

**THE *TRADE PRACTICES ACT*: A HARD ACT TO FOLLOW? ONLINE CONSUMERS AND THE NEW AUSTRALIAN CONSUMER LAW LANDSCAPE\***

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ABSTRACT

As online traders have been poor at developing consumer trust in e-commerce, the law plays a crucial role in creating such trust. At the start of 2010, we published a paper outlining a model to serve as an international best practice standard for the protection of e-commerce consumers. In this article, which was written with the assistance of a generous grant from the auDA Foundation, we have applied that best practice standard to assess how effectively protected Australian e-consumers are under Australia's recently reformed consumer law landscape.

We focus on two areas of central importance to the effective protection of e-consumers in which Australian law fails to provide adequate protection. First, the law must ensure that consumers are afforded access to appropriate information. Second, it is of fundamental importance that the law caters for access to appropriate dispute resolution mechanisms.

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## I INTRODUCTION

E-commerce can give consumers (particularly in rural areas) reasonably priced and convenient access to products not necessarily otherwise available. However, online traders have been poor at developing consumer trust in e-commerce.<sup>1</sup> Consequently, the law plays a crucial role in creating such consumer trust.

So far, there has been a paucity of studies examining the effectiveness of Australia's approach to consumer protection in general, and there are no comprehensive studies seeking to assess how effectively protected Australians are when engaging in e-commerce as consumers.

Moreover, the fact that the Australian consumer law landscape has undergone a fundamental reform, with the last aspects of the reform having taken effect at the start of 2011, means that this is a particularly important point in time to examine the issues at hand.

At the start of 2010, we published a paper outlining a model to serve as an international best practice standard for the protection of e-commerce consumers.<sup>2</sup> The model takes its point of departure in a normative template developed in 2006 by the second author to assess a range of commercial websites.<sup>3</sup> That normative template reflected UN, OECD and Australian sources on e-consumer protection.

Our model identifies four areas of central importance to the effective protection of e-consumers.<sup>4</sup> For each of these four areas of concern, the model outlines a large number of sub-issues. Thanks to a generous grant from the auDA Foundation, we have now been able to apply that model to assess how well protected Australian online consumers are. The areas we studied are as follows.

First, consumers must have access to appropriate information to be able to decide the advantages as well as disadvantages of entering into a particular transaction.<sup>5</sup> In this regard, Australian law is too weak (discussed further below).

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<sup>1</sup> See also Roger Clarke, *Trust in the Context of e-Business* (1 October 2001) Roger Clarke's Web-Site <<http://www.rogerclarke.com/EC/Trust.html>>.

<sup>2</sup> Dan Svantesson and Roger Clarke, 'A Best Practice Model for E-Consumer Protection' (2010) 26(1) *Computer Law and Security Review* 31.

<sup>3</sup> Roger Clarke, *Major Impediment to B2C Success Is ... the Concept 'B2C'* (3 July 2006) Roger Clarke's Web-Site <<http://www.rogerclarke.com/ec/icec06.html>>.

<sup>4</sup> For more information about the methodology used for the development of our model, see Svantesson and Clarke, above n 2, 32.

<sup>5</sup> *Ibid.*

Second, consumers must be able to contract on fair terms. Consumers typically never enter into any negotiation of the terms of a contract. Instead, it is the business that dictates the terms of the contract and it is crucial that the law operates to level the playing field somewhat.<sup>6</sup> Australian law copes well with this requirement and nothing more is said about this here.

Third, it is essential that consumers' personal data are protected as they enter into transactions.<sup>7</sup> While Australian law suffers from severe weaknesses in this regard, those privacy matters are better addressed in a separate article.

Finally, with a large and increasing number of consumer disputes, it is of fundamental importance that consumers have access to appropriate dispute resolution mechanisms.<sup>8</sup> This is the second area of weakness in focus in this article.

Therefore, we present our key findings focusing on two areas in need of improvement in Australia's approach to protecting online consumers: first, how Australian law regulates consumer access to appropriate information and, second, how Australian law addresses the need for appropriate dispute resolution mechanisms.<sup>9</sup>

While our assessment is based on the law as it now stands, important aspects of the empirical evidence of how the law is actually being applied relate to the pre-reform structure. Thus, the article takes account of both the experiences of how the law worked pre-reform, and of how it will work post-reform.

Finally, by way of introduction, as this article applies a model outlined in an earlier work, this article may in a sense be seen as a second part of the first article. However, to ensure that this article is useful and clear in its own right, the key features of the applied model are repeated in this article, obviously causing some repetition for those who have already read the article outlining the model in the first place.

## II GENERAL ISSUES

Prior to the reform, online consumers in Australia were protected by a patchwork of state and federal law including, in particular, the *Commonwealth Trade Practices Act 1974* (Cth) ('TPA'), *Privacy Act 1988* (Cth) and *Spam Act*

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Note that our analyses of the relevant privacy considerations will be presented in a separate article. Further, we do not focus on the impact of self-regulatory codes of conduct. Such instruments are analysed in detail in a coming study.

2003 (Cth), and the State *Sale of Goods Acts* and *Fair Trading Acts*. These Acts overlapped in part and interacted in a complicated manner. Indeed, this regulatory complexity was one of the greatest weaknesses in Australia's protection of e-consumers. The *Competition and Consumer Act 2010* (Cth) including the part titled Australian Consumer Law ('ACL') has doubtlessly simplified the landscape. However, the complexities of a patchwork approach remains to a degree. For example, there is some overlap between matters dealt with under the *Spam Act* and under the *ACL*.

Before moving on to discussing the two key weaknesses in how Australian law protects online consumers (as identified through our model), some observations must be made as to how Australia defines a 'consumer'. Indeed, to understand the Australian approach, it is necessary to note that Australian law gives the term 'consumer' an unusually broad, lengthy and complex definition. Significantly, the Australian definition includes what can be referred to as 'business consumers' - businesses acting as consumers in purchasing goods or services.<sup>10</sup>

### III THE FIRST MAJOR WEAKNESS: APPROPRIATE INFORMATION<sup>11</sup>

An informed consumer is considerably better equipped to look after her/his own interests than an uninformed consumer. Businesses must be required to make available all relevant information that can help the consumer assess the benefits and risks of entering into a particular transaction. Having access to such information equips the consumer to decide whether to contract or not and ensures that the consumer knows what to expect. Hence unnecessary disappointments, with subsequent disputes, are avoided.

E-consumers are particularly dependent on appropriate information being provided, because such information acts as a substitute for the real-life 'touch-and-feel' that occurs during offline transactions. In addition, e-commerce is a particularly suitable transaction form for the supply of information. While it would be virtually impossible to provide signage or printed information materials outlining the specifications of all items sold in physical shops, it is comparatively easy for an e-retailer to include links to detailed information about the products it sells. Thus, legal regulation requiring e-retailers to provide detailed information about their products, the sales process etc., is not prohibitively onerous for the e-retailers.

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<sup>10</sup> *ACL* s 3.

<sup>11</sup> Svantesson and Clarke, above n 2, 33.

The type of information that e-retailers should be required to provide can be broken down into six categories: information about the e-retailer; information about the product; information about the sales process; information about the terms of the contract; information about how the consumer's personal data will be dealt with, and information about applicable dispute resolution processes. The Australian approach to each of these six areas is discussed below, followed by some concluding observations as to the strengths and weaknesses of Australia's approach.

