phrase ‘unconscionable within the meaning of the unwritten law’ means unconscionable conduct as defined under case law: whatever the courts define as unconscionable conduct is also prohibited under the ACL, and consumers can take advantage of the wide range of remedies provided by the ACL when bringing a legal action against a business when it has generally behaved unconscionably. However the section adds little to our understanding of the meaning of ‘unconscionable conduct’.

Unconscionable conduct in connection with the supply or acquisition of goods or services

Section 21 of the ACL states:

A person must not, in trade or commerce, in connection with:

- the supply or possible supply of goods or services to a person (other than a listed public company); or
- the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

This section applies whenever a business deals with an individual or company (other than a listed public company) by supplying goods or services to them or by acquiring goods or services from them.

Checklist

A business will have contravened ACL s. 21 if all of the following requirements are satisfied.
--

- ☐ The business has ‘engaged in conduct’.
- ☐ The conduct was ‘in trade or commerce’.
- ☐ The conduct was in connection with the supply of goods or services to, or acquisition of goods or services from, another person.
- ☐ The other person was not a listed public company.
- ☐ The conduct was unconscionable.

The exclusion of listed public companies from the scope of the protection provided by the section means that this protection is limited to consumers and to small business.

ACL s. 21 does not contain a definition of ‘unconscionable’. ACL s. 22(1), however, contains an extensive list of matters that the court may consider in deciding whether or not a business has contravened ACL s. 21 when supplying goods or services to a customer. These include:

- (a) *the relative strengths of the bargaining positions of the supplier and the customer;*
- (b) *whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;*
- (c) *whether the customer was able to understand any documents relating to the supply of the goods or services;*
- (d) *whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer by the supplier;*
- (e) *the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier;*
- (f) *the extent to which the supplier’s conduct towards the customer was consistent with the supplier’s conduct in similar transactions between the supplier and other customers;*
- (g) *the requirements of any applicable industry code;*
- (h) *the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code;*
- (i) *the extent to which the supplier unreasonably failed to disclose to the customer any intended conduct of the supplier that might affect the interests of the customer, and any risks to the customer arising from the supplier’s intended conduct;*
- (j) *if there is a contract between the supplier and the customer for the supply of the goods or services, the extent to which the supplier was willing to negotiate the terms and conditions of the contract, the terms and conditions of the contract, the conduct of the supplier and the customer in complying with the contract, and any conduct that the supplier or the customer engaged in after they entered into the contract;*
- (k) *whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and*
- (l) *the extent to which the supplier and the customer acted in good faith.*

ACL s. 22(2) contains a similar list of matters which the court may consider in deciding whether or not a business has contravened ACL s. 21 when acquiring goods or services from a supplier.

Law in context: Law in the media

Federal Court finds Lux acted unconscionably in door-to-door vacuum sale to vulnerable consumer¹⁶

In 2004 the ACCC successfully brought a legal action against Lux Pty Ltd for engaging in unconscionable conduct in relation to the door-to-door sale of a \$949 Lux vacuum cleaner. A Lux door-to-door sales agent sold the vacuum cleaner to a clearly vulnerable woman while she was home alone at her house. In handing down its judgement, the Federal Court stated that it should have been apparent to the salesman that the woman, who was home alone at the time the salesman came to her door, was substantially illiterate, was unable to understand commercial matters in any depth, was unlikely to be able to make a worthwhile judgement as to whether buying the vacuum cleaner would be in her best interest and was, therefore, patently a person of some vulnerability. The court found that the salesman did not give the woman the opportunity to get independent advice or assistance before having her sign the contract to buy the vacuum cleaner. The court declared that Lux Pty Ltd, through the actions of the salesman, had acted unconscionably.

Law in context: Law in practice Dealing fairly with disadvantaged or vulnerable consumers¹⁷

On its website, the ACCC provides advice to businesses in dealing fairly with disadvantaged or vulnerable consumers:

Businesses are encouraged to deal with all consumers. However, if it is apparent that a potential customer may not have the capacity to make a voluntary or informed decision about the implications and/or benefits of their purchasing or contractual decisions, then businesses need to act responsibly and take extra care in their dealings to ensure that no unfair advantage is taken.

Businesses that accommodate the special needs of consumers get a good reputation in all areas of their business. Businesses that take advantage of vulnerable or disadvantaged consumers get a bad reputation, not just with the consumer involved, but with their family, friends, carers and the broader community.

What do we mean by 'disadvantaged or vulnerable'?

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

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

Of course, not all consumers with these characteristics are more at risk of poor business practices. But be aware that your marketing message and conduct may affect some consumers differently when making decisions about buying goods or services.

It is also important to note, however, that businesses should continue to contract or do business with consumers who may experience a disadvantage or vulnerability, as a refusal to deal will not be in any party's interests, and may be in danger of breaching anti-discrimination legislation.

Tips for business

Preparing your business

16 Source: <http://www.accc.gov.au/content/index.phtml/itemId/558117/fromItemId/2332>

17 Source: <http://www.accc.gov.au/content/index.phtml/itemId/705064>

Are your staff aware of fair trading, anti-discrimination and other relevant laws? Have they received relevant training?

Be alert to any special needs your consumers have and make sure you have systems in place to prevent any unfair treatment.

Is your marketing message clear and accurate? Keep in mind the different needs of current and potential consumers.

Are all documents you use to market goods or services to consumers clear and simple?

During a transaction

Have you clearly disclosed important or unusual terms or conditions of the agreement?

Does the consumer understand the terms of any agreement associated with the transaction?

Has the consumer had an opportunity to consider the offer properly? Make sure they are not flustered, agitated or in a highly emotional state when they enter into a contract. Observe any cooling-off periods that may apply or consider offering a cooling-off period in writing.

Consider that it may be appropriate for a guardian, carer or other appropriate person to be present to either act on the customer's behalf and/or help explain and assist the customer with the decision.

If you are in any doubt, give the consumer an opportunity to seek advice about the contract before they sign it. Make sure your actions, whether intentional or not, do not take advantage of any characteristic listed under the heading, 'What do we mean by disadvantaged or vulnerable?'

After a transaction

If things go wrong, be open to resolving complaints and, where appropriate, setting aside contracts or agreements.

Do not reward your staff or agents for unfair, pressure-based selling.

The customers protected by s 21 include other businesses as well as consumers.

Law in context: Law in the media

ACCC acts against landlord for alleged unconscionable conduct¹⁸

In February 1999 the ACCC alleged that Leelee Pty Ltd, the landlord of the Adelaide International Food Plaza, had acted unconscionably towards a tenant by:

- increasing the rent contrary to the terms of the lease,
- failing to act to protect the tenant's rights under his lease, and
- forcing the tenant to charge not less than a particular amount for certain food dishes while allowing his competitors to charge less for their food dishes.

The ACCC also took action against the managing director of Leelee Pty Ltd for aiding or abetting or being knowingly concerned in the contraventions.

Activity 7.5 — Research

Visit www.accc.gov.au. What are the 'high risk' situations identified by the ACCC where unconscionable conduct is likely?

Unfair contract terms

The ACL contains a set of provisions that seek to address the use of unfair terms in consumer contracts. ACL s. 23 states:

A term of a consumer contract is void if:

- the term is unfair; and
- the contract is a standard form contract.

