

# LEGAL STUDIES

## Option 1: Consumers

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### 1. The nature of consumer law

- **The developing need for consumer protection**

- Contemporary consumers rely on the supplier and manufacturer to have the goods at a high standard
- Consumers have developed more access to rights and awareness of rights
- Caveat emptor: 'let the buyer beware' implies that consumers should use their own powers of care and knowledge to protect themselves against exploitation

- **The definition of consumer**

A consumer is a person who buys or uses goods or services generated within the economy. In most cases a consumer can decide whether or not to purchase an item and can be influenced by marketing and advertisements.

- **Objectives of consumer laws**

The primary objective of consumer law is to protect the welfare of consumers → to outweigh the imbalance of power between consumers and manufacturers



The law attempts to achieve this objective by:

- Educating the public to make them aware of their rights – educated consumers can protect themselves from exploitation
- Articulating and mandating standards for the quality of goods and services – this promotes transparency and accountability in the manufacturing and service sectors
- Providing statutory and common law remedies for consumers
- Implementing weights and measures laws providing consumers with reliable benchmarks of quality
- Ensuring that various occupations are licensed protecting consumers in a time of global advertising, mass marketing and e-commerce where there has been a marked reduction in personal interaction between buyers and sellers
- Regulating contractual relationships between buyers and sellers – especially 'unfair' contract terms guarding against unsafe and defective products helping vulnerable and disadvantaged consumers.

- **Contracts – types, elements, terms, exclusion clauses**

A contract is an agreement made between two or more persons that is recognised by the courts as being legally binding on the parties.

**Types:** Written, Oral (rely on good faith) and written-oral (mixture of both)

**Elements:**

Intention to create legal relations: If an agreement is to be treated as a contract, it is essential that the parties intended to enter into a legally binding relationship. A court will look at the behaviour and statements of the parties to determine whether they had such an intention.

Offer: a firm proposal made with a willingness to be bound by the terms → invitation to treat, words or conduct made to invite someone to make an offer or to negotiate.

Acceptance of offer: the unconditional consent to all terms of the offer

Consideration: something given, done or suffered in return for a promise of a contract e.g giving money.

**Terms of a contract:**

Condition: (of a contract) a term of fundamental and essential importance; if a condition is breached by a party then the other party is entitled to end the contract

Warranty: a term of a contract whose breach entitles the aggrieved party to sue for damages, but not to end the contract

Damages: money ordered by a court to be paid to a plaintiff as compensation for damage suffered

**Exclusion clauses:** incorporated to limit a party's liability for conduct that would otherwise breach the contract or cause harm. Should be fair and parties must be aware.

Express terms: have been specifically stated and agreed by both parties at time contact is made

Implied terms: that have not been expressly stated, but which courts are willing or required by statute to enforce.

- Merchantable quality
- Fit for purpose

**Merchantable quality:** a condition in contracts, implied by statute, guaranteeing that goods offered for sale are of a sufficiently high quality to be suitable for sale, and are fit for their usual purpose

**Fit for purpose:** an implied term in contracts of sale, guaranteeing that the goods sold will do what they were designed to do

- **Standards implied by statutes**
- **Unjust contracts – common law and statutory protection**

**Unconscionable conduct:** one party's exploitation of the vulnerability of another party to a contract; the victim may have been impaired by some external factor (e.g. age, disability, lack of education) or he or she may have been deceived or threatened by the stronger party

- Ω Commercial Bank of Australia v Amadio (1983) – signed to hand over house if loan fell through, did not speak English and was not explained terms of contract.
- Ω Blomley v Ryan (1956)

### Common Law Protection:

**Undue influence:** a contract must be fairly negotiated without any undue influence. Where the parties are in a relationship in which one party may be able to exercise considerable influence over the other, there is a risk of abuse of trust.

- Ω Johnson v Buttress (1936) 56 CLR 113 - a will was successfully challenged on the ground that the mental state of the old man, and his dependent relationship with a friend, influenced him in his disposition of a house.

**Reasonable care:** a contract for professional services must be performed with reasonable care.

- Ω Astley v Austrust (1999) 161 ALR 155 - a company sued a law firm in negligence for poor business advice, which had left the company with onerous debts.

**Absence of duress or coercion:** a contract must be entered in the absence of duress or coercion.

- Ω Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd (1991) 22 NSWLR 298, the contract was for paintwork on a helicopter. When the charter company arrived to pick up the helicopter, which had been sent back to correct defects in the paintwork, the document presented by Hawker Pacific showed a lower price but included a term excluding liability for unsatisfactory work. The company urgently needed the helicopter, which had been chartered for that same day, and argued successfully that the contract was void for duress.

**Merchantable quality:** goods should be satisfactory for buyers use

- Ω Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387, underwear purchased caused a severe skin reaction. Grant succeeded in negligence against the manufacturer and against the retail shop for breach of the implied term of the contract of sale, that the goods would be satisfactory for the buyer's use.