### *A Information about the E-Retailer*

The Internet is a particularly suitable communications medium for those seeking to engage in fraud – a web shop with a professional look can be created in a couple of hours, it can be operated at distance and can be moved and removed as suits the needs of the criminal. Consequently, consumers need information that allows them to assess the reliability of the e-retailer. High quality e-consumer protection regulation must require e-retailers to provide, at least, the following:

- Information regarding the e-retailer's identity;
- Information regarding the e-retailer's place of registration (in the countries that require registration);
- Information regarding the e-retailer's physical location; and
- Information regarding the e-retailer's contact details, including physical address, postal address, e-mail address and telephone number.<sup>12</sup>

Within its limited scope of application, the *Spam Act 2003* (Cth) includes some information requirements.<sup>13</sup> However, the information needs identified above are not restricted to unsolicited electronic messages and thus the impact of the Spam Act is severely limited in this regard.

Furthermore, *ACL* s 100 impacts indirectly on some of this. Section 100(1) requires that suppliers provide the consumer with a proof of transaction where the total price of the product is \$75 or more. Section 100(2) makes clear that consumers can request proof of transaction where the total price of the product is less than \$75. Importantly, the proof of transaction must identify the supplier, including its Australian Business Number (ABN) where available or its Australian Company Number (ACN). While this provision is a step in the right

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<sup>12</sup> Ibid 33.

<sup>13</sup> See especially *Spam Act 2003* (Cth) s 17.

direction, its relevance in relation to the information requirements listed above is limited as it only ensures that some of the information is provided post-contractually. We suggest that the listed information must be provided prior to the contract being formed.

Apart from this, Australian law merely addresses instances where an e-retailer misleads consumers in relation to this type of matters. Where this occurs, the e-retailer may have violated several areas of law such as *ACL* s 18 (previously *TPA* s. 52) regulating misleading and deceptive conduct, and some subsections of *ACL* s 29<sup>14</sup> addressing misrepresentations (previously *TPA* s 53).<sup>15</sup> The case of *Mark Foys v TVSN (Pacific) Ltd*<sup>16</sup> is an example of how the *ACL* seeks to prevent businesses providing misleading information about their identity. There, the Federal Court ruled that a company website with numerous, repeated, and prominent uses of the name of another business, and the graphic depiction of the well-known building from which that business used to operate amounted to a breach.

Another example is found in *ACCC v Chen*.<sup>17</sup> In that case, an individual located in the US had placed a website on the World Wide Web. The website was very similar to, and had a domain name confusingly similar to, the official website for the Sydney Opera House. The operator of the website was found to have represented an association with the Sydney Opera House. An injunction was granted against the website operator.

Apart from the prohibitions in the *ACL* regarding misleading or deceptive conduct, mention must be made of the provisions of the 2006 *Australian Guidelines for Electronic Commerce*.<sup>18</sup> Section 23 of the *Guidelines* suggests that businesses ought to provide consumers with accurate and easily assessable information that allows:

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<sup>14</sup> See in particular s 29(1)(g), dealing with misrepresentations suggesting that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have and s 29(1)(h), addressing misrepresentations suggesting that the person has a sponsorship, approval or affiliation she/hedoes not have.

<sup>15</sup> The tort of passing off may also affect situations where an e-retailer unfairly claims a connection with another organisation or indeed misrepresents itself as being that other organisation.

<sup>16</sup> (2000) 181 ALR 90.

<sup>17</sup> [2003] FCA 897.

<sup>18</sup> Treasury, Commonwealth of Australia, *The Australian Guidelines for Electronic Commerce (17 March 2006) ('Guidelines')* <[http://archive.treasury.gov.au/documents/1083/PDF/australian\\_guidelines\\_for\\_electronic\\_commerce.pdf](http://archive.treasury.gov.au/documents/1083/PDF/australian_guidelines_for_electronic_commerce.pdf)>.

- identification of the business;
- prompt, easy and effective communication with the business regarding any electronic transaction; and,
- service of legal documents.

Further, section 24 states that this information should include:

- the name under which the business trades;
- the physical address of the business and its registration address;
- the business's email address, telephone number and other contact information;
- any relevant statutory registration or licence numbers, including the business's ABN and/or ACN; and
- contact details and an easy method of identifying the membership of and accessing the relevant codes of practice of any relevant self-regulatory scheme, business association, dispute resolution organisation or other certification body. This could be satisfied by displaying the logo of the industry association and providing an Internet link to the association's website.

However, due to their status as mere guidelines, there are no legal requirements for e-retailers to comply with the above.

### *B Information about the Product*

Perhaps the most obvious type of information needed by a consumer is information that allows the consumer to assess the characteristics, quality and price of the product. High quality e-consumer protection regulation must consequently require e-retailers to provide, at least, the following:

- An accurate and appropriately detailed description of the product, its characteristics, uses, limitations (including geographical constraints on use), compatibility, as well as the need for services and maintenance;
- Information as to the full price of the product, including applicable taxes and surcharges (such as delivery costs);
- All costs itemised;
- The applicable currency;
- Information regarding applicable warranties and guarantees;
- Information regarding any applicable after-sales service provided by the seller, manufacturer, or a third-party; and

- Safety-related information.<sup>19</sup>

The *ACL* affords consumers the right to request an itemised bill, but only in relation to services. Consequently the application of itemised bills for consumers purchasing goods in general including those ordered over the Internet is excluded.<sup>20</sup> Although some regulation of the provision of safety-related information exists,<sup>21</sup> the *ACL* has created limiting regulation in this regard. In addition to the regulation of misleading and/or deceptive conduct stemming from *ACL* s 18, it is relevant to note how *ACL* s 29 regulates misrepresentations in a range of specific contexts.

In *ACCC v Hughes*,<sup>22</sup> *TPA* s 53 (now *ACL* s 29) was applied in an online environment. There, false representations were made on a website about the benefits of oral contraceptives sold over the Internet. Amongst other things, it was falsely claimed that the contraceptives had ‘nil side effects’.

In addition to the important s 29, the *ACL* also contains specific regulation of country of origin statements,<sup>23</sup> as well as rules requiring a vendor to provide a clear statement of a cash price.

The application of this latter requirement is exemplified in *ACCC v Virgin Mobile Australia Pty Ltd* (No. 2),<sup>24</sup> where action was taken against a business in the mobile phone industry for conduct that was said to be in breach of the then *TPA* ss 52, 53 and 53C. The violation of s 53C stemmed from the defendant’s failure ‘to state, in its advertisements, the cash price of the relevant mobile phone and/or the cash price, alternatively the minimum cost, of the Telephone and Service Package [in question]’.<sup>25</sup>

Finally, just as in relation to information about the retailer, the *Australian Guidelines for Electronic Commerce* contains guidelines for the relevant information about the product. More specifically, section 28 of the Guidelines suggests that businesses ought to provide all information referring to costs and should indicate the applicable currency, including guidance on how to get information on exchange rates, or a link to a site where such information may be

<sup>19</sup> Svantesson and Clarke, above n 2, 33.

<sup>20</sup> *ACL*, s 101.

<sup>21</sup> For example, *Australian Competition and Consumer Commission v Robinson* [2011] FCA 17 which involved an online trader not providing the required safety standard information for infant sleep bags.

<sup>22</sup> (2002) ATPR 41-863.

<sup>23</sup> *ACL* pt 5-3.

<sup>24</sup> [2002] FCA 1548.

<sup>25</sup> *Ibid* [16].



found. Further, section 31 states the information should include a prominently displayed single-figure total minimum price for the product or service, with all compulsory charges such as delivery, postage and handling charges included in this price. This does not preclude a business itemising the total costs which are collected by the business from the consumer. As noted above, however, these *Guidelines* are not binding on businesses.