18 Source: <http://www.accc.gov.au/content/index.phtml/itemId/322893>

- The contract continues to bind the parties if it is capable of operating without the unfair term.

A finding by a court that a term is unfair, and therefore void, means that the term is treated as if it never existed.

Checklist

A term of a contract will be in contravention of ACL s. 23 and therefore void if all of the following requirements are satisfied.

- ☐ The contract is a consumer contract.
- ☐ The contract is a standard form contract.
- ☐ The term is unfair.

Three requirements must be satisfied before the term will be void.

Requirement 1: The contract is a consumer contract

A ‘consumer contract’ is defined in ACL s. 23(3) as a contract for the supply of goods, services or an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

This definition of ‘consumer contract’ is narrower than the definition of ‘consumer’ in ACL s. 3. The earlier definition focuses upon the type of product being purchased whereas this definition focuses upon the purpose to which the product will be put by the buyer. A contract to supply goods, services or an interest in land to a business for business purposes is therefore not covered by ACL s. 23.

Requirement 2: The contract is a standard form contract

A ‘standard form contract’ is usually understood to be a contract the terms of which are not negotiated by the parties but are provided by the business to the consumer on a ‘take it or leave it’ basis.

The term ‘standard form contract’ is not defined in the ACL, but according to ACL s. 27(2), in determining whether a contract is a standard form contract, the court must take into account,

- (a) whether one of the parties has all or most of the bargaining power relating to the transaction,
- (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties,
- (c) whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented,
- (d) whether another party was given an effective opportunity to negotiate the terms of the contract, and
- (e) whether the terms of the contract take into account the specific characteristics of another party or the particular transaction.

A consumer contract is presumed to be a standard form contract unless another party to the proceedings proves otherwise: s. 27(1). This presumption limits the potential for avoidance by a business of the unfair contract terms provisions in the ACL.

Requirement 3: The term is unfair

According to ACL s. 24(1), a term of a consumer contract is 'unfair' if three requirements are satisfied:

- (a) *It causes a significant imbalance in the parties' rights and obligations arising under the contract.* The consumer must prove that, on the balance of probabilities, the term would cause a significant imbalance in the rights and obligations of the business and the consumer.
- (b) *It is not reasonably necessary to protect the legitimate interests of the business.* The onus is on the business to establish, on the balance of probabilities, that the use of the term is reasonably necessary to protect their legitimate interests.
- (c) *It would cause detriment to the consumer.* Detriment is not limited to financial detriment. It also includes other forms of detriment that may affect the consumer, including inconvenience, delay or distress.

In determining whether a term of a consumer contract is unfair, the court must take into account the extent to which the term is 'transparent': ACL s. 24(2). A term is transparent if it is expressed in reasonably plain language, legible, presented clearly, and readily available to the party affected by the term: ACL s. 24(3).

ACL also lists a number of examples of unfair terms in s. 25:

- *A term that permits the business (but not the consumer) to avoid or limit performance of the contract.* This example refers to the unfair use of disclaimers by a business to avoid or limit their liability under the contract.
- *A term that permits the business (but not the consumer) to terminate the contract.* Any term that allows the business to terminate the contract in the event of an inconsequential breach by the consumer, or for no valid business reason, is likely to be considered an unfair term.

Director of Consumer Affairs Victoria v AAPT Limited [2006] VCAT 1493

The terms of a mobile phone contract offered by AAPT permitted AAPT to immediately terminate the contract in the event of any breach by the customer, no matter how inconsequential. AAPT also had the right to immediately terminate the contract if the customer changed their address. The court decided that these terms were unfair terms.

A term will also be considered unfair if it states or implies that the consumer cannot cancel the contract under any circumstances or only with the consent of the business, regardless of the conduct of the business.

- *A term that penalises the consumer (but not the business) for a breach or termination of the contract.* This will include any term imposing penalties for trivial breaches committed inadvertently by the consumer, and any term imposing penalties for terminating a contract because the supplier has not complied with its obligations under the contract.
- *A term that permits the business (but not the consumer) to vary the terms of the contract.* This will include any term that requires a consumer to accept increased costs or penalties, new requirements or reduced benefits, as well as any term giving the supplier the right to make corrections to the contract at its discretion and without liability.

Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd (Civil Claims) [2008] VCAT 2092

The Victorian Civil and Administrative Tribunal decided that a clause in a health club contract allowing the health club operator to unilaterally change the location of the club within a 12-kilometre radius of the club's original location was unfair.

- *A term that permits the business (but not the consumer) to renew or not renew the contract.* If a consumer contract provides the business with the right to renew (or not to renew) the contract but not the consumer, or permits with business to automatically renew the contract without notifying the consumer, the business may be unfairly advantaged.
- A term that permits the business to vary the upfront price payable under the contract without the right of the consumer to terminate the contract. A term allowing the business to unilaterally increase the price after the contract has been formed is likely to be seen as unfair.
- A term that permits the business to unilaterally vary the characteristics of the goods, services or interest in land being supplied. This will include any term that allows a business to substitute a different product or service to that which the business originally agreed to supply to the consumer.

Director of Consumer Affairs Victoria v AAPT Limited [2006] VCAT 1493

A term in AAPT's mobile phone contract allowed AAPT to 'vary a Supplier or its products, or vary [AAPT's] charges from time to time without notice to you [the consumer]'. The court decided that this term caused a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, and was therefore an unfair term.

- *A term that permits the business to unilaterally determine whether the contract has been breached or to interpret its meaning.* If the business has the right to determine whether it has performed its contractual obligations properly, the business may unfairly refuse to acknowledge that it has breached its obligations. Similarly, if the business reserves the right to decide the meaning of a contractual term, the business is able to manipulate the contract to its own advantage in a manner that may not be fair.
- *A term that limits the vicarious liability of the business for its agents.* This includes a term that permits the business to deny responsibility for what is said to the consumer by a sales representative, employee or agent of the business.
- *A term that permits the business to assign the contract to the detriment of the consumer without the consumer's consent.* When a business is sold, its contracts with its customers are often transferred to the purchaser. This may be considered unfair if the assignment detrimentally affects a consumer's rights under the contract.
- *A term that limits the consumer's right to sue the business.* A term that could be used to prevent a consumer from enforcing their rights against the business when the business is in default of the contract is likely to be seen as unfair.
- *A term that limits the evidence the consumer can adduce in proceedings relating to the contract.* This will include, for example, a term that limits the evidence able to be presented by the consumer to the contract itself and excludes any evidence of pre-contractual negotiations.
- *A term that imposes the evidential burden on the consumer in proceedings relating to the contract.* This is similar to the previous example in that it has the potential to deter consumers from taking legal action against a business.

These examples are included in the legislation in order to provide guidance only. They do not actually prohibit the use of such terms, or create a legal presumption that the terms are unfair.

Activity 7.6 — Reflect

What are the similarities and differences between ‘unconscionable conduct’ and an ‘unfair term’?

Exemptions

According to ACL s. 26, the unfair contract term provisions do not apply to:

- terms that define the main subject matter of a consumer contract,
- terms that set the ‘upfront price’ payable under the contract, or
- terms that are required, or expressly permitted, by a law of the Commonwealth or a State or a Territory.