**Fit for purpose:** Good is meant to do what is expected

- Ω G. H. Myers & Co. v Brent Cross Service Co. (1934) 1 KB 46, the court held that a repair company that installed faulty connecting rods in a car was liable for the breach of this implied term.

**Match its advertised description:** does what it is advertised to do

- Ω Beale v Taylor (1967) 1 WLR 1193, a car for sale was advertised incorrectly. The buyer was entitled to damages for breach of the English statute applying to the sale of goods.

**Deceptive or misleading:** manufacturers/suppliers cannot engage in deceptive or misleading marketing behaviour.

- Ω In Qanstruct Pty Ltd v Bongiorno Ltd (1993) 113 ALR 667, the members of a company were induced to purchase four life insurance policies, and were told that the payments would be tax deductible. They suffered financial loss as a result of going into debt without realising the promised tax benefits. The statements of the defendant company, Bongiorno, were held to have been misleading.

## Statutory Protection:

Legislation ensures that all consumer contracts contain implied terms providing broad protection against unconscionable conduct, defective products and misleading advertising.

- Sale of Goods Act 1923 (NSW)
- Trade Practices Act 1974 (Cth), now Competition and Consumer Act 2010 (Cth)
- Fair Trading Act 1987 (NSW)
- Contracts Review Act – amends and rescinds contracts)
- Spam Act
- Privacy act
  
- **The role of negligence in consumer protection**

Where goods manufactured without proper care cause injury, loss, damage or death, the consumer is entitled to bring an action under relevant legislation. Alternatively, he or she may have a cause of action for breach of contract, if the supplier or manufacturer has expressly or impliedly promised that the good are free of defect.

**Negligence:** breach of a duty of care resulting in harm that could be foreseen

In Australia, governments seek to keep unsafe products from the market and inform consumers about product safety. Federal and state governments seek to ensure that:

- Unsafe products that reach the market are readily detected and reported
- There is effective and timely removal of unsafe products from the market
- Compulsory product recall occurs if required
- Compensation is available to consumers who purchase unsafe products
- Breaches of consumer protection laws attract sanctions

Ω **PRODUCT RECALL: Cadbury Old Gold Dark Chocolate, 70% Cocoa, 200 gram block – the milk solids weren't declared on the labelling and this caused allergic reactions for lactose-intolerant consumers (2009).**

- **Regulation of marketing and advertising: statutory protection, non-statutory controls on advertising**

## Statutory protection

### Deceptive or misleading conduct

- Section 52 of the Trade Practices Act 1974 (Cth)
- Section 41 of the Fair Trading Act contains a similar provision

MEDIA: Chocolate egg truffle recall – product contained almonds, hazelnuts and gluten and did not display on label.

CASE: ACCC v Telstra – coverage everywhere, disclaimed on website, not obvious enough to be fair to consumer.

### False or misleading representations

- Section 53 Trade Practices Act 1974 (Cth)

MEDIA: Sanitarium warned for false claims about fruit content in cereal. Package picture did not match content.

MEDIA: Ribena – claimed had same level of vitamin C as an orange, not true.

CASE: ACCC V Target Aus – misleading advertising on TV.

### **Unconscionable conduct**

- The federal legislation (Trade Practices Act s 51AB) and Fair Trading Act (s 43) also provide broad protection for vulnerable consumers against unscrupulous suppliers who use their greater bargaining power to obtain an advantage.

CASE: Blomley v Ryan

### **Offering gifts and prizes**

Suppliers who entice consumers to buy their products by offering gifts, prizes or other free items with the intention of not providing the advertised gift breach federal law

- Section 54 of the Trade Practices Act
- Section 48 of the Fair Trading Act is identical

### **Bait advertising**

Advertising goods or services for sale at a specified price with the knowledge that the company will not be able to offer them at that price for a reasonable period

- Section 54 of the Trade Practices Act

CASE: Reardon v Morley Ford Pty Ltd – car dealer advertised price and failed to sell at that price.

### **Referral selling**

It is illegal for a supplier to offer discounts, rebates or other benefits to consumers in return for introducing other customers to the supplier.

- Section 57 of the Trade Practices Act 1974 (Cth)

### **Pyramid selling**

An illegal form of selling whereby an individual pays to become a distributor of a good in return for a reward for recruiting new distributors

- Section 65AAC of the Trade Practices Act

### **Unsolicited and unordered goods**

It is illegal for suppliers to send unsolicited credit cards through the mail, with the exception of credit card companies providing a replacement for an expired card.

- Section 63A and Section 64 of the Trade Practices Act

## Coercion

Corporations may not use physical force, harassment or coercion on consumers in connection with the sale or possible sale of goods or services, or to obtain payment for goods or services.

- Section 60 of the Trade Practices Act

MEDIA: ACCC inquiry into Apple about naming 4G iPad as it doesn't work in 4G network.