### *C Information about the Sales Process*

E-retailers have worked hard to ensure a streamlined sales process, making it as easy as possible for consumers to place their orders. However, the simplicity of the ordering process is typically coupled with complex terms and conditions governing the transaction. In other words, while it may be very easy to order a particular product, it may be very difficult for a consumer to understand the rules governing the sales process. It is consequently important that high quality e-consumer protection regulation requires e-retailers to provide, at least, the following information about the sales process:

- Information about the technical steps to be followed in order to conclude a contract;
- Information about any constraints placed on the sale (such as non-delivery to certain jurisdictions);
- Information about the expected delivery time and method;
- Information about any applicable order tracking system in place;
- Information about the payment process;
- Information about the parties' rights to cancel, terminate or retract, as well as applicable refund, exchange and returns possibilities;
- Information about what will appear on credit card statements in case of sale by credit card; and
- Information about the security measures applied to the transaction.

Furthermore, e-retailers must be required to ensure that any commercial communication (e.g. e-mail or website) is clearly identified as being of a commercial nature.<sup>26</sup>

Also in this regard, the *ACL* disappoints by failing to prescribe a minimum standard of what type of information e-consumers reasonably can expect.

The *Australian Guidelines for Electronic Commerce* contains several provi-

<sup>26</sup> Svantesson and Clarke, above n 2, 33.

sions that are relevant to the type of information, regarding the sales process, businesses ought to provide to their consumers. Sections 33–36 detail how a business engaging in electronic commerce should handle the conclusion of contracts. Section 33 specifies that where appropriate, prior to the conclusion of the contract, businesses should give consumers the opportunity to let them know the purpose for which they require the product or service or the result they wish to achieve. Furthermore, Section 34 suggests that businesses should put in place procedures that let consumers: (1) review and accept or reject the terms and conditions of the contract; (2) identify and correct any errors; and (3) confirm and accept or reject the offer.

Section 32 outlines the information that should be included, where applicable:

- notice of any optional ongoing costs, fees and charges;
- any restrictions, limitations or conditions of purchase, such as geographic limitations;
- details of payment options;
- terms of delivery;
- mandatory safety and health care warnings that a consumer would get at any physical point of sale;
- conditions about termination, return, exchange, cancellation and refunds; and
- details of any after-sales service.

Sections 39–41 discuss how payment from a consumer should be handled. Section 40 outlines how consumers should have access to information regarding: available payment methods; the security of those payment methods in clear, simple language, so as to help consumers judge the risk in relying on those methods; how best to use those methods; how to cancel regular payments under those methods; and any costs applicable to those payment methods.

Section 42 outlines that information should be made available to consumers regarding the security and authentication mechanisms the business uses in clear, simple language which helps consumers assess the risk in relying on those systems.

Once again, however, there is no legislative requirement for businesses to disclose information regarding the process of sale. Instead, remedies are merely available to consumers to whom misleading information has been supplied.

### *D Information about the Terms of the Contract*

Studies show that few consumers ever take the time to read the terms and conditions they agree to when entering into contracts online. For example, in one such study 90% of the respondents indicated that they never read the whole agreement, while at the same time 64% indicated that they always click 'I agree'. Furthermore, 55% did not believe that they entered into a legally binding contract when clicking 'I agree'.<sup>27</sup>

However, that should not be seen as an indication that e-retailers need not provide their consumers with information about the terms and conditions of the contract. Instead, the fact that few consumers ever take the time to read the terms and conditions they agree to highlights that: (1) businesses, including e-retailers, must be required to provide easily accessible information about the terms and conditions they stipulate in their contracts, and (2) the law must be structured to meet the consumers' legitimate expectations of protection. The latter issue is discussed in detail below. Here we focus on the information that must be provided so as to ensure that consumers may be informed about the terms of the contract.

Any jurisdiction aiming at providing high quality consumer protection regulation must insist on e-retailers providing their consumers with the following:

- The terms of the contract expressed in clear, unambiguous and simple language;
- Information of any avenues for negotiating the terms of the contract;
- Information, such as a date, indicating the relevant version of the terms in question; and
- Technical facilities for the safekeeping of the terms (such as printing or downloading).

Furthermore, it is not enough that e-retailers are required to provide the types of information listed above. High quality regulation must also demand that the information be presented in accessible language.<sup>28</sup>

The Australian approach to the issues discussed here can only be described as multi-faceted. It consists of a combination of general principles of contract law, and legislative provisions.

<sup>27</sup> Andrew Gatt, 'The Enforceability of Click-Wrap Agreements' (2002) 18(6) *Computer Law and Security Report* 408, cited in Svantesson and Clarke, above n 2, 34.

<sup>28</sup> Svantesson and Clarke, above n 2, 33-4.

Looking first at the principles from contract law, one can point to the *contra proferentem* rule providing for an interpretation ‘against the interest of the party for whose benefit it was drawn’.<sup>29</sup> The *contra proferentem* rule is applicable to cases whereby ambiguity exists in a term’s construction,<sup>30</sup> and it ought to work as an incentive for contractual clarity, which is of obvious benefit to consumers.

Clarity of drafting will, however, not necessarily protect against actions under the *ACL* s 18,<sup>31</sup> and as far as statute law is concerned, *ACL* s18 is, once again, of key importance. In the case of *eBay AG v Creative Festival Entertainment Pty Ltd*,<sup>32</sup> the Federal Court applied s 52 of the TPA and also general principles of contract law in finding that a vendor’s reference to terms of sale contained on a website separate from their own was misleading and deceptive conduct. In the case, the vendor (Ticketmaster) was selling tickets to a music festival (Big Day Out) on their website. The sale was expressed to be subject to the Big Day Out conditions, which were not contained on the vendor’s website. The consumer had to navigate to the separate Big Day Out website to view the additional terms and conditions. As such, the Court held the vendor had breached s 52, as the vendor’s actions were insufficient to bring the additional terms and conditions to the attention of the consumer.

Further, Australia’s recently introduced unfair terms regulation may have an impact in this context. In particular, *ACL* s 3(2-3) emphasises that the transparency of a contractual term is taken into account in assessing whether or not it is unfair.

Turning to the *Australian Guidelines for Electronic Commerce*, there are several sections under the *Guidelines* that pertain to the terms of the contract. Under the *Guidelines*, businesses should provide enough information about the terms, conditions and costs of a transaction to enable consumers to make informed decision per s 25.

Section 26 specifies the information provided ought to be clear, accurate and easily accessible, and that the information be provided in a way that gives consumers an adequate opportunity for review before entering into the transaction, and that allows consumers to retain a copy of the information.

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<sup>29</sup> Trischa Mann (ed) *Australian Law Dictionary* (Oxford University Press, 2010).

<sup>30</sup> *Burke v State Bank of New South Wales* (1994) 37 NSWLR 53, 72; *Delbridge Pty Ltd v Warrandyte High School Council* [1991] 2 VR 545, 558.

<sup>31</sup> *CH Real Estate Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37.

<sup>32</sup> (2006) 170 FCR 450.

Section 27 states that businesses should provide all information that they are required to provide, either by law or by any relevant code of practice to which the business subscribes. Where there is a legislative or other mandatory regime for disclosing contractual information, compliance with that regime is sufficient to address the *Guidelines*.

In addition to that vacuous non-requirement, s 29 states that information about terms and conditions should be clearly identified and distinguished from advertising material, while section 30 suggests that businesses should give consumers a clear and complete text of the transaction's terms and conditions. The consumer should be able to access and retain a record of that information, for example, by printing or electronic record.