A term that defines the main subject matter of the contract is one that identifies the good, service or interest in land that is being supplied to the consumer. Exempting such a term from the coverage of ACL s. 23 ensures that consumers cannot avoid their contractual obligations simply because they have changed their mind about what they are buying. According to one judge:

[T]erms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile.¹⁹

The rationale for exempting terms that set the ‘upfront price’ is that the upfront price is easily understood by consumers, and when the price is stated upfront it is unlikely to create any imbalance in the parties’ rights and obligations.

The exemption of terms ‘required, or expressly permitted, by a law’ ensures that a court will not be required to determine whether a term is unfair when the term must or can be included in consumer contracts by law.

Specific protections

Chapter 3 provides various specific protections for consumers against unfair business practices. The protections in Chapter 2 differ from the protections in Chapter 3 in that the former prohibit misleading or deceptive conduct, unconscionable conduct and unfair terms generally, and the latter prohibit specific claims and practices. They also differ in that criminal penalties may attach to contravention of the specific prohibitions.

In practice, if a business has engaged in misleading or deceptive conduct or one of the other general forms of prohibited conduct it will usually be accused of contravening both the general prohibition and one or more of the specific prohibitions.

Unfair practices

ACL Part 3-1 prohibits certain unfair practices, including:

- making false or misleading representations about goods or services: ACL s. 29,
- making false or misleading representations about the sale of land: ACL s. 30,
- engaging in misleading conduct in relation to employment: ACL s. 31,

19 Harbison J in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates and Yoga Pty Ltd (Civil Claims)* [2008] VCAT 482 at 66.

- offering a rebate, gift, prize or other free item without intending to provide it, or without intending to provide it within a reasonable time: ACL s. 32,
- engaging in misleading conduct regarding the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods: ACL s. 33,
- engaging in misleading conduct regarding the nature, characteristics, suitability for purpose or quantity of any services: ACL s. 34,

Doherty v Traveland Pty Ltd (1982) 4 ATPR 40–323

Traveland Pty Ltd continued to issue a brochure stating that a particular tour was a 13-day trip after it was changed to an 11-day trip. The court held that Traveland had engaged in misleading conduct regarding the characteristics of a service.

- engaging in **bait advertising**: ACL s. 35,

bait advertising advertising a product to attract customers to a businesses' premises when the business knows or should know that it is likely to run out of stock very quickly

- wrongly accepting payment when unable to supply the product: ACL s. 36,
- making false or misleading representations about the profitability or risk of a home business: ACL s. 37,
- sending unsolicited debit or credit cards: ACL s. 39,
- asserting a right to payment for unsolicited goods or services: ACL s. 40,
- asserting a right to payment for unauthorised entries or advertisements: ACL s. 43,
- participating in, or inducing another person to participate in, a pyramid scheme: ACL s. 44,
- supplying goods with more than one displayed price and not charging the lower price: ACL s. 47,
- failing to specify a single price (i.e. a price including all charges, fees, taxes, levies, etc) for goods or services supplied for personal, domestic or household use or consumption: ACL s. 48,

Law in context: Law in the media

ACCC institutes against cafés over alleged menu breaches²⁰

In September 2010 the ACCC instituted proceedings against four cafés and restaurants for alleged failure to specify a single price. The cafés had failed to include Sunday and public holiday surcharges in their menu prices. The ACCC sought declarations, injunctions, civil penalties and costs. The ACCC had undertaken a compliance survey and identified a number of café and restaurant menus that did not comply with the Act. The traders were contacted and the ACCC took no further action against those who responded. Infringement notices were issued to those cafés that did not correct their menus despite the ACCC's concerns. Proceedings were instituted against the cafes that did not comply with the infringement notices.

- offering a contingent rebate, commission or other benefit in return for a referral: ACL s. 49, and
- using physical force, harassment or coercion in relation to the supply of or payment for goods, services or land: ACL s. 50.

We now consider some of these unfair practices in more detail.

False or misleading representations about goods or services

ACL s. 29(1) relates to statements made by a business when advertising or selling its products. A business must not, in trade or commerce, in connection with the supply of goods or services or in

²⁰ Source: <http://www.accc.gov.au/content/index.phtml/itemId/946357>

connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation:

- (a) that the goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use,

Hartnell v Sharp Corporation of Australia Pty Ltd (1975) 5 ALR 493

In a number of its magazine advertisements, Sharp Corporation of Australia Pty Ltd falsely claimed that 'every Sharp microwave oven is tested and approved by the Standards Association of Australia'. The court decided that this was a false representation that goods were of a particular standard. Sharp was fined \$100 000.

ACCC v Cadbury Schweppes Pty Ltd (2004) FCA 516

Cadbury Schweppes Pty Ltd (CS) sold flavoured cordial under the Cottees' brand with a label containing the words 'banana mango flavoured cordial', with pictures of bananas and mangoes and a cartoon monkey holding a banana. The cordial did not contain any bananas or mangoes. The court decided that CS's failure to adequately inform potential buyers of this fact amounted to a false representation about the composition of goods.

- (b) that the services are of a particular standard, quality, value or grade,

Law in context: Law in the media

Federal Court declares phone card advertising false and misleading²¹

In August 2010, the Federal Court in Perth declared that phone card sellers Prepaid Services Pty Ltd (PPS) and Boost Tel Pty Ltd (Boost) had engaged in misleading conduct and made false representations in regard to the value, price and benefits of their phone cards. The ACCC alleged that PPS and Boost had contravened the Act by representing that certain phone cards would provide consumers with a specified amount of call time, when that was not the case; that no fees, other than timed call charges, would apply when in fact other fees were charged; and that a specified rate per minute would apply to calls regardless of the number and length of calls made, when in fact the specified call rate was highly unlikely to be ever achieved. For example, Boost represented that its card offered 1896 minutes of talk time to various countries including the UK and Japan at a flat rate of ½ cent per minute. In fact, the 1896 minutes could only be obtained in exceptional and unlikely circumstances, namely through one continuous call in excess of 30 hours or through a series of calls of exactly one or five minutes duration. The court declared Boost's conduct to be false and misleading, ordered injunctions to prevent similar conduct in the future, ordered Boost to publish corrective notices, and ordered Boost to pay the ACCC's costs. The court made similar declarations and orders against PPS.

- (c) that the goods are new,
- (d) that a particular person has agreed to acquire the goods or services,
- (e) that purports to be a testimonial by any person relating to the goods or services,
- (f) concerning a testimonial by any person relating to goods or services,
- (g) that the goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits,
- (h) that the person making the representation has a sponsorship, approval or affiliation,
- (i) with respect to the price of the goods or services,
- (j) concerning the availability of facilities for the repair of goods or of spare parts for the goods,
- (k) concerning the place of origin of the goods,
- (l) concerning the need for any goods or services,

21 Source: <http://www.accc.gov.au/content/index.phtml/itemId/941786>

- (m) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, or
- (n) concerning a requirement to pay for a contractual right that is equivalent to any condition, warranty, guarantee, right or remedy that a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

The prohibition of false or misleading representations about the place of origin of the goods in ACL s. 29(1)(k) is expanded upon in ACL Part 5-3. According to ACL s. 255, a representation as to the country of origin of goods — such as a label stating that goods are ‘made in Australia’ — can only be made if the goods have been ‘substantially transformed’ in Australia, and more than 50 per cent of the cost of production was incurred in Australia. Goods are ‘substantially transformed’ in a country if they undergo a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change: ACL s. 29(3). A representation that goods are the produce of a particular country — such as a label stating that goods are a ‘Product of Australia’ — can only be used if the country was the country of origin of each significant ingredient or significant component of the goods, and all, or virtually all, processes involved in the production or manufacture happened in that country.