**Cooling off periods** – Time that gives buyers an opportunity to rethink or seek external advice on their decision in entering a contract of sale

- Fair Trading Act 1987 (NSW) – regulates direct commerce contracts (door-to-door and telephone sales) and permits a five-day cooling-off period (s40E)
- Conveyancing Act 1919 (NSW) – specifies a five-day cooling-off period for sales of residential property (s 66S)
- Student Assistance Act 1973 (Cth) – provides for a fourteen-day cooling-off period for a loan contract between a student and a financial company.

## Non-statutory controls on advertising

Australia has a highly accessible, self-regulatory framework that complements its statutory regime.

- Administered by the Advertising Standards Bureau (ASB) through the Advertising Standards Board and the Advertising Claims Board.
- These boards operate on the principle that advertisers share a common interest in promoting consumer confidence in and respect for general standards of advertising.
- The **Advertising Standards Board** provides a free complaint resolution service to the public and an appeal mechanism by which the community and advertisers can challenge decisions made by them.
- The **Advertising Claims Board** provides a complaint resolution service regarding issues of truth, accuracy and legality of advertising. Its primary purpose is to resolve disputes between competitors through alternative dispute resolution (ADR), rather than expensive and time-consuming litigation.

- **Occupational licensing**

**Registration:** listing practitioners on an official register to identify them and ensure that they comply with legal requirements

**Certification:** recognising those who have obtained qualifications that are necessary and/or desirable for practicing the profession. It also provides information to the public that will help them choose between competing professionals

**Licensing:** identifying those who have fulfilled criteria related to education, experience and compliance with professional codes of ethics, and authorising them to practice.

- Protects consumers from unqualified professionals, trade persons and businesses

## Self-regulation

One way that industries may set practising standards and regulate the entry of individuals into their field is self-regulation through professional bodies.

- Australian Medical Association (AMA): a national body that regulates the ethics, work standards and academic qualifications of doctors
- NSW Law Society: performs the same role for solicitors in New South Wales.

## State Regulation

State parliaments have enacted legislation that provides strict guidelines regarding the fiduciary duty of solicitors, real estate and travel agents. The objective is to compel businesses, tradespersons and professionals to act honestly and in accordance with their legal duties to consumers.

**Fiduciary duty:** (1) Legal obligations that must be fulfilled without regard to self-interest or the opportunity to make unauthorised profit from the position (2) The legal duty to manage a client's money while it is held in a trust account

- Examples: automobile dealers and repairers, and travel agents

## NSW FAIR TRADING

- Can refuse or remake license in terms of malpractice, inadequate training, breach of conditions/duty, deceptive behavior

**Table 10.2** Reasons for a licence to be refused or revoked

Possible reasons for the refusal of a licence	Possible reasons for revoking a licence
Inadequate training or education of the applicant	Malpractice by the licence holder
Inability of the licence holder to meet minimum industry or professional standards	Fraudulent, misleading or deceptive behaviour by the licence holder
A breach of the licence holder's fiduciary duty with regard to trust funds	
Concern regarding the character of the applicant, such as his or her honesty	

## 2. Consumer redress and remedies

### • Awareness and self-help

Self-help is a useful mechanism for consumer redress because it is resource-efficient and easily carried out. Further, it can provide just outcomes for consumers without undertaking costly litigation.

**Complaints to suppliers** - redress in the form of repair, replacement or refund

- Statutory protections in place for consumers
- Opportunity to foster goodwill and customer loyalty

## Complaints to manufacturers

- Once the location of the manufacturer has been determined, it is wise for the aggrieved consumer to contact the firm via telephone and in writing.
- Under the *Trade Practices Act 1974* (Cth), manufacturers are legally obliged to stand by their warranties/guarantees
- Must meet the requirements for merchantable quality and fitness for purpose
- **State government organisations**

### The roles of these agencies include:

- Educate public about rights
- Provide advice
- Advise governments
- Investigate serious complaints
- Take breaches to the relevant tribunal/court to bring an action

**NSW OFFICE OF FAIR TRADING** – The legislative framework that governs this organisation sets the rules for fairness in the daily transactions between consumers and traders. It investigates unfair practices and administers the licensing of operators in a range of industries

- Property manager sentenced to 18 months prison
- Wagga Wagga businesses checked by Fair trading – 72 breaches of legislation

**COMMUNITY SERVICES COMMISSION** – deals with complaints relating to aged care, disability care and home care. It also conducts reviews of people in care and monitors community service issues.

**NSW LEGAL AID** – Legal Aid Commission Act 1979 (NSW)

- Independent statutory body
- Helps people with low financial status to have a fair go in court
- Provides legal advice and assistance to socially and economically disadvantaged people, including court representation upon successful application for a grant of legal aid
- **Federal government organisations**

## COMPETITION AND CONSUMER POLICY DIVISION OF THE COMMONWEALTH DEPARTMENT OF THE TREASURY

- Provides advice to the Commonwealth Government on the consumer policy framework contained in the federal legislation and on how to promote competitive and informed markets
- Advice on the policy and regulatory frameworks for promoting competition, and those for consumer protection

## COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL (CCAAC)

- Provides independent advice to the Minister for Competition Policy and Consumer Affairs on consumer policy issues



## THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

- Independent statutory body that regulates Australia's corporate markets and financial services sectors
- Ensures that Australia's financial markets are fair and transparent
- Enforcement of consumer protection laws covering investments, superannuation, insurance and financial advice
- Australian Securities and Investments Commission Act 2001 (Cth)
- Corporations Act 2001 (Cth)

## AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

- Administers the federal consumer legislation
- Promote competition and fair trade in the marketplace (regulates monopolies)
- Packaging and recycling group Visy Industries Pty Ltd received a \$36 million fine in Nov 08 for price-fixing in the market for cardboard cartons, breached the Trade Practices Act by engaging in illegal cartel behaviour with rival packaging company Amcor Ltd.
- ACCC bites Apple for selling iPad as 4G
- Suppliers refer coles and woolies to ACCC – increase in demand and asking for a lower price

## MINISTERIAL COUNCIL ON CONSUMER AFFAIRS (MCCA)

- Responsible for fair trading, consumer protection and credit laws
- Consider consumer policy issues of national significance
- Develop a consistent approach to those issues
- Facilitates communication and cooperation between Australia and New Zealand

- **Industry organisations**

### Industry based ombudsman:

Takes complaints from citizens or consumers about agencies, departments or providers and investigates these complaints in order to reach a resolution that is fair to both sides.

- MEDIA: Ombudsman acts on Sydney water and watchdog – investigation of odor coming from plant (Sydney water) and nothing has been done about it.

### Industry based dispute resolution:

Complaint handling and dispute resolution schemes designed to provide consumer remedies, enhance business reputation and support claims that these industries are self-regulating.

### Customer focused corporate compliance programs:

Internal self-regulatory programs that aim to ensure that a business meets its legal obligations to consumers, and to remedy any breach

Improve relations with customers

- MEDIA: code of practice being introduced to settle NRMA dispute

- **The role of tribunals and courts**

### **Consumer trader, Tenancy Tribunal (CTTT)**

- Consumer, Trader and Tenancy Tribunal Act 2001 (NSW)
- Resolve disputes between tenants, landlords, traders and consumers in a timely and effective manner

### **Courts**

- Last resort
- Ensure laws comply with Australian constitution
- Interprets legislation
- Costly

- **The role of non-government organisations**

### **Consumer Credit Legal Centre (CCLC)**

- Community legal centre specialising in issues related to financial services, such as consumer credit, banking and debt recovery
- Focus on issues concerning economically disadvantaged consumers

### **Choice**

- Researches and campaigns on behalf of consumers and publishes Choice magazine
- Provides consumers with independent advice on product quality

### **Consumers' Health Forum of Australia**

- The national peak body representing the interests of Australian health care consumers

### **Consumers' Federation of Australia**

- The national peak body for Australian consumer groups
- Its members include legal centres, local organisations and public interest bodies

### **Not Good Enough ([www.notgoodenough.org](http://www.notgoodenough.org))**

- Website to help consumers to resolve disputes with suppliers of goods and services
- Publishes individuals' input about products and services, and facilitates responses from companies

- **The role of the media**

- Provide the consumer with information regarding the release, quality and safety of new products
- Various lifestyle and current affairs programs feature segments that address consumer complaints and interests
- Biased in favour of sponsors
- Generally provide the consumer with another layer of information and publicise the shoddy practices of unscrupulous suppliers and manufacturers

- **Consumer remedies: individual, society**

### **Court-based**

A court may award any of a number of remedies to a successful complainant. These include:

- Damages – monetary compensation awarded by the court and paid by the defendant to someone who proves that loss was suffered as a result of the defendant's actions
- Rescission and modification of contract – if a court considers a contract to be unfair, it can order a contract to be rescinded (cancelled) and a new one created
- Special orders – courts may resolve consumer disputes by issuing orders for rectification of the wrong, for example the repair of defective goods
- Injunctions – a court may order a party to a contract to refrain from doing something that is in breach of the contract
- Specific performance – a court order requiring a party to a contract to perform the obligations that he or she has agreed to in the contract.

### **Alternative dispute resolution**

Negotiation – Mediation – Conciliation – Arbitration

### **Benefits to the individual and society**

The societal benefits of consumer redress include:

- The promotion of social equality – consumers are treated similarly regardless of their educational levels and bargaining power
- Safety – dangerous products are not allowed into our markets
- Ethical conduct – by requiring suppliers and manufacturers to fulfill obligations to consumers, expectations of responsible behaviour are reinforced
- International cooperation – in a globalised marketplace, a national commitment to consumer protection may have consequences for other countries as well, at least in theory
- Greater choice and quality – market conditions become more consumer-friendly

## **3. Contemporary issues concerning consumers**

- **CREDIT**

Credit is the purchase of goods and services in advance of future payment. Many individuals in our consumer-driven society obtain goods and services via the use of a credit card or loans. In a sense, the 21st century is rapidly becoming a 'cashless society' in which credit providers issue loans almost too readily. In fact, many consumers live well beyond their means, and as a consequence, can risk exploitation by unscrupulous lenders. As a result, they have trouble meeting their repayments, and cars, house- hold goods or even homes are repossessed.