#### *E Information about How the Consumer's Personal Data Will Be Dealt With*

A consumer's personal information is a significant resource, with a commercial value. As a consequence, e-retailers typically have an incentive to collect as much personal information as they can. This creates a conflict with the consumer's privacy interest.

At a minimum, high quality e-consumer protection regulation must require e-retailers to provide existing, and potential, consumers with detailed yet accessible information about:

- How they collect data;
- What that data will be used for;
- Who will have access to the data;
- Where that data is held; and
- How the data will be kept safe.

Such regulation should also require e-retailers to highlight the consumer's rights in relation to the data, such as access and correction rights.

A further concern arises relating to the lack of power of consumers to negotiate terms and the risk that e-retailers generally will make the sacrifice of privacy a condition of doing business.<sup>33</sup> Privacy is, however, not addressed in this article.

#### *F Information about Applicable Dispute Resolution Processes*

Few consumers take account of the availability of a dispute resolution process when deciding whether or not to purchase a particular product. However,

<sup>33</sup> Svantesson and Clarke, above n 2, 34.

consumer re-visits and customer loyalty will be greatly harmed by negative experiences, and aggrieved consumers and consumer advocacy organisations can be expected to generate critical media coverage of unfair behaviour by e-retailers. Moreover, if exposed to information about the applicable dispute resolution process, consumers are better placed to assess the risks of engaging in the transaction. Consequently, high quality e-consumer protection regulations should require e-retailers to provide, at a minimum, the following information about the applicable dispute resolution process:

- Applicable internal complaint systems;
- Applicable external complaints systems;
- Options for mediation;
- Limitations to the consumer's avenues for redress, such as binding choice of forum clauses;
- Applicable choice of law clauses;
- Arbitration clauses; and
- Limitations to the consumer's legal rights, such as lawful exclusion, or limitation, of the seller's liability.<sup>34</sup>

Apart from general principles of contract law, and applicable provisions of the regulation of unfair contracts, which demand that particularly onerous clauses are emphasised, Australian law does not regulate this type of information.

However, the *Australian Guidelines for Electronic Commerce* contains some relevant provisions. Sections 43 and 45 state that businesses should set up internal procedures to handle consumer complaints<sup>35</sup> and to provide consumers with clear and accessible information about complaints-handling procedures including any that may form part of an industry code of conduct to which the trader is a signatory.<sup>36</sup>

Further, sections 45 and 46 of the *Guidelines* state that businesses should provide clear and accessible information on any independent, external customer dispute resolution mechanism to which the business subscribes or any relevant government body. Section 48 requires that where a business specifies an applicable law or jurisdiction to govern any contractual dispute or a jurisdiction or forum where disputes must be determined, it should clearly and conspicuously state that information at the earliest possible stage of the consumer's interac-

<sup>34</sup> Ibid.

<sup>35</sup> *Guidelines*, s 43.

<sup>36</sup> Ibid s 45.

tion with the business.

An Australian Standard on Complaints Handling was published as long ago as 1995, and a subsequent international Standard of 2004 was localised in 2006. Yet the Australian Guidelines, also of 2006, make mention of only the earlier version, and only in a footnote, thereby failing to provide any impetus to the adoption of the international Standard. The international Standard is further discussed below, in the context of dispute resolution.

As mentioned repeatedly above, the *Guidelines* are not binding and, as such, the *ACL* currently has only self-enforced regulation to ensure consumers can receive full information regarding the relevant dispute resolution and jurisdictional issues. Thus, an action may only be brought by a consumer for unconscionable or misleading and deceptive conduct if they are provided inaccurate or misleading information regarding any applicable dispute resolution processes.

It is also important to note that, as the *ACL* is within the Federal jurisdiction, the *Civil Dispute Resolution Act 2011* (Cth) applies to *ACL* proceedings. The policy of the *Civil Dispute Resolution Act 2011* (Cth) is to ensure people take ‘genuine steps’ to resolve disputes before commencing civil proceedings in the Federal or Federal Magistrates Court.<sup>37</sup> Genuine steps are defined as a person’s sincere and genuine attempt to resolve the dispute having regard to the person’s circumstances and the nature of circumstances of the dispute.<sup>38</sup> An applicant instituting civil proceedings at the Federal level must file a genuine steps statement at the time of filing the application, specifying the steps that have or have not been taken to resolve issues in the dispute.<sup>39</sup> A respondent who has been given a copy of a genuine steps statement filed by an applicant must also file a genuine steps statement before the hearing date that must either agree or disagree with the applicant’s genuine steps statements and provide subsequent reasoning.<sup>40</sup> The courts may impose sanctions for non-compliance with the obligation to file genuine steps statements and failure to undertake genuine steps to resolve a dispute.<sup>41</sup>

### *G An Assessment of Australia’s Approach to Appropriate Information*

As has been made clear, the *ACL* has largely adopted an inadequate approach

<sup>37</sup> *Civil Dispute Resolution Act 2011* (Cth) ss 3-5.

<sup>38</sup> *Ibid* s 4(1A).

<sup>39</sup> *Ibid* s 6(2)(a).

<sup>40</sup> *Ibid* s 72(2).

<sup>41</sup> *Ibid* s 11.

to the regulation of what type of information e-retailers must provide to their consumers. Thus, virtually no positive obligations are placed on e-retailers to provide important information. Instead the regulation only becomes relevant where an e-retailer has actively sought to mislead the consumers.

There are several problems with this. First and most importantly, as was noted above and as has been recognised elsewhere (compare eg the relevant EU regulation), by ensuring that e-retailers are required to provide appropriate information to the consumers, the consumers are better equipped to look out for their own interest and, as the saying goes, prevention is better than cure.

Further, where the necessary information is not provided, a consumer may, correctly or incorrectly, start making assumptions as to the matters that should have been made clear in the information provided by the e-retailer. For example, many international companies' websites may automatically redirect you to the national site, with a country-specific domain name (eg .au). Seeing the country-specific domain name, a consumer may reasonably assume that the applicable currency is the Australian dollar. They may proceed with the transaction and charge the amount owing to their credit card. It would not be until receipt of their credit card statement that they would know they had been charged in US dollars.<sup>42</sup> Once such a situation arises, it may be difficult and costly to resolve. The better approach would, of course, have been to avoid it arising by requiring appropriate information to be provided.

To conclude, the strength of Australia's approach to the regulation of what type of information e-retailers must provide to their customers is to be found in the existence of relatively strong abuse regulation, primarily due to s 18 of the *ACL*. The weakness is, save for product safety standards requirements, the lack of regulation setting a minimum standard for what information must be provided.

The existence of the non-enforceable guidelines for electronic commerce is of little use, and does not affect this analysis.

Adding to the problems highlighted above, Australian law also fails to:

- ensure that the type of information outlined above is made available both before and after the transaction is entered into;
- prescribe a time limit for how long the information must be accurate;<sup>43</sup>

<sup>42</sup> Although at the time of writing the Australian dollar is on par with the US dollar, that application of non-trivial exchange fees may impact on the final price the consumer has to pay.

<sup>43</sup> One exception is found in *Spam Act 2003* (Cth) s 17(1)(d).



- require the use of version numbering on all information provided by e-retailers; and
- require e-retailers to provide consumers with a prompt (printable and saveable) confirmation of the transaction as soon as an order has been placed.<sup>44</sup>

#### IV THE SECOND MAJOR WEAKNESS: FAIR AND EFFECTIVE DISPUTE RESOLUTION

Ensuring a fair resolution to a dispute between an e-retailer and a consumer requires a multi-faceted approach. The starting point must be a realisation of two fundamental considerations: first, the combination of the small values typical of e-commerce transactions and the complexities of, and costs associated with, litigation means that few consumer disputes are suitably handled by the legal system; and second, a consumers' right to take legal action is an important incentive to ensure that businesses do not try to avoid their responsibilities.