Law in context: Law in the media

Major charity donation follows ACCC concerns about Golden Circle ownership claims²²

US company HJ Heinz Company acquired tinned fruit and vegetable manufacturer Golden Circle in December 2008. After the acquisition, Heinz continued to sell Golden Circle products with the representation ‘Proudly Australian Owned’. The Golden Circle website also continued to include a statement that its ‘iconic status has been achieved through a commitment to remaining proudly Australian owned’. After the ACCC raised concerns in 2010 that this amounted to a breach of the TPA, Heinz admitted that it had engaged in misleading conduct and gave court-enforceable undertakings that it would cease supplying Golden Circle branded products with Australian-owned representations, use its best endeavours to ensure that corrective signage appeared next to Golden Circle products on supermarket shelves, and publish corrective advertisements in major newspapers throughout Australia. More than 800 000 tins of Golden Circle fruit and vegetables with the misleading labels (worth approximately \$1.8 million) were donated to Australian welfare agencies that feed the hungry.

A sign informing buyers that they are not entitled to a refund under any circumstances would be a contravention of ACL s 29(1)(m) since a consumer’s implied right to a refund under the ACL cannot be excluded by the seller.²³ Such a sign would also be a contravention of ACL s 18.

Activity 7.7 — Reflect

For each of the types of false or misleading representation listed above, give a specific example of conduct that would be found to be in contravention of the section.

Bait advertising

A business engages in bait advertising when it advertises a product at a price that is likely to attract buyers to its premises when it knows or should know that it is likely to run out of stock very quickly. The cheap or free product is ‘bait’ to attract buyers who will hopefully purchase another, more expensive, product. Bait advertising is prohibited by ACL s. 35 as follows:

A person must not, in trade or commerce, advertise goods or services for supply at a specified price if:

²² Source: <http://www.accc.gov.au/content/index.phtml/itemId/919479/fromItemId/927069>

²³ *Miller v Fiona’s Clothes Horse of Centrepont Pty Ltd* (1989) ATPR 40–963.

- there are reasonable grounds for believing that the person will not be able to offer for supply those goods or services at that price for a period that is, and in quantities that are, reasonable, having regard to:
 - the nature of the market in which the person carries on business; and
 - the nature of the advertisement; and
- the person is aware or ought reasonably to be aware of those grounds.

A person who, in trade or commerce, advertises goods or services for supply at a specified price must offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to:

- the nature of the market in which the person carries on business; and
- the nature of the advertisement.

Law in context: Law in the media

ACCC makes a noise over Repco's sound promotion²⁴

In 2005 the ACCC investigated Repco's '\$1 Million Sizzling Sound Sellout' and found that Repco had engaged in bait advertising. To promote the sale, Repco had circulated 3.9 million catalogues to consumers' letterboxes and via in-store distribution stands as well as advertising the sale on its website. Five of the products advertised in the catalogue were advertised at a discount of between 66 per cent and 92 per cent off their original pre-sale price, four on the catalogue's front page. More than one-third of Repco's 290 stores Australia-wide did not have any of the five products available for sale during any part of the sale period. Of those stores that did hold stock, most did not have any stock available to consumers after the first day of the sale.

Wrongly accepting payment

A business must not accept payment from a buyer when it either does not intend to supply the product or it knows or should know that it will be unable to provide the product within the specific time quoted or within a reasonable time: ACL s. 36. This prohibition is contravened if the business accepts payment when it knows it will be unable to provide the product; it is also contravened if the business accepts payment and promises to be able to provide the product within a particular period but it knows or should know that it will take longer than that.

Dawson v World Travel Headquarters Pty Ltd (1981) 53 FLR 455

World Travel Headquarters Pty Ltd (WTH) accepted a booking for a tour advertised as a 2-day trip to Singapore after the tour had been changed to an overnight stay in Singapore. The court decided that WTH had contravened the prohibition on accepting payment without intending the supply.

Inertia selling

The practice of sending an **unsolicited product** to a person and then pressuring the person to pay for that product is known as **inertia selling**. Inertia selling is prohibited by the ACL.

unsolicited products products sent to a buyer without the buyer having requested them

inertia selling the practice of sending an unsolicited product to a customer and then pressuring the customer to pay for that product

A business must not claim a right to payment for goods, services or an entry in a directory unless it reasonably believes that it in fact has a right to payment: ACL ss. 40, 43. If a business has sent an unsolicited product to a person, the person:

²⁴ Source: <http://www.accc.gov.au/content/index.phtml/itemId/720211>

- does not have to pay for it, and
- is not liable for the loss of or damage to the product unless the loss or damage results from a wilful and unlawful act: ACL ss. 41(1), 42.

Further, after the expiry of a certain period, the product becomes the property of the person, free of charge: ACL s. 41(2). The person can send the business notice in writing that the product is unsolicited and telling the business where it can collect the product. (The person is not obliged to return the unsolicited product themselves.) If the business has not collected the product within either 1 month from the day the notice is given or 3 months from the day the person received the product, whichever is the earliest, the product becomes the property of the person. If the person does not send the notice, the product automatically becomes the property of the person 3 months from the day the person received the product: ACL s. 41(2). The product does not automatically become the property of the person if:

- the person unreasonably refuses to permit the business to recover possession of the product during the period,
- within that period the business takes possession of the product, or
- the product was received by the person in circumstances in which the person knew or should have known that the product was not intended for them: ACL s. 41(3).

Pyramid schemes

A **pyramid scheme** is a type of product distribution scheme whereby a participant makes a profit or receives a commission for the sale of each product to a buyer. The participant is also rewarded for the introduction of other participants to the scheme, usually by receiving a commission for each new participant.

pyramid scheme a product distribution scheme where new participants must pay to join after being induced to do so by the prospect that they will be entitled to payment upon the introduction of further participants

For example, imagine Johnny starts a scheme where he convinces five people (the level one distributors) to pay a participation fee of \$1000 to distribute vegan meals on his behalf. Johnny makes \$5000 without selling a meal. The level one distributors each convince five more people (the level two distributors) to pay the participation fee, and in return they receive a commission of \$100 for each new participant they introduce. Each level one distributor makes \$500 (\$100 x 5) and Johnny makes another \$22 500 (\$900 x 25). If each of the 25 level two distributors is able to convince five more people (the level three distributors) to join the scheme, Johnny will make \$112 500 (\$900 x 125). As you can see, pyramid schemes have the potential to grow very quickly and to make a lot of money for the person who sets up the scheme.