In addition, consumers face other credit issues such as:

- Unfair contract terms
- Credit providers with inadequate procedures for handling complaints
- Time delays in the handling of complaints by credit providers
- Too many steps involved in the process of seeking legal redress and hence only the most sophisticated consumers will persevere.

## LEGAL RESPONSES

### Australian Securities and Investment Commission Act 2001 (Cth)

- Created a separate legislative framework for the regulation of financial services
- Enhances consumer protection
- Protects/assures consumer and industry from unscrupulous behaviour
- Credit market of greater integrity through government monitoring
- Conditions of Australian credit license
- Lending standards (providing credit/assistance)

### Key Legislation

Trade Practices Amendment (Australian Consumer Law) Act 2009 (Cth)

Competition and Consumer Act 2012 (Cth)

Fair Trading Act 1987 (NSW)

National Consumer Credit Protection Act 2009 (Cth)

Credit (Commonwealth Powers) Act 2010 (NSW)

Civil Liability Act 2002 (NSW)

Contracts Review Act 1980 (NSW)

#### Benefits from this legislation:

- Responsible lending standards
- Robust licensing regime that excludes unscrupulous providers
- Creates greater integrity within the system
- Rigorous entry conditions
- Greater consumer confidence

### The Uniform Consumer Credit Code (UCCC)

- Outline rights/requirements in any credit arrangement
- Disclose all information about arrangement through written contract
- Cannot enter into contract with consumer who may find it difficult to make repayments - Amadio v Commonwealth Bank (unconscionable conduct)
- Debtors know their contract is backed by national legislation
- Failure to comply with the code can lead to civil penalties up to \$500 000 and/or criminal charges
- A consumer credit code business checklist - "plain English" guide to setting out credit contract
- Pre contractual statement disclosing mandatory details about fees and charges/information statement - consumer rights/obligations

#### Media Articles

##### SMH 'Banks target vulnerable customers'

- The law centres policy and campaigns adviser, Gerard Brody, said new credit laws offered some consumer protection, but banks were allowed to profile and target their customers through data mining

##### SMH 'RBA cracks down on credit card charges'

## Cases

ASIC v Healey 2011 - Corporations Act 2001 (Cth)

- Directors and a former officer of Centro were to breach their duty of care and diligence in relation to the relevant Centro entities and failed to take all reasonable steps to ensure compliance with the financial reporting obligations

## **NON-LEGAL RESPONSES**

**NSW Office of Fair Trading** – provides free advice regarding the consumer credit code

**Community Justice Centres** – provide free mediation and conflict management services

**Financial Ombudsman Service** – provides a free mediation service

**Consumer Credit Legal Centre** – provides free telephone and financial counseling advice, particularly for low income consumers

## Media Articles:

SMH 'Consumer credit legal centre'

- QLD couple approached fast access finance to borrow \$1000 due to substantial debt
- \$98 per week for 5 months - excess of 48% interest rate imposed by government
- Consumer credit legal centre took issue to Queensland Civil and Administrative Tribunal

SMH 'NSW Office of Fair Trading

- LJ Hooker received \$80 000 deposit on house - did not disclose all information to the consumer about the history of the property - occupants killed
- Agency refused to refund the money after information was disclosed
- Office of Fair Trading found the agents had breached the Competition and Consumer Act by misleading the consumer - deceptive conduct

## **RESPONSIVENESS OF THE LEGAL SYSTEM**

Laws dealing with credit issues are designed to protect the rights of consumers entering credit agreements. Responsiveness of the law to this issue is so that all Australian consumers are protected from unconscionable credit contracts

- The ASIC has the authority to levy fines of up to \$220000 for an individual and \$1.1 million for a corporation
- Infringement notices enabling Australian Securities and Investments Commission (ASIC) to act quickly to penalise breaches of the law

Media Article:

SMH 'Leighton accepts ASIC infringement notices'

- Leighton accepts 3 infringement notices
- Paid penalty of \$300 000
- Accepted penalty to avoid further legal costs

## Compensation Remedy

- The aim of compensation is to reimburse consumers for financial loss.
- The Financial Ombudsman Service (FOS) has previously proposed the establishment of an industry based Financial Services Compensation Scheme (“FSCS”) for retail clients. The scheme proposed by FOS is industry based and industry funded, provides adequate but limited compensation to consumers as a last resort.

2011-2012 Annual Review (FOS): Disputes resolved continue to rise

Effective, responsive, well-known

The Circular – fall in disputes = effectiveness

## • PRODUCT CERTIFICATION

Product certification is the process of providing a guarantee that goods/services have passed performance and quality tests before they are marketed.