Taking account of these two considerations, the conclusion must be that any high quality consumer protection regulation ought to provide consumers with a realistic avenue for redress without having to resort to taking legal action against the seller, as well as an appropriate mechanism for pursuing his/her rights in a court where necessary.<sup>45</sup>

The genuine steps procedure outlined by the *Civil Dispute Resolution Act 2011* (Cth) works in favour of an effective framework to ensure fair and effective dispute resolution in Federal level consumer protection cases to some extent. However, more pragmatic improvements better suited to e-retailer and consumer disputes are imperative.

##### *A Appropriate Handling of Complaints*

It was noted earlier that the *Australian Guidelines for Electronic Commerce* create an (unenforceable) obligation on businesses to have internal procedures to handle consumer complaints. This is reinforced by an Australian Standard of long standing, AS 4269, of 1995. This declared a set of 'Essential Elements' (in one page), and provided brief guidance in relation to the implementation of procedures to implement them (in four pages). AS 4269 eventually stimulated, and was superseded by, an international industry Standard, ISO 10002-2004.

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<sup>44</sup> Also in relation to these matters, the applicable provisions in the *Australian Guidelines for Electronic Commerce* fail to act as a substitute for legal regulation.

<sup>45</sup> Svantesson and Clarke, above n 2, 36.

An Australianised version was released in 2006. This document is also very brief, identifying ‘Guiding Principles’ (in just over one page) and providing a Framework (in less than three pages) and notes on the operation of appropriate processes (in less than two pages).

The Australian Standard (*Standard*) has been mentioned in a wide range of regulations at the Commonwealth level and in at least three States. These relate to the areas of Commonwealth concern of financial services licensing, consumer credit reporting and privacy and to the State areas of utilities and fair trading.<sup>46</sup> The impact is limited, however. In some cases, the regulations require only that a regulator ‘take into account’ the *Standard*. Even where an organisation is required to ‘comply with’ the *Standard*, the impact is greatly weakened by the vague nature of the Standard itself.

A number of court decisions have mentioned the *Standard*, most commonly in the context of complaints about misleading and deceptive conduct.<sup>47</sup> Those cases establish an expectation by the Federal Court that at least miscreant companies should have a complaints-handling scheme that ‘complies with’ the Standard, but they fall far short of imposing a legal requirement that every company that deals with consumers have an effective internal process for handling complaints.

The Guidelines for Electronic Commerce also create an (equally unenforceable) obligation on businesses to provide dissatisfied complainants with information about any external complaints scheme that may be available to them. There are many contexts in which such schemes exist, but Australian law is

<sup>46</sup> These include the *Corporations Regulations 2001* (Cth) 7.6.02; *National Consumer Credit Protection Regulations 2010* (Cth) sch 2; *Privacy (Private Sector) Regulations 2001* (Cth) reg 7.3; *Water Industry Competition (General) Regulation 2008* (NSW) sch 2 reg 4(2); *Gas Supply (Natural Gas Retail Competition) Regulation 2001* (NSW); *School Education Regulations 2000* (WA); *Fair Trading Legislation Amendment Regulation (No 1) 2009* (Qld).

<sup>47</sup> *Chapel Road Pty Limited and Australian Securities and Investments Commission* [2003] AATA 660; *Australian Timeshare and Holiday Ownership Council Limited and Australian Securities and Investments Commission* [2008] AATA 62; *CCC v Tel.Pacific Limited* [2009] FCA 279; *Australian Competition and Consumer Commission v Dukemaster Pty Ltd (ACN 050 275 226)* [2009] FCA 682; *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd* [2009] FCA 960; *Australian Competition & Consumer Commission v Refund Home Loans Pty Ltd ACN 106 212 300 (No 2)* [2010] FCA 237; *Australian Competition and Consumer Commission v Panasonic Australia Pty Ltd* [2010] FCA 856; *Australian Competition and Consumer Commission v Cabcharge Australia Ltd* [2010] FCA 1261.

seriously deficient in that it establishes no over-arching or fall-back complaints channel.

Given the very limited guidance that is provided to business by Parliaments and regulatory agencies and the unenforceable nature of such documents as do exist, it is unsurprising that complaints-handling by businesses is often poor, and that external complaints processes are haphazard - in many contexts disappointing to consumers because of a lack of resources, commitment and powers - and in some contexts entirely lacking.

### *B An Appropriate Alternative Dispute Resolution System*

For a dispute resolution mechanism to be adequate, it must be: cost-effective, easy to understand, accessible, credible, timely, transparent to the parties, fair and capable of providing effective remedies. Further, a consumer must have the right to be represented and/or assisted by a third party.

It is common in many jurisdictions to require retailers to have established business processes for handling complaints received from customers. In some industry sectors, industry-wide complaints-handling schemes are available. In addition, many jurisdictions have mature dispute resolution mechanisms that operate administratively or as tribunals, with less strict rules and lower costs than the courts.<sup>48</sup>

An appropriate alternative dispute resolution system requires both these mechanisms; that is, where appropriate, there must be a requirement for e-retailers to maintain an internal dispute resolution scheme, but there must also be an external dispute resolution scheme to which consumers may turn if they are displeased with the outcome or procedure of the internal scheme.

Focusing on the external scheme, we note that, under s 53A of the *Federal Court Act 1976* (Cth), the Court has the power to refer a dispute to mediation or arbitration. A referral to arbitration requires the consent of both the parties as the arbitrator has the power to bind the parties to the decision. Furthermore, s 23 of the *Federal Magistrates Act 1999* (Cth) requires that, if the Federal Magistrates Court considers an alternative dispute resolution will help the parties resolve the dispute, the Court is required to advise the parties to use that process. In addition, as previously discussed, the *Civil Dispute Resolution Act 2011* (Cth) provides an avenue for civil proceedings in the Federal Court of the Federal Magistrates Court for both applicants and respondents to take genuine steps to resolve the dispute before the hearing date commences. However, the

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<sup>48</sup> Svantesson and Clarke, above n 2, 37.

*Civil Dispute Resolution Act 2011* (Cth) could usefully include a separate provision regarding case-by-case online mediation in disputes between e-retailers and consumers, not least across jurisdictional boundaries.

It is worth noting that, in the cases of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*<sup>49</sup> and *Francis Travel Marketing P/L v Virgin Atlantic Airways Ltd*,<sup>50</sup> it has been clarified that one party's reliance upon a provision of the *TPA* does not alone stand in the way of the dispute being open to arbitration. However, it would be inappropriate to read too much into these decisions for the following reasons. First, neither of the parties involved in those disputes were actual consumers. Second, unlike other parts of the *TPA*, the provision argued to be applicable in those cases (s 52) was not mandatory in the sense of being imposed by the then ss 67 and 68. How all this affects the *ACL* remains to be seen.

Furthermore, in relation to international transactions, it is possible to read the unfair contract provisions as limiting the possibility of having international consumers' transactions settled by arbitration.

#### *C A Realistic Avenue for Taking Legal Action*

Litigation, particularly where it crosses jurisdictional borders, is complex and typically very costly.<sup>51</sup> This means that few consumer transactions justify legal action being taken. In other words, it is typically less expensive for a consumer to accept the loss than to take legal action against the seller.<sup>52</sup> However, consumers must always have a realistic avenue for legal action, as the existence of such avenues puts pressure on the e-retailers not to simply ignore consumer complaints.