The problem with pyramid schemes is that while those who start the scheme (those at the ‘top’ of the pyramid) make substantial profits, most participants who are further down the pyramid fail to recover their initial outlay. This is usually because the commission for the sale of each product is rather low, the product itself is difficult to sell, and new participants become increasingly difficult to find. Eventually the pyramid ‘collapses’ (i.e. both the market for the product and the availability of new participants dry up) and most of the participants end up having spent a lot more than they made. Further damage is caused by the fact that most participants conscript friends and family members as new participants, and close relationships can be damaged when everyone ends up out of pocket.

Businesses are expressly prohibited from participating in, or inducing others to participate in, pyramid schemes: ACL s. 44. A pyramid scheme is defined as a scheme where:

- to take part in the scheme, new participants must make a ‘participation payment’, and

- the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled to a 'recruitment payment' in relation to the introduction to the scheme of further new participants.

In deciding whether a scheme is a pyramid scheme, the court will have regard to:

- (a) the extent to which the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme, and
- (b) the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods and services by comparison with the emphasis given to their entitlement to recruitment payments: ACL s. 46.

As a general rule, schemes for the distribution of a single product are likely to be pyramid schemes whereas schemes for the distribution of a wide range of products are likely to be legitimate (e.g. Amway).

The Internet has become a popular medium for the proliferation of pyramid schemes. People who are unsure whether or not a particular scheme is a pyramid scheme can visit the ACCC website and consult the list of known pyramid schemes.

Activity 7.8 — Research

Visit www.scamwatch.gov.au.

- (a) What are the warning signs for a pyramid scheme?
- (b) How does the website suggest that consumers protect themselves from pyramid schemes?

Contingent referral selling

When a business offers a buyer a discount in the form of a rebate, commission or other benefit in return for the buyer providing the business with the contact details of another potential buyer, it is known as **referral selling**. Referral selling is not prohibited by the ACL. The business is however prohibited from making the discount contingent upon a later event, such as the referral buying the product: ACL s. 49. The business must give the discount immediately and unconditionally.

referral selling offering a buyer a discount in the form of a rebate, commission or other benefit in return for the buyer providing the seller with the contact details of another potential buyer

Consumer transactions

ACL Part 3-2 regulates transactions with consumers by implying certain guarantees, closely regulating unsolicited consumer agreements, and imposing certain minimum requirements in relation to lay-by agreements.

Consumer guarantees

The ACL implies into contracts with consumers certain guarantees intended to protect the interests of the consumer.

When the contract relates to the supply of goods to a consumer, the guarantees include:

- a guarantee that the seller has *title*; that is, the business has the right to pass on to the consumer ownership of the goods: ACL s. 51,
- a guarantee that the consumer will have *undisturbed possession*; that is, the consumer's subsequent possession of the goods will not be interrupted by the business or some other person seeking to recover the goods: ACL s. 52,

- a guarantee that there are no *undisclosed securities*; that is, there is no security, charge or encumbrance that has not been disclosed to the consumer: ACL s. 53,
- a guarantee that the goods are of *acceptable quality*; that is, they are as fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe, and durable as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable: s. 54,
- a guarantee that the goods are *fit for any disclosed purpose*; that is, they are reasonably suitable for any purpose disclosed by the consumer to the business and for any purpose the business represents that the goods are reasonably fit: s. 55,
- a guarantee that the goods *correspond with their description*: s. 56,
- a guarantee that the goods *correspond with any sample or demonstration model* in quality, state or condition: s. 57,
- a guarantee that the manufacturer will ensure that *repair facilities and spare parts* are reasonably available: s. 58, and
- a guarantee that the manufacturer will comply with any *express warranties* given in relation to the goods: s. 59.

When the contract relates to the supply of services to a consumer, the guarantees include:

- a guarantee that the services will be rendered with *due care and skill*: s. 60,
- a guarantee that the services, and any product resulting from the services, will be *fit for any disclosed purpose*; that is, they will be suitable for any purpose disclosed by the consumer to the business, and they will be of such nature, quality, state or condition that they would be reasonably expected to achieve the result disclosed by the consumer to the seller: s. 61, and
- a guarantee that the services will be supplied to the consumer within a *reasonable time* (if a time for supply was not fixed by contract or otherwise agreed upon): s. 62.

Unlike the terms implied into contracts by the State and territory sale of goods legislation (see chapter 6), these guarantees cannot be excluded or overridden by the business. ACL s. 64 states that any term of the contract between the business and the consumer that seeks to exclude, restrict or modify the guarantees is automatically void. This ensures that a business cannot seek to avoid its legal obligations to consumers by including a term in its consumer contracts — for example, on its website or on a sign in the shop — that states that no such guarantees are provided.

The consequences of a business failing to comply with these consumer guarantees are set out below.

Unsolicited consumer agreements

An **unsolicited consumer agreement** is an agreement to supply goods or services for at least \$100 that is made by telephone or at a place other than the business premises of the supplier and that is not a result of an invitation by the consumer to enter into negotiations for the supply: ACL s. 69. An agreement formed following a ‘cold’ telephone call by a business to a consumer at their home is an unsolicited consumer agreement, as is an agreement formed with a consumer by a ‘door-to-door’ salesperson.

unsolicited consumer agreement an agreement to supply goods or services for at least \$100 that is made by telephone or at a place other than the business premises of the supplier and that is not a result of an invitation by the consumer to enter into negotiations for the supply

ACL s. 73 states that the dealer (that is, the person dealing with the consumer, who may or may not be the supplier) must not call on the consumer for the purpose of negotiating an unsolicited consumer agreement:

- (a) at any time on a Sunday or a public holiday,

- (b) before 9 am on any other day, or
- (c) after 6 pm on any other day (or after 5 pm if the other day is a Saturday).

The dealer must, as soon practicable and before starting to negotiate, inform the consumer about the dealer's purpose and (if the dealer is physically present) that the dealer must leave upon request: ACL s. 74.

If an agreement is formed, the consumer must be given a copy of the agreement immediately (if made face to face) or within 5 business days (if made by telephone): ACL s. 78. ACL s. 79 sets out the information that must be included in the agreement, including information about the consumer's right to terminate the agreement. ACL s. 82 gives the consumer a 'cooling off' period: the consumer is entitled to terminate the agreement within 10 days (unless the dealer has contravened one of the earlier prohibitions — such as the restriction on when the consumer can be called on — in which case the cooling off period is 3–6 months).

These rights cannot be waived by the consumer: ACL s. 90.

Activity 7.9 — Reflect

Why is ACL s. 90 such an important element in the system of protections provided to consumers in relation to unsolicited consumer agreements?

Law in context: Law in the media

Telco admits telemarketing and door-to-door sales likely to mislead²⁵

For several years People Telecom had used telemarketers and door-to-door sales agents to promote its telecommunication services, including mobile, fixed phone and data services. A number of customers complained to the ACCC that the agents transferred their services to People Telecom without their consent, or after representing that the agents were working on behalf of the customer's current telecommunications carrier, or that the customer was required to change their carrier to People Telecom, or that changing to People Telecom would not compromise any arrangements with their current carrier when this was not the case.

