

LEGAL STUDIES

Outline the role of law in protecting the rights of the consumer. In your answer, assess the effectiveness of legal processes in resolving conflict in consumer law.

The Trade Practices Act 1974 (Cth) defines a consumer as a person 'who acquires goods or services of less than \$40,000 or of a kind ordinarily acquired for personal or domestic use'. As society has changed, consumerism has also radically changed. There is an array of growing **legal issues** facing consumers that create **injustices**. Such issues include deceptive marketing practices and problems with unmerchantable products. Government bodies, legislation, occupational licensing, damages, injunctions and specific performance orders can be employed to remedy these issues. These **remedies** aim to provide **justice** to consumers and are evaluated in terms of their accessibility, resource and time efficiency and their ability to recognize and protect individual rights. Processes for redress are used to help rectify consumer injustices.

Over time, the role of the consumer has dramatically changed creating legal issues and a need for remedies. During the industrial revolution of the 18th and 19th century, the relationship between the supplier and purchaser gradually changed. During this period, there were major changes to subsistence society which traditionally involved customary means of acquiring goods such as growing fruit and bartering it. The rise of factories created a means by which consumers could have an easy access to a wide range of goods and services and consumers were consequently able to deal with a wider range of suppliers. The *Lassies-faire* approach that customers would not buy from a dishonest trader was no longer relevant as the market place became large and impersonal. Due to the increase in mass-consumerism, the caveat emptor principle arose where consumers had to be aware of faulty products. During urbanisation, consumerism accelerated and as a result, legal issues started to arise, such as deceptive advertising. These issues had to be ameliorated by remedies which are commonly used in contemporary society.

Deceptive marketing practices are devious means by which a business uses to sell its product or service. Deceptive marketing practices may include bait and switch advertising which is when a product is advertised at a very low price to attract consumers who are then diverted by the sales team to purchase more expensive products. Bait and switch advertising was seen in the case of *Reardon v Morely Ford Pty Ltd* (1980) as Morely Ford advertised two vehicles at a low price with the intention of attracting many customers to purchase the many expensive cars on offer. Other deceptive marketing practices include referral selling which is when vendors persuade customers to purchase a product with the promise of a discount if they bring in prospective customers. Such practices are highly unethical, thus, illegal. The Trade Practices Act 1974 (Cth) is a statutory remedy used to protect consumers against such practices and prohibits bait and switch advertising and referral selling under section 56 and 52 of the Act. This law is regulated by the ACCC, thus firms found guilty of such practices are liable to criminal prosecution and penalties of up to \$50,000. The Fair Trading Act 1997 (NSW) is another statute which aims to remedy any injustices or trickery consumers face due to the use of deceptive marketing practices. This law complements the TPA and covers individuals or businesses who have engaged in unscrupulous and misleading advertising in NSW. This illustrates the need for laws such as the Trade Practices Act and the Fair Trading Act to set standards for small and large businesses to conform with, to ensure consumers are fairly dealt with.

These statutory remedies available for consumers are effective as they blatantly state the rights of consumers and the requirements of businesses to obey in relation to advertising. It can be argued that these remedies are cost and time in-efficient as for the laws to be enforced; a court case may have to proceed, although their main aim is to simply allow consumers to achieve justice. The ACCC is another body used to investigate and remedy injustices consumers face from deceptive and misleading advertising. Their effectiveness is displayed through their thorough investigation of the Ribena scandal. As stated in the SMH 07 article "Ribena to withdraw vitamin C claims", Ribena

misled consumers by falsely stating their product “contained four times the vitamin C of oranges”. The ACCC is an accessible body that provides remedies and justice for misled consumers as they offer free investigations. Other remedies which are available to aid consumers who have been misled by deceptive advertising will be discussed below.

Unmerchantable products are goods or services sold that are unfit for the purpose for which they were purchased. All goods are subject to certain qualities and if these qualities are not met, legal issues arise. The Sale of Goods Act 1923 acts as a statutory remedy which states products sold commercially must be of merchantable quality, fit for purpose, sold by description. Defective products are commonly sold. This issue was seen in the case of *Grant v Australian Knitting Mills* 1936 where a man purchased a woolen undergarment and from following the instructions of use which he contracted a severe form of dermatitis from not washing the top before wear. The Privy Council ruled that the business was negligent and should have produced correct labeling and a good ‘fit for purpose’. The Trade Practices Act and Fair Trading Act also include clauses specifying certain requirements goods sold in Australia should meet so they are of merchantable quality and acceptable for use. Occupational licensing is a government requirement that certain businesses obtain a permit or license to operate. Manufacturers must hold a manufacturing license which allows them to operate. Under this license, manufacturers are required to produce ‘merchantable products’ which are fit for their intended purpose. Apple has been criticized for the Ipod batteries they produce and in a SMH article in 05 “Apple offers US\$50 for Ipod battery problems” stated “Consumers with poor battery life will be offered US\$50 coupons and extended service warranties... in a class action suit”. This displays that multinational companies such as Apple distribute unmerchantable products but are compelled to act accordingly by providing a remedy such as a US\$50 damage for consumers who have had problems with their Ipod. Damages are another remedy which will be later discussed. Overall, the Sale of Goods Act, TPA, FTA and occupational licensing are remedies consumers can use to try and mend issues caused by unmerchantable quality. The statutory remedies are accessible as information relating to the laws are readily available online but may be costly as a court case may have to proceed. Occupational licensing promotes justice as the manufacturing industry is required to hold permits to operate and forces them to meet certain standards. These remedies aim to promote justice for consumers to ensure they purchase goods that will be safe and fit for use.