A realistic avenue for taking legal action requires the following elements:

1. an ability for consumers to take legal action in their local jurisdiction;
2. the application of the consumer protection provided by the consumer's country of domicile;
3. access to advice when taking legal action or being sued;
4. domestic consumer protection agencies actively participating in inter-

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<sup>49</sup> [2006] FCAFC 192.

<sup>50</sup> (1996) 39 NSWLR 160.

<sup>51</sup> In parts, this section draws on a report written by the first author for the XVIIIth Congress of the International Academy of Comparative Law (Washington, DC, 2010).

<sup>52</sup> Svantesson and Clarke, above n 2, 36.

- national cooperation;
5. domestic consumer protection agencies supporting, and actively participating in, individual cross-border consumer claims; and
  6. an ability to participate in class actions.<sup>53</sup>

*D The Consumers' Ability to Take Legal Action in Their Local Jurisdiction*

Australian law does not contain any specific provisions on jurisdiction with respect to consumer transactions and apart from general provisions dealing with unfairness and unconscionability, no steps are taken to ensure that consumers can take legal action in their local jurisdiction. These general legal principles indirectly ensure that consumers have the right to take action in their home forum by invalidating choice of forum clauses in certain circumstances. For example, in *Oceanic Sun Special Shipping Line Co Inc v Fay*,<sup>54</sup> the choice of forum clause was stated on a ticket issued after the contract was concluded. The Court held that the relevant choice of forum clause did not form part of the contract and, as it was deemed unenforceable, the Court did not have to address the matter of the clause's validity. While the validity of the clause was not considered, the decision is interesting in the context of contracts of adhesion not brought to the attention of the party alleged to be bound by the contract.

This type of example is rare and the starting point for any inquiry in this area must be the realisation that forum selection clauses are allowed in international contracts.<sup>55</sup> In *Akai Pty Ltd v People's Insurance Co Ltd*<sup>56</sup> the High Court of Australia noted that, in the absence of strong grounds in favour of allowing the proceeding to continue, a proceeding will be stayed if it is contrary to an exclusive choice of forum clause.<sup>57</sup> The burden of proof is placed on the party seeking to disregard the choice of forum clause.<sup>58</sup>

Consumers may also gain some assistance from s 64 of the *ACL* (similar to the *TPA* s 68) which places several restrictions on clauses seeking to limit the application of parts of the *ACL*. For example, a choice of forum clause nominating a court that would not apply the *ACL* could be viewed as a contractual

<sup>53</sup> Ibid.

<sup>54</sup> (1988) 165 CLR 197.

<sup>55</sup> Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (LexisNexis Butterworths, 7th ed, 2002) 68; Reid Mortensen, *Private International Law in Australia* (LexisNexis Butterworths, 2006).

<sup>56</sup> (1996) 188 CLR 418.

<sup>57</sup> Nygh and Davies, above n 55, 133.

<sup>58</sup> Ibid.

term that has ‘the effect of excluding, restricting or modifying’ the application of the *ACL*. Consequently, s 64 of the *ACL* could have a significant impact on the choice of forum question in international consumer transactions. The exact impact is, however, untested.

There is only limited case law available to illustrate how the provisions discussed above will be construed by judges in the context of international consumer contracts. The reason for this lack of judicial application is presumably twofold. First, in Australia (as elsewhere) few consumers find it useful to go to court in relation to international disputes – the monetary values are simply too small to justify the costs of international litigation. Second, while the attitude may be changing slowly, the Australian Competition and Consumer Commission (‘ACCC’), which is the relevant governmental agency tasked with protecting consumer interest, has been reluctant to deal with cross-border disputes.

Further, for Australian courts to be able to exercise jurisdiction over a foreign defendant that has violated provisions of the *ACL*, it is necessary to show that the defendant’s conduct took place in Australia. This may, however, not be a significant obstacle if the approach taken in a recent decision is accepted. In *Australian Competition & Consumer Commission v ICellnet LLC*,<sup>59</sup> Nicholson J used the High Court’s decision in the *Gutnick* case<sup>60</sup> to conclude that ‘there is an authority that the destination of downloading can be the situs at which an offence is committed’.<sup>61</sup> While this may be a useful approach to ensure that Australian consumers can access the local Courts, it is worrying to see principles laid down in the context of the highly specialised field of defamation being transferred, without discussion, into an unrelated field such as consumer protection.

One of the most significant examples of cross-border litigation in consumer contracts is *Australian Competition & Consumer Commission v Chen*<sup>62</sup> referred to above. There the Court noted that:

While domestic courts can, to a limited extent, adapt their procedures and remedies to meet the challenges posed by cross-border transactions in the Internet age, an effective response

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<sup>59</sup> [2004] FCA 1210.

<sup>60</sup> *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.

<sup>61</sup> *Australian Competition & Consumer Commission v ICellnet LLC* [2004] FCA 1210 [10] citing *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 [44].

<sup>62</sup> [2003] FCA 897.

requires international co-operation of a high order.<sup>63</sup>

Having acknowledged the difficulties associated with enforcing such an injunction, the Court nevertheless ruled in favour of the ACCC.

*L The Consumers' Ability to Ensure the Application of the Consumer Protection Provided by the Consumer's Country of Domicile*

Turning to choice of law question – that is, the consumers' options for ensuring the application of the consumer protection provided by the consumer's country of domicile – the situation is equally grim for consumers. Australian law lacks a general prohibition against choice of law clauses for international consumer transactions. However, whether in an international consumer contract or not, such clauses may be invalid on four different grounds. First, a choice of law clause will be invalid if entered into in bad faith, such as with the aim of avoiding the proper operation of the law.<sup>64</sup> Second, such clauses may be invalid where the chosen law is unconnected to the contract, the parties and the subject-matter.<sup>65</sup> Third, a court may opt not to uphold the parties' choice of law where its application would cause a result contrary to the forum's public policy.<sup>66</sup> Fourth, and most interestingly, as is discussed in detail below, the parties' choice may be affected by overriding legislation.

In addition, s 67 of the *ACL* goes even further and states:

If:

- (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
- (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:
  - (i) the provisions of the law of a country other than Australia;
  - (ii) the provisions of the law of a State or a Territory;

the provisions of this Division apply in relation to the supply

<sup>63</sup> Ibid [61].

<sup>64</sup> *Golden Acres Ltd v Queensland Estate Pty Ltd* [1969] Qd R 378.

<sup>65</sup> Mortensen, above n 55, 392.

<sup>66</sup> Ibid 393.

under the contract despite that term.

These provisions do not include any particular reference to online consumer transactions and, unfortunately, s 67 of the *ACL*, like the same section of the *TPA* before it, has not been the object of any judicial examination that clearly helps predict its implications for international consumer disputes.<sup>67</sup>

Furthermore, it has been noted that the choice of a foreign law as the proper law does not necessarily prevent the application of provisions of the *TPA* primarily aimed at consumer protection:

The fact that the proper law of the contract is the law of a foreign country does not prevent the conduct of one party to the contract from falling within the purview of s 52, if it would otherwise do so. The conduct of a party to a contract under, or pursuant to, or in connection with, that contract, can amount to a contravention of s 52 even though the proper law of the contract is foreign law, provided it is conduct in trade or commerce as defined. There is nothing in the *TPA* which, in the case of trade or commerce carried on under a contract, limits the application of the Act to cases where the relevant contract has local law as its proper law. If it were otherwise, the provisions of the statute could easily be circumvented.<sup>68</sup>

#### *F The Consumers' Access to Advice when Taking Legal Action or Being Sued*

There are doubtlessly many things to consider when embarking on international litigation, and consumers in general are poorly equipped to make informed decisions as to the risks and potential benefits of litigating. Thus, it falls on governmental agencies to ensure that consumers have easy access to:

- sufficient information about the court system;
- information about how to initiate a claim;
- information about what type of evidence is admissible;
- information about what type of evidence is required;
- information about the costs involved;
- information about the consequences of losing the matter (eg having to pay

<sup>67</sup> But see *Laminex (Aust) Pty Ltd v Coe Manufacturing Co & 2 Ors* [1999] NSWCA 370.