In March 2010 People Telecom admitted in a court enforceable undertaking given to the ACCC that its sales agents had transferred customers from rival carriers without consent and made other potentially misleading claims in order to sign up customers. As part of the undertaking People Telecom agreed to write to affected customers, and to place a notice on its website, offering to allow them to terminate their contract without penalty, and refund or waive certain debts arising from the misrepresentations. People Telecom also agreed to monitor the conduct of its agents to ensure they complied with the scripts provided by People Telecom, and to implement a trade practices compliance program.

Lay-by agreements

A **lay-by agreement** is an agreement between a supplier and a consumer for the supply of consumer goods where the price of the goods is to be paid by three or more instalments and the goods will not be delivered to the consumer until the total price of the goods has been paid: ACL s. 96(3). Lay-by agreements must be in writing: ACL s. 96(1). ACL s. 97 gives the consumer the right to terminate the lay-by agreement at any time prior to delivery of the goods. The supplier must refund any payments made by the consumer, less any permitted termination charge: ACL s. 99.

lay-by agreement an agreement between a supplier and a consumer for the supply of consumer goods where the price of the goods is to be paid by three or more instalments and the goods will not be delivered to the consumer until the total price of the goods has been paid

²⁵ Source: <http://www.accc.gov.au/content/index.phtml/itemId/916367/fromItemId/927069>

Evidence of transactions

The consumer is entitled to receive evidence of their transactions. The business must provide the consumer with a proof of transaction for transactions over \$75, and upon request for lesser amounts: ACL s. 100. The information to be included in a proof of transaction is the same as that needed to comply with the tax invoice requirements for the GST. If a consumer requests it, a business must also provide an itemised bill for services: ACL s. 101.

Safety of consumer goods

ACL Part 3-3 regulates the safety of products sold to consumers.

Product safety standards

The ACL provides for the creation of *product safety standards*. These standards impose upon businesses certain requirements relating to:

- the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of consumer goods,
- the testing of consumer goods during, or after the completion of, manufacture or processing, and
- the form and content of markings, warnings or instructions to accompany consumer goods: ACL s. 104

A business is prohibited from supplying goods or services that do not comply with any relevant product safety standard: ACL ss. 106, 107.

Bans

Goods or services that could cause injury may be made the subject of an *interim ban* by the relevant Minister under ACL s. 109. Interim bans last for 60 days, and can be extended further: ACL s. 110. ACL s. 114 allows for the imposition of a *permanent ban*.

A business is prohibited from supplying goods or services that are the subject of an interim or a permanent ban: ACL ss. 118, 119.

Activity 7.10 — Research

Visit the website of the ACCC at www.accc.gov.au. Provide an example of goods that have been recently banned in Australia.

Recalls

Goods that could cause injury or that do not comply with the relevant product safety standard may be made the subject of a *compulsory recall notice* by the relevant Minister under ACL s. 122. The notice requires the business to recall the goods, notify members of the public about the nature of the defect, and inform the public about what the business proposes to do: repair the goods, replace the goods, or provide a refund. It is also possible for a business to voluntarily recall goods under ACL s. 128.

Safety warning notices

ACL s. 129 allows for the publication on the internet of a *safety warning notice*, that is, a notice stating that particular consumer goods or services are under investigation to determine if they cause injury, and/or warning of the possible risks involved in the use of the goods or services.

ACL ss. 131 and 132 oblige a business that becomes aware that particular goods or services have been associated with the death, serious injury or illness of another person to give written notice to the relevant Minister.

Law in context: Law in the media

Apollo withdraws bike due to safety concerns²⁶

In February 2010 a children's bicycle missing three required safety components was withdrawn from sale by Apollo Bicycle Co Pty Ltd following concerns raised by the ACCC. More than 450 Radius Racer X Al 12" children's bicycles supplied by Apollo did not have a hand brake, a front white reflector or red rear reflector as required under the mandatory product safety standard for pedal bicycles.

Apollo provided the ACCC with court enforceable undertakings that it would:

- not supply any bicycles to which the mandatory standard applies unless the bicycles comply with the standard,
- supply the missing components to retailers and advise them to contact customers to arrange to have the missing components fitted,
- cause information notices to be displayed at retail outlets and on their website,
- conduct an audit to identify any products which do not comply with the relevant mandatory standards, and
- develop and implement a trade practices compliance program.

The Apollo product was detected by the ACCC during a national product safety survey focusing on children's bicycles and toys.

Information standards

ACL Part 3-4 regulates the use of *information standards* for goods or services. An information standard sets out the form and content of the information that must accompany the supply of goods or services (for example, on the product packaging): ACL s. 134. A business must not, in trade or commerce, supply goods or services if the relevant information standard has not been complied with: ACL ss. 136, 137.

Manufacturers' liability

In addition to the general duty of care imposed upon them by the law of **negligence**, ACL Part 3-5 imposes a range of obligations and liabilities upon manufacturers.

negligence a tort committed when one person fails to exercise reasonable care and causes harm to another person

The term 'manufacturer' refers not only to the actual manufacturer of a product. According to ACL s. 7, a 'manufacturer' includes any person who:

- grows, extracts, produces, processes or assembles goods,
- holds himself or herself out to the public as the manufacturer of goods,
- applies their name or trademark to goods supplied by them,
- permits another person to hold them out to the public as the manufacturer of the goods, or

²⁶ Source: <http://www.accc.gov.au/content/index.phtml/itemId/914271/fromItemId/927069>

- imports goods into Australia if the actual manufacturer of the goods does not have a place of business in Australia.

Caution!

The term 'manufacturer' refers not only to the actual manufacturer but also to a range of other persons, including, in some circumstances, the importer of goods.

The ACL imposes strict liability upon the manufacturers of defective goods. The consumer does not need to prove negligence or fault. If:

- the manufacturer supplies the goods in trade or commerce,
 - the goods have a safety defect, and
 - the individual suffers injuries because of the safety defect,
- the manufacturer must compensate the individual: ACL s. 138.

Goods have a 'safety defect' if they are not as safe as a consumer would expect them to be, having regard to:

- the way they have been marketed,
- their packaging,
- any mark used on the goods,
- any instructions about using the goods,
- what might reasonably be expected to be done with the goods, and
- the time when they were supplied by their manufacturer: ACL s. 9.

If goods have a safety defect, the manufacturer must compensate:

- anyone injured because of the safety defect: ACL s 138,
- anyone other than the injured individual who suffers loss because of the safety defect: ACL s. 139,
- anyone who used or intended to use other goods damaged or destroyed because of the safety defect: ACL s. 140, and
- anyone who used or intended to use land or buildings damaged or destroyed because of the safety defect: ACL s. 141.

However, the manufacturer is not liable if:

- the safety defect did not exist at the time they were supplied by the manufacturer,
- they had that defect only because the manufacturer was complying with a mandatory standard for them,
- the state of scientific or technical knowledge at the time when they were supplied by the manufacturer was not such as to enable the defect to be discovered, or
- the defective goods were a component of other goods and the defect is attributable to the design of the other goods, or the markings on or accompanying the other goods, or the instructions or warnings given by the manufacturer of the other goods: ACL s. 142.

Activity 7.11 — Reflect

How have the above provisions of the ACL added to or modified the liability of manufacturers under the tort of negligence?