LEGAL RESPONSES	NON-LEGAL RESPONSES
<p><b>The Australian Competition and Consumer Commission (ACCC)</b> enforces mandatory product safety and information standards and bans unsafe goods under the Competition and Consumer Act.</p> <p>The <b>NSW office of Fair Trading</b> also plays a role in monitoring product safety under the Fair Trading Act.</p> <p><b>Product Safety</b> Product suppliers and manufacturers have an obligation to ensure that only safe products are marketed. Can be done by:</p> <ul style="list-style-type: none"> <li>- Providing clear instructions for use, including warns for potential misuse of the product</li> <li>- Being aware of industry standards</li> <li>- Developing product recall plans and procedures, including strategies for effective communication to the public</li> <li>- Incorporating safety standards through product improvement</li> </ul> <p><b>The Australian Securities and Investment Commission Act 2001:</b> This legislation is enforced by the ‘Australian Securities and Investment Commission (ASIC)</p> <ul style="list-style-type: none"> <li>- Ensuring that market participants act with integrity with regard to contracts for loans, superannuation and other financial products and services</li> </ul>	<p><b>Not Good Enough:</b></p> <ul style="list-style-type: none"> <li>- Consumer advocacy website.</li> <li>- Allows consumers the chance to discuss product and services quality.</li> <li>- Another area in which the website protects consumer rights is that it publishes consumer feedback</li> </ul> <p><b>CHOICE:</b></p> <ul style="list-style-type: none"> <li>- An independent publisher of consumer information</li> <li>- Rigorous and scientific product reviews that staff perform in order to ensure that products are up to expected standard.</li> <li>- Government and industry lobbying campaigns to ensure that rights are protected.</li> </ul> <p><b>The Media:</b></p> <ul style="list-style-type: none"> <li>- Most influential industries. Chance for consumers to be informed and to inform others and a chance to resolve disputes.</li> <li>- Places pressure either on governments or manufacturers to improve the quality and standard of products.</li> <li>- Accessible to all, with many stories being globally available on the internet. It also informs the consumer of their rights in simple terms.</li> </ul>

<p><b>This statute is policed by the ACCC;</b>  The ACCC has the power to conduct random national surveys of retail outlets in order to detect non-complying products;</p> <ul style="list-style-type: none"> <li>- Investigate allegations by consumers and suppliers about non-complying goods and investigate goods sold by direct marketing</li> <li>- Conduct product recalls, contain court-enforceable actions and/or initiate prosecution</li> <li>- It can seek proof and request for goods to be test</li> </ul> <p><b>Certification marks</b></p> <ul style="list-style-type: none"> <li>- Guarantees have been made by credited certification organisations that the item tested is identical to the one offered for sale</li> <li>- The manufacturer's packaging, literature and promotional information are authorised to use the certification mark</li> </ul> <p>The CE mark indicates that a product can be legally sold within the European Union</p>	<ul style="list-style-type: none"> <li>- Can often be bias and it has a lack of enforceability</li> </ul>
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**CASE: Bindeez Beads**

- Chemical found in beads that could harm children if swallowed
- Product recall

*MEDIA: CHOICE "Call for Updated Stroller Safety Standards"*

- 3/18 strollers tested complied with voluntary safety standards
- Encourage government to bring mandatory safety standards up to date

**PRODUCT STANDARDS**

**SAFETY STANDARDS:** include safety, labelling and design requirements. Established when there is a clear risk to consumers.

**Hot water bottles:**

**Identified risk to consumer:**

Hot water bottles have been known to cause serious burns when placed directly on skin.

**Safety standards:**

Must be sold with cover and instructions to ensure consumer is aware of importance of not placing directly on skin.

**Children's dummies:**

**Identified risk to consumer:**

Incorrect design structure can pose serious hazards to young children e.g. chocking.

## Safety standards

Number of restrictions on size, shape and materials have been introduced

### Case study:

5 month old choked and died when dummy with small shield and no holes became caught in his throat – did not meet safety standards.

**INFORMATION STANDARDS:** Prescribed information must be given to consumers when they purchase specific goods. E.g. information including contents and risks

### Flotation Buoys:

#### Identified risk to consumer:

Aquatic toys are not safety devices

#### Information standards:

Warning must be visible – in caps lock/bold so is highly visible to consumer

### Macro Chocolates:

#### Identified risk to consumer:

Batch of chocolates released earlier this year failed to list all included ingredients – posed serious health threats to those with allergies

#### Information standards:

- Products were recalled as to ensure consumers were not harmed
- Products must clearly label all ingredients.

## RESPONSIVENESS OF THE LEGAL SYSTEM

Federal and state governments enforce mandatory product safety and information standards via the ACCC and the NSW Office of Fair Trading. Both organisations play a central role in educating businesses and consumers about product safety, and publish publications on safety and standards. They also conduct ongoing marketplace surveys to ensure that products continue to meet acceptable standards. Both organisations can prosecute suppliers who ignore their statutory obligations.

Where problems do occur with a product, both the ACCC and Office of Fair Trading have powers to remove unsafe goods from sale. This might include recalling dangerous products or a public warning of a particular defect.

Clearly, without a product certification process in operation, there would be a very real risk to the health and safety of Australian consumers, as a consequence of inadequate quality assurance and safety measures.