Remedies applicable for both deceptive and misleading advertising and unmerchantable products are similar in application. Both legal issues can be attempted to be resolved through the issuing of damages. Damages are monetary payments ordered by the court to pay the plaintiff who has had been treated unfairly. Damages are only awarded through court, thus, for this type of remedy to be awarded, a court hearing needs to occur. Damages aim to put the parties into the financial position prior to the legal issue.

Damages are effective as they have high levels of compliance and enforceability as are imposed by the court, although, if damages are desired, both parties need to resolve their dispute in the adversarial court process which can be an intimidating, timely and costly process. This remedy aims to provide justice to consumers. **Restitution, expectation, reliance**

An injunction or a specific performance order may be ordered by the courts if a business was found to be carrying out deceptive and misleading advertising or producing unmerchantable products. An injunction and specific performance order is a court order that requires a party to stop acting in a manner or to perform an action. Akin to damages, these remedies are only awarded in court, thus a timely, intimidating and costly court hearing must proceed. These remedies have low level of compliance as parties do not like being forced to perform specific actions but are quite enforceable as imposed by the courts. An injunction may order a business to cease publishing particular advertisements. This was evident in the Telstra case of 2007. Telstra published advertisements on TV which included taglines such as “Everywhere you need it”. This referred to internet access offered by Telstra. In very small print at the bottom of the ads, it stated that coverage was limited to certain regions. The ACCC got involved in this issue and in the SMH 07 article “Conditions apply:

Telstra ads must carry fine print”, they asked the courts for a “...more costly and brand-damaging remedy such as an injunction blocking ads”. This case displays the ability of an injunction to force a business to stop an action in order to act in an ethically and honest manner. A specific performance order would be similar and would require a business to act in other ways, for example, alter the production of a product to create merchantable products fit for use. Injunctions and specific performance orders aim to achieve justice and equality for parties who have experienced injustices due to faulty products of misleading advisements.

In order for remedies to be effective, consumers must partake in a process of redress. Processes for redress include self help and awareness. This should be the first step any consumer should take who has encountered injustices. This step is cost-effective and accessible as consumers deal with their own problems, but may not be effective and may put the consumer in a worse situation legally as the firm the plaintiff is dealing with may exploit their powers or may ignore the issue. Another process for redress is mediation and conciliation. This step is only effective if both parties involved in the dispute voluntarily want to partake in the sessions. Mediation and conciliation is relatively cheap and easily accessible through Community Justice Centres which are open at night. This process is effective as the disputes are resolved with a neutral third party who suggests remedies. As mediation and conciliation agreements are not usually legally binding, there may be problems with enforcement and compliance. This process aims to promote justice for both parties entered into the dispute as a mutually formed agreement intends to be formed.

The NSW Consumer, Trader and Tenancy Tribunal (CTTT) is another process for redress which can be used by a consumer who has faulty goods or who has been deceived by misleading advertising. This tribunal provides a cheap, fast and accessible solution, but is limited to cases less than three years old and issues worth less than \$25,000. Due to this cost limit, most deceptive and misleading advertisement cases against multinational businesses would not be administered by the CTTT. Arbitration is another means for consumer redress which aims to remedy injustices caused by consumer issues. Arbitration is when a neutral third party initiates the issue and provides a legally binding decision to the parties. This process is adversarial and usually provides a fast solution to issues. Inequalities may result through the use of arbitration as the process may be forced upon weaker parties. This remedy is quite costly as legal counsel is required but through the neutrality of the third party, the main aim of this process is to provide justice to the parties.

The court system is another source of redress for consumer issues and allows issues to be dealt with in a formal manner and creates a legally binding decision. Even though remedies produced through court are highly enforceable, the court system proves to be a costly, intimidating and time consuming source of redress for consumer issues. The court system aims to provide a just outcome for the party who has been deceived or mistreated by a business, but due to unequal bargaining powers common to large businesses, many consumers do not receive equal outcomes. The court system is quite effective with consumer issues as ABS statistics in 03 shows only 10% of consumer issues go to court. A class action is when a group of seven or more consumers combine together to initiate a court case against a business that has misled or mistreated them. A class action provides an avenue to collective justice and proves to be a more efficient source of consumer redress as a group of consumers lobby a business rather than one consumer alone. Problems with class actions include difficulties in accessing and distributing damages. A class action aims to provide justice for all consumers who have been wrongly treated by a business.

Overall, there are various legal issues that face consumers in the contemporary commercial world. Such issues include deceptive and misleading advertising and the supply of unmerchantable products. These issues are dealt with using remedies which include government bodies, legislation, occupational licensing, damages, injunctions and specific performance orders. Processes of redress allow a means by which consumers can seek remedies and include self help and awareness, mediation and conciliation, CTTT, arbitration, the court system and class action. These methods aim to provide justice for mistreated consumers.