Offences and defences

In this section we consider the possible offences committed by a business that contravenes the ACL, the penalties that may be imposed, and the defences available to the business.

Offences and penalties

ACL Part 4-1 sets out the offences and penalties associated with the various prohibitions described above.

Criminal penalties are imposed on a **strict liability** basis for contravention of any of the following prohibitions:

strict liability liability where fault does not have to be proved

- making false or misleading representations about goods or services: ACL s. 151,
- making false or misleading representations about the sale of land: ACL s. 152,
- engaging in misleading conduct in relation to employment: ACL s. 153,
- offering rebates, gifts, prizes or other free items without intending to supply: ACL s. 154,
- engaging in misleading conduct as to the nature of goods: ACL s. 155,
- engaging in misleading conduct as to the nature of services: ACL s. 156,
- engaging in bait advertising: ACL s. 157,
- wrongly accepting payment without intending to supply or without intending to supply within a reasonable time: ACL s. 158,
- making misleading representations about business activities that can be carried on from home: ACL s. 159,
- sending an unsolicited credit card or debit card: ACL s. 161,
- asserting a right to payment for unsolicited goods or services: ACL s. 162,
- asserting a right to payment for unauthorised entries or advertisements: ACL s. 163,
- participating in, or inducing another to participate in, a pyramid scheme: ACL s. 164,
- engaging in multiple pricing: ACL s. 165,
- failing to specify a single price: ACL s. 166,
- engaging in contingent referral selling: ACL s. 167, and
- using physical force, harassment or coercion in connection with the supply of or payment for goods or services: ACL s. 168.

A contravention of the prohibition of multiple pricing can lead to a penalty of \$5000 for corporations and \$1000 for individuals. A contravention of any of the other prohibitions can lead to a penalty of \$1.1 million for corporations and \$220 000 for individuals. All contraventions can lead to the recording of a criminal conviction.

A variety of penalties are also imposed for contravening the prohibitions relating to:

- consumer guarantees: ACL s. 169,
- unsolicited consumer agreements: ACL ss. 170–183,
- lay-by agreements: ACL ss. 188–191,
- warranties: ACL s. 192,
- repairs: ACL s. 193,
- safety standards: ACL ss. 194–196,
- bans: ACL ss. 197–198,
- recalls: ACL ss. 199–201,
- products associated with death or serious injury: ACL s. 202,
- information standards: ACL ss. 203–204, and
- substantiation notices: ACL ss. 205–206.

The court cannot order imprisonment for a contravention of any of these prohibitions, but imprisonment may be ordered to enforce the payment of a penalty already imposed.

Prosecutions are usually commenced by the ACCC but they can also be commenced by another person with the written consent of the relevant Minister. A prosecution must be commenced within 3 years of the commission of the offence: ACL s. 212.

Defences

ACL Part 4-1 also sets out the defences available to a business accused of contravening these prohibitions and committing these offences.

A business will not be liable if:

- the contravention was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance by the business on information supplied by another person: ACL s. 207, or
- the contravention was due to the act or default of another person, to an accident or to some other cause beyond the control of the business, and the business took reasonable precautions and exercised due diligence to avoid the contravention: ACL s. 208.

In relation to a contravention committed by the publication of an advertisement, it is a defence if the business can establish that its business is to publish advertisements and that it received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention: ACL s. 209.

In relation to a contravention committed by the supplying of goods or services that did not comply with a product safety standard or information standard, it is a defence if:

- the goods or services were acquired for the purpose of re-supply from a person who carried on in Australia a business of supplying such goods, and
- the business did not know, and could not with reasonable diligence have ascertained, that the goods or services did not comply with that standard or it relied in good faith on a representation by the person from whom it acquired the goods or services that a product safety standard or information standard, as the case may be, had not been prescribed: ACL ss. 210-211.

Enforcement and remedies

In this section we consider the various ways in which the prohibitions in the ACL are enforced, and the various remedies that can be granted by a court in the event of contravention by a business.

Enforcement

The prohibitions in the ACL are enforced in a number of different ways.

Enforceable undertakings

If a business suspects that it might have contravened the ACL, the business can offer the ACCC an undertaking that it will not do it again and take steps to improve compliance. If it is accepted by the ACCC, the undertaking is court-enforceable: ACL s. 218.

Substantiation notices

The ACCC can issue a *substantiation notice* to a business seeking information about claims made by the business in the marketplace to determine if they are genuine and whether further investigation is necessary: ACL ss. 219–222.

Public warning notices

The ACCC can issue a public warning notice about a business where the regulator has reasonable grounds to suspect that the business has contravened the ACL, or has refused or failed to respond to a substantiation notice: ACL s. 223.

Legal action

A consumer or any other person harmed as a result of a contravention of the ACL by the business can commence a legal action against the business seeking one or more of the remedies below. An action can also be brought by the ACCC.

General remedies

ACL Part 5-2 sets out the remedies that can be granted by a court for contravention of the ACL. These remedies include:

- various pecuniary (that is, monetary) penalties: ACL ss. 224–231,
- various types of **injunction**: ACL ss. 232–235;

injunction a court order forbidding someone from engaging in particular conduct that will be a breach of the law or infringe the legal rights of another

- an order that the business pay damages to any person who has suffered loss because of the contravention: ACL s. 236,
- a compensation order for injured persons (on application by either the injured person or the ACCC) or non-party consumers (on application by the ACCC): ACL ss. 237–241,
- an order declaring a contract void, varying a contract, refusing to enforce a contract, ordering a refund, ordering compensation, ordering repair of the goods, ordering the provision of services, or ordering execution of an instrument relating to land: ACL s. 243,
- various non-punitive orders including an order directing the business to perform a community service, an order directing the business to establish compliance and education programs for its employees, an order requiring the business to disclose information, and an order requiring the business to place an advertisement: ACL s. 246,
- an adverse publicity order: ACL s. 247, and
- an order disqualifying a person from managing a corporation: ACL s. 248.

Law in context: Law in the media

Domino's to correct 'fresh dough' claims²⁷

In 2006 Domino's Pizza Enterprises Ltd corrected claims in its advertising brochures after the ACCC expressed concerns that a representation in its 'Australia's Most Popular Pizza' advertisement may have misled consumers. The advertisement contained the claim that all of the dough used for its pizza bases was made fresh daily in its local stores. However, not all Domino's dough was made fresh daily in its stores. The 'Classic' and 'Pan' pizza bases were made fresh daily in stores, but the 'Thin 'n' Crispy' pizza bases were made off the premises and delivered snap-frozen to each local store.

ACCC v Jetplace Pty Ltd [2010] FCA 759

²⁷ Source: <http://www.accc.gov.au/content/index.phtml?itemId=773648>

Jetplace Pty Ltd was the operator of the socialising and dating website www.redhotpie.com.au. In addition to the profiles created by registered users of the website, nearly 1400 profiles were fictitious and created by Jetplace itself. Jetplace used some of these profiles to send 'flirts' or customised messages to registered users of the website. The Jetplace profiles also appeared in searches carried out by registered users and by visitors to the website. The court decided that Jetplace had contravened the TPA by engaging in misleading or deceptive conduct and by representing that membership of the website had performance characteristics and benefits that it did not have. The court made orders restraining Jetplace from engaging in similar conduct in the future. Jetplace was also ordered to publish a corrective notice about the conduct when certain users of the website next logged on; to email a copy of the notice to each user; and to implement a corporate trade practices law compliance program.