## MARKETING INNOVATIONS

- A process by which a business creates a 'consumer interest' in its products.

**Testimonials** (consists of a written or spoken statement, targeting/applying to ordinary citizens) and **Endorsements** (applies to pitches by celebrities, acting on behalf of a company to advertise the good or service) are classified as types of marketing, with the aim of adding credibility to their product



## Types of Marketing Techniques:

- Gifts and Prizes
- Cash-Back Offers

LEGAL RESPONSES	NON-LEGAL RESPONSES
<p>Legislation is put in place by the Aus Gov with the aim of protecting consumers from new marketing innovations such as spam, false websites and phishing</p> <ul style="list-style-type: none"> <li>- Spam Act 2003 (Cth)</li> <li>- Competition and Consumer Act 2010 (Cth)</li> </ul> <p><b>The Australian Competition and Consumer Commission</b></p> <p>Ineffectiveness is supported in a recent media article in the Sydney Morning Herald "Mounting Scams target busy owners" <a href="http://www.smh.com.au/small-business/mounting-scams-target-busy-owners-20120318-1vdog.html">http://www.smh.com.au/small-business/mounting-scams-target-busy-owners-20120318-1vdog.html</a></p> <ul style="list-style-type: none"> <li>- The article states how reports of internet scams have only increased (nearly 4 times more from 2009 and 2012).</li> <li>- It is clear that with the number of consumers trapped in online scams and marketing innovations increasing.</li> <li>- However in some aspects in ACCC is effective in preventing consumers from becoming victims from marketing innovations as they have a website dedicated to this issue</li> <li>- <b>SCAMwatch</b> is a website created by the ACCC dedicated to informing consumers about scams and allowing them to report and possible scams they have encountered.</li> </ul> <p><b>The Australian and Communications and Media Authority (ACMA)</b></p> <p>In the case of ACMA v Clarity1 Pty Ltd the ACMA successfully charge Wayne Mansfield the director of the company Charity 1 with sending 213 million 'commercial electronic messages' under the trading names of two businesses Business Seminars Australia and Maverick partnerships</p> <p>The penalty for this was \$4.5 million against the company and \$1 million against Wayne Mansfield, this shows the effectiveness. Justice</p> <p>Landmark case where two companies Mobilegate Ltd and Winning Bid Pty Ltd and three owners were found by the federal court to be in breach of the Spam Act 2003. They were the first case to be brought to the courts about spam via SMS messaging. The money the company took accumulated to \$2 million dollars. The companies and owners were all fined to a calculated sum of \$15.75 million</p>	<p><b>Australian Communications and Media Authority</b></p> <ul style="list-style-type: none"> <li>- Statutory authority</li> <li>- Within the federal Department of Broadband, Communications and the Digital Economy</li> <li>- Responsible for the regulation of broadcasting, radio and television communications, and the internet</li> </ul> <p><b>Australian Direct Marketing Association</b></p> <ul style="list-style-type: none"> <li>- Industry body for direct marketing companies</li> <li>- Developed the 'eMarketing Code of Practice' (2005) - Spam Act 2003 (Cth)</li> <li>- Details how marketers can and cannot use electronic messages</li> </ul> <p><b>Internet Industry Association (IIA)</b></p> <ul style="list-style-type: none"> <li>- Organisation for internet service providers</li> <li>- Developed several codes of practice</li> <li>- IIA Spam Code of Practice (2006)</li> </ul> <p><b>Australian Securities and Investments Commission (ASIC)</b></p> <ul style="list-style-type: none"> <li>- Regulate and enforce laws relating to fairness and honesty in financial services, markets and companies</li> <li>- Oversees the regulatory issues posed by developments in electronic communication</li> <li>- Responsible for approving codes of practice in the financial services industries</li> </ul>

## Media Articles:

Google, Facebook and others team up to combat email scams – SMH Jan 31 2012

Bigpond backs down on Uluru adverts – SMH Sept 8 2008

Intrinsic marketing of call centres <http://www.abc.net.au/news/2008-12-08/intrusive-marketing/233198>

## Cases:

Hurley v McDonalds: McDonalds ran a competition where customers had to collect and match tokens to win a prize → repeated next year and previous token not accepted Mr Hurley took McDonalds to court saying company had acted unconscionably. Ruled that Hurley had to show that McDonalds were liable for 'serious misconduct or something clearly unfair or unreasonable' and failed to establish.

## Responsiveness of the legal system

- The Australian legal system gives consumers adequate protection against the misuse of technology available to e-marketers within Australia
- Competition and Consumer Act 2010 (Cth)
- Telecommunications Act 1997 (Cth)
- Allows the ACCC to police the consumer laws domestically, with a wide variety of civil sanctions available
- Cross-border e-marketing
- Future consumer solutions may be dependent upon the existence of multilateral international treaties

Australian consumers buying products in Australia are clearly protected. The emerging problem, however, relates to marketing that originates from foreign countries via the internet.