<sup>68</sup> *Francis Travel Marketing P/L v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 (Gleeson CJ).



the winning party's costs); and

- information about the consequences of winning the matter (eg whether the consumer will still have to pay her/his own costs).

In Australia, the body best suited to assume the responsibility of providing this information is the ACCC – an independent statutory authority that was implemented to administer the *Trade Practices Act*, among other Acts.<sup>69</sup> The ACCC is the only national agency dealing with competition matters and the only agency with the responsibility of administering the *ACL*. The enduring goal of the ACCC is to 'serve the long term interests of consumers through enforcing compliance with the *Competition and Consumer Act 2010* (Cth)'.<sup>70</sup> The approach of the ACCC contains five elements which are set out by Chairman Rod Sims as follows:

1. The ACCC must be proactive and strategic rather than reactive;
2. The ACCC should not be too conservative;
3. The ACCC must communicate well so people know what we are and are not doing, and most importantly, why;
4. The ACCC should give our opinion where we see the need for law or policy changes; and
5. The ACCC need to keep attracting the best people to the ACCC.<sup>71</sup>

Currently the ACCC identifies that it holds three roles. Firstly, the ACCC must maintain and enhance competition in Australia. Secondly, the ACCC must protect consumers (whether they are individuals or businesses) and ensure they are properly engaged in the market economy. Finally, the ACCC must regulate monopolies effectively.<sup>72</sup>

The goals of the ACCC are achieved in several ways. Foremost, the ACCC has the power (but no obligation) to investigate consumer complaints and bring litigation against businesses that the ACCC believes have violated the consumer protection legislation. A consumer is able to complain to the ACCC if they feel they have been defrauded or deceived.

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<sup>69</sup> Australian Competition and Consumer Commission, *About the ACCC: Our Structure* (2013) <[www.accc.gov.au](http://www.accc.gov.au)>.

<sup>70</sup> Rod Sims, 'Enduring Perspectives and 2012 Objectives' (Speech delivered to the Australia-Israel Chamber of Commerce, Melbourne, 20 February 2012) <<http://www.accc.gov.au/system/files/Enduring%20Perspectives%20and%202012%20Objectives%20-%20Rod%20Sims%20-%2020%20February%202012.pdf>> 1.

<sup>71</sup> *Ibid* 2.

<sup>72</sup> *Ibid* 1-2.

Alongside this, the ACCC provides information, education and legal assistance to consumers, and is able to recommend dispute resolution to businesses and consumers as a possible alternative to litigation.

In relation to international disputes, the ACCC refers consumers to the *ec consumer.org* initiative, which in turn outlines several alternative ways to resolve complaint through independent third parties, without having to file a claim in court. These ADR alternatives do not, however, stand in the way of an aggrieved consumer taking action in the courts.

The ACCC's actual investigatory power is limited. The 2008 – 2009 ACCC Annual Report revealed that close to 12,000 complaints were lodged to the ACCC for what was alleged to be cybercrime related breaches of the *TPA*. However, the ACCC took action in only two of these cases.

Moreover, during the 2008–2009 period, the ACCC had 140 full time investigators, but the team specifically dealing with online scams ranged between only three or four investigators.<sup>73</sup>

Therefore, a deficiency of resources and staff will mean that a large number of consumer complaints will not be actioned. Notwithstanding this, the Annual Report of the ACCC indicated that 74% of calls to the ACCC are answered within 20 seconds, and during the 2008 – 2009 period, the ACCC responded to 112 561 contacts, being a 27 per cent increase over contact levels of the previous year. This would indicate that, while the ACCC is not actively investigating all the complaints it receives, it is facilitating and enabling consumer self-help by increasing its contact levels, thus increasing the information and resources available to a consumer.

Alongside the ACCC, there are also agencies, such as the Australian Securities and Investments Commission (ASIC) that play a part in assisting consumers. ASIC has the power to protect consumers from misleading and deceptive conduct and unconscionable conduct affecting all financial products and services, including the provision of credit.<sup>74</sup> This protection is likely to become increasingly relevant with more banks and credit unions offering instant online approval for products such as credit cards and home loans. Secondly, the Commonwealth Director of Public Prosecutions (CDDP) determines whether

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<sup>73</sup> House of Representatives Standing Committee on Communications, Parliament of Australia, Canberra, 18 November 2009, 11 (Scott Gregson).

<sup>74</sup> See Australian Securities and Investments Commission, *About ASIC: What We Do* (3 May 2013) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/Our+role?openDocument>>.

the ACCC will pursue and prosecute all criminal offences under the *ACL* and holds the statutory power to carry on or to terminate proceedings for committal, trial or for summary convictions.<sup>75</sup> The CDDP has a *prosecution policy* that dictates whether and to what extent the ACCC may investigate alleged criminal offences under the *ACL*. The CDDP may also provide advice to the ACCC on legal and related issues during the investigations.<sup>76</sup>

*G Domestic Consumer Protection Agencies' Active Participation in International Cooperation*

The ACCC is vested with the power to participate in consumer redress related to international disputes. While only courts are entitled to make a determination as to whether a contravention has occurred, the ACCC can bring suspected contraventions before the courts. If the offending party acknowledges its contravention, the ACCC can accept formal administrative settlements or undertakings from the offending party instead of bringing the matter before a court.

The ACCC is not equipped to seek the enforcement of domestic judgments abroad and of foreign judgments before local courts. However, the ACCC is otherwise actively involved with its foreign counterparts. For example, there are several instruments in place that provide the ACCC with the tools to engage in international cooperation, including being a party to many different international treaties and cooperation agreements.<sup>77</sup>

The ACCC represents Australia in several different international organisations such as the International Competition Network ('ICN'). Most importantly, as far as online consumer protection is concerned, the ACCC is a member of the International Consumer Protection and Enforcement Network ('ICPEN'). This is 'a membership organisation consisting of the trade practices law enforcement authorities of more than two dozen countries'.<sup>78</sup> One of the more interesting activities conducted by ICPEN is their 'Sweep Day'. During a sweep day, the member organisations all search the World Wide Web for the targeted online activity, such as get-rich-quick schemes (which were targeted in 2004).

<sup>75</sup> *Director of Public Prosecutions Act 1983* (Cth) s 9.

<sup>76</sup> Attorney-General's Department, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2008) <<http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>>.

<sup>77</sup> A full list can be found here: Australian Competition and Consumer Commission, *International Agreements* (2013) <<http://www.accc.gov.au/content/index.phpml/itemId/255435>>.

<sup>78</sup> International Consumer Protection and Enforcements Network, *About ICPEN* (2013) <<http://www.icpen.org/>>.

ICPEN is also involved in the operation of a website aimed at addressing cross-border e-commerce complaints.<sup>79</sup>

Furthermore, the ACCC Annual Report 2008 – 2009 indicated that the ACCC is actively involved in information exchange with enforcement bodies in other jurisdictions to help facilitate consumer protection cross-border.<sup>80</sup>

*H Domestic Consumer Protection Agencies Supporting, and Actively Participating in, Individual Cross-Border Consumer Claims*

As it is seldom profitable for consumers to invest the considerable amount of money and time required for cross-border litigation, it is important that consumer protection agencies actively participate in, individual cross-border consumer claims. Indeed, it is typically necessary for such organisations to take the lead in such matters.