ACL ss. 251–253 provide the business with access to a range of defences similar to those set out in ACL Part 4-1.

Consumer guarantees

ACL Part 5-4 sets out the remedies available to a consumer when a product does not comply with the consumer guarantees in ACL Part 3-2 (that is, those relating to title, fitness for purpose, etc).

Action against supplier of goods or services

Where the non-compliance is not a major failure, the consumer can require the business to remedy the failure within a reasonable time: ACL s. 259(2). The business can remedy the non-compliance by:

- curing the defect in title (if any),
- repairing the goods,
- replacing the goods, or
- providing a refund: ACL s. 261.

Where the non-compliance is a major failure or cannot be remedied by the business, the consumer can reject the goods (that is, return the goods for a refund or a replacement) or require the business to pay to the consumer the difference between the value of the goods and the price paid for them: ACL s. 259(3). A failure to comply with a guarantee is a major failure if:

- the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure,
- the goods depart in one or more significant respects from their description, sample or demonstration model,
- the goods are substantially unfit for a purpose for which goods of that kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose,
- the goods are unfit for a disclosed purpose that was made known to the business and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose, or
- the goods are not of acceptable quality because they are unsafe: ACL s. 260.

The consumer will lose the right to reject the goods (that is, return the goods for a refund or a replacement) if:

- the rejection period for the goods has ended, or
- the goods have been lost, destroyed or disposed of by the consumer, or
- the goods were damaged after being delivered to the consumer for reasons not related to their state or condition at the time of supply, or

- the goods have been attached to, or incorporated in, any real or personal property and they cannot be detached or isolated without damaging them: ACL s. 262.

The ‘rejection period’ is the period within which it would be reasonable to expect the relevant failure to comply with a guarantee to become apparent having regard to the type of goods, the use to which a consumer is likely to put them, 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 such a failure becomes apparent.

If a consumer acquires goods from a supplier and gives them to another person as a gift, the other person can exercise any rights or remedies which would be available if they had acquired the goods from the supplier: ACL s. 266.

Similar provisions apply to an action against a supplier of services: ACL ss. 267-270.

Action against manufacturer

If a consumer guarantee relating to the supply of goods has not been complied with, the consumer has (in addition to any rights against the supplier) the right to recover compensation from the manufacturer: ACL s. 271.

The manufacturer is not liable if the guarantee was not complied with only because of:

- an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer, or
- a cause independent of human control that occurred after the goods left the control of the manufacturer, or
- the fact that the price charged by the supplier was higher than the manufacturer’s recommended retail price, or the average retail price, for the goods: ACL s. 271(2).

Activity 7.12 — Reflect

Why might a consumer prefer to commence a legal action against the manufacturer of defective goods rather than the supplier (that is, the retailer) of the goods?

Codes of conduct

Industry self regulation plays an important role in Australia’s consumer protection regime. Legislation sets minimum standards, and industry codes of conduct establish ‘best practice’.

Codes of conduct are usually voluntary. However, Part IVB of the *Competition and Consumer Act 2010* (Cth) enables the government to establish mandatory codes of conduct for a particular industry or profession. The government will usually do so if the voluntary code of conduct has been unsuccessful in reforming the industry or profession to better protect consumers. A prescribed mandatory industry code of conduct is binding on all industry participants. The ACCC is responsible for promoting compliance with prescribed industry codes of conduct by providing education and information and, where necessary, taking enforcement action.

Mandatory industry codes of conduct include:

1. the Franchising Code (see chapter 10),
2. the Oil Code, and
3. the Horticulture Code.

Industry ombudsman

As an alternative to lodging a complaint with the ACCC or local consumer protection authority or commencing civil proceedings against the business, a consumer concerned about the conduct of a particular business may be able to take advantage of the services offered by the relevant industry **ombudsman** (see table 7.2).

ombudsman a public official who investigates complaints about the government or an organisation

Table 7.2 — Industry ombudsman

Financial Ombudsman Service	www.fos.org.au
Private Health Insurance Ombudsman	www.phio.org.au
Telecommunications Industry Ombudsman	www.tio.com.au

Activity 7.13 — Research

What types of complaints are dealt with by the Financial Ombudsman Service? What is the procedure for lodging a complaint?

Revision questions

Before proceeding, ensure that you can answer the following questions.

- 7.6 Does the ACL apply to all Australian businesses? How?
- 7.7 What is the role of the ACCC?
- 7.8 Which bodies enforce State consumer protection laws?
- 7.9 How is 'consumer' defined in the ACL?
- 7.10 In what circumstances will a business be in contravention of ACL s. 18?
- 7.11 Why is ACL s. 18 of such broad application?
- 7.12 Can ACL s. 18 be enforced by persons other than consumers? Explain.
- 7.13 How does a court decide whether or not conduct is 'misleading or deceptive'?
- 7.14 Can an expression of opinion be misleading or deceptive within the meaning of ACL s. 18?
- 7.15 Can a statement about the future be misleading or deceptive within the meaning of ACL s. 18?
- 7.16 What are the consequences of contravening ACL s. 18?
- 7.17 How is unconscionable conduct defined for the purposes of ACL s. 20?
- 7.18 What factors are taken into account by the court in deciding whether ACL s. 21 has been contravened?
- 7.19 In what circumstances will a term of a contract be unfair and therefore void under ACL s. 23?
- 7.20 What factors are taken into consideration by a court in deciding whether or not a term of a contract is unfair?

- 7.21 How do the specific protections in ACL Chapter 3 differ from the general protections in ACL Chapter 2?
- 7.22 What kinds of unfair practices are prohibited by ACL Part 3-2?
- 7.23 What kinds of representations are prohibited by ACL s. 29?
- 7.24 What are the consequences of a business displaying a sign that says 'no refunds'?
- 7.25 What is 'bait advertising' and how is it regulated by the ACL?
- 7.26 When will a business 'wrongly accept payment' in contravention of the ACL?
- 7.27 What is 'inertia selling' and how is it regulated by the ACL?
- 7.28 When does a consumer become the owner of unsolicited goods?
- 7.29 What is a 'pyramid scheme' and how are they regulated by the ACL?
- 7.30 What is 'referral selling' and how is it regulated by the ACL?
- 7.31 What is the 'consumer guarantee' implied into contracts with consumers?
- 7.32 What is an 'unsolicited consumer agreement', and how are they regulated by the ACL?
- 7.33 How are lay-by agreements regulated by the ACL?
- 7.34 How is the safety of consumer goods regulated by the ACL?
- 7.35 In what circumstances will a manufacturer be liable to a consumer under ACL Part 3-5?
- 7.36 Contravention of which of the prohibitions in TPA Part V will lead to a fine?
- 7.37 What defences are available to a business accused of contravening the ACL?
- 7.38 What are the general remedies able to be granted by a court following contravention of the ACL?
- 7.39 What are the consequences of non-compliance with a consumer guarantee?
- 7.40 What is a code of conduct, and how does it differ from a legal rule?