Advances in electronic marketing allow fraudulent marketers to communicate easily with their victims and to transfer ill-gotten gains across borders. The transnational nature of scams makes it very difficult for Australian authorities to catch the perpetrators. Further, there are complicated and problematic questions of jurisdiction and foreign law.

**Conclusion:** There will continue to be consumer protection issues raised by marketing in the information society. Domestic law has served us well, but it may prove to be powerless when it comes to online purchases from foreign marketers. Australia doesn't exist in a vacuum – we are part of a global marketplace, which employs rapidly changing technologies. Countries cannot shut down their borders to keep out an incoming cyber-threat. Attempts to solve these challenges at the national or regional levels are simply not sufficient. Cyber-criminals are not bound to geographical locations, so laws and technological measures can no longer be limited to national or regional boundaries.

## • TECHNOLOGY

Technology is the application of scientific knowledge to make life easier for humans. To that end, the use of new technology in the areas of computing and global communication is constantly changing the level and complexity of interaction between consumers and sellers.

Technology has infiltrated all levels of consumer transaction services – ATMs, EFTPOS and electronic home and office banking services.

The problem facing consumer law is that the various services now available over the internet operate in a less regulated environment. These include e-mail, file transfer capability (FTP), and most significantly, Hyper Text Transaction Protocol (HTTP), which provides the basis of the World Wide Web.

## LEGAL RESPONSES

The use of technology in the global marketplace makes it very difficult for Australian law because it has no international jurisdiction, and legislative strategies for meeting these challenges are still developing.

- Assets of a foreign online marketer can be frozen however the absence of international treaties and foreign bank privacy laws may make it difficult to recover a consumers money
- Arrest warrants can be issued, and if there is an extradition treaty with the foreign country, individuals in that country who breach our consumer laws can be extradited to Australia for trial
- ACCC has authority under *Telecommunications Act 1997* to administer Rules of Conduct governing deals with international telecommunications operators

Issues arising in respect to online transactions include:

- There is a need to ensure fair dealings between suppliers and consumers
- Consumer deals are increasingly occurring over the phone or internet, consumers need to be aware that deals are fair and honest
- Many sites offer computer-generated responses, which prevent consumers from effectively self-helping
- Increasing trend of online shopping through remote purchasing can result in a compromise of product quality, provision of advice, and “after-sales service”
- Need to ensure that identity data gathered about consumers via their online transaction is protected and privacy maintained- privacy laws are generally effective in ensuring this. E.g. many charity companies buy a section of a magazine mailing list (e.g. Reader’s Digest) and use their details to email, phone or mail information to them in order to receive a donation

**It is necessary within a technological society, to constantly reform the law in order to ensure justice for consumers is achieved.**

**New technological abilities such as online shopping, pose an issue of scams and fraud for consumers which need to be addressed through both domestic and international law.**

MEDIA: Warning of tap and pay technology

MEDIA: Online privacy laws - consumers need to be made known of where their information is being collected and where it’s being used.

## NON-LEGAL

### **Australian Direct Marketing Association (ADMA)**

- Industry body for direct marketing companies
- Strongly committed to self-regulation
- Formulated the ‘eMarketing code of Practice’ (2005) - supplement the Spam Act 2003 (Cth) = regulates commercial electronic messages and outlaws spam

**Internet Industry Association (IIA)** developed the Spam Code of Practice (2006) - supplement the Spam Act 2003 – explaining its requirements and how to comply with it

### **The Australian Securities and Investments Commission (ASIC)**

- Mission: regulating and enforcing laws relating to fairness and honesty in financial services, markets and companies
- Responsible for approving codes of practice in the financial services industry (e.g. Electronic Funds Transfer Code of Conduct)

## **Australian Communications and Media Authority (ACMA)**

- Statutory authority (Federal Department of Broadband Communications & the Digital Economy)
- Responsible for the regulation of broadcasting, radio, television communications and the internet - ACMA v Mobilegate SMS Spam Penalty (2009) Ronnie Usmanov

## **RESPONSIVENESS OF THE LEGAL SYSTEM**

Generally, the Australian legal system affords consumers adequate protection against the misuse of technology provided that e-marketers are located within Australian borders. The Trade Practices Act 1974 (Cth) and Telecommunications Act 1997 (Cth) allow the ACCC to police the consumer law domestically, with an arsenal of criminal and civil sanctions at its disposal. However, cross-border e-marketing raises complex jurisdictional questions, and the law's evolution in order to adapt is ongoing. Future consumer remedies may be dependent upon the existence of multilateral international treaties.

## **Conclusion**

As can be seen above, the legal system will always trail behind technological innovation. It is clear that lawmakers will encounter significant problems into the future as they attempt to ensure that the use of technology for sales, advertising and marketing doesn't weaken consumer protection in the domestic and global marketplace.

E-commerce and e-marketing will continue to evolve and new technologies will challenge law enforcers by creating new opportunities for fraud. Effective consumer protection will require not only government enforcement, but also private self-regulatory initiatives on the part of industry and the combined efforts of government, business, and consumer groups to equip consumers with the tools to protect themselves.