Examples can be found of the ACCC taking action against foreign e-retailers that have violated Australian law. However, with a continuing increase in cross-border trade comes greater need for resources for the ACCC to be able to pursue even just the most serious matters.

### I THE CONSUMERS' ABILITY TO PARTICIPATE IN CLASS ACTIONS

To commence a representative action<sup>81</sup> in the Federal Court, the *Federal Court of Australia Act 1976* (Cth) s 33C allows that where seven or more persons have claims against the same person and:

(a) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(b) the claims of all those persons give rise to a substantial common issue of law or fact,

a proceeding may be commenced by one or more of those persons as representing some or all of them.

Whilst this seems like strong protection for a consumer, Australian case law has a strict definition of the phrase 'same transaction, event or series of trans-

<sup>79</sup> The website is accessible at: ICPEN, *econsumer.gov: Your Site for Cross-Border Consumer Complaints* (2013) <<http://www.econsumer.gov>>.

<sup>80</sup> Australian Competition and Consumer Commission, *ACCC Annual Report 2008-9* (2013) <<http://www.accc.gov.au/content/index.phtml/itemId/898144>>.

<sup>81</sup> Commonly also referred to as 'class actions'.

actions/events'. As an example, in the case of *Payne v Young*,<sup>82</sup> Payne and six other plaintiffs joined as parties to a claim for reimbursement of fees paid for inspections of their abattoir required by State legislation, which was alleged to be unconstitutional. The Court held the claims arose out of similar transactions, peculiar to each plaintiff, and as such there could be no joinder.

It will depend on the law of each State as to whether a class action may be brought at State level. In Queensland, s 75 of the *Uniform Civil Procedure Rules 1999* allows two or more persons to be plaintiffs where they have the *same interest* in the subject matter of the proceeding. The Courts have held this section is sufficient to allow for class actions to be brought in Queensland. The requirement for the 'same interest' is reflected in the civil procedure legislation of most States and Territories.

The State position is subject to much the same limitations as the Federal provisions. The case of *Carnie v Esanda Finance Corporation Ltd*<sup>83</sup> defined the term 'same interest' to mean 'a community of interest in the determination of some substantial issue of law or fact'. The requirements to bring a class action, however, are less stringent after the *Esanda* case.

#### *A An Assessment of Australia's Approach to Fair Dispute Resolution*<sup>84</sup>

Overall, the Australian position in relation to dispute resolution is weak. There are several flaws with the Australian dispute resolution structure that affect consumers engaging in electronic commerce. Despite the existence of guidelines and standards, businesses are not under any effective compulsion to operate effective complaints-handling schemes and are provided with no meaningful guidance on how to design such schemes. There is little coherence in external complaints-handling mechanisms. Many that do exist are largely powerless. There are many gaps in the coverage and there is no compulsion on businesses to communicate the existence of external complaints mechanisms to their customers.

At the next level, there is a lack of obligation for parties to attend alternative dispute resolution for claims of small amounts. Whilst the Court has the power to refer a dispute to alternative dispute resolution, there is no obligation on the parties to engage in a process such as mediation before turning to the courts.

<sup>82</sup> (1980) 145 CLR 609.

<sup>83</sup> (1995) 182 CLR 398

<sup>84</sup> Due to word limitations, we are here focusing on the Commonwealth level, rather than State level.

As electronic commerce transactions are usually of small value, the cost and complexity of litigating a dispute is not worthwhile. Persons looking to engage in online fraud are well aware of this and are often able to use these factors to try to avoid their obligations. If provisions existed to obligate parties to engage in alternative dispute resolution processes, it would likely reduce the amount of fraud occurring online. If a business had to be consistently engaged in alternative dispute resolution, it is likely they would improve their compliance with the law to save their time and expense.

Next, there is no guarantee that a consumer will be able to take legal action in their country of domicile. The issues with jurisdiction over international disputes are discussed above and need not be reiterated here. The consumer may thus be forced to bear the expense of initiating proceedings in a jurisdiction outside their country of domicile. They will usually be forced to initiate action in the defendant's country of domicile, the location of which may be hard or impossible to establish. Furthermore, this is only adding to the consumer's loss and expense.

Australia's lack of provision against forum selection clauses decreases the potential consumer protection even more. Consumers, when engaging in electronic transactions, will usually be entering into click-wrap agreements, the nature of which have been discussed above. The consumer, therefore, has no avenue of negotiating or removing the forum selection clause from the contract before agreeing to its terms. Whilst several avenues for overcoming a forum selection clause were discussed above, none of them provide solid protection to a consumer, all remaining relatively untested in the courts. Alongside this, unless strong evidence is presented to the court as to why the clause should be overturned, the proceeding will be stayed if it is contrary to the forum selection clause. Taking these matters into consideration, the protection available for a consumer to take action in their country of domicile is limited.

The protection offered in relation to choice of law clauses is better than for choice of forum clauses, but still nowhere near strong enough. A consumer has many more grounds available to them to contest the application of a choice of law clause than a choice of forum clause, and the court seems to read a choice of law clause more onerously. Notwithstanding this, it is worth noting that these provisions are also relatively untested in relation to electronic commerce.

The final concern with Australia's dispute resolution procedures is the stringency with which class actions are dealt. It would be ideal for consumers to have a greater access to class actions, removing such restrictive requirements.

To increase the availability of class actions would increase consumer rights, particularly in situations where a vast number of consumers have been defrauded by a single business in transactions of small value. Whilst it would not be worth the cost of litigation to sue as an individual, it may be viable for a group to come together and bring a class action. Moreover, the potential for a class action to be brought against a vendor would no doubt ensure businesses improved their compliance with consumer protection legislation.

The stronger point of the Australian system surrounds the ACCC and the availability of assistance to consumers who feel they have been mistreated by a business. Unfortunately, the ACCC's limited resources means that the access to this assistance in many ways is more theoretical than practical, with only a fraction of complaints being investigated.

From a practical perspective, it is worth pointing out that the ACCC produces a vast number of publications, has an informative website and is rather efficient in their contact with consumers. This information is generally presented in a way that is easy to access and understand, thus providing consumers with a way to easily gain information regarding their rights and options.

A conferral of more power upon the ACCC to allow it to cooperate with decisions from international consumer protection agencies, along with an obligation to act in certain specified circumstances, would ensure greater consumer protection, whilst also likely increasing Australia's relationship with these agencies.

Overall, there is room for vast improvement in Australia's handling of fair dispute resolution. Much greater protection needs to be implemented to allow for a system that guards the consumer, rather than the corporation.

## V CONCLUDING REMARKS

Applying a model we have developed to serve as an international best practice standard for the protection of e-commerce consumers, we have been able to assess how well protected Australian online consumers are under the new consumer law landscape. In this article, we have presented our key findings by identifying two areas in need of improvement.

The first area studied in detail was how well Australian law copes with the requirement that e-consumers are provided with appropriate information. The conclusion must be that Australian law fails in this regard. Australian regulators have opted for an abuse regulation instead of a prescriptive regulation. Thus, Australian law is only reactive in respect of a matter that also needs

proactive regulation.

The second area of concern we examined was how well Australian law facilitates access to fair dispute resolution. Unfortunately, we had to conclude that Australian law also fails in this regard. This conclusion is unavoidable in the absence of rules ensuring that an e-consumer can take legal action against overseas businesses in Australia and under Australian law.



CASE NOTE

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